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CODE OF FEDERAL REGULATIONS

Title 41

Public Contracts and Property Management

Chapters 1 to 100

Revised as of July 1, 2021

Containing a codification of documents
of general applicability and future effect

As of July 1, 2021

With Ancillaries

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 41 CFR 50-201.1 *refers to title 41, part 50-201, section 1.*

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The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

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Provisions of the Code that are no longer in force and effect as of the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on any given date in the past by using the appropriate List of CFR Sections Affected (LSA). For the convenience of the reader, a ''List of CFR Sections Affected'' is published at the end of each CFR volume. For changes to the Code prior to the LSA listings at the end of the volume, consult previous annual editions of the LSA. For changes to the Code prior to 2001, consult the List of CFR Sections Affected compilations, published for 1949-1963, 1964-1972, 1973-1985, and 1986-2000.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR INDEX AND FINDING AIDS. This volume contains the Parallel Table of Authorities and Rules. A list of CFR titles, chapters, subchapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of ''Title 3—The President'' is carried within that volume.

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OLIVER A. POTTS,
Director,
Office of the Federal Register
July 1, 2021

THIS TITLE

Title 41—PUBLIC CONTRACTS AND PROPERTY MANAGEMENT consists of Subtitle A—Federal Procurement Regulations System [Note]; Subtitle B—Other Provisions Relating to Public Contracts; Subtitle C—Federal Property Management Regulations System; Subtitle D is reserved for other provisions relating to property management, Subtitle E—Federal Information Resources Management Regulations System and Subtitle F—Federal Travel Regulation System.

As of July 1, 1985, the text of subtitle A is no longer published in the Code of Federal Regulations. For an explanation of the status of subtitle A, see 41 CFR chapters 1–100 (page 3).

Other government-wide procurement regulations relating to public contracts appear in chapters 50 through 100, subtitle B.

The Federal property management regulations in chapter 101 of subtitle C are government-wide property management regulations issued by the General Services Administration. In the remaining chapters of subtitle C are the *implementing* and *supplementing* property management regulations issued by individual Government agencies. Those regulations which implement chapter 101 are numerically keyed to it.

The Federal Travel Regulation System in chapters 300–304 of subtitle F is issued by the General Services Administration.

Title 41 is composed of four volumes. The chapters in these volumes are arranged as follows: chapters 1–100, chapter 101, chapters 102–200, and chapter 201 to end. These volumes represent all current regulations codified under this title of the CFR as of July 1, 2021.

For this volume, Cheryl E. Sirofchuck was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 41—Public Contracts and Property Management

(This book contains chapters 1 to 100)

SUBTITLE A—FEDERAL PROCUREMENT REGULATIONS SYSTEM [NOTE]

SUBTITLE B—OTHER PROVISIONS RELATING TO PUBLIC CONTRACTS

Part

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CHAPTER 51—Committee for Purchase From People Who Are Blind or Severely Disabled 51–1

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CHAPTERS 62–100 [Reserved]

Subtitle A—Federal Procurement Regulations System [Note]

EDITORIAL NOTE: On September 19, 1983 (48 FR 42103), a joint document issued by the General Services Administration, the Department of Defense and the National Aeronautics and Space Administration, established a new Federal Acquisition Regulation in title 48 of the Code of Federal Regulations (CFR). The general Federal Acquisition Regulation (FAR) published on that date is codified at chapter 1 of title 48. Chapters 2 through 49 of title 48 were reserved and established for individual agency implementations and supplementations of the FAR. The FAR in chapter 1 together with the agency regulations in chapters 2 to 49 comprise the Federal Acquisition Regulations System that went into effect on April 1, 1984.

The FAR system replaced both the Federal Procurement Regulations System (FPRS) for civilian contracts (41 CFR subtitle A, chapters 1 to 49) and the Defense Acquisition Regulations (DAR) for defense contracts (32 CFR chapter 1, parts 1 to 39). While the new FAR regulations in title 48 replaced the title 32 DAR and title 41 FPR regulations as of April 1, 1984, both the DAR and FPR provisions continue to apply to those contracts which preceded the effective date of the FAR.

On April 11, 1991 (56 FR 14643), the Department of Defense removed 32 CFR parts 1–39, contained in volumes I through III. As of the revision date of this volume, the FAR provisions in 41 CFR subtitle A, chapters 1 to 49, appearing in the July 1, 1984 edition, continue to apply to those contracts entered into prior to the adoption of the FAR.

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AUTHORITY: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38. Interpret or apply sec. 6, 49 Stat. 2038, as amended; 41 U.S.C. 40; 108 Stat. 7201; 28 U.S.C. 2461 note (Federal Civil Penalties Inflation Adjustment Act of 1990); Pub. L. 114–74 at § 701, 129 Stat 584.

§ 50–201.1 The Walsh-Healey Public Contracts Act.

The Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35–45), hereinafter referred to as the Act, was enacted ''to provide conditions for the purchase of supplies and the making of contracts by the United States.'' It is not an act of general applicability to industry. The Supreme Court has described it as an instruction by the Government to its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. Its purpose, according to the Supreme Court ''was to impose obligations upon those favored with Government business and to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment.'' (''Perkins v. Lukens Steel Co.,'' 310 U.S. 113, 128 (1940); ''Endicott Johnson Corp. v. Perkins,'' 317 U.S. 501 (1943).) To this end, the Act requires those who enter into contracts to perform Government work subject to its terms to adhere to specifically prescribed representations and stipulations as set forth in 41 CFR 50–201.1 pertaining to qualifications of contractors, minimum wages, overtime pay, safe and sanitary working conditions of workers employed on the contract, the use of child labor or convict labor on the contract work, and the enforcement of such provisions. Except as otherwise specifically provided, these representations and stipulations are required to be included in every contract ''for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000'' which is made and entered into by an agency of the United States or other entity as designated in section 1 of the Act, hereinafter referred to as ''contracting agency.'' Contractors performing work subject to the Act thus ''enter into competition to obtain Government business on terms of which they are fairly forwarned by inclusion in the contract.'' (''Endicott Johnson Corp. v. Perkins, supra,'' 317 U.S. at 507.) The Act also provides for enforcement of the required representations and stipulations by various methods. Certain exemptions from the application of the Act are provided in section 9 of the statute. Other exemptions, variations, and tolerances may be provided under section 6 of the statute by the Secretary of Labor or the President.

[43 FR 22975, May 30, 1978. Redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.2 Administration of the Act.

(a) The Secretary of Labor is authorized and directed to administer the provisions of the Act, to make investigations, findings, and decisions thereunder, and to make, amend, and rescind rules and regulations with respect to its application (see sections 4

and 5). The Supreme Court has recognized that the Secretary may issue rulings defining the coverage of the Act. (''Endicott Johnson Corp. v. Perkins, supra''.) According to the Court (ibid.), in the statute as originally enacted ''Congress submitted the administration of the Act to the judgment of the Secretary of Labor, not to the judgment of the courts.'' An amendment to the Act in 1952 added specific provisions for judicial review (see section 10). The Secretary has promulgated regulations to carry out provisions of the Act, which are set forth elsewhere in this chapter (Part 50–201 (General Regulations); Part 50–202 (Minimum Wage Determinations); Part 50–203 (Rules of Practice); and Part 50–204 (Safety and Health Standards)). The Secretary of Labor has delegated to the Administrator of the Wage and Hour Division through the Assistant Secretary for Employment Standards the authority to promulgate regulations and to issue official rulings and interpretations. So long as such regulations, rulings, and interpretations are not modified, amended, rescinded, or determined by judicial authority to be incorrect, they may be relied upon as provided in section 10 of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U.S.C. 251, *et seq.*, discussed in 29 CFR part 790). Furthermore, these interpretations are intended to indicate the construction of the law which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or by authoritative rulings of the courts. (''Skidmore v. Swift & Co.'', 323 U.S. 134 (1944), ''Roland Co. v. Walling'', 326 U.S. 657 (1946); ''Endicott Johnson Corp. v. Perkins, supra'', and ''Perkins v. Lukens Steel Co., supra''.)

(b) The courts have held that the ''interpretations of the Walsh-Healey Act and the regulations adopted thereunder, as made by the Secretary of Labor acting through his Administrator, are both correct and reasonable.'' (''Jno. McCall Coal Company v. United States,'' 374 F. 2d 689, 692 (C.A. 4, 1967); see also ''United States v. Davison Fuel and Dock Company,'' 371 F. 2d 705, 711–714 (C.A. 4, 1967).) These policies are designed to protect not only employees but also the competitive interest of all firms qualified to compete for covered contracts.

[43 FR 22975, May 30, 1978. Redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.3 Insertion of stipulations.

Except as hereinafter directed, in every contract made and entered into by an executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment, the contracting officer shall cause to be inserted or incorporated by reference in such invitation or the specifications and in such contract, the following stipulations:

REPRESENTATIONS AND STIPULATIONS PURSUANT TO PUBLIC LAW 846, 74TH CONGRESS, AS AMENDED

(a) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract.

(b) No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 40 hours in any 1 week unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor: *Provided, however,* That the provisions of this stipulation shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs 1 or 2 of subsection (b) of section 7 of an act entitled ''The Fair Labor Standards Act of 1938'': *Provided, further,* That in the case of such an employer, during the life of the agreement referred to the applicable overtime rate set by the Secretary of Labor shall be paid for hours in excess of 12 in any 1 day or in excess of 56 in any 1 week and if such overtime is not paid, the employer shall be required to compensate his employees during

that week at the applicable overtime rate set by the Secretary of Labor for hours in excess of 40 in any 1 week.

(c) No person under 16 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(d) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this paragraph.

(e) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $27 per day for each person under 16 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(f) The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

(g) The contractor is not a person who is ineligible to be awarded Government contracts by virtue of sanctions imposed pursuant to the provisions of section 3 of the act.

(h) No part of the contract shall be performed and none of the materials, articles, supplies or equipment manufactured or furnished under the contract shall be manufactured or furnished by any person found by the Secretary of Labor to be ineligible to be awarded Government contracts pursuant to section 3 of the act.

(i) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.

[7 FR 4494, June 16, 1942, as amended at 7 FR 11086, Dec. 30, 1942; 11 FR 6238, June 8, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 27 FR 306, Jan. 11, 1962; 27 FR 4556, May 12, 1962; 34 FR 6687, Apr. 19, 1969; 34 FR 7451, May 8, 1969; 51 FR 12266, Apr. 9, 1986. Redesignated and amended at 61 FR 40716, Aug. 5, 1996; 81 FR 43452, July 1, 2016; 83 FR 15, Jan. 2, 2018; 84 FR 220, Jan. 23, 2019]

§50–201.4 Statutory exemptions.

Inclusion of the stipulations enumerated in §50–201.1 is not required in the following instances:

(a) Where the contracting officer is authorized by the express language of a statute to purchase ''in the open market'', or where a purchase of articles, supplies, materials or equipment, either in being or virtually so, is made without advertising for bids under circumstances bringing such purchase within the exception to the General Purchase Statute, R.S. 3709, that is, where immediate delivery is required by the public exigency.

(b) Where the contract relates to perishables, including dairy, livestock, and nursery products (''perishables'' covers products subject to decay or spoilage and not products canned, salted, smoked, or otherwise preserved);

(c) Where the contract relates to agricultural or farm products processed for first sale by the original producers;

(d) Where the contract is by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof;

(e) Where the contract is with a common carrier for carriage of freight or personnel by vessel, airplane, bus,

truck, express, or railway line, where published tariff rates are in effect;

(f) Where the contract is for the furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934 (48 Stat. 1064 as amended; 47 U.S.C. chapter 5).

[Regs. 504, 1 FR 1626, Sept. 19, 1936, as amended at 9 FR 8347, July 22, 1944. Redesignated at 24 FR 10952, Dec. 30, 1959, and further redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.101 Employees affected.

The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract, and shall not be deemed applicable to employees performing only office or custodial work, nor to any employee employed in a bona fide executive, administrative, professional, or outside salesman capacity, as those terms are defined and delimited by the regulations (29 CFR part 541) applicable during the period of performance of the contract under section 13(a)(1) of the Fair Labor Standards Act of 1938, as amended.

[35 FR 17782, Nov. 19, 1970. Redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.102 Overtime.

(a) Employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 40 hours in any one week: *Provided,* Such persons shall be paid for any hours in excess of 40 hours in any one week the overtime rate of pay which has been set therefor by the Secretary of Labor.

(b) Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate received by the employee. The ''basic hourly rate'' means an hourly rate equivalent to the rate upon which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended. The basic hourly rate may, in no case, be less than the applicable minimum wage.

(c) If in any one week or part thereof an employee is engaged in work covered by the contract's stipulations, overtime shall be paid for any hours worked in excess of 40 hours in any one week at the overtime rate set forth in paragraph (b) of this section.

(d) The overtime pay requirements of this section shall be deemed to be complied with in the case of any employee employed as provided in section 7(b) of the Fair Labor Standards Act of 1938, as amended, pursuant to the provisions of paragraph (1) or (2) of that section.

[7 FR 4494, June 16, 1942, as amended at 18 FR 1832, Apr. 2, 1953. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 51 FR 12266, Apr. 9, 1986. Further redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.103 Dealer as agent of undisclosed principal.

Whenever a dealer, to whom a contract within the act and regulations in this part has been awarded, causes a manufacturer to deliver directly to the Government the materials, supplies, articles, or equipment required under the contract, such dealer will be deemed the agent of the manufacturer in executing the contract. As the principal of such agent the manufacturer will be deemed to have agreed to the stipulations contained in the contract.

[1 FR 2359, Nov. 28, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959, and further redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.104 Protection against unintentional employment of underage minors.

An employer shall not be deemed to have knowingly employed an underage minor in the performance of contracts subject to the Act if, during the period of the employment of such minor, the employer has on file an unexpired certificate of age issued and held pursuant to regulations issued by the Secretary of Labor under section 3(1) of the Fair Labor Standards Act of 1938 (29 CFR 570.121), showing that such minor is at least 16 years of age.

[52 FR 6147, Mar. 2, 1987. Redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.105 Hours worked.

In determining the hours for which an employee is employed, there shall be excluded any time which is excluded by section 3(*o*) of the Fair Labor Standards Act of 1938, as amended, from the computation of hours worked for purposes of sections 6 and 7 of that act.

[18 FR 1832, Apr. 2, 1953. Redesignated at 24 FR 10952, Dec. 30, 1959, and further redesignated at 61 FR 40716, Aug. 5, 1996]

§ 50–201.201 Breach of stipulations.

(a) Whenever the Department of Labor notifies the head of a contracting agency that a contractor is liable for liquidated damages by reason of a breach of stipulations as provided in section 2 of the act, there shall be withheld from any balance due under the contract such amount as may be necessary to satisfy such liability pending final disposition of the case.

(b) Whenever a final determination of a breach of stipulations is made, the Secretary of Labor will furnish to the contracting agency a copy of the findings and decision with such recommendations as will assist the contracting agency in determining whether or not the contract should be canceled for such breach.

[Regs. 504, 1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50–201.301 Agency regulations.

Each agency which prescribes additional regulations for the Administration of the Walsh-Healey Public Contracts Act and for the implementation of the regulations in this part, shall submit such regulations, directives, and orders to the Administrator of the Wage and Hour Division prior to issuance. Any such regulations may not be enforced prior to approval by the Administrator or prior to 60 days after submission if not disapproved by the Administrator. Currently existing regulations are not affected by this section, except where such regulations are not in conformity with the Walsh-Healey Public Contracts Act and the Department of Labor regulations. In such cases, agency regulations shall be appropriately revised.

[43 FR 22977, May 30, 1978]

§ 50–201.501 Records of employment.

Every contractor subject to the provisions of the act and this part shall maintain the following records of employment which shall be available for the inspection and transcription of authorized representatives of the Secretary of Labor:

(a) Name, address, sex, and occupation of each employee covered by the contract stipulations;

(b) Date of birth of each employee under 19 years of age; and if the employer has obtained a certificate of age as provided in § 50–201.105, there shall also be recorded the title and address of the office issuing such certificate, the number of the certificate, if any, the date of its issuance, and the name, address and date of birth of the minor, as the same appears on the certificate of age;

(c) Wage-and-hour records for each such employee including the rate of wages and the amount paid each pay period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract. Compliance with this paragraph shall be deemed complete if wage-and-hour records for all employees in the plant are maintained during the period between the award of any Government contract and the date of delivery of the materials, supplies, articles, or equipment: *Provided*, That where no separate records for employees engaged on Government contracts are maintained, it shall be presumed until affirmative proof is present to the contrary that all employees in the plant, from the date of award of any such contract until the date of delivery of the materials, supplies, articles or equipment, were engaged on such Government contract;

(d) The records required by paragraphs (a), (b), and (c) of this section shall be kept on file for at least 3 years from their last date of entry;

(e) Basic employment and earnings records: All basic time and earning cards or sheets of the employer on which are entered the daily starting and stopping time of individual employees or of separate work forces, or

the individual employees' daily, weekly, or pay period amounts of work accomplished (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees;

(f) Wage rate tables: All tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages or salary, or overtime excess compensation;

(g) Work time schedules: All schedules or tables of the employer which establish the hours and days of employment of individual employees or of separate work forces;

(h) The records required by paragraphs (e), (f), and (g) of this section shall be kept on file at least 2 years from their last date of entry or their last effective date whichever is later.

(Approved by the Office of Management and Budget under control number 1215–0017)

[7 FR 7949, Oct. 7, 1942, as amended at 13 FR 5440, Sept. 17, 1948; 23 FR 2573, Apr. 18, 1958. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 47 FR 145, Jan. 5, 1982]

§ 50–201.502 Record of injuries.

Every person who is or shall become a party to a Government contract which is subject to the provisions of the Walsh-Healey Public Contracts Act and the regulations thereunder, or who is performing or shall perform any part of such contract subject to the provisions of such Act or regulations, shall comply with the recordkeeping requirements of 29 CFR Part 1904.

[36 FR 20676, Oct. 28, 1971]

§ 50–201.601 Requests for exceptions and exemptions.

(a)(1) Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by § 50–201.1 must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

(2) Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of the contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

(b) All requests for exceptions or exemptions which relate solely to safety and health standards shall be transmitted directly to the Occupational Safety and Health Administration, U.S. Department of Labor, Washington, DC 20210, or, for those pertaining to coal mines, the Mine Safety and Health Administration, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203. All other requests for exceptions or exemptions shall be transmitted to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210.

[7 FR 4767, June 26, 1942. Redesignated at 24 FR 10952, Dec. 30, 1959 and amended at 36 FR 288, Jan. 8, 1971; 52 FR 6147, Mar. 2, 1987]

§ 50–201.602 Decisions concerning exceptions and exemptions.

Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or authorized representative, and shall be transmitted to the department or agency originating the request and to the Comptroller General. All such decisions containing significant issues of general applicability shall be disseminated to all contracting agencies by the Wage and Hour Division, ESA, of the Department of Labor.

[52 FR 6147, Mar. 2, 1987]

§ 50–201.603 Full administrative exemptions.

The following classes of contracts have been exempted from the application of § 50–201.1 pursuant to the procedure required under section 6 of the act:

(a) Contracts for public utility services including electric light and power, water, steam, and gas;

(b) Contracts for materials, supplies, articles, or equipment no part of which will be manufactured or furnished within the geographic limits of the States of the United States of America,

Puerto Rico, the Virgin Islands, or the District of Columbia: In addition, the representations and stipulations required by the act and this part in any contract for materials, supplies, articles, or equipment to be manufactured or furnished in part within and in part outside such geographic limits shall not be applicable to any work performed under the contract outside such geographic limits;

(c) Contracts covering purchases against the account of a defaulting contractor where the stipulations required in this section were not included in the defaulted contract;

(d) Contracts awarded to sales' agents or publisher representatives, for the delivery of newspapers, magazines or periodicals by the publishers thereof.

[25 FR 12553, Dec. 8, 1960]

§ 50–201.701 Definition of "person."

Whenever used in the regulations in this part, the word *person* includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

[1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50–201.1101 Minimum wages.

Determinations of prevailing minimum wages or changes therein will be published in the FEDERAL REGISTER by the Wage and Hour Division, ESA, of the Department of Labor.

[52 FR 6147, Mar. 2, 1987]

§ 50–201.1102 Tolerance for apprentices, student-learners, and handicapped workers.

(a) Apprentices, student-learners, and workers, whose earning capacity is impaired by age or physical or mental deficiencies or injuries may be employed at wages lower than the prevailing minimum wages, determined by the Secretary of Labor pursuant to section 1(b) of the Public Contracts Act, in accordance with the same standards and procedures as are prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, and by the regulations of the Administrator of the Wage and Hour Division of the Department of Labor issued thereunder (29 CFR parts 520, 521, 524, 525, and 528).

(b) Any certificate in effect pursuant to such regulations shall constitute authorization for employment of that worker under the Public Contracts Act in accordance with the terms of the certificate, insofar as the prevailing minimum wage is concerned.

(c) The Administrator is authorized to issue certificates under the Public Contracts Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, at appropriate rates of compensation and in accordance with the standards and procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR parts 520, 521, 524, and 525).

(d) The Administrator is also authorized to withdraw, annul, or cancel such certificates in accordance with the regulations set forth in 29 CFR parts 525 and 528.

[28 FR 9529, Aug. 30, 1963, as amended at 52 FR 6147, Mar. 2, 1987]

§ 50–201.1201 [Reserved]

§ 50–201.1202 Complaints.

Whenever any officer or employee of the United States Government or of any agency thereof has any knowledge of, or receives any complaint with respect to, a breach or violation of the stipulations required under § 50–201.1, he shall transmit such complaint according to the usual practice in his department to the Department of Labor, together with such other information as he has in his possession.

[1 FR 1627, Sept. 19, 1936. Redesignated at 24 FR 10952, Dec. 30, 1959]

§ 50–201.1203 Other contracts.

Nothing in this part shall be construed as impairing the authority possessed by any contracting agency to require labor standards in contracts not covered by this act.

[1 FR 1627, Sept. 19, 1936. Redesignated, at 24 FR 10952, Dec. 30, 1959]

PART 50–202—MINIMUM WAGE DETERMINATIONS

Subpart A—Application and Scope

Sec.
50–202.1 Application and scope.

Subpart B—Groups of Industries

50–202.2 Minimum wage in all industries.
50–202.3 Learners, student learners, apprentices, and handicapped workers.

Subpart C [Reserved]

CROSS REFERENCE: For regulations relative to employment of learners, see 29 CFR part 522.

AUTHORITY: Secs. 1, 4, and 6, 49 Stat. 2036, 2038; 41 U.S.C. 35, 38, 40. Sec. 10, 66 Stat. 308; 41 U.S.C. 43a.

Subpart A—Application and Scope

§ 50–202.1 Application and scope.

Not less than the minimum wages prescribed in this part shall be paid to employees described in § 50–201.102 of this chapter when their work relates to contracts subject to the Walsh-Healey Public Contracts Act. The minimum wages prescribed in this part shall apply to all contracts bids for which are solicited or negotiations otherwise commenced on or after the effective date of the applicable determination. Nothing in this part shall affect any obligations for the payment of minimum wages that an employer may have under any law or agreement more favorable to employees than than the requirements of this part.

(Secs. 1, 4, 49 Stat. 2036, 2038; 41 U.S.C. 35, 38)

[26 FR 9043, Sept. 26, 1961]

Subpart B—Groups of Industries

§ 50–202.2 Minimum wage in all industries.

In all industries, the minimum wage applicable to employees described in § 50–201.102 of this chapter shall be not less than $3.35 per hour commencing January 1, 1981, $3.80 per hour commencing April 1, 1990, and $4.25 per hour commencing April 1, 1991.

[56 FR 32258, July 15, 1991]

§ 50–202.3 Learners, student learners, apprentices, and handicapped workers.

Learners, student learners, apprentices, and handicapped workers may be employed at less than the minimum wage prescribed in § 50–202.2 to the same extent such employment is permitted under section 14 of the Fair Labor Standards Act.

(Sec. 6, 49 Stat. 2038; 41 U.S.C. 40)

[43 FR 28495, June 30, 1978]

Subpart C [Reserved]

PART 50–203—RULES OF PRACTICE

Subpart A—Proceedings Under Section 5 of the Walsh-Healey Public Contracts Act

Sec.
50–203.1 Reports of breach or violation.
50–203.2 Issuance of a formal complaint.
50–203.3 Answer.
50–203.4 Motions.
50–203.5 Intervention.
50–203.6 Witnesses and subpoenas.
50–203.7 Prehearing conferences.
50–203.8 Hearing.
50–203.9 Briefs.
50–203.10 Decision of the administrative law judge.
50–203.11 Review.
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Subpart B—Exceptions and Exemptions Pursuant to Section 6 of the Walsh-Healey Public Contracts Act

50–203.13 Requests for exceptions and exemptions.

50–203.14 Decisions concerning exceptions and exemptions.

Subpart C—Minimum Wage Determinations Under the Walsh-Healey Public Contracts Act

50–203.15 Initiation of proceeding.
50–203.16 Industry panel meetings.
50–203.17 Hearings.
50–203.18 Evidence.
50–203.19 Subpoenas and witness fees.
50–203.20 Examination of witnesses.
50–203.21 Decisions.
50–203.22 Effective date of determinations.

AUTHORITY: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38.

Subpart A—Proceedings Under Section 5 of the Walsh-Healey Public Contracts Act

SOURCE: 11 FR 14493, Dec. 18, 1946, unless otherwise noted. Redesignated at 24 FR 10952, Dec. 30, 1959.

§50–203.1 Reports of breach or violation.

(a) Any employer, employee, labor or trade organization or other interested person or organization may report a breach or violation, or apparent breach or violation of the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35–45), or of any of the rules or regulations prescribed thereunder.

(b) A report of breach or violation may be reported to the nearest office of the Wage and Hour Division, Employment Standards Administration or with the Administrator, Wage and Hour Division, Employment Standards Administration, 200 Constitution Avenue, NW., Washington, D.C. 20210.

(c) [Reserved]

(d) In the event that the Wage and Hour Division is notified of a breach or violation which also involves safety and health standards, such Director shall notify the appropriate Regional Director of the Bureau of Labor Standards who shall with respect to the safety and health violation take action commensurate with his responsibilities pertaining to safety and health standards.

(e) The report should contain the following:

(1) The full name and address of the person or organization reporting the breach or violation.

(2) The full name and address of the person against whom the report is made, hereinafter referred to as the ''respondent''.

(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the Walsh-Healey Public Contracts Act, or of any of the rules or regulations prescribed thereunder.

(41 U.S.C. 35, 40; 5 U.S.C. 556)

[32 FR 7702, May 26, 1967, as amended at 36 FR 288, Jan. 8, 1971; 61 FR 19987, May 3, 1996]

§50–203.2 Issuance of a formal complaint.

After a report of a breach or violation has been filed, or upon his own motion and without any report of a breach or violation having been previously filed, the Solicitor may issue and cause to be served upon the respondent a formal complaint stating the charges. Notice of hearing before an administrative law judge designated by the Secretary of Labor shall be issued and served within a reasonable time after the issuance of the complaint. A copy of the complaint and notice of hearing shall be served upon the surety or sureties. Unless the administrative law judge otherwise determines, the date of hearing shall not be sooner than 30 days after the date of issuance of the complaint.

[35 FR 14839, Sept. 24, 1970, as amended at 61 FR 19987, May 3, 1996]

§50–203.3 Answer.

(a) The respondent shall have the right, unless otherwise specified in the complaint and notice, within twenty (20) days after date of issuance of the formal complaint, to file an answer thereto. Such answer shall not be limited to a mere denial of the charges. It shall specifically deny or admit each of the charges, and, if the answer is in denial of any one of the charges, it shall contain a concise statement of the facts relied upon in support of the denial. Any charges not specifically denied in the answer shall be deemed to be admitted and may be so found by the administrative law judge, unless

the respondent disclaims knowledge upon which to make a denial. If the answer should admit any charge but the respondent believes there are reasons or circumstances warranting special consideration, such reasons and circumstances should be fully but concisely stated.

(b) Such answer shall be in writing, and signed by the respondent or his attorney or by any other duly authorized agent with power of attorney affixed.

(c) If no answer is filed, or if the answer as filed does not warrant a postponement of the hearing, such hearing will be held as scheduled.

(d) The original and two copies of the answer shall be filed with the Chief administrative law judge, Department of Labor, Washington, D.C.

(e) In any case where formal complaints have been amended, the respondent shall have the right to amend his answer within such time as may be fixed by the administrative law judge.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.4 Motions.

(a) All motions except those made at the hearing shall be filed in writing with the Chief administrative law judge, Department of Labor, Washington, D.C., and shall be included in the record. Such motions shall state briefly the order or relief applied for and the grounds for such motion. The moving party shall file an original and two copies of all such motions. All motions made at the hearing shall be stated orally and included in the stenographic report of the hearing.

(b) The administrative law judge designated to conduct the hearing may in his discretion reserve his ruling upon any question or motion.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.5 Intervention.

Any employer, employee, labor or trade organization or other interested person or organization desiring to intervene in any pending proceeding prior to, or at the time it is called for hearing, but not after a hearing, except for good cause shown, shall file a petition in writing for leave to intervene, which shall be served on all parties to the proceeding, with the Chief administrative law judge, Department of Labor, or with the administrative law judge designated to conduct the hearing, setting forth the position and interest of the petitioner and the grounds of the proposed intervention. The Chief administrative law judge, or the administrative law judge, as the case may be, may grant leave to intervene to such extent and upon such terms as he shall deem just.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.6 Witnesses and subpoenas.

(a) Witnesses shall be examined orally under oath except that for good and exceptional cause the administrative law judge may permit their testimony to be taken by deposition under oath.

(b) The administrative law judge shall upon application by any party, and upon a showing of general relevance and reasonable scope of the evidence sought, issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence under oath, including books, records, correspondence, or documents. Applications for the issuance of subpoenas duces tecum shall specify the books, records, correspondence or other documents sought.

(c) Witnesses summoned before the administrative law 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 witnesses appear, and the person taking the depositions shall be paid by the party at whose instance the depositions are taken.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971; 61 FR 19987, May 3, 1996]

§ 50–203.7 Prehearing conferences.

(a) At any time prior to the hearing the administrative law judge may, on

motion of the parties or on his own motion, whenever it appears that the public interest will be served thereby, direct the parties to appear before him for a conference at a designated time and place to consider, among other things:

(1) Simplification of the issues;

(2) The necessity or desirability of amending the pleadings for purposes of clarification, amplification or limitation;

(3) Obtaining stipulations of fact or admissions of undisputed facts or the authenticity of documents;

(4) The procedure at the hearing;

(5) Limiting the number of witnesses;

(6) The propriety of mutual exchange among parties of prepared testimony or exhibits; or

(7) Any other matters which would tend to expedite the disposition of the proceeding.

(b) The action taken at the conference may be recorded, in summary form or otherwise, for use at the hearing. Such record, when agreed to by the parties and approved by the administrative law judge, shall be conclusive as to the action embodied therein. Stipulations and admissions of fact and amendments to pleadings shall be made a part of the record of the proceeding.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.8 Hearing.

(a) The hearing for the purpose of taking evidence upon a formal complaint shall be conducted by an administrative law judge. Administrative law judges shall, so far as practicable, be assigned to cases in rotation. In case of the death, illness, disqualification or unavailability of the administrative law judge presiding in any proceeding, another administrative law judge may be designated to take his place. Such hearings shall be open to the public unless otherwise ordered by the administrative law judge.

(b) The administrative law judges shall perform no duties inconsistent with their duties and responsibilities as administrative law judges. Save to the extent required for the disposition of ex parte matters as authorized by law, no administrative law judge shall consult any person or party as to any fact in issue unless upon notice and opportunity for all parties to participate.

(c) Administrative law judges shall act independently in the performance of their functions as administrative law judge and shall not be responsible to, or subject to the supervision or direction of, any officer, employee or agent engaged in the performance of investigative or prosecuting functions for the Department of Labor in the enforcement of the Public Contracts Act.

(d) At all hearings it shall be the right of counsel for the Government to open and close, subject to the right of the administrative law judge to designate, upon cause shown, who shall open and close.

(e) It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has breached or violated any of the provisions of the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35–45), or any rules or regulations prescribed thereunder, as set forth in the formal complaint. Counsel for the Government, and the administrative law judge, shall have the power to call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

(f) Any party to the proceeding shall have the right to appear at such hearing in person, by counsel, or otherwise, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence.

(g) In any such proceedings, the rules of evidence prevailing in courts of law or equity shall not be controlling. However, it shall be the policy to exclude irrelevant, immaterial, or unduly repetitious evidence.

(h) In any such proceedings, in the discretion of the administrative law judge, stipulations of fact may be made with respect to any issue.

(i) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, shall be stated orally, together with a short statement of the grounds for such objection, and included in the stenographic report of the hearing. No such objection shall be deemed waived

by further participation in the proceeding.

(j) Unless the administrative law judge otherwise directs, any party to the proceeding shall be entitled to a reasonable period at the close of the hearing for oral argument, which shall not be included in the stenographic report of the hearing unless the administrative law judge directs.

(k) In the discretion of the administrative law judge, the hearing may be continued from day to day, or adjourned to a later date, or to a different place, by announcement thereof at the hearing by the administrative law judge, or by other appropriate notice.

(l) Contemptuous conduct at any hearing before an administrative law judge shall be ground for exclusion from the hearing. The failure or refusal of a witness to appear at any such hearing or to answer any question which has been ruled to be proper shall be ground for the action provided in section 5 of the Walsh-Healey Public Contracts Act of June 30, 1936 (sec. 5, 49 Stat. 2039; 41 U.S.C. 39), and in the discretion of the administrative law judge may be ground for the striking out of all testimony which may have been previously given by such witness on related matters.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971; 61 FR 19987, May 3, 1996; 61 FR 32910, June 25, 1996]

§ 50–203.9 Briefs.

(a) Any interested person or organization shall be entitled to file with the administrative law judge, Department of Labor, Washington, D.C., briefs, proposed findings of fact or conclusions of law, or other written statements, within the time allowed by the administrative law judge.

(b) Any brief or written statement shall be stated in concise terms.

(c) Three copies of all such documents shall be filed.

(d) Briefs or written statements of more than twenty pages shall be properly indexed.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.10 Decision of the administrative law judge.

(a) Following the hearing and upon completion of the record, the administrative law judge shall issue an order and decision embodying his findings of fact and conclusions of law on all issues as to whether respondent has violated the representations and stipulations of the act and the amount of damages due therefor, which shall become final, unless a petition for review is filed under § 50–203.11, before the expiration of the time provided for the filing of such petition. The decision of the administrative law judge shall be inoperative unless and until it becomes final. If the respondent is found to have violated the act, the administrative law judge in his decision shall make recommendations to the Administrative Review Board as to whether respondent should be relieved from the application of the ineligible list provisions of section 3 of the Walsh-Healey Public Contracts Act of June 30, 1936 (sec. 3, 49 Stat. 2037; 41 U.S.C. 37).

(b) The decision of the administrative law judge shall be made part of the record, and a copy thereof shall be served upon the respondent or respondents by mailing a copy thereof by registered mail to the respondent or respondents or to the attorney or attorneys of record. Upon request from employees or other interested persons, the decision will be served upon such persons, and in the discretion of the administrative law judge, the decision will be served upon such other persons or their attorneys who appeared at the hearing or upon brief by mailing a copy thereof to such persons.

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19987, May 3, 1996]

§ 50–203.11 Review.

(a) Within twenty (20) days after service of the decision of the administrative law judge any interested party to the proceeding may file with the Chief administrative law judge an original and four copies of a petition for review of the decision. The petition shall set out separately and particularly each error assigned. The request for review and the record will then be

certified to the Administrative Review Board.

(b) The petitioner may file a brief (original and four copies) in support of his petition within the period allowed for the filing of the petition. Any interested person upon whom the decision has been served may file within ten (10) days after the expiration of the period within which the petition is required to be filed a brief in support of or in opposition to the administrative law judge's decision.

(c) The petition and the briefs filed under this section shall make specific reference to the pages of the transcript or of the exhibits which are relevant to the errors asserted with respect to findings of fact, and objections to such findings which are not so supported will not be considered.

(d) No matter properly subject to objection before the administrative law judge will be considered by the Administrative Review Board unless it shall have been raised before the administrative law judge or unless there were reasonable grounds for failure so to do; nor will any matter be considered by the Administrative Review Board unless included in the assignment or errors. In the discretion of the Administrative Review Board, review may be denied if the petition and brief in support thereof fail to show adequate cause for such review.

(e) The order denying review, or the decision of the Administrative Review Board, whichever is entered, will be made a part of the record, and a copy of such order or decision will be served upon the parties who were served with a copy of the administrative law judge's decision.

(f) If the respondent is found to have violated the Act, the Administrative Review Board shall determine whether respondent shall be relieved from the application of the ineligible list provisions of section 3 of the Walsh-Healey Public Contracts Act (sec. 4, 49 Stat. 2039; 41 U.S.C. 37).

[11 FR 14493, Dec. 18, 1946. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971; 61 FR 19987, May 3, 1996]

§ 50–203.12 Effective date.

The amendments to subpart A shall become effective upon publication in the FEDERAL REGISTER May 3, 1996; Provided, however, That in any case where a hearing has begun or has been completed prior to said publication, the proceeding shall be conducted pursuant to the rules of practice in effect at the time the proceeding was initiated unless the parties stipulate in writing or orally for the record that the proceeding be conducted in accordance with §§ 50–203.1 to 50–203.12.

[61 FR 19988, May 3, 1996]

Subpart B—Exceptions and Exemptions Pursuant to Section 6 of the Walsh-Healey Public Contracts Act

§ 50–203.13 Requests for exceptions and exemptions.

(a) Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by § 50–201.1 of this chapter must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

(b) Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of a contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

(c) All requests for exceptions or exemptions which relate solely to safety and health standards shall be transmitted directly to the Bureau of Labor Standards, WSA, Department of Labor. All other requests for exceptions or exemptions shall be transmitted to the Office of Government Contracts Wage Standards, WSA, of the Department of Labor.

[12 FR 446, Jan. 22, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959, and amended at 36 FR 289, Jan. 8, 1971]

§ 50–203.14 Decisions concerning exceptions and exemptions.

Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or officer prescribed by him, originals being filed in the Department of Labor, and certified copies shall be transferred to the department or agency originating the request and to the Comptroller General. All such decisions shall be promulgated to all contracting agencies by the Office of Government Contracts Wage Standards, WSA of the Department of Labor.

[36 FR 289, Jan. 8, 1971]

Subpart C—Minimum Wage Determinations Under the Walsh-Healey Public Contracts Act

SOURCE: 17 FR 7944, Aug. 30, 1952, unless otherwise noted. Redesignated at 24 FR 10952, Dec. 30, 1959.

§ 50–203.15 Initiation of proceeding.

Wage determination proceedings may be initiated by the Secretary of Labor with respect to any industry. The proceedings may be initiated by the Secretary of Labor upon his own motion or upon the request of any party showing a proper interest in the industry.

§ 50–203.16 Industry panel meetings.

The Secretary of Labor may, within his discretion, invite representatives of employers and employees in an industry to meet as an informal panel group to discuss with representatives of the Department of Labor the various questions relating to the issuance of a wage determination for the industry.

§ 50–203.17 Hearings.

(a) Hearings held for the purpose of receiving evidence with regard to prevailing minimum wages in the various industries shall be conducted by an administrative law judge.

(b) Due notice of hearing shall be published in the FEDERAL REGISTER.

(c) The hearing shall be stenographically reported and a transcript made which will be available to any person at prescribed rates upon request addressed to the Secretary, United States Department of Labor, Washington, DC 20210.

(d) At the discretion of the administrative law judge, the hearing may be continued from day to day or adjourned to a later date, or to a different place by announcement thereof at the hearing or by other appropriate notice.

[17 FR 7944, Aug. 30, 1952. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19988, May 3, 1996]

§ 50–203.18 Evidence.

(a) Witnesses appearing at the hearing need not be sworn. The administrative law judge may, however, within his discretion, require that witnesses take an oath or affirmation as to testimony submitted.

(b) Written statements may be filed any time prior to the date of the hearing by persons who cannot appear personally.

(c) Written documents and exhibits shall be tendered in quadruplicate. When evidence is embraced in a document containing matter not intended to be put in evidence, within the discretion of the administrative law judge, such a document will not be received but the person offering the same may present to the administrative law judge the original document together with two copies of those portions of the document intended to be put in evidence.

(d) At any stage of the hearing, the administrative law judge may call for further evidence upon any matter. After the hearing has been closed, no further evidence shall be taken, except at the request of the Administrative Review Board, unless provision has been made at the hearing for the later receipt of such evidence. In the event that the Administrative Review Board shall cause the hearing to be reopened for the purpose of receiving further evidence, due and reasonable notice of the time and place fixed for such taking of testimony shall be given to all persons who have appeared at the hearing or filed a notice of intention to appear at the hearing.

(e) The rules of evidence prevailing in courts of law or equity shall not be controlling. However, it shall be the

policy to exclude irrelevant, immaterial, or unduly repetitious evidence.

[17 FR 7944, Aug. 30, 1952. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19988, May 3, 1996]

§ 50–203.19 Subpoenas and witness fees.

(a) Subpoenas requiring the attendance of witnesses or the presentation of a document from any place in the United States at any designated place of hearing shall be issued by the administrative law judge upon request and upon a timely showing, in writing, of the general relevance and reasonable scope of the evidence sought. Any person appearing in the proceeding may apply for the issuance of a subpoena. Such application shall identify exactly the witness or document and state fully the nature of the evidence proposed to be secured.

(b) Witnesses summoned by the Secretary shall be paid the same fees and mileage as are paid witnesses in the courts of the United States. Witness fees and mileage shall be paid by the party at whose instance witnesses appear, and the Secretary before issuing a subpoena may require a deposit of an amount adequate to cover the fees and mileage involved.

[17 FR 7944, Aug. 30, 1952. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19988, May 3, 1996]

§ 50–203.20 Examination of witnesses.

The administrative law judge shall, consistent with orderly procedure, permit any person appearing at the hearing to conduct such examination or cross-examination of any witness as may be required for a full and true disclosure of the facts, and to object to the admission or exclusion of evidence. Objections to the admission or exclusion of evidence shall be stated briefly with the reasons relied on. Such objections shall become a part of the record, but the record shall not include argument thereon except as ordered by the administrative law judge.

[17 FR 7944, Aug. 30, 1952. Redesignated at 24 FR 10952, Dec. 30, 1959, as amended at 61 FR 19988, May 3, 1996]

§ 50–203.21 Decisions

(a) Within 30 days after the close of the hearing, each interested person at the hearing may file with the administrative law judge an original and four copies of a statement containing proposed findings of fact and conclusions of law, together with reasons for such proposals. The administrative law judge shall, immediately following the termination of the thirty-day period provided for the filing of proposed findings and conclusions, certify the complete record to the Administrative Review Board.

(b) Upon the basis, and after consideration, of the whole record, the Administrative Review Board may issue a tentative decision. The tentative decision shall become part of the record, and shall include: (1) A statement of findings and conclusions, with the reasons and bases therefor, upon all material issues of fact, law, or discretion presented on the record, and (2) any proposed wage determination. Any tentative decision shall be published in the FEDERAL REGISTER.

(c) Within twenty-one days following the publication of any tentative decision in the FEDERAL REGISTER, any interested person may file an original and four copies of a statement containing exemptions to the tentative decision, together with supporting reasons.

(d) Thereafter, the Administrative Review Board may issue a decision ruling upon each exception filed and including any appropriate wage determination. Any such decision shall be published in the FEDERAL REGISTER after it becomes the final action of the Department.

[26 FR 8945, Sept. 22, 1961, as amended at 61 FR 19988, May 3, 1996; 85 FR 13041, Mar. 6, 2020; 85 FR 30627, May 20, 2020]

§ 50–203.22 Effective date of determinations.

Any minimum wage determination issued as a result of hearings held under this subpart shall take effect not less than 30 days after due notice is given of the issuance thereof by publication in the FEDERAL REGISTER, or at such time prior thereto as may be provided therein upon good cause found and published therewith.

PART 50–204—SAFETY AND HEALTH STANDARDS FOR FEDERAL SUPPLY CONTRACTS

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Subpart D—Gases, Vapors, Fumes, Dusts, and Mists

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Subpart E—Transportation Safety

50–204.75 Transportation safety.

AUTHORITY: Secs. 1, 4, 49 Stat. 2036, 2038, as amended; 41 U.S.C. 35, 38; 5 U.S.C. 556.

SOURCE: 34 FR 7946, May 20, 1969, unless otherwise noted.

Subpart A—Scope and Application

§ 50–204.1 Scope and application.

(a) The Walsh-Healey Public Contracts Act requires that contracts entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 must contain, among other provisions, a stipulation that ''no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.'' (sec. 1(e)), 49 Stat. 2036, 41 U.S.C. 35(e)). This part 50–204 expresses the Secretary of Labor's interpretation and application of this provision with regard to certain particular working conditions. In addition, §§ 50–204.27, 50–204.30, 50–204.31, 50–204.32, 50–204.33, and 50–204.36 contain requirements concerning the instruction of personnel, notification of incidents, reports of exposures, and maintenance and disclosure of records.

(b)(1) Every investigator conducting investigations and every officer of the Department of Labor determining whether there are or have been violations of the safety and health requirements of the Walsh-Healey Public Contracts Act and of any contract subject thereto; and whether a settlement of

the resulting issues should be made without resort to administrative or court litigation, shall treat a failure to comply with, or violation of, any of the safety and health measures contained in this part 50–204 as resulting in working conditions which are ''unsanitary or hazardous or dangerous to the health and safety of employees'' within the meaning of section 1(e) of the Act and the contract stipulation it requires. Evidence of compliance with the safety, sanitary, and factory inspection laws of a State in which the work, or part thereof, is performed will be considered prima facie evidence of compliance with the safety and health requirements of the Act and of any contract subject thereto, and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health rules contained in this part.

(2) Every investigator shall have technical competence in safety, industrial hygiene, or both as may be appropriate, in the matters under investigation.

(c) [Reserved]

(d) The standards expressed in this part 50–204 are for application to ordinary employment situations; compliance with them shall not relieve anyone from the obligation to provide protection for the health and safety of his employees in unusual employment situations. Neither do such standards purport to describe all of the working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees. Where such other working conditions may be found to be unsanitary or hazardous or dangerous to the health and safety of employees, professionally accepted safety and health practices will be used.

(e) Compliance with the standards expressed in this part 50–204 is not intended, and shall not be deemed to relieve anyone from any other obligation he may have to protect the health and safety of his employees, arising from sources other than the Walsh-Healey Public Contracts Act, such as State, local law or collective bargaining agreement.

[34 FR 7946, May 20, 1969, as amended at 36 FR 9868, May 29, 1971]

§ 50–204.1a Variances.

(a) Variances from standards in this part may be granted in the same circumstances in which variances may be granted under sections 6(b)(6)(A) or 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970 (29 U.S.C. 655). The procedures for the granting of variances and for related relief under this part are those published in part 1905 of title 29, Code of Federal Regulations.

(b) Any requests for variances shall also be considered requests for variances under the Williams-Steiger Occupational Safety and Health Act of 1970, and any variance from a standard which is contained in this part and which is incorporated in part 1910 of title 29, Code of Federal Regulations, shall be deemed a variance from the standard under both the Walsh-Healey Public Contracts Act and the Williams-Steiger Occupational Safety and Health Act of 1970. In accordance with the requirements of §1954.3(d)(1)(i) of title 29, Code of Federal Regulations, variance actions taken under State provisions under a State occupational safety and health plan approved under section 18 of the Occupational Safety and Health Act of 1970 with regard to State standards found to be at least as effective as the comparable Federal standards contained in this part and incorporated in part 1910 of title 29, Code of Federal Regulations, shall be deemed a variance action from the standard under both the Walsh-Healey Public Contracts Act and the Occupational Safety and Health Act of 1970.

[36 FR 9868, May 29, 1971, as amended at 40 FR 25452, June 16, 1975]

Subpart B—General Safety and Health Standards

§ 50–204.2 General safety and health standards.

(a) Every contractor shall protect the safety and health of his employees by complying with the standards described in the subparagraphs of this paragraph whenever a standard deals with an occupational safety or health subject or issue involved in the performance of the contract.

(1) U.S. Department of Labor—Title 29 CFR—

Part 1501—Safety and Health Regulations for Ship Repairing.
Part 1502—Safety and Health Regulations for Shipbuilding.
Part 1503—Safety and Health Regulations for Shipbreaking.
Part 1504—Safety and Health Regulations for Longshoring.
Part 1910—Subpart C through Subpart S (national consensus standards).

(2) U.S. Department of Interior, Bureau of Mines.

(i) In Chapter I of Title 30, Code of Federal Regulations, the standards requiring safe and healthful working conditions or surroundings in:

Subchapter B—Respiratory Protective Apparatus; Tests for Permissibility; Fees.
Subchapter C—Explosives and Related Articles; Tests for Permissibility and Suitability.
Subchapter D—Electrical Equipment, Lamps, Methane Detectors; Tests for Permissibility; Fees.
Subchapter O—Coal Mine Health and Safety.

(ii) In Chapter II of Title 30 the standards requiring safe and healthful working conditions or surroundings in:

Part 211—Coal-Mining Operating and Safety Regulations.
Part 216—Operating and Safety Regulations Governing the Mining of Coal in Alaska.
Part 221—Oil and Gas Operating Regulations.
Part 231—Operating and Safety Regulations Governing the Mining of Potash; Oil Shale, Sodium, and Phosphate; Sulphur; and Gold, Silver, or Quicksilver; and Other Nonmetallic Minerals, Including Silica Sand.

(3) U.S. Department of Transportation: 49 CFR parts 171–179 and 14 CFR part 103 Hazardous material regulation—Transportation of compressed gases.

(4) U.S. Department of Agriculture Respiratory Devices for Protection against Certain Pesticides—ARS–33–76–2.

(b) Information concerning the applicability of the standards prescribed in paragraph (a) of this section may be obtained from the following offices:

(1) Office of the Bureau of Labor Standards, U.S. Department of Labor, Railway Labor Building, Washington, DC 20210.

(2) The regional and field offices of the Bureau of Labor Standards which are listed in the U.S. Government Organization Manual, 1970–71 edition at p. 324.

(c) In applying the safety and health standards referred to in paragraph (a) of this section the Secretary may add to, strengthen or otherwise modify any standards whenever he considers that the standards do not adequately protect the safety and health of employees as required by the Walsh-Healey Public Contracts Act.

[34 FR 7946, May 20, 1969, as amended at 36 FR 9868, May 29, 1971]

§ 50–204.3 Material handling and storage.

(a) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repair, with no obstruction across or in aisles that could create a hazard. Permanent aisles and passageways shall be appropriately marked.

(b) Storage of material shall not create a hazard. Bags, containers, bundles, etc. stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

(c) Storage areas shall be kept free from accumulation of materials that constitute hazards from tripping, fire, explosion, or pest harborage. Vegetation control will be exercised when necessary.

(d) Proper drainage shall be provided.

(e) Clearance signs to warn of clearance limits shall be provided.

(f) Derail and/or bumper blocks shall be provided on spur railroad tracks where a rolling car could contact other cars being worked, enter a building, work or traffic area.

(g) Covers and/or guard rails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

[34 FR 7946, May 20, 1969; 35 FR 1015, Jan. 24, 1970]

§ 50–204.4 Tools and equipment.

Each employer shall be responsible for the safe condition of tools and

equipment used by employees, including tools and equipment which may be furnished by employees.

§50–204.5 Machine guarding.

(a) One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, in going nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—Barrier guards, two hand tripping devices, electronic safety devices, etc.

(b) General requirements for machine guards. Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.

(c) Point of Operation Guarding.

(1) Point of operation is the area on a machine where work is actually performed upon the material being processed.

(2) Where existing standards prepared by organizations listed in §50–204.2 provide for point of operation guarding such standards shall prevail. Other types of machines for which there are no specific standards, and the operation exposes an employee to injury, the point of operation shall be guarded. The guarding device shall be so designed and constructed so as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

(3) Special hand tools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

(4) The following are some of the machines which usually require point of operation guarding:

Guillotine cutters.
Shears.
Alligator shears.
Power presses.
Milling machines.
Power saws.
Jointers.
Portable power tools.
Forming rolls and calenders.

(d) Revolving drums, barrels and containers shall be guarded by an enclosure which is interlocked with the drive mechanism, so that the barrel, drum or container cannot revolve unless the guard enclosure is in place.

(e) When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one half (½) inch.

(f) Machines designed for a fixed location shall be securely anchored to prevent walking or moving.

§50–204.6 Medical services and first aid.

(a) The employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health.

(b) In the absence of an infirmary, clinic or hospital in near proximity to the work place which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.

(c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

[34 FR 7946, May 20, 1969; 35 FR 1015, Jan. 24, 1970]

§50–204.7 Personal protective equipment.

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in function of any part of the body through absorption, inhalation or physical contact. Where employees provide their own protective

equipment, the employer shall be responsible to assure its adequacy, including proper maintenance and sanitation of such equipment. All personal protective equipment shall be of safe design and construction for the work to be performed.

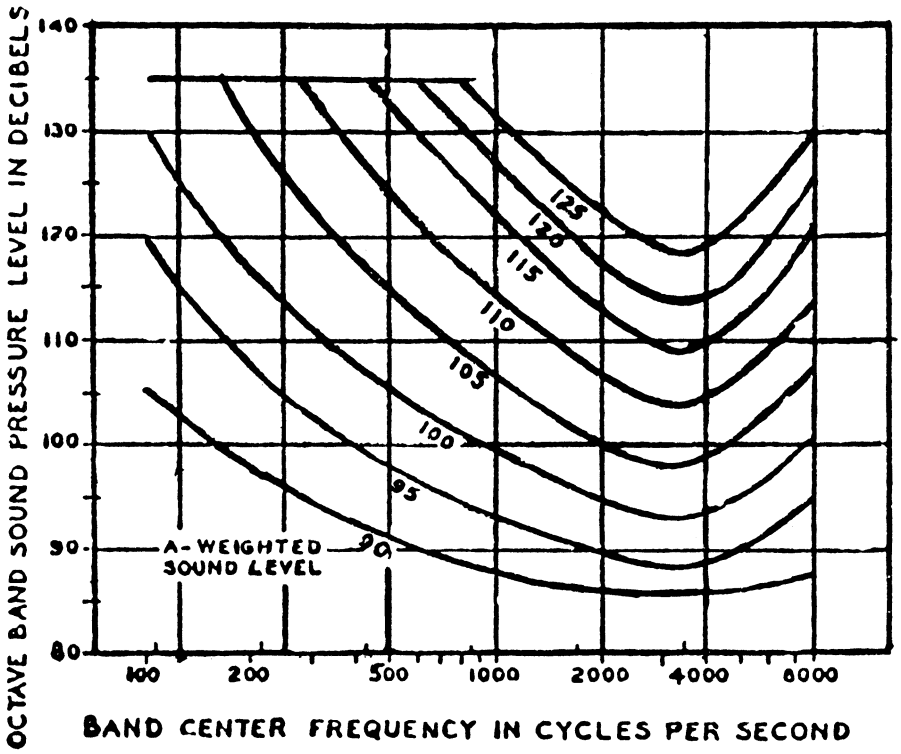
[35 FR 1015, Jan. 24, 1970]

§ 50–204.8 Use of compressed air.

Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

§ 50–204.10 Occupational noise exposure.

(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table I of this section when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:



Equivalent sound level contours. Octave band sound pressure levels may be converted to the equivalent A-weighted sound level by plotting them on this graph and noting the A-weighted sound level corresponding to the point of highest penetration into the sound level contours. This equivalent A-weighted sound level, which may differ from the actual A-weighted sound level of the noise, is used to determine exposure limits from Table I.

(b) When employees are subject to sound exceeding those listed in Table I of this section, feasible administrative

or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of the table, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

(c) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.

(d) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

TABLE I

PERMISSIBLE NOISE EXPOSURES [1]

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1½	102
1	105
½	110
¼ or less	115

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: C1/T1 + C2/T2 * * * Cn/Tn exceeds unity, then, the mixed exposure should be considered to exceed the limit value. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

[34 FR 7946, May 20, 1969, as amended at 35 FR 1015, Jan. 24, 1970]

Subpart C—Radiation Standards

§ 50–204.20 Radiation—definitions.

As used in this subpart:

(a) *Radiation* includes alpha rays, beta rays, gamma rays, X-rays, neutrons, high-speed electrons, high-speed protons, and other atomic particles; but such term does not include sound or radio waves, or visible light, or infrared or ultraviolet light.

(b) *Radioactive material* means any material which emits, by spontaneous nuclear disintegration, corpuscular or electromagnetic emanations.

(c) *Restricted area* means any area access to which is controlled by the employer for purposes of protection of individuals from exposure to radiation or radioactive materials.

(d) *Unrestricted area* means any area access to which is not controlled by the employer for purposes of protection of individuals from exposure to radiation or radioactive materials.

(e) *Dose* means the quantity of ionizing radiation absorbed, per unit of mass, by the body or by any portion of the body. When the provisions in this subpart specify a dose during a period of time, the dose is the total quantity of radiation absorbed, per unit of mass, by the body or by any portion of the body during such period of time. Several different units of dose are in current use. Definitions of units used in this subpart are set forth in paragraphs (f) and (g) of this section.

(f) *Rad* means a measure of the dose of any ionizing radiation to body tissues in terms of the energy absorbed per unit of mass of the tissue. One rad is the dose corresponding to the absorption of 100 ergs per gram of tissue (1 millirad (mrad) = 0.001 rad).

(g) *Rem* means a measure of the dose of any ionizing radiation to body tissue in terms of its estimated biological effect relative to a dose of 1 roentgen (r) of X-rays (1 millirem (mrem) = 0.001 rem). The relation of the rem to other dose units depends upon the biological effect under consideration and upon the conditions for irradiation. Each of the following is considered to be equivalent to a dose of 1 rem:

(1) A dose of 1 rad due to X- or gamma radiation;

(2) A dose of 1 rad due to X-, gamma, or beta radiation;

(3) A dose of 0.1 rad due to neutrons or high energy protons;

(4) A dose of 0.05 rad due to particles heavier than protons and with sufficient energy to reach the lens of the eye;

(5) If it is more convenient to measure the neutron flux, or equivalent, than to determine the neutron dose in rads, as provided in paragraph (g)(3) of this section, 1 rem of neutron radiation may, for purposes of the provisions in this subpart be assumed to be equivalent to 14 million neutrons per square centimeter incident upon the body; or, if there is sufficient information to estimate with reasonable accuracy the

approximate distribution in energy of the neutrons, the incident number of neutrons per square centimeter equivalent to 1 rem may be estimated from the following table:

NEUTRON FLUX DOSE EQUIVALENTS

Neutron energy (million electron volts [Mev])	Number of neutrons per square centimeter equivalent to a dose of 1 rem (neutrons/cm^2)	Average flux to deliver 100 millirem in 40 hours (neutrons/cm^2 per sec.)
Thermal	970×10^6	670
0.0001	720×10^6	500
0.005	820×10^6	570
0.02	400×10^6	280
0.1	120×10^6	80
0.5	43×10^6	30
1.0	26×10^6	18
2.5	29×10^6	20
5.0	26×10^6	18
7.5	24×10^6	17
10	24×10^6	17
10 to 30	14×10^6	10

(h) For determining exposures to X- or gamma rays up to 3 Mev., the dose limits specified in this part may be assumed to be equivalent to the ''air dose''. For the purpose of this subpart ''air dose'' means that the dose is measured by a properly calibrated appropriate instrument in air at or near the body surface in the region of the highest dosage rate.

§ 50–204.21 Exposure of individuals to radiation in restricted areas.

(a) Except as provided in paragraph (b) of this section, no employer shall possess, use, or transfer sources of ionizing radiation in such a manner as to cause any individual in a restricted area to receive in any period of one calendar quarter from sources in the employer's possession or control a dose in excess of the limits specified in the following table:

	Rems per calendar quarter
1. Whole body: Head and trunk; active blood-forming organs; lens of eyes; or gonads	1¼
2. Hands and forearms; feet and ankles	18¾
3. Skin of whole body	7½

(b) An employer may permit an individual in a restricted area to receive doses to the whole body greater than those permitted under paragraph (a) of this section, so long as:

(1) During any calendar quarter the dose to the whole body shall not exceed 3 rems; and

(2) The dose to the whole body, when added to the accumulated occupational dose to the whole body, shall not exceed 5 (N–18) rems, where ''N'' equals the individual's age in years at his last birthday; and

(3) The employer maintains adequate past and current exposure records which show that the addition of such a dose will not cause the individual to exceed the amount authorized in this paragraph. As used in this paragraph ''Dose to the whole body'' shall be deemed to include any dose to the whole body, gonad, active bloodforming organs, head and trunk, or lens of the eye.

(c) No employer shall permit any employee who is under 18 years of age to receive in any period of one calendar quarter a dose in excess of 10 percent of the limits specified in the table in paragraph (a) of this section.

(d) *Calendar quarter* means any 3-month period determined as follows:

(1) The first period of any year may begin on any date in January: *Provided,* That the second, third, and fourth periods accordingly begin on the same date in April, July, and October, respectively, and that the fourth period extends into January of the succeeding year, if necessary to complete a 3-month quarter. During the first year of use of this method of determination, the first period for that year shall also include any additional days in January preceding the starting date for the first period; or

(2) The first period in a calendar year of 13 complete, consecutive calendar weeks; the second period in a calendar year of 13 complete, consecutive calendar weeks; the third period in a calendar year of 13 complete, consecutive calendar weeks; the fourth period in a calendar year of 13 complete, consecutive calendar weeks. If at the end of a calendar year there are any days not falling within a complete calendar week of that year, such days shall be included within the last complete calendar week of that year. If at the beginning of any calendar year there are days not falling within a complete calendar week of that year, such days

shall be included within the last complete calendar week of the previous year; or

(3) The four periods in a calendar year may consist of the first 14 complete, consecutive calendar weeks; the next 12 complete, consecutive calendar weeks, the next 14 complete, consecutive calendar weeks, and the last 12 complete, consecutive calendar weeks. If at the end of a calendar year there are any days not falling within a complete calendar week of that year, such days shall be included (for purposes of this part) within the last complete calendar week of the year. If at the beginning of any calendar year there are days not falling within a complete calendar week of that year, such days shall be included (for purposes of this part) within the last complete week of the previous year.

(e) No employer shall change the method used by him to determine calendar quarters except at the beginning of a calendar year.

§50–204.22 Exposure to airborne radioactive material.

(a) No employer shall possess, use or transport radioactive material in such a manner as to cause any employee, within a restricted area, to be exposed to airborne radioactive material in an average concentration in excess of the limits specified in Table I of appendix B to 10 CFR part 20. The limits given in Table I are for exposure to the concentrations specified for 40 hours in any workweek of 7 consecutive days. In any such period where the number of hours of exposure is less than 40, the limits specified in the table may be increased proportionately. In any such period where the number of hours of exposure is greater than 40, the limits specified in the table shall be decreased proportionately.

(b) No employer shall possess, use, or transfer radioactive material in such a manner as to cause any individual within a restricted area, who is under 18 years of age to be exposed to airborne radioactive material in an average concentration in excess of the limits specified in Table II of Appendix B to 10 CFR part 20. For purposes of this paragraph, concentrations may be averaged over periods not greater than 1 week.

(c) *Exposed* as used in this section means that the individual is present in an airborne concentration. No allowance shall be made for the use of protective clothing or equipment, or particle size, except as authorized by the Director, Bureau of Labor Standards.

§50–204.23 Precautionary procedures and personnel monitoring.

(a) Every employer shall make such surveys as may be necessary for him to comply with the provisions in this subpart. ''Survey'' means an evaluation of the radiation hazards incident to the production, use, release, disposal, or presence of radioactive materials or other sources of radiation under a specific set of conditions. When appropriate, such evaluation includes a physical survey of the location of materials and equipment, and measurements of levels of radiation or concentrations of radioactive material present.

(b) Every employer shall supply appropriate personnel monitoring equipment, such as film badges, pocket chambers, pocket dosimeters, or film rings, to, and shall require the use of such equipment by:

(1) Each employee who enters a restricted area under such circumstances that he receives, or is likely to receive, a dose in any calendar quarter in excess of 25 percent of the applicable value specified in paragraph (a) of §50–204.21; and

(2) Each employee under 18 years of age who enters a restricted area under such circumstances that he receives, or is likely to receive, a dose in any calendar quarter in excess of 5 percent of the applicable value specified in paragraph (a) of §50–204.21; and

(3) Each employee who enters a high radiation area.

(c) As used in this subpart:

(1) ''Personnel monitoring equipment'' means devices designed to be worn or carried by an individual for the purpose of measuring the dose received (e.g., film badges, pocket chambers, pocket dosimeters, film rings, etc.);

(2) ''Radiation area'' means any area, accessible to personnel, in which there exists radiation at such levels that a

major portion of the body could receive in any one hour a dose in excess of 5 millirem, or in any 5 consecutive days a dose in excess of 100 millirem; and

(3) ''High radiation area'' means any area, accessible to personnel, in which there exists radiation at such levels that a major portion of the body could receive in any one hour a dose in excess of 100 millirem.

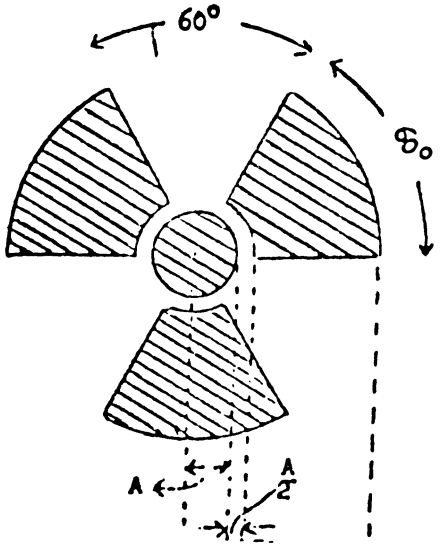
§ 50–204.24 Caution signs, labels, and signals.

(a) *General.* (1) Symbols prescribed by this section shall use the conventional radiation caution colors (magenta or purple on yellow background). The symbol prescribed by this section is the conventional three-bladed design:

RADIATION SYMBOL

1. Cross-hatched area is to be magenta or purple.

2. Background is to be yellow.



(2) In addition to the contents of signs and labels prescribed in this section, employers may provide on or near such signs and labels any additional information which may be appropriate in aiding individuals to minimize exposure to radiation or to radioactive material.

(b) *Radiation areas.* Each radiation area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION[2]

RADIATION AREA

(c) *High radiation area.* (1) Each high radiation area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION[2]

HIGH RADIATION AREA

(2) Each high radiation area shall be equipped with a control device which shall either cause the level of radiation to be reduced below that at which an individual might receive a dose of 100 millirems in 1 hour upon entry into the area or shall energize a conspicuous visible or audible alarm signal in such a manner that the individual entering and the employer or a supervisor of the activity are made aware of the entry. In the case of a high radiation area established for a period of 30 days or less, such control device is not required.

(d) *Airborne radioactivity area.* (1) As used in the provisions of this subpart, ''airborne radioactivity area'' means (i) any room, enclosure, or operating area in which airborne radioactive materials, composed wholly or partly of radioactive material, exist in concentrations in excess of the amounts specified in column 1 of Table 1 of appendix B to 10 CFR part 20 or (ii) any room, enclosure, or operating area in which airborne radioactive materials exist in concentrations which, averaged over the number of hours in any week during which individuals are in the area, exceed 25 percent of the amounts specified in column 1 of the described Table 1.

(2) Each airborne radioactivity area shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

[2] Or ''Danger''.

CAUTION [2]

AIRBORNE RADIOACTIVITY AREA

(e) *Additional requirements.* (1) Each area or room in which radioactive material is used or stored and which contains any radioactive material (other than natural uranium or thorium) in any amount exceeding 10 times the quantity of such material specified in appendix C to 10 CFR part 20 shall be conspiciously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(2) Each area or room in which natural uranium or thorium is used or stored in an amount exceeding 100 times the quantity specified in appendix C to 10 CFR part 20 shall be conspicuously posted with a sign or signs bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(f) *Containers.* (1) Each container in which is transported, stored, or used a quantity of any radioactive material (other than natural uranium or thorium) greater than the quantity of such material specified in appendix C to 10 CFR part 20 shall bear a durable, clearly visible label bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(2) Each container in which natural uranium or thorium is transported, stored, or used in a quantity greater than 10 times the quantity specified in appendix C to 10 CFR part 20 shall bear a durable, clearly visible label bearing the radiation caution symbol and the words:

CAUTION [2]

RADIOACTIVE MATERIALS

(3) Notwithstanding the provisions of paragraphs (f) (1) and (2) of this section a label shall not be required:

(i) If the concentration of the material in the container does not exceed that specified in column 2 of the described Table 1, or

(ii) For laboratory containers, such as beakers, flasks, and tests tubes, used transiently in laboratory procedures, when the user is present.

(4) Where containers are used for storage, the labels required in this paragraph shall state also the quantities and kinds of radioactive materials in the containers and the date of measurement of the quantities.

§ 50–204.25 Exceptions from posting requirements.

Notwithstanding the provisions of § 50–204.24:

(a) A room or area is not required to be posted with a caution sign because of the presence of a sealed source, provided the radiation level 12 inches from the surface of the source container or housing does not exceed 5 millirem per hour.

(b) Rooms or other areas in on-site medical facilities are not required to be posted with caution signs because of the presence of patients containing radioactive material, provided that there are personnel in attendance who shall take the precautions necessary to prevent the exposure of any individual to radiation or radioactive material in excess of the limits established in the provisions of this subpart.

(c) Caution signs are not required to be posted at areas or rooms containing radioactive materials for periods of less than 8 hours: *Provided*, That (1) the materials are constantly attended during such periods by an individual who shall take the precautions necessary to prevent the exposure of any individual to radiation or radioactive materials in excess of the limits established in the provisions of this subpart; and (2) such area or room is subject to the employer's control.

[2] Or ''Danger''.

§ 50–204.26 Exemptions for radioactive materials packaged for shipment.

Radioactive materials packaged and labeled in accordance with regulations of the Department of Transportation shall be exempt from the labeling and posting requirements during shipment, provided that the inside containers are labeled in accordance with the provisions of § 50–204.24.

§ 50–204.27 Instruction of personnel posting.

Employers regulated by the AEC shall be governed by ''§ 20.206'' (10 CFR part 20) standards. Employers in a State named in § 50–204.34(c) shall be governed by the requirements of the laws and regulations of that State. All other employers shall be regulated by the following:

(a) All individuals working in or frequenting any portion of a radiation area shall be informed of the occurrence of radioactive materials or of radiation in such portions of the radiation area; shall be instructed in the safety problems associated with exposure to such materials or radiation and in precautions or devices to minimize exposure; shall be instructed in the applicable provisions of this subpart for the protection of employees from exposure to radiation or radioactive materials; and shall be advised of reports of radiation exposure which employees may request pursuant to the regulations in this part.

(b) Each employer to whom this subpart applies shall post a current copy of its provisions and a copy of the operating procedures applicable to the work under contract conspicuously in such locations as to ensure that employees working in or frequenting radiation areas will observe these documents on the way to and from their place of employment, or shall keep such documents available for examination of employees upon request.

§ 50–204.28 Storage of radioactive materials.

Radioactive materials stored in a nonradiation area shall be secured against unauthorized removal from the place of storage.

§ 50–204.29 Waste disposal.

No employer shall dispose of radioactive material except by transfer to an authorized recipient, or in a manner approved by the Atomic Energy Commission or a State named in § 50–204.34(c).

§ 50–204.30 Notification of incidents.

(a) *Immediate notification.* Each employer shall immediately notify the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR part 20, § 50–204.34(b) of this part, or the requirements of the laws and regulations of States named in § 50–204.34(c), by telephone or telegraph of any incident involving radiation which may have caused or threatens to cause:

(1) Exposure of the whole body of any individual to 25 rems or more of radiation; exposure of the skin of the whole body of any individual to 150 rems or more of radiation; or exposure of the feet, ankles, hands, or forearms of any individual to 375 rems or more of radiation; or

(2) The release of radioactive material in concentrations which, if averaged over a period of 24 hours, would exceed 5,000 times the limit specified for such materials in Table II of appendix B to 10 CFR part 20.

(3) A loss of 1 working week or more of the operation of any facilities affected; or

(4) Damage to property in excess of $100,000.

(b) *Twenty-four hour notification.* Each employer shall within 24 hours following its occurrence notify the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR part 20, § 50–204.34(b) of this part, or the requirements of the laws and applicable regulations of States named in § 50–204.34(c), by telephone or telegraph of any incident involving radiation which may have caused or threatens to cause:

(1) Exposure of the whole body of any individual to 5 rems or more of radiation; exposure of the skin of the whole body of any individual to 30 rems or more of radiation; or exposure of the feet, ankles, hands, or forearms to 75 rems or more of radiation; or

(2) A loss of 1 day or more of the operation of any facilities; or

(3) Damage to property in excess of $10,000.

§ 50–204.31 Reports of overexposure and excessive levels and concentrations.

(a) In addition to any notification required by § 50–204.30 each employer shall make a report in writing within 30 days to the Regional Director of the appropriate Wage and Labor Standards Administration, Office of Occupational Safety of the Bureau of Labor Standards of the U.S. Department of Labor, for employees not protected by AEC by means of 10 CFR part 20, or under § 50–204.34(b) of this part, or the requirements of the laws and regulations of States named in § 50–204.34(c), of each exposure of an individual to radiation or concentrations of radioactive material in excess of any applicable limit in this subpart. Each report required under this paragraph shall describe the extent of exposure of persons to radiation or to radioactive material; levels of radiation and concentrations of radioactive material involved, the cause of the exposure, levels of concentrations; and corrective steps taken or planned to assure against a recurrence.

(b) In any case where an employer is required pursuant to the provisions of this section to report to the U.S. Department of Labor any exposure of an individual to radiation or to concentrations of radioactive material, the employer shall also notify such individual of the nature and extent of exposure. Such notice shall be in writing and shall contain the following statement: ''You should preserve this report for future reference.''

§ 50–204.32 Records.

(a) Every employer shall maintain records of the radiation exposure of all employees for whom personnel monitoring is required under § 50–204.23 and advise each of his employees of his individual exposure on at least an annual basis.

(b) Every employer shall maintain records in the same units used in tables in § 50–204.21 and appendix B to 10 CFR part 20.

§ 50–204.33 Disclosure to former employee of individual employee's record.

(a) At the request of a former employee an employer shall furnish to the employee a report of the employee's exposure to radiation as shown in records maintained by the employer pursuant to § 50–204.32(a). Such report shall be furnished within 30 days from the time the request is made, and shall cover each calendar quarter of the individual's employment involving exposure to radiation or such lesser period as may be requested by the employee. The report shall also include the results of any calculations and analysis of radioactive material deposited in the body of the employee. The report shall be in writing and contain the following statement: ''You should preserve this report for future reference.''

(b) The former employee's request should include appropriate identifying data, such as social security number and dates and locations of employment.

§ 50–204.34 AEC licensees—AEC contractors operating AEC plants and facilities—AEC agreement State licensees or registrants.

(a) Any employer who possesses or uses source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended, under a license issued by the Atomic Energy Commission and in accordance with the requirements of 10 CFR part 20 shall be deemed to be in compliance with the requirements of this subpart with respect to such possession and use.

(b) AEC contractors operating AEC plants and facilities: Any employer who possesses or uses source material, byproduct material, special nuclear material, or other radiation sources under a contract with the Atomic Energy Commission for the operation of

AEC plants and facilities and in accordance with the standards, procedures, and other requirements for radiation protection established by the Commission for such contract pursuant to the Atomic Energy Act of 1954 as amended (42 U.S.C. 2011 *et seq.*), shall be deemed to be in compliance with the requirements of this subpart with respect to such possession and use.

(c) AEC-agreement State licensees or registrants:

(1) *Atomic Energy Act sources.* Any employer who possesses or uses source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*), and has either registered such sources with, or is operating under a license issued by, a State which has an agreement in effect with the Atomic Energy Commission pursuant to section 274(b) (42 U.S.C. 2021(b)) of the Atomic Energy Act of 1954, as amended, and in accordance with the requirements of that State's laws and regulations shall be deemed to be in compliance with the radiation requirements of this part, insofar as his possession and use of such material is concerned, unless the Secretary of Labor, after conference with the Atomic Energy Commission, shall determine that the State's program for control of these radiation sources is incompatible with the requirements of this part. Such agreements currently are in effect only in the States of Alabama, Arkansas, California, Kansas, Kentucky, Florida, Mississippi, New Hampshire, New York, North Carolina, Texas, Tennessee, Oregon, Idaho, Arizona, Colorado, Louisiana, Nebraska, and Washington.

(2) *Other sources.* Any employer who possesses or uses radiation sources other than source material, byproduct material, or special nuclear material, as defined in the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*), and has either registered such sources with, or is operating under a license issued by a State which has an agreement in effect with the Atomic Energy Commission pursuant to section 274(b) (42 U.S.C. 2021(b)) of the Atomic Energy Act of 1954, as amended, and in accordance with the requirements of that State's laws and regulations shall be deemed to be in compliance with the radiation requirements of this part, insofar as his possession and use of such material is concerned, provided the State's program for control of these radiation sources is the subject of a currently effective determination by the Secretary of Labor that such program is compatible with the requirements of this part. Such determinations currently are in effect only in the States of Alabama, Arkansas, California, Kansas, Kentucky, Florida, Mississippi, New Hampshire, New York, North Carolina, Texas, Tennessee, Oregon, Idaho, Arizona, Colorado, Louisiana, Nebraska, and Washington.

§ 50–204.35 Application for variations from radiation levels.

(a) In accordance with policy expressed in the Federal Radiation Council's memorandum concerning radiation protection guidance for Federal agencies (25 FR 4402), the Director, Bureau of Labor Standards may from time to time grant permission to employers to vary from the limitations contained in §§ 50–204.21 and 50–204.22 when the extent of variation is clearly specified and it is demonstrated to his satisfaction that (1) such variation is necessary to obtain a beneficial use of radiation or atomic energy, (2) such benefit is of sufficient value to warrant the variation, (3) employees will not be exposed to an undue hazard, and (4) appropriate actions will be taken to protect the health and safety of such employees.

(b) Applications for such variations should be filed with the Director, Bureau of Labor Standards, U.S. Department of Labor, Washington, DC 20210.

§ 50–204.36 Radiation standards for mining.

(a) For the purpose of this section, a ''working level'' is defined as any combination of radon daughters in 1 liter of air which will result in the ultimate emission of 1.3×10^5 million electron volts of potential alpha energy. The numerical value of the ''working level'' is derived from the alpha energy released by the total decay of short-lived radon daughter products in equilibrium with 100 pico-curies of radon 222 per liter of air. A working level month is

defined as the exposure received by a worker breathing air at one working level concentration for 4⅓ weeks of 40 hours each.

(b)(1) Occupational exposure to radon daughters in mines shall be controlled so that no individual will receive an exposure of more than 2 working level months in any calendar quarter and no more than 4 working level months in any calendar year. Actual exposures shall be kept as far below these values as practicable.

(2) In enforcing this section, the Director of the Bureau of Labor Standards may at any stage approve variations in individual cases from the limitation set forth in paragraph (b)(1) of this section to comply with the requirements of the Act upon a showing to the satisfaction of the Director by an employer having a mine with conditions resulting in an exposure of more than 4 working level months but not more than 12 working level months in any 12 consecutive months that (i) under the particular facts and circumstances involved the working conditions of the employees so exposed are such that their health and safety are protected, and (ii) the employer has a bona fide plan to reduce the levels of exposure to those specified in paragraph (b)(1) of this section as soon as practicable, but in no event later than January 1, 1971.

(3) Whenever a variation under paragraph (b)(2) of this section is sought, a request therefor should be submitted in writing to the Director of the Bureau of Labor Standards, U.S. Department of Labor, Washington, DC 20210, within 90 days following the end of the calendar quarter or year, as the case may be.

(c)(1) For uranium mines, records of environmental concentrations in the occupied parts of the mine, and of the time spent in each area by each person involved in underground work shall be established and maintained. These records shall be in sufficient detail to permit calculations of the exposures, in units of working level months, of the individuals and shall be available for inspection by the Secretary of Labor or his authorized agents.

(2) For other than uranium mines and for surface workers in all mines, paragraph (c)(1) of this section will be applicable: *Provided*, *however*, That if no environmental sample shows a concentration greater than 0.33 working level in any occupied part of the mine, the maintenance of individual occupancy records and the calculation of individual exposures will not be required.

(d)(1) At the request of an employee (or former employee) a report of the employee's exposure to radiation as shown in records maintained by the employer pursuant to paragraph (c) of this section, shall be furnished to him. The report shall be in writing and contain the following statement:

> This report is furnished to you under the provisions of the U.S. Department of Labor, Radiation Safety and Health Standards (41 CFR 50–204.36). You should preserve this report for future reference.

(2) The former employee's request should include appropriate identifying data, such as social security number and dates and locations of employment.

Subpart D—Gases, Vapors, Fumes, Dusts, and Mists

§ 50–204.50 Gases, vapors, fumes, dusts, and mists.

(a) (1) Exposures by inhalation, ingestion, skin absorption, or contact to any material or substance (i) at a concentration above those specified in the ''Threshold Limit Values of Airborne Contaminants for 1968'' of the American Conference of Governmental Industrial Hygienists, except for the ANSI Standards listed in Table I of this section and except for the values of mineral dusts listed in Table II of this section, and (ii) concentrations above those specified in Tables I and II of this section, shall be avoided, or protective equipment shall be provided and used.

(2) The requirements of this section do not apply to exposures to airborne asbestos dust. Exposures of employees to airborne asbestos dust shall be subject to the requirements of 29 CFR 1910.93a.

(b) To achieve compliance with paragraph (a) of this section, feasible administrative or engineering controls

must first be determined and implemented in all cases. In cases where protective equipment in addition to other measures is used as the method of protecting the employee, such protection must be approved for each specific application by a competent industrial hygienist or other technically qualified source.

TABLE II—MINERAL DUSTS

Substance	Mppcf[e]	Mg/M[3]
Silica:		
Crystalline:		
Quartz (respirable)	250[f]	10mg/M[3m]
	$\%SiO_2 = 5$	$\%SiO_2 = 2$
Quartz (total dust)	.....	30mg/M[3]
		$\%SiO_2 = 2$
Cristobalite: Use ½ the value calculated from the count or mass formulae for quartz.		
Tridymite: Use ½ the value calculated from the formulae for quartz.		
Amorphous, including natural diatomaceous earth	20	80mg/M[3]
		$\%SiO_2$
Silicates (less than 1% crystalline silica):		
Mica	20	
Soapstone	20	
Talc	20	
Portland cement	50	
Graphite (natural)	15	
Coat dust (respirable fraction less than 5% SiO_2) ..	.....	2.4mg/M[3] or
For more than 5% SiO_2	.....	10mg/M[3]
		$\%SiO_2 = 2$
Inert or Nuisance Dust:		
Respirable fraction	1	5mg/M[3]
Total dust	505	15mg/M[3]

NOTE: Conversion factors—
mppcf × 35.3 = million particles per cubic meter
= particles per c.c.

[e]Millions of particles per cubic foot of air, based on impinger samples counted by light-field technics.

[f]The percentage of crystalline silica in the formula is the amount determined from air-borne samples, except in those instances in which other methods have been shown to be applicable.

[j]As determined by the membrane filter method at 430 × phase contrast magnification.

[m]Both concentration and percent quartz for the application of this limit are to be determined from the fraction passing a size-selector with the following characteristics:

Aerodynamic diameter (unit density sphere)	Percent passing selector
2	90
2.5	75
3.5	50
5.0	25
10	0

The measurements under this note refer to the use of an AEC instrument. If the respirable fraction of coal dust is determined with a MRE the figure corresponding to that of 2.4 Mg/M[3] in the table for coal dust is 4.5 Mg/M[3]

[36 FR 23217, Dec. 7, 1971]

§ 50–204.65 Inspection of compressed gas cylinders.

Each contractor shall determine that compressed gas cylinders under his extent that this can be determined by visual inspection. Visual and other inspections shall be conducted as prescribed in the Hazardous Materials Regulations of the Department of Transportation (49 CFR parts 171–179 and 14 CFR part 103). Where those regulations are not applicable, visual and other inspections shall be conducted in accordance with Compressed Gas Association Pamphlets C–6–198 and C–8–1962.

§ 50–204.66 Acetylene.

(a) The in-plant transfer, handling, storage, and utilization of acetylene in cylinders shall be in accordance with Compressed Gas Association Pamphlet G–1–1966.

(b) The piped systems for the in-plant transfer and distribution of acetylene shall be designed, installed, maintained, and operated in accordance with Compressed Gas Association Pamphlet G–1.3–1959.

(c) Plants for the generation of acetylene and the charging (filling) of acetylene cylinders shall be designed, constructed, and tested in accordance with the standards prescribed in Compressed Gas Association Pamphlet G–1.4–1966.

§ 50–204.67 Oxygen.

The in-plant transfer, handling, storage, and utilization of oxygen as a liquid or a compressed gas shall be in accordance with Compressed Gas Association Pamphlet G–4–1962.

§ 50–204.68 Hydrogen.

The in-plant transfer, handling, storage, and utilization of hydrogen shall be in accordance with Compressed Gas Association Pamphlets G–5.1–1961 and G–5.2–1966.

§ 50–204.69 Nitrous oxide.

The piped systems for the in-plant transfer and distribution of nitrous oxide shall be designed, installed, maintained, and operated in accordance with Compressed Gas Association Pamphlet G–8.1–1964.

§ 50–204.70 Compressed gases.

The in-plant handling, storage, and utilization of all compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle cargo tanks shall be in accordance with Compressed Gas Association Pamphlet P–1–1965.

[35 FR 1015, Jan. 24, 1970]

§ 50–204.71 Safety relief devices for compressed gas containers.

Compressed gas cylinders, portable tanks, and cargo tanks shall have pressure relief devices installed and maintained in accordance with Compressed Gas Association Pamphlets S–1.1–1963 and 1965 addenda and S–1.2–1963.

§ 50–204.72 Safe practices for welding and cutting on containers which have held combustibles.

Welding or cutting, or both, on containers which have held flammable or combustible solids, liquids, or gases, or have contained substances which may produce flammable vapors or gases will not be attempted until the containers have been thoroughly cleaned, purged, or inerted in strict accordance with the rules and procedures embodied in American Welding Society Pamphlet A–6.0–65, edition of 1965.

[35 FR 1015, Jan. 24, 1970]

Subpart E—Transportation Safety

§ 50–204.75 Transportation safety.

Any requirements of the U.S. Department of Transportation under 49 CFR Parts 171–179 and Parts 390–397 and 14 CFR part 103 shall be applied to transportation under contracts which are subject to the Walsh-Healey Public Contracts Act. See also § 50–204.2(a)(3) of this part. When such requirements are not otherwise applicable, Chapters 10, 11, 12, and 14 of the Uniform Vehicle Code of the National Committee on Uniform Traffic Laws and Ordinances, 1962 edition, shall be applied whenever pertinent.

[35 FR 1016, Jan. 24, 1970]

PART 50–205—ENFORCEMENT OF SAFETY AND HEALTH STANDARDS BY STATE OFFICERS AND EMPLOYEES

Sec.

50–205.1 Purpose and scope.
50–205.2 Definitions.
50–205.3 Agreement with a State agency.
50–205.4 Plan of cooperation.
50–205.5 Inspections by State agency.
50–205.6 Complaints.
50–205.7 Manual of instructions.
50–205.8 Reports of inspections.
50–205.9 Inspections by the Department of Labor.
50–205.10 Modification or termination of agreement.

AUTHORITY: Sec. 4, 49 Stat. 2038, 41 U.S.C. 38. Interpret or apply sec. 1, 49 Stat. 2036, 41 U.S.C. 35.

SOURCE: 27 FR 1270, Feb. 10, 1962, unless otherwise noted.

§ 50–205.1 Purpose and scope.

The Walsh-Healey Public Contracts Act authorizes and directs the Secretary of Labor to utilize, with the consent of a State, such State and local officers and employees as he may find necessary to assist in the administration of the Act. It is the purpose of this part to prescribe the rules governing the use of such State and local officers in inspections (or investigations) relating to the enforcement of the stipulation required by the Act providing that no part of a contract subject thereto will be performed nor will any materials, supplies, articles, or equipment to be manufactured or furnished under such a contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract, and the enforcement of the safety and health standards interpreting and applying that stipulation published in part 50–204 of this chapter.

§ 50–205.2 Definitions.

(a) *Act* means the Walsh-Healey Public Contracts Act.

(b) *Secretary* means the Secretary of Labor.

(c) *State agency* means any authority of a State government which is responsible for the enforcement of State laws or regulations prescribing safety and health standards for employees.

(d) *Director* means the Director, Bureau of Labor Standards or his duly authorized representative.

(41 U.S.C. 40; 5 U.S.C. 556)

[27 FR 1270, Feb. 10, 1962, as amended at 32 FR 7704, May 26, 1967]

§ 50–205.3 Agreement with a State agency.

The Secretary may enter into an agreement with the head of a State agency providing for the use of State or local officers and employees in the conduct of inspections under the safety and health provisions of the Act as interpreted or applied in part 50–204 of this chapter whenever he finds that the utilization of such State or local officers is necessary to assist in the administration of those provisions. In making such a finding, consideration may be given to the State laws or regulations administered by the State agency providing safety and health standards, the central and field organization of the State agency, and the qualifications of its investigative personnel.

§ 50–205.4 Plan of cooperation.

Each agreement under this part shall incorporate a plan of cooperation between the Department of Labor and the State agency. The plan shall include the operative details of the cooperation contemplated in the making of safety and health inspections. The plan shall include a statement of the location of the State offices designated to make inspections and those of the Department of Labor designated to cooperate with such State offices.

§ 50–205.5 Inspections by State agency.

Inspections shall be conducted by the State agency with whom an agreement has been made under this part in order to determine the extent of compliance by Government contractors subject to the Act (as determined by the Department of Labor) with the safety and health provisions interpreted or applied in part 50–204 of this chapter. Inspectors of the State agency shall be considered authorized representatives of the Secretary of Labor in making inspections including the examining of the records of the Government contractor maintained under §§ 50–201.501 and 50–201.502 of this chapter. Inspections shall be made upon request of the Department of Labor or concurrently with inspections made to ascertain the compliance by employers with State safety and health requirements.

§ 50–205.6 Complaints.

When a complaint of alleged safety and health violations by an employer apparently subject to the Act is filed with a State agency, that agency shall transmit a copy of the complaint to the cooperating office of the Department of Labor within 5 days from the receipt of the complaint. All complaints shall be considered confidential and shall not be disclosed to any employer without the consent of the complainant.

§ 50–205.7 Manual of instructions.

The Director shall provide the State agency with a manual of instructions which shall be used in the making of inspections.

(41 U.S.C. 40; 5 U.S.C. 556)

[32 FR 7704, May 26, 1967]

§ 50–205.8 Reports of inspections.

The State agency shall furnish the Department of Labor with a report of its inspection when the following circumstances exist:

(a) The inspection was requested by the Department of Labor;

(b) The inspection discloses serious violations of the safety and health requirements of part 50–204 of this chapter by an employer apparently subject to the Act;

(c) The inspection discloses minor violations of the safety and health requirements of part 50–204 of this chapter by an employer apparently subject to the Act which are not corrected

promptly when such apparent violations are brought to the attention of the employer or as to which fully reliable assurances of future compliance are not or cannot be obtained.

§50–205.9 Inspections by the Department of Labor.

The Director may conduct such inspections as he may find appropriate to assure compliance with the safety and health provisions of the Act or whenever he may find that a safety and health inspection should be carried out along with investigation under other provisions of the Act or the Fair Labor Standards Act of 1938. Whenever an inspection by the Director discloses apparent violations of State safety and health requirements, the Director shall report such disclosures to the State agency.

(41 U.S.C. 40; 5 U.S.C. 556)

[32 FR 7704, May 26, 1967]

§50–205.10 Modification or termination of agreement.

Any agreement entered into this part may be modified at any time with the consent of both parties, and may be terminated by either party after notifying the other party 60 days prior thereto.

PART 50–210—STATEMENTS OF GENERAL POLICY AND INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

Sec.

50–210.0 General enforcement policy.
50–210.1 Coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers.

AUTHORITY: Sec. 4, 49 Stat. 2038; 41 U.S.C. 38.

§50–210.0 General enforcement policy.

(a) In order to clarify at this time the practices and policies which will guide the administration and enforcement of the Fair Labor Standards Act of 1938 (52 Stat 1060, as amended, 29 U.S.C. 201–219), and the Walsh-Healey Public Contracts Act (49 Stat. 2036, as amended; 41 U.S.C. 35–45), as affected by the Portal-to-Portal Act of 1947 (Pub. L. 49, 80th Cong.), the following policy is announced effective June 30, 1947:

(b) The investigation, inspection and enforcement activities of all officers and agencies of the Department of Labor as they relate to the Fair Labor Standards Act (52 Stat. 1060, as amended, 29 U.S.C. 201–219) and the Walsh-Healey Public Contracts Act of June 30, 1936 (49 Stat. 2036, as amended; 41 U.S.C. 35–45), will be carried out on the basis that all employers in all industries whose activities are subject to the provisions of the Fair Labor Standards Act (52 Stat. 1060, as amended; 29 U.S.C. 201–219) or the Walsh-Healey Public Contracts Act (49 Stat. 2036, as amended; 41 U.S.C. 35–45) are responsible for strict compliance with the provisions thereof and the regulations issued pursuant thereto.

(c) Any statements, orders, or instructions inconsistent herewith are rescinded.

NOTE: The text of §50–210.0 *General enforcement policy* is identical to that of §775.0 under 29 CFR Chapter V.

[12 FR 3916, June 17, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959]

§50–210.1 Coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers.

(a) The Division of Public Contracts returns to the interpretation contained in Rulings and Interpretations No. 2[1] with respect to coverage under the Walsh-Healey Public Contracts Act of truck drivers employed by oil dealers, by amending section 40(e)(1) of Rulings and Interpretations No. 3[1] to read as follows:

(1) Where the contractor is a dealer, the act applies to employees at the central distributing plant, including warehousemen, compounders, and chemists testing the lot out of which the Government order is filled, the crews engaged in loading the materials in vessels, tank cars or tank wagons

[1] Not filed with the Office of the Federal Register.

for shipment, and truck drivers engaged in the activities described in section 37(m) above.[2] However, the contractor is not required to show that the employees at the bulk stations, including truck drivers, are employed in accordance with the standards of the act. (Bulk stations as the term is used herein are intermediate points of storage between a central distributing plant and service stations.)

[12 FR 2477, Apr. 17, 1947. Redesignated at 24 FR 10952, Dec. 30, 1959]

[2] Refers to Rulings and Interpretation No. 3.

PARTS 50–211—50–999 [RESERVED]

CHAPTER 51—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

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PART 51–1—GENERAL

Sec.
51–1.1 Policy.
51–1.2 Mandatory source priorities.
51–1.3 Definitions.

AUTHORITY: 41 U.S.C. 46–48c.

SOURCE: 56 FR 48976, Sept. 26, 1991, unless otherwise noted.

§ 51–1.1 Policy.

(a) It is the policy of the Government to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities. The Committee for Purchase from People who are Blind or Severely Disabled (hereinafter the Committee) was established by the Javits-Wagner—O'Day Act, Public Law 92–28, 85 Stat. 77 (1971), as amended, 41 U.S.C. 46–48c (hereinafter the JWOD Act). The Committee is responsible for implementation of a comprehensive program designed to enforce this policy.

(b) It is the policy of the Committee to encourage all Federal entities and employees to provide the necessary support to ensure that the JWOD Act is implemented in an effective manner. This support includes purchase of products and services published on the Committee's Procurement List through appropriate channels from nonprofit agencies employing persons who are blind or have other severe disabilities designated by the Committee; recommendations to the Committee of new commodities and services suitable for addition to the Procurement List; and cooperation with the Committee and the central nonprofit agencies in the provision of such data as the Committee may decide is necessary to determine suitability for addition to the Procurement List.

[56 FR 48976, Sept. 26, 1991, as amended at 59 FR 16777, Apr. 8, 1994]

§ 51–1.2 Mandatory source priorities.

(a) The JWOD Act mandates that commodities or services on the Procurement List required by Government entities be procured, as prescribed in this regulation, from a nonprofit agency employing persons who are blind or have other severe disabilities, at a price established by the Committee, if that commodity or service is available within the normal period required by that Government entity. Except as provided in paragraph (b) of this section, the JWOD Act has priority, under the provisions of 41 U.S.C. 48, over any other supplier of the Government's requirements for commodities and services on the Committee's Procurement List.

(b) Federal Prison Industries, Inc. has priority, under the provisions of 18 U.S.C. 4124, over nonprofit agencies employing persons who are blind or have other severe disabilities in furnishing commodities for sale to the Government. All or a portion of the Government's requirement for a commodity for which Federal Prison Industries, Inc. has exercised its priority may be added to the Procurement List. However, such addition is made with the understanding that procurement under the JWOD Act shall be limited to that portion of the Government's requirement for the commodity which is not available or not required to be procured from Federal Prison Industries, Inc.

(c) The JWOD Act requires the Committee to prescribe regulations providing that, in the purchase by the Government of commodities produced and offered for sale by qualified nonprofit agencies employing persons who are blind and nonprofit agencies employing persons who have other severe disabilities, priority shall be accorded to commodities produced and offered for sale by qualified nonprofit agencies for the blind. In approving the addition of commodities, to the Procurement List, the Committee accords priority to nonprofit agencies for the blind. Nonprofit agencies for the blind and nonprofit agencies employing persons with severe disabilities have equal priority for services.

§ 51–1.3 Definitions.

As used in this chapter:

AbilityOne Program means the program authorized by the JWOD Act to increase employment and training opportunities for persons who are blind or

have other severe disabilities through Government purchasing of commodities and services from nonprofit agencies employing these persons.

Agency and *Federal agency* mean *Entity of the Government*, as defined herein.

Blind means an individual or class of individuals whose central visual acuity does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle no greater than 20 degrees.

Central nonprofit agency means an agency organized under the laws of the United States or of any State, operated in the interest of the blind or persons with other severe disabilities, the net income of which does not incur in whole or in part to the benefit of any shareholder or other individual, and designated by the Committee to facilitate the distribution (by direct allocation, subcontract, or any other means) of orders of the Government for commodities and services on the Procurement List among nonprofit agencies employing persons who are blind or have other severe disabilities, to provide information required by the Committee to implement the JWOD Program, and to otherwise assist the Committee in administering these regulations as set forth herein by the Committee.

Committee means the Committee for Purchase from People who are Blind or Severely Disabled.

Contracting activity means any element of an entity of the Government that has responsibility for identifying and/or procuring Government requirements for commodities or services. Components of a contracting activity, such as a contracting office and an ordering office, are incorporated in this definition, which includes all offices within the definitions of ''contracting activity,'' ''contracting office,'' and ''contract administration office'' contained in the Federal Acquisition Regulation, 48 CFR 2.101.

Direct labor means all work required for preparation, processing, and packing of a commodity or work directly related to the performance of a service, but not supervision, administration, inspection or shipping.

Fiscal year means the 12-month period beginning on October 1 of each year.

Government and *Entity of the Government* mean any entity of the legislative branch or the judicial branch, any executive agency, military department, Government corporation, or independent establishment, the U.S. Postal Service, and any nonappropriated fund instrumentality under the jurisdiction of the Armed Forces.

Interested person means an individual or legal entity affected by a proposed addition of a commodity or service to the Procurement List or a deletion from it.

Military resale commodities means commodities on the Procurement List sold for the private, individual use of authorized patrons of Armed Forces commissaries and exchanges, or like activities of other Government departments and agencies.

Nonprofit agency (formerly workshop) means a nonprofit agency for the blind or a nonprofit agency employing persons with severe disabilities, as appropriate.

Other severely disabled and *severely disabled individuals* (hereinafter persons with severe disabilities) mean a person other than a blind person who has a severe physical or mental impairment (a residual, limiting condition resulting from an injury, disease, or congenital defect) which so limits the person's functional capabilities (mobility, communication, self-care, self-direction, work tolerance or work skills) that the individual is unable to engage in normal competitive employment over an extended period of time.

(1) Capability for normal competitive employment shall be determined from information developed by an ongoing evaluation program conducted by or for the nonprofit agency and shall include as a minimum, a preadmission evaluation and a reevaluation at least annually of each individual's capability for normal competitive employment.

(2) A person with a severe mental or physical impairment who is able to engage in normal competitive employment because the impairment has been

overcome or the condition has been substantially corrected is not ''other severely handicapped'' within the meaning of the definition.

Participating nonprofit agency (formerly participating workshop) means any nonprofit agency which has been authorized by the Committee to furnish a commodity or service to the Government under the JWOD Act.

Procurement List means a list of commodities (including military resale commodities) and services which the Committee has determined to be suitable to be furnished to the Government by nonprofit agencies for the blind or nonprofit agencies employing persons with severe disabilities pursuant to the JWOD Act and these regulations.

Qualified nonprofit agency for other severely handicapped (hereinafter nonprofit agency employing persons with severe disabilities) (formerly workshop for other severely handicapped) means an agency organized under the laws of the United States or any State, operated in the interests of persons with severe disabilities who are not blind, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in furnishing commodities and services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs persons with severe disabilities (including blind) for not less than 75 percent of the work-hours of direct labor required to furnish such commodities or services.

Qualified nonprofit agency for the blind (hereinafter nonprofit agency for the blind) (formerly workshop for the blind) means an agency organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual; which complies with applicable occupational health and safety standards prescribed by the Secretary of Labor; and which in furnishing commodities and services (whether or not the commodities or services are procured under these regulations) during the fiscal year employs blind individuals for not less than 75 percent of the work-hours of direct labor required to furnish such commodities or services.

Severely disabled individual; Severe disability; Significantly disabled individual; Significant disability; are interchangeable or synonymous terms used within the AbilityOne Program to describe persons with severe disabilities who qualify to participate in the AbilityOne Program.

State means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any territory remaining under the jurisdiction of the Trust Territory of the Pacific Islands.

[56 FR 48976, Sept. 26, 1991, as amended at 59 FR 16777, Apr. 8, 1994; 71 FR 68493, Nov. 27, 2006; 77 FR 58500, Sept. 21, 2012]

PART 51–2—COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

Sec.
51–2.1 Membership.
51–2.2 Powers and responsibilities.
51–2.3 Notice of proposed addition or deletion.
51–2.4 Determination of suitability.
51–2.5 Committee decision.
51–2.6 Reconsideration of Committee decision.
51–2.7 Fair market price.
51–2.8 Procurement list.
51–2.9 Oral presentations by interested persons at Committee meetings.

AUTHORITY: 41 U.S.C. 46–48c.

SOURCE: 56 FR 48977, Sept. 26, 1991, unless otherwise noted.

§51–2.1 Membership.

Under the JWOD Act, the Committee is composed of 15 members appointed by the President. There is one representative from each of the following departments or agencies of the Government: The Department of Agriculture, the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the Department of Education, the Department of Commerce, the Department of Justice, the Department of

Labor, the Department of Veterans Affairs, and the General Services Administration. Four members are private citizens: One who is conversant with the problems incident to the employment of blind individuals; one who is conversant with the problems incident to the employment of persons with other severe disabilities; one who represents blind individuals employed in qualified nonprofit agencies for the blind; and one who represents persons with severe disabilities (other than blindness) employed in qualified nonprofit agencies employing persons with severe disabilities.

§ 51–2.2 Powers and responsibilities.

The Committee is responsible for carrying out the following functions in support of its mission of providing employment and training opportunities for persons who are blind or have other severe disabilities and, whenever possible, preparing those individuals to engage in competitive employment:

(a) Establish rules, regulations, and policies to assure effective implementation of the JWOD Act.

(b) Determine which commodities and services procured by the Federal Government are suitable to be furnished by qualified nonprofit agencies employing persons who are blind or have other severe disabilities and add those items to the Committee's Procurement List. Publish notices of addition to the Procurement List in the FEDERAL REGISTER. Disseminate information on Procurement List items to Federal agencies. Delete items no longer suitable to be furnished by nonprofit agencies. Authorize and deauthorize central nonprofit agencies and nonprofit agencies to accept orders from contracting activities for the furnishing of specific commodities and services on the Procurement List.

(c) Determine fair market prices for items added to the Procurement List and revise those prices in accordance with changing market conditions to assure that the prices established are reflective of the market.

(d) Monitor nonprofit agency compliance with Committee regulations and procedures.

(e) Inform Federal agencies about the AbilityOne Program and the statutory mandate that items on the Procurement List be purchased from qualified nonprofit agencies, and encourage and assist entities of the Federal Government to identify additional commodities and services that can be purchased from qualified nonprofit agencies. To the extent possible, monitor Federal agencies' compliance with JWOD requirements.

(f) Designate, set appropriate ceilings on fee paid to these central nonprofit agencies by nonprofit agencies selling items under the AbilityOne Program, and provide guidance to central nonprofit agencies engaged in facilitating the distribution of Government orders and helping State and private nonprofit agencies participate in the AbilityOne Program.

(g) Conduct a continuing study and evaluation of its activities under the JWOD Act for the purpose of assuring effective and efficient administration of the JWOD Act. The Committee may study, independently, or in cooperation with other public or nonprofit private agencies, problems relating to:

(1) The employment of the blind or individuals with other severe disabilities.

(2) The development and adaptation of production methods which would enable a greater utilization of these individuals.

(h) Provide technical assistance to the central nonprofit agencies and the nonprofit agencies to contribute to the successful implementation of the JWOD Act.

(i) Assure that nonprofit agencies employing persons who are blind will have priority over nonprofit agencies employing persons with severe disabilities in furnishing commodities.

[56 FR 48977, Sept. 26, 1991, as amended at 59 FR 59341, Nov. 16, 1994; 71 FR 68493, Nov. 27, 2006]

§ 51–2.3 Notice of proposed addition or deletion.

At least 30 days prior to the Committee's consideration of the addition or deletion of a commodity or service to or from the Procurement List, the Committee publishes a notice in the

FEDERAL REGISTER announcing the proposed addition or deletion and providing interested persons an opportunity to submit written data or comments on the proposal. Interested persons submitting comments in bound form should also submit an unbound copy that is capable of being legibly photocopied.

[59 FR 59341, Nov. 16, 1994]

§51–2.4 Determination of suitability.

(a) For a commodity or service to be suitable for addition to the Procurement List, each of the following criteria must be satisfied:

(1) *Employment potential.* The proposed addition must demonstrate a potential to generate employment for persons who are blind or have other severe disabilities.

(2) *Nonprofit agency qualifications.* The nonprofit agency (or agencies) proposing to furnish the item must qualify as a nonprofit agency serving persons who are blind or have other severe disabilities, as set forth in part 51–4 of this chapter.

(3) *Capability.* The nonprofit agency (or agencies) desiring to furnish a commodity or service under the JWOD Program must satisfy the Committee as to the extent of the labor operations to be performed and that it will have the capability to meet Government quality standards and delivery schedules by the time it assumes responsibility for supplying the Government.

(4) *Level of impact on the current contractor for the commodity or service.* (i) In deciding whether or not a proposed addition to the Procurement List is likely to have a severe adverse impact on the current contractor for the specific commodity or service, the Committee gives particular attention to:

(A) The possible impact on the contractor's total sales, including the sales of affiliated companies and parent corporations. In addition, the Committee considers the effects of previous Committee actions.

(B) Whether that contractor has been a continuous supplier to the Government of the specific commodity or service proposed for addition and is, therefore, more dependent on the income from such sales to the Government.

(ii) If there is not a current contract for the commodity or service being proposed for addition to the Procurement List, the Committee may consider the most recent contractor to furnish the item to the Government as the current contractor for the purpose of determining the level of impact.

(b) In determining the suitability of a commodity or service for addition to the Procurement List, the Committee also considers other information it deems pertinent, including comments on a proposal published in the FEDERAL REGISTER to add the commodity or service to the Procurement List and information submitted by Government personnel and interested persons. Because the Committee's authority to establish fair market prices is separate from its authority to determine the suitability of a commodity or service for addition to the Procurement List, the Committee does not consider comments on proposed fair market prices for commodities and services proposed for addition to the Procurement List to be pertinent to a suitability determination.

[56 FR 48977, Sept. 26, 1991, as amended at 59 FR 59341, Nov. 16, 1994; 62 FR 66529, Dec. 19, 1997]

§51–2.5 Committee decision.

The Committee considers the particular facts and circumstances in each case in determining if a commodity or service is suitable for addition to the Procurement List. When the Committee determines that a proposed addition is likely to have a severe adverse impact on a current contractor, it takes this fact into consideration in deciding not to add the commodity or service to the Procurement List, or to add only a portion of the Government requirement for the item. If the Committee decides to add a commodity or service in whole or in part to the Procurement List, that decision is announced in the FEDERAL REGISTER with a notice that includes information on the effective date of the addition.

[59 FR 59342, Nov. 16, 1994]

§ 51–2.6 Reconsideration of Committee decision.

(a) The Committee may reconsider its decision to add items to the Procurement List if it receives pertinent information which was not before it when it initially made the decision. Unless otherwise provided by the Committee, requests for reconsideration from interested persons must be received by the Committee within 60 days following the effective date of the addition in question. A request for reconsideration must include the specific facts believed by the interested person to justify a decision by the Committee to modify or reverse its earlier action.

(b) In reconsidering its decision, the Committee will balance the harm to the party requesting reconsideration if the item remains on the Procurement List against the harm which the nonprofit agency or its employees who are blind or have other severe disabilities would suffer if the item were deleted from the Procurement List. The Committee may also consider information bringing into question its conclusions on the suitability criteria on which it based its original decision as factors weighing toward a decision to delete the item, and information concerning possible harm to the Government and the JWOD Program as factors weighing toward confirmation of the original decision.

[56 FR 48977, Sept. 26, 1991, as amended at 59 FR 59342, Nov. 16, 1994]

§ 51–2.7 Fair market price.

(a) The Committee is responsible for determining fair market prices, and changes thereto, for commodities and services on the Procurement List. The Committee establishes an initial fair market price at the time a commodity or service is added to the Procurement List. This initial price is based on Committee procedures, which permit negotiations between the contracting activity and the nonprofit agency which will produce or provide the commodity or service to the Government, assisted by the appropriate central nonprofit agency. If agreed to by the negotiating parties, the initial price may be developed using other methodologies specified in Committee pricing procedures.

(b) Prices are revised in accordance with changing market conditions under Committee procedures, which include negotiations between contracting activities and producing nonprofit agencies, assisted by central nonprofit agencies, or the use of economic indices, changes in nonprofit agency costs, or other methodologies permitted under these procedures.

(c) Recommendations for initial fair market prices, or changes thereto, shall be submitted jointly by the contracting activities and nonprofit agencies concerned to the appropriate central nonprofit agency. After review and analysis, the central nonprofit agency shall submit the recommended prices and methods by which prices shall be changed to the Committee, along with the information required by Committee pricing procedures to support each recommendation. The Committee will review the recommendations, revise the recommended prices where appropriate, and establish a fair market price, or change thereto, for each commodity or service which is the subject of a recommendation.

[64 FR 55842, Oct. 15, 1999]

§ 51–2.8 Procurement list.

(a) The Committee maintains a Procurement List which includes the commodities and services which shall be procured by Government departments and agencies under the JWOD Act from the nonprofit agency(ies) designated by the Committee. Copies of the Procurement List, together with information on procurement requirements and procedures, are available to contracting activities upon request.

(b) For commodities, including military resale commodities, the Procurement List identifies the name and national stock number or item designation for each commodity, and where appropriate, any limitation on the portion of the commodity which must be procured under the JWOD Act.

(c) For services, the Procurement List identifies the type of service to be furnished, the Government department or agency responsible for procuring the service, and, where appropriate, the activity or item to be serviced.

(d) Additions to and deletions from the Procurement List are published in

the FEDERAL REGISTER as they are approved by the Committee.

§51–2.9 Oral presentations by interested persons at Committee meetings.

(a) Upon written request from an interested person, that person may, at the discretion of the Committee Chair, be permitted to appear before the Committee to present views orally. Generally, only those persons who have raised significant issues which, if valid, could influence the Committee's decision in the matter under consideration will be permitted to appear.

(b) When the Chair has approved the appearance before the Committee of an interested person who has made a written request:

(1) The name of the spokesperson and the names of any other persons planning to appear shall be provided to the Committee staff by telephone at least three working days before the meeting.

(2) In the absence of prior authorization by the Chair, only one person representing a particular agency or organization will be permitted to speak.

(3) Oral statements to the Committee and written material provided in conjunction with the oral statements shall be limited to issues addressed in written comments which have previously been submitted to the Committee as the result of notice of proposed rulemaking in the FEDERAL REGISTER.

(4) Written material to be provided in conjunction with the oral presentation and an outline of the presentation shall be submitted to the Committee staff at least three working days before the meeting.

(c) The Committee may also invite other interested persons to make oral presentations at Committee meetings when it determines that these persons can provide information which will assist the Committee in making a decision on a proposed addition to the Procurement List. Terms of appearance of such persons shall be determined by the Chair.

PART 51–3—CENTRAL NONPROFIT AGENCIES

Sec.

51–3.1 General.
51–3.2 Responsibilities under the AbilityOne Program.
51–3.3 Assignment of commodity or service.
51–3.4 Distribution of orders.
51–3.5 Fees.
51–3.6 Reports to central nonprofit agencies.

AUTHORITY: 41 U.S.C. 46–48c.

SOURCE: 56 FR 48979, Sept. 26, 1991, unless otherwise noted.

§51–3.1 General.

Under the provisions of section 2(c) of the JWOD Act, the following are currently designated central nonprofit agencies:

(a) To represent nonprofit agencies for the blind: National Industries for the Blind.

(b) To represent nonprofit agencies employing persons with other severe disabilities: NISH.

§51–3.2 Responsibilities under the AbilityOne Program.

Each central nonprofit agency shall:

(a) Represent its participating nonprofit agencies in dealing with the Committee under the JWOD Act.

(b) Evaluate the qualifications and capabilities of its nonprofit agencies and provide the Committee with pertinent data concerning its nonprofit agencies, their status as qualified nonprofit agencies, their manufacturing or service capabilities, and other information concerning them required by the Committee.

(c) Obtain from Federal contracting activities such procurement information as is required by the Committee to:

(1) Determine the suitability of a commodity or service being recommended to the Committee for addition to the Procurement List; or

(2) Establish an initial fair market price for a commodity or service or make changes in the fair market price.

(d) Recommend to the Committee, with the supporting information required by Committee procedures, suitable commodities or services for procurement from its nonprofit agencies.

(e) Recommend to the Committee, with the supporting information required by Committee procedures, initial fair market prices for commodities or services proposed for addition to the Procurement List.

(f) Distribute within the policy guidelines of the Committee (by direct allocation, subcontract, or any other means) orders from Government activities among its nonprofit agencies.

(g) Maintain the necessary records and data on its nonprofit agencies to enable it to allocate orders equitably.

(h) Oversee and assist its nonprofit agencies to insure contract compliance in furnishing a commodity or a service.

(i) As market conditions change, recommend price changes with appropriate justification for assigned commodities or services on the Procurement List.

(j) Monitor and assist its nonprofit agencies to meet the statutory and regulatory requirements to fully participate in the program. Conduct assistance visits with its nonprofits as necessary and provide the Committee with the results and recommendations of such visits.

(k) When authorized by the Committee, enter into contracts with Federal contracting activities for the furnishing of commodities or services provided by its nonprofit agencies.

(l) At the time designated by the Committee, submit a completed, original copy of the appropriate Initial Certification (Committee Form 401 or 402) for the nonprofit agency concerned. This requirement does not apply to a nonprofit agency that is already authorized to furnish a commodity or service under the JWOD Act.

(m) Review and forward to the Committee by December 1 of each year a completed original copy of the appropriate Annual Certification (Committee Form 403 or 404) for each of its participating nonprofit agencies covering the fiscal year ending the preceding September 30.

(n) Perform other JWOD administrative functions, including activities to increase Government and public awareness of the JWOD Act subject to the oversight of the Committee.

[56 FR 48979, Sept. 26, 1991, as amended at 59 FR 59342, Nov. 16, 1994; 62 FR 32237, June 13, 1997; 68 FR 53684, Sept. 12, 2003; 73 FR 28043, May 15, 2008]

§ 51–3.3 Assignment of commodity or service.

(a) The central nonprofit agencies shall determine by mutual agreement the assignment to one of them of a commodity or service for the purpose of evaluating its potential for possible future addition to the Procurement List, except that the Committee shall initially assign a commodity to National Industries for the Blind when NISH has expressed an interest in the commodity and National Industries for the Blind has exercised the blind priority.

(b) NISH shall provide National Industries for the Blind with procurement information necessary for a decision to exercise or waive the blind priority when it requests a decision. National Industries for the Blind shall normally notify NISH of its decision within 30 days, but not later than 60 days after receipt of the procurement information, unless the two central nonprofit agencies agree to an extension of time for the decision. Disagreements on extensions shall be referred to the Committee for resolution.

(c) If National Industries for the Blind exercises the blind priority for a commodity, it shall immediately notify the Committee and NISH and shall submit to the Committee a proposal to add the commodity to the Procurement List within nine months of the notification, unless the Committee extends the assignment period because of delays beyond the control of National Industries for the Blind. Upon expiration of the assignment period, the Committee shall reassign the commodity to NISH.

(d) The central nonprofit agency assigned a commodity shall obtain a decision from Federal Prison Industries on the exercise or waiver of its priority and shall submit the procurement information required by Federal Prison Industries when it requests the decision. Federal Prison Industries shall normally notify the central nonprofit agency of its decision within 30 days, but not later than 60 days after receipt of the procurement information, unless it agrees with the central nonprofit agency on an extension of time for the decision. The central nonprofit agency

shall refer a disagreement over an extension to the Committee for resolution with Federal Prison Industries.

(e) The central nonprofit agency shall provide the Committee the decision of Federal Prison Industries on the waiver or exercise of its priority when it requests the addition of the commodity to the Procurement List. NISH shall also provide the decision of National Industries for the Blind waiving its priority.

[59 FR 59342, Nov. 16, 1994]

§51–3.4 Distribution of orders.

Central nonprofit agencies shall distribute orders from the Government only to nonprofit agencies which the Committee has approved to furnish the specific commodity or service. When the Committee has approved two or more nonprofit agencies to furnish a specific commodity or service, the central nonprofit agency shall distribute orders among those nonprofit agencies in a fair and equitable manner.

[56 FR 48979, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991]

§51–3.5 Fees.

A central nonprofit agency may charge fees to nonprofit agencies for facilitating their participation in the AbilityOne Program. Fees shall be calculated based on nonprofit agency sales to the Government under the AbilityOne Program. Fees shall not exceed the fee limit approved by the Committee.

[56 FR 48979, Sept. 26, 1991, as amended at 71 FR 68494, Nov. 27, 2006]

§51–3.6 Reports to central nonprofit agencies.

Any information, other than that contained in the Annual Certification required by §51–4.3(a) of this chapter, which a central nonprofit agency requires its nonprofit agencies to submit on an annual basis, shall be requested separately from the Annual Certification. If the information is being sought in response to a request by the Committee, nonprofit agencies shall be advised of that fact and the central nonprofit agency shall, prior to distribution, provide to the Committee a copy of each form which it plans to use to obtain such information from its nonprofit agencies.

PART 51–4—NONPROFIT AGENCIES

Sec.
51–4.1 General.
51–4.2 Initial qualification.
51–4.3 Maintaining qualification.
51–4.4 Subcontracting.
51–4.5 Violations by nonprofit agencies.

AUTHORITY: 41 U.S.C. 46–48c.

SOURCE: 56 FR 48980, Sept. 26, 1991, unless otherwise noted.

§51–4.1 General.

To participate in the AbilityOne Program, a nonprofit agency shall be represented by the central nonprofit agency assigned by the Committee on the basis of the nonprofit agency's articles of incorporation and bylaws.

[56 FR 48980, Sept. 26, 1991, as amended at 71 FR 68494, Nov. 27, 2006]

§51–4.2 Initial qualification.

(a) To qualify for participation in the JWOD Program:

(1) A privately incorporated nonprofit agency shall submit to the Committee through its central nonprofit agency the following documents, transmitted by a letter signed by an officer of the corporation or chief executive:

(i) A legible copy (preferably a photocopy) of the articles of incorporation showing the date of filing and the signature of an appropriate State official.

(ii) A copy of the bylaws certified by an officer of the corporation.

(iii) If the articles of incorporation or bylaws do not include a statement to the effect that no part of the net income of the nonprofit agency may inure to the benefit of any shareholder or other individual, one of the following shall be submitted:

(A) A certified true copy of the State statute under which the nonprofit agency was incorporated which includes wording to the effect that no part of the net income of the nonprofit agency may inure to the benefit of any shareholder or other individual.

(B) A copy of a resolution approved by the governing body of the corporation, certified by an officer of the corporation, to the effect that no part of the net income of the nonprofit agency

may inure to the benefit of any shareholder or other individual.

(2) A State-owned or State-operated nonprofit agency, or a nonprofit agency established or authorized by a State statute other than the State corporation laws and not privately incorporated, shall submit to the Committee through its central nonprofit agency the following documents, transmitted by a letter signed by an officer of the wholly-owned State corporation or an official of the agency that directs the operations of the nonprofit agency, as applicable:

(i) A certified true copy of the State statute establishing or authorizing the establishment of nonprofit agency(ies) for persons who are blind or have other severe disabilities.

(ii) In the case of a wholly-owned State corporation, a certified true copy of the corporation bylaws; and, in the case of a State or local government agency, a certified true copy of implementing regulations, operating procedures, notice of establishment of the nonprofit agency, or other similar documents.

(b) The Committee shall review the documents submitted and, if they are acceptable, notify the nonprofit agency by letter, with a copy to its central nonprofit agency, that the Committee has verified its nonprofit status under the JWOD Act.

(c) A nonprofit agency shall submit two completed copies of the appropriate Initial Certification (Committee Form 401 or 402) to its central nonprofit agency at the time designated by the Committee. This requirement does not apply if a nonprofit agency is already authorized to furnish a commodity or service under the JWOD Act.

[56 FR 48980, Sept. 26, 1991, as amended at 59 FR 59342, Nov. 16, 1994]

§ 51–4.3 Maintaining qualification.

(a) To maintain its qualification under the JWOD Act, each nonprofit agency authorized to furnish a commodity or a service shall continue to comply with the requirements of a ''nonprofit agency for other severely handicapped'' or a ''nonprofit agency for the blind'' as defined in § 51–1.3 of this chapter. In addition, each such nonprofit agency must submit to its central nonprofit agency by November 1 of each year, two completed copies of the appropriate Annual Certification (Committee Form 403 or 404) covering the fiscal year ending the preceding September 30.

(b) In addition to paragraph (a) of this section, each nonprofit agency participating in the Ability One Program shall:

(1) Furnish commodities or services in strict accordance with Government orders.

(2) Comply with the applicable compensation, employment, and occupational health and safety standards prescribed by the Secretary of Labor, including procedures to encourage filling of vacancies within the nonprofit agency by promotion of qualified employees who are blind or have other severe disabilities.

(3) Comply with directives or requests issued by the Committee in furtherance of the objectives of the JWOD Act or its implementing regulations.

(4) Make its records available for review at any reasonable time to representatives of the Committee or the central nonprofit agency representing the nonprofit agency.

(5) Maintain records of direct labor hours performed in the nonprofit agency by each worker.

(6) Maintain a file for each blind individual performing direct labor which contains a written report reflecting visual acuity and field of vision of each eye, with best correction, signed by a person licensed to make such an evaluation, or a certification of blindness by a State or local governmental entity.

(7) Maintain in the file for each blind individual performing direct labor annual reviews of ability to engage in normal competitive employment. These reviews must be signed by an individual qualified by training and/or experience to make this determination.

(8) Maintain an ongoing placement program operated by or for the nonprofit agency to include liaison with appropriate community services such as the State employment service, employer groups and others. Those individuals determined capable and desirous of normal competitive employment

shall be assisted in obtaining such employment.

(9) Upon receipt of payment by the Government for commodities or services furnished under the Ability One Program, pay to the central nonprofit agency a fee which meets the requirements of §51–3.5 of this chapter.

(c) Each nonprofit agency employing persons with severe disabilities participating in the AbilityOne Program shall, in addition to the requirements of paragraphs (a) and (b) of this section, maintain in each individual with a severe disability's file:

(1) A written report signed by a licensed physician, psychiatrist, or qualified psychologist, reflecting the nature and extent of the disability or disabilities that cause such person to qualify as a person with a severe disability, or a certification of the disability or disabilities by a State or local governmental entity.

(2) Reports which state whether that individual is capable of engaging in normal competitive employment. These reports shall be signed by a person or persons qualified by training and experience to evaluate the work potential, interests, aptitudes, and abilities of persons with disabilities and shall normally consist of preadmission evaluations and reevaluations prepared at least annually. The file on individuals who have been in the nonprofit agency for less than two years shall contain the preadmission report and, where appropriate, the next annual reevaluation. The file on individuals who have been in the nonprofit agency for two or more years shall contain, as a minimum, the reports of the two most recent annual reevaluations.

(d) The information collection requirements of §§51–4.2 and 51–4.3 and the recordkeeping requirements of §51–4.3 have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Public Law 96–511). The information collection requirements have been assigned the following OMB control numbers:

Committee form	OMB control No.
Committee form 401	3037–0004
Committee form 402	3037–0003
Committee form 403	3037–0001
Committee form 404	3037–0002

The recordkeeping requirements have been assigned OMB control number 3037–0005.

[56 FR 48980, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 62 FR 32237, June 13, 1997; 62 FR 66529, Dec. 19, 1997; 68 FR 53685, Sept. 12, 2003; 71 FR 68494, Nov. 27, 2006; 73 FR 28043, May 15, 2008]

§51–4.4 Subcontracting.

(a) Nonprofit agencies shall seek broad competition in the purchase of materials and components used in the commodities and services furnished to the Government under the JWOD Act. Nonprofit agencies shall inform the Committee, through their central nonprofit agency, before entering into multiyear contracts for materials or components used in the commodities and services furnished to the Government under the JWOD Act.

(b) Each nonprofit agency shall accomplish the maximum amount of subcontracting with other nonprofit agencies and small business concerns that the nonprofit agency finds to be consistent both with efficient performance in furnishing commodities or services under the JWOD Act and maximizing employment for persons who are blind or have other severe disabilities.

(c) Nonprofit agencies may subcontract a portion of the process for producing a commodity or providing a service on the Procurement List provided that the portion of the process retained by the prime nonprofit agency generates employment for persons who are blind or have other severe disabilities. Subcontracting intended to be a routine part of the production of a commodity or provision of a service shall be identified to the Committee at the time the commodity or service is proposed for addition to the Procurement List and any significant changes in the extent of subcontracting must be approved in advance by the Committee.

(d) A nonprofit agency may not subcontract the entire production process for all or a portion of an order without the Committee's prior approval.

[56 FR 48980, Sept. 26, 1991, as amended at 62 FR 66529, Dec. 19, 1997]

§ 51–4.5 Violations by nonprofit agencies.

(a) Any alleged violations of these regulations by a nonprofit agency shall be investigated by the Committee which shall notify the nonprofit agency concerned and afford it an opportunity to submit a statement of facts and evidence. Pending a decision by the Committee, the central nonprofit agency concerned may be directed by the Committee to temporarily suspend allocations to the nonprofit agency.

(b) If a nonprofit agency fails to correct its violations of these regulations, the Committee, after affording the nonprofit agency an opportunity to address the Committee on the matter, may terminate the nonprofit agency's eligibility to participate in the JWOD Program.

[56 FR 48979, Sept. 26, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 73 FR 28043, May 15, 2008]

PART 51–5—CONTRACTING REQUIREMENTS

Sec.
51–5.1 General.
51–5.2 Mandatory source requirement.
51–5.3 Scope of requirement.
51–5.4 Purchase exceptions.
51–5.5 Prices.
51–5.6 Shipping.
51–5.7 Payments.
51–5.8 Violations by entities of the Government.

AUTHORITY: 41 U.S.C. 46–48C.

SOURCE: 56 FR 48981, Sept. 26, 1991, unless otherwise noted.

§ 51–5.1 General.

(a) Contracting activities are encouraged to assist the Committee and the central nonprofit agencies in identifying suitable commodities and services to be furnished by nonprofit agencies employing persons who are blind or have other severe disabilities so that the Committee can attain its objective of increasing employment and training opportunities for individuals who are blind or have other severe disabilities. For items which appear to be suitable to be furnished by nonprofit agencies, the contracting activity should refer the candidate commodities and services to the Committee or a central nonprofit agency. If a contracting activity decides to procure one or more commodities which are similar to a commodity or commodities on the Procurement List, the contracting activity should refer the commodities it intends to procure to the Committee or a central nonprofit agency.

(b) Contracting activities shall provide the Committee and designated central nonprofit agencies with information needed to enable the Committee to determine whether a commodity or service is suitable to be furnished by a nonprofit agency. For commodities, information such as the latest solicitation and amendments, bid abstracts, procurement history, estimated annual usage quantities, and anticipated date of next solicitation issuance and opening may be needed. For services, similar information including the statement of work and applicable wage determination may be required. In order to assist in evaluating the suitability of an Office of Management and Budget Circular No. A–76 conversion, contracting activities should provide a copy of the draft statement of work and applicable wage determination to the central nonprofit agency upon its request.

§ 51–5.2 Mandatory source requirement.

(a) Nonprofit agencies designated by the Committee are mandatory sources of supply for all entities of the Government for commodities and services included on the Procurement List, as provided in § 51–1.2 of this chapter.

(b) Purchases of commodities on the Procurement List by entities of the Government shall be made from sources authorized by the Committee. These sources may include nonprofit agencies, central nonprofit agencies, Government central supply agencies such as the Defense Logistics Agency and the General Services Administration, and certain commercial distributors. Identification of the authorized sources for a particular commodity may be obtained from the central nonprofit agencies at the addresses noted in § 51–6.2 of this chapter.

(c) Contracting activities shall require other persons providing commodities which are on the Procurement

List to entities of the Government by contract to order these commodities from the sources authorized by the Committee.

(d) Procedures for obtaining military resale commodities are contained in §51–6.4 of this chapter.

(e) Contracting activities procuring services which have included within them services on the Procurement List shall require their contractors for the larger service requirement to procure the included Procurement List services from nonprofit agencies designated by the Committee.

[56 FR 48981, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 60 FR 54200, Oct. 20, 1995; 63 FR 16439, Apr. 3, 1998]

§51–5.3 Scope of requirement.

(a) When a commodity is included on the Procurement List, the mandatory source requirement covers the National Stock Number or item designation listed and commodities that are essentially the same as the listed item. In some instances, only a portion of the Government requirement for a National Stock Number or item designation is specified by the Procurement List. Where geographic areas, quantities, percentages or specific supply locations for a commodity are listed, the mandatory provisions of the JWOD Act apply only to the portion or portions of the commodity indicated by the Procurement List.

(b) For services, where an agency and location or geographic area are listed on the Procurement List, only the service for the location or geographic area listed must be procured from the nonprofit agency, except as provided in §51–6.14 of this chapter. Where no location or geographic area is indicated by the Procurement List, it is mandatory that the total Government requirement for that service be procured from a nonprofit agency.

(c) When a commodity or service is added to the Procurement List, the addition does not affect contracts for the commodity or service awarded prior to the effective date of the Procurement List addition or options exercised under those contracts.

[56 FR 48981, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 63 FR 16439, Apr. 3, 1998]

§51–5.4 Purchase exceptions.

(a) A central nonprofit agency will normally grant a purchase exception for a contracting activity to procure from commercial sources commodities or services on the Procurement List when both of the following conditions are met:

(1) The central nonprofit agency or its nonprofit agency(ies) cannot furnish a commodity or service within the period specified, and

(2) The commodity or service is available from commercial sources in the quantities needed and significantly sooner than it will be available from the nonprofit agency(ies).

(b) The central nonprofit agency may grant a purchase exception when the quantity involved is not sufficient to be furnished economically by the nonprofit agency(ies).

(c) The Committee may also grant a purchase exception for the reasons set forth in paragraphs (a) and (b) of this section.

(d) The central nonprofit agency shall obtain the approval of the Committee before granting a purchase exception when the value of the procurement exceeds the simplified acquisition threshold set forth in the Federal Acquisition Streamlining Act of 1994 or any subsequent amendments thereto.

(e) When the central nonprofit agency grants a purchase exception under the above conditions, it shall do so promptly and shall specify the quantities and delivery period covered by the exception.

(f) When a purchase exception is granted under paragraph (a) of this section:

(1) Contracting activities shall initiate purchase actions within 15 days following the date of the purchase exception. The deadline may be extended by the central nonprofit agency with, in cases of procurements exceeding the simplified acquisition threshold, the concurrence of the Committee.

(2) Contracting activities shall furnish a copy to the solicitation to the

appropriate central nonprofit agency at the time it is issued, and a copy of the annotated bid abstract upon awarding of the commercial contract.

(g) Any decision by a central nonprofit agency regarding a purchase exception may be appealed to the Committee by the contracting activity.

[56 FR 48981, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59343, Nov. 16, 1994]

§ 51–5.5 Prices.

(a) The prices for items on the Procurement List are fair market prices established by the Committee under authority of the Javits-Wagner-O'Day Act (41 U.S.C. 47(b)).

(b) Prices for commodities include applicable packaging, packing, and marking. Prices include transportation to point of delivery as specified in § 51–5.6.

(c) Price changes for commodities and services shall usually apply to orders received by the nonprofit agency on or after the effective date of the change. In special cases, after considering the views of the contracting activity, the Committee may make price changes applicable to orders received by the nonprofit agency prior to the effective date of the change.

(d) To assist the Committee in revising the fair market prices for services on the Procurement List, upon request from the central nonprofit agency, the contracting activity should take the following actions:

(1) Submit to the Department of Labor in a timely fashion a request for wage determination rate.

(2) Provide a copy of the new wage determination rate or the Department of Labor document stating that the wage determination rate is unchanged to the central nonprofit agency at least 60 days before the beginning of the new service period.

(3) Provide to the central nonprofit agency at least 90 days before the beginning of the new service period a copy of the statement of work applicable to the new service period.

(e) If a contracting activity desires packing, packaging, or marking of products other than the standard pack or as provided in the Procurement List, any difference in cost shall be negotiated with the nonprofit agency.

[56 FR 48981, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 64 FR 55842, Oct. 15, 1999]

§ 51–5.6 Shipping.

(a) Except as provided in paragraph (b) of this section, commodities are sold to the Government on an ''F.O.B. destination'' basis, with delivery being accomplished when the shipment reaches the facility designated by the contracting activity. Time of delivery is when the shipment is released by the carrier and accepted by the contracting activity or its agent. In this delivery method, the nonprofit agency will normally use commercial bills of lading and will be responsible for any loss or damage to the goods occurring before the commodities reach the designated delivery point. The nonprofit agency will prepare and distribute commercial bills of lading, furnish delivery schedules, designate the carriers, and pay all shipping charges to specified delivery points.

(b) The Committee may determine that certain commodities are to be sold to the Government on an ''F.O.B. origin'' basis, with delivery being accomplished when a shipment is placed aboard the vehicle of the initial carrier. Time of delivery is when the shipment is released to and accepted by the initial carrier. In this delivery method, the nonprofit agency will normally use Government bills of lading, and responsibility for loss or damage to the goods while in transit passes to the Government at the time the initial carrier accepts a shipment. If the contracting activity fails to furnish a Government bill of lading promptly, such failure shall be considered an excusable delay in delivery.

[64 FR 55842, Oct. 15, 1999]

§ 51–5.7 Payments.

Payments for products or services of persons who are blind or have other severe disabilities shall be made within 30 days after shipment or receipt of a proper invoice or voucher.

§51–5.8 Violations by entities of the Government.

Any alleged violations of the JWOD Act or these regulations by entities of the Government shall be investigated by the Committee, which shall notify the entity and afford it an opportunity to submit a statement.

[56 FR 48981, Sept. 26, 1991, as amended at 59 FR 59343, Nov. 16, 1994]

PART 51–6—PROCUREMENT PROCEDURES

Sec.
51–6.1 Direct order process.
51–6.2 Allocation process.
51–6.3 Long-term procurements.
51–6.4 Military resale commodities.
51–6.5 Adjustment and cancellation of orders.
51–6.6 Request for waiver of specification requirement.
51–6.7 Orders in excess of nonprofit agency capability.
51–6.8 Deletion of items from the Procurement List.
51–6.9 Correspondence and inquiries.
51–6.10 Quality of merchandise.
51–6.11 Quality complaints.
51–6.12 Specification changes and similar actions.
51–6.13 Replacement and similar commodities.
51–6.14 Replacement services.
51–6.15 Disputes.

AUTHORITY: 41 U.S.C. 8501–8506.

SOURCE: 56 FR 48983, Sept. 26, 1991, unless otherwise noted.

§51–6.1 Direct order process.

(a) Once a commodity or service is added to the Procurement List, the central nonprofit agency may authorize the contracting activity to issue orders directly to a nonprofit agency without requesting an allocation for each order. This procedure is known as the direct order process.

(b) In these cases, the central nonprofit agency shall specify the normal leadtime required for orders transmitted directly to the nonprofit agencies. This method shall be used whenever possible since it eliminates double handling and decreases the time required for processing orders.

(c) An order for commodities or services shall provide leadtime sufficient for purchase of materials, production or preparation, and delivery or completion.

(d) The central nonprofit agency shall keep the contracting activity informed of any changes in leadtime experienced by its nonprofit agencies in order to keep to a minimum requests for extensions once an order is placed. Where, due to unusual conditions, an order does not provide sufficient leadtime, the central nonprofit agency or the individual nonprofit agency may request an extension of delivery or completion date which should be granted, if feasible. If extension of delivery or completion date is not feasible, the contracting activity shall:

(1) Notify the central nonprofit agency and the individual nonprofit agency(ies) as appropriate.

(2) Request the central nonprofit agency to reallocate or to issue a purchase exception authorizing procurement from commercial sources as provided in §51–5.4 of this chapter.

(e) The contracting activity shall promptly provide to the central nonprofit agency concerned a copy of all orders issued to nonprofit agencies.

(f) The written direct order authorization remains valid until it is revoked by the central nonprofit agency.

§51–6.2 Allocation process.

(a) In those cases where a direct order authorization has not been issued as described in §51–6.1, the contracting activity shall submit written requests for allocation to the appropriate central nonprofit agency indicated by the Procurement List at the address listed below:

Agency	Agency symbol
National Industries for the Blind, 1901 North Beauregard Street, Suite 200, Alexandria, Virginia 22311–1727.	NIB
NISH, 2235 Cedar Lane, Vienna, Virginia 22182–5200.	NISH

(b) Requests for allocations shall contain, as a minimum:

(1) For commodities. Name, stock number, latest specification, quantity, unit price, and place and time of delivery.

(2) For services. Type and location of service required, latest specification,

work to be performed, estimated volume, and time for completion.

(c) Contracting activities shall request allocations in sufficient time for the central nonprofit agency to reply, for the order(s) to be placed, and for the nonprofit agencies to furnish the commodity or service (see paragraph (i) of this section).

(d) When a commodity on the Procurement List also appears on the Federal Prison Industries' ''Schedule of Products,'' the contracting activity shall obtain clearance from the Federal Prison Industries prior to requesting an allocation or placing an order directly to the nonprofit agency(ies).

(e) The central nonprofit agency shall make allocations to the appropriate nonprofit agency(ies) upon receipt of a request from the contracting activity and instruct that the orders be forwarded to the central nonprofit agency or direct to the nonprofit agency(ies) with a copy provided promptly to the central nonprofit agency.

(f) Central nonprofit agencies shall reply promptly to requests for allocation. When a request for allocation provides a delivery schedule (based on established lead times and time required for processing the allocation request) which cannot be met, the central nonprofit agency shall request a revision, which the contracting activity shall grant, if feasible, or the central nonprofit agency shall issue a purchase exception authorizing procurement from commercial sources as provided in § 51–5.4 of this chapter.

(g) An allocation is not an obligation to supply a commodity or service, or an obligation for the contracting activity to issue an order. Nonprofit agencies are not authorized to commence production until receipt of an order.

(h) Upon receipt of an allocation, the contracting activity shall promptly submit an order to the appropriate central nonprofit agency or designated nonprofit agency(ies). Where this cannot be done promptly, the contracting activity shall advise the central nonprofit agency and the nonprofit agency(ies) immediately.

(i) An order for commodities or services shall provide leadtime sufficient for purchase of materials, production or preparation, and delivery or completion.

(j) The Central nonprofit agency shall keep the contracting activity informed of any changes in leadtime experienced by its nonprofit agency(ies) in order to keep to a minimum requests for extensions once an order is placed. Where, due to unusual conditions, an order does not provide sufficient leadtime, the central nonprofit agency or nonprofit agency may request an extension of delivery or completion date which should be granted, if feasible. If extension of delivery or completion date is not feasible, the contracting activity shall:

(1) Notify the central nonprofit agency and nonprofit agency(ies) as appropriate.

(2) Request the central nonprofit agency to reallocate or to issue a purchase exception authorizing procurement from commercial sources as provided in § 51–5.4 of this chapter.

(k) In those instances where the central nonprofit agency is the prime contractor rather than the nonprofit agency, the central nonprofit agency will designate the nonprofit agency(ies) authorized by the Committee to furnish definite quantities of commodities or specific services upon receipt of an order from the contracting activity.

[56 FR 48983, Sept. 26, 1991, as amended at 59 FR 59343, Nov. 16, 1994]

§ 51–6.3 Long-term procurements.

(a) Contracting activities are encouraged to investigate long-term ordering agreements for commodities listed on the Procurement List to level off demand, thereby helping ensure stability of employment and development of job skills for persons who are blind or have other severe disabilities.

(b) Contracting activities are encouraged to use the longest contract term available by law to their agencies for contracts for commodities and services under the AbilityOne Program, in order to minimize the time and expense devoted to formation and renewal of these contracts.

[56 FR 48983, Sept. 26, 1991, as amended at 62 FR 32237, June 13, 1997; 71 FR 68494, Nov. 27, 2006]

§51–6.4 Military resale commodities.

(a) Purchase procedures for ordering military resale commodities are available from the central nonprofit agencies. Authorized resale outlets (military commissary stores, Armed Forces exchanges and like activities of other Government departments and agencies) shall request the central nonprofit agency responsible for the military resale commodity being ordered to designate the nonprofit agency or its agent to which the outlets shall forward orders.

(b) Authorized resale outlets shall stock military resale commodities in as broad a range as practicable. Authorized resale outlets may stock commercial items comparable to military resale commodities they stock, except that military commissary stores shall stock military resale commodities in the 300–800–, 900–, 1000–, 1100–, 10000–(10000–10999); 13000 (13000–13999); 14000 (14000–14999); 15000 (15000–15999); and 16000 (16000–16999) series exclusively, unless an exception has been granted on an individual store basis for the stocking of comparable commercial items for which there is a significant customer demand.

(c) The Defense Commissary Agency shall, after consultation with the Committee:

(1) Establish mandatory lists of military resale commodities to be stocked in commissary stores.

(2) Require the stocking in commissary stores of military resale commodities in the 0– (0–99), 200–, 300–, 400–, 500–, 600–, 700–, 800–, 900–, 1000–, 1100–, 1200– (1200–9999), 10000– (10000–10999), 11000 (11000–11999); 12000 (12000–12999); 13000 (13000–13999); 14000 (14000–14999); 15000 (15000–15999); and 16000 (16000–16999) series in as broad a range as is practicable.

(3) Issue guidance requiring commissary store personnel to maximize sales potential of military resale commodities.

(4) Establish policies and procedures which reserve to its agency headquarters the authority to grant exceptions to the exclusive stocking of 300–, 800–, 900–, 1000–, 1100–, 10000– (10000–10999); 13000 (13000–13999); 14000 (14000–14999); 15000 (15000–15999); and 16000 (16000–16999) series military resale commodities.

(d) The Defense Commissary Agency shall provide the Committee a copy of each directive which relates to the stocking of military resale commodities in commissary stores, including exceptions authorizing the stocking of commercial items in competition with 300–, 800–, 900–, 1000–, 1100–, 10000–(10000–10999); 13000 (13000–13999); 14000 (14000–14999); 15000 (15000–15999); and 16000 (16000–16999) series military resale commodities.

(e) The prices of military resale commodities include delivery to destination or, in the case of destinations overseas, to designated depots at ports of embarkation. Zone pricing is used for delivery to Alaska and Hawaii.

[56 FR 48983, Sept. 26, 1991, as amended at 59 FR 59343, Nov. 16, 1994; 62 FR 32237, June 13, 1997; 71 FR 67312, Nov. 21, 2006; 80 FR 32039, June 5, 2015; 80 FR 35848, June 23, 2015]

§51–6.5 Adjustment and cancellation of orders.

When the central nonprofit agency or an individual nonprofit agency fails to comply with the terms of a Government order, the contracting activity shall make every effort to negotiate an adjustment before taking action to cancel the order. When a Government order is canceled for failure to comply with its terms, the central nonprofit agency shall be notified, and, if practicable, requested to reallocate the order. The central nonprofit agency shall notify the Committee of any cancellation of an order and the reasons for that cancellation.

§51–6.6 Request for waiver of specification requirement.

(a) Nonprofit agencies and central nonprofit agencies are encouraged to recommend changes to specification requirements or request waivers where there are opportunities to provide equal or improved products at a lower cost to the Government.

(b) A nonprofit agency shall not request a waiver of a specification requirement except when it is not possible to obtain the material meeting the specification or when other requirements contained in the specification cannot be met.

(c) Requests for waiver of specification shall be transmitted by the nonprofit agency to its central nonprofit agency.

(d) The central nonprofit agency shall review the request and the specification to determine if the request is valid and shall submit to the contracting activity only those requests which it has determined are necessary to enable the nonprofit agency to furnish the item.

(e) The central nonprofit agency request for waiver shall be transmitted in writing to the contracting activity. In addition, a copy of the request shall be transmitted to the Committee, annotated to include a statement concerning the impact on the cost of producing the item if the waiver is approved.

§ 51–6.7 Orders in excess of nonprofit agency capability.

(a) Nonprofit agencies are expected to furnish commodities on the Procurement List within the time frames specified by the Government. The nonprofit agency must have the necessary production facilities to meet normal fluctuations in demand.

(b) Nonprofit agencies shall take those actions necessary to ensure that they can ship commodities within the time frames specified by the Government. In instances where the nonprofit agency determines that it cannot ship the commodity in the quantities specified by the required shipping date, it shall notify the central nonprofit agency and the contracting activity. The central nonprofit agency shall request a revision of the shipping schedule which the contracting activity should grant, if feasible, or the central nonprofit agency shall issue a purchase exception authorizing procurement from commercial sources as provided in § 51–5.4 of this chapter.

§ 51–6.8 Deletion of items from the Procurement List.

(a) When a central nonprofit agency decides to request that the Committee delete a commodity or service from the Procurement List, it shall notify the Committee staff immediately. Before reaching a decision to request a deletion of an item from the Procurement List, the central nonprofit agency shall determine that none of its nonprofit agencies is capable and desirous of furnishing the commodity or service involved.

(b) Except in cases where the Government is no longer procuring the item in question, the Committee shall, prior to deleting an item from the Procurement List, determine that none of the nonprofit agencies of the other central nonprofit agency is desirous and capable of furnishing the commodity or service involved.

(c) Nonprofit agencies will normally be required to complete production of any orders for commodities on hand regardless of the decision to delete the item. Nonprofit agencies shall obtain concurrence of the contracting activity and the Committee prior to returning a purchase order to the contracting activity.

(d) For services, a nonprofit agency shall notify the contracting activity of its intent to discontinue performance of the service 90 days in advance of the termination date to enable the contracting activity to assure continuity of the service after the nonprofit agency's discontinuance.

(e) The Committee may delete an item from the Procurement List without a request from a central nonprofit agency if the Committee determines that none of the nonprofit agencies participating in the AbilityOne Program are capable and desirous of furnishing the commodity or service to the Government, or if the Committee decides that the commodity or service is no longer suitable for procurement from nonprofit agencies employing people who are blind or have other severe disabilities. In considering such an action, the Committee will consult with the appropriate central nonprofit agency, the nonprofit agency or agencies involved, and the contracting activity.

[56 FR 48983, Sept. 26, 1991; 56 FR 64002, Dec. 6, 1991, as amended at 59 FR 59344, Nov. 16, 1994; 71 FR 68494, Nov. 27, 2006]

§ 51–6.9 Correspondence and inquiries.

Routine contracting activity correspondence or inquiries concerning deliveries of commodities being shipped from or performance of services by

nonprofit agencies employing persons who are blind or have other severe disabilities shall be with the nonprofit agency involved. Major problems shall be referred to the appropriate central nonprofit agency. In those instances where the problem cannot be resolved by the central nonprofit agency and the contracting activity involved, the contracting activity or central nonprofit agency shall notify the Committee of the problem so that action can be taken by the Committee to resolve it.

§ 51–6.10 Quality of merchandise.

(a) Commodities furnished under Government specification by nonprofit agencies employing persons who are blind or have other severe disabilities shall be manufactured in strict compliance with such specifications. Where no specifications exist, commodities furnished shall be of a quality equal to or higher than similar items available on the commercial market. Commodities shall be inspected utilizing nationally recognized test methods and procedures for sampling and inspection.

(b) Services furnished by nonprofit agencies employing persons who are blind or have other severe disabilities shall be performed in accordance with Government specifications and standards. Where no Government specifications and standards exist, the services shall be performed in accordance with commercial practices.

§ 51–6.11 Quality complaints.

(a) When the quality of a commodity received is not considered satisfactory by the using activity, the activity shall take the following actions as appropriate:

(1) For commodities received from Defense Logistics Agency supply centers, General Services Administration supply distribution facilities, Department of Veterans Affairs distribution division or other central stockage depots, or specifically authorized supply source, notify the supplying agency in writing in accordance with that agency's procedures. The supplying agency shall, in turn, provide copies of the notice to the nonprofit agency involved and its central nonprofit agency.

(2) For commodities received directly from nonprofit agencies employing persons who are blind or have other severe disabilities, address complaints to the nonprofit agency involved with a copy to the central nonprofit agency with which it is affiliated.

(b) When the quality of a service is not considered satisfactory by the contracting activity, it shall address complaints to the nonprofit agency involved with a copy to the central nonprofit agency with which it is affiliated.

§ 51–6.12 Specification changes and similar actions.

(a) Contracting activities shall notify the nonprofit agency or agencies authorized to furnish a commodity on the Procurement List and the central nonprofit agency concerned of any changes to the specification or other description of the commodity.

(b) When a Government entity is changing the specification or description of a commodity on the Procurement List, including a change that involves the assignment of a new national stock number or item designation, the office assigned responsibility for the action shall obtain the comments of the Committee and the central nonprofit agency concerned on the proposed change and shall notify the nonprofit agency and the central nonprofit agency concerned at least 90 days prior to placing an order for a commodity covered by the new specification or description.

(c) For services on the Procurement List, the contracting activity shall notify the nonprofit agency furnishing the service and the central nonprofit agency concerned at least 90 days prior to the date that any changes in the statement of work or other conditions of performance will be required, including assumption of performance of the service by the contracting activity.

(d) If an emergency makes it impossible for a contracting activity to give the 90-day notice required by paragraphs (b) and (c) of this section, the contracting activity shall inform the nonprofit agency and the central nonprofit agency concerned of the reasons

it cannot meet the 90-day notice requirement when it places the order or change notice.

(e) Nonprofit agencies shall recommend changes in specifications, item descriptions, and statements of work that will improve the commodity or service being provided, reduce costs, or improve overall value to the Government. Contracting activities shall respond promptly to these recommendations and work with the nonprofit agencies to implement them when appropriate.

[56 FR 48983, Sept. 26, 1991, as amended at 59 FR 59344, Nov. 16, 1994; 62 FR 66529, Dec. 19, 1998]

§ 51–6.13 Replacement and similar commodities.

(a) When a commodity on the Procurement List is replaced by another commodity which has not been recently procured, and a nonprofit agency can furnish the replacement commodity in accordance with the Government's quality standards and delivery schedules, the replacement commodity is automatically considered to be on the Procurement List and shall be procured from the nonprofit agency designated by the Committee at the fair market price the Committee has set for the replacement commodity. The commodity being replaced shall continue to be included on the Procurement List until there is no longer a Government requirement for that commodity.

(b) If contracting activities desire to procure additional sizes, colors, or other variations of a commodity after the commodity is added to the Procurement List, and these similar commodities have not recently been procured, these commodities are also automatically considered to be on the Procurement List.

(c) In accordance with § 51–5.3 of this chapter, contracting activities are not permitted to purchase commercial items that are essentially the same as commodities on the Procurement List.

[59 FR 59344, Nov. 16, 1994]

§ 51–6.14 Replacement services.

If a service is on the Procurement List to meet the needs of a Government entity at a specific location and the entity moves to another location, the service at the new location is automatically considered to be on the Procurement List if a qualified nonprofit agency is available to provide the service at the new location, unless the service at that location is already being provided by another contractor. If the service at the new location is being provided by another contractor, the service will not be on the Procurement List unless the Committee adds it as prescribed in part 51–2 of this chapter. If another Government entity moves into the old location, the service at that location will remain on the Procurement List to meet the needs of the new Government entity.

[63 FR 16439, Apr. 3, 1998]

§ 51–6.15 Disputes.

Disputes between a nonprofit agency and a contracting activity arising out of matters covered by parts 51–5 and 51–6 of this chapter shall be resolved, where possible, by the contracting activity and the nonprofit agency, with assistance from the appropriate central nonprofit agency. Disputes which cannot be resolved by these parties shall be referred to the Committee for resolution.

[62 FR 66529, Dec. 19, 1997. Redesignated at 63 FR 16439, Apr. 3, 1998.]

PART 51–7—PROCEDURES FOR ENVIRONMENTAL ANALYSIS

Sec.

51–7.1 Purpose and scope.
51–7.2 Early involvement in private, State, and local activities requiring Federal approval.
51–7.3 Ensuring environmental documents are actually considered in agency determinations.
51–7.4 Typical classes of action.
51–7.5 Environmental information.

AUTHORITY: 42 U.S.C. 4321 *et seq.*

SOURCE: 56 FR 48986, Sept. 26, 1991, unless otherwise noted.

§ 51–7.1 Purpose and scope.

(a) *Purpose.* This part implements the National Environmental Policy Act of

1969 (NEPA) and provides for the implementation of those provisions identified in 40 CFR 1507.3(b) of the regulations issued by the Council on Environmental Quality (CEQ) (40 CFR parts 1500–1508) published pursuant to NEPA.

(b) *Scope*. This part applies to all actions of the Committee for Purchase from Persons who are Blind or Severely Disabled which may affect environmental quality in the United States.

[56 FR 48986, Sept. 26, 1991, as amended at 59 FR 16777, Apr. 8, 1994]

§51–7.2 Early involvement in private, State, and local activities requiring Federal approval.

(a) 40 CFR 1501.2(d) requires agencies to provide for early involvement in actions which, while planned by private applicants or other non-Federal entities, require some sort of Federal approval. Pursuant to the JWOD Act (41 U.S.C. 46–48c), the Committee for Purchase from People who are Blind or Severely Disabled makes the determination as to which qualified nonprofit agency serving persons who are blind or have other severe disabilities will furnish designated products and services to the Government.

(b) To implement the requirements of 40 CFR 1501.2(d) with respect to these actions, the Committee staff shall consult as required with other appropriate parties to initiate and coordinate the necessary environmental analysis. The Executive Director shall determine on the basis of information submitted by private agencies and other non-Federal entities or generated by the Committee whether the proposed action is one that normally does not require an environmental assessment or environmental impact statement (EIS) as set forth in §51–7.4, or is one that requires an environmental assessment as set forth in 40 CFR 1501.4.

(c) To facilitate compliance with these requirements, private agencies and other non-Federal entities are expected to:

(1) Contact the Committee staff as early as possible in the planning process for guidance on the scope and level of environmental information required to be submitted in support of their request;

(2) Conduct any studies which are deemed necessary and appropriate by the Committee to determine the impact of the proposed action on the human environment;

(3) Consult with appropriate Federal, regional, State and local agencies and other potentially interested parties during preliminary planning stages to ensure that all environmental factors are identified;

(4) Submit applications for all Federal, regional, State and local approvals as early as possible in the planning process;

(5) Notify the Committee as early as possible of all other Federal, regional, State, local and Indian tribe actions required for project completion so that the Committee may coordinate all Federal environmental reviews; and

(6) Notify the Committee of all known parties potentially affected by or interested in the proposed action.

[56 FR 48986, Sept. 26, 1991, as amended at 59 FR 16777, Apr. 8, 1994]

§51–7.3 Ensuring environmental documents are actually considered in agency determinations.

(a) 40 CFR 1505.1 of the NEPA regulations contains requirements to ensure adequate consideration of environmental documents in agency decision-making. To implement these requirements, the Committee staff shall:

(1) Consider all relevant environmental documents in evaluating proposals for agency action;

(2) Ensure that all relevant environmental documents, comments and responses accompany the proposal through the agency review processes;

(3) Consider only those alternatives discussed in the relevant environmental documents when evaluating proposals for agency action; and

(4) Where an EIS has been prepared, consider the specific alternative analysis in the EIS when evaluating the proposal which is the subject of the EIS.

(b) For each of the Committee's actions authorized by the JWOD Act, the following list identifies the point at which the NEPA process begins, the point at which it ends, and the key agency official or office required to consider the relevant environmental

documents as a part of their decision-making:

(1) Action: Request.

(2) Start of NEPA process: Upon receipt of request.

(3) Completion of NEPA process: When the deciding official reviews the proposal and makes a determination.

(4) Key official or office required to consider environmental document: When a positive determination is made under § 51–7.2(b), the applicant in conjunction with the Committee staff will prepare the necessary papers.

§ 51–7.4 Typical classes of action.

(a) 40 CFR 1507.3(b)(2) in conjunction with 40 CFR 1508.4 requires agencies to establish three typical classes of action for similar treatment under NEPA. These typical classes of action are set forth below:

(1) Actions normally requiring EIS: None.

(2) Actions normally requiring assessments but not necessarily EISs: Requests for actions for which determinations under § 51–7.2(b) are found to be affirmative.

(3) Actions normally not requiring assessments or EISs: Request for actions by nonprofit agencies through the central nonprofit agencies to add a commodity or service to the Committee's Procurement List.

(b) The Committee shall independently determine, by referring to 40 CFR 1508.27, whether an EIS or an environmental assessment is required where:

(1) A proposal for agency action is not covered by one of the typical classes of action above; or

(2) For actions which are covered, but where the presence of extraordinary circumstances indicates that some other level of environmental review may be appropriate.

§ 51–7.5 Environmental information.

Interested parties may contact the Executive Director at (703) 603–7740 for information regarding the Committee's compliance with NEPA.

[56 FR 48986, Sept. 26, 1991, as amended at 59 FR 16777, Apr. 8, 1994]

PART 51–8—PUBLIC AVAILABILTY OF AGENCY MATERIALS

Sec.
51–8.1 General.
51–8.2 Proactive Disclosures.
51–8.3 Requirements for Making Requests.
51–8.4 Responsibility for Responding to Requests.
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51–8.10 Fees.
51–8.11 Other Rights and Services.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 85 FR 37778, June 24, 2020, unless otherwise noted.

§ 51–8.1 General.

(a) This part contains the rules that the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) follows in processing requests for records under the Freedom of Information Act (''FOIA''), 5 U.S.C. 552. The rules in this part should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed under part 51–9 as well as under this part. As a matter of policy, the Committee makes discretionary disclosures of records or information exempt from disclosure under the FOIA whenever disclosure would not foreseeably harm an interest protected by a FOIA exemption, but this policy does not create any right enforceable in court.

(b) The Committee has a centralized system for processing requests, all requests are handled by the FOIA Officer.

§ 51–8.2 Proactive Disclosures.

Records that the Committee is required to make available for public inspection in an electronic format may be accessed through the Committee's public website: *www.abilityone.gov*. The Committee is responsible for determining which of its records must be made publicly available, for identifying

additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. The Committee shall ensure that its website of posted records and indices is reviewed and updated on an ongoing basis. The Committee's FOIA Public Liaison contact information is available at *https://www.abilityone.gov/laws,_regulations_and_policy/foia.html*.

§51–8.3 Requirements for Making Requests.

(a) *General Information*. (1) The Committee has designated a FOIA office to process and respond to all FOIA requests. All Committee departments have the capability to receive requests electronically either through email or a web portal. A request will receive the quickest possible response if it is addressed to the FOIA office. To make a request for records, a requester should write directly to the FOIA office.

(2) A requester may submit a request for records to the Executive Director at the Committee's offices, 1401 S Clark Street, Suite 715, Arlington, Virginia 22202–3259, or via email to *FOIA@abilityone.gov*, or via facsimile to (703) 603–0655. The request must be in writing and should indicate that it is being made under the FOIA. Failure to submit a request in accordance with these procedures may delay the processing of the request.

(3) A requester who is making a request for records about himself or herself must comply with the verification of identity provision set forth in part 51–9.

(4) Where a request for records pertains to a third party, a requester may receive greater access by submitting either a notarized authorization signed by that individual or a declaration made in compliance with the requirements set forth in 28 U.S.C. 1746 by that individual authorizing disclosure of the records to the requester, or by submitting proof that the individual has deceased (*e.g.*, a copy of a death certificate or an obituary). As an exercise of administrative discretion, the Committee can require a requester to supply additional information if necessary in order to verify that a particular individual has consented to disclosure.

(b) *Description of records sought*. Requesters must describe records sought in sufficient detail to enable Committee personnel to locate them with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. In general, requesters should include as much detail as possible about the specific records or the types of records that they are seeking. Before submitting their requests, requesters may contact the FOIA office or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the FOIA office determines that it does not reasonably describe the records sought, the FOIA office shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the FOIA office or FOIA Public Liaison, each of whom is available to assist the requester in reasonably describing the records sought. If a request does not reasonably describe the records sought, the agency's response to the request may be delayed.

(c) If the Committee determines that a request does not reasonably describe the records, it shall inform the requester of this fact and extend to the requester an opportunity to clarify the request or to confer promptly with knowledgeable Committee personnel to attempt to identify the records being sought or to reformulate a request. The Committee may offer assistance in identifying records and reformulating a request where: The description is deemed insufficient, the production of voluminous records is required, or a considerable number of work hours would be required to complete the request that would interfere with the business of the Committee.

§ 51–8.4 Responsibility for Responding to Requests.

(a) *In general.* Except in the instances described in paragraphs (c) of this section, the Committee is responsible for responding to a record request it received. In determining which records are responsive to a request, the Committee ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the Committee shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c) is not considered responsive to a request. The Committee has no obligation to create a record solely for the purpose of making it available under the FOIA.

(b) *Authority to grant or deny requests.* The Executive Director, or designee, is authorized to grant or deny any request for records that are maintained by the Committee.

(c) *Consultation, referral, and coordination.* When reviewing records located by the Committee in response to a request, the Committee shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under the FOIA. As to any such record, the Committee shall proceed in one of the following ways:

(1) *Consultation.* When records originated with the Committee processing the request, but contain information of interest to another agency, or other Federal Government office, the Committee should typically consult with that other agency prior to making a release determination.

(2) *Referral.* (i) When upon the receipt of the request the Committee determines that a different agency, or other Federal Government office is best able to determine whether to disclose the record, the Committee should refer the responsibility for responding to the request to the other agency, as long as that agency is subject to the FOIA. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the Committee processing the request and the originating agency jointly agree that the former is in the best position to respond regarding the record, then the record may be handled as a consultation.

(ii) Whenever the Committee refers any part of the responsibility for responding to a request to another agency, it shall document the referral, maintain a copy of the record that it refers, and notify the requester of the referral and inform the requester of the name(s) of the agency to which the record was referred, including that agency's FOIA contact information.

(3) *Coordination.* The standard referral procedure is not appropriate where disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. For example, if the Committee responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publically known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if the Committee locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the Committee, upon receipt of the request, should coordinate with the originating component or agency to seek its views on the disclosability of the record. The release determination for the record that is the subject of the coordination should then be conveyed to the requester by the Committee.

(d) *Classified information.* Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another agency under any applicable executive order concerning the classification of records, the Committee shall refer the responsibility for responding to the request regarding

that information to the agency that classified the information, or that should consider the information for classification. Whenever a component's record contains information that has been derivatively classified (*e.g.*, when it contains information classified by another agency), the Committee shall refer the responsibility for responding to that portion of the request to the agency that classified the underlying information.

(e) *Timing of responses to consultations and referrals.* All consultations and referrals received by the Committee will be handled according to the date that the FOIA request was received by the first agency.

(f) *Agreements regarding consultations and referrals.* The Committee may establish agreements with other agencies to eliminate the need for consultations or referrals with respect to particular types of records.

§ 51–8.5 Timing of Responses to Requests.

(a) *In general.* (1) The Committee ordinarily will respond to requests according to their order of receipt. The time limits prescribed in the FOIA will begin only after the Committee identifies a request as being made under the FOIA and deemed received by the Committee.

(2) An initial determination whether, and to what extent, to grant each request for records or a fee waiver shall be made within 10 business days after receipt of that request. The requester shall be notified as soon as the determination is made.

(3) When a requester complies with the procedures established in this part for obtaining records under the FOIA, the request shall receive prompt attention, and a response will be made within 20 business days.

(b) *Unusual circumstances.* Whenever the Committee cannot meet the statutory time limit for processing a request because of ''unusual circumstances,'' as defined in the FOIA, and the Committee extends the time limit on that basis, the Committee shall, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. Where the extension exceeds 10 working days, the Committee will, as described by the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. The Committee shall make available its FOIA office and its FOIA Public Liaison for this purpose. The agency must also alert requesters to the availability of the Office of Government Information Services to provide dispute resolution services.

(c) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, the Committee may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. The Committee shall not aggregate multiple requests that involve unrelated matters.

(d) *Multitrack processing.* (1) The Committee may use two or more processing tracks by distinguishing between simple, complex, and expedited requests based on the amount of work and/or time needed to process a request or the number of pages involved. Expedited processing shall be in accordance with the standards set forth in paragraph (g) of this section. Among the factors a component may consider are the number of pages involved in processing the request and the need for consultations or referrals. The Committee shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow their request so that it can be placed in a different processing track.

(e) *Expedited processing.* (1) Requests and appeals may be taken out of order and given expedited treatment whenever it is determined that they involve:

(i) Circumstances in which the lack of expedited processing could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency to inform the public about an actual or alleged Federal Government activity, if made by a person

who is primarily engaged in disseminating information;

(iii) The loss of substantial due process rights; or

(iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity that affect public confidence.

(2) A request for expedited processing may be made at any time. Requests based on paragraphs (e)(1)(i) through (iv) of this section must be submitted to the Committee's FOIA office.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For example, under paragraph (e)(1)(ii) of this section, a requester who is not a full-time member of the news media must establish that the requester is a person whose primary professional activity or occupation is information dissemination, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. As a matter of administrative discretion, the Committee may waive the formal certification requirement.

(4) The Committee shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request will be given priority and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted on expeditiously.

§ 51–8.6 Responses to Requests.

(a) *In general*. The Committee should, to the extent practicable, communicate with requesters having access to the internet using electronic means, such as email or web portal.

(b) *Acknowledgment of requests*. The Committee shall acknowledge the request and assign it an individualized tracking number if it will take longer than 10 working days to process. The Committee shall include in the acknowledgement a brief description of the records sought to allow requesters to more easily keep track of their requests.

(c) *Grants of requests*. When the Committee makes a determination to grant a request in full or in part, it shall notify the requester in writing. The Committee shall inform the requester of any fees charged under subpart 51–8.10 of this part and shall disclose the requested records to the requester promptly upon payment of any applicable fees. The Committee must inform the requester of the availability of the FOIA Public Liaison to offer assistance.

(d) *Adverse determinations of requests*. If the Committee makes an adverse determination denying a request in any respect, the requester will be notified in writing. Adverse determinations, or denials of requests, include decisions that: The requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(e) *Content of denial*. The denial will be signed by the Executive Director or designee and include:

(1) The name and title or position of the person responsible for the denial;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records

that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) A statement that the denial may be appealed under subpart 51–8.8 of this part, and a description of the appeal requirements set forth therein; and

(5) A statement notifying the requester of the assistance available from the Committee's FOIA Public Liaison and the dispute resolution services offered by Office of Government Information Services (OGIS).

§ 51–8.7 Confidential Commercial Information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the Committee from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, either at the time of submission or within a reasonable time thereafter, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations expire 10 years after the date of the submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The Committee will promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if, after reviewing the request, the responsive records, and any appeal by the requester, the Committee determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The Committee has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure under that exemption or any other applicable exemption.

(2) The notice must either describe the commercial information requested or include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, notice may be made by posting or publishing the notice in a place or manner reasonably likely to accomplish notification.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section do not apply if:

(1) The Committee determines that the information is exempt under the FOIA;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous, except that, in such a case, the Committee shall give the submitter written notice of any final decision to disclose the information and shall provide that notice within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The Committee will specify a reasonable time period within which the submitter must respond to the notice referenced above. If a submitter has any objections to disclosure, it should provide the Committee a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or

commercial or financial information that is privileged or confidential.

(2) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. Information received by the Committee after the date of any disclosure decision shall not be considered by the Committee. Any information provided by a submitter under this subpart may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The Committee will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* (1) Whenever the Committee decides to disclose information over the objection of a submitter, the Committee will provide the submitter written notice, which will include:

(i) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(ii) A description of the information to be disclosed; and

(iii) A specified disclosure date, which must be a reasonable time after the notice, and not less than 10 business days after the date of the notice submission.

(iv) A statement that the submitter must notify the Committee immediately if the submitter intends to seek injunctive relief.

(2) Notwithstanding paragraph (e)(2) of this section, even if the submitter fails to respond to Committee's notice specified in paragraph (c) of this section, whenever the Committee decides to disclose the commercial information, the Committee will provide the submitter written notice of disclosure, as specified in paragraph (g)(1) of this section.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the Committee will promptly notify the submitter.

(i) *Requester notification.* The Committee will notify the requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

§ 51–8.8 Administrative Appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the Committee's Chief FOIA Officer. The contact information for the FOIA Officer is available at the Committee's website, at *https://www.abilityone.gov/laws,_regulations_and_policy/foia.html*. Appeals can be submitted through email or the web portal accessible on the FOIA web page. Examples of adverse determinations are provided in § 51–8.6(d). The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the Committee's determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* (1) The Committee Executive Director or designee will act on behalf of the Committee on all appeals under this section.

(2) An appeal ordinarily will not be adjudicated if the request becomes a matter of FOIA litigation.

(3) On receipt of any appeal involving classified information, the Committee's Chief FOIA Officer shall take appropriate action to ensure compliance with

(c) *Decisions on appeals.* A decision on an appeal must be made in writing. A decision that upholds a Committee determination will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit and will inform the requester of the mediation services offered by the Office of Government Information Services (OGIS) of the National Archives and

Records Administration as a non-exclusive alternative to litigation. If a Committee's decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The Committee will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *Engaging in dispute resolution services provided by OGIS.* Mediation is a voluntary process. If the Committee agrees to participate in the mediation services provided by the Office of Government Information Services, it will actively engage as a partner to the process in an attempt to resolve the dispute.

(e) *When appeal is required.* Before seeking review by a court of a Committee's adverse determination, a requester generally must first submit a timely administrative appeal.

§ 51–8.9 Preservation of Records.

The Committee will preserve all correspondence pertaining to the requests it receives under this subpart, as well as copies of all requested records, until disposition or destruction is authorized pursuant to Title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration. Records will not be destroyed while they are the subject of a pending request, appeal, or lawsuit under the Act.

§ 51–8.10 Fees.

(a) *In general.* The Committee will charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. In order to resolve any fee issues that arise under this section, the Committee may contact a requester for additional information. The Committee shall ensure that searches, review, and duplication are conducted in the most efficient and the least expensive manner. The Committee will ordinarily collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check or money order payable to the United States Department of Treasury.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or a purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. The Committee's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information.

(2) *Direct costs* are those expenses that an agency incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records in order to respond to a FOIA request. For example, direct costs include the salary of the employee performing the work (*i.e.*, the basic rate of pay for the employee, plus 16 percent of that rate to cover benefits) and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space, and of heating or lighting a facility.

(3) *Duplication* is reproducing 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, audiovisual materials, or electronic records, among others.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution. The Committee may seek assurance from the requester that the request is in furtherance of scholarly research and agencies will advise requesters of their placement in this category.

Example 1 to paragraph (b)(4). A request from a professor of geology at a university for records relating to soil erosion, written on letterhead of the Department of Geology, would be presumed to be from an educational institution.

Example 2 to paragraph (b)(4). A request from the same professor of geology seeking drug information from the Food and Drug Administration in furtherance of a murder mystery he is writing would not be presumed to be an institutional request, regardless of whether it was written on institutional stationary.

Example 3 to paragraph (b)(4). A student who makes a request in furtherance of the student's coursework or other school-sponsored activities and provides a copy of a course syllabus or other reasonable documentation to indicate the research purpose for the request, would qualify as part of this fee category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (b)(1) of this section 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. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(6) *Representative of the news media* 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. 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 that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, the Committee shall also consider a requester's past publication record in making this determination.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 51–8.7, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Charging fees.* In responding to FOIA requests, the Committee will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (k) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, the Committee should not add any additional costs to charges calculated under this section.

(1) *Search.* (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. The Committee will charge search fees for all other requesters, subject to the restrictions of paragraph (d) of this section. The Committee may properly charge for time spent searching even if responsive records are not located or if the Committee determines that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees shall be as follows: Professional—$10.00; and clerical/administrative—$4.75.

(iii) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. Requesters shall

be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by an agency at a Federal records center operated by the National Archives and Records Administration (NARA), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication*. Duplication fees shall be charged to all requesters, subject to the restrictions of paragraph (d) of this section. The Committee shall honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the Committee in the form or format requested. Where photocopies are supplied, agencies will provide one copy per request at the cost of 25¢ per page. For copies of records produced on tapes, disks, or other media, the Committee will charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned in order to comply with a requester's preference to receive the records in an electronic format, the requester shall also pay the direct costs associated with scanning those materials. For other forms of duplication, agencies will charge the direct costs.

(3) *Review*. The Committee will charge review fees to requesters who make commercial use requests. Review fees will be assessed in connection with the initial review of the record, *i.e.*, the review conducted by the Committee to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with the Committee's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (c)(1)(ii) of this section.

(d) *Restrictions on charging fees*. (1) No search fees will be charged for requests by educational institutions (unless the records are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(2)(i) If the Committee fails to comply with the FOIA's time limits in which to respond to a request, it may not charge search fees, or, in the instances of requests from requesters described in paragraph (d)(1) of this section, may not charge duplication fees, except as described in paragraphs (d)(2)(ii) through (iv) of this section.

(ii) If the Committee has determined that unusual circumstances, as defined by the FOIA, apply and the Committee provided timely written notice to the requester in accordance with the FOIA, a failure to comply with the time limit shall be excused for an additional 10 days.

(iii) If the Committee has determined that unusual circumstances, as defined by the FOIA, apply and more than 5,000 pages are necessary to respond to the request, the Committee may charge search fees, or, in the case of requesters described in paragraph (d)(1) of this section, may charge duplication fees if the following steps are taken. The Committee must have provided timely written notice of unusual circumstances to the requester in accordance with the FOIA and the Committee must have discussed with the requester via written mail, email, or telephone (or made not less than three good-faith attempts to do so) how the requester could effectively limit the scope of the request in accordance with 5. U.S.C. 552(a)(6)(B)(ii). If this exception is satisfied, the Committee may charge all applicable fees incurred in the processing of the request.

(iv) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, Committee shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.

(e) *Notice of anticipated fees in excess of $25.00.* (1) When the Committee determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the requesting party will be notified of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless a written statement from the requester has been received indicating a willingness to pay fees as high as those anticipated. If only a portion of the fee can be readily estimated, the Committee shall advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and shall advise the requester whether those entitlements have been provided.

(2) If the Committee notifies the requester that the actual or estimated fees are in excess of $25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or, in the case of a noncommercial use, requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. The Committee is not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the Committee estimates that the total fee will exceed that amount, the Committee will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The Committee will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) The Committee will make available the FOIA Public Liaison or other personnel to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(f) *Charges for other services.* Although not required to provide special services, if the Committee chooses to do so as a matter of administrative discretion, the direct costs of providing the service will be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail.

(g) *Charging interest.* The Committee may charge interest on any unpaid bill for processing FOIA requests starting on the 31st day following the date of billing the requester. Interest rates will be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the Committee.

(h) *Aggregating requests.* When the Committee reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the Committee may aggregate those requests and charge accordingly. The Committee may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, the Committee will aggregate them only where there is a reasonable basis for determining that aggregating the requests is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(i) *Advance payments.* (1) For requests other than those described in paragraphs (i)(2) or (i)(3) of this section, the

Committee shall not require the requester to make an advance payment before work is commenced or continued on a request. Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(2) When the Committee determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. The Committee may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee within 30 calendar days of the billing date, the Committee may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the Committee may require that the requester make an advance payment of the full amount of any anticipated fee before the Committee begins to process a new request or continues to process a pending request or any pending appeal. Where the Committee has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which the Committee requires advance payment, the request will not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the Committee's fee determination, the request will be closed.

(j) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Committee shall inform the requester of the contact information for that program.

(k) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application demonstrating how disclosure of the requested 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 is not primarily in the commercial interest of the requester.

(2) The Committee will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the factors described in paragraphs (k)(2)(i) through (ii) of this section are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information is likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about the Committee operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public must be considered. The Committee ordinarily will presume that a representative of the news media will satisfy this consideration.

(iii) The disclosure must not be primarily in the commercial interest of

the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, the Committee will consider the following criteria:

(A) The Committee must identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or for profit interest. Requesters must be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the Committee must determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (k)(2)(i) through (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. The Committee ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) through (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the Committee and should address the criteria referenced above. A requester may submit a fee waiver request at a later time as long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester must pay any costs incurred up to the date the fee waiver request was received.

§ 51–8.11 Other Rights and Services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the FOIA.

PART 51–9—PRIVACY ACT RULES

Subpart 51–9.1—General Policy

Sec.

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Subpart 51–9.7—Rules of Conduct for Disclosure of Information About an Individual

51–9.701 Committee rules of conduct.

AUTHORITY: 5 U.S.C. 552a.

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Subpart 51–9.1—General Policy

§51–9.101 Maintenance of records.

§51–9.101–1 Collection and use.

Any information used in whole or in part in making a determination about an individual's rights, benefits, or privileges under the Committee programs, shall, to the extent practicable, be collected directly from the subject individual. At the time information is collected, the individual must be informed of the authority for collecting such information, whether providing the information is mandatory or voluntary, the purposes for which the information will be used, the routine uses as published in the FEDERAL REGISTER, and the effects on the individual, if any, of not providing the information. The information collected shall be used only for the intended purpose or permission for additional use will be obtained from the subject individual.

§51–9.101–2 Standards of accuracy.

The Executive Director shall ensure that all records which are used by the agency to make determinations about any individual are maintained with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual. Upon petition by an individual, the Executive Director shall provide the individual with the opportunity to review his records, and to request amendment of a portion which the individual believes is not accurate, relevant, timely or complete. Prior to dissemination of records about any individual to any person or to another agency, exclusive of disclosure pursuant to the Freedom of Information Act, the Executive Director shall make reasonable effort to ensure that such records are accurate, complete, timely, and relevant.

§51–9.101–3 Content of systems of records.

The Executive Director shall maintain in records only such information about an individual as is relevant and necessary to accomplish an agency purpose required by statute or executive order. Such records shall not contain any information describing how any individual exercises rights guaranteed by the First Amendment unless specifically authorized by statute, by the subject individual, or is pertinent to and within the scope of an authorized law enforcement activity. For these purposes, First Amendment rights include, but are not limited to, religious and political beliefs, freedom of speech, the press, assembly, and freedom to petition.

§51–9.101–4 Rules of conduct.

Any employee of the Committee involved in the design, development, operation or maintenance of any system of records, or in maintaining any record, shall review the provisions of 5 U.S.C. 552a and these regulations, and shall conduct himself accordingly with the rules of conduct concerning the protection of personal information outlined in 41 CFR 51–9.7, Disclosure of Information about an Individual.

§51–9.101–5 Safeguarding systems of records.

The Executive Director shall ensure that appropriate administrative, technical and physical safeguards are established to ensure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.

§51–9.102 Availability of records.

Committee records pertaining to an individual shall be made available to the subject individual to the greatest extent possible. Disclosures of records to other than the subject individual will be made only in accordance with subpart 51–9.2 of this part.

§ 51–9.102–1 Specific exemptions.

Systems of records maintained by the Committee which have been exempted from certain requirements of the Privacy Act are designated in subpart 51–9.6 of this part. An individual shall have access to all exempted records containing information about him under procedures outlined in subpart 51–9.3 of this part. Upon request, an individual shall receive an accounting of any disclosure of information about him.

Subpart 51–9.2—Disclosure of Records

§ 51–9.201 Conditions of disclosure.

No Committee member or employee of the Committee shall disclose any record to any person or to another agency without the express written consent of the subject individual unless the disclosure is:

(a) To Committee members or employees who have a need for the information in the official performance of their duties.

(b) Required under the provisions of the Freedom of Information Act.

(c) For a routine use as published in the annual notice in the FEDERAL REGISTER.

(d) To the Bureau of Census for uses pursuant to Title 13.

(e) To a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record and the record is to be transferred in a form that is not individually identifiable. The written statement should include as a minimum:

(1) A statement of the purpose for requesting the records, and

(2) Certification that the records will be used only for statistical purposes.

These written statements shall be maintained as records. In addition to stripping, personally identifying information from records released for statistical purpose, the Committee will ensure that the identity of the individual cannot reasonably be deducted by combining various statistical records.

(f) To the National Archives of the United States 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 Administrator of General Services or his designee to determine whether the record has such value.

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

(h) To a person showing compelling circumstances affecting the health and safety of an individual (not necessarily the individual to whom the record pertains). Upon such disclosure, a notification of such shall be sent to the last known address of the individual.

(i) To either House of Congress or to a subcommittee or committee (joint or of either House, to the extent that the subject matter falls within their jurisdiction).

(j) To the Comptroller General, or any of his authorized representatives in the course of the performance of the duties of the General Accounting Office, or

(k) Pursuant to the order of the court of competent jurisdiction.

§ 51–9.202 Accounting of disclosures.

(a) Except for disclosures made pursuant to paragraphs (a) and (b) of § 51–9.201 of this part, an accurate accounting of each disclosure will be made and retained for five years after the disclosure or for the life of the record, whichever is longer. The accounting will include the date, nature, and purpose of each disclosure, and the name and address of the person or agency to whom the disclosure is made.

(b) The accounting will be recorded and maintained in any manner the Executive Director determines is satisfactory for the purposes of constructing a

listing of all disclosures, and for providing a cross reference to the justification or basis upon which the disclosure was made, including written documentation required when records are released for statistical or law enforcement purposes and any written consents provided by the individual.

(c) Except for disclosures made to agencies or instrumentalities in law enforcement activities in accordance with §51–9.201(e)(2) or for disclosures made from systems exempted from this requirement of the Act as outlined in subpart 51–9.6 of this part, the accounting of disclosures will be made available to the individual upon request. Procedures for requesting access to the accounting are outlined in subpart 51–9.3 of this part.

Subpart 51–9.3—Individual Access to Records

§51–9.301 Notification.

Any individual who wishes to determine if a system of records maintained by the Committee contains a record pertaining to him should direct a request to the Executive Director at the address indicated in the public notice describing the system of records which has been published in the FEDERAL REGISTER. The request should display clearly the legend ''Privacy Act Request'' both on the face of the request letter and on the face of the envelope. The request letter should contain the complete name and identifying number of the system as published in the FEDERAL REGISTER; the full name, address, and telephone number of the subject individual; a brief description of the nature, time, place and circumstances of the individual's association with the Committee and any other information which the individual believes would facilitate the Executive Director's determination whether the individual's name is included in the system of records. The Executive Director shall answer or acknowledge the request within ten working days.

§51–9.302 Times, places and requirements for access requests.

Records will be available for authorized access during normal business hours at the offices where the records are located. A requester should be prepared to identify himself through production of a driver's license, student or employee identification card, or other identification acceptable to the Executive Director. When the disclosure of records to the wrong individual would result in substantial harm, embarrassment, inconvenience, or unfairness to the subject individual, the Executive Director may require a notarized statement of identity. The Executive Director shall ensure that such times, places, and requirements for identification are not excessive and do not restrict individual access unduly.

§51–9.303 Access procedures.

§51–9.303–1 Form of requests.

(a) An individual must request access to his record in writing. The Executive Director shall accept by telephone only general inquiries for information regarding systems of records or procedures.

(b) A written request should be directed to the Executive Director as listed in the public notice describing the system of records. The individual should display clearly on the face of the request letter and on the face of the envelope the legend ''Privacy Act Request'', and include the complete name and identifying number of the system as published in the FEDERAL REGISTER; the full name, address, the telephone number of the individual; a brief description of the nature, time, place and circumstances of the individual's association with the Committee; and any other information which the individual believes would facilitate the Executive Director's search for the record.

(c) An individual who wishes to have a person of his choosing accompany him in reviewing a record must sign a statement authorizing the disclosure of his record in the presence of another individual, if so requested by the Executive Director. An individual who intends to visit the Committee office in order to review a record should make an appointment with the Executive Director at least one week in advance.

§ 51–9.303–2 Special requirements for medical/psychological records.

(a) The Executive Director may require an individual who requests access to his medical or psychological record to designate a physician of his choice to whom he may disclose the individual's record if in the opinion of the Executive Director, disclosure directly to the individual might be harmful.

(b) The Executive Director shall mark records which should not be disclosed directly to the subject individual and shall inform an individual requesting such records of the requirement to designate a physician to whom the records can be disclosed.

§ 51–9.303–3 Granting access.

(a) Upon receipt of a request for access to non-exempt records, the Executive Director shall make such records available to the individual, or shall acknowledge the request within ten working days. The acknowledgment shall indicate when the Executive Director will make the record available.

(b) If the Executive Director anticipates more than ten days in making a record available he also shall include in the acknowledgement specific reasons for the delay.

(c) If an individual's request for access does not contain sufficient information to permit the Executive Director to locate the record, the Executive Director shall request additional information from the individual and shall have ten working days following receipt of the additional information in which to make the record available, or to acknowledge receipt of the request and indicate when the record will be available. In no case shall more information be requested from the individual than that contained in the pertinent system of records.

(d) The Executive Director, at his discretion, either shall permit an individual to examine the original of the record, or shall provide the individual with a copy of the record. Fees shall be charged only for copies requested by the individual and not for copies provided to the individual for convenience of the agency.

(e) An individual may request to pick up a record in person or receive it by mail, directed to the name and address provided by the individual in his request. The Executive Director shall not make a record available to a third party for delivery to the subject individual, except in the case of medical records outlined in § 51–9.303–2.

(f) The Executive Director shall maintain in an individual's record an accounting of disclosures to the individual's documenting compliance with the request.

(g) The procedures for access to an accounting of disclosures is identical to the procedure for access to a record as set forth in this section.

§ 51–9.303–4 Denials of access.

(a) The Executive Director may deny any individual access to his record only on the grounds that the Committee has published rules in the FEDERAL REGISTER exempting the pertinent system of records from the access requirement.

(b) Upon receipt of a request for access to an exempt system, the Executive Director shall prepare a letter denying access. The letter of denial shall contain a justification for denial of access which includes appropriate citation to the exemption provisions of these rules or other FEDERAL REGISTER notice exempting the system.

§ 51–9.304 Fees.

§ 51–9.304–1 Records available without charge.

The Executive Director shall make one copy of a record available to an employee without charge, and may waive the fee requirement for any other individual requesting records if the cost of collecting the fee is an unduly large part of, or greater than, the fee, or when furnishing the record without charge conforms to generally established business custom or is in the public interest.

§ 51–9.304–2 Records available at a fee.

The Executive Director shall provide one copy of a record to the individual at a fee prescribed in § 51–9.304–5. A reasonable number of additional copies will be provided for the applicable fee where reproduction services are not readily available.

§51–9.304–3 Prepayment of fees over $25.

When the Executive Director determines that the anticipated total fee is likely to exceed $25, he shall notify the individual that he must prepay the anticipated fee prior to making the records available. The Committee will remit the excess paid by the individual or bill the individual for an additional amount according to variations between the final fee charged and the amount prepaid.

§51–9.304–4 Form of payment.

Payment shall be by check or money order payable to the Committee for Purchase from People who are Blind or Severely Disabled and shall be addressed to the Executive Director.

[40 FR 51168, Nov. 3, 1975, as amended at 59 FR 16777, Apr. 8, 1994]

§51–9.304–5 Reproduction fee schedule.

(a) The fee for reproducing a copy of a record (by routine electrostatic copying) up to and including material 8½ × 14 inches shall be $0.10 per page.

(b) The fee for reproducing a copy of a record over 8½ × 14 inches or whose physical characteristics do not permit reproduction by routine electrostatic copying shall be the direct cost of reproducing the records through Government or commercial sources.

Subpart 51–9.4—Requests To Amend Records

§51–9.401 Submission of requests to amend records.

(a) An individual who desires to amend any record or information pertaining to him should direct a written request to the Executive Director, Committee for Purchase from People who are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

(b) A request should bear the legend ''Privacy Act—Request to Amend Record'' prominently marked on both the face of the request letter and the envelope.

(5 U.S.C. 552a)

[40 FR 51168, Nov. 3, 1975. Redesignated at 56 FR 48983, Sept. 26, 1991, and amended at 59 FR 16777, Apr. 8, 1994; 63 FR 16440, Apr. 3, 1998: 65 FR 35287, June 2, 2000]

§51–9.402 Review of requests to amend records.

(a) Upon receipt of a request to amend a record, the responsible official, whenever practicable shall complete the review and advise the individual of the results within ten working days. If a determination cannot be made within ten working days, the Executive Director, within ten working days, shall send the individual a written acknowledgment of receipt of the request including a description of the request and the date when the requester may except to be advised of action taken on the request. Except in unusual circumstances, the Executive Director shall complete the review within 30 working days. In unusual circumstances, causing delay beyond the 30 day limit, the Executive Director shall inform the individual in writing of the cause of delay, the actions taken to review the record, and the date the Executive Director anticipates the review to be complete.

(b) When reviewing a record in response to a request to amend, the Executive Director shall assess the accuracy, relevance, timeliness, and completeness of the record to ensure fairness to the individual in any determination made on the basis of the record. With respect to a request to delete information, the Executive Director also shall review the request and record to determine whether the information is relevant and necessary to accomplish an agency purpose required to be accomplished by law or Executive Order.

§51–9.403 Approval of requests to amend.

If the Executive Director agrees to amend a record, he promptly shall make the necessary corrections to the record and shall send a copy of the corrected record to the individual. Where an accounting of disclosure has been

maintained, he shall advise all previous recipients of the record of the fact that a correction was made of/and the substance of the correction. Where practicable, the Executive Director shall send a copy of the corrected record to previous recipients.

§ 51–9.404 Refusal of request to amend.

(a) The Executive Director, or any official acting for him, shall have the authority to issue an initial refusal of a request to amend a record within his custody and shall be responsible for the initial adverse agency determination.

(b) If the Executive Director, after reviewing the request to amend a record, determines not to amend the record, he promptly shall advise the requester in writing of the determination. The refusal letter (1) shall state the reasons for refusal, (2) shall state the requester's right to seek a review of the initial determination, and (3) shall state the procedures for requesting such review.

§ 51–9.405 Request of review of refusal to amend a record.

(a) An individual who disagrees with the refusal to amend may appeal that refusal with the Committee. An individual should address a request for review of a refusal to amend any record, exclusive of a personnel record of a current Committee employee to the Chairperson, Committee for Purchase from People who are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

(b) A request to review must be in writing and should include a copy of the initial request and refusal to amend. The request to review should bear the legend ''Privacy Act—Request for Review of Refusal to Amend'' on both the face of the letter and the envelope. The Chairperson shall complete the review and make a determination no later than 30 working days after receipt of the request for review, unless a determination is made to extend the 30 day period. If a determination is made to extend the 30 day period, the Chairperson shall notify the requester in writing of the reasons for the delay and the date when the review will be completed.

(c) Upon receipt of a request to review a refusal to amend, the Chairperson shall undertake an independent review of the request and initial determination. If, after conducting the review, the Chairperson agrees to amend, he shall notify the requester promptly in writing of the determination, amend the record, and notify previous recipients in accordance with § 51–9.403.

(d) If, after conducting the review, the Chairperson agrees with the refusal to amend the record, he shall notify the requester promptly in writing of the determination. The notification shall include the reasons for the refusal, and shall advise the individual of his right to file a statement of disagreement, and the procedures for doing so. The Chairperson also shall advise the individual that such statement of disagreement will be made available in any subsequent disclosures of the record together with a concise statement summarizing reasons for refusal where the responsible official deems it appropriate. The Chairperson also will advise the individual of his right to bring civil action against the agency in a district court of the United States.

(5 U.S.C. 552a)

[40 FR 51168, Nov. 3, 1975, Redesignated at 56 FR 48983, Sept. 26, 1991, and amended at 59 FR 16777, Apr. 8, 1994; 59 FR 59345, Nov. 16, 1994; 63 FR 16440, Apr. 3, 1998; 65 FR 35287, June 2, 2000]

Subpart 51–9.5—Report on New Systems and Alteration of Existing Systems

§ 51–9.501 Reporting requirement.

(a) No later than 30 days prior to the establishment of a new systems of records, the Executive Director shall submit a copy of the proposal to the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Management and Budget for their evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals of the disclosure of information relating to such individuals.

(b) No later than 30 days prior to the alteration of a system of records, the

Executive Director for the maintenance of that system of records shall submit a copy of the proposal to the President of the Senate, the Speaker of the House of Representatives, and the Director of the Office of Management and Budget for their evaluation of the probable or potential effect of such proposal on the privacy and other personal or property rights of individuals of the disclosure of information relating to such individuals.

§51–9.502 Federal Register notice of establishment of new system or alteration of existing system.

(a) When the Executive Director receives notice that the Senate, the House of Representatives, and the Office of Management and Budget do not object to the establishment of a new system of records, or the alteration of an existing system of records, or

(b) When no fewer than 30 days elapse from the submission of the proposal to the Senate, the House of Representatives, and the Office of Management and Budget, without receipt by the Executive Director of an objection to the proposal, then a notice shall be published in the FEDERAL REGISTER of the proposed establishment or alteration of a system of records. The notice shall include all of the information required to be provided by the Privacy Act of 1974, and such other information as deemed necessary.

§51–9.503 Effective date of new systems of records or alteration of an existing system of records.

Systems of records proposed to be established or altered in accordance with the provision of the subpart shall be effective no sooner than 30 days from the publication of notice required by §51–9.502.

Subpart 51–9.6—Exemptions [Reserved]

Subpart 51–9.7—Rules of Conduct for Disclosure of Information About an Individual

§51–9.701 Committee rules of conduct.

(a) Every Committee member and employee who is involved in the design, development, operation, or maintenance of a system of records, or who has access to a system of records, shall familiarize himself with the requirements of the Privacy Act of 1974 (5 U.S.C. 552a) and the Committee regulations and orders issued thereunder and apply these requirements to all systems of records.

(b) No Committee member or employee shall 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, unless the disclosure would be to a recipient specified in paragraph (c) of this section. The term ''record'' means any item, collection, or grouping of information about an individual that is maintained by an agency, including but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. The term ''system of records'' means a group of any records under the control of the Committee from which information is retrieved by the name of the individual or by some identifying number symbol, or other identifying particular assigned to the individual. The term ''routine use'' means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected. The term ''individual'' means a citizen of the United States or an alien lawfully admitted for permanent residence. The term ''agency'' is defined in 5 U.S.C. 552(e).

(c) An employee may disclose any record which is contained in a system of records, without a written request by and without the prior written consent of the individual to whom the record pertains, if the disclosure would be:

(1) To those Committee members and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) Required under section 552 of Title 5 U.S.C.;

(3) For a routine use as described in paragraph (b) of this section;

(4) 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 U.S.C.;

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

(6) To the National Archives of the United States 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 Administrator of General Services or his designee to determine whether the record has such value;

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

(8) 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;

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

(10) To the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) Pursuant to the order of a court of competent jurisdiction.

(d) No Committee member or employee shall maintain a record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity.

(e) No Committee member or employee shall sell or rent an individual's name and address unless such action is specifically authorized by law.

(f) A Committee member or employee, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by paragraph a of this section or by any other rules or regulations established under the Privacy Act of 1974, and who (1) knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, or (2) willfully maintains a system of records without meeting the notice requirements of the Privacy Act of 1974, or (3) knowingly and willfully requests or obtains any record concerning an individual from any agency under false pretenses, is subject to criminal penalties and administrative sanctions. Any Committee member or employee who (i) makes a determination not to amend an individual's record in accordance with the Privacy Act of 1974, or (ii) refuses to comply with an individual's request to gain access to review, and obtain a copy of any information pertaining to him, or (iii) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities or of benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual, or (iv) fails to comply with any provision of the Privacy Act of 1974 or any Committee regulation implementing it, subjects the Committee to civil penalties and himself to administrative sanctions.

PART 51–10—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE COMMITTEE FOR PURCHASE FROM PEOPLE WHO ARE BLIND OR SEVERELY DISABLED

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 50 FR 22894, June 23, 1986, unless otherwise noted. Redesignated at 56 FR 48983, Sept. 26, 1991.

§51–10.101 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 handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§51–10.102 Application.

This part applies to all programs or activities conducted by the agency.

§51–10.103 Definitions.

For purposes of this part, the term—

Asssistant 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 telephone handset amplifiers, 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. 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.

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.

Handicapped person 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 alocoholism.

(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.

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 listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Qualified handicapped person means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, a handicapped person who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency.

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, a handicapped person who meets the essential eligibility requirements and who can acheive 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;

(3) With respect to any other program or activity, a handicapped person who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 51–10.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617), and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

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

§§ 51–10.104—51–10.109 [Reserved]

§ 51–10.110 Self-evaluation.

(a) The agency shall, by August 24, 1987, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, until three years following the completion of the

self-evaluation, maintain on file and make available for public inspection:

(1) a description of areas examined and any problems identified, and

(2) a description of any modifications made.

§51–10.111 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 head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§51–10.112—51–10.129 [Reserved]

§51–10.130 General prohibitions against discrimination.

(a) No qualified handicapped person shall, on the basis of handicap, 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 handicap—

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person 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 handicapped person 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 handicapped persons or to any class of handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified handicapped person 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 handicapped person the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

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

(i) Subject qualified handicapped persons to discrimination on the basis of handicap; or

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

(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 handicapped persons 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 handicapped persons.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified handicapped persons to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified handicapped persons to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified handicapped persons to discrimination on the basis of handicap. 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 nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to handicapped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or Executive order to a different class of handicapped persons 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 handicapped persons.

§§ 51–10.131—51–10.139 [Reserved]

§ 51–10.140 Employment.

No qualified handicapped person shall, on the basis of handicap, 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 1613, shall apply to employment in federally conducted programs or activities.

§§ 51–10.141—51–10.148 [Reserved]

§ 51–10.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 51–10.150, no qualified handicapped person shall, because the agency's facilities are inaccessible to or unusable by handicapped persons, 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.

§ 51–10.150 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 handicapped persons. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) 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 § 51–10.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head 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 would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of the services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by handicapped persons. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements

to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified handicapped persons in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of §51–10.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to handicapped persons. In cases where a physical alteration to an historic property is not required because of §51–10.150(a)(2) or (a)(3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide handicapped persons into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by October 21, 1986, except that where structural changes in facilities are undertaken, such changes shall be made by August 22, 1989, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by February 23, 1987 months after the effective date], a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including handicapped persons or organizations representing handicapped persons, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§51–10.151 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 handicapped persons. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§51–10.152—51–10.159 [Reserved]

§51–10.160 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 a handicapped person 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 handicapped person.

(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, telecommunication devices for deaf person (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 adminstrative 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 § 51–10.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head 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, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, handicapped persons receive the benefits and services of the program or activity.

§§ 51–10.161—51–10.169 [Reserved]

§ 51–10.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(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 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Executive Director shall be responsible for coordinating the implementation of this section. Complaints may be sent to the Executive Director, Committee for Purchase from People who are Blind or Severely Disabled, Jefferson Plaza 2, Suite 10800, 1421 Jefferson Davis Highway, Arlington, Virginia 22202–3259.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) 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.

(f) 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 handicapped persons.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by § 51–10.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt

of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[50 FR 22894, June 23, 1986. Redesignated at 56 FR 48983, Sept. 26, 1991, and amended at 59 FR 16777, Apr. 8, 1994; 63 FR 16440, Apr. 3, 1998; 65 FR 35287, June 2, 2000]

§§ 51–10.171—51–10.999 [Reserved]

PART 51–11—PRODUCTION OR DISCLOSURE IN FEDERAL AND STATE PROCEEDINGS

Sec.

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AUTHORITY: 41 U.S.C. 8503(d); 41 CFR Ch. 51.

SOURCE: 82 FR 49748, Oct. 27, 2017, unless otherwise noted.

§51–11.1 Scope and purpose.

(a) This part sets forth policies and procedures of the Committee for Purchase From People Who Are Blind or Severely Disabled (Committee) regarding the testimony of current and former employees as witnesses and the production or disclosure of Committee documents or information:

(1) In all Federal and State proceedings in which the United States is a party; and

(2) In all Federal and State proceedings in which the United States is not a party, when a demand pursuant to a subpoena, order or request (collectively referred to in this part as a ''demand'') of a court or other authority is issued for such material, testimony, or information.

(b) The Committee intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving the Committee in controversial issues not related to its functions;

(3) Prevent the misuse of the Committee's employees as involuntary expert witnesses for private interests or as inappropriate expert witnesses as to the state of the law;

(4) Maintain the Committee's impartiality among private litigants where neither the Committee nor any other Federal entity is a named party; and

(5) Protect sensitive, confidential information and the deliberative processes of the Committee.

(c) In providing for these requirements, the Committee does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of the Committee. The procedures specified in this part, or the failure of any Committee employee to follow the procedures specified in this part, are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

§51–11.2 Applicability.

This part applies to demands and requests to employees of the Committee in legal proceedings, for factual or expert testimony relating to official information or for production of official records or information. However, it does not apply to:

(a) Demands for a current Committee employee to testify as to facts or events that are unrelated to his or her

official duties or that are unrelated to the functions of the Committee;

(b) Demands for a former Committee employee to testify as to matters in which the former employee was not directly or materially involved while at the Committee;

(c) Requests for the release of non-exempt records under the Freedom of Information Act, 5 U.S.C. 552 (41 CFR part 51–8), or the Privacy Act, 5 U.S.C. 552(a) (41 CFR part 51–9); and

(d) Congressional or Government Accountability Office (GAO) demands and requests for testimony or records.

§ 51–11.3 Definitions.

As used in this part:

Committee means the Committee for Purchase From People Who Are Blind or Severely Disabled.

Committee employee or *employee* means:

(1) Any current or former officer or employee of the Committee;

(2) Any other individual hired through contractual agreement by or on behalf of the Committee or who has performed or is performing services under such an agreement for the Committee; and

(3) Any individual who served or is serving in any consulting or advisory capacity to the Committee, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by the Committee and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Committee.

Demand means a subpoena, request, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or information related to, for the appearance and testimony of a Committee employee that is issued in a legal proceeding.

General Counsel means Committee General Counsel or Committee employee to whom the General Counsel has delegated authority to act under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of discovery, litigation and informal requests by attorneys or others involved in legal proceedings seeking interviews or the like.

Records or *official records and information* mean all documents and materials, however stored, that is in the custody and control of the Committee, relating to information in the custody and control of the Committee, or acquired by a Committee employee in the performance of his or her official duties or because of his or her official status, while such individual was employed.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

§ 51–11.4 General prohibition.

(a) In any Federal or State case or matter in which the United States is not a party, no employee or former employee of the Committee shall, in response to a demand, produce any record contained in the files of the Committee, or disclose any information relating to or based upon record contained in the files of the Department, or disclose any information or produce any record acquired as part of the performance of that person's official duties or because of that person's official status without prior written approval of the General Counsel in accordance with § 51–11.9.

(1) Whenever a demand is made upon an employee or former employee as described in this paragraph (a), the employee shall immediately notify the General Counsel. The General Counsel shall follow procedures set forth in § 51–11.8.

(2) If oral testimony is sought by a demand in any case or matter in which the United States is not a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by his attorney, setting forth a summary of the testimony sought and its relevance to the proceeding, must be furnished to the General Counsel. Any authorization for testimony by a present or former employee of the Committee shall be limited to the scope of the demand as summarized in such statement.

(3) When information other than oral testimony is sought by a demand, the General Counsel shall request a summary of the information sought and its relevance to the proceeding.

(b) In any Federal or State case or matter in which the United States is a party, the General Counsel is authorized to reveal and furnish to any person, including an actual or prospective witness, a grand jury, counsel, or a court, either during or preparatory to a proceeding, such testimony, and relevant unclassified material, documents, or information secured by the employee or former employee of the Committee, as the General Counsel shall deem necessary or desirable to the discharge of the attorney's official duties: *Provided*, Such an attorney shall consider, with respect to any disclosure, the factors set forth in §51–11.7.

(1) If oral testimony is sought by a demand in a case or matter in which the United States is a party, an affidavit, or, if that is not feasible, a statement by the party seeking the testimony or by the party's attorney setting forth a summary of the testimony sought must be furnished to the agency attorney handling the case or matter.

(2) [Reserved]

(c) In appropriate cases, the General Counsel shall notify the United States Department of Justice (DOJ) of the demand and coordinate with the DOJ to file any appropriate motions or other pleadings.

§51–11.5 Service of demand.

(a) Written demands directed to the Committee or requests for official records, information or testimony shall be served in accordance with the requirements of the Federal Rules of Civil or Criminal Procedure, or applicable State procedures, as appropriate. If the demand is served by U.S. mail, it should be addressed to the General Counsel, Committee for Purchase From People Who Are Blind or Severely Disabled, 1401 S. Clark Street, Suite 715, Arlington, VA 22202. The Committee's acceptance of service of a demand shall not constitute an admission or waiver of any objection with respect to the propriety of jurisdiction, service of process, venue or any other defense in law or equity available under applicable law.

(b) If any doubt exists, whether a demand relates to purely personal matters or arises out of the performance of official duties, copies of the demand may be delivered to the General Counsel for such determination.

§51–11.6 Filing requirements for demands for documents or testimony.

Compliance with the following requirements is required when issuing demands or requests for official records, information or testimony.

(a) Requests must be in writing and must be submitted to the General Counsel. If a subpoena is served on the Committee or a Committee employee before submitting a written request and receiving a final determination, the Committee will object to the subpoena on grounds that it was not submitted in accordance with this part.

(b) Written requests must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show the relevance of the information sought;

(3) A detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden

on the Committee to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a Committee employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each Committee employee for time spent by the employee to prepare for testimony, in travel, and for attendance at the legal proceeding.

(c) The Committee reserves the right to require additional information to complete any request where appropriate.

(d) Requests should be submitted at least 45 calendar days before the date that records or testimony is required. Requests submitted in less than 45 calendar days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with the request.

§ 51–11.7 Factors the Committee will consider.

The General Counsel in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) The Committee has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder the Committee in performing its statutory duties or use the Committee resources in a way that will interfere with the ability of the Committee employees to do their regular work;

(e) Allowing such testimony or production of records would be in the best interest of the Committee or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, Executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(k) Disclosure would result in the Committee appearing to favor one private litigant over another private litigant;

(l) Disclosure relates to documents that originate from another agency;

(m) A substantial Government interest is implicated;

(n) The demand or request is within the authority of the party making it;

(o) The demand improperly seeks to compel a Committee employee to serve as an expert witness for a private interest;

(p) The demand improperly seeks to compel a Committee employee to testify as to a matter of law; and/or

(q) The demand or request is sufficiently specific to be answered.

§51–11.8 Processing demands or requests.

(a) After service of a demand or request, the General Counsel will review the demand or request and, in accordance with the provisions of this part, determine whether, or under what conditions, to authorize an employee to testify on matters relating to Committee records and/or produce records.

(b) The Committee will process requests in the order in which they are received. Absent exigent or unusual circumstances, the Committee will respond within 45 calendar days from the date of receipt. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this part where a waiver is considered necessary to promote a significant interest of the Committee or the United States or for other good cause.

§51–11.9 Final determination.

The General Counsel makes the final determination on demands and requests for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a Committee employee.

§51–11.10 Restrictions that apply to testimony.

(a) Conditions or restrictions may be imposed on the testimony of the Committee employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that they will seek to file the transcript of the testimony under seal and that it will be used or made available only in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript or testimony be provided to the Committee at the requester's expense.

(b) The Committee may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information;

(2) Testify as to any information outside the scope of the General Counsel's authorization (*see* §51–11.7); or

(3) For a current Committee employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of the Committee unless testimony is being given on behalf of the United States whether or not the United States is a party.

§51–11.11 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the Committee may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original Committee records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official Committee records, and they are not to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes.

§ 51–11.12 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination previously referred to, the General Counsel when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

§ 51–11.13 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay the demand, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has not been authorized to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951). A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

§ 51–11.14 Fees.

(a) *Generally*. The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the Committee.

(b) *Fees for records*. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by the Committee in its Freedom of Information Act regulations at 41 CFR part 51–8.

(c) *Witness fees*. Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, travel time and expenses, and for attendance in the legal proceeding.

(d) *Payment of fees*. Witness fees for current Committee employees and any records certification fees shall be paid by check or money order presented to the Committee made payable to the United States Department of Treasury. Applicable fees for former Committee employees' testimony must be paid directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records*. The Committee Records Manager may certify that records are true copies in order to facilitate their use as evidence. Certification requests require 45 calendar days for processing and a fee of $15.00 for each document certified.

(f) *Waiver or reduction of fees*. The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees*. Fees will not be assessed if the total charge would be $10.00 or less.

§ 51–11.15 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the Committee, or as ordered by a Federal court after the Committee has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former Committee employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current Committee employee who testifies or produces official records and information in violation of this part may be subject to disciplinary action.

PARTS 51–12—51–99 [RESERVED]

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, EQUAL EMPLOYMENT OPPORTUNITY, DEPARTMENT OF LABOR

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PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

SOURCE: 43 FR 49240, Oct. 20, 1978, unless otherwise noted.

Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

EDITORIAL NOTE: Nomenclature changes to subpart A appear at 85 FR 71570, Nov. 10, 2020.

§ 60–1.1 Purpose and application.

The purpose of the regulations in this part is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a ''Disputes'' clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law,

regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

[79 FR 72993, Dec. 9, 2014]

§ 60–1.2 Administrative responsibility.

The Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive order. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.3 Definitions.

Administering agency means any department, agency and establishment in the executive branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

Administrative law judge means an administrative law judge appointed as provided in 5 U.S.C. 3105 and subpart B of part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

Agency means any contracting or any administering agency of the Government.

Applicant means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the contractor to attract and retain a particular employee for the value the employee is perceived to add to the contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor decisions, statements and policies related to setting or altering employee compensation.

Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the requirements of Executive Order 11246.

Construction work means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other onsite functions incidental to the actual construction.

Contract means any Government contract or subcontract or any federally assisted construction contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Director means the Director, Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, or his or her designee.

Equal opportunity clause means the contract provisions set forth in § 60–1.4 (a) or (b), as appropriate.

Essential job functions—(1) *In general.* The term *essential job functions* means

the fundamental job duties of the employment position an individual holds.

(2) A job function may be considered essential if:

(i) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(ii) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

(3) The application or interpretation of the ''essential job functions'' definition in this part is limited to the discrimination claims governed by Executive Order 13665 and its implementing regulations.

Federally assisted construction contract means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

Government means the government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term ''personal property,'' as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ''nonpersonal services'' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federally assisted construction contracts.

Internet Applicant. (1) Internet Applicant means any individual as to whom the following four criteria are satisfied:

(i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

(ii) The contractor considers the individual for employment in a particular position;

(iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and,

(iv) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

(2) For purposes of paragraph (1)(i) of this definition, ''submits an expression of interest in employment through the Internet or related electronic data technologies,'' includes all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection processes for that particular position.

(i) Example A: Contractor A posts on its web site an opening for a Mechanical Engineer position and encourages potential applicants to complete an online profile if they are interested in being considered for that position. The web site also advises potential applicants that they can send a hard copy resume to the HR Manager with a cover letter identifying the position for which they would like to be considered. Because Contractor A considers both Internet and traditional expressions of interest for the Mechanical Engineer position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to

Contractor A meet this part of the definition of Internet Applicant for this position.

(ii) Example B: Contractor B posts on its web site an opening for the Accountant II position and encourages potential applicants to complete an online profile if they are interested in being considered for that position. Contractor B also receives a large number of unsolicited paper resumes in the mail each year. Contractor B scans these paper resumes into an internal resume database that also includes all the on-line profiles that individuals completed for various jobs (including possibly for the Accountant II position) throughout the year. To find potential applicants for the Accountant II position, Contractor B searches the internal resume database for individuals who have the basic qualifications for the Accountant II position. Because Contractor B considers both Internet and traditional expressions of interest for the Accountant II position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to the employer meet this part of the definition of Internet Applicant for this position.

(iii) Example C: Contractor C advertises for Mechanics in a local newspaper and instructs interested candidates to mail their resumes to the employer's address. Walk-in applications also are permitted. Contractor C considers only paper resumes and application forms for the Mechanic position, therefore no individual meets this part of the definition of an Internet Applicant for this position.

(3) For purposes of paragraph (1)(ii) of this definition, ''considers the individual for employment in a particular position,'' means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not ''consider the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

(4) For purposes of paragraph (1)(iii) of this definition, ''basic qualifications'' means qualifications—

(i)(A) That the contractor advertises (e.g., posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or

(B) For which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., through an external resume database), and

(ii) That meet all of the following three conditions:

(A) The qualifications must be noncomparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, ''a Bachelor's degree in Accounting'' is objective, while ''a technical degree from a good school'' is not. A basic qualification is objective if a third-party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

(5) For purposes of paragraph (1)(iv) of this definition, a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

Minority group as used herein shall include, where appropriate, female employees and prospective female employees.

Modification means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

Order, *Executive order*, or *Executive Order 11246* means parts II, III, and IV of the Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such order, and any other Executive order superseding such order.

Particular religion means the religion of a particular individual, corporation, association, educational institution, society, school, college, university, or institution of learning, including acceptance of or adherence to sincere religious tenets as understood by the employer as a condition of employment, whether or not the particular religion of an individual employee or applicant is the same as the particular religion of his or her employer or prospective employer.

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract and, for the purposes of subpart B of this part, any person who has held a contract subject to the order.

Qualitative evidence includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs

(OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

Quantitative evidence includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

Recruiting and training agency means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor.

Religion includes all aspects of religious observance and practice, as well as belief.

Religious corporation, association, educational institution, or society. (1) Religious corporation, association, educational institution, or society means a corporation, association, educational institution, society, school, college, university, or institution of learning that:

(i) Is organized for a religious purpose;

(ii) Holds itself out to the public as carrying out a religious purpose;

(iii) Engages in activity consistent with, and in furtherance of, that religious purpose; and

(iv)(A) Operates on a not-for-profit basis; or

(B) Presents other strong evidence that its purpose is substantially religious.

(2) Whether an organization's engagement in activity is consistent with, and in furtherance of, its religious purpose is determined by reference to the organization's own sincere understanding of its religious tenets.

(3) To qualify as religious a corporation, association, educational institution, society, school, college, university, or institution of learning may, or may not: Have a mosque, church, synagogue, temple, or other house of worship; or be supported by, be affiliated with, identify with, or be composed of individuals sharing, any single religion, sect, denomination, or other religious tradition.

(4) The following examples apply this definition to various scenarios. It is assumed in each example that the employer is a federal contractor subject to Executive Order 11246.

(i)(A) *Example.* A closely held for-profit manufacturer makes and sells metal candlesticks and other decorative items. The manufacturer's mission statement asserts that it is committed to providing high-quality candlesticks and similar items to all of its customers, a majority of which are churches and synagogues. Some of the manufacturer's items are also purchased by federal agencies for use during diplomatic events and presentations. The manufacturer regularly consults with ministers and rabbis regarding new designs to ensure that they conform to any religious specifications. The manufacturer also advertises heavily in predominantly religious publications and donates a portion of each sale to charities run by churches and synagogues.

(B) *Application.* The manufacturer likely does not qualify as a religious organization. Although the manufacturer provides goods predominantly for religious communities, the manufacturer's fundamental purpose is secular

and pecuniary, not religious, as evidenced by its mission statement. Because the manufacturer lacks a religious purpose, it cannot carry out activity consistent with that (nonexistent) religious purpose. And while the manufacturer advertises heavily in religious publications and consults with religious functionaries on its designs, the manufacturer does not identify itself, as opposed to its customers, as religious. Finally, given that the manufacturer is a for-profit entity, it would need to make a strong evidentiary showing that it is a religious organization, which it has not.

(ii)(A) *Example.* A nonprofit organization enters government contracts to provide chaplaincy services to military and federal law-enforcement organizations around the country. The contractor is organized as a non-profit, but it charges the military and other clients a fee, similar to fees charged by other staffing organizations, and its manager and employees all collect a market-rate salary. The organization's articles of incorporation state that its purpose is to provide religious services to members of the same faith wherever they may be in the world, and to educate other individuals about the faith. Similar statements of purpose appear on the organization's website and in its bid responses to government requests for proposals. All employees receive weekly emails, and occasionally videos, about ways to promote faith in the workplace. The employee handbook contains several requirements regarding personal and workplace conduct to ensure ''a Christian atmosphere where the Spirit of the Lord can guide the organization's work.''

(B) *Application.* Under these facts, the contractor likely qualifies as a religious organization. The contractor's organizing documents expressly state that its mission is primarily religious in nature. Moreover, the contractor exercises religion through its business activities, which is providing chaplaincy services, and through its hiring and training practices. Through its emails and other communications, the contractor holds itself out as a religious organization to its employees, applicants, and clients. Finally, notwithstanding that the contractor collects a placement fee similar to nonreligious staffing companies, it is organized as a non-profit.

(iii)(A) *Example.* A small catering company provides kosher meals primarily to synagogues and for various events in the Jewish community, but other customers, including federal agencies, sometimes hire the caterer to provide meals for conferences and other events. The company's two owners are Hasidic Jews and its six employees, while not exclusively Jewish, receive instruction in kosher food preparation to ensure such preparation comports with Jewish laws and customs. This additional work raises the company's operating costs higher than were it to provide non-kosher meals. The company's mission statement, which has remained substantially the same since the company was organized, describes its purpose as fulfilling a religious mandate to strengthen the Jewish community and ensure Jewish persons can participate fully in public life by providing kosher meals. The company's ''about us'' page on its website states that above all else, the company seeks to ''honor G-d'' and maintain the strength of the Jewish religion through its kosher meal services. The company also donates a portion of its proceeds to charitable projects sponsored by local Jewish congregations. In its advertising and on its website, the company prominently includes religious symbols and text.

(B) *Application.* The company likely qualifies as a religious organization. The company's mission statement and other materials show a religious purpose. Its predominant business activity of providing kosher meals directly furthers and is wholly consistent with that self-identified religious purpose, as are its hiring and training practices. Through its advertising and website, the company holds itself out as a religious organization. Finally, although the company operates on a for-profit basis, the other facts here show strong evidence that the company operates as a religious organization.

(iv)(A) *Example.* A for-profit collector business sells a wide variety of artistic, cultural, religious, and archeological items. The government purchases some of these from time to time for research

or aesthetic purposes. The business's mission statement provides that its purpose is to curate the world's treasures to perpetuate its historic, cultural, and religious legacy. Most of the business's customers are private individuals or museums interested in the items as display pieces or for their cultural value. The business's marketing materials include examples of religious iconography and artifacts from a variety of world religions, as well as various cultural and artistic items.

(B) *Application*. The business likely does not qualify as a religious organization. Its mission statement references an arguably religious purpose, namely perpetuating the world's religious legacy, but in context that appears to have more to do with religion's historic value rather than evidencing a religious conviction of the business or its owner. Similarly, it is at best unclear whether the business is engaging in activities in furtherance of this purpose when most of its sales serve no religious purpose. Finally, while the business displays some religious items, these appear to be a minor part of the business's overall presentation and do not convey that the business has a religious identity. The factors to qualify as a religious organization do not appear to be met, especially given that the business as a for-profit entity would need to make a strong evidentiary showing that it is a religious organization.

Rules, regulations, and relevant orders of the Secretary of Labor used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Sincere means sincere under the law applied by the courts of the United States when ascertaining the sincerity of a party's religious exercise or belief.

Site of construction means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

Subcontract. (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

Subcontractor means any person holding a subcontract and, for the purposes of subpart B of this part, any person who has held a subcontract subject to the order. The term ''first-tier subcontractor'' refers to a subcontractor holding a subcontract with a prime contractor.

United States as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

(a) *Severability*. Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

(b) [Reserved]

[43 FR 49240, Oct. 20, 1978, as amended at 61 FR 19988, May 3, 1996; 62 FR 44188, Aug. 19, 1997; 62 FR 66971, Dec. 22, 1997; 70 FR 58961, Oct. 7, 2005; 80 FR 54974, Sept. 11, 2015; 85 FR 39846, July 2, 2020; 85 FR 71570, Nov. 10, 2020; 85 FR 79371, Dec. 9, 2020]

§ 60–1.4 Equal opportunity clause.

(a) *Government contracts*. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government

contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided,* however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination

clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided,* That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(2) [Reserved]

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Inclusion of the equal opportunity clause by reference.* The equal opportunity clause may be included by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director of OFCCP may designate.

(e) *Incorporation by operation of the order.* By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

[80 FR 54975, Sept. 11, 2015]

§ 60–1.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, and other than contracts and subcontracts with depositories of Federal funds in any amount and with financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. No agency, contractor, or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause: *Provided,* that where a contractor has contracts or subcontracts with the Government in any 12-month period which have an aggregate total value (or can reasonably be expected to have an aggregate total value) exceeding $10,000, the $10,000 or under exemption does not apply, and the contracts are subject to the order and the regulations issued pursuant thereto regardless of whether any single contract exceeds $10,000.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, ''call-type'' contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, any agency, instrumentality or subdivision of such government, except for educational institutions and medical facilities, are exempt from the requirements of filing the annual compliance report provided for by § 60–1.7(a)(1) and maintaining a written affirmative action compliance program prescribed by § 60–1.40 and part 60–2 of this chapter.

(5) *Contracts with religious entities.* Section 202 of Executive Order 11246, as amended, shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

(6) *Contracts with certain educational institutions.* It shall not be a violation of the equal opportunity clause for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation,

association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion. The primary thrust of this provision is directed at religiously oriented church-related colleges and universities and should be so interpreted.

(7) *Work on or near Indian reservations.* It shall not be a violation of the equal opportunity clause for a construction or nonconstruction contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. The use of the word ''near'' would include all that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors or subcontractors extending such a preference shall not, however, discriminate among Indians on the basis of religion, sex, or tribal affiliation, and the use of such a preference shall not excuse a contractor from complying with the other requirements contained in this chapter.

(b) *Specific contracts and facilities*—(1) *Specific contracts.* The Director may exempt an agency or any person from requiring the inclusion of any or all of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so require. The Director may also exempt groups or categories of contracts or subcontracts of the same type where he finds it impracticable to act upon each request individually or where group exemptions will contribute to convenience in the administration of the order.

(2) *Facilities not connected with contracts.* The Director may exempt from the requirements of the equal opportunity clause any of a prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

(c) *National security.* Any requirement set forth in these regulations in this part shall not apply to any contract or subcontract whenever the head of an agency determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the head of the agency will notify the Director in writing within 30 days.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Director may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when in his judgment such action is necessary or appropriate to achieve the purposes of the order. Such withdrawal shall not apply to contracts or subcontracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(e) *Broad interpretation.* This subpart shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the U.S. Constitution and law, including the Religious Freedom Restoration Act of 1993, as amended, 42 U.S.C. 2000bb *et seq.*

(f) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978, as amended at 62 FR 66971, Dec. 22, 1997; 68 FR 56393, Sept. 30, 2003; 85 FR 79372, Dec. 9, 2020]

§ 60–1.6 [Reserved]

§ 60–1.7 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.* (1) Each prime contractor and subcontractor shall file annually, on or before the September 30, complete and accurate reports on Standard Form 100 (EEO–1) promulgated jointly by the Office of Federal Contract Compliance Programs, the

Equal Employment Opportunity Commission and Plans for Progress or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with § 60–1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and (iv) has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided*, That any subcontractor below the first tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of paragraphs (a)(1) (i), (ii), and (iv) of this section.

(2) Each person required by § 60–1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with § 60–1.7(a)(1), or at such other intervals as the Director may require. The Director may extend the time for filing any report.

(3) The Director or the applicant, on their own motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Director, an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and the regulations in this part.

(b) *Requirements for bidders or prospective contractors*—(1) *Certification of compliance with part 60–2: Affirmative Action Programs*. Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract: (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to part 60–2 of this chapter; (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; (iii) whether it has filed with the Joint Reporting Committee, the Director or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information*. A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the applicant or the Director requests.

(c) *Use of reports*. Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.8 Segregated facilities.

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term ''facilities,'' as used in

this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; Provided, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

[79 FR 72994, Dec. 9, 2014]

§ 60–1.9 Compliance by labor unions and by recruiting and training agencies.

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to cooperate with, and to comply in the implementation of, the purposes of the order.

(c) In order to effectuate the purposes of paragraph (a) of this section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to cooperate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.10 Foreign government practices.

Contractors shall not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are exempted from this obligation only when hiring persons outside the United States for work to be performed outside the United States (see 41 CFR 60–1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, sexual orientation, gender identity, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Director of such refusal.

[79 FR 72994, Dec. 9, 2014]

§ 60–1.11 Payment or reimbursement of membership fees and other expenses to private clubs.

(a)(1) A contractor which maintains a policy or practice of paying membership fees or other expenses for employee participation in private clubs or organizations shall ensure that the policy or practice is administered without regard to the race, color, religion, sex, or national origin of employees.

(2) Payment or reimbursement by contractors of membership fees and other expenses for participation by

their employees in a private club or organization which bars, restricts or limits its membership on the basis of race, color, sex, religion, or national origin constitutes a violation of Executive Order 11246 except where the contractor can provide evidence that such restrictions or limitations do not abridge the promotional opportunities, status, compensation or other terms and conditions of employment of those of its employees barred from membership because of their race, color, religion, sex, or national origin. OFCCP shall provide the contractor with the opportunity to present evidence in defense of its actions.

(b) The contractor has the responsibility of determining whether the club or organization restricts membership on the basis of race, color, religion, sex, or national origin. The contractor may make separate determinations for different chapters of an organization, and where it does so, may limit any necessary corrective action to the particular chapters which observe discriminatory membership policies and practices.

[46 FR 3896, Jan. 16, 1981]

EFFECTIVE DATE NOTE: At 46 FR 3896, Jan. 16, 1981, § 60–1.11 was added. At 46 FR 18951, Mar. 27, 1981, the effective date was deferred until further notice.

§ 60–1.12 Record retention.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position (for purposes of recordkeeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; for purposes of recordkeeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor), regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3, tests and test results, and interview notes. The term ''personnel records relevant to the complaint,'' for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers submitted by unsuccessful applicants and by all other candidates for the same position as that for which the complainant unsuccessfully applied. Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation.

(b) *Affirmative action programs.* A contractor establishment required under § 60–1.40 to develop and maintain a written affirmative action program (AAP) must maintain its current AAP and documentation of good faith effort,

and must preserve its AAP and documentation of good faith effort for the immediately preceding AAP year, unless it was not then covered by the AAP requirement.

(c) *Contractor identification of record.* (1) For any record the contractor maintains pursuant to this section, the contractor must be able to identify:

(i) The gender, race, and ethnicity of each employee; and

(ii) Where possible, the gender, race, and ethnicity of each applicant or Internet Applicant as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.

(2) The contractor must supply this information to the Office of Federal Contract Compliance Programs upon request.

(d) *Adverse impact evaluations.* When evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under part 60–3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants, as defined in 41 CFR 60–1.3, and those records relating to the analyses of the impact of employment tests that are used as employee selection procedures, without regard to whether the tests were administered to Internet Applicants, as defined in 41 CFR 60–1.3.

(e) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraphs (a) through (c) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control.

[65 FR 68042, Nov. 13, 2000, as amended at 70 FR 58962, Oct. 7, 2005]

Subpart B—General Enforcement; Compliance Review and Complaint Procedure

§ 60–1.20 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices, except in the case of preaward reviews. In a preaward review, the desk audit normally is conducted at the contractor's establishment.

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with

employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.

(2) *Off-site review of records.* An analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60–1.12; at the contractor's option the documents may be provided either on-site or off-site; or

(4) *Focused review.* An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(c) [Reserved]

(d) *Preaward compliance evaluations.* Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total $10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of $10 million or more shall be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with the Order within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a preaward compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward compliance evaluation, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.

(e) *Submission of Documents; Standard Affirmative Action Formats.* Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments (§ 60–1.40). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in § 60–1.26(b) shall be applicable. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.

(f) *Confidentiality and relevancy of information.* If the contractor is concerned with the confidentiality of such information as lists of employee names, reasons for termination, or pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for purposes of the compliance

evaluation. The contractor must provide full access to all relevant data on-site as required by § 60–1.43. Where necessary, the compliance officer may take information made available during the on-site evaluation off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made. The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis. Such data may only be coded if the contractor makes the key to the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director. The OFCCP District/Area Director shall issue a ruling within 10 days. The contractor may appeal that ruling to the OFCCP Regional Director within 10 days. The Regional Director shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (g) of this section. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied by OFCCP and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(g) *Public Access to Information.* OFCCP will treat information obtained in the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978, as amended at 62 FR 44189, Aug. 19, 1997; 70 FR 36265, June 22, 2005; 79 FR 72994, Dec. 9, 2014]

§ 60–1.21 Filing complaints.

Complaints shall be filed within 180 days of the alleged violation unless the time for filing is extended by the Director for good cause shown.

[43 FR 49240, Oct. 20, 1978; 43 FR 51400, Nov. 3, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.22 Where to file.

Complaints may be filed with the OFCCP, 200 Constitution Avenue, NW., Washington, DC 20210, or with any OFCCP regional or area office.

§ 60–1.23 Contents of complaint.

(a) The complaint shall include the name, address, and telephone number of the complainant, the name and address of the contractor or subcontractor committing the alleged discrimination, a description of the acts considered to be discriminatory, and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his/her authorized representative. Complaints alleging class-type violations which do not identify the alleged discriminatee or discriminatees will be accepted, provided the other requirements of this paragraph are met.

(b) If a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. In the event such information is not furnished to the Director within 60 days of the date of such request, the case may be closed.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.24 Processing of matters.

(a) *Complaints.* OFCCP may refer appropriate complaints to the Equal Employment Opportunity Commission (EEOC) for processing under Title VII of the Civil Rights Act of 1964, as amended, rather than processing under

E.O. 11246 and the regulations in this chapter. Upon referring complaints to the EEOC, OFCCP shall promptly notify complainant(s) and the contractor of such referral.

(b) *Complaint investigations.* In conducting complaint investigations, OFCCP shall, as a minimum, conduct a thorough evaluation of the allegations of the complaint and shall be responsible for developing a complete case record. The case record should contain the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, a reference to at least one covered contract, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations.

(c)(1) [Reserved]

(2) If any complaint investigation or compliance review indicates a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the Director shall proceed in accordance with § 60–1.26.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within ten days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action.

(5) For reasonable cause shown, the Director may reconsider or cause to be reconsidered any matter on his/her own motion or pursuant to a request.

(d) *Reports to the Director.* (1) With the exception of complaints which have been referred to EEOC, within 60 days from receipt of a complaint or within such additional time as may be allowed by the Director for good cause shown, the complaint shall be processed and the case record developed containing the following information:

(i) Name and address of the complainant;

(ii) Brief summary of findings, including a statement regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause;

(iii) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

(2) A written report of every preaward compliance review required by this regulation or otherwise required by the Director, shall be developed and maintained.

(3) A written report of every other compliance review or any other matter processed involving an apparent violation of the equal opportunity clause shall be made. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.25 Assumption of jurisdiction by or referrals to the Director.

The Director may inquire into the status of any matter pending before an agency. Where he considers it necessary or appropriate to the achievement of the purposes of the order, he may assume jurisdiction over the matter and proceed as provided herein. Whenever the Director assumes jurisdiction over any matter, or an agency refers any matter he may conduct, or have conducted, such investigations, hold such hearings, make such findings, issue such recommendations and directives, order such sanctions and penalties, and take such other action as may be necessary or appropriate to achieve the purposes of the order. The Director shall promptly notify the agency of any corrective action to be taken or any sanctions to be taken or

any sanction to be imposed by the agency. The agency shall take such action, and report the results thereof to the Director within the time specified.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.26 Enforcement proceedings.

(a) *General*. (1) Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings. Violations may be found based upon, *inter alia*, any of the following:

(i) The results of a complaint investigation;

(ii) The results of a compliance evaluation;

(iii) Analysis of an affirmative action program;

(iv) The results of an on-site review of the contractor's compliance with the Order and its implementing regulations;

(v) A contractor's refusal to submit an affirmative action program;

(vi) A contractor's refusal to allow an on-site compliance evaluation to be conducted;

(vii) A contractor's refusal to provide data for off-site review or analysis as required by the regulations in this chapter;

(viii) A contractor's refusal to establish, maintain and supply records or other information as required by the regulations in this chapter or applicable construction industry requirements;

(ix) A contractor's alteration or falsification of records and information required to be maintained by the regulations in this chapter; or

(x) Any substantial or material violation or the threat of a substantial or material violation of the contractural provisions of the Order, or of the rules or regulations in this chapter.

(2) OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.

(b) *Administrative enforcement*. (1) OFCCP may refer matters to the Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate. However, if a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review, and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter.

(2) Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60–30 of this chapter and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a Final Administrative Order shall be issued within on year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any), whichever is later.

(c) *Referrals to the Department of Justice*. (1) The Director may refer matters to the Department of Justice with a recommendation for the institution of judicial enforcement proceedings. There are no procedural prerequisites

to a referral to the Department of Justice. Such referrals may be accomplished without proceeding through the conciliation procedures in this chapter, and a referral may be made at any stage in the procedures under this chapter.

(2) Whenever a matter has been referred to the Department of Justice for consideration of judicial enforcement, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction (including relief against noncontractors, including labor unions, who seek to thwart the implementation of the Order and regulations), and an order for such additional sanctions or relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above in this paragraph (c)(2).

(3) The Attorney General is authorized to conduct such investigation of the facts as he/she deem necessary or appropriate to carry out his/her responsibilities under the regulations in this chapter.

(4) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Director, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. The Attorney General may do so by providing the contractor and any other respondent with reasonable notice of his/her findings, his/her intent to file suit, and the actions he/she believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(5) As used in the regulations in this part, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(6) The Director or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(d) *Initiation of lawsuits by the Attorney General without referral from the Director.* In addition to initiating lawsuits upon referral under this section, the Attorney General may, subject to approval by the Director, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he/she shall make reasonable efforts to secure compliance with the contract provisions of the Order. He/she may do so by providing the contractor and any other respondent with reasonable notice of the Department of Justice's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Director, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional sanctions or equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above in this paragraph (d).

(e) To the extent applicable, this section and part 60–30 of this chapter shall govern proceedings resulting from any Director's determinations under § 60–2.2(b) of this chapter.

[62 FR 44190, Aug. 19, 1997, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.27 Sanctions.

(a) *General*. The sanctions described in subsections (1), (5), and (6) of section 209(a) of the Order may be exercised only by or with the approval of the Director. Referral of any matter arising under the Order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Director.

(b) *Debarment*. A contractor may be debarred from receiving future contracts or modifications or extensions of existing contracts, subject to reinstatement pursuant to § 60–1.31, for any violation of Executive Order 11246 or the implementing rules, regulations and orders of the Secretary of Labor. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

[62 FR 44191, Aug. 19, 1997]

§ 60–1.28 Show cause notices.

When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause he may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.29 Preaward notices.

(a) *Preaward compliance reviews*. Upon the request of the Director, agencies shall not enter into contracts or approve the entry into contracts or subcontracts with any bidder, prospective prime contractor, or proposed subcontractor named by the Director until a preaward compliance review has been conducted and the Director or his designee has approved a determination that the bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the equal opportunity clause.

(b) *Other special preaward procedures*. Upon the request of the Director, agencies shall not enter into contracts or approve the entry into subcontracts with any bidder; prospective prime contractor or proposed subcontractor specified by the Director until the agency has complied with the directions contained in the request.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.30 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarment taken against any contractor.

[62 FR 44191, Aug. 19, 1997]

§ 60–1.31 Reinstatement of ineligible contractors.

A contractor debarred from further contracts for an indefinite period under the Order may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment. A contractor debarred for a fixed period may request reinstatement in a letter filed with the Director 30 days prior to the expiration of the fixed debarment period, or at any time thereafter. The filing of a reinstatement request 30 days before a fixed debarment period ends will not result in early reinstatement. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Order and implementing regulations. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

[62 FR 44192, Aug. 19, 1997]

§ 60–1.32 Intimidation and interference.

(a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate

against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;

(3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or

(4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

[62 FR 44192, Aug. 19, 1997]

§ 60–1.33 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may

withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

(e) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[85 FR 71571, Nov. 10, 2020]

§ 60–1.34 Violation of a Conciliation Agreement.

When a conciliation agreement has been violated, the following procedures are applicable:

(a) A written notice shall be sent to the contractor setting forth the violations alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(b) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(c) If the contractor is unable to demonstrate that it has not violated its commitments, or if the complaint alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement contained in this chapter.

(d) In any proceeding involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

(E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086)

[44 FR 77002, Dec. 28, 1979, as amended at 62 FR 44192, Aug. 19, 1997; 70 FR 36265, June 22, 2005]

§ 60–1.35 Contractor obligations and defenses to violation of the nondiscrimination requirement for compensation disclosures.

(a) *General defenses.* A contractor may pursue a defense to an alleged violation of paragraph (3) of the equal opportunity clauses listed in § 60–1.4(a) and (b) as long as the defense is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants, subject to paragraph (3) of the equal opportunity clause. Contractors may pursue this defense by demonstrating, for example, that it disciplined the employee for violation of a consistently and uniformly applied company policy, and that this policy does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.

(b) *Essential job functions defense.* Actions taken by a contractor which adversely affect an employee will not be deemed to be discriminatory if the employee has access to the compensation information of other employees or applicants as part of such employee's essential job functions and disclosed the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, and the disclosure was not in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the contractor, or is consistent with the contractor's legal duty to furnish information.

(c) *Dissemination of nondiscrimination provision.* The contractor or subcontractor shall disseminate the nondiscrimination provision, using the language as prescribed by the Director of OFCCP, to employees and applicants:

(1) The nondiscrimination provision shall be incorporated into existing employee manuals or handbooks; and

(2) The nondiscrimination provision shall be disseminated to employees and applicants. Dissemination of the provision shall be executed by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

[80 FR 54977, Sept. 11, 2015]

Subpart C—Ancillary Matters

§ 60–1.40 Affirmative action programs.

(a)(1) Each nonconstruction (supply and service) contractor must develop and maintain a written affirmative action program for each of its establishments, if it has 50 or more employees and:

(i) Has a contract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(2) Each contractor and subcontractor must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a subcontract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(b) Nonconstruction contractors should refer to part 60–2 for specific affirmative action requirements. Construction contractors should refer to part 60–4 for specific affirmative action requirements.

[65 FR 68042, Nov. 13, 2000]

§ 60–1.41 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause in § 60–1.4 shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase ''an equal opportunity employer.''

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997; 79 FR 72994, Dec. 9, 2014]

§ 60–1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Director, the notices which contractors are required to post by paragraphs (1) and (3) of the equal opportunity clause in § 60–1.4 will contain the following language and be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER NO. 11246

Title VII of the Civil Rights Act of 1964—*Administered by:*

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 15 or more employees, by Labor Organizations, by Employment Agencies, and by Apprenticeship or Training Programs

Any person who believes he or she has been discriminated against should contact

The Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20507

Executive Order No. 11246—*Administered by:*

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Prohibits discrimination because of Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

Any person who believes he or she has been discriminated against should contact

The Office of Federal Contract Compliance Programs, U.S. Department of Labor, Washington, DC 20210

[79 FR 72995, Dec. 9, 2014]

§ 60–1.43 Access to records and site of employment.

Each contractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance evaluations and complaint investigations. Each contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Director. Information obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP.

[62 FR 44192, Aug. 19, 1997]

§ 60–1.44 Rulings and interpretations.

Rulings under or interpretations of the order or the regulations contained in this part shall be made by the Secretary or his designee.

§ 60–1.45 Existing contracts and subcontracts.

All contracts and subcontracts in effect prior to October 24, 1965, which are not subsequently modified shall be administered in accordance with the nondiscrimination provisions of any prior applicable Executive orders. Any contract or subcontract modified on or after October 24, 1965, shall be subject to Executive Order 11246. Complaints received by and violations coming to the attention of agencies regarding contracts and subcontracts which were subject to Executive Orders 10925 and 11114 shall be processed as if they were complaints regarding violations of this order.

§ 60–1.46 Delegation of authority by the Director.

The Director is authorized to redelegate the authority given to him by the regulations in this part. The authority redelegated by the Director pursuant to the regulations in this part shall be exercised under his general direction and control.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60–1.47 Effective date.

The regulations contained in this part shall become effective July 1, 1968, for all contracts, the solicitations, invitations for bids, or requests for proposals which were sent by the Government or an applicant on or after said effective date, and for all negotiated contracts which have not been executed as of said effective date. Notwithstanding the foregoing, the regulations in this part shall become effective as to all contracts executed on and after the 120th day following said effective date. Subject to any prior approval of the Secretary, any agency may defer the effective date of the regulations in this part, for such period of time as the Secretary finds to be reasonably necessary. Contracts executed prior to the effective date of the regulations in this part shall be governed by the regulations promulgated by the former President's Committee on Equal Employment Opportunity which appear at 28 FR 9812, September 2, 1963, and at 28 FR 11305, October 23, 1963, the temporary regulations which appear at 30 FR 13441, October 22, 1965, and the orders at 31 FR 6881, May 10, 1966, and 32 FR 7439, May 19, 1967.

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

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AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971.

SOURCE: 65 FR 68042, Nov. 13, 2000, unless otherwise noted.

Subpart A—General

§ 60–2.1 Scope and application.

(a) *General.* The requirements of this part apply to nonconstruction (supply and service) contractors. The regulations prescribe the contents of affirmative action programs, standards and procedures for evaluating the compliance of affirmative action programs implemented pursuant to this part, and related matters.

(b) *Who must develop affirmative action programs.* (1) Each nonconstruction contractor must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a contract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(2) Each contractor and subcontractor must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a subcontract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(c) *When affirmative action programs must be developed.* The affirmative action programs required under paragraph (b) of this section must be developed within 120 days from the commencement of a contract and must be updated annually.

(d) *Who is included in affirmative action programs.* Contractors subject to the affirmative action program requirements must develop and maintain a written affirmative action program for each of their establishments. Each employee in the contractor's workforce must be included in an affirmative action program. Each employee must be included in the affirmative action program of the establishment at which he or she works, except that:

(1) Employees who work at establishments other than that of the manager to whom they report, must be included in the affirmative action program of their manager.

(2) Employees who work at an establishment where the contractor employs fewer than 50 employees, may be included under any of the following three options: In an affirmative action program which covers just that establishment; in the affirmative action program which covers the location of the personnel function which supports the establishment; or, in the affirmative action program which covers the location of the official to whom they report.

(3) Employees for whom selection decisions are made at a higher level establishment within the organization must be included in the affirmative action program of the establishment where the selection decision is made.

(4) If a contractor wishes to establish an affirmative action program other than by establishment, the contractor may reach agreement with OFCCP on

the development and use of affirmative action programs based on functional or business units. The Director, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

(e) *How to identify employees included in affirmative action programs other than where they are located.* If pursuant to paragraphs (d)(1) through (3) of this section employees are included in an affirmative action program for an establishment other than the one in which the employees are located, the organizational profile and job group analysis of the affirmative action program in which the employees are included must be annotated to identify the actual location of such employees. If the establishment at which the employees actually are located maintains an affirmative action program, the organizational profile and job group analysis of that program must be annotated to identify the program in which the employees are included.

[65 FR 68042, Nov. 13, 2000, as amended at 85 FR 71572, Nov. 10, 2020]

§ 60–2.2 Agency action.

(a) Any contractor required by § 60–2.1 to develop and maintain a written affirmative action program for each of its establishments that has not complied with that section is not in full compliance with Executive Order 11246, as amended. When a contractor is required to submit its affirmative action program to OFCCP (e.g., for a compliance evaluation), the affirmative action program will be deemed to have been accepted by the Government at the time OFCCP notifies the contractor of completion of the compliance evaluation or other action, unless within 45 days thereafter the Deputy Assistant Secretary has disapproved such program.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his/her agency or through the OFCCP or other Government agencies, that the contractor does not have an affirmative action program at each of its establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer must declare the contractor/bidder nonresponsible and so notify the contractor and the Deputy Assistant Secretary, unless the contracting officer otherwise affirmatively determines that the contractor is able to comply with the equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Deputy Assistant Secretary to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request must set forth the basis upon which the contractor/bidder seeks such a determination. If the Director, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60–1.26; or the Deputy Assistant Secretary may require the investigation or compliance evaluation be developed further or additional conciliation be conducted: Provided, That during any pre-award conferences, every effort will be made through the processes of conciliation, mediation, and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in this part so that, in the performance of the contract, the contractor is able to meet its equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: Provided further, That a contractor/bidder may not be declared nonresponsible more than twice due to past noncompliance with the equal opportunity clause at a particular establishment or facility without receiving prior notice and an opportunity for a hearing.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action

program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, that fact shall be recorded in the investigation file. Except as provided in § 60–1.26(b)(1), whenever administrative enforcement is contemplated, the notice to the contractor shall be issued giving the contractor 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts, or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for its failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the case file shall be processed for enforcement proceedings pursuant to § 60–1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with part 60–30 of this chapter.

(3) During the ''show cause'' period of 30 days, every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the case shall be processed for enforcement proceedings pursuant to § 60–1.26 of this chapter.

(d) During the ''show cause'' period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

[65 FR 68042, Nov. 13, 2000, as amended at 85 FR 71572, Nov. 10, 2020]

Subpart B—Purpose and Contents of Affirmative Action Programs

§ 60–2.10 General purpose and contents of affirmative action programs.

(a) *Purpose.* (1) An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action-oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination.

(2) An affirmative action program also ensures equal employment opportunity by institutionalizing the contractor's commitment to equality in every aspect of the employment process. Therefore, as part of its affirmative action program, a contractor monitors and examines its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.

(3) An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination.

(b) *Contents of affirmative action programs.* (1) An affirmative action program must include the following quantitative analyses:

(i) Organizational profile—§ 60–2.11;

(ii) Job group analysis—§ 60–2.12;

(iii) Placement of incumbents in job groups—§ 60–2.13;

(iv) Determining availability—§ 60–2.14;

(v) Comparing incumbency to availability—§ 60–2.15; and

(vi) Placement goals—§ 60–2.16.

(2) In addition, an affirmative action program must include the following components specified in the § 60–2.17 of this part:

(i) Designation of responsibility for implementation;

(ii) Identification of problem areas;

(iii) Action-oriented programs; and

(iv) Periodic internal audits.

(c) *Documentation.* Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60–2.11 through 60–2.17.

§ 60–2.11 Organizational profile.

(a) *Purpose.* An organizational profile is a depiction of the staffing pattern within an establishment. It is one method contractors use to determine whether barriers to equal employment opportunity exist in their organizations. The profile provides an overview of the workforce at the establishment that may assist in identifying organizational units where women or minorities are underrepresented or concentrated. The contractor must use either the organizational display or the workforce analysis as its organizational profile:

(b) *Organizational display.* (1) An organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of the contractor's organizational structure. The organizational display must identify each organizational unit in the establishment, and show the relationship of each organizational unit to the other organizational units in the establishment.

(2) An organizational unit is any component that is part of the contractor's corporate structure. In a more traditional organization, an organizational unit might be a department, division, section, branch, group or similar component. In a less traditional organization, an organizational unit might be a project team, job family, or similar component. The term includes an umbrella unit (such as a department) that contains a number of subordinate units, and it separately includes each of the subordinate units (such as sections or branches).

(3) For each organizational unit, the organizational display must indicate the following:

(i) The name of the unit;

(ii) The job title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor);

(iii) The total number of male and female incumbents; and

(iv) the total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.

(c) *Workforce analysis.* (1) A workforce analysis is a listing of each job title as appears in applicable collective bargaining agreements or payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision.

(2) If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated

the order of jobs in the line through which an employee could move to the top of the line.

(3) Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(4) For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

§ 60–2.12 Job group analysis.

(a) Purpose: A job group analysis is a method of combining job titles within the contractor's establishment. This is the first step in the contractor's comparison of the representation of minorities and women in its workforce with the estimated availability of minorities and women qualified to be employed.

(b) In the job group analysis, jobs at the establishment with similar content, wage rates, and opportunities, must be combined to form job groups. Similarity of content refers to the duties and responsibilities of the job titles which make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the job group.

(c) The job group analysis must include a list of the job titles that comprise each job group. If, pursuant to § 60–2.1(d) and (e) the job group analysis contains jobs that are located at another establishment, the job group analysis must be annotated to identify the actual location of those jobs. If the establishment at which the jobs actually are located maintains an affirmative action program, the job group analysis of that program must be annotated to identify the program in which the jobs are included.

(d) Except as provided in § 60–2.1(d), all jobs located at an establishment must be reported in the job group analysis of that establishment.

(e) Smaller employers: If a contractor has a total workforce of fewer than 150 employees, the contractor may prepare a job group analysis that utilizes EEO–1 categories as job groups. EEO–1 categories refers to the nine occupational groups used in the Standard Form 100, the Employer Information EEO–1 Survey: Officials and managers, professionals, technicians, sales, office and clerical, craft workers (skilled), operatives (semiskilled), laborers (unskilled), and service workers.

§ 60–2.13 Placement of incumbents in job groups.

The contractor must separately state the percentage of minorities and the percentage of women it employs in each job group established pursuant to § 60–2.12.

§ 60–2.14 Determining availability.

(a) Purpose: Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups.

(b) The contractor must separately determine the availability of minorities and women for each job group.

(c) In determining availability, the contractor must consider at least the following factors:

(1) The percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question.

(2) The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization. Trainable refers

to those employees within the contractor's organization who could, with appropriate training which the contractor is reasonably able to provide, become promotable or transferable during the AAP year.

(d) The contractor must use the most current and discrete statistical information available to derive availability figures. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions.

(e) The contractor may not draw its reasonable recruitment area in such a way as to have the effect of excluding minorities or women. For each job group, the reasonable recruitment area must be identified, with a brief explanation of the rationale for selection of that recruitment area.

(f) The contractor may not define the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women. For each job group, the pool of promotable, transferable, and trainable employees must be identified with a brief explanation of the rationale for the selection of that pool.

(g) Where a job group is composed of job titles with different availability rates, a composite availability figure for the job group must be calculated. The contractor must separately determine the availability for each job title within the job group and must determine the proportion of job group incumbents employed in each job title. The contractor must weight the availability for each job title by the proportion of job group incumbents employed in that job group. The sum of the weighted availability estimates for all job titles in the job group must be the composite availability for the job group.

§ 60–2.15 Comparing incumbency to availability.

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to § 60–2.13 with the availability for those job groups determined pursuant to § 60–2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with § 60–2.16.

§ 60–2.16 Placement goals.

(a) Purpose: Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity.

(b) A contractor's determination under § 60–2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination.

(c) Where, pursuant to § 60–2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group.

(d) The placement goal-setting process described above contemplates that contractors will, where required, establish a single goal for all minorities. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor may be required to establish separate goals for those groups.

(e) In establishing placement goals, the following principles also apply:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they

intended to achieve proportional representation or equal results.

(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

(f) A contractor extending a publicly announced preference for American Indians as is authorized in 41 CFR 60–1.5(a)(6) may reflect in its placement goals the permissive employment preference for American Indians living on or near an Indian reservation.

[65 FR 68042, Nov. 13, 2000, as amended at 79 FR 72995, Dec. 9, 2014]

§ 60–2.17 Additional required elements of affirmative action programs.

In addition to the elements required by § 60–2.10 through § 60–2.16, an acceptable affirmative action program must include the following:

(a) *Designation of responsibility*. The contractor must provide for the implementation of equal employment opportunity and the affirmative action program by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official's sole responsibility. He or she must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program.

(b) *Identification of problem areas*. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

(1) The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (*i.e.*, employment in the unit or group), or of minority or female distribution (*i.e.*, placement in the different jobs within the unit or group);

(2) Personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;

(3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;

(4) Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and

(5) Any other areas that might impact the success of the affirmative action program.

(c) *Action-oriented programs*. The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60–2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

(d) *Internal audit and reporting system*. The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:

(1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;

(2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;

(3) Review report results with all levels of management; and

(4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60–2.18 [Reserved]

Subpart C—Miscellaneous

§ 60–2.30 Corporate management compliance evaluations.

(a) Purpose. Corporate Management Compliance Evaluations are designed to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management, *i.e.*, glass ceiling. During Corporate Management Compliance Evaluations, special attention is given to those components of the employment process that affect advancement into mid-and senior-level positions.

(b) If, during the course of a Corporate Management Compliance Evaluation, it comes to the attention of OFCCP that problems exist at establishments outside the corporate headquarters, OFCCP may expand the compliance evaluation beyond the headquarters establishment. At its discretion, OFCCP may direct its attention to and request relevant data for any and all areas within the corporation to ensure compliance with Executive Order 11246.

§ 60–2.31 Program summary.

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be prescribed by the Director and published in the FEDERAL REGISTER as a notice before becoming effective. Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

[65 FR 68042, Nov. 13, 2000, as amended at 85 FR 71572, Nov. 10, 2020]

§ 60–2.32 Affirmative action records.

The contractor must make available to the Office of Federal Contract Compliance Programs, upon request, records maintained pursuant to § 60–1.12 of this chapter and written or otherwise documented portions of AAPs maintained pursuant to § 60–2.10 for such purposes as may be appropriate to the fulfillment of the agency's responsibilities under Executive Order 11246.

§ 60–2.33 Preemption.

To the extent that any state or local laws, regulations or ordinances, including those that grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, they will be regarded as preempted under the Executive Order.

§ 60–2.34 Supersedure.

All orders, instructions, regulations, and memorandums of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent with this part 60–2.

§ 60–2.35 Compliance status.

No contractor's compliance status will be judged alone by whether it reaches its goals. The composition of the contractor's workforce (*i.e.*, the employment of minorities or women at a percentage rate below, or above, the goal level) does not, by itself, serve as a basis to impose any of the sanctions authorized by Executive Order 11246 and the regulations in this chapter. Each contractor's compliance with its affirmative action obligations will be determined by reviewing the nature and extent of the contractor's good faith affirmative action activities as required under § 60–2.17, and the appropriateness of those activities to identified equal employment opportunity problems. Each contractor's compliance with its nondiscrimination obligations will be determined by analysis of statistical data and other non-statistical information which would indicate whether employees and applicants are being treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

[79 FR 72995, Dec. 9, 2014]

PART 60–3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

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APPENDIX TO PART 60–3

60–3.17 Policy statement on affirmative action (see section 13B).
60–3.18 Citations.

AUTHORITY: Secs. 201, 202, 203, 203(a), 205, 206(a), 301, 303(b), and 403(b) of E.O. 11246; as amended by sec. 715 of Civil Rights Act of 1964, as amended (42 U.S.C. 2000(e)–14).

SOURCE: 43 FR 38295, 38314, August 25, 1978, unless otherwise noted.

GENERAL PRINCIPLES

§ 60–3.1 Statement of purpose.

A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

§ 60–3.2 Scope.

A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter ''Title VII''); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter ''Executive Order 11246''); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions*. These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures*. These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations*. These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected*. These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

§ 60–3.3 Discrimination defined: Relationship between use of selection procedures and discrimination.

A. *Procedure having adverse impact constitutes discrimination unless justified*. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 of this part are satisfied.

B. *Consideration of suitable alternative selection procedures*. Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse

impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

§ 60–3.4 Information on impact.

A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B of this section in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO–1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), of this part.

C. *Evaluation of selection rates. The ''bottom line.''* If the information called for by sections 4A and B of this section shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in paragraphs (1) and (2) of this section, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the ''four-fifths rule.''* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse

impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

§ 60–3.5 General standards for validity studies.

A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 of this part. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See 14B of this part. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C of this part. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D of this part.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in

Education (American Psychological Association, Washington, D.C., 1974) (hereinafter ''A.P.A. Standards'') and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 of this part.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H of this section), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A ''reasonable period of time'' will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action,

nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency*. Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B of this part. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

§ 60–3.6 Use of selection procedures which have not been validated.

A. *Use of alternate selection procedures to eliminate adverse impact*. A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 of this part. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed*. There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used*. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used*. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

§ 60–3.7 Use of other validity studies.

A. *Validity studies not conducted by the user*. Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C of this part), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources*. Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence*. Evidence from the available studies meeting the standards of section 14B of this part clearly demonstrates that the selection procedure is valid;

(2) *Job similarity*. The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence*. The studies include a study of test fairness for each

race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy paragraphs (1) and (2) of this section but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study*. if validity evidence from a study covering more than one unit within an organization statisfies the requirements of section 14B of this part, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables*. If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 of this part.

§ 60–3.8 Cooperative studies.

A. *Encouragement of cooperative studies*. The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies*. If validity evidence from a cooperative study satisfies the requirements of section 14 of this part, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

§ 60–3.9 No assumption of validity.

A. *Unacceptable substitutes for evidence of validity*. Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision*. Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

§ 60–3.10 Employment agencies and employment services.

A. *Where selection procedures are devised by agency*. An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

§ 60–3.11 Disparate treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

§ 60–3.12 Retesting of applicants.

Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

§ 60–3.13 Affirmative action.

A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's ''Policy Statement on Affirmative Action Programs for State and Local Government Agencies'' (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

TECHNICAL STANDARDS

§ 60–3.14 Technical standards for validity studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude

the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 of this part.

A. *Validity studies should be based on review of information about the job*. Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) of this section with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies*—(1) *Technical feasibility*. Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job*. There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures*. Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample*. Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity

study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors reman the same, the greater the magnitude of the relationship (e.g., correlation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in

scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 of this part and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

(1) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(2) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is

a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in paragraph 14C(4) of this section, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of

concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (*i.e.*, a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies*—(1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behav- iors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) of this section. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of paragraph 14B of this section.

(4) *Use of construct validity study without new criterion-related evidence*—(a)

Standards for use. Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies paragraph 14B of this section only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) of this section for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) of this section for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

DOCUMENTATION OF IMPACT AND VALIDITY EVIDENCE

§ 60–3.15 Documentation of impact and validity evidence.

A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) of this section should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, *et seq.*, reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 of this part) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section 4 of this part) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) of this

part should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by section 4B of this part. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) of this section. If the determination of adverse impact is made using a procedure other than the ''four-fifths rule,'' as defined in the first sentence of section 4D of this part, a justification, consistent with section 4D of this part, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 of this part, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in paragraph 15(A)(2)(a) of this part until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 of this part, or until the job has changed substantially.

(3) *Documentation of validity evidence*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 of this part) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, of this section).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, of this section).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, of this section).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, of this section).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an

enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word ''(Essential)'' is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading ''Source Data'' in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies*. Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study*. Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting*. An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis or review of job information*. A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (essential).

(4) *Job titles and codes*. It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures*. The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description*. A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A of this part, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the

relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the

case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person*. The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness*. The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies*. Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study*. Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting*. An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job*. A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content*. Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job*. The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job,

should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of realibility should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s)

and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of paragraph 15B of this section or paragraph 15E(1) of this section, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate paragraph of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria

used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See sections 14C(3) and section 15C of this section.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D of this section.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

DEFINITIONS

§ 60–3.16 Definitions.

The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, of this part), or, in unusual circumstances, if use of the

procedure is otherwise justified in accord with Federal law. See section 6B, of this part.

D. *Content validity*. Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity*. Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity*. Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer*. Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended.

H. *Employment agency*. Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action*. For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency*. Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis*. A detailed statement of work behaviors and other information relevant to the job.

L. *Job description*. A general statement of job duties and responsibilities.

M. *Knowledge*. A body of information applied directly to the performance of a function.

N. *Labor organization*. Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable*. Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group*. Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure*. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate*. The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should*. The term ''should'' as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill*. A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility*. The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection

procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

APPENDIX TO PART 60–3

§ 60–3.17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 of this section, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic ''conscious,'' include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking ''journeyman'' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability

of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.
Michael H. Moskow,
Under Secretary of Labor.
Ethel Bent Walsh,
Acting Chairman, Equal Employment Opportunity Commission.
Robert E. Hampton,
Chairman, Civil Service Commission.
Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.
Richard Albrecht,
General Counsel,
Department of the Treasury.

§ 60–3.18 Citations.

The official title of these guidelines is ''Uniform Guidelines on Employee Selection Procedures (1978)''. The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

''Section 60–3, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR 38295 (August 25, 1978).''

The short form citation is:

''Section 60–3, U.G.E.S.P. (1978); 43 FR 38295 (August 25, 1978).''

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60–3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1–18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: ''Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR 38295, (August 25, 1978); 29 CFR Part 1607, section 6A.''

PART 60–4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS

Sec.
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60–4.4 Affirmative action requirements.
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60–4.6 Goals and timetables.
60–4.7 Effect on other regulations.
60–4.8 Show cause notice.
60–4.9 Incorporation by operation of the Order.

AUTHORITY: Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

SOURCE: 43 FR 49254, Oct. 20, 1978, unless otherwise noted.

§ 60–4.1 Scope and application.

This part applies to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of $10,000. The regulations in this part are applicable to all of a construction contractor's or subcontractor's construction employees who are engaged in on site contruction including those construction employees who work on a non-Federal or nonfederally assisted construction site. This part also establishes procedures which all Federal contracting officers and all applicants, as applicable, shall follow in soliciting for and awarding Federal or federally assisted construction contracts. Procedures also are established which administering agencies shall follow in making any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of Executive Order 11246, as amended.

In addition, this part applies to construction work performed by construction contractors and subcontractors for Federal nonconstruction contractors and subcontractors if the construction work is necessary in whole or in part to the performance of a nonconstruction contract or subcontract.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–4.2 Solicitations.

(a) All Federal contracting officers and all applicants shall include the notice set forth in paragraph (d) of this section and the Standard Federal Equal Employment Opportunity Construction Contract Specifications set forth in § 60–4.3 of this part in all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts to be performed in geographical areas designated by the Director pursuant to § 60–4.6 of the part. Administering agencies shall require the inclusion of the notice set forth in paragraph (d) of this section and the specifications set forth in § 60–4.3 of this part as a condition of any grant, contract, subcontract, loan, insurance or guarantee involving federally assisted construction covered by this part 60–4.

(b) All nonconstruction contractors covered by Executive Order 11246 and the implementing regulations shall include the notice in paragraph (d) of this section in all construction agreements which are necessary in whole or in part to the performance of the covered nonconstruction contract.

(c) Contracting officers, applicants and nonconstruction contractors shall given written notice to the Director within 10 working days of award of a contract subject to these provisions. The notification shall include the name, address and telephone number of the contractor; employer identification number; dollar amount of the contract, estimated starting and completion dates of the contract; the contract number; and geographical area in which the contract is to be performed.

(d) The following notice shall be included in, and shall be a part of, all solicitations for offers and bids on all Federal and federally assisted construction contracts or subcontracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to § 60–4.6 of this part (see 41 CFR 60–4.2(a)):

NOTICE OF REQUIREMENT FOR AFFIRMATIVE ACTION TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY (EXECUTIVE ORDER 11246)

1. The Offeror's or Bidder's attention is called to the ''Equal Opportunity Clause'' and the ''Standard Federal Equal Employment Specifications'' set forth herein.

2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Timetables	Goals for minority participation for each trade	Goals for female participation in each trade
	Insert goals for each year.	Insert goals for each year.

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and nonfederally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR part 60–4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60–4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR part 60–4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of $10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.

4. As used in this Notice, and in the contract resulting from this solicitation, the ''covered area'' is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65977, Oct. 3, 1980]

§ 60–4.3 Equal opportunity clauses.

(a) The equal opportunity clause published at 41 CFR 60–1.4(a) of this chapter is required to be included in, and is part of, all nonexempt Federal contracts and subcontracts, including construction contracts and subcontracts. The equal opportunity clause published at 41 CFR 60–1.4(b) is required to be included in, and is a part of, all nonexempt federally assisted construction contracts and subcontracts. In addition to the clauses described above, all Federal contracting officers, all applicants and all nonconstruction contractors, as applicable, shall include the specifications set forth in this section in all Federal and federally assisted construction contracts in excess of $10,000 to be performed in geographical areas designated by the Director pursuant to § 60–4.6 of this part and in construction subcontracts in excess of $10,000 necessary in whole or in part to the performance of nonconstruction Federal contracts and subcontracts covered under the Executive order.

STANDARD FEDERAL EQUAL EMPLOYMENT OPPORTUNITY CONSTRUCTION CONTRACT SPECIFICATIONS (EXECUTIVE ORDER 11246)

1. As used in these specifications:

a. ''Covered area'' means the geographical area described in the solicitation from which this contract resulted;

b. ''Director'' means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;

c. ''Employer identification number'' means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.

d. ''Minority'' includes:

(i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);

(ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);

(iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

2. Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction

trade, it shall physically include in each subcontract in excess of $10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.

3. If the Contractor is participating (pursuant to 41 CFR 60–4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.

4. The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted constuction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the FEDERAL REGISTER in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

5. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.

6. In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs

for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newpaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR part 60–3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

8. Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.

9. A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all

women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin.

11. The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.

12. The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.

13. The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60–4.8.

14. The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.

15. Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

(b) The notice set forth in 41 CFR 60–4.2 and the specifications set forth in 41 CFR 60–4.3 replace the New Form for Federal Equal Employment Opportunity Bid Conditions for Federal and Federally Assisted Construction published at 41 FR 32482 and commonly known as the Model Federal EEO Bid Conditions, and the New Form shall not be used after the regulations in 41 CFR part 60–4 become effective.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978, as amended at 45 FR 65978, Oct. 3, 1980; 79 FR 72995, Dec. 9, 2014]

§ 60–4.4 Affirmative action requirements.

(a) To implement the affirmative action requirements of Executive Order 11246 in the construction industry, the Office of Federal Contract Compliance Programs previously has approved affirmative action programs commonly referred to as ''Hometown Plans,'' has promulgated affirmative action plans referred to as ''Imposed Plans'' and has approved ''Special Bid Conditions'' for high impact projects constructed in areas not covered by a Hometown or an Imposed Plan. All solicitations for construction contracts made after the effective date of the regulations in this part shall include the notice specified in § 60–4.2 of this part and the specifications in § 60–4.3 of this part in lieu of the Hometown and Imposed Plans including the Philadelphia Plan and Special Bid Conditions. Until the Director has issued an order pursuant to § 60–4.6 of this part establishing goals and timetables for minorities in the appropriate geographical areas or for a project covered by Special Bid Conditions, the goals and timetables for minorities to be inserted in the Notice required by 41 CFR 60–4.2 shall be the goals and timetables contained in the Hometown Plan, Imposed Plan or Special Bid Conditions presently covering the respective geographical area or project involved.

(b) Signatories to a Hometown Plan (including heavy highway affirmative action plans) shall have 45 days from

the effective date of the regulations in this part to submit under such a Plan (for the director's approval) goals and timetables for women and to include female representation on the Hometown Plan Administrative Committee. Such goals for female representation shall be at least as high as the goals established for female representation in the notice issued pursuant to 41 CFR 60–4.6. Failure of the signatories, within the 45-day period, to include female representation and to submit goals for women or a new plan, as appropriate, shall result in an automatic termination of the Office of Federal Contract Compliance Program's approval of the Hometown Plan. At any time the Office of Federal Contract Compliance Programs terminates or withdraws its approval of a Hometown Plan, or when the plan expires and another plan is not approved, the contractors signatory to the plan shall be covered automatically by the specifications set forth in § 60–4.3 of this part and by the goals and timetables established for that geographical area pursuant to § 60–4.6 of this part.

§ 60–4.5 Hometown plans.

(a) A contractor participating, either individually or through an association, in an approved Hometown Plan (including heavy highway affirmative action plans) shall comply with its affirmative action obligations under Executive Order 11246 by complying with its obligations under the plan: *Provided*, That each contractor or subcontractor participating in an approved plan is individually required to comply with the equal opportunity clause set forth in 41 CFR 60–1.4; to make a good faith effort to achieve the goals for each trade participating in the plan in which it has employees; and that the overall good performance by other contractors or subcontractors toward a goal in an approved plan does not excuse any covered contractor's or subcontractor's failure to take good faith efforts to achieve the plan's goals and timetables. If a contractor is not participating in an approved Hometown Plan it shall comply with the specifications set forth in § 60–4.3 of this part and with the goals and timetables for the appropriate area as listed in the notice required by 41 CFR 60–4.2 with regard to that trade. For the purposes of this part 60–4, a contractor is not participating in a Hometown Plan for a particular trade if it:

(1) Ceases to be signatory to a Hometown Plan covering that trade;

(2) Is signatory to a Hometown Plan for that trade but is not party to a collective bargaining agreement for that trade;

(3) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with labor organizations which are not or cease to be signatories to the same Hometown Plan for that trade;

(4) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with a labor organization for that trade but the two have not jointly executed a specific commitment to minority and female goals and timetables and incorporated the commitment in the Hometown Plan for that trade;

(5) Is participating in a Hometown Plan for that trade which is no longer acceptable to the Office of Federal Contract Compliance Programs;

(6) Is signatory to a Hometown Plan for that trade but is party to a collective bargaining agreement with a labor organization for that trade and the labor organization and the contractor have failed to make a good faith effort to comply with their obligations under the Hometown Plan for that trade.

(b) Contractors participating in Hometown Plans must be able to demonstrate their participation and document their compliance with the provision of the Hometown Plan.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–4.6 Goals and timetables.

The Director, from time to time, shall issue goals and timetables for minority and female utilization which shall be based on appropriate workforce, demographic or other relevant data and which shall cover construction projects or construction contracts performed in specific geographical areas. The goals, which shall be applicable to each construction trade in a covered contractor's or subcontractor's entire workforce which is working in

the area covered by the goals and timetables, shall be published as notices in the FEDERAL REGISTER, and shall be inserted by the contracting officers and applicants, as applicable, in the Notice required by 41 CFR 60–4.2. Covered construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed.

[45 FR 65978, Oct. 3, 1980]

§ 60–4.7 Effect on other regulations.

The regulations in this part are in addition to the regulations contained in this chapter which apply to construction contractors and subcontractors generally. See particularly, 41 CFR 60–1.4 (a), (b), (c), (d), and (e); 60–1.5; 60–1.7; 60–1.8; 60–1.26; 60–1.29; 60–1.30; 60–1.32; 60–1.41; 60–1.42; 60–1.43; and 41 CFR part 60–3; part 60–20; part 60–30; part 60–40; and part 60–50.

§ 60–4.8 Show cause notice.

If an investigation or compliance review reveals that a construction contractor or subcontractor has violated the Executive order, any contract clause, specifications or the regulations in this chapter and if administrative enforcement is contemplated, the Director shall issue to the contractor or subcontractor a notice to show cause which shall contain the items specified in paragraphs (i) through (iv) of 41 CFR 60–2.2(c)(1). If the contractor does not show good cause within 30 days, or in the alternative, fails to enter an acceptable conciliation agreement which includes where appropriate, make up goals and timetables, back pay, and seniority relief for affected class members, the OFCCP shall follow the procedure in 41 CFR 60–1.26(b): *Provided*, That where a conciliation agreement has been violated, no show cause notice is required prior to the initiation of enforcement proceedings.

[43 FR 49254, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–4.9 Incorporation by operation of the order.

By operation of the order, the equal opportunity clause contained in § 60–1.4, the Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246) contained in § 60–4.2, and the Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246) contained in § 60–4.3 shall be deemed to be a part of every solicitation or of every contract and subcontract, as appropriate, required by the order and the regulations in this chapter to include such clauses whether or not they are physically incorporated in such solicitation or contract and whether or not the contract is written.

PART 60–20—DISCRIMINATION ON THE BASIS OF SEX

Sec.

60–20.1 Purpose.
60–20.2 General prohibitions.
60–20.3 Sex as a *bona fide* occupational qualification.
60–20.4 Discriminatory compensation.
60–20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions.
60–20.6 Other fringe benefits.
60–20.7 Employment decisions made on the basis of sex-based stereotypes.
60–20.8 Harassment and hostile work environments.
APPENDIX TO PART 60–20—BEST PRACTICES

AUTHORITY: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339 as amended by E.O. 11375, 32 FR 14303, 3 CFR 1966–1970 Comp., p. 684; E.O. 12086, 43 FR 46501, 3 CFR 1978 Comp., p. 230; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13672, 79 FR 42971.

SOURCE: 81 FR 39166, June 15, 2016, unless otherwise noted.

§ 60–20.1 Purpose.

The purpose of this part is to set forth specific requirements that covered Federal Government contractors and subcontractors, including those

performing work under federally assisted construction contracts (''contractors''),[1] must meet in fulfilling their obligations under Executive Order 11246, as amended, to ensure nondiscrimination on the basis of sex in employment. These regulations are to be read in conjunction with the other regulations implementing Executive Order 11246, as amended, set forth in parts 60–1, 60–2, 60–3, 60–4, and 60–30 of this chapter. For instance, under no circumstances will a contractor's good faith efforts to comply with the affirmative action requirements of part 60–2 of this chapter be considered a violation of this part.

§ 60–20.2 General prohibitions.

(a) *In general.* It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The term sex includes, but is not limited to, pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping.

(b) *Disparate treatment.* Unless sex is a *bona fide* occupational qualification reasonably necessary to the normal operation of a contractor's particular business or enterprise, the contractor may not make any distinction based on sex in recruitment, hiring, firing, promotion, compensation, hours, job assignments, training, benefits, or other terms, conditions, or privileges of employment. Such unlawful sex-based discriminatory practices include, but are not limited to, the following:

(1) Making a distinction between married and unmarried persons that is not applied equally to men and women;

(2) Denying women with children an employment opportunity that is available to men with children;

(3) Treating men and women differently with regard to the availability of flexible work arrangements;

(4) Firing, or otherwise treating adversely, unmarried women, but not unmarried men, who become parents;

(5) Applying different standards in hiring or promoting men and women on the basis of sex;

(6) Steering women into lower-paying or less desirable jobs on the basis of sex;

(7) Imposing any differences in retirement age or other terms, conditions, or privileges of retirement on the basis of sex;

(8) Restricting job classifications on the basis of sex;

(9) Maintaining seniority lines and lists on the basis of sex;

(10) Recruiting or advertising for individuals for certain jobs on the basis of sex;

(11) Distinguishing on the basis of sex in apprenticeship or other formal or informal training programs; in other opportunities such as on-the-job training, networking, mentoring, sponsorship, individual development plans, rotational assignments, and succession planning programs; or in performance appraisals that may provide the basis of subsequent opportunities;

(12) Making any facilities and employment-related activities available only to members of one sex, except that if the contractor provides restrooms, changing rooms, showers, or similar facilities, the contractor must provide same-sex or single-user facilities;

(13) Denying transgender employees access to the restrooms, changing rooms, showers, or similar facilities designated for use by the gender with which they identify; and

(14) Treating employees or applicants adversely because they have received, are receiving, or are planning to receive transition-related medical services designed to facilitate the adoption of a sex or gender other than the individual's designated sex at birth.

(c) *Disparate impact.* Employment policies or practices that have an adverse impact on the basis of sex, and are not job-related and consistent with business necessity, violate Executive Order 11246, as amended, and this part. Examples of policies or practices that may violate Executive Order 11246 in terms of their disparate impact on the basis of sex include, but are not limited to:

[1] This part also applies to entities that are ''applicants'' for Federal assistance involving a construction contract as defined in part 60–1 of this chapter.

(1) Height and/or weight qualifications that are not necessary to the performance of the job and that negatively impact women substantially more than men;

(2) Strength, agility, or other physical requirements that exceed the actual requirements necessary to perform the job in question and that negatively impact women substantially more than men;

(3) Conditioning entry into an apprenticeship or training program on performance on a written test, interview, or other selection procedure that has an adverse impact on women where the contractor cannot establish the validity of the selection procedure consistent with the Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3; and

(4) Relying on recruitment or promotion methods, such as ''word-of-mouth'' recruitment or ''tap-on-the-shoulder'' promotion, that have an adverse impact on women where the contractor cannot establish that they are job-related and consistent with business necessity.

§ 60–20.3 Sex as a bona fide occupational qualification.

Contractors may not hire and employ employees on the basis of sex unless sex is a *bona fide* occupational qualification (BFOQ) reasonably necessary to the normal operation of the contractor's particular business or enterprise.

§ 60–20.4 Discriminatory compensation.

Compensation may not be based on sex. Contractors may not engage in any employment practice that discriminates in wages, benefits, or any other forms of compensation, or denies access to earnings opportunities, because of sex, on either an individual or systemic basis, including, but not limited to, the following:

(a) Contractors may not pay different compensation to similarly situated employees on the basis of sex. For purposes of evaluating compensation differences, the determination of similarly situated employees is case-specific. Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.

(b) Contractors may not grant or deny higher-paying wage rates, salaries, positions, job classifications, work assignments, shifts, development opportunities, or other opportunities on the basis of sex. Contractors may not grant or deny training, apprenticeships, work assignments, or other opportunities that may lead to advancement to higher-paying positions on the basis of sex.

(c) Contractors may not provide or deny earnings opportunities because of sex, for example, by denying women equal opportunity to obtain regularand/or overtime hours, commissions, pay increases, incentive compensation, or any other additions to regular earnings.

(d) Contractors may not implement compensation practices that have an adverse impact on the basis of sex and are not shown to be job-related and consistent with business necessity.

(e) A contractor will be in violation of Executive Order 11246 and this part any time it pays wages, benefits, or other compensation that is the result in whole or in part of the application of any discriminatory compensation decision or other practice.

§ 60–20.5 Discrimination on the basis of pregnancy, childbirth, or related medical conditions.

(a) *In general.*—(1) Discrimination on the basis of pregnancy, childbirth, or related medical conditions, including childbearing capacity, is a form of unlawful sex discrimination. Contractors must treat people of childbearing capacity and those affected by pregnancy, childbirth, or related medical conditions the same for all employment-related purposes, including receipt of benefits under fringe-benefit programs, as other persons not so affected, but similar in their ability or inability to work.

(2) Related medical conditions include, but are not limited to, lactation; disorders directly related to pregnancy,

such as preeclampsia (pregnancy-induced high blood pressure), placenta previa, and gestational diabetes; symptoms such as back pain; complications requiring bed rest; and the after-effects of a delivery.

(b) *Examples.* Examples of unlawful pregnancy discrimination include, but are not limited to:

(1) Refusing to hire pregnant people or people of childbearing capacity, or otherwise subjecting such applicants or employees to adverse employment treatment, because of their pregnancy or childbearing capacity;

(2) Firing female employees or requiring them to go on leave because they become pregnant or have a child;

(3) Limiting pregnant employees' job duties based solely on the fact that they are pregnant, or requiring a doctor's note in order for a pregnant employee to continue working; and

(4) Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, or related medical conditions to the same extent that hospitalization and other medical costs are covered for other medical conditions.

(c) *Accommodations*—(1) *Disparate treatment.* It is a violation of Executive Order 11246 for a contractor to deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions where:

(i) The contractor denies such assignments, modifications, or other accommodations only to employees affected by pregnancy, childbirth, or related medical conditions;

(ii) The contractor provides, or is required by its policy or by other relevant laws to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, and the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden; or

(iii) Intent to discriminate on the basis of pregnancy, childbirth, or related medical conditions is otherwise shown.

(2) *Disparate impact.* Contractors that have policies or practices that deny alternative job assignments, modified duties, or other accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity. For example, where a contractor's policy of offering light duty only to employees with on-the-job injuries has an adverse impact on employees affected by pregnancy, childbirth, or related medical conditions, the policy would be impermissible unless shown to be job-related and consistent with business necessity.

(d) *Leave*—(1) *In general.* To the extent that a contractor provides family, medical, or other leave, such leave must not be denied or provided differently on the basis of sex.

(2) *Disparate treatment.* (i) A contractor must provide job-guaranteed medical leave, including paid sick leave, for employees' pregnancy, childbirth, or related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees' ability to work.

(ii) A contractor must provide job-guaranteed family leave, including any paid leave, for male employees on the same terms that family leave is provided for female employees.

(3) *Disparate impact.* Contractors that have employment policies or practices under which insufficient or no medical or family leave is available must ensure that such policies or practices do not have an adverse impact on the basis of sex unless they are shown to be job-related and consistent with business necessity.

§ 60–20.6 Other fringe benefits.

(a) It shall be an unlawful employment practice for a contractor to discriminate on the basis of sex with regard to fringe benefits.

(b) As used herein, the term ''fringe benefits'' includes, but is not limited to, medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(c) The greater cost of providing a fringe benefit to members of one sex is not a defense to a contractor's failure to provide benefits equally to members of both sexes.

§ 60–20.7 Employment decisions made on the basis of sex-based stereotypes.

Contractors must not make employment decisions on the basis of sex-based stereotypes, such as stereotypes about how males and/or females are expected to look, speak, or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended. Examples of discrimination based on sex-based stereotyping may include, but are not limited to:

(a) Adverse treatment of an employee or applicant for employment because of that individual's failure to comply with gender norms and expectations for dress, appearance, and/or behavior, such as:

(1) Failing to promote a woman, or otherwise subjecting her to adverse employment treatment, based on sex stereotypes about dress, including wearing jewelry, make-up, or high heels;

(2) Harassing a man because he is considered effeminate or insufficiently masculine; or

(3) Treating employees or applicants adversely based on their sexual orientation where the evidence establishes that the discrimination is based on gender stereotypes;

(b) Adverse treatment of employees or applicants because of their actual or perceived gender identity or transgender status;

(c) Adverse treatment of a female employee or applicant because she does not conform to a sex stereotype about women working in a particular job, sector, or industry; and

(d) Adverse treatment of employees or applicants based on sex-based stereotypes about caregiver responsibilities. For example, adverse treatment of a female employee because of a sex-based assumption that she has (or will have) family caretaking responsibilities, and that those responsibilities will interfere with her work performance, is discrimination based on sex. Other examples of such discriminatory treatment include, but are not limited to:

(1) Adverse treatment of a male employee because he has taken or is planning to take leave to care for his newborn or recently adopted or foster child based on the sex-stereotyped belief that women and not men should care for children;

(2) Denying opportunities to mothers of children based on the sex-stereotyped belief that women with children should not or will not work long hours, regardless of whether the contractor is acting out of hostility or belief that it is acting in the employee's or her children's best interest;

(3) Evaluating the performance of female employees who have family caregiving responsibilities adversely, based on the sex-based stereotype that women are less capable or skilled than their male counterparts who do not have such responsibilities; and

(4) Adverse treatment of a male employee who is not available to work overtime or on weekends because he cares for his elderly father, based on the sex-based stereotype that men do not have family caregiving responsibilities that affect their availability for work, or that men who are not available for work without constraint are not sufficiently committed, ambitious, or dependable.

§ 60–20.8 Harassment and hostile work environments.

(a) Harassment on the basis of sex is a violation of Executive Order 11246, as amended. Unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) Harassment because of sex includes sexual harassment (including sexual harassment based on gender identity or transgender status); harassment based on pregnancy, childbirth, or related medical conditions; and harassment that is not sexual in nature but that is because of sex or sex-based stereotypes.

APPENDIX TO PART 60–20—BEST PRACTICES

Best practices. Although not required by this part, following are best practices for contractors:

(1) Avoiding the use of gender-specific job titles such as ''foreman'' or ''lineman'' where gender-neutral alternatives are available;

(2) Designating single-user restrooms, changing rooms, showers, or similar single-user facilities as sex-neutral;

(3) Providing, as part of their broader accommodations policies, light duty, modified job duties or assignments, or other reasonable accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions;

(4) Providing appropriate time off and flexible workplace policies for men and women;

(5) Encouraging men and women equally to engage in caregiving-related activities;

(6) Fostering a climate in which women are not assumed to be more likely to provide family care than men; and

(7) Fostering an environment in which all employees feel safe, welcome, and treated fairly, by developing and implementing procedures to ensure that employees are not harassed because of sex. Examples of such procedures include:

(a) Communicating to all personnel that harassing conduct will not be tolerated;

(b) Providing anti-harassment training to all personnel; and

(c) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.

PART 60–30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246

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AUTHORITY: Executive Order 11246, as amended, 30 FR 12319, 32 FR 14303, as amended by E.O. 12086; 29 U.S.C. 793, as amended, and 38 U.S.C. 4212, as amended.

SOURCE: 43 FR 49259, Oct. 20, 1978, unless otherwise noted.

GENERAL PROVISIONS

§ 60–30.1 Applicability of rules.

This part provides the rules of practice for all administrative proceedings, instituted by the OFCCP including but not limited to proceedings instituted against construction contractors or subcontractors, which relate to the enforcement of equal opportunity under Executive Order 11246, as amended. In the absence of a specific provision, procedures shall be in accordance with the Federal Rules of Civil Procedure.

§ 60–30.2 Waiver, modification.

Upon notice to all parties, the Administrative Law Judge may, with respect to matters pending before him modify or waive any rule herein upon a determination that no party will be prejudiced and that the ends of justice will be served thereby.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.3 Computation of time.

In computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government in which event it includes the next business day.

§ 60–30.4 Form, filing, service of pleadings and papers.

(a) *Form.* The original of all pleadings and papers in a proceeding conducted under the regulations in this part shall be filed with the Administrative Law Judge assigned to the case or with the Chief Administrative Law Judge if the case has not been assigned. Every pleading and paper filed in the proceeding shall contain a caption setting forth the name of the agency instituting the proceeding, the title of the action, the case file number assigned by the Administrative Law Judge, and a designation of the pleading or paper (e.g., complaint, motion to dismiss, etc.). The pleading or papers shall be signed and shall contain the address and telephone number of the person representing the party or the person on whose behalf the pleading or paper was filed. Unless otherwise ordered for good cause by the Administrative Law Judge regarding specific papers and pleadings in a specific case, all such papers and pleadings are public documents.

(b) *Service.* Service upon any party shall be made by the party filing the pleading or document in accordance with 29 CFR part 26. When a party is represented by an attorney, the service shall be upon the attorney.

(c) *Proof of service.* A certificate of the person serving the pleading or other document, setting forth the manner of service, shall be proof of the service.

[43 FR 49259, Oct. 20, 1978, as amended at 86 FR 1795, Jan. 11, 2021]

PREHEARING PROCEDURES

§ 60–30.5 Administrative complaint.

(a) *Filing.* The Solicitor of Labor, Associate Solicitor for Labor Relations and Civil Rights Regional Solicitors and Regional Attorney upon referral from the Office of Federal Contract Compliance Programs, are authorized to institute enforcement proceedings by filing a complaint and serving the complaint upon the contractor which shall be designated as the defendant. The Department of Labor, OFCCP, as shall be designated on plaintiff.

(b) *Contents.* The complaint shall contain a concise jurisdictional statement, and a clear and concise statement sufficient to put the defendant on notice of the acts or practices it is alleged to have committed in violation of the order, the regulations, or its contractual obligations. The complaint shall also contain a prayer regarding the relief being sought, a statement of whatever sanctions the Government will seek to impose and the name and address of the attorney who will represent the Government.

(c) *Amendment*. The complaint may be amended once as a matter of course before an answer is filed, and the defendant may amend its answer once as a matter of course not later than 10 days after the filing of the original answer. Other amendments of the complaint or of the answer to the complaint shall be made only by leave of the Administrative Law Judge or by written consent of the adverse party; and leave shall be freely given where justice so requires. An amended complaint shall be answered within 14 days of its service, or within the time for filing an answer to the original complaint, whichever period is longer. An amended answer shall be responded to within 14 days of its service.

(E.O. 11246 as amended; sec. 503 of Rehabilitation Act of 1973 as amended)

[43 FR 49259, Oct. 20, 1978, as amended at 44 FR 49691, Aug. 24, 1979; 63 FR 59642, Nov. 4, 1998]

§ 60–30.6 Answer.

(a) *Filing and service*. Within 20 days after the service of the complaint, the defendant shall file an answer with the Chief Administrative Law Judge if the case has not been assigned to an Administrative Law Judge. The answer shall be signed by the defendant or its attorney, and served on the Government in accordance with § 60–30.4(b).

(b) *Contents; failure to file*. The answer shall (1) contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny, each of the allegations of the complaint unless the defendant is without knowledge, in which case the answer shall so state; or (2) state that the defendant admits all the allegations of the complaint. The answer may contain a waiver of hearing; and if not, a separate paragraph in the answer shall request a hearing. The answer shall contain the name and address of the defendant, or of the attorney representing the defendant. Failure to file an answer or to plead specifically to any allegation of the complaint shall constitute an admission of such allegation.

(c) *Procedure, upon admission of facts*. The admission, in the answer or by failure to file an answer, of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission, the Administrative Law Judge, without further hearing, may prepare his decision in which he shall adopt as his proposed findings of fact the material facts alleged in the complaint. The parties shall be given an opportunity to file exceptions to his decision and to file briefs in support of the exceptions.

§ 60–30.7 Notice of prehearing conference.

The Administrative Law Judge shall respond to defendant's request for a hearing within 15 days and shall serve a notice of prehearing conference on the parties. The notice shall contain the time and place of the conference.

§ 60–30.8 Motions; disposition of motions.

(a) *Motions*. Motions shall state the relief sought, the authority relied upon and the facts alleged, and shall be filed with the Administrative Law Judge. If made before or after the hearing itself, the motions shall be in writing. If made at the hearing, motions may be stated orally; but the Administrative Law Judge may require that they be reduced to writing and filed and served on all parties in the same manner as a formal motion. Unless otherwise ordered by the Administrative Law Judge, written motions shall be accompanied by a supporting memorandum. Within 10 days after a written motion is served, or such other time period as may be fixed, any party may file a response to a motion.

(b) *Disposition of motions*. The Administrative Law Judge may not grant a written motion prior to expiration of the time for filing responses thereto, except upon consent of the parties or following a hearing, but may overrule or deny such motion without awaiting response: *Provided*, That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions.

§ 60–30.9 Interrogatories, and admissions as to facts and documents.

(a) *Interrogatories*. Not later than 25 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier

date as the Administrative Law Judge may order, any party may serve upon an opposing party written interrogatories. Each interrogatory shall be answered separately and fully in writing under oath, unless objected to. Answers are to be signed by the person making them and objections by the attorney or by whoever is representing the party. Answers and objections shall be filed and served within 25 days of service of the interrogatory.

(b) *Admissions.* Not later than 14 days prior to the date of the hearing, except for good cause shown, or not later than 14 days prior to such earlier date as the Administrative Law Judge may order, any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in and exhibited with the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each of the matters as to which an admission is requested shall be deemed admitted, unless within 25 days after service, the party to whom the request is directed serves upon the requesting party a sworn statement either (1) denying specifically the matter as to which an admission is requested, or (2) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

(c) *Objections or failures to respond.* The party submitting the interrogatory or request may move for an order with respect to any objection or other failure to respond.

§ 60–30.10 Production of documents and things and entry upon land for inspection and other purposes.

(a) After commencement of the action, any party may serve on any other party a request to produce and/or permit the party, or someone acting on his behalf, to inspect and copy any unprivileged documents, phonorecords, and other compilations, including computer tapes and printouts which contain or may lead to relevant information and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After commencement of the action, any party may serve on any other party a request to permit entry upon designated property which may be relevant to the issues in the proceeding and, which is in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object or area.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time and place for making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 25 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections, in which case the reasons for each objection shall be stated. The party submitting the request may move for an order with respect to any objection or to other failure to respond.

§ 60–30.11 Depositions upon oral examination.

(a) *Depositions; notice of examination.* After commencement of the action, any party may take the testimony of any person, including a party, having personal or expert knowledge of the matters in issue, by deposition upon oral examination. A party desiring to take a deposition shall give reasonable notice in writing to every other party to the proceeding, and may use an administrative subpoena. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. The notice shall also set forth the categories of documents the witness is to bring with him to the deposition, if any. A copy of the notice shall be furnished to the person to be examined unless his name is unknown.

(b) *Production of witnesses; obligation of parties; objections*. It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Unless the parties agree otherwise, depositions shall be held within the county in which the witness resides or works. The party or prospective witness may file with the Administrative Law Judge an objection within 5 days after notice of production of such witness is served, stating with particularity the reasons why the party cannot or ought not to produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness. All errors or irregularities in compliance with the provisions of this section shall be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(c) *Before whom taken; scope of examination; failure to answer*. Depositions may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the deposition is held. At the time and place specified in the notice, each party shall be permitted to examine and cross-examine the witness under oath upon any matter which is relevant to the subject matter of the proceeding, or which is reasonably calculated to lead to the production of relevant and otherwise admissible evidence. All objections to questions, except as to the form thereof, and all objections to evidence are reserved until the hearing. A refusal or failure on the part of any person under the control of a party to answer a question shall operate to create a presumption that the answer, if given, would be unfavorable to the controlling party, unless the question is subsequently ruled improper by the Administrative Law Judge or the Administrative Law Judge rules that there was valid justification for the witness' failure or refusal to answer the question: *Provided*, That the examining party shall note on the record during the deposition the question which the deponent has failed, or refused to answer, and state his intention to invoke the presumption if no answer is forthcoming.

(d) *Subscription; certification; filing*. The testimony shall be reduced to typewriting, either by the officer taking the deposition or under his direction, and shall be submitted to the witness for examination and signing. If the deposition is not signed by the witness because he is ill, dead, cannot be found, or refuses to sign it, such fact shall be noted in the certificate of the officer and the deposition may then be used as fully as though signed. The officer shall immediately deliver the original copy of the transcript, together with his certificate, in person or by mail to the Administrative Law Judge. Copies of the transcript and certificate shall be furnished to all persons desiring them, upon payment of reasonable charges, unless distribution is restricted by order of the Administrative Law Judge for good cause shown.

(e) *Rulings on admissibility; use of deposition*. Subject to the provisions of this section, objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Any part or all of a deposition, so far as admissible in the discretion of the Administrative Law Judge, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice, in accordance with the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent, or was designated to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by the adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the administrative law judge finds: (i) That the witness is dead; or (ii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iii) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (iv) upon application and notice, that such exceptional circumstances exist as to make it desirable to allow the deposition to be used.

(4) If only part of a deposition is introduced in evidence by a party, any party may introduce any other parts by way of rebuttal and otherwise.

(f) *Stipulations*. If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.12 Prehearing conferences.

(a) Upon his own motion or the motion of the parties, the Administrative Law Judge may direct the parties or their counsel to meet with him for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitation;

(3) Stipulations, admissions of fact and of contents and authenticity of documents;

(4) Limitation of number of witnesses;

(5) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(6) Such other matters as may tend to expedite the disposition of the proceedings.

(b) The record shall show the matters disposed of by order and by agreement in such pretrial conferences. The subsequent course of the proceeding shall be controlled by such action.

§ 60–30.13 Consent findings and order.

(a) *General*. At any time after the issuance of a complaint and prior to or during the reception of evidence in any proceeding, the parties may jointly move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be in the discretion of the Administrative Law Judge after consideration of the nature of the proceeding, the requirments of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content*. Any agreement containing consent findings and an order disposing of a proceeding shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the complaint and the agreement;

(3) That any further procedural steps are waived; and

(4) That any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement is waived.

(c) *Submission*. On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the Administrative Law Judge for his consideration;

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition*. In the event an agreement containing consent findings and an order is submitted within the time allowed, the Administrative Law Judge, within 30 days, shall accept such agreement by issuing his decision based upon the agreed findings, and his decision shall consititute the final Administrative order.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

HEARINGS AND RELATED MATTERS

§ 60–30.14 Designation of Administrative Law Judges.

Hearings shall be held before an Administrative Law Judge of the Department of Labor who shall be designated by the Chief Administrative Law Judge of the Department of Labor. After commencement of the proceeding but prior to the designation of an Administrative Law Judge, pleadings and papers shall be filed with the Chief Administrative Law Judge.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.15 Authority and responsibilities of Administrative Law Judges.

The Administrative Law Judge shall propose findings and conclusions to the Secretary on the basis of the record. In order to do so, he shall have the duty to conduct a fair hearing, to take all necessary action to avoid delay, and to maintain order. He shall have all powers necessary to those ends, including, but not limited to, the power to:

(a) Hold conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding by consent of the parties or upon his own motion;

(b) Require parties to state their position with respect to the various issues in the proceeding;

(c) Require parties to produce for examination those relevant witnesses and documents under their control; and require parties to answer interrogatories and requests for admissions in full;

(d) Administer oaths;

(e) Rule on motions, and other procedural items or matters pending before him;

(f) Regulate the course of the hearing and conduct of participants therein;

(g) Examine and cross-examine witnesses, and introduce into the record documentary or other evidence;

(h) Receive, rule on, exclude, or limit evidence and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(i) Fix time limits for submission of written documents in matters before him and extend any time limits established by this part upon a determination that no party will be prejudiced and that the ends of justice will be served thereby;

(j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:

(1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;

(2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and

(3) Expelling any party or person from further participation in the hearing;

(k) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice;

(l) Recommend whether the respondent is in current violation of the order, regulations, or its contractual obligations, as well as the nature of the relief necessary to insure the full enjoyment of the rights secured by the order;

(m) Issue subpoenas; and

(n) Take any action authorized by these rules.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.16 Appearances.

(a) *Representation.* The parties or other persons or organizations participating pursuant to this part 60–30 have the right to be represented by counsel.

(b) *Failure to appear.* In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall have an election to present his evidence in whole or such portion thereof sufficient to make a prima facie case before the Administrative Law Judge. Failure to appear at the hearing shall not be deemed to be a waiver of the right to be served with a copy of the Administrative Law Judge's recommended decision and to file exceptions to it.

§ 60–30.17 Appearance of witnesses.

(a) A party wishing to procure the appearance at the hearing of any person having personal or expert knowledge of the matters in issue shall serve on the prospective witness a notice, which may be accomplished by an administrative subpoena, setting forth the time, date, and place at which he is to appear for the purpose of giving testimony. The notice shall also set forth the categories of documents the witness is to bring with him to the hearing, if any. A copy of the notice shall be filed with the Administrative Law Judge and additional copies shall be served upon the opposing parties.

(b) It shall be the obligation of each party to produce for examination any person, along with such documents as may be requested, at the time and place, and on the date, set forth in the notice, if that party has control over such person. Each party shall be deemed to have control over its officers, agents, employees, and members. Due regard shall be given to the convenience of witnesses in scheduling their testimony so that they will be detained no longer than reasonably necessary.

(c) The party or prospective witness may file an objection within 5 days after notice of production of such witness is served stating with particularity the reasons why the party cannot produce a requested witness. The party serving the notice may move for an order with respect to such objection or failure to produce a witness.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.18 Rules of evidence.

In any hearing, decision, or administrative review conducted pursuant to this part, all evidentiary matters shall be governed by Office of Administrative Law Judges' Rules of evidence at 29 CFR part 18, subpart B, *Provided however*, That the provision at 29 CFR 18.1104 which delays the effective date of the rule with respect to certain investigations does not apply.

[55 FR 19069, May 8, 1990]

§ 60–30.19 Objections; exceptions; offer of proof.

(a) *Objections*. If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, he shall state briefly the grounds for such objection. Rulings on all objections shall appear in the record. Only objections made on the record may be relied upon subsequently in the proceedings.

(b) *Exceptions*. Formal exception to an adverse ruling is not required. Rulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Secretary, but shall be considered by the Secretary upon filing exceptions to the Administrative Law Judge's recommendations and conclusions.

(c) *Offer of proof*. An offer of proof made in connection with an objection taken to any ruling excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and, if the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.20 Ex parte communications.

The Administrative Law Judge shall not consult any person, or party, on any fact in issue unless upon notice and opportunity for all parties to participate. No employee or agent of the Federal Government engaged in the investigation and prosecution of this case shall participate or advise in the rendering of the recommended or final decision in the case, except as witness or counsel in the proceeding.

§ 60–30.21 Oral argument.

Any party shall be entitled upon request to a reasonable period between the close of evidence and termination of the hearing for oral argument. Oral arguments shall be included in the official transcript of the hearing.

§ 60–30.22 Official transcript.

The official transcripts of testimony taken, together with any exhibits, briefs, or memorandums of law, shall be filed with the Administrative Law Judge. Transcripts of testimony may be obtained from the official reporter by the parties and the public as provided in section 11(a) of the Federal Advisory Committee Act (86 Stat. 770). Upon notice to all parties, the Administrative Law Judge may authorize such corrections to the transcript as are necessary to reflect accurately the testimony.

§ 60–30.23 Summary judgment.

(a) *For the Government.* At any time after the expiration of 20 days from the commencement of the action, or after service of a motion for summary judgment by the respondent, the Government may move with or without supporting affidavits for a summary judgment upon all claims or any part.

(b) *For defendant.* The defendant may, at any time after commencement of the action, move with or without supporting affidavits for summary judgment in its favor as to all claims or any part.

(c) *Other parties.* Any other party to a formal proceeding under this part may support or oppose motions for summary judgment made by the Government or respondent, in accordance with this section, but may not move for a summary judgment in his own behalf.

(d) *Statement of uncontested facts.* All motions for summary judgment shall be accompanied by a ''Statement of Uncontested Facts'' in which the moving party sets forth all alleged uncontested material facts which shall provide the basis for its motion. At least 5 days prior to the time fixed for hearing on the motion, any party contending that any material fact regarding the matter covered by the motion is in dispute, shall file a ''Statement of Disputed Facts.'' Failure to file a ''Statement of Disputed Facts'' shall be deemed as an admission to the ''Statement of Uncontested Facts.''

(e) *Motion and proceedings.* The motion shall be served upon all parties at least 15 days before the time fixed for the hearing on the motion. The adverse party or parties may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the complaint and answer, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment rendered for or against the Government or the respondent shall constitute the findings and recommendations on the issues involved. Hearings on motions made under this section shall be scheduled by the Administrative Law Judge.

(f) *Case not fully adjudicated on motion.* If on motion under this section judgment is not rendered upon the whole case or for all the relief asked and a final hearing is necessary, the Administrative Law Judge at the hearing of the motion, by examining the notice and answer and the evidence before him and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. He shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings as are just. At the hearing on the merits, the facts so specified shall be deemed established, and the final hearing shall be conducted accordingly.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–30.24 Participation by interested persons.

(a)(1) To the extent that proceedings hereunder involve employment of persons covered by a collective bargaining agreement, and compliance may necessitate a revision of such agreement, any labor organization which is a signatory to the agreement shall have the right to participate as a party.

(2) Other persons or organizations shall have the right to participate as parties if the final Administrative order could adversely affect them or the class they represent, and such participation may contribute materially to the proper disposition of the proceedings.

(3) Any person or organization wishing to participate as a party under this section shall file with the Administrative Law Judge and serve on all parties a petition within 25 days after the commencement of the action or at such other time as ordered by the Administrative Law Judge, so long as it does not disrupt the proceeding. Such petition shall concisely state: (i) Petitioner's interest in the proceedings; (ii) who will appear for petitioner; (iii) the issues on which petitioner wishes to participate; and (iv) whether petitioner intends to present witnesses.

(4) The Administrative Law Judge shall determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interest, the Administrative Law Judge may request all such petitioners to designate a single representative to represent all such petitioners: *Provided,* That the representative of a labor organization qualifying to participate under paragraph (a)(1) of the section must be permitted to participate in the proceedings. The Administrative Law Judge shall give each petitioner written notice of the decision on his petition; and if the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The Administrative Law Judge shall give written notice to each party of each petition granted.

(b)(1) Any other interested person or organization wishing to participate as amicus curiae shall file a petition before the commencement of the final hearing with the Administrative Law Judge. Such petition shall concisely state: (i) The petitioner's interest in the hearing; (ii) who will represent the petitioner; and (iii) the issues on which petitioner intends to present argument. The Administrative Law Judge may grant the petition if he finds that the petitioner has a legitimate interest in the proceedings, and that such participation may contribute materially to the proper disposition of the issues. An amicus curiae is not a party but may participate as provided in this section.

(2) An amicus curiae may present a brief oral statement at the hearing at the point in the proceeding specified by the Administrative Law Judge. He may submit a written statement of position to the Administrative Law Judge prior to the beginning of a hearing and shall serve a copy on each party. He may also submit a brief or written statement at such time as the parties submit briefs and exceptions, and he shall serve a copy on each party.

[43 FR 49259, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

POST-HEARING PROCEDURES

§ 60–30.25 Proposed findings of fact and conclusions of law.

Within 20 days after receipt of the transcript of the testimony, each party and amicus may file a brief. Such briefs shall be served simultaneously on all parties and amici, and a certificate of service shall be furnished to the Administrative Law Judge. Requests for additional time in which to file a brief shall be made in writing, and copies shall be served simultaneously on the other parties. Requests for extensions shall be received not later than 3 days before the date such briefs are due. No reply brief may be filed except by special permission of the Administrative Law Judge.

§ 60–30.26 Record for recommended decision.

The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings, including briefs, but excepting the correspondence section of the docket, shall constitute the record for decision.

§ 60–30.27 Recommended decision.

Within a reasonable time after the filing of briefs, the Administrative Law Judge shall recommend findings, conclusions, and a decision. These recommendations shall be certified, together with the record for recommended decision, to the Administrative Review Board, United States Department of Labor, for a final Administrative order. The recommended findings, conclusions, and decision shall be

served on all parties and amici to the proceeding.

[61 FR 19988, May 3, 1996]

§ 60–30.28 Exceptions to recommended decisions.

Within 14 days after receipt of the recommended findings, conclusions, and decision, any party may submit exceptions to said recommendation. These exceptions may be responded to by other parties within 14 days of their receipt by said parties. All exceptions and responses shall be filed with the Administrative Review Board, United States Department of Labor. Service of such briefs or exceptions and responses shall be made simultaneously on all parties to the proceeding. Requests to the Administrative Review Board, United States Department of Labor, for additional time in which to file exceptions and responses shall be in writing and copies shall be served simultaneously on other parties. Requests for extensions must be received no later than 3 days before the exceptions are due.

[61 FR 19988, May 3, 1996]

§ 60–30.29 Record.

After expiration of the time for filing briefs and exceptions, the Administrative Review Board, United States Department of Labor, shall make a decision, which shall be the Administrative order, on the basis of the record. The record shall consist of the record for recommended decision, the rulings and recommended decision of the Administrative Law Judge and the exceptions and briefs filed subsequent to the Administrative Law Judge's decision.

[85 FR 30627, May 20, 2020]

§ 60–30.30 Administrative Order.

After expiration of the time for filing, the Administrative Review Board, United States Department of Labor, shall make a decision which shall be served on all parties. If the Administrative Review Board, United States Department of Labor, concludes that the defendant has violated the Executive Order, the equal opportunity clause, or the regulations, an Administrative Order shall be issued enjoining the violations, and requiring the contractor to provide whatever remedies are appropriate, and imposing whatever sanctions are appropriate, or any of the above. In any event, failure to comply with the Administrative Order shall result in the immediate cancellation, termination, and suspension of the respondent's contracts and/or debarment of the respondent from further contracts.

[85 FR 30627, May 20, 2020]

EXPEDITED HEARING PROCEDURES

AUTHORITY: Sections 60–30.31 to 60–30.37 issued under E.O. 11246 (30 FR 12319) as amended by E.O. 11375 and 12086.

SOURCE: Sections 60–30.31 through 60–30.37 appear at 44 FR 77003, Dec. 28, 1979, unless otherwise noted.

§ 60–30.31 Expedited hearings—when appropriate.

Expedited Hearings may be used, *inter alia*, when a contractor or subcontractor has violated a conciliation agreement; has not adopted and implemented an acceptable affirmative action program; has refused to give access to or to supply records or other information as required by the equal opportunity clause; or has refused to allow an on-site compliance review to be conducted.

§ 60–30.32 Administrative complaint and answer.

(a) Expedited hearings shall be commenced by filing an administrative complaint in accordance with 41 CFR 60–30.5. The complaint shall state that the hearing is subject to these expedited hearing procedures.

(b) The answer shall be filed in accordance with 41 CFR 60–30.6 (a) and (b).

(c) Failure to request a hearing within the 20 days provided by 41 CFR 60–30.6(a) shall constitute a waiver of hearing, and all the material allegations of fact contained in the complaint shall be deemed to be admitted. If a hearing is not requested or is waived, within 25 days of the complaint's filing, the Administrative Law Judge shall adopt as findings of fact the material facts alleged in the complaint, and shall order the appropriate sanctions and/or penalties sought in

the complaint. The Administrative Law Judge's findings and order shall constitute a final Administrative order, unless the Office of the Solicitor, U.S. Department of Labor, files exceptions to the findings and order within 10 days of receipt thereof. If the Office of the Solicitor, U.S. Department of Labor, files exceptions, the matter shall proceed in accordance with § 60–30.36 of this part.

(d) If a request for a hearing is received within 20 days as provided by 41 CFR 60–30.6(a), the hearing shall be convened within 45 days of receipt of the request and shall be completed within 15 days thereafter, unless more hearing time is required.

§ 60–30.33 Discovery.

(a) Any party may serve requests for admissions in accordance with § 60–30.9 (b) and (c).

(b) Witness lists and hearing exhibits will be exchanged at least 10 days in advance of the hearing.

(c) For good cause shown, and upon motion made in accordance with § 60–30.8, the Administrative Law Judge may allow the taking of depositions. Other discovery will not be permitted.

§ 60–30.34 Conduct of hearing.

(a) At the hearing, the Government shall be given an opportunity to demonstrate the basis for the request for sanctions and/or remedies, and the contractor shall be given an opportunity to show that the violation complained of did not occur and/or that good cause or good faith efforts excuse the alleged violations. Both parties shall be allowed to present evidence and argument and to cross-examine witnesses.

(b) The hearing shall be informal in nature, and the Administrative Law Judge shall not be bound by formal rules of evidence.

§ 60–30.35 Recommended decision after hearing.

Within 15 days after the hearing is concluded, the Administrative Law Judge shall recommend findings, conclusions, and a decision. The Administrative Law Judge may permit the parties to file written post-hearing briefs within this time period, but the Administrative Law Judge's recommendations shall not be delayed pending receipt of such briefs. These recommendations shall be certified, together with the record, to the Administrative Review Board, United States Department of Labor, for a final Administrative order. The recommended decision shall be served on all parties and amici to the proceeding.

[61 FR 19989, May 3, 1996]

§ 60–30.36 Exceptions to recommendations.

Within 10 days after receipt of the recommended findings, conclusions and decision, any party may submit exceptions to said recommendations. Exceptions may be responded to by other parties within 7 days after receipt by said parties of the exceptions. All exceptions and responses shall be filed with the Administrative Review Board, United States Department of Labor. Briefs or exceptions and responses shall be served simultaneously on all parties to the proceeding.

[61 FR 19989, May 3, 1996]

§ 60–30.37 Final Administrative Order.

After expiration of the time for filing exceptions, the Administrative Review Board, United States Department of Labor, shall issue an Administrative Order which shall be served on all parties. Unless the Administrative Review Board, United States Department of Labor, issues an Administrative Order within 30 days after the expiration of the time for filing exceptions, the Administrative Law Judge's recommended decision shall become a final Administrative Order which shall become effective on the 31st day after expiration of the time for filing exceptions. Except as to specific time periods required in this subsection, 41 CFR 60–30.30 shall be applicable to this section.

[85 FR 30627, May 20, 2020]

PART 60–40—EXAMINATION AND COPYING OF OFCCP DOCUMENTS

Subpart A—General

Sec.

60–40.1 Purpose and scope.
60–40.2 Information available on request.

60–40.3 Information exempt from compulsory disclosure and which may be withheld.
60–40.4 Information disclosure of which is prohibited by law.

Subpart B—Procedures for Disclosure

60–40.5 Applicability of procedures.
60–40.6 To whom to direct requests.
60–40.7 Partial disclosure.
60–40.8 Facilities and procedures for disclosure.

AUTHORITY: E.O. 11246, as amended by E.O. 11375, and as amended by E.O. 12086; 5 U.S.C. 552.

SOURCE: 43 FR 49264, Oct. 20, 1978, unless otherwise noted.

Subpart A—General

§ 60–40.1 Purpose and scope.

This part contains the general rules of the OFCCP providing for public access to information from records of the OFCCP or its various compliance agencies. These regulations implement 5 U.S.C. 552, the Freedom of Information Act and supplement the policy and regulations of the Department of Labor, 29 CFR part 70. It is the policy of the OFCCP to disclose information to the public and to cooperate with other public agencies as well as private parties seeking to eliminate discrimination in employment. This part sets forth generally the categories of records accessible to the public, the types of records subject to prohibitions or restrictions on disclosure, and the places at which and the procedures whereby members of the public may obtain access to and inspect and copy information from records in the custody of the OFCCP.

[43 FR 49264, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–40.2 Information available on request.

(a) Upon the request of any person for identifiable records obtained or generated pursuant to Executive Order 11246 (as amended) such records shall be made available for inspection and copying, notwithstanding the applicability of the exemption from mandatory disclosure set forth in 5 U.S.C. 552 subsection (b), if it is determined that the requested inspection or copying furthers the public interest and does not impede any of the functions of the OFCCP, except in the case of records disclosure of which is prohibited by law.

(b) Consistent with the above, all contract compliance documents within the custody of the OFCCP shall be disclosed upon request unless specifically prohibited by law or as limited elsewhere herein. The types of documents which if in the custody of the OFCCP must be disclosed include, but are not limited to, the following:

(1) Affirmative action plans, whether or not reviewed and finally accepted by the OFCCP except as limited in 41 CFR 60–40.3(a)(1).

(2) Imposed plans and hometown plans, pending or approved.

(3) Text of final conciliation agreements.

(4) Validation studies of tests or other preemployment selection methods.

(5) Dates and times of scheduled compliance reviews.

§ 60–40.3 Information exempt from compulsory disclosure and which may be withheld.

(a) The following documents or parts thereof are exempt from mandatory disclosure by the OFCCP, and should be withheld if it is determined that the requested inspection or copying does not further the public interest and might impede the discharge of any of the functions of the OFCCP.

(1) Those portions of affirmative action plans such as goals and timetables which would be confidential commercial or financial information because they indicate, and only to the extent that they indicate, that a contractor plans major shifts or changes in his personnel requirements and he has not made this information available to the public. A determination to withhold this type of information should be made only after receiving verification and a satisfactory explanation from the contractor that the information should be withheld.

(2) Those portions of affirmative action plans which constitute information on staffing patterns and pay scales but only to the extent that their release would injure the business or financial position of the contractor,

would constitute a release of confidential financial information of an employee or would constitute an unwarranted invasion of the privacy of an employee.

(3) The names of individual complainants.

(4) The assignments to particular contractors of named compliance officers if such disclosure would subject the named compliance officers to undue harassment or would affect the efficient enforcement of the Executive order.

(5) Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information, interagency or intra-agency memoranda or letters which would not be available by law to a private party in litigation with the agency, personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, data which would be exempt from mandatory disclosure pursuant to the ''informants privilege'' or such information the disclosure of which is prohibited by statute.

(6) Copies of preemployment selection tests used by contractors.

(b) Other records may be withheld consistent with the Freedom of Information Act on a case-by-case basis, with the prior approval of the Director, OFCCP.

§ 60–40.4 Information disclosure of which is prohibited by law.

The Standard Form 100 (EEO–1) which is submitted by contractors to the OFCCP or a Joint Reporting Committee servicing both the OFCCP and the EEOC shall be disclosed pending further instructions from the Director. The statutory prohibition on disclosure set forth in section 709(e) of the Civil Rights Act of 1964 is limited by the terms of that section to information obtained pursuant to the authority of title VII of that Act and its disclosure by employees of the EEOC.

Subpart B—Procedures for Disclosure

§ 60–40.5 Applicability of procedures.

Requests for the inspection and copying of information from records in the custody of the OFCCP which are identifiable and available under the provisions of subpart A of this part shall be made and acted upon as provided in the following sections of this subpart. Officers and employees of the OFCCP are authorized by the Director to continue to furnish to the public, informally and without compliance with these procedures, information and copies from its records which prior to the enactment of the Freedom of Information Act (5 U.S.C. 552) were customarily furnished in the regular performance of their duties.

[43 FR 49264, Oct. 20, 1978; 43 FR 51401, Nov. 3, 1978]

§ 60–40.6 To whom to direct requests.

A request for contract compliance records or information shall be directed to the National OFCCP or appropriate OFCCP Regional or Area Office. If the person making the request does not know in which office the record is located, he may direct his request to the Director, Office of Federal Contract Compliance Programs, Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, for appropriate handling.

§ 60–40.7 Partial disclosure.

If a requested record contains some materials which are protected from disclosure and other materials which are not so protected, identifying details or protected matters shall be deleted wherever analysis indicates that such deletions are feasible. Whenever such deletions are made, the remainder of the records may be disclosed.

§ 60–40.8 Facilities and procedures for disclosure.

(a) [Reserved]

(b) Procedures relating to the avaliability of records shall be governed by the Department of Labor regulations, 29 CFR 70.35 to 70.64.

PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

Sec.
60–50.1 Purpose and scope.
60–50.2 Equal employment policy.
60–50.3 Accommodations to religious observance and practice.
60–50.4 Enforcement.
60–50.5 Nondiscrimination.

AUTHORITY: Sec. 201 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

SOURCE: 43 FR 49265, Oct. 20, 1978, unless otherwise noted.

§ 60–50.1 Purpose and scope.

(a) The purpose of the provisions in this part is to set forth the interpretations and guidelines of the Office of Federal Contract Compliance Programs regarding the implementation of Executive Order 11246, as amended, for promoting and insuring equal employment opportunities for all persons employed or seeking employment with Government contractors and subcontractors or with contractors and subcontractors performing under federally assisted construction contracts, without regard to religion or national origin.

(b) Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin. These guidelines are intended to remedy such unfair treatment.

(c) These guidelines are also intended to clarify the obligations of employers with respect to accommodating to the religious observances and practices of employees and prospective employees.

(d) The employment problems of blacks, Spanish-surnamed Americans, orientals, and American Indians are treated under part 60–2 of this chapter and under other regulations and procedures implementing the requirements of Executive Order 11246, as amended. Accordingly, the remedial provisions of § 60–50.2(b) shall not be applicable to the employment problems of these groups.

(e) Nothing contained in this part 60–50 is intended to supersede or otherwise limit the exemption set forth in § 60–1.5(a)(5) of this chapter for contracts with certain educational institutions.

§ 60–50.2 Equal employment policy.

(a) *General requirements*. Under the equal opportunity clause contained in section 202 of Executive Order 11246, as amended, employers are prohibited from discriminating against employees or applicants for employment because of religion or national origin, and must take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their religion or national origin. Such action includes, but is not limited to the following: Employment, upgrading, demotion, or transfer: Recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

(b) *Outreach and positive recruitment*. Employers shall review their employment practices to determine whether members of the various religious and/or ethnic groups are receiving fair consideration for job opportunities. Special attention shall be directed toward executive and middle-management levels, where employment problems relating to religion and national origin are most likely to occur. Based upon the findings of such reviews, employers shall undertake appropriate outreach and positive recruitment activities, such as those listed below, in order to remedy existing deficiencies. It is not contemplated that employers necessarily will undertake all of the listed activities. The scope of the employer's efforts shall depend upon all the circumstances, including the nature and extent of the employer's deficiencies and the employer's size and resources.

(1) Internal communication of the employer's obligation to provide equal

employment opportunity without regard to religion or national origin in such a manner as to foster understanding, acceptance, and support among the employer's executive, management, supervisory, and all other employees and to encourage such persons to take the necessary action to aid the employer in meeting this obligation.

(2) Development of reasonable internal procedures to insure that the employer's obligation to provide equal employment opportunity without regard to religion or national origin is being fully implemented.

(3) Periodically informing all employees of the employer's commitment to equal employment opportunity for all persons, without regard to religion or national origin.

(4) Enlisting the assistance and support of all recruitment sources (including employment agencies, college placement directors, and business associates) for the employer's commitment to provide equal employment opportunity without regard to religion or national origin.

(5) Reviewing employment records to determine the availability of promotable and transferable members of various religious and ethnic groups.

(6) Establishment of meaningful contacts with religious and ethnic organizations and leaders for such purposes as advice, education, technical assistance, and referral of potential employees.

(7) Engaging in significant recruitment activities at educational institutions with substantial enrollments of students from various religious and ethnic groups.

(8) Use of the religious and ethnic media for institutional and employment advertising.

§ 60–50.3 Accommodations to religious observance and practice.

An employer must accommodate to the religious observances and practices of an employee or prospective employee unless the employer demonstrates that it is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. As part of this obligation, an employer must make reasonable accommodations to the religious observances and practices of an employee or prospective employee who regularly observes Friday evening and Saturday, or some other day of the week, as his Sabbath and/or who observes certain religious holidays during the year and who is conscientiously opposed to performing work or engaging in similar activity on such days, when such accommodations can be made without undue hardship on the conduct of the employer's business. In determining the extent of an employer's obligations under this section, at least the following factors shall be considered: (a) Business necessity, (b) financial costs and expenses, and (c) resulting personnel problems.

§ 60–50.4 Enforcement.

The provisions of this part are subject to the general enforcement, compliance review, and complaint procedures set forth in subpart B of part 60–1 of this chapter.

§ 60–50.5 Nondiscrimination.

The provisions of this part are not intended and shall not be used to discriminate against any qualified employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin.

[79 FR 72995, Dec. 9, 2014]

PART 60–300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

60–300.1 Purpose, applicability and construction.
60–300.2 Definitions.
60–300.3 [Reserved]

60–300.4 Coverage and waivers.
60–300.5 Equal opportunity clause.

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APPENDIX A TO PART 60–300—GUIDELINES ON A CONTRACTOR'S DUTY TO PROVIDE REASONABLE ACCOMMODATION
APPENDIX B TO PART 60–300—SAMPLE INVITATION TO SELF-IDENTIFY
APPENDIX C TO PART 60–300—REVIEW OF PERSONNEL PROCESSES

AUTHORITY: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

SOURCE: 78 FR 58662, Sept. 24, 2013, unless otherwise noted.

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60–300.1 Purpose, applicability and construction.

(a) *Purpose*. The purpose of the regulations in this part is to set forth the standards for compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, (VEVRAA), which prohibits discrimination against protected veterans and pre-JVA veterans as defined in this part, and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified protected veterans.

Disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans are protected veterans under VEVRAA.

(b) *Applicability*. This part applies to any Government contract or subcontract of $100,000 or more, entered into or modified on or after December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction): Provided, that subpart C of this part applies only as described in § 60–300.40(a); and that the non-discrimination protections in § 60–300.21 and the right to file complaints alleging discriminatory conduct set forth in § 60–300.61 also apply to ''pre-JVA veterans'' as defined in § 60–300.2, who are applicants or employees of a contractor with a Government contract of $25,000 or more entered into prior to December 1, 2003, and unmodified since to a contract amount of $100,000. Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part.

(c) *Construction*—(1) *In general*. The Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) (42 U.S.C. 12101, *et seq.*) set out as an appendix to 29 CFR part 1630 issued pursuant to Title I may be relied upon for guidance in interpreting the parallel provisions of this part.

(2) *Relationship to other laws*. This part does not invalidate or limit the

remedies, rights, and procedures under any Federal law or the law of any state or political subdivision that provides greater or equal protection for the rights of disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, or Armed Forces service medal protected veterans as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

(i) *Uniformed Services Employment and Reemployment Rights Act*. This part does not invalidate or limit the obligations, responsibilities, and requirements of the contractor pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. 4301, *et seq.*). This includes the obligation under USERRA to reemploy employees of the contractor following qualifying service in the uniformed services in the position the employee would have obtained with reasonable certainty had the employee been continuously employed during the period of uniformed service. Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with USERRA, and compliance with USERRA will not necessarily determine its compliance with this part.

(ii) [Reserved]

§ 60–300.2 Definitions.

For the purpose of this part:

(a) *Act* means the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, also referred to throughout this regulation as ''VEVRAA.''

(b) *Active duty wartime or campaign badge veteran* means a veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

(c) *Armed Forces service medal veteran* means any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

(d) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of the Act.

(e) *Contract* means any Government contract or subcontract.

(f) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of $100,000 or more.

(g) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

(h) *Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(i) *Disabled veteran* means:

(1) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or

(2) A person who was discharged or released from active duty because of a service-connected disability.

(j) *Employment service delivery system* means a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act. The Wagner-Peyser Act requires that these services be provided as part of the One-Stop delivery system established by the States under Section 134 of the Workforce Investment Act of 1998.

(k) *Equal opportunity clause* means the contract provisions set forth in § 60–300.5, ''Equal opportunity clause.''

(l) *Essential functions*—(1) *In general.* The term essential functions means fundamental job duties of the employment position the disabled veteran holds or is seeking. The term essential functions does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(m) *Government* means the Government of the United States of America.

(n) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term *Government contract* does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) *Construction*, as used in the definition of Government contract and subcontract of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) *Contracting agency* means any department, agency, establishment or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.

(4) *Nonpersonal services*, as used in the definition of Government contract and subcontract of this section, includes, but is not limited to, the following: Utility, construction, transportation, research, insurance, and fund depository.

(5) *Person*, as used in the definition of Government contract and subcontract of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

(6) *Personal property*, as used in the definition of Government contract and subcontract of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(o) *Pre-JVA veteran* means an individual who is an employee of or applicant to a contractor with a contract of $25,000 or more entered into prior to December 1, 2003 and unmodified since to $100,000 or more, and who is a special disabled veteran, veteran of the Vietnam era, pre-JVA recently separated veteran, or other protected veteran, as defined below:

(1) *Special disabled veteran* means:

(i) A veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability:

(A) Rated at 30 percent or more; or

(B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap; or

(ii) A person who was discharged or released from active duty because of a service-connected disability.

(2) Veteran of the Vietnam Era means a person who:

(i) Served on active duty for a period of more than 180 days, and was discharged or released therefrom with other than a dishonorable discharge, if any part of such active duty occurred:

(A) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or

(B) Between August 5, 1964, and May 7, 1975, in all other cases; or

(ii) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed:

(A) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or

(B) Between August 5, 1964, and May 7, 1975, in all other cases.

(3) Pre-JVA recently separated veteran means a pre-JVA veteran during the one-year period beginning on the date of the pre-JVA veteran's discharge or release from active duty.

(4) Other protected veteran means a person who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

(p) *Prime contractor* means any person holding a contract of $100,000 or more, and, for the purposes of subpart D of this part, ''General Enforcement and Complaint Procedures,'' includes any person who has held a contract subject to the Act.

(q) *Protected veteran* means a veteran who is protected under the non-discrimination and affirmative action provisions of the Act; specifically, a veteran who may be classified as a ''disabled veteran,'' ''recently separated veteran,'' ''active duty wartime or campaign badge veteran,'' or an ''Armed Forces service medal veteran,'' as defined by this section.

(r) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(s) *Qualified disabled veteran* means a disabled veteran who has the ability to perform the essential functions of the employment position with or without reasonable accommodation.

(t) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on

subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(u) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

(v) *Reasonable accommodation*—(1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant who is a disabled veteran to be considered for the position such applicant desires; [1] or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified disabled veteran to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable the contractor's employee who is a disabled veteran to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees who are not disabled veterans.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by disabled veterans; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for disabled veterans.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified disabled veteran in need of the accommodation.[2] This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(w) *Recently separated veteran* means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active

[1] A contractor's duty to provide a reasonable accommodation with respect to applicants who are disabled veterans is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Disabled veteran applicants must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

[2] Contractors must engage in such an interactive process with a disabled veteran, whether or not a reasonable accommodation ultimately is identified that will make the person a qualified individual. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

duty in the U.S. military, ground, naval or air service.

(x) *Recruiting and training agency* means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(y) *Secretary* means the Secretary of Labor, United States Department of Labor, or his or her designee.

(z) *Subcontract.* (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

(aa) *Subcontractor* means any person holding a subcontract of $100,000 or more and, for the purposes of subpart D of this part, ''General Enforcement and Complaint Procedures,'' any person who has held a subcontract subject to the Act.

(bb) *TAP* means the Department of Defense's Transition Assistance Program, or any successor programs thereto. The TAP was designed to smooth the transition of military personnel and family members leaving active duty via employment workshops and individualized employment assistance and training.

(cc) *Undue hardship*—(1) *In general. Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(dd) *United States*, as used in this part, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

(ee) *Veteran* means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.

[78 FR 58662, Sept. 24, 2013, as amended at 85 FR 39846, July 2, 2020; 85 FR 71572, Nov. 10, 2020]

§ 60–300.3 [Reserved]

§ 60–300.4 Coverage and waivers.

(a) *General*—(1) *Contracts and subcontracts of $100,000 or more.* Contracts and subcontracts of $100,000 or more are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts for indefinite quantities.* With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, ''call-type'' contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than $100,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order is $100,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Employment activities within the United States.* This part applies only to employment activities within the United States and not to employment activities abroad. The term ''employment activities within the United States'' includes actual employment within the United States, and decisions of the contractor made within the United States pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) *Waivers*—(1) *Specific contracts and classes of contracts.* The Director may waive the application to any contract of the equal opportunity clause in whole or part when he or she deems that special circumstances in the national interest so require. The Director may also grant such waivers to groups or categories of contracts: Where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the Act. When a waiver has been granted for any class of contracts, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply

unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) *National security*. Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Director in writing within 30 days.

(3) *Facilities not connected with contracts*. The Director may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities which he or she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor.

§ 60–300.5 Equal opportunity clause.

(a) *Government contracts*. Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

EQUAL OPPORTUNITY FOR VEVRAA PROTECTED VETERANS[3]

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran (hereinafter collectively referred to as ''protected veteran(s)'') in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, including the following:

i. Recruitment, advertising, and job application procedures.

ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.

iii. Rates of pay or any other form of compensation and changes in compensation.

iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.

v. Leaves of absence, sick leave, or any other leave.

vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor.

vii. Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.

viii. Activities sponsored by the contractor including social or recreational programs.

ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to immediately list all employment openings which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, with the appropriate employment service delivery system where the opening occurs. Listing employment openings with the state workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service delivery system. In order to satisfy the listing requirement described herein, contractors must provide information about the job vacancy in any manner and format permitted by the appropriate employment service delivery system which will allow that system to provide priority referral of veterans protected by VEVRAA for that job vacancy. Providing information on employment openings to a privately run job service or exchange will satisfy the contractor's listing obligation if the privately run job service or exchange provides the information to the appropriate employment service delivery system in any manner and format that the employment service delivery system permits which will allow that system to provide priority referral of protected veterans.

3. Listing of employment openings with the appropriate employment service delivery

[3] The definitions set forth in 41 CFR 60–300.2 apply to the terms used throughout this Clause, and they are incorporated herein by reference.

system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a *bona fide* job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

4. Whenever a contractor, other than a state or local governmental contractor, becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the employment service delivery system in each state where it has establishments that: (a) It is a Federal contractor, so that the employment service delivery systems are able to identify them as such; and (b) it desires priority referrals from the state of protected veterans for job openings at all locations within the state. The contractor shall also provide to the employment service delivery system the name and location of each hiring location within the state and the contact information for the contractor official responsible for hiring at each location. The ''contractor official'' may be a chief hiring official, a Human Resources contact, a senior management contact, or any other manager for the contractor that can verify the information set forth in the job listing and receive priority referrals from employment service delivery systems. In the event that the contractor uses any external job search organizations to assist in its hiring, the contractor shall also provide to the employment service delivery system the contact information for the job search organization(s). The disclosures required by this paragraph shall be made simultaneously with the contractor's first job listing at each employment service delivery system location after the effective date of this final rule. Should any of the information in the disclosures change since it was last reported to the employment service delivery system location, the contractor shall provide updated information simultaneously with its next job listing. As long as the contractor is contractually bound to these provisions and has so advised the employment service delivery system, there is no need to advise the employment service delivery system of subsequent contracts. The contractor may advise the employment service delivery system when it is no longer bound by this contract clause.

5. The provisions of paragraphs 2 and 3 of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

6. As used in this clause: i. *All employment openings* includes all positions except executive and senior management, those positions that will be filled from within the contractor's organization, and positions lasting three days or less. This term includes full-time employment, temporary employment of more than three days' duration, and part-time employment.

ii. *Executive and senior management* means: (1) Any employee (a) compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (b) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (c) who customarily and regularly directs the work of two or more other employees; and (d) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight; or (2) any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

iii. *Positions that will be filled from within the contractor's organization* means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings which the contractor proposes to fill from regularly established ''recall'' lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of his or her own organization.

7. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

8. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

9. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer.

Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are protected veterans. The contractor must ensure that applicants or employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran (e.g., providing Braille or large print versions of the notice, posting the notice for visual accessibility to persons in wheelchairs, providing the notice electronically or on computer disc, or other versions). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

10. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding that the contractor is bound by the terms of VEVRAA, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, protected veterans.

11. The contractor will include the provisions of this clause in every subcontract or purchase order of $100,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to VEVRAA so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs, may direct to enforce such provisions, including action for noncompliance.

12. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to their protected veteran status.

[End of Clause]

(b) *Subcontracts*. Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) *Adaptation of language*. Such necessary changes in language may be made to the equal opportunity clause as must be appropriate to identify properly the parties and their undertakings.

(d) *Inclusion of the equal opportunity clause in the contract*. It is not necessary to include the equal opportunity clause verbatim in the contract. The clause shall be made a part of the contract by citation to 41 CFR 60–300.5(a) and inclusion of the following language, in bold text, after the citation: ''THIS CONTRACTOR AND SUBCONTRACTOR SHALL ABIDE BY THE REQUIREMENTS OF 41 CFR 60–300.5(A). THIS REGULATION PROHIBITS DISCRIMINATION AGAINST QUALIFIED PROTECTED VETERANS, AND REQUIRES AFFIRMATIVE ACTION BY COVERED PRIME CONTRACTORS AND SUBCONTRACTORS TO EMPLOY AND ADVANCE IN EMPLOYMENT QUALIFIED PROTECTED VETERANS.''

(e) *Incorporation by operation of the Act*. By operation of the Act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) *Duties of contracting agencies*. Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the Act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the Act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the Act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in § 60–300.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60–300.20 Covered employment activities.

The prohibition against discrimination in this part applies to the following employment activities:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

§ 60–300.21 Prohibitions.

The term discrimination includes, but is not limited to, the acts described in this section and § 60–300.23.

(a) *Disparate treatment.* It is unlawful for the contractor to deny an employment opportunity or benefit or otherwise to discriminate against a qualified individual because of that individual's status as a protected veteran or pre-JVA veteran.

(b) *Limiting, segregating and classifying.* Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of that individual's status as a protected veteran or pre-JVA veteran. For example, the contractor may not segregate protected veterans as a whole, or any classification of protected veterans or pre-JVA veterans, into separate work areas or into separate lines of advancement.

(c) *Contractual or other arrangements*—(1) *In general.* It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee who is a protected veteran or pre-JVA veteran to the discrimination prohibited by this part.

(2) *Contractual or other arrangement defined.* The phrase ''contractual or other arrangement or relationship'' includes, but is not limited to, a relationship with: an employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(3) *Application.* This paragraph (c) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

(d) *Standards, criteria or methods of administration.* It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

(1) Have the effect of discriminating on the basis of status as a protected veteran or pre-JVA veteran; or

(2) Perpetuate the discrimination of others who are subject to common administrative control.

(e) *Relationship or association with a protected veteran.* It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known protected veteran or pre-JVA veteran status of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

(f) *Not making reasonable accommodation.* (1) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified disabled veteran or pre-JVA special disabled veteran, unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(2) It is unlawful for the contractor to deny employment opportunities to an applicant or employee who is a qualified disabled veteran or pre-JVA special disabled veteran based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(3) A qualified disabled veteran or pre-JVA special disabled veteran is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified disabled veteran or pre-JVA special disabled veteran.

(g) *Qualification standards, tests and other selection criteria*—(1) *In general.* It is unlawful for the contractor to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out individuals on the basis of their status as protected veterans or pre-JVA veterans unless the standard, test or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude a disabled veteran if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude individuals on the basis of their status as protected veterans or pre-JVA veterans but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant who is a disabled veteran or pre-JVA special disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a protected veteran or pre-JVA veteran for an employment opportunity, the contractor may not rely on portions of such veteran's military record, including his or her discharge papers, which are not relevant to the qualification requirements of the opportunity in issue.

(2) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, do not apply to 38 U.S.C. 4212 and are similarly inapplicable to this part.

(h) *Administration of tests.* It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who is a disabled veteran or pre-JVA special disabled veteran with a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(i) *Compensation.* In offering employment or promotions to protected veterans or pre-JVA veterans, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related and/or military-service-related pension or other disability-related and/or military-service-related benefit the applicant or employee receives from another source.

§ 60–300.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60–300.2(g) defining *direct threat.*).

§ 60–300.23 Medical examinations and inquiries.

(a) *Prohibited medical examinations or inquiries.* Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is a disabled veteran or as to the nature or severity of such a veteran's disability.

(b) *Permitted medical examinations and inquiries*—(1) *Acceptable pre-employment inquiry.* The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) *Employment entrance examination.* The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of their status as a disabled veteran.

(3) *Examination of employees.* The contractor may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an employee to perform job-related functions.

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(5) Medical examinations conducted in accordance with paragraphs (b)(2) and (b)(4) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees who are disabled veterans as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) *Invitation to self-identify.* The contractor shall invite applicants to self-identify as being covered by the Act, as specified in § 60–300.42.

(d) *Confidentiality and use of medical information.* (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

§ 60–300.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor: (1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job

performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in sensitive positions subject to such regulations.

(b) *Drug testing*—(1) *General policy*. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of § 60–300.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees*. Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–300.23(b)(5) and 60–300.23(d)(2).

§ 60–300.25 Health insurance, life insurance and other benefit plans.

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with state law.

(b) The contractor may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

(d) The contractor shall not deny a qualified disabled veteran equal access to insurance or subject a qualified disabled veteran to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b) and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

Subpart C—Affirmative Action Program

§ 60–300.40 Applicability of the affirmative action program requirement.

(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of $100,000 or more.

(b) Contractors described in paragraph (a) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

(c) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–300.44(i).

(d) The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

§ 60–300.41 Availability of affirmative action program.

The full affirmative action program, absent the data metrics required by § 60–300.44(k), shall be made available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

§ 60–300.42 Invitation to self-identify.

(a) *Pre-offer*. The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a protected veteran who may be covered by the Act. This invitation may be included in the application materials for the position, but in any circumstance shall be provided to applicants prior to making an offer of employment to a job applicant.

(b) *Post-offer*. In addition to the invitation in paragraph (a) of this section, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she belongs to one or more of the specific categories of protected veteran for which the contractor is required to report pursuant to 41 CFR part 61–300. Such an invitation shall be made at any time after the offer of employment but before the applicant begins his or her job duties.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to the Act. The invitations also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the invitations shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the act. (An acceptable form for such an invitation is set forth in appendix B of this part.)

(d) If an applicant identifies himself or herself as a disabled veteran in the post-offer self-identification detailed in paragraph (b) of this section, the contractor should inquire of the applicant whether an accommodation is necessary, and if so, should engage with the applicant regarding reasonable accommodation. The contractor may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, *et seq*. The contractor shall maintain a separate file in accordance with § 60–300.23(d) on persons who have self-identified as disabled veterans.

(e) The contractor shall keep all information on self-identification confidential. The contractor shall provide the information to OFCCP upon request. This information may be used only in accordance with this part.

(f) Nothing in this section relieves the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be protected veterans.

(g) Nothing in this section relieves the contractor from liability for discrimination under the Act.

§ 60–300.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act, contractors shall not discriminate against protected veterans, and shall take affirmative action to employ and advance in employment qualified protected veterans at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–300.20.

§ 60–300.44 Required contents of affirmative action programs.

Acceptable affirmative action programs shall contain, but not necessarily be limited to, the following elements:

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran (e.g., providing Braille or large print versions of the notice, or posting the notice for visual accessibility to persons in wheelchairs). The policy statement shall indicate the top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things, that the contractor will: recruit, hire, train and promote persons in all job titles, and ensure that all other personnel actions are administered, without regard to protected veteran status; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and applicants shall not be subjected to harassment, intimidation, threats, coercion or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the affirmative action provisions of VEVRAA or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by VEVRAA or its implementing regulations in this part or any other Federal, state or local law requiring equal opportunity for protected veterans; or

(4) Exercising any other right protected by VEVRAA or its implementing regulations in this part.

(b) *Review of personnel processes.* The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees who are known protected veterans for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a protected veteran is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype protected veterans in a manner which limits their access to all jobs for which they are qualified. The contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government (Appendix C of this part is an example of an appropriate set of procedures. The procedures in appendix C are not required and contractors may develop other procedures appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified disabled veterans, they are job-related for the position in question and are consistent with business necessity.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification standards tend to screen out qualified disabled

veterans, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor has the burden to demonstrate that it has complied with the requirements of this paragraph (c)(2).

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–300.2(g) defining direct threat.)

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–300.21(f), as a matter of nondiscrimination the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled veteran unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee who is known to be a disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee's disability; if the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed because of their status as a protected veteran.

(f) *External dissemination of policy, outreach and positive recruitment*—(1) *Required outreach efforts.*

(i) The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit protected veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(ii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) *Examples of outreach and recruitment activities* . Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section. This is an illustrative list, and contractors may choose from these or other activities, as appropriate to their circumstances.

(i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for veterans, in order to fulfill its commitment to provide meaningful employment opportunities for such veterans:

(A) The Local Veterans' Employment Representative in the local employment service office (*i.e.*, the One-Stop) nearest the contractor's establishment;

(B) The Department of Veterans Affairs Regional Office nearest the contractor's establishment;

(C) The veterans' counselors and coordinators (''Vet-Reps'') on college campuses;

(D) The service officers of the national veterans' groups active in the area of the contractor's establishment;

(E) Local veterans' groups and veterans' service centers near the contractor's establishment;

(F) The Department of Defense Transition Assistance Program (TAP), or any subsequent program that, in whole or in part, might replace TAP; and

(G) Any organization listed in the Employer Resources section of the National Resource Directory (*http://www.nationalresourcedirectory.gov/*), or any future service that replaces or complements it.

(ii) The contractor should also consider taking the actions listed below, as appropriate, to fulfill its commitment to provide meaningful employment opportunities to protected veterans:

(A) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor's affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(B) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are protected veterans.

(C) An effort should be made to participate in work-study programs with Department of Veterans Affairs rehabilitation facilities which specialize in training or educating disabled veterans.

(D) Protected veterans should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(E) The contractor should take any other positive steps it deems necessary to attract qualified protected veterans not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for any of the classifications of protected veterans.

(F) The contractor, in making hiring decisions, should consider applicants who are known protected veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(G) The contractor should consider listing its job openings with the National Resource Directory's Veterans Job Bank, or any future service that replaces or complements it.

(3) *Assessment of external outreach and recruitment efforts.* The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified protected veterans. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts must be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified protected veterans, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

(4) *Recordkeeping obligation.* The contractor shall document all activities it undertakes to comply with the obligations of this section, and retain these documents for a period of three (3) years.

(g) *Internal dissemination of policy.* (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified protected veterans. It is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

(2) The contractor shall implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual or otherwise make the policy available to employees;

(ii) If the contractor is party to a collective bargaining agreement, it shall notify union officials and/or employee representatives to inform them of the contractor's policy, and request their cooperation;

(3) The contractor is encouraged to additionally implement and disseminate this policy internally as follows:

(i) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for protected veterans;

(ii) Publicize it in the company newspaper, magazine, annual report and other media;

(iii) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's support for the affirmative action policy;

(iv) Discuss the policy thoroughly in both employee orientation and management training programs;

(v) When employees are featured in employee handbooks or similar publications for employees, include disabled veterans.

(h) *Audit and reporting system.* (1) The contractor shall design and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor's affirmative action program;

(ii) Indicate any need for remedial action;

(iii) Determine the degree to which the contractor's objectives have been attained;

(iv) Determine whether known protected veterans have had the opportunity to participate in all company sponsored educational, training, recreational and social activities;

(v) Measure the contractor's compliance with the affirmative action program's specific obligations; and

(vi) Document the actions taken to comply with the obligations of paragraphs (i) through (v) above, and retain these documents as employment records subject to the recordkeeping requirements of § 60–300.80.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity should appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) *Training.* All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented.

(k) *Data collection analysis.* The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

(1) The number of applicants who self-identified as protected veterans pursuant to § 60–300.42(a), or who are otherwise known as protected veterans;

(2) The total number of job openings and total number of jobs filled;

(3) The total number of applicants for all jobs;

(4) The number of protected veteran applicants hired; and

(5) The total number of applicants hired.

§ 60–300.45 Benchmarks for hiring.

The benchmark is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(a) *Purpose:* The purpose of establishing benchmarks is to create a quantifiable method by which the contractor can measure its progress toward achieving equal employment opportunity for protected veterans.

(b) Hiring benchmarks shall be set by the contractor on an annual basis. Benchmarks shall be set using one of the two mechanisms described below:

(1) Establish a benchmark equaling the national percentage of veterans in the civilian labor force, which will be published and updated annually on the OFCCP Web site; or

(2) Establish a benchmark by taking into account:

(i) The average percentage of veterans in the civilian labor force in the State(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP Web site;

(ii) The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the State where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP Web site;

(iii) The applicant ratio and hiring ratio for the previous year, based on the data collected pursuant to § 60–300.44(k);

(iv) The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts, as set forth in § 60–300.44(f)(3); and

(v) Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

(c) The contractor shall document the hiring benchmark it has established each year. If the contractor sets its benchmark using the procedure in paragraph (b)(2) of this section, it shall document each of the factors that it considered in establishing the hiring benchmark and the relative significance of each of these factors. The contractor shall retain these records for a period of three (3) years.

Subpart D—General Enforcement and Complaint Procedures

§ 60–300.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative

action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of VEVRAA and its regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60–300.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60–300.62.

(c) *Reporting requirements.* During a compliance evaluation, OFCCP may verify whether the contractor has complied with applicable reporting requirements required under regulations promulgated by the Veterans' Employment and Training Service (VETS). If the contractor has not complied with any such reporting requirement, OFCCP will notify VETS.

(d) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total $10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of $10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with VEVRAA within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

§ 60–300.61 Complaint procedures.

(a) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint alleging a violation of the Act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown. Complaints may be submitted to OFCCP, 200 Constitution Avenue NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Complaints may also be submitted to the Veterans' Employment and Training Service of the Department of Labor directly, or through the Local Veterans' Employment Representative (LVER) at the local employment service office. Such parties will assist veterans in preparing complaints, promptly refer such complaints to OFCCP, and maintain a record of all complaints which they receive and forward. OFCCP shall inform the party forwarding the complaint of the progress and results of its complaint investigation. The state employment service delivery system shall cooperate with the Director in the investigation of any complaint.

(b) *Contents of complaints*—(1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;

(ii) Name and address of the contractor who committed the alleged violation;

(iii) Documentation showing that the individual is a protected veteran or pre-JVA veteran. Such documentation must include a copy of the veteran's form DD–214, and, where applicable, a copy of the veteran's Benefits Award Letter, or similar Department of Veterans Affairs certification, updated within one year prior to the date the complaint is filed;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made, and the other information specified in paragraph (b)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(c) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(d) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(e) *Resolution of matters.* (1) If the complaint investigation finds no violation of the Act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–300.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Director will review all determinations of no violation that involve complaints that are not also cognizable under Title I of the Americans with Disabilities Act.

(3) In cases where the Director decides to reconsider the determination of a Notification of Results of Investigation, the Director shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration, to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the Act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60–300.62.

§ 60–300.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the

contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation*. (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph

(a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

(e) *Severability.* Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[85 FR 71572, Nov. 10, 2020]

§ 60–300.63 Violation of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

§ 60–300.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the Act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60–300.65).

§ 60–300.65 Enforcement proceedings.

(a) *General.* (1) If a compliance evaluation, complaint investigation or other review by OFCCP finds a violation of the Act or this part, and the

violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above in this sentence. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–300.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure.* (1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the Act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided,* That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of exceptions and responses to exceptions to such decision (if any), whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management, Regional Solicitors, and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to ''Executive Order 11246'' shall mean the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; references to ''equal opportunity clause'' shall mean the equal opportunity clause published at § 60–300.5; and references to ''regulations'' shall mean the regulations contained in this part.

§ 60–300.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Director, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the Act or this part.

(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the Act or this part.

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to § 60–300.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–300.67 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–300.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the Act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months

from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the Act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the Director's decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–300.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Act or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by the Act or this part or any other Federal, state or local law requiring equal opportunity for protected veterans, or

(4) Exercising any other right protected by the Act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by the Director against any contractor who violates this obligation.

§ 60–300.70 Disputed matters related to compliance with the Act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the Act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–300.80 Recordkeeping.

(a) *General requirements.* Except as set forth in paragraph (b) of this section, any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period will be one year from the date of the making of the record or the personnel action involved, whichever occurs later, except as set forth in paragraph (b) of this section. Such records include, but are not necessarily limited

to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least $150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term *personnel records relevant to the complaint, compliance evaluation or action* would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) *Records with three-year retention requirement.* Records required by §§ 60–300.44(f)(4), 60–300.44(k), and 60–300.45(c) shall be maintained by all contractors for a period of three years from the date of the making of the record.

(c) *Failure to preserve records.* Failure to preserve complete and accurate records as required by this part constitutes noncompliance with the contractor's obligations under the Act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided,* That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(d) The requirements of this section shall apply only to records made or kept on or after the date that the Office of Management and Budget has cleared the requirements.

§ 60–300.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the Act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information. The contractor must provide records and other information in any of the formats in which they are maintained, as selected by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act. OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.

§ 60–300.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which

are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, the Department of Veterans Affairs, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the Act.

§ 60–300.83 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Director.

§ 60–300.84 Responsibilities of appropriate employment service delivery system.

By statute, appropriate employment service delivery systems are required to refer qualified protected veterans to fill employment openings listed by contractors with such appropriate employment delivery systems pursuant to the mandatory job listing requirements of the equal opportunity clause and are required to give priority to protected veterans in making such referrals. The employment service delivery systems shall provide OFCCP, upon request, information pertinent to whether the contractor is in compliance with the mandatory job listing requirements of the equal opportunity clause.

APPENDIX A TO PART 60–300—GUIDELINES ON A CONTRACTOR'S DUTY TO PROVIDE REASONABLE ACCOMMODATION

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent ''free-standing'' source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. *See* § 60–300.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under VEVRAA, like reasonable accommodation required under section 503 and the ADA, is a part of the nondiscrimination obligation. *See* EEOC appendix cited in this paragraph. Affirmative action is unique to VEVRAA and section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor *shall* make an inquiry of a disabled veteran who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of an ''otherwise qualified'' disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–300.2(s), a disabled veteran is qualified if he or she has the ability to perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the disabled veteran is qualified with respect to that process. One is ''otherwise qualified'' if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees who are known to be disabled veterans. As stated in § 60–300.42(b) (see also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they are placed on the contractor's payroll, to indicate whether they are a disabled veteran who may be protected by the Act. Section 60–300.42(d) further provides that the contractor must seek the advice of disabled veterans who ''self-identify'' in this way as to reasonable accommodation. Moreover, § 60–300.44(d) provides that if an employee who is a known disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables a disabled

veteran to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee who is a disabled veteran in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the ''best'' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) accommodations in the application process; (2) accommodations that enable employees who are disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are disabled veterans to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term ''undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., the Department of Veterans Affairs or a state vocational rehabilitation agency, or if Federal, state or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the disabled veteran must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for ''reasonable accommodation'' in §60–300.2(t) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are any number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor must consult with the disabled veteran in deciding on the reasonable accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate state vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–800–669–4000 (voice), 1–800–669–6820 (TTY)), the Job Accommodation Network (JAN) operated by the Office of Disability Employment Policy in the U.S. Department of Labor (1–800–526–7234 or 1–800–232–9675), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a disabled veteran to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For the visually-impaired, such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, Braille devices, talking calculators, magnifiers, audio recordings and Braille or large-print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and text telephones (TTYs). For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, speech activated software and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, sign language interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by disabled veterans—including areas used by employees for purposes other than the performance of essential job functions such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in §60–300.2(t) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job

functions which a qualified disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a disabled veteran is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, *i.e.*, those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor which has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind disabled veteran with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or disabled veterans with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the disabled veteran's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider applicants who are known disabled veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees who are disabled veterans by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A ''reasonable amount of time'' must be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned disabled veteran at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled veterans. It should also be noted that the contractor is not required to promote a disabled veteran as an accommodation.

11. With respect to the application process, reasonable accommodations may include the following: (1) providing information regarding job vacancies in a form accessible to disabled veterans who are vision or hearing impaired, e.g., by making an announcement available in braille, in large print, or on computer disc, or by responding to job inquiries via TTYs; (2) providing readers, sign language interpreters and other similar assistance during the application, testing and interview process; (3) appropriately adjusting or modifying employment-related examinations, e.g., extending regular time deadlines, allowing a disabled veteran who is blind or has a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her ability, to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices; and (4) ensuring a disabled veteran with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

APPENDIX B TO PART 60–300—SAMPLE INVITATION TO SELF-IDENTIFY

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, 38 U.S.C. 4212 (VEVRAA), which requires Government contractors to take affirmative action to employ and advance in employment: (1) disabled veterans; (2) recently separated veterans; (3) active duty wartime or campaign badge veterans; and (4) Armed Forces service medal veterans. These classifications are defined as follows:

• A ''disabled veteran'' is one of the following:

• a veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or

• a person who was discharged or released from active duty because of a service-connected disability.

• A ''recently separated veteran'' means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service.

• An ''active duty wartime or campaign badge veteran'' means a veteran who served on active duty in the U.S. military, ground, naval or air service during a war, or in a

campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

• An ''Armed forces service medal veteran'' means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985.

Protected veterans may have additional rights under USERRA—the Uniformed Services Employment and Reemployment Rights Act. In particular, if you were absent from employment in order to perform service in the uniformed service, you may be entitled to be reemployed by your employer in the position you would have obtained with reasonable certainty if not for the absence due to service. For more information, call the U.S. Department of Labor's Veterans Employment and Training Service (VETS), toll-free, at 1–866–4–USA–DOL.

2. [THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE ''PRE–OFFER'' INVITATION AS REQUIRED BY 41 CFR 60–300.42(a). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERANS SET FORTH IN PARAGRAPH 1 MUST ACCOMPANY THIS SELF–IDENTIFICATION REQUEST.] If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below. As a Government contractor subject to VEVRAA, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to VEVRAA.

[ ] I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERAN LISTED ABOVE

[ ] I AM NOT A PROTECTED VETERAN

[THE FOLLOWING TEXT SHOULD BE USED IF REQUIRED TO EXTEND THE ''POST–OFFER'' INVITATION DESCRIBED IN 41 CFR 60–300.42(b). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERAN INCLUDED IN THE POST–OFFER INVITATION MUST ACCOMPANY THIS SELF–IDENTIFICATION REQUEST.]

As a Government contractor subject to VEVRAA, we are required to submit a report to the United States Department of Labor each year identifying the number of our employees belonging to each specified ''protected veteran'' category. If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below.

I BELONG TO THE FOLLOWING CLASSIFICATIONS OF PROTECTED VETERANS (CHOOSE ALL THAT APPLY):

[ ] DISABLED VETERAN

[ ] RECENTLY SEPARATED VETERAN

[ ] ACTIVE WARTIME OR CAMPAIGN BADGE VETERAN

[ ] ARMED FORCES SERVICE MEDAL VETERAN

[ ] I am a protected veteran, but I choose not to self-identify the classifications to which I belong.

[ ] I am NOT a protected veteran.

If you are a disabled veteran it would assist us if you tell us whether there are accommodations we could make that would enable you to perform the essential functions of the job, including special equipment, changes in the physical layout of the job, changes in the way the job is customarily performed, provision of personal assistance services or other accommodations. This information will assist us in making reasonable accommodations for your disability.

3. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

4. The information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if you have a condition that might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by the Office of Federal Contract Compliance Programs, or enforcing the Americans with Disabilities Act, may be informed.

5. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

APPENDIX C TO PART 60–300—REVIEW OF PERSONNEL PROCESSES

The following is a set of procedures which contractors may use to meet the requirements of § 60–300.44(b):

1. The application or personnel form of each known applicant who is a protected veteran should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

2. The personnel or application records of each known protected veteran should include (i) the identification of each promotion for which the protected veteran was considered, and (ii) the identification of each training

program for which the protected veteran was considered.

3. In each case where an employee or applicant who is a protected veteran is rejected for employment, promotion, or training, the contractor should prepare a statement of the reason as well as a description of the accommodations considered (for a rejected disabled veteran). The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, should be treated as confidential medical records in accordance with §60–300.23(d). These materials should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place a disabled veteran on the job, the contractor should make a record containing a description of the accommodation. The record should be treated as a confidential medical record in accordance with §60–300.23(d).

PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.
60–741.1 Purpose, applicability and construction.
60–741.2 Definitions.
60–741.3 Exceptions to the definitions of ''disability'' and ''qualified individual.''
60–741.4 Coverage and waivers.
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60–741.20 Covered employment activities.
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60–741.40 General purpose and applicability of the affirmative action program requirement.
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Subpart D—General Enforcement and Complaint Procedures

60–741.60 Compliance evaluations.
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60–741.80 Recordkeeping.
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APPENDIX A TO PART 60–741—GUIDELINES ON A CONTRACTOR'S DUTY TO PROVIDE REASONABLE ACCOMMODATION
APPENDIX B TO PART 60–741—DEVELOPING REASONABLE ACCOMMODATION PROCEDURES

AUTHORITY: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

SOURCE: 78 FR 58733, Sept. 24, 2013, unless otherwise noted.

Subpart A—Preliminary Matters, Equal Opportunity Clause

§60–741.1 Purpose, applicability, and construction.

(a) *Purpose*. The purpose of this part is to set forth the standards for compliance with section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which prohibits discrimination against individuals with disabilities and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.

(b) *Applicability*. This part applies to all Government contracts and subcontracts in excess of $10,000 for the

purchase, sale or use of personal property or nonpersonal services (including construction): *Provided*, That subpart C of this part applies only as described in § 60–741.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part: *Provided*, That compliance shall also satisfy the employment provisions of the Department of Labor's regulations implementing section 504 of the Rehabilitation Act of 1973 (see 29 CFR 32.2(b)) when the contractor is also subject to those requirements.

(c) *Construction*—(1) *In general*. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act (ADA) of 1990, as amended, (42 U.S.C. 12101 *et seq.*) or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title (29 CFR part 1630). The Interpretive Guidance on Title I of the Americans with Disabilities Act set out as an appendix to 29 CFR part 1630 issued pursuant to that title may be relied upon for guidance in interpreting the parallel non-discrimination provisions of this part.

(2) *Benefits under State worker's compensation laws*. Nothing in this part alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(3) *Relationship to other laws*. This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of individuals with disabilities as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60–741.2 Definitions.

For the purpose of this part:

(a) *Act* means the Rehabilitation Act of 1973, as amended, 29 U.S.C. 706 and 793.

(b) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of section 503 of the Rehabilitation Act of 1973.

(c) *Contract* means any Government contract or subcontract.

(d) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract in excess of $10,000.

(e) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

(f) *Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(g) *Disability*—(1) The term disability means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment (as defined in paragraph (v) of this section).

(2) As used in this part, the definition of ''disability'' must be construed in

favor of broad coverage of individuals, to the maximum extent permitted by law. The question of whether an individual meets the definition under this part should not demand extensive analysis.

(3) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(4) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(5) See paragraphs (m), (o), (t), (v), and (z) of this section, respectively, for definitions of ''major life activities,'' ''physical or mental impairment,'' ''record of such an impairment,'' ''regarded as having such an impairment,'' and ''substantially limits.''

(6) See § 60–741.3 for exceptions to the definition of ''disability.''

(h) *Equal opportunity clause* means the contract provisions set forth in § 60–741.5, ''Equal opportunity clause.''

(i) *Essential functions*—(1) *In general.* The term *essential functions* means fundamental job duties of the employment position the individual with a disability holds or desires. The term *essential functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(j) *Government* means the Government of the United States of America.

(k) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term *Government contract* does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) *Construction,* as used in paragraphs (k) and (x)(1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) *Contracting agency* means any department, agency, establishment, or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(4) *Nonpersonal services,* as used in paragraphs (k) and (x)(1) of this section, includes, but is not limited to, the following: utility, construction, transportation, research, insurance, and fund depository.

(5) *Person,* as used in paragraphs (k), (p), (u), (x), and (y) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(6) *Personal property*, as used in paragraphs (k) and (x)(1) of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(l) *Individual with a disability*—See definition of ''disability'' in paragraph (g) of this section.

(m) *Major life activities*—(1) *In general*. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) *Major bodily functions*. For purposes of paragraph (m)(1) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term ''major'' shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a ''major life activity'' is not determined by reference to whether it is of ''central importance to daily life.''

(n) *Mitigating measures*—(1) *In general*. The term mitigating measures includes, but is not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or ''auxiliary aids or services'' (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(2) *Ordinary eyeglasses or contact lenses*. The term *ordinary eyeglasses or contact lenses* means lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(3) *Low-vision devices*. The term *low-vision devices* means devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses.

(4) *Auxiliary aids and services*. The term *auxiliary aids and services* includes—

(i) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(ii) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(iii) Acquisition or modification of equipment or devices; and

(iv) Other similar services and actions.

(o) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(p) *Prime contractor* means any person holding a contract in excess of $10,000, and, for the purposes of subpart D of this part, ''General Enforcement and Complaint Procedures,'' includes any person who has held a contract subject to the act.

(q) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the

contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) *Qualified individual* means an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. See § 60–741.3 for exceptions to this definition.

(s) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(t) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

(u) *Reasonable accommodation*—(1) *In general*. The term *reasonable accommodation* means modifications or adjustments:

(i) To a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires;[1] or

(ii) To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) That enable the contractor's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's

[1] A contractor's duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.[2] This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(4) Individuals who meet the definition of ''disability'' solely under the ''regarded as'' prong of the definition of ''disability'' as defined in paragraph (v)(1) of this section are not entitled to receive reasonable accommodation.

(v) *Record of such 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. An individual shall be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.

(w) *Recruiting and training agency* means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(x) *Regarded as having such an impairment*—(1) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment if the individual is subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

(2) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts, or may or does ultimately establish a defense to such action.

(3) Establishing that an individual is regarded as having such an impairment does not, by itself, establish liability for unlawful discrimination in violation of this part. Such liability is established only when an individual proves that a contractor discriminated on the basis of disability as prohibited by this part.

(4) *Impairments that are transitory and minor*. Paragraph (v)(1) of this section shall not apply to an impairment that is shown by the contractor to be transitory and minor. The contractor must demonstrate that the impairment is *both* ''transitory'' *and* ''minor.'' Whether the impairment at issue is or would be ''transitory and ''minor'' is to be determined objectively. The fact that a contractor subjectively believed the impairment was transitory and minor is not sufficient to defeat an individual's coverage under paragraph (v)(1) of this section.

(i) An impairment is transitory if it has an actual or expected duration of six months or less.

(ii) [Reserved]

[2] Before providing a reasonable accommodation, the contractor is strongly encouraged to verify with the individual with a disability that the accommodation will effectively meet the individual's needs.

(y) *Secretary* means the Secretary of Labor, United States Department of Labor, or his or her designee.

(z) *Subcontract.* (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

(aa) *Subcontractor* means any person holding a subcontract in excess of $10,000 and, for the purposes of subpart D of this part, ''General Enforcement and Complaint Procedures,'' any person who has held a subcontract subject to the act.

(bb) *Substantially limits*—(1) *In general.* The term ''substantially limits'' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. *Substantially limits* is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered ''substantially limiting.'' Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

(2) *Non-applicability to the ''regarded as'' prong*. Whether an individual's impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of paragraph (g)(1)(iii) of this section.

(3) *Ameliorative effects of mitigating measures*. Except as provided in paragraph (z)(3)(i) of this section, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures as defined in paragraph (n) of this section.

(i) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially limits a major life activity. See paragraph (n)(2) of this section for a definition of ''ordinary eyeglasses or contact lenses.''

(ii) *Non-ameliorative effects of mitigating measures*. The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(4) In determining whether an individual is substantially limited the focus is on how a major life activity is substantially limited, and not on the outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(5) *Predictable assessments*. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, the principles set forth in this section are intended to provide for generous coverage through a framework that is predictable, consistent, and workable for all individuals and contractors with rights and responsibilities under this part. Therefore, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (g)(1)(i) or (ii) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. With respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(i) *Examples of predictable assessments*. Applying the principles set forth in this section it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis (MS) substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may also substantially limit additional major life activities not explicitly listed above.

(ii) [Reserved]

(cc) *Undue hardship*—(1) *In general*. *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (aa)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(dd) *United States*, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

[78 FR 58733, Sept. 24, 2013, as amended at 85 FR 39846, July 2, 2020; 85 FR 71573, Nov. 10, 2020]

§ 60–741.3 Exceptions to the definitions of "disability" and "qualified individual."

(a) *Current illegal use of drugs*—(1) *In general.* The terms ''disability'' and ''qualified individual'' do not include individuals currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use.

(2) *''Drug'' defined.* The term *drug* means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) *''Illegal use of drugs'' defined.* The term *illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) *Construction.* (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude from the definition of *disability* or *qualified individual* an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must, as appropriate, satisfy the requirements of the definition of *disability* and *qualified individual.*

(5) *Drug testing.* It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60–741.24(b)(1).)

(b) *Alcoholics*—(1) *In general.* The terms *disability* and *qualified individual* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation*. Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(c) *Contagious disease or infection*—(1) *In general*. The terms *disability* and *qualified individual* do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) *Duty to provide reasonable accommodation*. Nothing in paragraph (c)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (c)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(d) *Homosexuality and bisexuality*. Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

(e) *Other conditions*. The term *disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 60–741.4 Coverage and waivers.

(a) *Coverage*—(1) *Contracts and subcontracts in excess of $10,000*. Contracts and subcontracts in excess of $10,000 are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities*. With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, ''call-type'' contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will not be in excess of $10,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Employment activities within the United States*. This part applies only to employment activities within the United States and not to employment activities abroad. The term *employment activities within the United States* includes actual employment within the United States, and decisions of the contractor made within the United States, pertaining to the contractor's applicants and employees who are within

the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) *Waivers*—(1) *Specific contracts and classes of contracts.* The Director may waive the application to any contract of the equal opportunity clause in whole or part when he or she deems that special circumstances in the national interest so require. The Director may also grant such waivers to groups or categories of contracts: where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the act. When a waiver has been granted for any class of contracts, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) *National security.* Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Director in writing within 30 days.

(3) *Facilities not connected with contracts.* (i) Upon the written request of the contractor, the Director may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Director finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the act.

(ii) The Director's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract shall include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay, and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility, and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract; and

(F) Such other factors that the Director deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Director's findings as to whether granting a waiver will interfere with or impede the effectuation of

the act shall include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the act;

(B) The contractor's compliance with the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Director deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the act.

(iv) A contractor granted a waiver under paragraph (b)(3) of this section shall:

(A) Promptly inform the Director of any changed circumstances not reflected in the contractor's waiver request; and

(B) Permit the Director access during normal business hours to the contractor's places of business for the purpose of investigating whether the facility granted a waiver meets the standards and requirements of paragraph (b)(3) of this section, and for inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation.

(v)(A) A waiver granted under paragraph (b)(3) of this section shall terminate on one of the following dates, whichever is earliest:

(*1*) Two years after the date the waiver was granted.

(*2*) When the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract.

(*3*) When the Director determines, based on information provided by the contractor under this section or upon any other relevant information, that the facility does not meet the requirements of paragraph (b)(3) of this section.

(B) When a waiver terminates in accordance with paragraph (b)(3)(v)(A) of this section the contractor shall ensure that the facility complies with this part on the date of termination, except that compliance with §§ 60–741.40 through 60–741.44, if applicable, must be attained within 120 days of such termination.

(vi) False or fraudulent statements or representations made by a contractor under paragraph (b)(3) of this section are prohibited and may subject the contractor to sanctions and penalties under this part and criminal prosecution under 18 U.S.C. 1001.

§ 60–741.5 Equal opportunity clause.

(a) *Government contracts.* Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

Equal Opportunity for Workers With Disabilities

1. The contractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability in all employment practices, including the following:

i. Recruitment, advertising, and job application procedures;

ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

iii. Rates of pay or any other form of compensation and changes in compensation;

iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

v. Leaves of absence, sick leave, or any other leave;

vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor;

vii. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

viii. Activities sponsored by the contractor including social or recreational programs; and

ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to comply with the rules, regulations, and relevant orders of

the Secretary of Labor issued pursuant to the act.

3. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

4. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers, or access to computers, that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

5. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, individuals with physical or mental disabilities.

6. The contractor will include the provisions of this clause in every subcontract or purchase order in excess of $10,000, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

7. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability.

[End of Clause]

(b) *Subcontracts.* Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) *Adaption of language.* Such necessary changes in language may be made to the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

(d) *Inclusion of the equal opportunity clause in the contract.* It is not necessary to include the equal opportunity clause verbatim in the contract. The clause shall be made a part of the contract by citation to 41 CFR 60–741.5(a) and inclusion of the following language, in bold text, after the citation: ''This contractor and subcontractor shall abide by the requirements of 41 CFR 60–741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.''

(e) *Incorporation by operation of the act.* By operation of the act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) *Duties of contracting agencies.* Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of

their obligations under the act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in § 60–741.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60–741.20 Covered employment activities.

The prohibition against discrimination in this part applies to the following employment activities:

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

§ 60–741.21 Prohibitions.

(a) The term *discrimination* includes, but is not limited to, the acts described in this section and § 60–741.23.

(1) *Disparate treatment*. It is unlawful for the contractor to deny an employment opportunity or benefit or otherwise to discriminate against a qualified individual on the basis of disability.

(2) *Limiting, segregating and classifying*. Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. For example, the contractor may not segregate employees into separate work areas or into separate lines of advancement on the basis of disability.

(3) *Contractual or other arrangements*—(i) *In general*. It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(ii) *Contractual or other arrangement defined*. The phrase *contractual or other arrangement or relationship* includes, but is not limited to, a relationship with: an employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(iii) *Application*. This paragraph (a)(3) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

(4) *Standards, criteria or methods of administration*. It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

(i) Have the effect of discriminating on the basis of disability; or

(ii) Perpetuate the discrimination of others who are subject to common administrative control.

(5) *Relationship or association with an individual with a disability*. It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified

individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association.

(6) *Not making reasonable accommodation.* (i) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability as defined in §§ 60–741.2(g)(1)(i) or (ii), unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(ii) It is unlawful for the contractor to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(iii) The reasonable accommodation obligation extends to the contractor's use of electronic or online job application systems. If a contractor uses such a system, it must provide necessary reasonable accommodation to ensure that an otherwise qualified individual with a disability who is not able to fully utilize that system is nonetheless provided with equal opportunity to apply and be considered for all jobs. Though not required by this part, it is a best practice for the contractor to make its online job application system accessible and compatible with assistive technologies used by individuals with disabilities.

(iv) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

(v) A contractor is not required to provide reasonable accommodation to an individual who satisfies only the ''regarded as having such an impairment'' prong of the definition of ''disability,'' as defined in § 60- 741.2(v)(1).

(vi) *Reasonable accommodation procedures.* The development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations under section 503 and this part. Such procedures help ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. They also help ensure that the contractor's supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly, within a reasonable period of time. The development and use of written reasonable accommodation procedures is not required by this part, and it is not a violation of this part for a contractor not to have or use such procedures. However, Appendix B of this part provides guidance to contractors that choose to develop and use written reasonable accommodation procedures.

(7) *Qualification standards, tests and other selection criteria*—(i) *In general.* It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude an individual with a disability or a class of individuals with disabilities on the basis of disability but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant with a disability because the

applicant's disability prevents him or her from performing marginal functions.

(ii) *Qualification standards and tests related to uncorrected vision*. It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the contractor, is shown to be job-related for the position in question and consistent with business necessity. An individual challenging a contractor's application of a qualification standard, test, or other criterion based on uncorrected vision need not be an individual with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

(iii) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60–3, do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

(8) *Administration of tests*. It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(9) *Compensation*. In offering employment or promotions to individuals with disabilities, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related pension or other disability-related benefit the applicant or employee receives from another source. Nor may the contractor reduce the amount of compensation offered to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.

(b) *Claims of No Disability*. Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of the lack of disability, or because an individual with a disability was granted an accommodation that was denied to an individual without a disability.

§ 60–741.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60–741.2(e) defining *direct threat*.)

§ 60–741.23 Medical examinations and inquiries.

(a) *Prohibited medical examinations or inquiries*. Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(b) *Permitted medical examinations and inquiries*—(1) *Acceptable pre-employment inquiry*. The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) *Employment entrance examination*. The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(3) *Examination of employees*. The contractor may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an

employee to perform job-related functions.

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. These medical examinations and activities do not have to be job-related and consistent with business necessity.

(5) Medical examinations conducted in accordance with paragraph (b)(2) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees with disabilities as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) *Invitation to self-identify.* The contractor shall invite the applicant to self-identify as an individual with a disability as specified in § 60–741.42.

(d) *Confidentiality and use of medical information.* (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, as amended, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

§ 60–741.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in sensitive positions subject to such regulations.

(b) *Drug testing*—(1) *General policy.* For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of § 60–741.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees.* Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 60–741.23(b)(5) and (c).

§ 60–741.25 Health insurance, life insurance and other benefit plans.

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(b) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(d) The contractor may not deny an individual with a disability equal access to insurance or subject an individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b), and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

Subpart C—Affirmative Action Program

§ 60–741.40 General purpose and applicability of the affirmative action program requirement.

(a) *General purpose.* An affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. An affirmative action program institutionalizes the contractor's commitment to equality in every aspect of employment and is more than a paperwork exercise. An affirmative action program is dynamic in nature and includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities.

(b) *Applicability of the affirmative action program.* (1) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of $50,000 or more.

(2) Contractors described in paragraph (b)(1) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

(3) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–741.44(i).

(c) *Submission of program to OFCCP.* The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

§ 60–741.41 Availability of affirmative action program.

The full affirmative action program, absent the data metrics required by § 60–741.44(k), shall be available to any

employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

§ 60–741.42 Invitation to self-identify.

(a) *Pre-offer*. (1) As part of the contractor's affirmative action obligation, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(1)(i) or (ii). This invitation shall be provided to each applicant when the applicant applies or is considered for employment. The invitation may be included with the application materials for a position, but must be separate from the application.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (a) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(b) *Post-offer*. (1) At any time after the offer of employment, but before the applicant begins his or her job duties, the contractor shall invite the applicant to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(1)(i) or (ii).

(2) The contractor shall invite an applicant to self-identify as required in paragraph (b) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(c) *Employees*. The contractor shall invite each of its employees to voluntarily inform the contractor whether the employee believes that he or she is an individual with a disability as defined in § 60–741.2(g)(1)(i) or (ii). This invitation shall be extended the first year the contractor becomes subject to the requirements of this section and at five year intervals, thereafter, using the language and manner prescribed by the Director and published on the OFCCP Web site. At least once during the intervening years between these invitations, the contractor must remind their employees that they may voluntarily update their disability status.

(d) The contractor may not compel or coerce an individual to self-identify as an individual with a disability.

(e) The contractor shall keep all information on self-identification confidential, and shall maintain it in a data analysis file (rather than in the medical files of individual employees). *See* § 60–741.23(d). The contractor shall provide self-identification information to OFCCP upon request. Self-identification information may be used only in accordance with this part.

(f) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees of whose disability the contractor has knowledge.

(g) Nothing in this section shall relieve the contractor from liability for discrimination in violation of section 503 or this part.

§ 60–741.43 Affirmative action policy.

Under the affirmative action obligations imposed by the act, contractors shall not discriminate because of physical or mental disability and shall take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–741.20.

§ 60–741.44 Required contents of affirmative action programs.

Acceptable affirmative action programs shall contain, but not necessarily be limited to the following elements:

(a) *Policy statement*. The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees with disabilities are provided the notice in a form that is accessible and understandable to the individual with a disability (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). The policy statement shall indicate the top United States executive's (such as the

Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things that the contractor will: recruit, hire, train, and promote persons in all job titles, and ensure that all other personnel actions are administered without regard to disability; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and applicants shall not be subjected to harassment, intimidation, threats, coercion, or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of section 503 or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;

(3) Opposing any act or practice made unlawful by section 503 or its implementing regulations in this part, or any other Federal, State or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by section 503 or its implementing regulations in this part.

(b) *Review of personnel processes.* The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that its personnel processes do not stereotype individuals with disabilities in a manner which limits their access to all jobs for which they are qualified. In addition, the contractor shall ensure that applicants and employees with disabilities have equal access to its personnel processes, including those implemented through information and communication technologies. The contractor is required to provide necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal opportunity in the operation of personnel processes. The contractor is also encouraged to make its information and communication technologies accessible, even absent a specific request for reasonable accommodation.[3] The contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government.

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to

[3] Contractors are encouraged to make their information and communication technology accessible. There are a variety of resources that may assist contractors in assessing and ensuring the accessibility of its information and communication technology. These include the Web Content Accessibility Guidelines (WCAG 2.0) of the World Wide Web Consortium Web Accessibility Initiative, online at *www.w3.org/WAI/intro/wcag.php*, and the regulations implementing the accessibility requirements for Federal agencies prescribed in section 508 of the Rehabilitation Act. Information on section 508 may be found online at *http://www.section508.gov/index.cfm*. This Web site also provides information about various State accessibility requirements and initiatives.

the extent that qualification standards tend to screen out qualified individuals on the basis of disability, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph (c).

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (*See* § 60–741.2(e) defining direct threat.)

(d) *Reasonable accommodation to physical and mental limitations.* (1) As is provided in § 60–741.21(a)(6), as a matter of nondiscrimination, the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee's disability. If the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(2) *Reasonable accommodation procedures.* The development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations under section 503 and this part. Such procedures help ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. They also help ensure that the contractor's supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly, within a reasonable period of time. The development and use of written reasonable accommodation procedures is not required by this part, and it is not a violation of this part for a contractor not to have or use such procedures. However, Appendix B of this part provides guidance to contractors that choose to develop and use written reasonable accommodation procedures.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed on the basis of disability.

(f) *External dissemination of policy, outreach, and positive recruitment*—(1) *Required outreach efforts.* (i) The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit qualified individuals with disabilities. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(ii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) Examples of *outreach and recruitment activities.* Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section.

(i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for individuals with disabilities, in order to fulfill its commitment to provide equal employment opportunity for such individuals:

(A) The State Vocational Rehabilitation Service Agency (SVRA), State

mental health agency, or State developmental disability agency in the area of the contractor's establishment;

(B) The Employment One-Stop Career Center (One-Stop) or American Job Center nearest the contractor's establishment;

(C) The Department of Veterans Affairs Regional Office nearest the contractor's establishment (*www.va.gov*);

(D) Entities funded by the Department of Labor that provide recruitment or training services for individuals with disabilities, such as the services currently provided through the Employer Assistance and Resource Network (EARN) (*www.earnworks.com*);

(E) Local Employment Network (EN) organizations (other than the contractor, if the contractor is an EN) listed in the Social Security Administration's Ticket to Work Employment Network Directory (*www.yourtickettowork.com/endir*);

(F) Local disability groups, organizations, or Centers for Independent Living (CIL) near the contractor's establishment;

(G) Placement or career offices of educational institutions that specialize in the placement of individuals with disabilities; and

(H) Private recruitment sources, such as professional organizations or employment placement services that specialize in the placement of individuals with disabilities.

(ii) The contractor should also consider taking the actions listed below to fulfill its commitment to provide equal employment opportunities to individuals with disabilities:

(A) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor's affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(B) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are individuals with disabilities.

(C) An effort should be made to participate in work-study programs for students, trainees, or interns with disabilities. Such programs may be found through outreach to State and local schools and universities, and through EARN.

(D) Individuals with disabilities should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(E) The contractor should take any other positive steps it deems necessary to attract individuals with disabilities not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These individuals may be located through State and local agencies supported by the U.S. Department of Education's Rehabilitation Services Administration (RSA) (*http://rsa.ed.gov/*), local Ticket-to-Work Employment Networks, or local chapters of groups or organizations that provide services for individuals with disabilities.

(F) The contractor, in making hiring decisions, should consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(3) *Assessment of external outreach and recruitment efforts.* The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as

to the effectiveness of its outreach efforts must be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

(4) *Recordkeeping obligation*. The contractor shall document all activities it undertakes to comply with the obligations of this section, and retain these documents for a period of three (3) years.

(g) *Internal dissemination of policy*. (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. It is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory, and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

(2) The contractor shall implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual or otherwise make the policy available to employees;

(ii) If the contractor is a party to a collective bargaining agreement, it shall notify union officials and/or employee representatives of the contractor's policy and request their cooperation;

(3) The contractor is encouraged to additionally implement and disseminate this policy internally as follows:

(i) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for individuals with disabilities. The contractor should periodically schedule special meetings with all employees to discuss policy and explain individual employee responsibilities;

(ii) Publicize it in the company newspaper, magazine, annual report and other media;

(iii) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation making clear the chief executive officer's support for the affirmative action policy;

(iv) Discuss the policy thoroughly in both employee orientation and management training programs;

(v) Include articles on accomplishments of individuals with disabilities in company publications; and

(vi) When employees are featured in employee handbooks or similar publications for employees, include individuals with disabilities.

(h) *Audit and reporting system*. (1) The contractor shall design and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor's affirmative action program;

(ii) Indicate any need for remedial action;

(iii) Determine the degree to which the contractor's objectives have been attained;

(iv) Determine whether known individuals with disabilities have had the opportunity to participate in all company sponsored educational, training, recreational, and social activities;

(v) Measure the contractor's compliance with the affirmative action program's specific obligations; and

(vi) Document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the recordkeeping requirements of § 60–741.80.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity should appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) *Training.* All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented.

(k) *Data collection analysis.* The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

(1) The number of applicants who self-identified as individuals with disabilities pursuant to § 60–741.42(a), or who are otherwise known to be individuals with disabilities;

(2) The total number of job openings and total number of jobs filled;

(3) The total number of applicants for all jobs;

(4) The number of applicants with disabilities hired; and

(5) The total number of applicants hired.

§ 60–741.45 Utilization goals.

The utilization goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(a) *Goal.* OFCCP has established a utilization goal of 7 percent for employment of qualified individuals with disabilities for each job group in the contractor's workforce, or for the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section.

(b) *Purpose.* The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within each job group in its workforce, or within the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section. The utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

(c) *Periodic review of goal.* The Director of OFCCP shall periodically review and update, as appropriate, the utilization goal established in paragraph (a) of this section.

(d) *Utilization analysis*—(1) *Purpose.* The utilization analysis is designed to evaluate the representation of individuals with disabilities in each job group within the contractor's workforce, or to evaluate the representation of individuals with disabilities in the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section, with the utilization goal established in paragraph (a) of this section.

(2) *Grouping jobs for analysis.* The contractor must use the same job groups established for utilization analyses under Executive Order 11246, either in accordance with 41 CFR part 60–2, or in accordance with 41 CFR part 60–4, as appropriate, except as provided below.

(i) *Contractors with 100 or fewer employees.* If a contractor has a total workforce of 100 or fewer employees, it need not use the jobs groups established for utilization analyses under Executive Order 11246, and has the option to measure the representation of individuals with disabilities in its entire workforce with the utilization goal established in paragraph (a) of this section.

(ii) [Reserved]

(3) *Annual evaluation.* The contractor shall annually evaluate its utilization of individuals with disabilities in each job group, or in its entire workforce as provided in paragraph (d)(2)(i) of this section.

(e) *Identification of problem areas.* When the percentage of individuals with disabilities in one or more job groups, or in a contractor's entire workforce as provided in paragraph (d)(2)(i) of this section, is less than the utilization goal established in paragraph (a) of this section, the contractor must take steps to determine whether and where impediments to equal employment opportunity exist. When

making this determination, the contractor must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audit, and any other areas that might affect the success of the affirmative action program.

(f) *Action-oriented programs.* The contractor must develop and execute action-oriented programs designed to correct any identified problems areas. These action-oriented programs may include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities, alternative or additional outreach and recruitment efforts from among those listed in § 60–741.44 (f)(1) and (f)(2), and/or other actions designed to correct the identified problem areas and attain the established goal.

(g) A contractor's determination that it has not attained the utilization goal established in paragraph (a) of this section in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part.

(h) The utilization goal established in paragraph (a) of this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

§ 60–741.46 Voluntary affirmative action programs for employees with disabilities.

(a) The contractor is permitted to develop and implement training and employment for employees with disabilities. Examples include, developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury (TBI) or developmental disabilities and utilizing linkage agreements to recruit program trainees. Successful programs such as these have been developed by some contractors and OFCCP desires to make clear they are permissible, though not required.

(1) If a contractor elects to implement a voluntary affirmative action program for employees with disabilities, a description of the program and the policies governing the program, including the name and title of the official responsible for the program, shall be included in the contractor's written affirmative action program. An annual report describing the contractor's activities pursuant to the program and identifying the outcomes achieved should also be included in the contractor's affirmative action program.

(2) Disability-related information from the applicant and/or employee self-identification request required by § 60–741.42 may be used to identify individuals with disabilities who are eligible to benefit from a voluntary affirmative action program for employees with disabilities.

(b) The contractor shall not use such programs to segregate individuals with disabilities or to limit or restrict the employment opportunities of any individual with a disability.

(c) The contractor shall not discriminate against an individual with a disability who has participated in a voluntary affirmative action program for employees with disabilities with respect to any term, condition, or benefit of employment, including, but not limited to, employment acts such as compensation, promotion, and termination, that are listed in § 60–741.20.

(d) These voluntary training and development programs should not result in discrimination against other groups and do not relieve a contractor from liability for discrimination under this act, Executive Order 11246, or the Vietnam Era Vetrans' Readjustment Assistance Act.

§ 60–741.47 Sheltered workshops.

Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities in the contractor's own work force. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become ''qualified individuals with disabilities.''

Subpart D—General Enforcement and Complaint Procedures

§ 60–741.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review is conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of section 503 and its regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60–741.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60–741.62.

(c) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total $10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of $10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with section 503 within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice, OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the

award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

§ 60–741.61 Complaint procedures.

(a) *Coordination with other agencies.* Pursuant to section 107(b) of the Americans with Disabilities Act of 1990, as amended (ADA), OFCCP and the Equal Employment Opportunity Commission (EEOC) have promulgated regulations setting forth procedures governing the processing of complaints falling within the overlapping jurisdiction of both the act and title I of the ADA to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Complaints filed under this part will be processed in accordance with those regulations, which are found at 41 CFR part 60–742, and with this part.

(b) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint with the Director alleging a violation of the act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Complaints may be submitted to the OFCCP, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210, or to any OFCCP regional, district, or area office. Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown.

(c) *Contents of complaints*—(1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;

(ii) Name and address of the contractor who committed the alleged violation;

(iii) The facts showing that the individual has a disability, a record or history of a disability, or was regarded by the contractor as having a disability;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* When a written complaint is filed by an authorized representative, that complaint need not identify by name the person on whose behalf it is filed. However, the authorized representative must nonetheless provide the name, address and telephone number of the person on whose behalf the complaint is filed to OFCCP, along with the other information specified in paragraph (c)(1) of this section. OFCCP shall verify the authorization of such complaint with the person on whose behalf the complaint is filed. Any such person may request that OFCCP keep his or her identity confidential during the investigation of the complaint, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(d) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(e) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(f) *Resolution of matters.* (1) If the complaint investigation finds no violation of the act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–741.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or

her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Director will review all determinations of no violation that involve complaints that are not also cognizable under title I of the Americans with Disabilities Act.

(3) In cases where the Director decides to reconsider the determination of a Notification of Results of Investigation, the Director shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60–741.62.

§ 60–741.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is

protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to), remedies such as back pay and retroactive seniority.

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

(e) *Expedited conciliation option.* A contractor may voluntarily waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement. OFCCP may inform the contractor of this expedited conciliation option, but

may not require or insist that the contractor avail itself of the expedited conciliation option.

(f) *Severability*. Should a court of competent jurisdiction hold any provision(s) of this section to be invalid, such action will not affect any other provision of this section.

[85 FR 71574, Nov. 10, 2020]

§ 60–741.63 Violations of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

§ 60–741.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60–741.65).

§ 60–741.65 Enforcement proceedings.

(a) *General*. (1) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any combination of these outcomes. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance review. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service (IRS) for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–741.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure*. (1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions, and decision of the Administrative Law Judge, or the

submission of any exceptions and responses to exceptions to such decision (if any) whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management, Regional Solicitors and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to ''Executive Order 11246'' shall mean section 503 of the Rehabilitation Act of 1973, as amended; references to ''equal opportunity clause''' shall mean the equal opportunity clause published at § 60–741.5; and references to ''regulations'' shall mean the regulations contained in this part.

§ 60–741.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Director, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the act or this part.

(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the act or this part.

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the act or this part subject to reinstatement pursuant to § 60–741.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months, but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–741.67 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–741.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the Director's decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–741.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the act or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;

(3) Opposing any act or practice made unlawful by the act or this part or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by the act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion, or discrimination. The sanctions and penalties contained in this part may be exercised by the Director against any contractor who violates this obligation.

§ 60–741.70 Disputed matters related to compliance with the act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–741.80 Recordkeeping.

(a) *General requirements.* Except as set forth in paragraph (b) of this section, any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later, except as set forth in paragraph (b) of this section. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least $150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor must preserve all personnel records relevant to the complaint, compliance evaluation, or action until final disposition of the complaint, compliance evaluation or action. The term ''personnel records relevant to the complaint, compliance evaluation, or action'' will include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) *Records with three-year retention requirement.* Records required by § 60–741.44(f)(4) and (k) shall be maintained by all contractors for a period of three years from the date of the making of the record.

(c) *Failure to preserve records.* Failure to preserve complete and accurate

records as required by this part constitutes noncompliance with the contractor's obligations under the act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided,* That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

§ 60–741.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information. The contractor must provide records and other information in any of the formats in which they are maintained, as selected by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the act, the Americans with Disabilities Act of 1990, as amended (ADA), and in furtherance of the purposes of the act and the ADA. OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.

§ 60–741.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency, or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the act.

§ 60–741.83 Rulings and interpretations.

Rulings under or interpretations of the act and this part shall be made by the Director.

APPENDIX A TO PART 60–741—GUIDELINES ON A CONTRACTOR'S DUTY TO PROVIDE REASONABLE ACCOMMODATION

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on title I of the Americans with Disabilities Act, as amended (ADA), set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent ''free-standing'' source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. *See* § 60–741.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under section 503, like reasonable accommodation required under the ADA, is a part of the nondiscrimination obligation. *See* EEOC appendix cited in this paragraph. Affirmative action is unique to section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed

in paragraph 2 of this appendix that a contractor shall make an inquiry of an employee with a known disability who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–741.2(r), an individual with a disability is qualified if he or she satisfies all the skill, experience, education, and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the individual with a disability is qualified with respect to that process. One is qualified within the meaning of section 503 if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide reasonable accommodation for applicants and employees of whose disabilities the contractor has actual knowledge. As stated in § 60–741.42, as part of the contractor's affirmative action obligation, the contractor is required to invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability both prior to an offer of employment, and after an offer of employment but before he or she begins his/her employment duties. That invitation also informs applicants of the contractor's reasonable accommodation obligation and invites individuals with disabilities to request any accommodation they might need. Moreover, § 60–741.44(d) provides that if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the ''best'' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term ''undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source (e.g., a State vocational rehabilitation agency) or if Federal, State, or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the individual with a disability must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for ''reasonable accommodation'' in § 60–741.2(s) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are a number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the individual

with a disability in deciding on the appropriate accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate State vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–800–669–4000 (voice) or 1–800–669–6820 (TTY)), the Job Accommodation Network (JAN)—a service of the U.S. Department of Labor's Office of Disability Employment Policy (1–800–526–7234 (voice) or 1–877–781–9403 (TTY)), private disability organizations, and other employers.

6. With respect to accommodations that can permit an employee with a disability to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For those visually-impaired, such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, Braille writers, talking calculators, magnifiers, audio recordings, and Braille or large print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids, and TTY machines. For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, mechanical page turners, and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter, or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by individuals with disabilities—including areas used by employees for purposes other than the performance of essential job functions—such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots, and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in §60–741.2(s) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified individual with a disability cannot perform to another position. Accordingly, if a clerical employee is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, *i.e.,* those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor that has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind individual with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the individual with a disability. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit individuals with disabilities who cannot work a standard schedule because of the need to obtain medical treatment, or individuals with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider known applicants with disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A reasonable amount of time should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned individual with a disability at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled. It should also be noted that the contractor is not required to promote an individual with a disability as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) Providing information regarding job vacancies in a form accessible to those with vision or hearing impairments (e.g., by making an announcement available

in Braille, in large print, or on audio tape, or by responding to job inquiries via TTY); (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3) appropriately adjusting or modifying employment-related examinations (e.g., extending regular time deadlines, allowing a blind person or one with a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her disability to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices); and (4) ensuring an applicant with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

APPENDIX B TO PART 60–741—DEVELOPING REASONABLE ACCOMMODATION PROCEDURES

As stated in §§60–741.21(a)(6) and 60–741.44(d), the development and use of written procedures for processing requests for reasonable accommodation is a best practice. This Appendix provides guidance contractors may wish to use should they decide to adopt this best practice. As stated in the regulations, contractors are not required to use written reasonable accommodation procedures, and the failure to use such procedures will not result in a finding of violation.

1. *Designation of responsible official.* The contractor should designate an official to be responsible for the implementation of the reasonable accommodation procedures. The responsible official may be the same official who is responsible for the implementation of the contractor's affirmative action program. The responsible official should have the authority, resources, support, and access to top management that is needed to ensure the effective implementation of the reasonable accommodation procedures. The name, title/office, and contact information (telephone number and email address) of the responsible official should be included in the reasonable accommodation procedures, and should be updated when changes occur.

2. *Description of process.* The contractor's reasonable accommodation procedures should contain a description of the steps the contractor takes when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description should identify this information. For example, the contractor's reasonable accommodation procedures may state that to obtain a reasonable accommodation, the contractor must be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation. The description should also indicate that, if the need for accommodation is not obvious, or if additional information is needed, the contractor may initiate an interactive process with the accommodation requester.

3. *Form of requests for reasonable accommodation.* The reasonable accommodation procedures should specify that a request for reasonable accommodation may be oral or written and should explain that there are no required ''magic words'' that must be used by the requester to request an accommodation. The procedures should also state that requests for reasonable accommodation may be made by an applicant, employee, or by a third party, such as a relative, job coach, or friend, on his or her behalf.

4. *Submission of reasonable accommodation requests by employees.* The reasonable accommodation procedures should identify to whom an employee (or a third party acting on his or her behalf) must submit an accommodation request. At a minimum, this should include any supervisor or management official in the employee's chain of command, and the official responsible for the implementation of the reasonable accommodation procedures.

5. *Recurring requests for a reasonable accommodation.* The reasonable accommodation procedures should provide that in instances of a recurring need for an accommodation (e.g., a hearing impaired employee's need for a sign language interpreter for meetings) the requester will not be required to repeatedly submit or renew their request for accommodation each time the accommodation is needed. In the absence of a reasonable belief that the individual's recurring need for the accommodation has changed, requiring the repeated submission of a request for the accommodation could be considered harassment on the basis of disability in violation of this part.

6. *Supporting medical documentation.* The reasonable accommodation procedures should explain the circumstances, if any, under which the contractor may request and review medical documentation in support of a request for reasonable accommodation. The procedures should explain that any request for medical documentation may not be open ended, and must be limited to documentation of the individual's disability and the functional limitations for which reasonable accommodation is sought. The procedures should also explain that the submission of medical documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

7. *Written confirmation of receipt of request.* The reasonable accommodation procedures should specify that written confirmation of the receipt of a request for reasonable accommodation will be provided to the requester, either by letter or email. The written confirmation should include the date the accommodation request was received, and be signed by the authorized decisionmaker or his or her designee.

8. *Timeframe for processing requests.* The reasonable accommodation procedures should state that requests for accommodation will be processed as expeditiously as possible. Oral requests for reasonable accommodation should be considered received on the date they are initially made, even if the contractor has a reasonable accommodation request form that has not been completed. Requests for reasonable accommodation must be processed within a reasonable period of time. What constitutes a reasonable period of time will depend upon the specific circumstances. However, in general, if supporting medical documentation is not needed, that timeframe should not be longer than 5 to 10 business days. If supporting medical documentation is needed, or if special equipment must be ordered, that timeframe should not exceed 30 calendar days, unless there are extenuating circumstances beyond the control of the contractor. The procedures should explain what constitutes extenuating circumstances. However, reasonable accommodations may need to be provided even more expeditiously for applicants. See the discussion of accommodation requests from applicants in section 10, below.

9. *Delay in responding to request.* If the contractor's processing of an accommodation request will exceed established timeframes, written notice should be provided to the requester. The notice should include the reason(s) for the delay and a projected date of response. The notice should also be dated and signed by the authorized decisionmaker or his or her designee.

10. *Reasonable accommodation requests by applicants.* The reasonable accommodation procedures should include procedures to ensure that all applicants, including those using the contractor's online or other electronic application system, are made aware of the contractor's reasonable accommodation obligation and are invited to request any reasonable accommodation needed to participate fully in the application process. All applicants should also be provided with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. The contractor's procedures should provide that reasonable accommodation requests by or on behalf of an applicant are processed expeditiously, using timeframes tailored to the application process.

11. *Denial of reasonable accommodation.* The contractor's reasonable accommodation procedures should specify that any denial or refusal to provide a requested reasonable accommodation will be provided in writing. The written denial should include the reason for the denial and be dated and signed by the authorized decisionmaker or his or her designee. If the contractor provides an internal appeal or reconsideration process, the written denial should inform the requester about this process.

12. *Confidentiality.* The contractor's reasonable accommodation procedures should indicate that all requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as confidential medical records and maintained in a separate medical file, in accordance with section 503 and this part.

13. *Dissemination of procedures to employees.* The contractor should disseminate its written reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by their inclusion in an employee handbook that is disseminated to all employees and/or by email or electronic posting on a company Web page where work-related notices are ordinarily posted. Notice of the reasonable accommodation procedures should be provided to employees who work off-site in the same manner that notice of other work-related matters is ordinarily provided to these employees.

14. *Training.* The contractor should provide annual training for its supervisors and managers regarding the implementation of the reasonable accommodation procedures. Training should also be provided whenever significant changes are made to the reasonable accommodation procedures. Training regarding the reasonable accommodation procedures may be provided in conjunction with other required equal employment opportunity or affirmative action training.

PART 60–742—PROCEDURES FOR COMPLAINTS/CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY FILED AGAINST EMPLOYERS HOLDING GOVERNMENT CONTRACTS OR SUBCONTRACTS

Sec.

60–742.1 Purpose and application.
60–742.2 Exchange of information.
60–742.3 Confidentiality.

60–742.4 Standards for investigations, hearings, determinations and other proceedings.
60–742.5 Processing of complaints filed with OFCCP.
60–742.6 Processing of charges filed with EEOC.
60–742.7 Review of this part.
60–742.8 Definitions.

AUTHORITY: 42 U.S.C. 12117(b).

SOURCE: 57 FR 2962, 2965, Jan. 24, 1992, unless otherwise noted.

§ 60–742.1 Purpose and application.

The purpose of this part is to implement procedures for processing and resolving complaints/charges of employment discrimination filed against employers holding government contracts or subcontracts, where the complaints/charges fall within the jurisdiction of both section 503 of the Rehabilitation Act of 1973 (hereinafter ''Section 503'') and the Americans with Disabilities Act of 1990 (hereinafter ''ADA''). The promulgation of this part is required pursuant to section 107(b) of the ADA. Nothing in this part should be deemed to affect the Department of Labor's (hereinafter ''DOL'') Office of Federal Contract Compliance Programs' (hereinafter ''OFCCP'') conduct of compliance reviews of government contractors and subcontractors under section 503. Nothing in this part is intended to create rights in any person.

§ 60–742.2 Exchange of information.

(a) EEOC and OFCCP shall share any information relating to the employment policies and practices of employers holding government contracts or subcontracts that may assist each office in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, affirmative action programs, annual employment reports, complaints, charges, investigative files, and compliance review reports and files.

(b) All requests by third parties for disclosure of the information described in paragraph (a) of this section shall be coordinated with the agency which initially compiled or collected the information.

(c) Paragraph (b) of this section is not applicable to requests for data in EEOC files made by any state or local agency designated as a ''FEP agency'' with which EEOC has a charge resolution contract and a work-sharing agreement containing the confidentiality requirements of sections 706(b) and 709(e) of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). However, such an agency shall not disclose any of the information, initially compiled by OFCCP, to the public without express written approval by the Director of OFCCP.

§ 60–742.3 Confidentiality.

When the Department of Labor receives information obtained by EEOC, the Department of Labor shall observe the confidentiality requirements of sections 706(b) and 709(e) of title VII of the Civil Rights Act of 1964, as incorporated by section 107(a) of the ADA, as would EEOC, except in cases where DOL receives the same information from a source independent of EEOC. Questions concerning confidentiality shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel of EEOC.

§ 60–742.4 Standards for investigations, hearings, determinations and other proceedings.

In any OFCCP investigation, hearing, determination or other proceeding involving a complaint/charge that is dual filed under both section 503 and the ADA, OFCCP will utilize legal standards consistent with those applied under the ADA in determining whether an employer has engaged in an unlawful employment practice. EEOC and OFCCP will coordinate the arrangement of any necessary training regarding the substantive or procedural provisions of the ADA, and of EEOC's implementing regulations (29 CFR part 1630 and 29 CFR part 1601).

§ 60–742.5 Processing of complaints filed with OFCCP.

(a) Complaints of employment discrimination filed with OFCCP will be considered charges, simultaneously dual filed, under the ADA whenever the complaints also fall within the jurisdiction of the ADA. OFCCP will act as EEOC's agent for the sole purposes of receiving, investigating and processing the ADA charge component of a section

503 complaint dual filed under the ADA, except as otherwise set forth in paragraph (e) of this section.

(b) Within ten days of receipt of a complaint of employment discrimination under section 503 (charge under the ADA), OFCCP shall notify the contractor/respondent that it has received a complaint of employment discrimination under section 503 (charge under the ADA). This notification shall state the date, place and circumstances of the alleged unlawful employment practice.

(c) Pursuant to work-sharing agreements between EEOC and state and local agencies designated as FEP agencies, the deferral period for section 503 complaints/ADA charges dual filed with OFCCP will be waived.

(d) OFCCP shall transfer promptly to EEOC a complaint of employment discrimination over which it does not have jurisdiction but over which EEOC may have jurisdiction. At the same time, OFCCP shall notify the complainant and the contractor/respondent of the transfer, the reason for the transfer, the location of the EEOC office to which the complaint was transferred and that the date OFCCP received the complaint will be deemed the date it was received by EEOC.

(e) OFCCP shall investigate and process as set forth in this section all section 503 complaints/ADA charges dual filed with OFCCP, except as specifically provided in this paragraph. Section 503 complaints/ADA charges raising Priority List issues, those which also include allegations of discrimination of an individual nature on the basis of race, color, religion, sex, or national origin, and those which also include an allegation of discrimination on the basis of age will be referred in their entirety by OFCCP to EEOC for investigation, processing and final resolution, provided that such complaints/charges do not include allegations of violation of affirmative action requirements under section 503. In such a situation, OFCCP will bifurcate the complaints/charges and refer to EEOC the Priority List issues or allegations of discrimination on the basis of race, color, religion, sex, national origin, or age. OFCCP shall normally retain, investigate, process and resolve all allegations of discrimination, over which it has jurisdiction, of a systemic or class nature on the basis of race, color, religion, sex, or national origin that it receives. However, in appropriate cases the EEOC may request that it be referred such allegations so as to avoid duplication of effort and assure effective law enforcement.

(1) *No cause section 503 complaints/ADA charges*. If the OFCCP investigation of the section 503 complaint/ADA charge results in a finding of no violation under section 503 (no cause under the ADA), OFCCP will issue a determination of no violation/no cause under both section 503 and the ADA, and issue a right-to-sue letter under the ADA, closing the complaint/charge.

(2) *Cause section 503 complaints/ADA charges*—(i) *Successful conciliation*. If the OFCCP investigation of the section 503 complaint/ADA charge results in a finding of violation under section 503 (cause under the ADA), OFCCP will issue a finding of violation/cause under both section 503 and ADA. OFCCP shall attempt conciliation to obtain appropriate full relief for the complainant (charging party), consistent with EEOC's standards for remedies. If conciliation is successful and the contractor/respondent agrees to provide full relief, the section 503 complaint/ADA charge will be closed and the conciliation agreement will state that the complainant (charging party) agrees to waive the right to pursue the subject issues further under section 503 and/or the ADA.

(ii) *Unsuccessful conciliation*. All section 503 complaints/ADA charges not successfully conciliated will be considered for OFCCP administrative litigation under section 503, consistent with OFCCP's usual procedures. (See 41 CFR part 60–741, subpart B.) If OFCCP pursues administrative litigation under section 503, OFCCP will close the complaint/charge at the conclusion of the litigation process (including the imposition of appropriate sanctions), unless the complaint/charge is dismissed on procedural grounds or because of a lack of jurisdiction, or the contractor/respondent fails to comply with an order to provide make whole relief. In these

three cases, OFCCP will refer the matter to EEOC for any action it deems appropriate. If EEOC declines to pursue further action, it will issue a notice of right-to-sue. If OFCCP does not pursue administrative enforcement, it will close the section 503 component of the complaint/charge and refer the ADA charge component to EEOC for litigation review under the ADA. If EEOC declines to litigate, EEOC will close the ADA charge and issue a notice of right-to-sue.

(f) Consistent with the ADA procedures set forth at 29 CFR 1601.28, OFCCP shall promptly issue upon request a notice of right-to-sue after 180 days from the date the complaint/charge was filed. Issuance of a notice of right-to-sue shall terminate further OFCCP processing of any complaint/charge unless it is determined at that time or at a later time that it would effectuate the purposes of section 503 and/or the ADA to further process the complaint/charge.

(g) If an individual who has already filed a section 503 complaint with OFCCP subsequently attempts to file or files an ADA charge with EEOC covering the same facts and issues, EEOC will decline to accept the charge (or, alternatively, dismiss a charge that has been filed) on the grounds that such charge has already been filed under the ADA, simultaneous with the filing of the earlier section 503 complaint, and will be processed by OFCCP in accordance with the provisions of this section.

§ 60–742.6 Processing of charges filed with EEOC.

(a) *ADA cause charges falling within the jurisdiction of section 503 that the Commission has declined to litigate.* ADA cause charges that also fall within the jurisdiction of section 503 and that the Commission has declined to litigate will be referred to OFCCP for review of the file and any administrative action deemed appropriate under section 503. Such charges will be considered to be complaints, simultaneously dual filed under section 503, solely for the purposes of OFCCP review and administrative action described in this paragraph.

(b) *ADA charges which also include allegations of failure to comply with section 503 affirmative action requirements.* ADA charges filed with EEOC, in which both allegations of discrimination under the ADA and violation of affirmative action requirements under section 503 are made, will be referred in their entirety to OFCCP for processing and resolution under section 503 and the ADA, unless the charges also include allegations of discrimination on the basis of race, color, religion, sex, national origin or age, or include allegations involving Priority List issues, or the charges are otherwise deemed of particular importance to EEOC's enforcement of the ADA. In such situations, EEOC will bifurcate the charges and retain the ADA component of the charges (and when applicable, the allegations pertaining to discrimination on the basis of race, color, religion, sex, national origin or age), referring the section 503 affirmative action component of the charges to OFCCP for processing and resolution under section 503. ADA charges which raise both discrimination issues under the ADA and section 503 affirmative action issues will be considered complaints, simultaneously dual filed under section 503, solely for the purposes of referral to OFCCP for processing, as described in this paragraph.

(c) EEOC shall transfer promptly to OFCCP a charge of disability-related employment discrimination over which it does not have jurisdiction, but over which OFCCP may have jurisdiction. At the same time, EEOC shall notify the charging party and the contractor/respondent of the transfer, the reason for the transfer, the location of the OFCCP office to which the charge was transferred and that the date EEOC received the charge will be deemed the date it was received by OFCCP.

(d) Except as otherwise stated in paragraphs (a) and (b) of this section, individuals alleging violations of laws enforced by DOL and over which EEOC has no jurisdiction will be referred to DOL to file a complaint.

(e) If an individual who has already filed an ADA charge with EEOC subsequently attempts to file or files a section 503 complaint with OFCCP covering the same facts and issues, OFCCP will accept the complaint, but will adopt as a disposition of the complaint EEOC's resolution of the ADA charge

(including EEOC's termination of proceedings upon its issuance of a notice of right-to-sue).

§ 60–742.7 Review of this part.

This part shall be reviewed by the Chairman of the EEOC and the Director of OFCCP periodically, and as appropriate, to determine whether changes to the part are necessary or desirable, and whether the part should remain in effect.

§ 60–742.8 Definitions.

As used in this part, the term:

ADA refers to title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*).

Affirmative action requirements refers to affirmative action requirements required by DOL pursuant to section 503 of the Rehabilitation Act of 1973, that go beyond the nondiscrimination requirements imposed by the ADA.

Chairman of the EEOC refers to the Chairman of the U.S. Equal Employment Opportunity Commission, or his or her designee.

Complaint/Charge means a section 503 complaint/ADA charge. The terms are used interchangeably.

Director of the Office of Federal Contract Compliance Programs refers to that individual or his or her designee.

DOL means the U.S. Department of Labor, and where appropriate, any of its headquarters or regional offices.

EEOC means the U.S. Equal Employment Opportunity Commission, and where appropriate, any of its headquarters, district, area, local, or field offices.

Government means the government of the United States of America.

Priority List refers to a document listing a limited number of controversial topics under the ADA on which there is not yet definitive guidance setting forth EEOC's position. The Priority List will be jointly developed and periodically reviewed by EEOC and DOL. Any policy documents involving Priority List issues will be coordinated between DOL and EEOC pursuant to Executive Order 12067 (3 CFR, 1978 Comp., p. 206) prior to final approval by EEOC.

OFCCP means the Office of Federal Contract Compliance Programs, and where appropriate, any of its regional or district offices.

Section 503 refers to section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793).

Section 503 complaint/ADA charge refers to a complaint that has been filed with OFCCP under section 503 of the Rehabilitation Act, and has been deemed to be simultaneously dual filed with EEOC under the ADA.

PART 60–999—OMB CONTROL NUMBERS FOR OFCCP INFORMATION COLLECTION REQUIREMENTS

Sec.
60–999.1 Purpose.
60–999.2 Display.

AUTHORITY: 44 U.S.C. Ch. 35.

SOURCE: 61 FR 43467, Aug. 23, 1996, unless otherwise noted.

§ 60–999.1 Purpose.

This part displays control numbers assigned to information collection requirements of the Office of Federal Contract Compliance Programs by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. Ch. 35. This part fulfills the PRA requirement that agencies display a current control number for each agency information collection requirement approved by OMB (44 U.S.C. 3507).

§ 60–999.2 Display.

41 CFR Part where the information collection requirement is located	Current OMB control No.
Part 60–1	1215–0072, 1215–0131, 1215–0163.
Part 60–2	1215–0072.
Part 60–3	3046–0017.
Part 60–4	1215–0163.
Part 60–20	1215–0072, 1215–0163.
Part 60–30	1215–0072, 1215–0163.
Part 60–40	1215–0072, 1215–0163.
Part 60–50	1215–0072, 1215–0163.
Part 60–250	1215–0072, 1215–0131, 1215–0163.
Part 60–741	1215–0072, 1215–0131, 1215–0163.

[62 FR 66971, Dec. 22, 1997]

CHAPTER 61—OFFICE OF THE ASSISTANT SECRETARY FOR VETERANS' EMPLOYMENT AND TRAINING SERVICE, DEPARTMENT OF LABOR

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PARTS 61–1—61–249 [RESERVED]

PART 61–300—ANNUAL REPORT FROM FEDERAL CONTRACTORS

Sec.
61–300.1 What is the purpose and scope of this part?
61–300.2 What definitions apply to this part?
61–300.10 What reporting requirements apply to Federal contractors and subcontractors, and what specific wording must the reporting requirements contract clause contain?
61–300.11 When and how should Federal contractors and subcontractors file VETS–4212 Reports?
61–300.20 How will DOL determine whether a contractor or subcontractor is complying with the requirements of this part?
61–300.99 What is the OMB control number for this part?

AUTHORITY: 38 U.S.C. 4211 and 4212.

SOURCE: 79 FR 57473, Sept. 25, 2014, unless otherwise noted.

§ 61–300.1 What is the purpose and scope of this part?

(a) This part 61–300 implements 38 U.S.C. 4212(d). Each contractor or subcontractor who enters into a contract or subcontract in the amount of $100,000 or more with any department or agency of the United States for the procurement of personal property and non-personal services (including construction), and who is subject to 38 U.S.C. 4212(a), must report annually to the Secretary of Labor information on the number of employees in its workforce who belong to the categories of veterans protected under the Act, and the number of those employees who were hired during the period covered by the report. Each contractor or subcontractor must provide the required information on veterans' employment by filing the Federal Contractor Veterans' Employment Report VETS–4212 (VETS–4212 Report), in accordance with the requirements of § 61–300.11.

(b) Notwithstanding the regulations in this part, the regulations at 41 CFR part 60–300, administered by OFCCP continue to apply to contractors' and subcontractors' affirmative action obligations regarding protected veterans.

(c) Reporting requirements of this part regarding protected veterans will be deemed waived in those instances in which the Director of OFCCP has granted a waiver under 41 CFR 60–300.4(b)(1), or has concurred in the granting of a waiver under 41 CFR 60–300.4(b)(3), from compliance with all the terms of the equal opportunity clause for those establishments not involved in Government contract work. Where OFCCP grants only a partial waiver, compliance with these reporting requirements regarding protected veterans will be required.

(d) 41 CFR part 60–300, subpart C and Appendix B to part 60–300 provide guidance concerning the affirmative action obligations of Federal contractors toward applicants for employment who are protected veterans.

§ 61–300.2 What definitions apply to this part?

(a) For the purposes of this part, the definitions for the terms ''contract,'' ''contractor'', ''Government contract,'' ''subcontract,'' and ''subcontractor'' are the same as those set forth in 41 CFR part 60–300.

(b) For purposes of this part:

(1) *Active duty wartime or campaign badge veteran* means a veteran who served on active duty in the U.S. military, ground, naval, or air service during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

(2) *Armed Forces service medal veteran* means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209, 3 CFR, 1996 Comp., p. 159).

(3) *Disabled veteran* means:

(i) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or

(ii) A person who was discharged or released from active duty because of a service-connected disability.

(4) *Electronic filing or ''e-filing''* means filing the VETS–4212 Report via the VETS web-based filing system. E-filing

also includes transmitting or delivering the VETS–4212 Report as an electronic data file. Instructions for electronically filing the VETS–4212 Report are found on VETS' Web site at: *http://www.dol.gov/vets/vets100filing.htm.*

(5) *Employee* means any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes except insurance sales agents who are considered to be employees for such purposes solely because of the provisions of 26 U.S.C. 3121 (d)(3)(B) (the Internal Revenue Code). Leased employees are included in this definition. Leased employee means a permanent employee provided by an employment agency for a fee to an outside company for which the employment agency handles all personnel tasks including payroll, staffing, benefit payments and compliance reporting. The employment agency shall, therefore, include leased employees in its VETS–4212 Report. The term employee shall not include persons who are hired on a casual basis for a specified time, or for the duration of a specified job (for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employee's work at the site); persons temporarily employed in any industry other than construction, such as temporary office workers, mariners, stevedores, lumber yard workers, etc., who are hired through a hiring hall or other referral arrangement, through an employee contractor or agent, or by some individual hiring arrangement, or persons (except leased employees) on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control.

(6) *Hiring location* (this definition is identical to *establishment* as defined by the instructions for completing Employer Information Report EEO–1, Standard Form 100 (EEO–1 Report)) means an economic unit which produces goods or services, such as a factory, office, store, or mine. In most instances the establishment is at a single physical location and is engaged in one, or predominantly one, type of economic activity. Units at different locations, even though engaged in the same kind of business operation, should be reported as separate establishments. For locations involving construction, transportation, communications, electric, gas, and sanitary services, oil and gas fields, and similar types of physically dispersed industrial activities, however, it is not necessary to list separately each individual site, project, field, line, etc., unless it is treated by the contractor as a separate legal entity. For these physically dispersed activities, list as establishments only those relatively permanent main or branch offices, terminals, stations, etc., which are either:

(i) Directly responsible for supervising such dispersed activities; or

(ii) The base from which personnel and equipment operate to carry out these activities. (Where these dispersed activities cross State lines, at least one such establishment should be listed for each State involved).

(7) *Job category* means any of the following: Officials and managers (Executive/Senior Level Officials and Managers and First/Mid-Level Officials and Managers), professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers, as required by the EEO–1 Report, as follows:

(i) *Officials and managers* as a whole are to be divided into the following two subcategories: Executive/Senior Level Officials and Managers and First/Mid-Level Officials and Managers.

(A) *Executive/Senior Level Officials and Managers* means individuals, who plan, direct and formulate policies, set strategy and provide the overall direction of enterprises/organizations for the development and delivery of products and services, within the parameters approved by boards of directors of other governing bodies. Residing in the highest levels of organizations, these executives plan, direct, or coordinate activities with the support of subordinate executives and staff managers. They include, in larger organizations, those individuals within two reporting levels of the Chief Executive Officer (CEO), whose responsibilities require frequent interaction with the CEO. Examples of

these kinds of managers are: Chief executive officers, chief operating officers, chief financial officers, line of business heads, presidents or executive vice presidents of functional areas or operating groups, chief information officers, chief human resources officers, chief marketing officers, chief legal officers, management directors and managing partners.

(B) *First/Mid-Level Officials and Managers* means individuals who serve as managers, other than those who serve as Executive/Senior Level Officials and Managers, including those who oversee and direct the delivery of products, services or functions at group, regional or divisional levels of organizations. These managers receive directions from Executive/Senior Level management and typically lead major business units. They implement policies, programs and directives of Executive/Senior Level management through subordinate managers and within the parameters set by Executives/Senior Level management. Examples of these kinds of managers are: Vice presidents and directors; group, regional or divisional controllers; treasurers; and human resources, information systems, marketing, and operations managers. The First/Mid-Level Officials and Managers subcategory also includes those who report directly to middle managers. These individuals serve at functional, line of business segment or branch levels and are responsible for directing and executing the day-to-day operational objectives of enterprises/organizations, conveying the directions of higher level officials and managers to subordinate personnel and, in some instances, directly supervising the activities of exempt and non-exempt personnel. Examples of these kinds of managers are: First-line managers; team managers; unit managers; operations and production managers; branch managers; administrative services managers; purchasing and transportation managers; storage and distribution managers; call center or customer service managers; technical support managers; and brand or product managers.

(ii) *Professionals* means individuals in positions that require bachelor and graduate degrees, and/or professional certification. In some instances, comparable experience may establish a person's qualifications. Examples of these kinds of positions include: accountants and auditors; airplane pilots and flight engineers; architects; artists; chemists; computer programmers; designers; dieticians; editors; engineers; lawyers; librarians; mathematical scientists; natural scientists; registered nurses; physical scientists; physicians and surgeons; social scientists; teachers; and surveyors.

(iii) *Technicians* means individuals in positions that include activities requiring applied scientific skills, usually obtained by post-secondary education of varying lengths, depending on the particular occupation, recognizing that in some instances additional training, certification, or comparable experience is required. Examples of these types of positions include: drafters; emergency medical technicians; chemical technicians; and broadcast and sound engineering technicians.

(iv) *Sales workers* means individuals in positions including non-managerial activities that wholly and primarily involve direct sales. Examples of these types of positions include: advertising sales agents; insurance sales agents; real estate brokers and sales agents; wholesale sales representatives; securities, commodities, and financial services sales agents; telemarketers; demonstrators; retail salespersons; counter and rental clerks; and cashiers.

(v) *Administrative support workers* means individuals in positions involving non-managerial tasks providing administrative and support assistance, primarily in office settings. Examples of these types of positions include: office and administrative support workers; bookkeeping; accounting and auditing clerks; cargo and freight agents; dispatchers; couriers; data entry keyers; computer operators; shipping, receiving and traffic clerks; word processors and typists; proofreaders; desktop publishers; and general office clerks.

(vi) *Craft workers* means individuals in positions that include higher skilled occupations in construction (building trades craft workers and their formal apprentices) and natural resource extraction workers. Examples of these

types of positions include: boilermakers; brick and stone masons; carpenters; electricians; painters (both construction and maintenance); glaziers; pipe layers, plumbers, pipefitters and steamfitters; plasterers; roofers; elevator installers; earth drillers; derrick operators; oil and gas rotary drill operators; and blasters and explosive workers. This category also includes occupations related to the installation, maintenance and part replacement of equipment, machines and tools, such as: automotive mechanics; aircraft mechanics; and electric and electronic equipment repairers. This category also includes some production occupations that are distinguished by the high degree of skill and precision required to perform them, based on clearly defined task specifications, such as: millwrights; etchers and engravers; tool and die makers; and pattern makers.

(vii) *Operatives* means individuals in intermediate skilled occupations and includes workers who operate machines or factory-related processing equipment. Most of these occupations do not usually require more than several months of training. Examples include: textile machine workers; laundry and dry cleaning workers; photographic process workers; weaving machine operators; electrical and electronic equipment assemblers; semiconductor processors; testers, graders and sorters; bakers; and butchers and other meat, poultry and fish processing workers. This category also includes occupations of generally intermediate skill levels that are concerned with operating and controlling equipment to facilitate the movement of people or materials, such as: bridge and lock tenders; truck, bus or taxi drivers; industrial truck and tractor (forklift) operators; parking lot attendants; sailors; conveyor operators; and hand packers and packagers.

(viii) *Laborers and helpers* means individuals with more limited skills who require only brief training to perform tasks that require little or no independent judgment. Examples include: production and construction worker helpers; vehicle and equipment cleaners; laborers; freight, stock and material movers; service station attendants; construction laborers; refuse and recyclable materials collectors; septic tank servicers; and sewer pipe cleaners.

(ix) *Service workers* means individuals in positions that include food service, cleaning service, personal service, and protective service activities. Skill may be acquired through formal training, job-related training or direct experience. Examples of food service positions include: cooks; bartenders; and other food service workers. Examples of personal service positions include: medical assistants and other healthcare support positions; hairdressers; ushers; and transportation attendants. Examples of cleaning service positions include: cleaners; janitors; and porters. Examples of protective service positions include: transit and railroad police and fire fighters; guards; private detectives and investigators.

(8) *NAICS* means the North American Industrial Classification System.

(9) *OFCCP* means the Office of Federal Contract Compliance Programs, U.S. Department of Labor.

(10) *Protected veteran* means a veteran who is protected under the non-discrimination and affirmative action provisions of the Act; specifically, a veteran who may be classified as a ''disabled veteran,'' ''recently separated veteran,'' ''active duty wartime or campaign badge veteran,'' or an ''Armed Forces service medal veteran,'' as defined in this section.

(11) *Recently separated veteran* means a veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

(12) *States* means each of the several States of the United States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

(13) *VETS* means the Office of the Assistant Secretary for Veterans' Employment and Training Service, U.S. Department of Labor.

§61–300.10 What reporting requirements apply to Federal contractors and subcontractors, and what specific wording must the reporting requirements contract clause contain?

Each contractor or subcontractor described in §61–300.1 must submit reports in accordance with the following reporting clause, which must be included in each of its covered government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract). Such clause is considered as an addition to the equal opportunity clause required by 41 CFR 60–300.5. The reporting requirements clause is as follows:

EMPLOYER REPORTS ON EMPLOYMENT OF PROTECTED VETERANS

(a) The contractor agrees to report at least annually, as required by the Secretary of Labor, on:

(1) The total number of employees in the workforce of such contractor, by job category and hiring location, and the total number of such employees, by job category and hiring location, who are protected veterans;

(2) The total number of new employees hired by the contractor during the period covered by the report, and of such employees, the number who are protected veterans; and

(3) The maximum number and minimum number of employees of such contractor at each hiring location during the period covered by the report.

(4) The term ''protected veteran'' refers to a veteran who may be classified as a ''disabled veteran,'' recently separated veteran, ''active duty wartime or campaign badge veteran,'' or an ''Armed Forces service medal veteran,'' as defined in 41 CFR 61–300.2.

(b) The above items must be reported by completing the report entitled ''Federal Contractor Veterans' Employment Report VETS–4212.''

(c) VETS–4212 Reports must be filed no later than September 30 of each year following a calendar year in which a contractor or subcontractor held a covered contract or subcontract.

(d) The employment activity report required by paragraphs (a)(2) and (a)(3) of this clause must reflect total new hires and maximum and minimum number of employees during the 12-month period preceding the ending date that the contractor selects for the current employment report required by paragraph (a)(1) of this clause. Contractors may select an ending date:

(1) As of the end of any pay period during the period July 1 through August 31 of the year the report is due; or

(2) As of December 31, if the contractor has previous written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO–1, Standard Form 100 (EEO–1 Report).

(e) The number of veterans reported according to paragraph (a) above must be based on data known to contractors and subcontractors when completing their VETS–4212 Reports. Contractors' and subcontractors' knowledge of veterans status may be obtained in a variety of ways, including, in response to an invitation to applicants to self-identify in accordance with 41 CFR 60–300.42, voluntary self-disclosures by employees who are protected veterans, or actual knowledge of an employee's veteran status by a contractor or subcontractor. Nothing in this paragraph (e) relieves a contractor from liability for discrimination under 38 U.S.C. 4212.

[End of Clause]

§61–300.11 When and how should Federal contractors and subcontractors file VETS–4212 Reports?

(a) The VETS–4212 Report must be used to report the information on veterans' employment required in paragraph (a) of the contract clause set forth in §61–300.10. The VETS–4212 Report requires contractors and subcontractors to provide the total number of employees in their workforces by job category and hiring location; the total number of such employees, by job category and hiring location, who are protected veterans; the total number of new hires during the period covered by the report; the total number of new hires during the period covered by the report who are protected veterans; and the maximum and minimum number of employees of such contractor or subcontractor during the period covered by the report. Contractors and subcontractors must complete a VETS–4212 Report for each hiring location in the manner described in the instructions published on the VETS Web site and included in the paper version of the VETS–4212 Report.

(b) VETS–4212 Reports must be filed between August 1 and September 30 of each year following a calendar year in which a contractor or subcontractor held a contract or subcontract.

(c)(1) *Electronic filing*. Instructions for e-filing the VETS–4212 Report are found on the Federal Contractor Reporting page on the VETS Web site at: *http://www.dol.gov/vets/*.

(i) *Single hiring location*. Contractors and subcontractors doing business at one hiring location may complete and submit a single VETS–4212 Report using the web-based filing system.

(ii) *Multiple hiring locations*. Contractors and subcontractors doing business at more than 10 locations must submit their VETS–4212 Reports in the form of an electronic data file in accordance with the instructions for filing the VETS–4212 Report. In these cases, state consolidated reports count as one location each. Contractors and subcontractors may submit VETS–4212 Reports in the form of electronic data files through the web-based filing system. Electronic data files also may be transmitted electronically as an email attachment (if they do not exceed the size stated in the specifications), or submitted on compact discs or other electronic storage media.

(2) *Alternative filing methods*. (i) Contractors and subcontractors with 10 or fewer hiring locations may file their VETS–4212 Report in paper format. Contractors and subcontractors may download a version of the VETS–4212 Report from the VETS Web site or send a written request for the paper version of the VETS–4212 Report to: Office of the Assistant Secretary for Veterans' Employment and Training, U.S. Department of Labor, 200 Constitution Avenue NW., Room S–1325, Washington, DC 20210, Attn: VETS–4212 Report Form Request.

(ii) VETS–4212 Reports in paper format or electronic data files on compact discs or other electronic storage media may be delivered by U.S. mail or courier delivery service to the addresses set forth in the instructions for completing the report. Paper copies of the VETS–4212 Reports and electronic data files (if they do not exceed the size stated in the specifications) also may be sent as email attachments to the address indicated in the instructions.

§ 61–300.20 How will DOL determine whether a contractor or subcontractor is complying with the requirements of this part?

During the course of a compliance evaluation, OFCCP may determine whether a contractor or subcontractor has submitted its VETS–4212 Report(s) as required by this part.

§ 61–300.99 What is the OMB control number for this part?

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and its implementing regulations at 5 CFR part 1320, the Office of Management and Budget has assigned Control No. 1293–0005 to the information collection requirements of this part.

PARTS 61–301—61–999 [RESERVED]

CHAPTERS 62–100 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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