DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–250

RIN 1215–AA62

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans and Vietnam Era Veterans

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: This final rule revises the regulations implementing the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA). VEVRAA requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. Today's rule generally conforms the VEVRAA regulations to the Office of Federal Contract Compliance Programs' regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503). The rule also withdraws portions of a final rule published by the Department of Labor on December 30, 1980 (which was subsequently suspended) concerning VEVRAA, Executive Order 11246, and Section 503. The withdrawal applies only to those provisions of the 1980 rule which pertain to VEVRAA.

DATES: The regulations are effective January 4, 1999. However, affected parties do not have to comply with the new recordkeeping requirements contained in the final rule until the Office of Management and Budget (OMB) completes its review under the Paperwork Reduction Act of 1995 and OFCCP publishes in the **Federal Register** valid OMB control numbers.

FOR FURTHER INFORMATION CONTACT: James I. Melvin, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room C3325, Washington, D.C. 20210. Telephone: (202) 693-0102 (voice), 1–800–326–2577 (TDD). Copies of this final rule, including copies in alternate formats, may be obtained by calling (202) 693–0102 (voice), 1–800–326–2577 (TDD). The alternate formats available are large print, an electronic file on computer disk and audiotape. The rule also is available on the Internet at http://www.dol.gov/dol/esa.

SUPPLEMENTARY INFORMATION:

Recent Legislative Developments

When OFCCP sent this final rule to the **Federal Register** for publication, both houses of Congress had passed S. 1021, the ''Veterans Employment Opportunities Act of 1998,'' but the bill had not yet been signed into law. If the bill becomes law it will require additional changes to the VEVRAA regulations, to increase the coverage threshold from a contract of $10,000 or more to a contract of $25,000 or more, and to add to the class of individuals protected under the law ''veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.'' OFCCP considered delaying publication of this final rule until regulatory provisions addressing the new legislation could be drafted and included in the rule. We rejected that approach, however, because it would unduly delay the implementation of the many important provisions contained in this final rule, without increasing the speed with which the revisions mandated by the new legislation could be published. OFCCP has already begun work on an additional regulatory document that would address the new legislation, and expects to publish that document in the near future.

Current Regulations and Rulemaking History

This final rule revises the current regulations (41 CFR Part 60–250) implementing the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, as amended, 38 U.S.C. 4212 (Section 4212 or VEVRAA). VEVRAA requires parties holding a Government contract or subcontract of $10,000 or more to ''take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.'' (VEVRAA, which was originally codified at 38 U.S.C. 2012, was redesignated as 38 U.S.C. 4212 by Section 5(a) of the Department of Veterans Affairs Codification Act, Pub. L. 102–83, August 6, 1991; no substantive change to VEVRAA resulted from this legislation.)

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which has authority to enforce Section 4212, has published regulations implementing the Act at 41 CFR Part 60–250. These regulations, consistent with the statute's mandate, establish various affirmative action obligations for contractors (e.g., contractors are required to use effective practices to recruit special disabled veterans and veterans of the Vietnam era). The regulations require that contractors refrain from discriminating against special disabled veterans and veterans of the Vietnam era in all aspects of employment, inasmuch as this prohibition is an indispensable component of affirmative action. Another central requirement of the current regulations is that contractors make reasonable accommodation to the known physical or mental limitations of a qualified special disabled veteran applicant or employee, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. An accommodation is, for example, any change in the work environment (e.g., the modification or acquisition of equipment) or in the way a job customarily is performed (e.g., changes in work assignments) that enables a qualified special disabled veteran to enjoy equal employment opportunities.

On May 1, 1996, OFCCP published an interim rule revising 41 CFR 60–250.5(d), Invitation to self-identify, and Appendix A to Part 60–250, Sample Invitation to Self-Identify (61 FR 19366). The revision was published to be consistent with an analogous requirement in the Section 503 final rule, also published on May 1, 1996 (61 FR 19336).

On September 24, 1996, OFCCP published a notice of proposed rulemaking (NPRM)(61 FR 50080), proposing to revise the regulations implementing VEVRAA. A correction notice and extension of the comment period was published on October 28, 1996 (61 FR 55613). The comment period ended December 27, 1996. Two comments were submitted in response to the May 1, 1996, interim rule, and another seven comments were submitted in response to the September 24, 1996, NPRM, as corrected. In addition, five organizations expressed views on the proposal in a meeting with OFCCP held during the comment period. The comments represented the views of contractor advocacy organizations, veterans advocacy organizations, an employer, an attorney who advises employers, a state governmental agency, and two Federal agencies. All comments have been analyzed and considered in the development of this final rule.

Regulatory Revisions

Today's final rule is precipitated, in part, by OFCCP's publication of a final rule revising the regulations

implementing Section 503 of the Rehabilitation Act of 1973 (61 FR 19336, May 1, 1996). Section 503 requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. In turn, the revision to the Section 503 regulations was designed, in part, to conform those regulations to regulations published by the Equal Employment Opportunity Commission (EEOC) implementing Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq. See* 29 CFR Part 1630. Title I of the ADA, which is enforced by the EEOC, prohibits private and state and local governmental employers with 15 or more employees from discriminating against qualified individuals with disabilities in all aspects of employment. The ADA regulations establish comprehensive, detailed prohibitions regarding disability discrimination but do not require affirmative action.

OFCCP has modeled its regulations implementing 38 U.S.C. 4212 on those implementing Section 503. This reflects the close similarity between the statutes in terms of their substantive protections and jurisdictional requirements. For instance, Section 4212, like Section 503, protects disabled individuals, albeit a more narrow class of disabled persons—that is, ''special disabled veterans.'' The VEVRAA regulations being revised today were identical to the former Section 503 regulations, except where differences were necessary because of the nature of the protected class or differences in the statutes, to assure that covered contractors were subject to consistent requirements under both laws. In order to retain that consistency and avoid confusion and conflict, OFCCP believes that the Section 4212 regulations should continue to parallel the Section 503 regulations.

Accordingly, OFCCP has revised the Section 4212 regulations to conform them to the Section 503 final rule published in 1996. Thus, today's final rule, similar to the final Section 503 regulations, adopts the standards contained in the regulations implementing the ADA regarding disability discrimination, but applies these standards with respect to special disabled veterans and, to a more limited extent, to veterans of the Vietnam era.

Specific changes are discussed in the Section-by-Section Analysis below.

Partial Withdrawal of 1980 Final Rule

OFCCP also proposed to withdraw portions of a final rule published by the Agency on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), and deferred indefinitely on August 21, 1981 (46 FR 42865). That 1980 rule would have revised the regulations at 41 CFR Chapter 60 implementing Section 4212 as well as two other laws enforced by OFCCP—Executive Order 11246, as amended, and Section 503. Executive Order 11246 requires Government contractors and subcontractors to assure equal employment opportunity without regard to race, color, religion, sex and national origin. As noted above, Section 503 mandates similar requirements with regard to the employment of individuals with disabilities.

The December 30, 1980, rule was to take effect on January 29, 1981. On January 28, 1981, the Department of Labor published a document (46 FR 9084) delaying the effective date of the final rule until April 29, 1981, to allow the Department time to review the regulation fully. The Department published three subsequent deferrals of the rule in 1981 in order to fully review the OFCCP regulations in accordance with Executive Order 12291, to permit consultation with interested groups, and to comply with new intergovernmental review and coordination procedures. The Department again postponed the rule's effective date on August 25, 1981, until action could be taken on a proposed rule published on the same date (46 FR 42968).

The August 25, 1981, proposal would have revised a number of provisions contained in the December 30, 1980, final rule as well as a number of provisions in 41 CFR Chapter 60 which were not amended by that final rule. Final action has not been taken with respect to the proposed regulations issued on August 25, 1981, or, consequently, with respect to the 1980 final rule.

The substance of a number of the provisions contained in the 1980 final rule pertaining to the current Section 4212 regulations has been incorporated into today's final rule. However, OFCCP has determined not to go forward with some of the other revisions to the regulations. For instance, unlike today's final rule (and the current regulations), the 1980 final rule would have consolidated a number of the provisions of the Section 4212 regulations with common provisions implementing Executive Order 11246 and Section 503 into 41 CFR Part 60–1, which currently sets out the general obligations under the Executive Order.

The one comment received on the proposed withdrawal of the 1980 final rule is discussed in the Section-by-Section Analysis below. In order to avoid conflict between today's final rule and the 1980 final rule, OFCCP hereby withdraws all provisions of the 1980 rule that pertain to Section 4212.

Section-by-Section Analysis

This final rule consists of five subparts. Subpart A, ''Preliminary Matters, Equal Opportunity Clause,'' explains the purpose, application and construction of the regulations in general and contains an extensive definitions section. The definitions section incorporates the definitions contained in the Section 503 final rule which are relevant to the enforcement of Section 4212, as well as statutorily required revisions to the definitions of ''special disabled veteran'' and ''veteran of the Vietnam era.'' Subpart A also contains provisions relating to coverage under Section 4212, and coverage exemptions and waivers, as well as the equal opportunity clause, which delineates a covered contractor's general duties under the Act.

Subpart B is a new subpart, which specifies the employment actions that will be deemed to constitute prohibited discrimination under Section 4212. This subpart is substantially identical to the parallel provisions in the Section 503 final rule. Where appropriate, references to special disabled veterans and veterans of the Vietnam era have been substituted for the references in the Section 503 regulations to individuals with disabilities.

Subpart C, which governs the applicability of the written affirmative action program requirement, reorganizes, clarifies and strengthens the affirmative action provisions in the current regulations. These revisions parallel those found in the Section 503 final rule. As stated in § 60–250.40(a), the requirements of Subpart C apply only to Government contractors with 50 or more employees and a contract of $50,000 or more. All other subparts of the regulation are applicable to all contractors covered by Section 4212.

Subpart D covers general enforcement and complaint procedures. In order to help ensure that OFCCP uses consistent enforcement approaches under VEVRAA and Executive Order 11246, this subpart, again paralleling the changes in the Section 503 final rule, incorporates a number of provisions from the regulations implementing the Executive Order. Further, Subpart D's provisions regarding complaint procedures, like the counterpart provisions in the Section 503 final rule, are in part based on the procedural regulations applicable to the ADA. These procedures also are revised to reflect an amendment to Section 4212.

Subpart E, Ancillary Matters, incorporates revised provisions on recordkeeping (e.g., it extends the current one-year record retention period to two years for larger contractors and conforms the scope of the retention obligation to that applied by the EEOC under the ADA and by OFCCP under Section 503), adds a mandatory notice posting requirement, and makes other revisions.

Finally, this rule contains a new appendix which sets out guidance on the duty to provide reasonable accommodation under the Act. The appendix is substantially identical to the counterpart appendix contained in the Section 503 final rule. In turn, that appendix is consistent with the discussion of the issue of reasonable accommodation contained in the Interpretative Guidance on Title I of the Americans with Disabilities Act, which is set out as an appendix to the EEOC's ADA regulations. Accordingly, the EEOC appendix may be relied on for guidance with respect to parallel provisions of this final rule.

This rule uses a long form amending procedure in which all sections of the regulations are republished, including sections for which no changes were proposed and sections for which the only proposed change was the section number. Use of the long form procedure ensures maximum clarity. The discussion which follows identifies the comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed revisions.

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–250.1 Purpose, Applicability and Construction

The preamble to the NPRM pointed out that the 1980 final rule would have consolidated provisions (e.g., definitions) which are applicable to both Section 4212 and Executive Order 11246 into 41 CFR Part 60–1, and would have established some common enforcement procedures under all of the laws enforced by OFCCP by making certain procedures (e.g., the show cause notice), which were previously applicable only to the Executive Order, applicable to Section 4212. The VEVRAA NPRM proposed withdrawal of the 1980 final rule, and did not propose similar consolidations because OFCCP now believes that consolidation of provisions in this way is not practical.

One commenter objected to OFCCP's stated inclination not to consolidate common provisions. The commenter felt that OFCCP applies a low priority to veterans' employment rights, and suggested that consolidating common provisions would strengthen enforcement of VEVRAA and place it on a par with enforcement of Executive Order 11246.

OFCCP disagrees with the commenter's assessment that the agency applies low priority to enforcement of VEVRAA. Traditionally, whenever OFCCP has conducted a compliance review it has examined compliance with VEVRAA (and Section 503) as well as compliance with Executive Order 11246. OFCCP also investigates all complaints of discrimination filed under VEVRAA; by contrast, most complaints of discrimination under the Executive Order are not investigated by OFCCP but are referred to the EEOC for processing under Title VII of the Civil Rights Act of 1964.

Further, OFCCP does not agree with the commenter's premise that consolidating provisions would alter enforcement of VEVRAA. The vast majority of the consolidations made in the 1980 rule simply moved various provisions from Parts 60–250 and 60–741 into Part 60–1, without substantive change. The thinking at that time was that the regulations would be easier to use if fundamental elements (such as definitions) appeared in one place at the beginning of Chapter 60. Also, OFCCP hoped to shorten the regulations by reducing instances in which similar material (e.g., provisions on coverage and waivers) was repeated three times in three different Parts of Chapter 60. Upon reexamination in light of the comment, OFCCP concludes that consolidating provisions is not justified or necessary at this time. In OFCCP's view, consolidation would not strengthen enforcement of VEVRAA and could be confusing to readers of the regulations.

Paragraph (c)(2) of the proposal, and of the final rule, provides that the contractor may take an action which would violate Part 60–250, or refrain from taking an action required by that part, where such action or omission is required or necessitated by another Federal law or regulation. OFCCP stated in the preamble to the NPRM, as examples of this principle, that ''contractors would be permitted to comply with requirements relating to the collection, analysis and disclosure of certain medical information which are imposed by the Mine Safety and Health Act (MSHA) and the Occupational Safety and Health Act (OSHA) (**and related state laws** which have been approved by the Occupational Safety and Health Administration).'' (Emphasis added.)

The EEOC commented that they agree that contractors may rely on an OSHA-approved state law that is identical to its Federal counterpart, as a defense. However, they stated that they have not yet taken a position on the use of a conflicting OSHA-approved state safety and health law that is not identical to the Occupational Safety and Health Act, as a defense to a violation of the ADA. We agree that our NPRM preamble statement relating to reliance on a state law may be overly broad. At this time we will not permit a contractor to rely upon a state law which is not identical to the Occupational Safety and Health Act, as a defense to a violation of VEVRAA. Accordingly, we have deleted the parenthetical statement which appeared in the NPRM.

Section 60–250.2 Definitions

Section 60–250.2(h) Contract

OFCCP proposed that ''contract'' be defined to include ''any Government contract **or subcontract**.'' (Emphasis added.) One commenter suggested that it is inappropriate to include subcontracts within the definition of contract, because doing so would impede OFCCP's ability to identify subcontractors and therefore to enforce VEVRAA against subcontractors. OFCCP disagrees. The regulations continue to define the terms ''subcontract'' and ''subcontractor.'' See §§ 250.2(l) and (m). The purpose of including ''subcontract'' within the definition of ''contract'' is simply to eliminate the need to mention subcontracts in the regulatory text each time the regulation seeks to address both contracts and subcontracts. This change will not in any way affect OFCCP's ability to identify subcontractors or to enforce the law against subcontractors.

Section 60–250.2(o) Qualified Special Disabled Veteran

In the proposed rule the definition of qualified special disabled veteran cross-referenced § 60–250.3, which in the proposal contained exceptions to the definition of special disabled veteran and qualified special disabled veteran. As discussed below, we have not included the exceptions in the final rule. Accordingly, we have dropped the cross reference from this definition.

Section 60–250.2(p) Veteran of the Vietnam Era

One commenter pointed out that on October 9, 1996, the Veterans' Benefits Improvement Act of 1996 (Public Law 104–275, Sec. 505) amended VEVRAA by, among others things, changing the

definition of ''Vietnam era.'' Under the revised definition, the Vietnam era now extends from February 28, 1961, through May 7, 1975, for veterans who served in the Republic of Vietnam during that period, and from August 5, 1964, through May 7, 1975, in all other cases.

Revision of the statutory definition requires a corresponding revision of OFCCP's regulatory definition of ''Veteran of the Vietnam era.'' This revision is a nondiscretionary, ministerial action which merely incorporates, without change, the statutory amendment into a pre-existing regulation. Publication in proposed form would serve no useful purpose, and therefore is unnecessary under the Administrative Procedure Act (5 U.S.C. 553(b)(B)). Accordingly, we find good cause to waive notice of proposed rulemaking and to include the revision in this final rule.

Section 60–250.3 Exceptions to the Definitions of ''special disabled veteran'' and ''qualified special disabled veteran''

As proposed, this section would have excluded from the Act's protection of special disabled veterans and qualified special disabled veterans: (a) an alcoholic whose current use of alcohol prevents performance of the essential functions of the employment position in question or which would pose a direct threat to property or to health or safety; and (b) an individual with a currently contagious disease or infection who, by reason of the disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason of the disease or infection, is unable to perform the essential functions of the employment position in question. The two exclusions would have been carried over from the Section 503 rule.

A commenter objected to the proposal's exclusion of certain alcoholics from protection. The commenter was concerned that the provision might encourage stereotyping of disabled veterans.

Upon consideration of the proposed rule in light of the comment, OFCCP has decided to remove from the final rule both proposed exclusions. The exclusions must appear in the Section 503 rules, because Section 503 itself requires them. However, none of Section 503's exclusions from protection have been legislated into VEVRAA. Accordingly, in this final rule we do not adopt the exclusions which are found at 41 CFR 60–741.3 in the Section 503 rule. In order to preserve parallel section numbering between the VEVRAA and Section 503 rules, we have designated § 60–250.3 as ''Reserved.''

Section 60–250.5 Equal Opportunity Clause

Paragraph (a)2 of the proposal required that contractors immediately list their employment openings at an appropriate office of the state employment service system wherein the opening occurs. One commenter suggested that listing job openings with the Department of Labor's America's Job Bank should be deemed to satisfy the job listing requirement. America's Job Bank is a computerized, nationwide listing of job openings. The computerized network links the 1800 state employment service offices. Job seekers may access the Job Bank via the Internet at http://www.ajb.dni.us/, and on computer systems in public libraries, colleges and universities, high schools, shopping malls and other public places.

OFCCP agrees, along with the Veterans' Employment and Training Service, that listing jobs in America's Job Bank will satisfy a contractor's listing obligation. Therefore, we have supplemented paragraph (a)2 of the equal opportunity clause to reflect this additional method for listing jobs.

The same commenter also felt that the regulations ''are unclear as to whether an employer is required to list with a state employment agency positions normally filled through outside temporary employment agencies.'' The commenter apparently disagrees with the interpretation some OFCCP staff have given the corresponding provision of the existing regulation. OFCCP believes that the answer to this question depends upon the facts of each particular situation, and therefore is too detailed to be included in a regulation.

Section 702 of the Veterans' Benefits Improvements Act of 1994, Public Law 103–446, permits the exemption of the contractor's ''executive and top management'' positions from the mandatory job listing requirement. OFCCP proposed a definition of ''executive and top management'' that was based upon the definition of ''executive'' found in the Department of Labor's regulations implementing the Fair Labor Standards Act (FLSA), 29 CFR 541.1. One commenter objected to the proposed definition, claiming that it ''would serve to exempt all but the very lowest positions.''

As proposed, the full definition stated that in order to be considered ''executive and top management,'' and thus exempt from the mandatory listing requirement, a job must satisfy five factors: (a) the incumbent employee's primary duty must consist of the management of the enterprise or of a customarily recognized department or subdivision of the enterprise; (b) the employee must customarily and regularly direct the work of two or more other employees; (c) the employee must have the authority to hire or fire other employees, or his or her suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or other change of status will be given particular weight; (d) the employee must customarily and regularly exercise discretionary powers; and (e) with certain limited exceptions, the employee must not devote more than 20 percent (40 percent in retail and service establishments) of his or her hours of work to activities which are not closely related to the work described in (a) through (d).

The commenter took a portion of the test out of context, citing only one clause from factor (c) relating to the employee's authority to make recommendations and suggestions about personnel actions. In fact, the standard is quite stringent in that all five factors must be satisfied. Thus, for example, in a case under the FLSA, Assistant Managers in a fast-food restaurant were determined not to be executives because, despite many management responsibilities, they spent more than 40 percent of their time on production duties. *Donovan* v. *Burger King,* 675 F.2d 516 (2nd Cir., 1982). Similarly, a Warehouse Manager for a retail shoe chain was found to fall outside the ''executive'' exemption of the FLSA because he did not regularly exercise discretionary powers, and because the employer was unable to demonstrate that the Manager did not devote more than 20 percent of his working hours to activities not related to the performance of the work described in factors (a) through (d). *Wirtz* v. *C&P Shoe Corp.*, 336 F.2d (5th Cir., 1964). Accordingly, OFCCP has decided to adopt the definition of ''executive and top management'' as proposed.

Throughout the equal opportunity clause, and elsewhere in the regulation, we have used the term ''local employment service office'' to refer to the office with which jobs must be listed. This is the same term used in the statute. A proposed definition of the term ''appropriate local office of the state employment service system'' has been dropped as unnecessary, and the remaining definitions in section 6 of the equal opportunity clause have been renumbered accordingly.

Subpart C—Affirmative Action Program

Section 60–250.40 Applicability of the Affirmative Action Program Requirement

One commenter objected to the proposed standard (which is also the standard under the current rule) that the written affirmative action program requirement applies only to contractors with 50 or more employees and a contract of $50,000 or more. The commenter felt that this was at odds with the statutory requirement that ''[a]ny contract in the amount of $10,000 or more'' contain a provision requiring that the contractor take affirmative action to employ and advance in employment qualified special disabled and Vietnam era veterans.

OFCCP does not agree that the two provisions are at odds. All nonexempt contractors, that is, all contractors with a contract of $10,000 or more, are subject to the basic nondiscrimination and affirmative action requirements of VEVRAA. These requirements include the duty to list job vacancies with a local employment service office. In addition, those contractors who meet the stated 50 employee/$50,000 contract threshold must prepare a **written affirmative action program.** The written AAP contains additional affirmative action obligations for larger contractors with larger contracts, such as undertaking specified outreach and positive recruitment activities. See, for example, § 60–250.44(f). Accordingly, the rule is adopted as proposed.

Section 60–250.42 Invitation to Self-identify

On May 1, 1996, OFCCP published an interim rule amending § 60–250.5(d) of the then-current regulations relating to invitations to self-identify. The interim rule was intended to conform the invitation to self-identify requirement under VEVRAA with the requirement contained in the Section 503 final rule. The rule was published in response to concerns raised by representatives of Government contractors that if contractors were faced with a self-identification requirement under VEVRAA that was different than the requirement under Section 503, each contractor would have to revise its forms, notices and posters when the Section 503 final regulations took effect, and then change those same forms, notices and posters again when OFCCP promulgated its revisions to the VEVRAA regulations.

The NPRM published on September 24, 1996, mirrored the VEVRAA interim rule and the Section 503 final rule. It required the contractor, after making an offer of employment and before the applicant began his or her employment duties, to invite applicants to identify themselves as special disabled or Vietnam era veterans in order to benefit from the contractor's affirmative action program. As an exception to the general requirement that the invitation be extended after an offer of employment, the proposal permitted a pre-offer invitation in two limited circumstances: if the invitation was made when the contractor actually was undertaking affirmative action at the pre-offer stage; or if the invitation was made pursuant to a Federal, state or local law requiring affirmative action for special disabled or Vietnam era veterans. This approach was intended to be consistent with § 1630.14(b) of the EEOC's regulations, and the EEOC's October 10, 1995, ''ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.''

The proposal also required that the contractor maintain a separate file on applicants and employees who identified themselves as covered disabled veterans or Vietnam era veterans, and provide that file to OFCCP upon request. Finally, the proposal provided that if an applicant identified himself or herself as a special disabled or Vietnam era veteran, the contractor should seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer had been extended.

Two comments were submitted in response to the May 1, 1996, interim rule. One of the interim rule commenters also commented on the NPRM, and two additional comments were submitted in response to the NPRM. Finally, five organizations expressed views on the proposal in a meeting with OFCCP held during the comment period.

The five organizations felt that the proposed limitations on pre-offer invitations to Vietnam era veterans were unduly restrictive. They asserted that in most instances a contractor would be aware of an applicant's veteran status at the pre-offer stage, because the applicant would include this information in his or her employment history, or because of priority referral from the job listing program. The organizations advocated that, with respect to Vietnam era veterans, the invitation to self identify should be mandatory at the pre-offer stage so that contractors could take affirmative action specific to Vietnam era veterans in the employment process. Upon consideration, we agree that limiting the invitation to Vietnam era veterans to the post-offer stage is unduly restrictive. The disability discrimination concerns embodied in the ADA (which justify restrictions on the timing of invitations extended to special disabled veterans) do not apply to Vietnam era veterans.

On the other hand, we are reluctant to **require** that the invitation be extended pre-offer, because to do so would **mandate** that contractors extend invitations at two different times—a pre-offer invitation to Vietnam era veterans and a post-offer invitation to special disabled veterans. This would potentially be confusing and seemingly over-technical, particularly for smaller employers.

Accordingly, the final rule contains separate invitation to self-identify provisions for special disabled veterans and for Vietnam era veterans. Paragraph (a) covers the invitation that is to be extended to special disabled veterans. It requires, with two limited exceptions, that the invitation be extended after a job offer has been made and before the individual begins his or her employment duties. The exceptions are that the invitation may be extended pre-offer when: the invitation is made when the contractor actually is undertaking affirmative action for special disabled veterans at the pre-offer stage; or the invitation is made pursuant to a Federal, state or local law requiring affirmative action for special disabled veterans. In this context, the reference to Federal law means a law other than one enforced by OFCCP (i.e., Section 503 and VEVRAA). Following are examples which illustrate the application of each exception:

Special disabled veteran example: A contractor establishes a job training program to train disabled veterans for high paying technical jobs like those at the contractor's establishment. The initial phase of the training program is a six-month classroom component. The contractor pays all costs for the classroom training, and pays the participants the minimum wage during this period. After completion of classroom training, all trainees participate in a six-month work-study phase of the program. During the work-study phase, participants are regarded as temporary trainee-employees of the contractor. The contractor hires graduates of the program as permanent employees, if openings exist when the training is complete. Program participants whom the contractor is unable to hire have acquired education and job experience that will assist them in obtaining skilled employment as technicians elsewhere.

The contractor's initial decision to accept an individual into the program is also a decision to employ that person as

a temporary employee during the classroom and work-study phases of the program. Under the general rule stated at § 60–250.42(a), the contractor could not ask program applicants to disclose whether they are disabled veterans because the question would be a pre-offer disability-related inquiry. However, the contractor's program is a voluntary affirmative action program that satisfies the exception at § 60–250.42(a)(1). The contractor's program is a specific and fully implemented affirmative action effort, which is not required by any Federal, state or local law. The affirmative action program requires the identification of disabled veterans prior to extending an offer to participate in the program, because the information is necessary for determining whether the applicant is eligible to participate in the program.

Federal, state or local law example: A state statute requires that state government jobs be filled in the following fashion. Applicants who meet basic eligibility requirements take a competitive examination. The names of applicants who pass the examination are placed on a list of eligible applicants in the following order: (1) disabled veterans; (2) veterans; (3) widows of veterans who were killed in action; (4) all others in order of their test scores. When job openings occur the selecting official is provided the names of the top five applicants from the list to interview for employment. All five applicants are interviewed before a job offer is extended.

The state statute expressly requires affirmative action in the form of according top priority to disabled veterans for placement on a list of eligibles. In order to implement the priority accorded disabled veterans, state officials must be able to determine whether an applicant is a disabled veteran prior to extending a job offer. The state's program fits within the exception at § 60–250.42(a)(2). Therefore, it is not a violation of VEVRAA (or of Section 503 or the ADA) for state hiring officials to invite applicants to self-identify as a special disabled veteran prior to extending an offer of employment.

Paragraph (b) covers invitations to veterans of the Vietnam era. It specifies that the invitation may be made at any time before the applicant begins his or her employment.

This approach necessitated some modification of Appendix B, which contains a sample invitation to self-identify. We have amended the Appendix to make it adaptable to situations in which a contractor extends an invitation to Vietnam era veterans separately from its invitation to special disabled veterans, as well as when the contractor extends a single invitation to both categories of veterans.

One comment on the interim rule expressed concerns about the separate file requirement contained in subsection (d)(4). The commenter, an agency of a state government, felt that the requirement that contractors maintain a separate file on persons who have self-identified and provide the file to OFCCP upon request, ''creates an undue burden on covered contractors, without any appreciable benefit to the class Sec. 60–250 was intended to protect.'' OFCCP disagrees that the requirement to maintain separate files results in an increased recordkeeping burden for contractors. As explained in the preamble to the interim rule:

> OFCCP believes that a number of contractors may already have maintained separate files on such applicants and employees in order to implement the VEVRAA confidentiality requirements. In addition, the ADA presently requires employers with 15 or more employees to maintain on separate forms and in separate medical files information obtained regarding the medical condition or history of applicants and to treat this information as confidential medical records (42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1)). Furthermore, because the invitation to self-identify is only required by the interim rule to occur after a job offer has been made, and not to all applicants, there will be fewer records of self-identification being generated than in the past.

Moreover, because the ADA requires that information regarding the medical condition or history of applicants be kept in separate files, OFCCP cannot impose a different standard with regard to disabled veterans under VEVRAA.

The second commenter on the interim rule addressed the portion of proposed subsection (d)(4) that provided that if an applicant identifies himself or herself as an individual with a disability, the contractor should seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The commenter asserted that if an applicant self-identified at the pre-offer stage, the contractor apparently cannot discuss accommodation at that stage unless the applicant first raises the issue. The commenter then opined that this imposed an additional burden as well as a more stringent restriction on Federal contractors under VEVRAA than the EEOC imposes under the ADA. Specifically, the commenter asserted that the EEOC's enforcement guidance permits an employer to ask an applicant questions regarding possible reasonable accommodations: (1) If the employer believes the applicant will need accommodation because of an obvious disability; (2) if the employer believes the applicant will need accommodation because of a hidden disability that the applicant has voluntarily disclosed; or (3) if the applicant has voluntarily disclosed to the employer that he or she needs accommodation. In the commenter's view OFCCP's interim rule permitted pre-offer discussion of accommodations only in the third instance mentioned above.

We disagree with the commenter's interpretation of the rule. The rule recommends that contractors make certain inquiries after tendering an offer of employment, but the rule does not **prohibit** inquiries before a job offer when the contractor becomes aware of the need for accommodation at the pre-offer stage. OFCCP intends that its regulations under Section 503 and VEVRAA be interpreted in a manner which is consistent with the EEOC's interpretations of the ADA. Accordingly, pre-offer discussion of accommodations would be permissible under VEVRAA in the same circumstances as those in which it would be permissible under the ADA.

The same commenter also submitted comments in response to the NPRM. Those comments requested that OFCCP provide ''clear guidance'' as to what is meant by ''actually taking affirmative action at the pre-offer stage.'' Consistent with interpretations made by the EEOC under the ADA, ''actually taking affirmative action at the pre-offer stage'' refers to an employer voluntarily using the information obtained in response to an invitation to self-identify, to benefit special disabled veterans. If an employer wishes to invoke this exception, it must provide affirmative action at the pre-offer stage that necessitates the identification of special disabled veterans. The example provided earlier in this discussion should help to illustrate the point.

The commenter also requested ''clear guidance'' as to what is meant by ''before the applicant begins his or her job [employment] duties.'' By this we mean that the invitation to self identify must be made before the applicant is placed on the contractor's payroll.

Another commenter pointed out that, as proposed, the rule would require contractors to discuss reasonable accommodation with all who self identify as either special disabled veterans or veterans of the Vietnam era. The commenter asserted, ''by encompassing Vietnam-era veterans, this provision presupposes that all Vietnam-era veterans are likely to require some form of accommodation to

be employable.'' The point is well taken. Reasonable accommodation is relevant in the context of special disabled veterans, but generally not in the context of Vietnam era veterans. We have modified the rule accordingly, and have made corresponding modifications to the sample invitation to self-identify found at Appendix B.

The same commenter also was concerned that self-identification, coupled with the provision that permits an employer to ask an applicant to demonstrate how the applicant will be able to perform job-related functions, could result in an employer ''withdraw[ing] the job offer on the pretense that the veteran couldn't perform some aspect of the job when asked to ''demonstrate.''' The commenter than asked, ''[w]ho couldn't be deemed to fail some task they'd never done before?'

As proposed, the literal wording of the rule was ambiguous as to whether a contractor would be permitted to require a demonstration from both Vietnam era and special disabled veterans, or only from the latter. The context of the proposal, specifically the reference to inquiries that are consistent with the ADA, makes clear, however, that our intent was to apply this standard with respect to special disabled veterans only. We have revised the rule to clarify the point.

Turning more directly to the commenter's concern, the concept of requiring an applicant with a known disability to demonstrate his or her ability to perform the job is drawn directly from the ADA, and OFCCP intends to apply it consistent with its application under the ADA. The EEOC Guidance on this subject explains that an employer may require a disabled applicant to demonstrate how he or she will perform the job only when: (1) the employer could reasonably believe that the applicant would not be able to perform a job function due to a known disability; or (2) all applicants in the job category (i.e., including those who are not disabled) are asked to demonstrate how they would perform the job. Thus, an employer need not hire someone who, even with accommodation, cannot perform the essential functions of the job. On the other hand, an employer may not use the demonstration requirement to discriminatorily deny an individual employment simply because that individual is disabled.

Another commenter was concerned that the proposed restrictions on pre-offer self-identification could preclude contractors from asking questions about military service on employment applications or in employment interviews. As the commenter pointed out, a normal employment application asks about military service and the reason for leaving or the type of discharge, and military service also is a common topic in employment interviews. However, such questions may elicit information that identifies an applicant as a special disabled or a Vietnam era veteran. The commenter asserted restricting such inquiries would require radical revision in the application process among United States employers.

The ADA prohibits employers from asking about the existence, nature, or severity of a disability at the pre-offer stage. The EEOC's October 10, 1995, Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations defines such an inquiry as one that is **likely** to elicit information about a disability. On the other hand, according to the EEOC Guidance, if there are many possible answers to a question and only some of those answers would contain disability-related information, the question is not disability-related. It is our intent that the VEVRAA rule be applied consistent with this standard. Under this interpretation, it would be permissible for an employer to inquire about an applicant's military service, including the reason for leaving or the type of discharge. This is because the large majority of those discharged from the military are discharged for reasons other than medical, and even among those discharged for medical reasons not all would qualify as special disabled veterans under VEVRAA or as individuals with disabilities under the ADA and Section 503. If the applicant's response indicated a discharge for medical reasons, the employer would not be permitted to ask follow-up questions relating to the nature or extent of the medical condition. However, if the response caused the employer to reasonably believe that the applicant may need an accommodation, the employer may inquire about that need.

The same commenter also expressed concern that a contractor electing to invite individuals to self-identify at the pre-offer stage might violate the ADA, which generally prohibits pre-offer inquiries as to whether an individual has a disability. The commenter sought further guidance on this issue.

As we have stated above, our intent is that this rule be applied consistently with the ADA. The limited instances of pre-offer self-identification permitted by the regulation should not result in violation of the ADA. The ADA expressly does not preempt other Federal, state or local laws that provide greater or equal protection for the rights of individuals with disabilities than are provided in the ADA. 42 USC 12201(b). Therefore, the provision permitting pre-offer invitations to self-identify directed to special disabled veterans, when required by a Federal, state or local law requiring affirmative action, would not violate the ADA. Similarly, a contractor actually undertaking affirmative action for special disabled veterans pursuant to VEVRAA at the pre-offer stage would not violate this provision of the ADA.

Finally, staff from the Department's Office of the Assistant Secretary of Labor for Veterans' Employment and Training (OASVET) have asked that we clarify one additional point. The restrictions on the timing of the invitation to self-identify that appear in the regulation, are completely unrelated to pre-application recruitment activities. Accordingly, it would not violate VEVRAA, Section 503 or the ADA, for an employer to advertise that it encourages applicants who are special disabled or Vietnam era veterans, or to otherwise direct its recruitment efforts at members of those two groups.

Section 60–250.44 Required Contents of Affirmative Action Programs

The regulations being replaced today, at § 60–250.6(b), specify that ''[c]ontractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications' of special disabled and Vietnam era veterans. Section 60-250.44(b) of the NPRM stated the obligation as follows: ''[t]he contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications'' of special disabled and Vietnam era veterans. One commenter felt that the duty to ''ensure'' as stated in the NPRM required a ''different mandate'' than the duty to ''review'' as stated in the rule that was current at that time. We disagree. When read in full context, the regulation being replaced today requires that contractors do more than simply examine their processes. If affirmative action is to have any meaning, it surely requires that contractors take steps to reform those processes that, upon review, are found not to meet the stated standard of assuring careful, thorough and systematic consideration.

Two commenters addressed the obligation in proposed § 60-250.44(d), that contractors inquire whether an employee with a known disability who is having difficulty performing a job is in need of accommodation. One commenter characterized the obligation

as: (1) conflicting with the EEOC's guidance under the ADA which ''gives the employee primary responsibility for requesting an accommodation''; (2) conflicting with the spirit of the ADA which ''empowers individuals with disabilities to choose to—or choose not to—ask for help''; and (3) ''paternalistic,'' ''potentially insulting and embarrassing to the individual,'' and liable to ''be perceived by special disabled veterans as prejudicial, because the employer has distinguished employees with disabilities from employees who do not'' have disabilities.

The other commenter read the provision as potentially requiring identification of special disabled veterans prior to the job offer, accommodation in the application process, and post-offer disability-related questions directed to only some entering employees, all of which the commenter thought were problematic under the ADA.

We do not share the commenters' views on this issue. Affirmative action, of which this provision is an example, is unique to VEVRAA and Section 503, and includes actions above and beyond those required as a matter of nondiscrimination. Also, by specifying ''employee,'' the provision does not conflict with the ADA restrictions relating to pre-offer, and post-offer but pre-employment, inquiries. Moreover, the rule does not undermine the concept of individuals with disabilities being able to choose not to ask for help. That is, the rule requires that the employer make inquiry, but it does not require a particular response from the employee. Additionally, contrary to this type of employer inquiry being prohibited by the ADA, it is permitted by the EEOC's interpretive materials. See 29 CFR Part 1630, Appendix, Section 1630.9.

Finally, we are sensitive to the concern that employers not be required to take actions which might be offensive to their employees with disabilities. However, we disagree with the commenter that the provision in question here crosses that line. It is instructive to note that OFCCP did not receive a single objection to this provision from a commenter that might be characterized as a veteran or an individual with disabilities, nor from a group representing veterans or individuals with disabilities. Similarly, OFCCP did not receive a single objection from any of these categories of commenters when it proposed the corresponding provision in its Section 503 NPRM. See 57 FR 48084 (October 21, 1992), corrected at 57 FR 49160 (October 30, 1992).

OFCCP has made one minor alteration to the text of § 60-250.44(d) for clarification. Language has been inserted to specify that the obligation to provide reasonable accommodation is an element of nondiscrimination, whereas the obligation to notify the employee of a performance problem and inquire whether the problem is related to disability is an element of affirmative action.

One commenter objected to the requirement in proposed § 60-250.44(e) that contractors ''develop and implement procedures to ensure'' that employees are not harassed because of their status as special disabled and Vietnam era veterans. The commenter felt that the requirement was unnecessary and impractical, adding that it is almost impossible for an employer to guarantee that an employee will not act inappropriately. But that is not what the regulation requires. The rule simply requires that contractors develop and implement procedures that are designed to ensure that disabled and Vietnam era veteran employees will not be harassed.

Proposed § 60–250.44(f) required that contractors undertake appropriate outreach and recruitment activities, and enumerated eight suggested activities. The proposed section's introductory provision stated that the scope of the contractor's efforts ''shall depend upon all the circumstances,'' and that ''[i]t is not contemplated that the contractor will necessarily undertake all the activities listed . . . or that its activities will be limited to those listed.''

One commenter objected to proposed subsection (f)(8), which would have provided that contractors, in making hiring decisions, should consider special disabled and Vietnam era veterans for all available positions for which they may be qualified, when the position(s) applied for is unavailable. The commenter felt that ''the requirement'' is onerous, in that it would require contractors to set up two application processes—one for covered veterans and one for all other applicants—and it would force contractors to review applicants' files numerous times in an effort to consider applicants for other jobs. Paragraph (f)(8) does not establish a ''requirement.'' As is outlined above it is a suggested measure, which contractors may take, or not take, as appropriate under the circumstances. Accordingly, we do not share the commenter's concerns about the provision.

Section 60–250.44(j) of the proposal would have required that all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes be trained to ensure that the commitments in the contractor's affirmative action program are implemented. One commenter objected to the provision, declaring that ''[t]he proposed mandatory training requirement suggests that OFCCP desires training above and beyond'' the current requirement. The commenter described the requirement in effect at that time as ''employees of federal contractors are instructed on the requirements of VEVRAA.'' However, the wording of proposed § 60–250.44(j) is virtually identical to the wording of § 60–250.6(i)(3) in the regulations being replaced today. Accordingly, no substantial change was intended and the rule is adopted as proposed.

Subpart D—General Enforcement and Complaint Procedures

Section 60–250.60 Compliance Evaluations

As proposed, paragraph (a) of this section would have clarified existing regulatory authority for OFCCP to conduct compliance reviews with regard to contractors' implementation of their affirmative action obligations, and would have provided that the review consist of ''a comprehensive analysis and evaluation'' of all relevant practices. The proposal was intended to make the VEVRAA provision consistent with the corresponding provision in the Section 503 regulations. One commenter noted that the proposal did not track a proposed revision to the regulations implementing Executive Order 11246, under which OFCCP proposed to supplement the ''comprehensive analysis'' approach with a variety of alternative means of assessing a contractor's compliance status. See proposed § 60–1.20(a) at 61 FR 25516, 25523 (May 21, 1996). The commenter recommended that ''[t]he proposed § 60-250.60 * * * be modified to clarify that OFCCP is not required to conduct a full, on-site compliance review of any contractor it selects for review.''

Since the publication of the VEVRAA proposal, OFCCP has promulgated a final version of its Executive Order 11246 ''compliance evaluation'' procedure. See 41 CFR 60–1.20(a) at 62 FR 44174, 44189 (August 19, 1997). As recommended by the commenter, OFCCP has decided to adopt the compliance evaluation approach for VEVRAA as well, in lieu of the proposed ''comprehensive analysis'' compliance review approach. (Corresponding wording changes have been made, as appropriate, throughout the regulations.) The new VEVRAA

regulatory text is virtually identical to the text of the Executive Order regulation, except for changes necessary to reflect differences between the two laws and their implementing regulations. This approach will improve the efficiency of OFCCP and permit the agency to target resources better. It will also further procedural consistency among the laws enforced by OFCCP.

The same commenter also recommended that the regulations be changed ''to insure that OFCCP may not arbitrarily demand that a federal contractor produce anything the agency wants, at any time it wants, at any location it wants.'' The commenter asserted that many contractors have faced ''seemingly endless requests for information under current regulations,'' and that ''[c]ontractors now have no recourse when confronted with endless requests for information.'' The commenter also asserted that OFCCP should establish in the regulation a definite time period within which the compliance evaluation should be completed. Such a time limit, the commenter argued, would help both OFCCP and the contractor to focus their efforts on supplying and reviewing definite records, and reduce piecemeal requests.

OFCCP does not agree that the regulations should contain additional assurances of the type requested. Under the proposed rule access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with VEVRAA. Moreover, the suggestion that OFCCP should be limited to one or a small number of data requests ignores the reality of conducting a law enforcement investigation. The initial data request often is intentionally restricted in scope, to minimize the burden on the responding party. However, if the materials provided in response to the initial request indicate potential problem areas, it is perfectly reasonable and appropriate for the agency to follow up with supplementary requests. Several rounds of supplementary requests may be necessary before the agency can definitively conclude that a violation did, or did not, occur. Contractors may expect that the currently prescribed time frames for completing compliance evaluations and reviews will continue. However, in OFCCP's view such time frames are more appropriately included in a compliance manual than in implementing regulations.

In addition, we have revised subsection (c) to reflect the terms of a Memorandum of Understanding entered into on May 29, 1997, between OFCCP and OASVET. The proposal provided that during a compliance review OFCCP would verify whether the contractor has filed its annual Veterans' Employment Report (VETS–100 Report) with OASVET and that OFCCP would notify OASVET if the contractor has not filed. We have added to the regulation a provision under which, if the contractor has not filed its report, OFCCP will request a copy from the contractor. If the contractor fails to provide a copy of the report to OFCCP, OFCCP will notify OASVET.

Section 60–250.61 Complaint procedures

Two commenters opposed our proposal under § 60–250.61(a) that the time for filing a complaint with OFCCP be expanded from 180 to 300 days after the alleged violation. Both felt that the current 180-day rule is more in keeping with the standard under Title VII and the ADA, both of which require filing within 180 days in non-deferral jurisdictions and 300 days in deferral jurisdictions. Additionally, one of the commenters argued that the 300-day filing period in deferral jurisdictions was developed for the convenience of the states, not the Federal enforcement agencies.

OFCCP recently considered this question in detail in conjunction with the preparation of the Section 503 final rule. In that rule we adopted a 300-day standard, based upon a desire to establish a uniform national standard that would be at least as long as the complaint filing period under the ADA. We elected not to adopt the split 180/300-day limit applied under the ADA because we are not statutorily bound to do so (as is the EEOC under Title VII and the ADA), and because the lack of a frequently updated and readily available list of deferral jurisdictions could make it difficult for complainants and contractors to know whether the 180 or the 300-day limit applies in any particular case. In line with OFCCP's approach of applying consistent procedures under Section 503 and VEVRAA wherever possible, we hereby adopt the proposed rule's standard that complaints must be filed within 300 days.

Section 60–250.61(b)(2) Contents of Complaints—Third Party Complaints

One commenter objected to this paragraph of the proposal, which provided in part that a complaint filed by an authorized representative need not identify by name the person on whose behalf the complaint was filed. The purpose of this provision is to help prevent retaliation against persons seeking to exercise their rights under VEVRAA. The commenter asserted that in some cases contractors would have difficulty responding to the allegations of a complaint without knowing the identity of the person on whose behalf it is filed.

In many cases it will not be necessary to disclose the individual's identity to enable the contractor to respond effectively. For example, as the commenter acknowledged, where the complaint alleges a broad contractor policy or practice, the contractor will be able to respond fully without knowing the name(s) of the person(s) on whose behalf the complaint was filed. However, we agree that where the complaint involves a practice with limited applicability or an isolated act of discrimination, it may not be possible to protect the individual's confidentiality. Therefore, the rule reflects that confidentiality will be protected where possible, given the facts and circumstances in the complaint.

Section 60–250.66 Sanctions and Penalties

Section 60–250.66(c) Debarment

The proposed paragraph would have authorized OFCCP to impose fixed-term debarments. One commenter objected to the fixed-term debarment concept. The commenter was concerned that fixed-term debarment is too harsh a measure, especially if it is used in response to what the commenter termed ''paper'' violations, which the commenter characterized as violations of recordkeeping or affirmative action requirements which do not involve discrimination. OFCCP does not view fixed-term debarments as too harsh a measure, and OFCCP does not intend to seek a fixed term debarment for minor, technical violations of the law. Explicit regulatory authority to impose debarment for a minimum fixed-term is necessary to ensure the continued future compliance of some contractors.

OFCCP believes the fixed-term debarment sanction will be particularly effective in encouraging compliance among the recalcitrant contractors who repeatedly break their promises of future compliance with respect to affirmative action and recordkeeping requirements. OFCCP views affirmative action and recordkeeping requirements as fundamental to VEVRAA compliance. These requirements provide the foundation for the contractor's affirmative action efforts and provide the basis for monitoring the contractor's compliance by both the contractor and OFCCP.

The regulation being replaced today (at § 60–250.50) requires a showing that a debarred contractor will carry out employment policies and practices in compliance with VEVRAA and its regulations as one of the conditions of reinstatement. OFCCP traditionally has accepted a contractor's promise of future compliance as sufficient to meet this requirement. Unfortunately, OFCCP has found that, for some contractors, a promise is not enough. The sanction of debarment for a fixed-term of not less than six months but no more than three years establishes a minimum trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that will ensure continuing compliance with the contractor's VEVRAA obligations. See, e.g., *OFCCP* v. *Disposable Safety Wear*, 92–OFC–11 (Decision and Final Administrative Order of the Secretary of Labor, September 29, 1992). The express recognition of fixed-term debarment in the regulations is designed to put contractors on notice that an empty promise of future compliance will not be a sufficient premise for continued contracting with the Federal Government. Express regulatory recognition of the sanction of fixed-term debarment will strengthen the VEVRAA enforcement scheme by deterring contractors from engaging in violations ''based on a cold weighing of the costs and benefits of noncompliance.'' *Janik Paving & Construction* v. *Brock*, 828 F.2d 84 (2d Cir. 1987). Accordingly, OFCCP has determined to retain in this final rule the authority to impose fixed-term debarments.

Subpart E—Ancillary Matters

Section 60–250.80 Recordkeeping

Under the regulation being replaced today (§ 60–250.52(a)), contractors are required to maintain for one year records relating to complaints and actions taken by the contractor in connection with such complaints. Paragraph (a) of proposed § 60–250.81 would have revised this obligation in two ways. First, it would have made the record retention obligation applicable to any personnel or employment record made or kept by the contractor, and set out a listing of examples of the types of records that must be retained. Second, it would have extended the required record retention period from one to two years for larger contractors. In this context, larger contractors are those that have 150 or more employees and a Government contract of $150,000 or more. When a contractor has been notified that a complaint has been filed, a compliance evaluation has been initiated or an enforcement action has been commenced, the contractor would be required to preserve all relevant personnel records until the final disposition of the action. Three comments were received on proposed paragraph (a).

Two commenters criticized the two-year record retention period proposed for larger contractors. The commenters questioned why OFCCP should need to review two years' worth of records, when complaints must be filed within 300 days and when a one-year retention period applies under the ADA and Title VII. As one commenter put it, ''[t]he responsibility and authority of OFCCP to investigate complaints under VEVRAA is no greater or more encompassing than EEOC's responsibility to investigate complaints under the ADA. Similarly, the data needed by OFCCP to accomplish this purpose is no greater than that of the EEOC.'' One of the commenters also said that OFCCP had ''significantly underestimate[d]'' the administrative and storage costs associated with maintaining an additional year of records.

These comments incorrectly minimize the differences in the enforcement schemes of EEOC and OFCCP. EEOC's enforcement of Title VII and the ADA is triggered exclusively by charges, which must be filed within 180 days (or, in deferral jurisdictions, 300 days) of an alleged violation. EEOC's one-year retention period is designed to ensure that relevant records are not discarded before the expiration of the complaint filing period. In contrast, OFCCP's evaluations of contractors' compliance with VEVRAA cover a two-year period. The agency's policy and practice are to examine the contractor's personnel policies and activities for the two years preceding the initiation of the evaluation, and to assess liability for discriminatory practices dating back two years. The two-year record retention period provides greater assurance that relevant records will be available to OFCCP during its compliance evaluations.

The commenter who asserted that OFCCP has underestimated the burdens on contractors provided no data or other support for its assertion. OFCCP continues to believe, as stated in the preamble to the NPRM, that the recordkeeping provisions of this proposed rule are consistent with those contained in the Section 503 final rule and therefore do not result in recordkeeping burdens beyond those under the Section 503 rule.

One commenter raised questions regarding the record retention obligations of contractors who are at or near the thresholds that trigger the different retention periods. Specifically, the commenter asked what would happen if the employment levels or contract values change so that they exceed or fall below the 150 employees/$150,000 thresholds during the course of the contract. A change in status relating to either threshold would affect the record retention obligation. If the number of employees should fall below 150 or if the contractor no longer has a contract of at least $150,000, the contractor would not be required to retain employment records for two years. The requirement to keep records for two years would become effective again on the date that the contractor met the thresholds of 150 employees and a contract of $150,000. The record retention requirement, however, would not be applied retroactively, *i.e.*, the change from one year to two years would be phased in day-by-day. See the discussion later in this section of the preamble regarding the obligation to maintain records once a compliance evaluation has commenced.

One commenter contended that the proposed regulatory language was inadequate because it failed to answer contractors' recurrent questions regarding what records must be kept. The commenter urged that the regulations should include guidance on: (1) who is an ''applicant'' for the purposes of the record retention requirement; and (2) whether and to what extent the record retention requirement applied when a contractor used electronic bulletin boards and the Internet as recruitment sources.

OFCCP has issued the following guidance on the meaning of the term ''applicant'' under Executive Order 11246:

> The precise definition of the term ''applicant'' depends upon [a contractor's] recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the [contractor's] practice. Question and Answer No. 15, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (44 F.R. 11996, 11998 (March 2, 1979)).

The Uniform Guidelines on Employee Selection Procedures do not apply to VEVRAA. See § 60–250.21(g)(2) of this rule. Nevertheless, the statement quoted above represents a reasoned, balanced approach to the question of who is an

applicant under VEVRAA, and hereby is adopted for that purpose. Accordingly, whether an individual will be considered an applicant turns on the employee selection procedures designed and utilized by the contractor. OFCCP is studying the range of ways contractors are utilizing electronic media in their employee selection processes and intends to issue guidance responding to questions most frequently asked by contractors regarding this issue.

One commenter expressed disapproval of the requirement that contractors retain all relevant records once a compliance review, complaint investigation or enforcement action has been initiated. This commenter contended that the requirement was burdensome and inequitable, particularly because the regulations lack a limitation on the period of time in which OFCCP must complete a compliance review.

The purpose of this record retention requirement is to ensure that OFCCP can obtain all relevant documents during a compliance evaluation, complaint investigation or enforcement action. OFCCP appreciates the commenter's concerns about the timely completion of compliance evaluations but, as discussed earlier in this preamble, disagrees with the assertion that the schedule should be codified in the regulations.

One commenter, a Federal agency, said that the recordkeeping requirements increase both the number of contractors and subcontractors that must maintain records, and the recordkeeping burden on each contractor and subcontractor. As a result, the commenter recommended that the increased burdens be submitted for approval to the Office of Management and Budget under the Paperwork Reduction Act, and that a Regulatory Flexibility Act analysis be conducted to address asserted increases in the burden on small businesses.

The assertion that the rule increases the number of contractors and subcontractors that must maintain records simply is incorrect. Coverage thresholds are not being altered in any way. Moreover, as was stated in the preamble to the NPRM, the recordkeeping provisions of this rule are consistent with those already being applied under Section 503; accordingly, this rule will not impose new recordkeeping burdens. Nevertheless, we have submitted the requirements to the Office of Management and Budget as is required under the Paperwork Reduction Act.

Subsection (c) of the rule states that the recordkeeping requirements shall apply only to records made or kept on or after the date on which OFCCP publishes in the **Federal Register** notice that the Office of Management and Budget has cleared the requirements. When OFCCP receives the clearance from OMB under the Paperwork Reduction Act of 1995, which it expects to occur approximately 60 days after publication of this final rule, we will revise subsection (c) to specify the actual date on which the recordkeeping requirements take effect.

Finally, in order that the section numbers in the VEVRAA rule correspond to the numbers of counterpart regulatory provisions in the Section 503 rules, we have renumbered this section as § 60–250.80. The section number in the NPRM was § 60–250.81.

Except as mentioned above, the final rule adopts the record retention provisions proposed in the NPRM without change.

Section 60–250.81 Access to Records

Each contractor is required to permit OFCCP access during normal business hours to its places of business, books, records and accounts for the purpose of investigating compliance with VEVRAA. OFCCP proposed to add computerized records to the list of items which the contractor must make available for inspection by OFCCP.

One commenter objected to the proposal regarding access to computerized records. The commenter contended that the proposal would allow unlimited access to sensitive information in a contractors' human resource files, regardless of its relevancy to the contractor's compliance with VEVRAA. The commenter requested that OFCCP modify the proposal to clarify that contractors need only provide ''reasonable'' access, that data requests would be limited in scope to information necessary to address specific compliance questions raised during the evaluation, and that contractors would not be required to reprogram their computers to comply with an OFCCP request. The commenter also recommended that contractors be afforded an appeal process for use when they believe a data request is unreasonable.

OFCCP's primary interest is that it have access during an investigation to relevant data that already exists, whether in computerized or other form. Accordingly, OFCCP intends to apply the same standards for access to computerized records that it always has applied regarding paper records.

The proposed rule would not have expanded the scope of records that must be made available to OFCCP. Contractors already must give OFCCP access to their ''books, records and accounts'' under the previous regulations. The proposed regulation simply would have clarified that ''books, records and accounts'' includes those maintained in computerized form.

The concern that the provision would permit, if not encourage, unfettered access to confidential commercial proprietary data or irrelevant information, is unjustified in OFCCP's view. Under the proposed rule, as under the current regulation, access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with VEVRAA. A further safeguard against broad requests for irrelevant data is the provision that information obtained under this regulation may be used only in connection with the administration of VEVRAA and in furtherance of the purposes of the Act.

Incorporating an appeal process for use by contractors when they disagree with a data request into the VEVRAA regulations at this time would result in procedural inconsistencies between VEVRAA and Section 503, which in our view would not be in the best interest of either contractors or OFCCP. Accordingly, OFCCP is considering this issue for further action in the future.

The regulation is adopted in the final rule as proposed in the NPRM, except that in order that the section numbers in the VEVRAA rule correspond to the numbers of counterpart regulatory provisions in the Section 503 rules, we have renumbered this section as § 60–250.81. The section number in the NPRM was § 60–250.82.

Section 60–250.82 Labor Organizations and Recruiting and Training Agencies

In order that the section numbers in the VEVRAA rule correspond to the numbers of counterpart regulatory provisions in the Section 503 rules, we have renumbered this section as § 60–250.82. The section number in the NPRM was § 60–250.83.

Section 60–250.83 Rulings and interpretations

In order that the section numbers in the VEVRAA rule correspond to the numbers of counterpart regulatory provisions in the Section 503 rules, we have renumbered this section as § 60–250.83. The section number in the NPRM was § 60–250.84.

Section 60–250.84 Responsibilities of Local Employment Service Offices

This section, which was numbered § 60–250.80 in the NPRM, is

renumbered as § 60–250.84. Also, the title of the section, and corresponding text within the section, have been amended to reflect the term ''local employment service office.''

Appendix B—Sample Invitation to Self-Identify

Proposed Appendix B would have contained a sample format that contractors could use to satisfy their obligation under § 60–250.42 to invite applicants to identify themselves as being covered under the Act and wishing to benefit under the contractor's affirmative action program. Paragraph d of the proposed sample invitation would have informed the special disabled veteran applicant that self-identification would assist the contractor in making accommodations to the individual's disability, and then would have suggested that the contractor insert a brief provision summarizing the relevant portion of its affirmative action program.

A commenter suggested that it would be helpful to include in paragraph d of the Appendix a cross reference to the relevant subsection of § 60–250.44. The implication of the comment is that § 60–250.44 contains a particular provision which details what should be inserted in the invitation. That is not the case. Each contractor's approach to affirmative action for special disabled veterans, and each affirmative action program, is different; that is, each is tailored to the contractor's unique circumstances. The contractor should insert into its invitation information about its affirmative action efforts that might be of benefit to covered veterans.

As noted above, we have modified Appendix B to reflect comments relating to § 60–250.42. Specifically, consistent with the revision to the regulation that permits contractors to invite Vietnam era veterans and special disabled veterans to self identify at different stages in the employment process, we have modified the Appendix so that it can be used in a way that best fits the contractor's actual practices relating to the timing of invitations to the two categories of veterans. Further, we have modified the Appendix, in both content and format, to enhance the user's understanding of whether particular portions of the invitation apply to special disabled veterans, Vietnam era veterans, or both.

Appendix C—Review of Personnel Processes

Proposed Appendix C would have set out an example of an appropriate set of procedures that contractors could use to facilitate a review by the contractor and the Government of the contractor's implementation of its duty to evaluate its personnel processes pursuant to proposed § 60–250.44(b). (Section 60–250.44(b) requires the contractor to ensure that its personnel processes provide for careful consideration of the qualifications of applicants and employees, who are known to be special disabled veterans or veterans of the Vietnam era, for employment opportunities.)

Paragraphs 3 and 4 of proposed Appendix C would have instructed contractors to attach or include a description of accommodations considered or used for special disabled veterans to application forms or personnel records. The EEOC commented that in most instances descriptions of accommodations constitute medical information that must be maintained in separate files and treated as confidential medical records. Accordingly, the EEOC recommended that paragraphs 3 and 4 be changed to require contractors to maintain descriptions of accommodations considered or used in separate confidential medical files.

We agree with the EEOC's recommendation and believe it is consistent with § 60–250.23(d) of this rule. Accordingly, we have modified paragraphs 3 and 4 consistent with the comment. Moreover, in order to maintain consistency between the VEVRAA and Section 503 rules, in a companion document published today we also are modifying the corresponding Appendix C to 41 CFR Part 60–741.

General Comments

Several comments addressed the regulatory proposal in general, rather than focusing on any particular section of the NPRM.

One commenter questioned the continued need for VEVRAA, stating that he did not ''think that any employment laws or regulations are necessary any more pertaining to the Vietnam war'' and that the ADA ''should be sufficient to cover disabled vets.'' The commenter also asserted that ''[c]omplying with the paper requirements of this Act are costly, time consuming, and difficult to administer'' and that laws like VEVRAA ''add an artificial cost to our products which puts U.S. business at a disadvantage when competing with foreign companies.''

OFCCP believes that VEVRAA serves a valuable purpose in ensuring that those who served their country are given opportunity to participate in our economic system. Moreover, we note that at least four times within the past seven years the Congress has acted to reauthorize VEVRAA or expand its reach. See, e.g., Section 505 of P.L. 104–275, Section 702 of P.L. 103–446, Section 502 of P.L. 102–568, and Section 1 of P.L. 102–16. OFCCP remains mindful, however, of concerns about compliance burdens. OFCCP seeks to minimize the burdens associated with compliance with VEVRAA by administering the statute, to the extent reasonable, in tandem with the agency's administration of Section 503.

One commenter suggested that publication of a final rule by OFCCP would somehow violate ''due process'' because interested parties were not given sufficient notice of assertedly ''massive, substantive revisions'' and a ''total rewrite'' of the regulations. The commenter supports its point by referring to two semi-annual regulatory agendas in which OFCCP characterized the regulatory action under VEVRAA as ''nonsignificant,'' and by claiming that the published agendas for two meetings of a Department of Labor Advisory Committee on Veterans' Employment and Training did not note anything about the alleged ''extensive rewrite of 41 CFR 60–250.''

OFCCP disagrees with the commenter and believes that it has followed all applicable rulemaking procedures. As is required under the Administrative Procedure Act, OFCCP published the proposed rule for public notice and comment. Despite an extended comment period of more than three months' duration, only a small number of comments were submitted on the proposal.

Moreover, OFCCP's designation of the regulatory action as ''nonsignificant'' is a term of art, referring to the categories used in Executive Order 12866, rather than an indication of the importance of the rule to OFCCP or to the regulated community. Under Executive Order 12866, a ''significant'' regulatory action is one that is likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the

President's priorities, or the principles set forth in Executive Order 12866. OFCCP's VEVRAA proposal clearly did not meet any of the standards of a ''significant'' action. Accordingly, OFCCP's designation of the action as ''nonsignificant'' was entirely appropriate, and was entirely consistent with other agencies' entries in the semiannual regulatory agendas.

Finally, OFCCP also does not agree with the commenter's characterization of this rule as containing extensive substantive revisions of the VEVRAA regulations. To be certain, we have changed the format of the rules. We also have codified in these regulations some concepts and procedures that heretofore existed only in judicial rulings and OFCCP practice. However, the fundamental principles—concepts such as the equal opportunity/affirmative action clause to be inserted in all nonexempt contracts, the contents of written affirmative action programs, the coverage thresholds for the AAP requirement, and the complaint and enforcement procedures—remain largely unchanged in this rule.

Regulatory Procedures

Executive Order 12866

The Department is issuing this rule in conformance with Executive Order 12866. This rule has been determined not to be significant for purposes of Executive Order 12866 and therefore need not be reviewed by OMB. This rule does not meet the criteria of Section 3(f)(1) of Executive Order 12866 and therefore the information enumerated in Section 6(a)(3)(C) of that Order is not required.

This conclusion is based on the fact that this rule does not substantively change the existing obligation of Federal contractors to apply a policy of nondiscrimination and affirmative action in their employment of qualified special disabled veterans and veterans of the Vietnam era. For instance, although the rule generally conforms the existing Section 4212 regulations' nondiscrimination provisions to the Section 503 final rule published by the OFCCP, it does not significantly alter the substance of the existing nondiscrimination provisions.

Regulatory Flexibility Act

The rule clarifies existing requirements, and does not substantively change existing obligations, for Federal contractors. Accordingly, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Unfunded Mandates Reform

Executive Order 12875—This rule will not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more, or increased expenditures by the private sector of $100 million or more.

Paperwork Reduction Act

The information collection requirements under the VEVRAA regulations being replaced today were covered by OMB control numbers 1215–0072 and 1215–0163. The new recordkeeping requirements contained in this final rule have been submitted to the Office of Management and Budget (OMB) for clearance under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). These new recordkeeping requirements are not effective until OFCCP displays currently valid OMB control numbers. When OMB completes its review OFCCP will publish a notice in the **Federal Register** regarding the control numbers.

In the Preamble to the NPRM OFCCP explained that the rule: would extend the current one-year record retention period to two years (for larger contractors) and make the retention obligation applicable to a broader range of records; require that, for purposes of confidentiality, medical information obtained regarding the medical condition or history of any applicant or employee be collected and maintained on separate forms and in separate medical files; and require those contractors who, for affirmative action purposes, choose to invite applicants to identify themselves as special disabled veterans or veterans of the Vietnam era to maintain a separate file on such applicants and employees.

OFCCP stated that the recordkeeping provisions of the rule were consistent with those contained in the Section 503 final rule. Therefore, OFCCP stated, although the recordkeeping provisions would be more expansive than those in the current VEVRAA regulations, they would not result in increased recordkeeping burdens.

OFCCP invited the public to comment on the accuracy of the agency's estimates regarding the burdens posed by the proposed revisions to the information collection requirements, and to suggest ways of minimizing the burden and enhancing the quality and utility of the information collected. None of the commenters responded to this request for comments. Several commenters, however, expressed general opinions about the burdens associated with the record retention requirements in their comments directed toward particular regulatory provisions. We have addressed those comments in our discussion of those regulatory provisions. After careful consideration of the comments, OFCCP continues to believe that the recordkeeping provisions in this rule will not result in increased burdens.

List of Subjects in 41 CFR Part 60–250

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements, Veterans.

Signed at Washington, DC, this 26th day of October, 1998.

Alexis M. Herman,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, with respect to the rule amending 41 CFR Chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely at 46 FR 42865, the revision of Part 60–250 is withdrawn, and in Part 60–30, all references to Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act are withdrawn; and, under authority of 38 U.S.C. 4212, Title 41 of the Code of Federal Regulations, Chapter 60 is amended by revising part 60–250 to read as follows:

PART 60–250—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING SPECIAL DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

Authority: 29 U.S.C 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60–250.1 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, or VEVRAA), which requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

(b) *Applicability.* This part applies to all Government contracts and subcontracts of $10,000 or more 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 § 60–250.40(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.

(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 special disabled veterans or veterans of the Vietnam era 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.

§ 60–250.2 Definitions.

(a) *Act* means the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.

(b) *Equal opportunity clause* means the contract provisions set forth in § 60–250.5, ''Equal opportunity clause.''

(c) *Secretary* means the Secretary of Labor, United States Department of Labor, or his or her designee.

(d) *Deputy Assistant Secretary* means the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee.

(e) *Government* means the Government of the United States of America.

(f) *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.

(g) *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.

(h) *Contract* means any Government contract or subcontract.

(i) *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) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.

(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) *Person,* as used in this paragraph (i) and paragraph (l) 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.

(4) *Nonpersonal services,* as used in this paragraph (i) and paragraph (l) of this section, includes, but is not limited to, the following: Utility, construction, transportation, research, insurance, and fund depository.

(5) *Construction,* as used in this paragraph (i) and paragraph (l) 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.

(6) *Personal property,* as used in this paragraph (i) and paragraph (l) 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).

(j) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of $10,000 or more.

(k) *Prime contractor* means any person holding a contract of $10,000 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.

(l) *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):

(1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

(m) *Subcontractor* means any person holding a subcontract of $10,000 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.

(n)(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) *Serious employment handicap,* as used in paragraph (n)(1) of this section, means a significant impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes and interests.

(o) *Qualified special disabled veteran* means a special disabled veteran who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such veteran holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(p) *Veteran of the Vietnam era* means a person who:

(1) 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:

(i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or

(ii) Between August 5, 1964, and May 7, 1975, in all other cases; or

(2) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed:

(i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or

(ii) Between August 5, 1964, and May 7, 1975, in all other cases.

(q) *Essential functions*—(1) *In general.* The term *essential functions* means fundamental job duties of the employment position the special disabled veteran 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.

(r) *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 special 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 special disabled veteran to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable the contractor's employee who is a special disabled veteran to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees who are not special 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 special 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 special 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 special 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.)

(s) *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 (s)(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

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[1] A contractor's duty to provide a reasonable accommodation with respect to applicants who are special disabled veterans is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Special 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 special 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.

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.

(t) *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.

(u) *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 a special disabled veteran 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.

§ 60–250.3 [Reserved]

§ 60–250.4 Coverage and waivers.

(a) *General*—(1) *Contracts and subcontracts of $10,000 or more.* Contracts and subcontracts of $10,000 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 $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 is $10,000 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary in writing within 30 days.

(3) *Facilities not connected with contracts.* The Deputy Assistant Secretary 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.

§ 60–250.5 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 Special Disabled Veterans and Veterans of the Vietnam Era

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era 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; and

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 wherein the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local employment service office of the state employment security agency wherein the opening occurs. Listing employment openings with the U.S. Department of Labor's America's Job Bank shall satisfy the requirement to list jobs with the local employment service office.

3. Listing of employment openings with the local employment service office 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 the contractor becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the state employment security agency in each state where it has establishments of the name and location of each hiring location in the state: *Provided,* That this requirement shall not apply to state and local governmental contractors. As long as the contractor is contractually bound to these provisions and has so advised the state agency, there is no need to advise the state agency of subsequent contracts. The contractor may advise the state agency 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, and the Virgin Islands.

6. As used in this clause: i. *All employment openings* includes all positions except executive and top 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 top management* means any employee: (a) Whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and (b) who customarily and regularly directs the work of two or more other employees therein; and (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) who customarily and regularly exercises discretionary powers; and (e) who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his or her hours of work in the work week to activities which are not directly and closely related to the performance of the work described in (a) through (d) of this paragraph 6. ii.; *Provided,* that (e) of this paragraph 6.ii. shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he or she is employed.

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 Deputy Assistant Secretary for 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 special disabled veterans or veterans of the Vietnam era. The contractor must ensure that applicants or employees who are special disabled veterans are informed of the contents of the notice (e.g., the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

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 the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and is committed to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

11. The contractor will include the provisions of this clause in every subcontract or purchase order of $10,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 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 Deputy Assistant Secretary for Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

[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 that the equal opportunity clause be quoted verbatim in the contract. The clause may be made a part of the contract by citation to 41 CFR 60–250.5(a).

(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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary, and taking such actions for noncompliance as are set forth in § 60–250.66 as may be ordered by the Secretary or the Deputy Assistant Secretary.

Subpart B—Discrimination Prohibited

§ 60–250.20 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.

§ 60–250.21 Prohibitions.

The term *discrimination* includes, but is not limited to, the acts described in this section and § 60–250.23.

(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 special disabled veteran or veteran of the Vietnam era.

(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 special disabled veteran or veteran of the Vietnam era. For example, the contractor may not segregate qualified special disabled veterans or veterans of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era; or

(2) Perpetuate the discrimination of others who are subject to common administrative control.

(e) *Relationship or association with a special disabled veteran or a veteran of the Vietnam era.* 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 special disabled veteran or Vietnam era 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 otherwise qualified applicant or employee who is a 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 otherwise qualified job applicant or employee who is a 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 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 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 special disabled veterans or veterans of the Vietnam era, 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 special 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 special disabled veterans or veterans of the Vietnam era 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 special disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a special disabled veteran or a veteran of the Vietnam era 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 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 special disabled veterans or veterans of the Vietnam era, 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.

§ 60–250.22 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 § 60–250.2(u) defining *direct threat.*)

§ 60–250.23 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 special 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 special 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 special 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 § 60–250.42.

(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.

§ 60–250.24 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 § 60–250.23. 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 §§ 60–250.23(b)(5) and (c).

§ 60–250.25 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 a qualified special disabled veteran equal access to insurance or subject a qualified special 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

§ 60–250.40 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 $50,000 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.

(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.

§ 60–250.41 Availability of affirmative action program.

The full affirmative action program 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.

§ 60–250.42 Invitation to self-identify.

(a) *Special disabled veterans.* The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a special disabled veteran who may be covered by the Act and wishes to benefit under the affirmative action program. Such invitation shall be extended after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, except that the contractor may invite special disabled veterans to self-identify prior to making a job offer when:

(1) The invitation is made when the contractor actually is undertaking affirmative action for special disabled veterans at the pre-offer stage; or

(2) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for special disabled veterans.

(b) *Veterans of the Vietnam era.* The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a veteran of the Vietnam era who may be covered by the Act and wishes to benefit under the affirmative action program. Such invitation may be made at any time before the applicant begins his or her employment duties.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. 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. Because a contractor usually may not seek advice from a special disabled veteran regarding placement and accommodation until after a job offer has been extended, the invitation set forth in Appendix B of this part contains instructions regarding modifications to be made if it is used at the pre-offer stage.)

(d) If an applicant so identifies himself or herself as a special disabled veteran, the contractor should also seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The contractor also may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file in accordance with § 60-250.23(d) on persons who have self-identified as special 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 shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be special disabled veterans or veterans of the Vietnam era.

(g) Nothing in this section shall relieve the contractor from liability for discrimination under the Act.

§ 60–250.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act contractors shall not discriminate because of status as a special disabled veteran or veteran of the Vietnam era and shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era at all levels of employment, including the executive

level. Such action shall apply to all employment activities set forth in § 60–250.20.

§ 60–250.44 Required contents of affirmative action programs.

Acceptable affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(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 special disabled veterans are informed of the contents of the policy statement (for example, the contractor may have the statement read to a visually disabled individual, or may lower the posted notice so that it may be read by a person in a wheelchair). The policy statement should indicate the chief executive officer's attitude on the subject matter, 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 should 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 special disabled veteran or Vietnam era 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 the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) or any other Federal, state or local law requiring equal opportunity for special disabled veterans or veterans of the Vietnam era;

(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 special disabled veterans or veterans of the Vietnam era; 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 special disabled veterans or veterans of the Vietnam era for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a special disabled veteran or a veteran of the Vietnam era is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, that is relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype special disabled veterans and veterans of the Vietnam era 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 of this part 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 special 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 special 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 shall have 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 § 60–250.2(u) defining *direct threat.*)

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–250.21(f), as a matter of nondiscrimination the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified special 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 special 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 special disabled veteran or veteran of Vietnam era.

(f) *External dissemination of policy, outreach and positive recruitment.* The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraphs (f)(1) through (f)(8) of this section that are reasonably designed to effectively recruit qualified special disabled veterans and veterans of the Vietnam era. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraphs (f)(1) through (f)(8) 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.

(1) The contractor should enlist the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for, qualified special

disabled veterans and veterans of the Vietnam era, to fulfill its commitment to provide meaningful employment opportunities to such veterans:

(i) The Local Veterans' Employment Representative or his or her designee in the local employment service office nearest the contractor's establishment;

(ii) The Department of Veterans Affairs Regional Office nearest the contractor's establishment;

(iii) The veterans' counselors and coordinators (''Vet-Reps'') on college campuses;

(iv) The service officers of the national veterans' groups active in the area of the contractor's establishment; and

(v) Local veterans' groups and veterans' service centers near the contractor's establishment.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant 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. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(3) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are special disabled veterans or veterans of the Vietnam era. 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.

(4) The contractor should establish meaningful contacts with appropriate veterans' service organizations which serve special disabled veterans or veterans of the Vietnam era for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have authority to approve or disapprove the acceptability of affirmative action programs.

(5) Special disabled veterans and veterans of the Vietnam era should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(6) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(7) The contractor should take positive steps to attract qualified special disabled veterans and veterans of the Vietnam era 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 Vietnam era veterans and veterans with disabilities.

(8) The contractor, in making hiring decisions, should consider applicants who are known special disabled veterans or veterans of the Vietnam era for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(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 internal procedures such as those 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 special disabled veterans and veterans of the Vietnam era. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (g)(2) of this section or that its 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. 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 practices are adequate.

(2) The contractor should implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual;

(ii) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified special disabled veterans and veterans of the Vietnam era. The contractor should periodically schedule special meetings with all employees to discuss policy and explain individual employee responsibilities;

(iii) Publicize it in the company newspaper, magazine, annual report and other media;

(iv) 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 attitude;

(v) Discuss the policy thoroughly in both employee orientation and management training programs;

(vi) Meet with union officials and/or employee representatives to inform them of the contractor's policy, and request their cooperation;

(vii) Include articles on accomplishments of special disabled veterans and veterans of the Vietnam era in company publications; and

(viii) When employees are featured in employee handbooks or similar publications for employees, include special 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 special disabled veterans and veterans of the Vietnam era have had the opportunity to participate in all company sponsored educational, training, recreational and social activities; and

(v) Measure the contractor's compliance with the affirmative action program's specific obligations.

(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 top 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.

Subpart D—General Enforcement and Complaint Procedures

§ 60–250.60 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 special disabled veteran or veteran of the Vietnam era 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. 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 the Executive Order and regulations;

(3) *Compliance check.* A visit to the establishment to ascertain whether data and other information previously submitted by the contractor are complete and accurate; whether the contractor has maintained records consistent with § 60–250.80; and/or whether the contractor has developed an affirmative action program consistent with § 60–250.40; 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 pursuant to § 60–250.62.

(c) *VETS–100 Report.* During a compliance evaluation, OFCCP may verify whether the contractor has complied with its obligation, pursuant to 41 CFR Part 61–250, to file its annual Veterans' Employment Report (VETS–100 Report) with the Office of the Assistant Secretary for Veterans' Employment and Training (OASVET). If the contractor has not filed its report, OFCCP will request a copy from the contractor. If the contractor fails to provide a copy of the report to OFCCP, OFCCP will notify OASVET.

§ 60–250.61 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 the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C. 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) or his or her designee 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 security agency shall cooperate with the Deputy Assistant Secretary 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 special disabled veteran or veteran of the Vietnam era. 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, indicating the veteran's level (by percentage) of disability, and whether the veteran has been determined by the Department of Veterans Affairs to have a serious employment handicap under 38 U.S.C. 3106;

(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 Deputy Assistant Secretary decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–250.65(a)(1), the complainant and contractor shall be so notified. The Deputy Assistant Secretary, 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary decides to reconsider the determination of a Notification of Results of Investigation, the Deputy Assistant Secretary 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 § 60–250.62.

§ 60–250.62 Conciliation agreements and letters of commitment.

(a) If a compliance evaluation, complaint investigation or other review by OFCCP finds a material violation of the Act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation 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) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

(b) The term ''conciliation agreement'' does not include ''letters of commitment'', which are appropriate for resolving minor technical deficiencies.

§ 60–250.63 Violation of conciliation agreements and letters of commitment.

(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.

(d) When OFCCP believes that a letter of commitment has been violated, the matter shall be handled, where appropriate, pursuant to § 60–250.64. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

§ 60–250.64 Show cause notices.

When the Deputy Assistant Secretary 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 § 60–250.65).

§ 60–250.65 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 Deputy Assistant Secretary may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–250.5, 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, 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; to ''equal opportunity clause'' shall mean the equal opportunity clause published at

§ 60–250.5; and to ''regulations'' shall mean the regulations contained in this part.

§ 60–250.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Deputy Assistant Secretary, 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 § 60–250.68. 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.

§ 60–250.67 Notification of agencies.

The Deputy Assistant Secretary shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–250.68 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary 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 Deputy Assistant Secretary's decision. The petition shall be served on the Deputy Assistant Secretary and the Associate Solicitor for Civil Rights and shall include the decision as an appendix. The Deputy Assistant Secretary 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.

§ 60–250.69 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 special disabled veterans or veterans of the Vietnam era;

(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 special disabled veterans or veterans of the Vietnam era; 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 Deputy Assistant Secretary against any contractor who violates this obligation.

§ 60–250.70 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

§ 60–250.80 Recordkeeping

(a) *General requirements.* 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. 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) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraph (a) of this section 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.

(c) 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.

§ 60–250.81 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 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 Act or this part. 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.

§ 60–250.82 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.

§ 60–250.83 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Deputy Assistant Secretary.

§ 60–250.84 Responsibilities of local employment service offices.

(a) Local employment service offices shall refer qualified special disabled veterans and veterans of the Vietnam era to fill employment openings listed by contractors with such local offices pursuant to the mandatory listing requirements of the equal opportunity clause, and shall give priority to special disabled veterans and veterans of the Vietnam era in making such referrals.

(b) Local employment service offices shall contact employers to solicit the job orders described in paragraph (a) of this section. The state employment security agency shall provide OFCCP upon request information pertinent to whether the contractor is in compliance with the mandatory listing requirements of the equal opportunity clause.

§ 60–250.85 Effective date.

This part is effective on January 4, 1999, and does not apply retroactively. Contractors presently holding Government contracts shall update their affirmative action programs as required to comply with the regulations in this part within 120 days after January 4, 1999.

Appendix A to Part 60–250—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 § 60–250.1(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 special 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'' special disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–250.2(o), a special disabled veteran 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 special 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 special disabled veterans. As stated in § 60–250.42 (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 covered by the Act and wish to benefit under the contractor's affirmative action program. That section further provides that the contractor should seek the advice of special disabled veterans who ''self-identify'' in this way as to proper placement and appropriate accommodation. Moreover, § 60–250.44(d) provides that if an employee who is a known special 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 special 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 special 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 special disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are special 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 special disabled veteran should 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. Section 60–250.2(r) 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 generally should consult with the special disabled veteran 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–EEOC (voice), 1–800–800–3302 (TDD)), the Job Accommodation Network (JAN) operated by the President's Committee on Employment of People with Disabilities (1–800–JAN–7234), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a special 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 telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck 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 special 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 § 60–250.2(r) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified special disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a special 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 special 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 special disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit special disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or special 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 special 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 special 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 special 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'' 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 special 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 special disabled veterans. It should also be noted that the contractor is not required to promote a special disabled veteran 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 special disabled veterans who are vision or hearing impaired, e.g., by making an announcement available in braille, in large print, or on audio tape, or by responding to job inquiries via TDDs; (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 special 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 special 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 60–250—Sample Invitation To Self-Identify

Note: When the invitation to self-identify is being extended to special disabled veterans

prior to an offer of employment, as is permitted in limited circumstances under §§ 60–250.42(a)(1) and (2), paragraph 7(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

[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, which requires Government contractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

2. **[The following text should be used when extending an invitation to veterans of the Vietnam era only.]** If you are a veteran of the Vietnam era, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. The term ''veteran of the Vietnam era'' refers to a person who 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 in the Republic of Vietnam between February 28, 1961, and May 7, 1975 or between August 5, 1964, and May 7, 1975, in all other cases. The term also refers to a person who was discharged or released from active duty for a service-connected disability if any part of such active duty was performed in the Republic of Vietnam between February 28, 1961, and May 7, 1975, or between August 5, 1964, and May 7, 1975, in all other cases.

[The following text should be used when extending an invitation to special disabled veterans only.] If you are a special disabled veteran, we would like to include you in our affirmative action program. If you would like to be included under the affirmative action program, please tell us. This information will assist us in placing you in an appropriate position and in making accommodations for your disability. The term ''special disabled veteran'' refers to 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 rated at 30 percent or more, or rated at 10 or 20 percent in the case of a veteran who has been determined by the Department of Veterans Affairs to have a serious employment handicap. The term also refers to a person who was discharged or released from active duty because of a service-connected disability.

[The following text should be used when extending an invitation to both veterans of the Vietnam era and special disabled veterans.] If you are a veteran of the Vietnam era or a special disabled veteran, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. [The contractor should include here the definitions of ''veteran of the Vietnam era'' and ''special disabled veteran'' found in the two preceding paragraphs.]

3. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

4. 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.

5. 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 special 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 OFCCP, or enforcing the Americans with Disabilities Act, may be informed.

6. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

7. **[The following text should be used only when extending an invitation to special disabled veterans, either by themselves or in combination with veterans of the Vietnam era. Paragraph 7(ii) should be omitted when the invitation to self-identify is being extended prior to an offer of employment.]** If you are a special disabled veteran it would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations. This information will assist us in placing you in an appropriate position and in making accommodations for your disability.

Appendix C to Part 60–250—Review of Personnel Processes

The following is a set of procedures which contractors may use to meet the requirements of § 60–250.44(b):

1. The application or personnel form of each known applicant who is a special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era should include (i) the identification of each promotion for which the covered veteran was considered, and (ii) the identification of each training program for which the covered veteran was considered.

3. In each case where an employee or applicant who is a special disabled veteran or a veteran of the Vietnam era 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 special 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 § 60–250.23(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 special 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 § 60–250.23(d).

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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–741

RIN 1215–AB19

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: This final rule amends Appendix C to the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503). Appendix C contains procedures that Government contractors may use to review their personnel processes to ensure that the processes are fair to disabled applicants and employees. The existing Appendix recommends that contractors attach or include a description of accommodations considered or used for special disabled veterans to application forms or personnel records. As amended, the Appendix recommends that the description of accommodations be maintained in separate confidential medical files. The amendments make Appendix C to the Rehabilitation Act rules consistent with Appendix C to OFCCP's rules implementing the Vietnam Era Veterans' Readjustment Assistance Act, which also are published elsewhere in this issue of the **Federal Register**.