

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60–741**

RIN 1250-AA02

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to revise the regulations implementing the non-discrimination and affirmative action regulations of section 503 of the Rehabilitation Act of 1973, as amended. Section 503 prohibits discrimination by covered Federal contractors and subcontractors against individuals on the basis of disability, and requires affirmative action on behalf of qualified individuals with disabilities. The proposed regulations would strengthen the affirmative action provisions, detailing specific actions a contractor must take to satisfy its obligations. They would also increase the contractor's data collection obligations, and establish a utilization goal for individuals with disabilities to assist in measuring the effectiveness of the contractor's affirmative action efforts. Revision of the non-discrimination provisions to implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 is also proposed.

DATES: To be assured of consideration, comments must be received on or before February 7, 2012.

ADDRESSES: You may submit comments, identified by RIN number 1250-AA02, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Fax:* (202) 693–1304 (for comments of six pages or less).

- *Mail:* Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693–0103 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at <http://www.regulations.gov>. Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:**Background**

Enacted in 1973, the purpose of section 503 of the Rehabilitation Act (section 503), as amended, is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal government contractors and subcontractors. Second, it requires each covered Federal government contractor and subcontractor to take affirmative action to employ and advance in employment qualified individuals with disabilities.

The nondiscrimination requirements and general affirmative action requirements of section 503 apply to all Government contractors with contracts or subcontracts in excess of \$10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). See 41 CFR 60–741.4. The requirement to prepare and maintain an affirmative action program, the specific obligations of which are described at 41 CFR 60–741.44, apply to those contractors that have a contract or subcontract of \$50,000 or more and 50 or more employees. In the section 503 context, with the awarding of a Federal contract comes a number of responsibilities, including compliance with the section 503 anti-discrimination and anti-retaliation provisions, meaningful and effective efforts to recruit and employ individuals with disabilities, creation and enforcement of personnel policies

that support its affirmative action obligations, maintenance of accurate records on its affirmative action efforts, and OFCCP access to these records upon request. Failure to abide by these responsibilities may result in various sanctions, from withholding progress payments up to and including termination of contracts and debarment from receiving future contracts.

The framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement has been in place since the 1970's. However, both the unemployment rate of working age individuals with disabilities and the percentage of working age individuals with disabilities that are not in the labor force remain significantly higher than for those without disabilities. Recent data from the U.S. Department of Labor's Bureau of Labor Statistics (BLS) indicates that just 21.8% of working age people with certain functional disabilities were in the labor force in 2010, compared with 70.1% of working age individuals without such disabilities; while the unemployment rate for working age individuals with these disabilities was 14.8%, compared with an unemployment rate of 9.4% for working age individuals without such disabilities. See *Table A. Employment status of the civilian noninstitutional population by disability status and age, 2009 and 2010 annual averages*, available online at <http://www.bls.gov/news.release/disabl.a.htm>.

A substantial disparity in the employment rate of individuals with disabilities continues to persist despite years of technological advancements that have made it possible to apply for and perform many jobs from remote locations, and to read, write, and communicate in an abundance of alternative ways. Strengthening the implementing regulations of section 503, whose stated purpose “requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities,” will be an important means by which the government can address the issue of employment for individuals with disabilities.

Prior to publishing this NPRM, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand those features of the section 503 regulations that work well, those that can be improved, and possible new requirements that could

help to effectuate the overall goal of increasing the employment opportunities for individuals with disabilities with Federal contractors. In addition, OFCCP also published an Advance Notice of Proposed Rulemaking (ANPRM) on July 23, 2010, 75 **Federal Register** (FR) 43116, requesting public comment on specific inquiries regarding potential ways to strengthen the section 503 affirmative action regulations. The comment period ended September 21, 2010, and all comments received have been reviewed and given due consideration.

A total of 127 comments were received and are available for review at the Federal eRulemaking Portal at <http://www.regulations.gov>. Comments were received from trade and professional associations; disability and veteran advocacy organizations; employers; federal, state, and local government agencies; representatives of schools and organizations that provide education and/or vocational training; and from several private citizens. These written comments were generally reflective of the comments, suggestions and opinions expressed during the town hall meetings, webinars, and listening sessions, and are summarized briefly below.

47 of the comments received were non-substantive in nature. These commenters provided only generic responses indicating general support or opposition to strengthening the affirmative action regulations and/or to concepts such as the use of hiring goals or voluntary self-identification as an individual with a disability, or addressed issues unrelated to the ANPRM. 80 commenters provided substantive responses to at least some of the ANPRM questions. 51 of these were from the disability/advocacy perspective and 24 were from the contractor community. By and large, the contractor community argued that changes to the affirmative action regulations were not needed, while disability and employment service organizations and agencies requested that OFCCP strengthen the existing affirmative action requirements and consider additional requirements.

Among the most significant inquiries in the ANPRM were two questions regarding the utility of establishing hiring goals for individuals with disabilities similar to the requirements for minorities and women contained in the implementing regulations for Executive Order 11246, and the data source(s) from which such goals could

be derived.¹ A third inquiry in the ANPRM asked about contractors' experiences with the disability employment goals programs of State or local governments.² 57 commenters addressed this issue. Of these, 37 said that hiring goals "like those for race and gender" should be established. These commenters asserted that quantitative and measurable analyses similar to those for minorities and women were needed to make affirmative action for individuals with disabilities "more than a paperwork exercise." Almost all of these commenters referenced the U.S. Census Bureau's American Community Survey (ACS)³ data as the best available source of data about the number of persons with certain types of disabilities in the US. However, these commenters did not offer workable recommendations as to how OFCCP or contractors could use the data for the establishment of goal percentages.

Five of these 37 commenters also responded to the inquiry regarding State or local government goal programs. These commenters all referenced California's State workforce affirmative action program as an example of an affirmative action success story. According to the commenters, the California program requires that State agencies submit annual affirmative action plans that include specific "targets and timetables" for the employment of individuals with disabilities, based on their availability in the State's working age population. Agencies' workforce composition and upward mobility of individuals with disabilities is monitored by the State Personnel Board, and annual reports are required to be submitted to the Governor and State legislature. As a result of these affirmative action efforts, the commenters stated, individuals with disabilities comprised 9.3% of the State

¹ Specifically, the ANPRM asked: "If OFCCP were to require Federal contractors to conduct utilization analyses and to establish hiring goals for individuals with disabilities, comparable to the analyses and establishment of goals required under the regulations implementing Executive Order 11246, what data should be examined in order to identify the appropriate availability pool of such individuals for employment?" and "Would the establishment of placement goals for individuals with disabilities measurably increase their employment opportunities in the Federal contractor sector? Explain why or why not."

² This question asked: "What experience have Federal contractors had with respect to disability employment goals programs voluntarily undertaken or required by state, local or foreign governments?"

³ The American Community Survey conducted by the U.S. Census Bureau inquires about an array of demographic information, including several questions intended to ascertain the existence of certain functional disabilities, focusing on serious oral, visual, intellectual, developmental and mobility impairment.

government workforce in 2009.⁴ Though informative, it should be noted that the commenters provided few details about the design or operation of the California State program, and that, consequently, it is unclear whether the California program represents an appropriate goals model for federal contractors.⁵

The remaining 20 commenters, mostly contractors or contractor representatives, opposed the use of hiring goals in the section 503 context, asserting primarily that available disability data (including ACS data) is not sufficiently comprehensive or robust to be used for this purpose. See the Preamble to section 60-741.46 for further discussion regarding disability data sources.

Another significant issue posed in the ANPRM was whether inviting applicants to self-identify as individuals with disabilities prior to receiving a job offer would enhance the contractor's ability to monitor the impact of their hiring practices and measure the effectiveness of their affirmative action efforts. 55 commenters addressed this question. Of these, 37 commenters said voluntary pre-offer self-identification of disability would have a positive effect on the employment of individuals with disabilities. Several commenters recommended that the contractor be required to invite voluntary self-identification at both the pre- and post-offer employment process stages to alleviate concerns that information about a hidden disability might be improperly used if provided before an employment offer was made. A few commenters recommended that individuals with disabilities be offered the additional option of self-identifying "for recordkeeping purposes only," rather than for purposes of receiving affirmative action. The remaining 19 commenters were against the idea of pre-offer self-identification for various reasons, including 3 commenters who erroneously asserted that it would violate the Americans with Disabilities Act (ADA) of 1990. See the Preamble to section 60-742 for a discussion of the permissibility under the ADA of disability-related inquiries in furtherance of an affirmative action obligation.

⁴ The commenters cite the Annual Census of Employees in the State Civil Service 2008–2009, California State Personnel Board, February 2010 for this statistic. See <http://www.spb.ca.gov/WorkArea/showcontent.aspx?id=5634>.

⁵ For example, no details were provided with regard to the basis of the availability data used in the program, the method(s) used in setting the "targets and timetables," the program's enforcement mechanism(s), if any, and/or the rate of State agencies' compliance with the program.

Support was also expressed among a significant number of commenters for strengthening the implementing regulations regarding contractors' use of linkage agreements⁶ with recruitment and/or training sources, and for adding a mandatory job listing requirement similar to the one in the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

This NPRM proposes several major changes to part 60–741. Many of these changes were informed and significantly shaped by the comments received on the ANPRM, and by the information we received at the town hall meetings, listening sessions, and in webinars. In addition to changes to the regulations implementing section 503's affirmative action requirements, changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 and the subsequent amendment by the Equal Employment Opportunity Commission (EEOC) of their implementing regulations at 29 CFR part 1630, have also been made to the rule's definitions and nondiscrimination provisions. The ADAAA amends section 503 to the same extent as it amends the ADA, and became effective on January, 1, 2009. It is, therefore, OFCCP's intention that these changes will have the same meaning as set forth in the ADAAA, and in the revised EEOC regulations published at 76 FR 16978 (March 25, 2011).

The detailed Section-by-Section Analysis below identifies and discusses all proposed changes in each section. Due to the extensive proposed revisions to the section 503 regulations, part 60–741 will be republished in its entirety in this NPRM for ease of reference. However, the Department will only accept comments on the proposed revisions of the regulations detailed herein.

Section-by-Section Analysis

41 CFR Part 60–741

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–741.1 Purpose, Applicability, and Construction

We propose a few minor changes to this section. Paragraph (a) of § 60–741.1 of the current rule sets forth the scope of section 503 and the purpose of its implementing regulations. Existing paragraph (a) discusses the contractor's affirmative action obligations but does not mention the other primary element of section 503—the prohibition of discrimination in employment against

individuals with disabilities. Accordingly, the proposed rule adds language to the first sentence of paragraph (a) including this important element.

Next, the proposal modifies the citation in paragraph (c) to the "Americans With Disabilities Act of 1990" (ADA) to reflect its recent amendment by the ADA Amendments Act of 2008.

Finally, in accordance with changes in the ADAAA, the proposed rule adds a new paragraph (c)(2), and renames the existing paragraph (c)(2) as (c)(3). New paragraph (c)(2) reflects the ADAAA's affirmation, in section 6(a)(1), that nothing in the statute "alters the standards for determining eligibility for benefits" under State worker's compensation law or under State and Federal disability benefit programs.

Section 60–741.2 Definitions

The proposed rule incorporates the vast majority of the existing definitions contained in existing § 60–741.2 without change. However, OFCCP proposes several changes to the substance and structure of this section, as set forth below.

With regard to the structure of this section, the current rule lists the definitions in order of subject matter. However, for those who are unfamiliar with the regulations, this ordering makes it difficult to locate specific terms within the section. For the most part, the proposed rule reorders the defined terms in alphabetical order. A few terms that are typically used in connection with specific definitions are defined as subparagraphs of those definitions. So, for example, definitions of the terms "contracting agency" and "modification" are found within the definition of "Government contract." This modified structure is proposed for ease of reference, and to allow individuals to continue to cite to specific definitions. However, because of this reordering, the citation to specific terms may be different in the proposed rule than it is currently. For instance, the term "contract," which is § 60–741.2(h) in the current regulations, is § 60–741.2(c) in the proposed regulation.

With regard to substantive changes, the proposed rule makes several revisions that relate to the definition of "disability" and its component parts as a result of the passage of the ADAAA, which became effective on January 1, 2009, and which amends both the ADA and section 503. As noted previously, it is OFCCP's intention that these terms will have the same meaning as set forth

in the ADAAA, and as implemented by the EEOC in its revised regulations.

The proposed section 503 rule replaces the term "individual with a disability" with the ADAAA term "disability." The ADAAA definition of "disability" retains the three prongs of the definition of "individual with a disability" in the current regulation, but clarifies that the assessment of whether a disability exists is to be made "with respect to an individual." The proposed rule incorporates this change in paragraph (g)(1). The term "individual with a disability" will be retained in alphabetical order as paragraph (l) in the proposed rule for the convenience of those not yet accustomed to the new terminology. However, proposed paragraph (l) does not contain a definition, but directs readers to refer to the new definition of "disability" in paragraph (g).

New paragraphs (g)(2), (g)(3) and (g)(4) incorporate additional ADAAA requirements regarding the assessment of when an impairment constitutes a "disability." These requirements are crucial to ensure that "the broad scope of protection" Congress intended for "disability" to provide is not unduly "narrowed" by administrative or court rulings. See ADAAA at section 2. Proposed paragraph (g)(2) provides that the definition of "disability" must be "construed in favor of broad coverage of individuals, to the maximum extent permitted by law," and that therefore extensive analysis should not be needed in order to determine whether an individual has a disability. New paragraph (g)(3) incorporates the ADAAA's affirmation that "an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability;" while new paragraph (g)(4) reflects the ADAAA's requirement that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

New paragraphs (g)(5) and (g)(6) are added for the convenience of persons using the rule. A cross-reference alerting the reader that the terms "major life activities," "physical or mental impairment," "record of such impairment," "regarded as having such an impairment," and "substantially limits" are separately defined in § 60–741.2 appears in (g)(5). A cross reference informing readers that exceptions to the definition of "disability" are contained in § 60–741.3 of the rule is added as paragraph (g)(6).

The proposed rule incorporates the ADAAA's revision of the definition of "major life activities" in paragraph (n).

⁶ See section 741.2(m) for a definition of "linkage agreement."

The ADAAA adds several items to the list of examples of major life activities contained in the current regulation. In addition, the ADAAA clarifies that the term “major life activities” includes “major bodily functions” and enumerates several examples of functions that would constitute “major bodily functions.” EEOC’s implementing regulations include additional examples of major life activities and major bodily functions. All of these examples are contained in the proposed rule in paragraphs (n)(1) and (2).

In new paragraph (n)(3), the proposed rule states that the term “major” must not be interpreted to create a demanding standard when determining other examples of major life activities, and cautions that such an assessment is not to be determined by reference to whether the life activity is of “central importance to daily life.” See ADAAA section 2(b)(4).

New paragraph (o) adds a definition of “mitigating measures” that, as prescribed in section 3 of the ADAAA, consists of a non-exhaustive list of examples of mitigating measures. The ADAAA also prescribes definitions of the mitigating measures of “ordinary eyeglasses or contact lenses,” “low-vision devices,” and “auxiliary aids and services,” and these definitions are likewise included in this paragraph of the proposed rule. Consistent with the EEOC’s recently issued implementing regulations, the proposed regulation also adds “psychotherapy, behavioral therapy, or physical therapy” to the non-exhaustive list of mitigating measures in paragraph (o)(1)(v).

The ADAAA replaces the term “qualified individual with a disability” with the term “qualified individual.” The definition of this new term omits the words “with a disability,” thus emphasizing that the assessment of whether a person is qualified for a job is distinct from the assessment of whether the person has a disability, but is otherwise unchanged from the definition in the Americans with Disabilities Act as originally enacted. The proposed rule reflects this statutory change in the definition of “qualified individual” in paragraph (s) by deleting the words “with a disability” that are in the current regulation.

Proposed paragraph (t) makes two changes to the definition of “reasonable accommodation” currently found at § 60–741.2(v). First, it revises footnote 2 in the current rule to emphasize that before providing a reasonable accommodation the contractor is advised to verify with the individual with a disability that the

accommodation it plans to provide will effectively meet the individual’s needs. Second, it adds a new paragraph (4) to reflect the ADAAA’s clarification that individuals who only satisfy the “regarded as” part of the definition of “disability” are not entitled to receive reasonable accommodation. See ADAAA at sec. 6(a)(1)(h).

A clarification has been added to the definition of “record of such an impairment” in proposed paragraph (u). It explains that an individual satisfies the record of prong of “disability” if the individual has “a history” of a substantially limiting impairment “when compared to most people in the general population,” or has been misclassified as having had such an impairment.

The ADAAA also significantly redefines and simplifies the “regarded as” part of the definition of “disability.” Under the new definition of “regarded as having such an impairment,” in proposed paragraph (w)(1), an individual satisfies the “regarded as” prong of the definition of “disability” if “the individual establishes that he or she has been subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity.” Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

In paragraph (w)(2) the proposed rule explains that an individual satisfies the regarded as prong any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts or ultimately establishes a defense for its challenged action. In paragraph (w)(3) the proposed rule clarifies that the establishment that an individual is regarded as having a disability is distinct from the establishment of liability for unlawful discrimination in violation of this part. Such liability is established only when the individual “proves that a contractor discriminated on the basis of disability.”

The ADAAA excludes from the “regarded as” prong of “disability” impairments that are “transitory and minor,” and defines a “transitory” impairment as one that “has an actual or expected duration of six months or

less.” Proposed paragraph (w)(4) incorporates this exclusion. The proposed rule also makes clear that it is incumbent upon the contractor to demonstrate that an impairment is both transitory and minor for it to be excluded from coverage under the regarded as prong of “disability.” Whether the contractor has succeeded in demonstrating that a particular impairment is transitory and minor will be determined objectively. A contractor’s subjective belief that the impairment was transitory and minor is not sufficient to defeat an individual’s coverage under the regarded as prong.

The definition of “substantially limits” at § 60–741.2(q) of the current rule is also significantly revised in accordance with the ADAAA, and to ensure that it is consistent with the EEOC’s implementing regulations. As revised in paragraph (aa), the proposed regulation sets forth rules of construction that must be applied when determining whether an impairment substantially limits a major life activity, but in contrast to the current regulation, does not specify a substantially limits standard. This new approach is in keeping with the ADAAA’s rejection of the current regulatory definition of “substantially limits” as “significantly restricted” as setting too high a standard, and with the statute’s mandate to interpret “substantially limits” “consistently with the findings and purposes” of the ADAAA. See ADAAA sections 2 and 3.

Paragraph (aa)(1) states that the term “substantially limits” must be construed broadly in favor of expansive coverage, to the maximum extent permitted by law, and is not meant to be a demanding standard requiring extensive analysis. An impairment need not “prevent” or “significantly or severely restrict” the individual from performing a major life activity to be considered substantially limiting. Rather, an impairment is substantially limiting if it substantially limits the ability to perform a major life activity “compared to most people in the general population.” In making this comparison, it may be useful, in appropriate cases, to consider the condition under which the individual performs the major life activity, the manner in which the individual performs the major life activity, and/or the duration of time it takes the individual to perform the major life activity. This comparison, though, usually will not require scientific, medical, or statistical analysis. So, for example, scientific, medical, or statistical analysis would not be needed to determine that an individual who, because of an impairment, could only

stand for five minutes at a time is substantially limited in the major life activity of standing, as most people can stand for a significant longer period of time.

In paragraph (aa)(2), the proposed regulation explains that whether an individual's impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of § 60–741.2(g)(1)(iii).

The ADAAA's express prohibition of the consideration of "the ameliorative effects of mitigating measures" when determining whether an impairment "substantially limits a major life activity" is incorporated into paragraph (aa)(3). The exception to this prohibition—the ADAAA's mandate that the ameliorative effects of "ordinary eyeglasses or contact lenses shall be considered" when determining whether an impairment substantially limits a major life activity—is encompassed in proposed (aa)(3)(i). Proposed paragraph (aa)(3)(ii) addresses the non-ameliorative effects of mitigating measures, such as negative side effects from medication, and provides that such detrimental effects may be considered when assessing whether an individual's impairment is substantially limiting.

In paragraph (aa)(4) the proposed regulation emphasizes that the focus of a "substantially limits" determination is not on the outcomes that an individual can achieve, but on whether a major life activity is substantially limited. Thus, for example, someone with a learning disability may be substantially limited in the major life activity of learning because of the additional time or effort required for the individual to read, write or learn, even though the individual has achieved a high level of academic success.

The proposed regulation notes, in paragraph (aa)(5), that the principles set forth in this section are intended to provide for generous coverage of the law by means of an analytical framework that is predictable, consistent, and workable for all individuals and contractors. Accordingly, the individualized assessment of some types of impairments will, "in virtually all cases," result in a factual determination that the individual has either a substantially limiting impairment (actual disability) or a history of a substantially limiting impairment (record of disability). With respect to such an impairment, the necessary individualized assessment of an individual should be particularly simple and straightforward. Proposed paragraph (aa)(5) includes several

examples of such impairments, including deafness, blindness, epilepsy, cancer and HIV, along with the major life activity they most typically substantially limit. It should also be noted that, consistent with the revised EEOC ADAAA implementing regulations, the discussion of the major life activity of working that appears in the current regulation at § 60–741.2(q)(3) has been removed from the text of the proposed regulation. No other major life activity receives special attention in the regulation. Moreover, in light of the expanded definition of disability pursuant to the ADAAA, this major life activity will seldom be used, since impairments that substantially limit an individual's ability to work usually will substantially limit one or more other major life activities. In those rare cases where an individual needs to demonstrate a substantial limitation in working, the individual can continue to do so by showing that an impairment substantially limits his or her ability to perform a class of jobs, or a broad range of jobs in various classes, as compared to most people having comparable training, skills, and abilities.

In addition to the revisions related to the definition of "disability," the proposed rule makes revisions to several other definitions in the section. First, the proposed rule replaces the term "Deputy Assistant Secretary," found currently at § 60–741.2(d), with "Director." The current rule defines "Deputy Assistant Secretary" as "the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee." As a result of the elimination of the Department's Employment Standards Administration in November 2009, the head of OFCCP now has the title of Director. See Secretary's Order 7–2009 (Nov. 6, 2009). Accordingly, the proposed rule reflects this change, which will be made throughout part 60–741.

Lastly, in paragraph (m), the proposed rule adds a definition of "linkage agreement," which is currently only described in the OFCCP Federal Contract Compliance Manual (FCCM). We propose adding this definition to the regulations for ease of reference and clarity to the contractor community.

Section 60–741.3 Exceptions to the Definitions of "Disability" and "Qualified Individual"

This section addresses exceptions to the key definitions of "disability" and "qualified individual." The proposed rule modifies this section by changing the terms "individual with a disability" and "qualified individual with a

disability" in the section title, as well as throughout the section, to "disability" and "qualified individual," respectively, in accordance with the ADAAA.

Section 60–741.4 Coverage and Waivers

The proposed rule replaces the term "Deputy Assistant Secretary," found in paragraphs (b)(1) and (b)(2) of this section, with the term "Director," for the reasons set forth in the discussion of § 60–741.2. The proposal also removes the text of paragraph (a)(2) as the "contract work only" exception applied to "employment decisions and practices occurring before October 29, 1992" and has now expired. Paragraphs (3), (4) and (5) are, accordingly, renumbered as paragraphs (2), (3) and (4).

Section 60–741.5 Equal Opportunity Clause

Paragraph (a) contains the equal opportunity (EO) clause that must be included in all covered Government contracts and subcontracts. The proposed rule makes several substantive changes to the text of the mandated clause.

In paragraph 1 of the EO clause, the phrase "to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability" is modified to read "to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability." This formulation more closely mirrors the language and intent of the ADAAA.

In paragraph 4, we propose two revisions. First, the proposed regulation revises the parenthetical at the end of the third sentence of this paragraph to replace the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulation also adds the following sentences to the end of proposed paragraph 4 of the EO clause:

With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise

are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

The addition of these sentences is in response to the increased use of telecommuting and other work arrangements that do not include a physical office setting, as well as internet-based application processes in which applicants never enter a contractor's physical office. These revisions therefore would permit equivalent access to the required notices for these employees and applicants.

For paragraph 5, which refers to the contractor's obligation to notify labor organizations or other workers' representatives about its obligations under section 503, we propose adding language clarifying that these obligations include non-discrimination, in addition to affirmative action. The current paragraph 5 does not specifically mention contractors' non-discrimination obligations.

The proposed rule also adds a new paragraph 7 to the EO clause that requires the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of individuals with disabilities protected under section 503. A comparable clause exists in the equal opportunity clause of the Executive Order 11246 regulations, *see* 41 CFR 60-1.4(a)(2), describing the protected classes under that Order. This proposed addition would ensure consistency between the regulations and aid in communicating the contractor's EEO responsibilities to job seekers.

In addition to modifying the text of the EO clause, the proposed rule also amends paragraph (d) of this section to require that the entire equal opportunity clause be included verbatim in Federal contracts. OFCCP has found that contractors are not always aware of their EO clause responsibilities.

Subcontractors, in particular, are frequently not informed of their EO responsibilities by the prime contractor and are unaware of their obligations until they are selected by OFCCP for a compliance evaluation. Requiring that the entire EO clause be included verbatim in all covered Federal contracts, including subcontracts, will help ensure that contractors (including subcontractors) read and understand the language in this clause.

Finally, the proposed rule replaces the term "Deputy Assistant Secretary," found in paragraphs (a)(4), (a)(6), and (f) of this section, with the term "Director," for the reasons set forth in the discussion of § 60-741.2.

Subpart B—Discrimination Prohibited

Section 60-741.21 Prohibitions

This section of the rule describes types of conduct that would violate the non-discrimination requirements of section 503. The proposed rule makes both minor and substantive changes.

First, the section's introductory sentence is numbered as (a), with appropriate subsection renumbering so that the original paragraphs (a) through (i) become paragraphs (1) through (9).

Next, paragraph (a)(1) of the proposed rule (§ 60-741.21(a) of the current rule) is revised to mirror the language in section 5 of the ADAAA by changing "discriminate against a qualified individual with a disability because of that individual's disability" to "discriminate against a qualified individual on the basis of disability."

The word "qualified" is deleted from the example in proposed paragraph (a)(2), which currently provides, in § 60-741.21(b), that "the contractor may not segregate employees into separate work areas or into separate lines of advancement on the basis of disability." As modified, the example would more accurately reflect the prohibition's requirement that a contractor not "limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability."

The proposed rule adds a new paragraph (iv) to paragraph (a)(6) that clarifies, as provided in the ADAAA, that a contractor is "not required" to provide reasonable accommodation to individuals who "satisfy only the 'regarded as having such an impairment' prong of the definition of disability." However, contractors are not prohibited from providing reasonable accommodation to individuals who are only "regarded as" having a disability, and may choose to do so if they wish. The new paragraph also includes a cross-reference to the definition of "regarded as" having a disability in proposed § 60-741.2(w).

A new paragraph (ii) is added to proposed paragraph (a)(7) to incorporate the ADAAA's specific prohibition on the use of qualification standards, employment tests, or other selection criteria that are "based on an individual's uncorrected vision" unless the standard, test, or other selection criteria, as used by the contractor, "is

shown to be job-related for the position in question and consistent with business necessity." On its face, this provision protects not only individuals with disabilities, but broadly prohibits a contractor from using any "individual's" uncorrected vision as a qualification standard unless the contractor can demonstrate that doing so is justified by business necessity. Thus, the proposed regulation states that an individual need not be an individual with a disability in order to challenge a contractor's use of an uncorrected vision standard, so long as the individual has been adversely affected by the contractor's use of the challenged standard. The proposed rule also renumbers the current paragraph (ii) as paragraph (iii).

A new sentence is added by the proposal to paragraph (a)(9), which currently provides that a contractor may not reduce the compensation provided to an individual with a disability because the individual receives a disability-related pension or benefit from another source. The new sentence clarifies that it would likewise be impermissible for a contractor to reduce the amount of compensation it provides to an individual with a disability because of the "actual or anticipated cost of a reasonable accommodation the individual needs or requests."

Finally, the proposed rule adds a new subsection (b) to incorporate the ADAAA's prohibition on claims of discrimination because of an individual's lack of disability. The ADAAA expressly prohibits claims that "an individual without a disability was subject to discrimination because of the lack of disability." ADAAA at sec. 6(a)(1)(g).

Section 60-741.22 Direct Threat Defense

The proposed rule changes the reference in the parenthetical at the end of this section to "§ 60-741.2(e)," to reflect the new designation of the definition of "direct threat" in the restructured Definitions section, as discussed in § 60-741.2, above.

Section 60-741.23 Medical Examinations and Inquiries

The proposed rule revises paragraph (b)(4) by adding a sentence at the end of the paragraph clarifying that voluntary medical examinations and activities need not be job-related and consistent with business necessity. Paragraph (b)(5) is revised to delete the reference to paragraph (b)(4). This revision is intended to clarify that contractors may not use medical information obtained through voluntary medical

examinations and activities as the basis for an employment decision such as a determination of fitness for duty.

Lastly, the proposed rule revises paragraph (d)(1)(iii) to add “as amended” to the reference to the “Americans with Disabilities Act.”

Section 60-741.25 Health Insurance, Life Insurance and Other Benefit Plans

The proposed rule revises paragraph (d) by changing the current rule’s two references to “qualified individual with a disability” to “individual with a disability.” This paragraph ensures that individuals will not be denied access to insurance or subjected to different terms or conditions of insurance on the basis of disability, if the disability does not impose increased risks. The ability to perform essential functions, as specified in the definition of “qualified individual” in § 60-741.2(s), is not relevant to these insurance considerations. Accordingly, the proposed rule would eliminate the term “qualified” from the paragraph’s references to “individual with a disability.”

Subpart C—Affirmative Action Program

Section 60-741.40 General Purpose and Applicability of the Affirmative Action Program Requirement

This section sets forth which contractors are required to maintain an affirmative action program, and the general timing requirements for its creation and submission to OFCCP. The proposed rule adds a new paragraph (a) that sets forth a statement of purpose that articulates OFCCP’s general expectations for contractors’ affirmative action programs. An affirmative action program must be “more than a paperwork exercise.” Rather, an affirmative action program is a management tool that includes measurable objectives, quantitative analyses, and internal auditing and reporting systems designed to measure the contractor’s progress toward achieving equal employment opportunity for individuals with disabilities.

In light of the addition of new paragraph (a), the existing paragraphs of this section have been renumbered and newly captioned in the proposed regulation. However, except for one minor clarification, the remainder of the text of § 60-741.40 is unchanged. We propose a minor clarification to paragraph (b)(3) of this section, which is paragraph (c) in the current rule, specifying that the affirmative action program shall be reviewed and updated annually “by the official designated by

the contractor pursuant to § 60-741.44(i).” While this is the intent of the existing language, the proposal clarifies this intention and ensures that company officials who are knowledgeable about the contractor’s affirmative action activities and obligations are reviewing the program.

Section 60-741.41 Availability of Affirmative Action Program

This section sets forth the manner by which contractors must make their affirmative action programs available to employees for inspection, including the location and hours during which the program may be obtained. The proposed regulation adds a sentence at the end of this section requiring that, in instances where contractors have employees who do not work at the contractors’ physical establishment, the contractor shall inform these employees about the availability of the affirmative action program by means other than a posting at its establishment. This addition is proposed in light of the increased use of telework and other flexible workplace arrangements.

Section 60-741.42 Invitation To Self-identify

The proposed revisions to this section make significant, substantive changes to the contractor’s responsibilities and the process through which applicants are invited to voluntarily self-identify as individuals with disabilities protected by section 503 during the hiring process. The proposed rule also adds a new requirement that contractors annually survey their employees, providing an opportunity for each employee who is, or subsequently becomes, an individual with a disability to voluntarily self-identify as such in an anonymous manner, thereby allowing those who have subsequently become disabled or who did not wish to self-identify during the hiring process to be counted.

These changes are proposed in order to collect important data pertaining to the participation of individuals with disabilities in the contractor’s applicant pools and workforces. This will allow the contractor and OFCCP to better identify and monitor the contractor’s hiring and selection practices with respect to individuals with disabilities. Data related to the pre-offer stage will be particularly helpful, as it will provide the contractor and OFCCP with valuable information regarding the number of individuals with disabilities who apply for jobs with contractors. This data will enable OFCCP and the contractor to assess the effectiveness of the contractor’s recruitment efforts over

time, and to refine and improve the contractor’s recruitment strategies, where necessary.

Proposed paragraph (a) of this section requires that the contractor invite all applicants to voluntarily self-identify as individuals with disabilities whenever the applicant applies for or is considered for employment. The invitation may be included with the application materials, but must be separable or detachable from the job application.

The requirement to give applicants and employees the opportunity to self-identify is consistent with the ADA’s restrictions on pre-employment disability-related inquiries. Although the ADA generally prohibits inquiries about disability prior to an offer of employment, it does not prohibit the collection of this information by a contractor in furtherance of its section 503 affirmative action obligation to employ and advance in employment qualified individuals with disabilities. The EEOC’s regulations implementing the ADA state that the ADA “does not invalidate or limit the remedies, rights, and procedures of any Federal law

* * * that provides greater or equal protection for the rights of individuals with disabilities” than does the ADA. 29 CFR 1630.1(c)(2). Noting that Section 503 is such a Federal law, EEOC states in the Appendix to its ADA implementing regulations that: “collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted by [the ADA or EEOC’s implementing regulations].” Appendix to 29 CFR 1630.14(a).

Proposed paragraph (a)(1) requires that the contractor invite applicants to self-identify “using the language and manner prescribed by the Director and published on the OFCCP Web site.” This will ensure consistency in all pre-offer invitations that are made, and will reassure applicants that the request is routine and executed pursuant to obligations created by OFCCP. It will also minimize any burden to contractors resulting from compliance with this responsibility, as they will not be required to develop suitable self-identification invitations individually. This, in turn, we believe, will facilitate contractor compliance with this proposed section.

The inquiry that OFCCP will prescribe for contractors is a limited one and will be narrowly tailored. To minimize privacy concerns and the possibility of misuse of disability-

related information, we are proposing that the required invitation would ask only for self-identification as to the existence of a “disability,” not asking about the general nature or type of disability the individual has, or the nature or severity of any limitations the individual has as a result of their disability. For example, OFCCP might prescribe that the contractor invite applicants to self-identify at the pre-offer stage using the following language:

1. This employer is a Government contractor or subcontractor subject to section 503 of the Rehabilitation Act of 1973 (section 503), as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. Regulations of the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) implementing section 503 require that Government contractors and subcontractors ask job applicants to indicate whether or not they have a disability. This information is requested in furtherance of our affirmative action obligations as a Government contractor subject to section 503, and to measure the effectiveness of the outreach, recruitment, training and development efforts we have undertaken pursuant to section 503.

A person has a disability as defined in section 503 if that person either: (1) Has a physical or mental impairment which substantially limits one or more of that person’s major life activities; or (2) has a history or record of such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include major bodily functions such as functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

Please indicate whether you have a disability as defined in section 503 by checking the box below.

YES, I HAVE A DISABILITY

2. Your submission of this information is voluntary, and your refusal to provide it will not adversely affect our consideration of your application for employment, or subject you to adverse treatment of any kind. The information provided will be used only in ways that are consistent with section 503 of the Rehabilitation Act of 1973, as amended, and OFCCP’s regulations.

3. This means that the information you provide will be used solely for affirmative action purposes, and/or by Government officials engaged in enforcement of the laws administered by OFCCP, or in the enforcement of other Federal EEO laws such as the Americans with Disabilities Act (ADA).

4. Section 503 also requires that Government contractors provide individuals with disabilities with reasonable accommodations that are needed to ensure equal employment opportunity. If you require an assistive device, sign language interpreter, or other assistance, change or modification to enable you to fully participate in the application process, please let us know.

OFCCP invites public comment on this potential self-identification invitation text, including suggestions for specific alternate text. An alternative would be to harmonize the approach to collecting such data that is used by the Federal government for government employees. Specifically, it is anticipated that the EEOC will use an applicant flow form to collect disability-related data pre-employment and OPM uses SF256 to collect data once an applicant is hired. Such forms ask for sufficient information to determine if an individual has certain “severe” or targeted disabilities, or has any of various other types of disabilities. We request comment on these alternative approaches in the context of the need to strike a balance between more specific data and encouraging responses, and in consideration of the objectives of ensuring applicant comprehension of what is being asked, achieving, to the extent possible, comparability of data with other sources, and compliance with the ADAAA.

Proposed paragraph (b) retains but modifies the current rule’s requirement that contractors invite individuals, after an offer of employment is extended, but before the applicant begins his or her job duties, to voluntarily self-identify as an individual with a disability. We propose to retain this requirement, in addition to the new requirement to invite self-identification at the pre-offer stage, so that individuals with hidden disabilities who fear potential discrimination if their disability is revealed prior to receiving a job offer will, nevertheless, have the opportunity to provide this valuable data.

Proposed paragraph (b)(1) requires that the contractor invite self-identification using the language and manner prescribed by the Director, as published on the OFCCP Web site. Again, we believe that this requirement will ensure consistency in all post-offer invitations that are made, minimize any burden to contractors of compliance with this responsibility and, consequently, facilitate such contractor compliance.

Proposed paragraph (c) requires that, on an annual basis, the contractor shall anonymously survey all of its employees using the language and

manner prescribed by the Director. Because baseline data are not available, at a minimum, it is important to provide all employees with an opportunity to self-identify. Annual surveying, however, would be meaningful because an employee may become disabled at any time or may feel more comfortable self-identifying once he or she has been employed for some time. Assuring that employee responses to the annual survey will be anonymous will likely increase the response rate, thereby providing that the most accurate data possible is available to assist contractors and OFCCP. Such data will assist contractors and OFCCP in evaluating and refining the contractor’s affirmative action efforts. Surveying of employees may be accomplished by the contractor using a paper and/or electronic format, using the method(s) generally used by the contractor to communicate with employees regarding work-related matters. Proposed paragraph (d) emphasizes that the contractor is prohibited from compelling or coercing individuals to self-identify. While proposed paragraph (e) emphasizes that all information regarding self-identification as an individual with a disability shall be kept confidential and maintained in a data analysis file in accordance with § 60-741.23 of this part. Paragraph (e) also states that self-identification information must be provided to OFCCP, upon request, and that the information may only be used in accordance with this part.

The proposed rule eliminates Appendix B of the current regulations. Appendix B provides a sample invitation to self-identify as an individual with a disability to assist the contractor in developing its own pre-employment self-identification invitation. Since the proposed regulation provides that OFCCP will prescribe the text that the contractor must use when inviting applicants and employees to voluntarily self-identify, there is no longer a need for a sample invitation.

Finally, the proposed rule renames existing paragraphs (c) and (d) as paragraphs (f) and (g). Proposed paragraph (g) is revised slightly to clarify that the contractor is not relieved from liability for discrimination in violation of “section 503 or this part.”

Section 60-741.44 Required Contents of Affirmative Action Programs

This section details the elements that the contractor’s affirmative action programs must contain. These elements include: (1) An equal employment opportunity policy statement; (2) a comprehensive annual review of

personnel processes; (3) a review of physical and mental job qualifications; (4) a statement that the contractor is committed to making reasonable accommodations for persons with physical and mental disabilities; (5) a statement that the contractor is committed to ensuring a harassment-free workplace for individuals with disabilities; (6) external dissemination of the contractor's affirmative action policy, as well as outreach and recruitment efforts; (7) internal dissemination of the contractor's affirmative action policy to all of its employees; (8) development and maintenance of an audit and reporting system designed to evaluate affirmative action programs; and (9) training regarding the implementation of the affirmative action program for all personnel involved in employment-related activities, such as the conduct of recruitment, screening, selection, and discipline of employees.

The first substantive proposed revisions to this section focus on the contractor's policy statement set forth in paragraph (a). The proposed regulation would revise the second sentence to clarify the contractor's duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It would also revise the parenthetical at the end of the sentence, replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves.

The proposed regulation would also revise the third sentence of paragraph (a) regarding the content of the policy statement, replacing the provision that the policy statement "should indicate the chief executive officer's attitude on the subject matter" with the requirement that the policy statement "shall indicate the chief executive officer's support for the affirmative action program." This proposed change is made to clarify the intent to mandate the inclusion of a statement from the contractor's CEO in the affirmative action policy statement that will signal to the contractor's employees that support for the affirmative action program goes to the very top of the contractor's organization.

In paragraph (b), the proposed rule requires that the contractor must review its personnel processes on at least an annual basis to ensure that its obligations are being met. The current rule requires that the contractor review

these processes "periodically." This standard is vague and subject to confusion. Indeed, OFCCP's efforts to enforce this requirement in recent years have been complicated by contractors' various subjective interpretations of what constitutes "periodic" review. This proposal sets forth a clear, measurable, and uniform standard that will be easily understood by the contractor and more easily enforced by OFCCP. In addition, the proposed rule requires that the contractor ensure that its use of information and communication technology is accessible to applicants and employees with disabilities. The contractor is required to review its technological processes annually, make any necessary changes and include a description of its review and any modifications made in its affirmative action program.

Further, the proposed revisions mandate certain specific steps that the contractor must take, at a minimum, in the review of its personnel processes. These specific steps are those currently set forth in Appendix C to the regulation. Appendix C currently suggests that the contractor: (1) Identify the vacancies and training programs for which applicants and employees with disabilities are considered; (2) provide a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describe the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs. Previously, these steps were recommended as an appropriate set of procedures. OFCCP's enforcement efforts have found that many contractors do not follow these recommended steps, and that the documentation contractors maintain of the steps they do take are often not conducive to a meaningful review by the contractor or OFCCP, particularly in the event of employee/applicant complaints. Such a meaningful review has always been the goal of the requirements in paragraph (b), as it ensures that the contractor remains aware of and actively engages in its overall affirmative action obligations toward individuals with disabilities. The proactive approach set forth in the current Appendix C would provide greater transparency between the contractor, its applicants/employees, and OFCCP as to the reasons for the contractor's personnel actions. Requiring that contractors record the specific reasons for their personnel actions and make them available to an

employee or applicant upon request would also aid them in clearly explaining their personnel actions to applicants and employees, which could subsequently reduce the number of complaints filed against contractors. Thus, we propose requiring the contractor to take these steps outlined currently in Appendix C (which are incorporated into paragraph (b) in the proposed rule), and encourage the contractor to undertake any additional appropriate procedures to satisfy its affirmative action obligations.

The proposed paragraph (c) clarifies that all physical and mental job qualification standards must be reviewed and updated, as necessary, on an *annual* basis. As with paragraph (b), the current rule's requirement that the contractor review these standards "periodically" is vague and subject to confusion. OFCCP has concluded that contractors inconsistently interpret what constitutes "periodic" review. The proposed change provides a clear, measurable, and uniform standard.

The proposed paragraph (c)(1) adds language requiring the contractor to document the results of its annual review of physical and mental job qualification standards. The regulation has long required this review to ensure that job qualification standards that tend to screen out individuals with disabilities are job-related and consistent with business necessity. The proposed change would merely require that the contractor document the review it has already been required to perform. It is anticipated that this documentation will list the physical and mental job qualifications for the job openings during a given AAP year- which should already be available from the contractor's job postings—and provide an explanation as to why each requirement is related to the job to which it corresponds. Documenting this review will ensure that the contractor critically analyzes its job requirements and proactively eliminates those that are not job-related. It will also allow OFCCP to conduct audits and investigations in a more thorough and efficient manner.

Paragraph (c)(3) currently provides that, as a defense to a claim by an individual that certain mental or physical qualifications are not job-related and consistent with business necessity, the contractor may assert that the individual poses a "direct threat" to the health or safety of the individual or others in the workplace. The definition of "direct threat" in these regulations spells out the criteria that the contractor must consider in determining whether a "direct threat" exists. The proposed paragraph (c)(3) would require the

contractor to contemporaneously create a written statement of reasons supporting its belief that a direct threat exists, tracking the criteria set forth in the “direct threat” definition in these regulations, and to maintain the written statement as set forth in the recordkeeping requirement in § 60–741.80. Once again, this is to ensure that the contractor’s “direct threat” analysis—which is already required under these regulations—is well-reasoned and available for review by OFCCP. Finally, for both the proposed documentation requirements in paragraphs (c)(1) and (c)(3), the proposed regulation requires that the contractor treat the created documents as confidential medical records in accordance with § 60–741.23.(d).

Perhaps the most significant substantive changes in the proposed rule address the scope of the contractor’s recruitment efforts and the dissemination of its affirmative action policies described in paragraphs (f) and (g) of this section. While these two paragraphs generally would require that the contractor engage in recruitment and disseminate its policies, the current rule recommends rather than requires the specific methods for carrying out these obligations.

The current paragraph (f) suggests a number of outreach and recruitment efforts that the contractor can undertake in order to increase the employment opportunities for individuals with disabilities. *See* 41 CFR 60–741.44(f)(1). The proposed paragraph (f) would require that the contractor engage in a minimum number of outreach and recruitment efforts (as described in proposed paragraph (f)(1)). The proposed paragraph (f) also includes a list of additional outreach and recruitment efforts that are suggested (proposed paragraph (f)(2)), a new requirement that the contractor conduct self-assessments of their outreach and recruitment efforts (proposed paragraph (f)(3)), and a clarification of the contractor’s recordkeeping obligation with regard to its outreach and recruitment efforts (proposed paragraph (f)(4)).

Proposed paragraph (f)(1) requires the contractor to promptly list all of its employment opportunities, with limited exceptions, with the nearest Employment One-Stop Career Center. It also requires the contractor to engage in a minimum of three additional outreach and recruitment efforts. First, the contractor is required to enter into linkage agreements and establish ongoing relationships with the local State Vocational Rehabilitation Agency office nearest the contractor’s

establishment, or a local organization listed in the Social Security Administration’s Ticket to Work Employment Network Directory.

Second, the contractor is required to enter into a linkage agreement with at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities. The listed organizations and agencies include: Entities, such as the Employer Assistance and Resource Network (EARN), that are funded by the Department of Labor to provide recruitment or training services for individuals with disabilities. EARN provides employers with free consulting services and resources to support the recruitment and hiring of individuals with disabilities; the nearest Employment One-Stop Career Center, established under the Workforce Investment Act to provide a full range of job seeker assistance under one roof; the nearest Department of Veterans Affairs Regional Offices, which, in part, provide services to disabled veterans; local disability groups, organizations or Centers for Independent Living that provide services to individuals with disabilities; placement or career offices of educational institutions; and private recruitment sources, such as professional organizations or employment placement services.

Third, proposed paragraph (f)(1) also requires that the contractor consult the Employer Resources section of the National Resource Directory, a partnership and online collaboration among the Departments of Labor, Defense, and Veterans Affairs. New contractors and subcontractors often inquire about how they can find qualified individuals with disabilities to comply with their AAP obligations. The National Resource Directory is a leading government Web site that provides prospective employers of disabled veterans access to veterans’ service organizations, existing job banks, and other resources at the national, state and local levels. Finally, proposed paragraph (f)(1) requires that the contractor send written notification of company policy related to affirmative action efforts to its subcontractors, including subcontracting vendors and suppliers in order to request appropriate action on their parts and to publicize the contractor’s commitment to affirmative action on behalf of individuals with disabilities. While the proposed regulations would not require that the contractor send written notification to vendors and suppliers who are not subcontractors as defined by these regulations, such disclosure remains an encouraged activity, just as

it is under the current regulation. *See* 41 CFR 60–741.44(f)(6).

We believe that the required linkage agreements we propose in paragraph (f)(1) will greatly facilitate the contractor’s efforts to attract qualified applicants with disabilities. We encourage comments from stakeholders regarding this proposal, particularly if stakeholders have information on recruitment sources not included in this proposal that might increase employment of individuals with disabilities.

In paragraph (f)(2) of the proposed rule, we list a number of outreach and recruitment efforts that are suggested measures for increasing employment opportunities for individuals with disabilities. The efforts listed in proposed paragraph (f)(2) are very similar to the efforts that are suggested in paragraphs (f)(1) through (f)(7) of the current rule. This includes: (1) Holding briefing sessions with representatives from recruiting resources; (2) incorporating efforts to locate individuals with disabilities into recruitment activities at educational institutions; (3) participating in work-study programs for students, trainees, or interns with disabilities; (4) making available individuals with disabilities for participation in career days, youth motivation programs, and related activities in their communities; (5) any other positive steps the contractor deems necessary to attract qualified individuals with disabilities, including contacts with any local disability-related organizations; and (6) considering applicants who are known individuals with disabilities for all available positions when the position applied for is unavailable.

Paragraph (f)(3) of the proposed rule requires the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities, and document its review. Contractors that do not proactively monitor their outreach and recruitment efforts often lose opportunities to consider and hire qualified individuals with disabilities. This requirement will allow the contractor to look at its measurable accomplishments and reconsider unproductive methods. We believe requiring this review on an annual basis strikes the proper balance by ensuring that adjustments to recruitment efforts are made on a timely basis if needed, while also ensuring that the contractor has enough data on existing recruitment

efforts to be able to determine if adjustments need to be made.

We recognize that the “effectiveness” of an outreach or recruitment effort is not easily defined, and may include a number of factors that are unique to a particular contractor establishment. Generally speaking, a review of the efficacy of a contractor’s efforts should include the number of candidates with disabilities that each effort identifies. Recognizing that other unique and intangible characteristics may contribute to the assessment of the “effectiveness” of a given effort, the proposed regulation allows the contractor some flexibility in making this assessment. However, the proposed regulation would require that the contractor consider the numbers of individuals with disabilities who were referrals, applicants, and hires for the current year and two previous years as criteria in evaluating its efforts, and document all other criteria that it uses to assess the effectiveness of its efforts, so that OFCCP compliance officers are able to understand clearly the rationale behind the contractor’s self-assessment. The contractor’s conclusion as to the effectiveness of its outreach must be reasonable as determined by OFCCP in light of these regulations. The primary indicator of effectiveness is whether qualified individuals with disabilities have been hired. Further, should the contractor determine that its efforts were not effective, the proposed rule requires the contractor to identify and implement one or more of the alternative efforts listed in proposed paragraphs (f)(1) and (f)(2) in order to fulfill its obligations. The general purpose of this self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and modifies its efforts as needed to ensure that its obligations are being met.

Paragraph (f)(4) of the proposed rule requires that the contractor document its linkage agreements and the activities it undertakes in order to comply with paragraph (f), and retain these documents for a period of five (5) years. This requirement will enable the contractor and OFCCP to more effectively review recruitment and outreach efforts undertaken to ensure that the affirmative action obligations of paragraph (f) are satisfied.

Paragraph (g) of this section requires that the contractor develop internal procedures to communicate to its employees its obligation to engage in affirmative action efforts. The current paragraph (g)(2) contains several suggested means by which the contractor may accomplish this. The

proposed rule mandates that the contractor include its affirmative action policy in its policy manual and discuss the policy in orientation and management training programs. In addition, if the contractor is party to a collective bargaining agreement, then the proposed rule requires the contractor to meet with union officials and representatives to inform them about the policy and seek their cooperation.

A newly proposed paragraph (g)(3) requires the contractor to document the activities it undertakes in order to comply with paragraph (g), and retain these documents as records subject to the recordkeeping requirements of § 60-741.80. This will allow for a more effective review by the contractor and OFCCP to ensure that the affirmative action obligations of paragraph (g) are being met.

Other suggested elements would remain in the proposed rule at newly created paragraph (g)(4) as suggested additional dissemination efforts the contractor can make. This includes suggesting that the contractor use company newspapers, magazines, annual reports, handbooks, or other media to publicize its affirmative action obligations and feature individuals with disabilities and their accomplishments. See current regulation at 41 CFR 60-741.44(g)(2)(vii) and (viii). The proposed rule also suggests that the contractor discuss its affirmative action policies at meetings with employees and/or supervisors and managers where personnel practices or equal employment opportunity matters are discussed.

Paragraph (h) of this section details the contractor’s responsibilities in designing and implementing an audit and reporting system for its affirmative action program, including the specific computations and comparisons that are part of the audit. The proposed regulations add a new paragraph (h)(1)(vi) requiring the contractor to document the actions taken to comply with paragraphs (h)(1)(i)–(v), and maintain such documents as records subject to the recordkeeping requirements of § 60-741.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The only substantive proposed change in paragraph (i) (Responsibility for implementation) requires that the identity of the officials responsible for a contractor’s affirmative action activities must appear on all internal and external communications regarding the contractor’s affirmative action program.

In the current regulation, this disclosure is only suggested. Requiring this disclosure will increase transparency, making it clear to applicants, employees, OFCCP, and other interested parties, which individual(s) is responsible for the implementation of the contractor’s affirmative action program.

Paragraph (j) of the current rule requires that the contractor train those employees who implement the personnel decisions pursuant to its affirmative action program. The proposed regulation specifies the topics that must be included in the contractor’s training: The business and societal benefits of employing individuals with disabilities; appropriate sensitivity toward recruits, applicants, and employees with disabilities; and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. Training employees on these issues will facilitate a greater understanding of the purpose of the affirmative action plan among the contractor’s decision makers, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities.⁷ The proposed regulation also requires that the contractor record which of its personnel receive this training, the dates they receive it, and the person(s) who administers the training, and maintain these records, along with all written or electronic training materials used, in accordance with the recordkeeping requirements of § 60-741.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The proposed regulation adds a new paragraph (k) that requires the contractor to maintain several quantitative measurements and comparisons regarding individuals with disabilities who have been referred by state employment services, have applied for positions with the contractor, and/or have been hired by the contractor. The impetus behind this new section is that, as stated in the discussion of § 60-741.44(a), no structured data regarding

⁷ Contractors needing assistance in developing their training will find resources available on the OFCCP Web site and/or may request free technical assistance from the nearest OFCCP field office. In addition, the Department of Labor’s Office of Disability Employment Policy (ODEP) provides extensive resources and technical assistance for employers on its Web site, <http://www.dol.gov/odep>.

the number of individuals with disabilities who are referred for, or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting candidates with disabilities. The proposed regulations provide for the collection of referral data as well as applicant and hire data (see § 60–741.42(a)). Accordingly, proposed paragraph (k) requires that the contractor document and update annually the following calculations: (1) For referral data, the total number of referrals from applicable employment service delivery systems and from groups and organizations with which the contractor has a linkage agreement; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known to be individuals with disabilities, and the “applicant ratio” of known applicants with disabilities to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the “hiring ratio” of hires with known disabilities to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled. These basic measurements will provide the contractor and OFCCP with important information that does not currently exist. This will aid the contractor in evaluating and tailoring its recruitment and other affirmative action strategies.

We seek comment on the amount of time it will take contractors to develop the computations and comparisons required in this proposed paragraph, however, OFCCP does not think these requirements will present an onerous burden to contractors. Although the measurements specific to disability are new requirements of this proposed regulation, the non-disability-specific data, such as the total number of applicants, the total number of job openings, and the number of jobs filled is information that contractors are already required to maintain pursuant to Executive Order 11246 and Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended.

OFCCP is also considering adding a reporting requirement, and invites public comment on this option. Under this proposal, contractors would be

required to provide OFCCP with a report containing the measurements and computations required by proposed paragraph (k), and including the percentage of applicants, new hires, and total workforce for each EEO–1 category. The report would be provided to OFCCP on an annual basis, regardless of whether the contractor has been selected for a compliance evaluation.

Section 60–741.45 Reasonable Accommodation Procedures

Current § 60–741.45 entitled “Sheltered workshops” has been revised and moved to § 60–741.48, and is discussed later in the preamble.

This proposed section is new. It requires the contractor to develop and implement written procedures for processing requests for reasonable accommodation. We believe that the development and implementation of written procedures for processing requests for reasonable accommodation will assist the contractor in consistently satisfying its reasonable accommodation obligation by serving as a “blueprint” for the prompt handling of reasonable accommodation requests. The maintenance and dissemination of such procedures will also ensure that applicants and employees know how to request a reasonable accommodation, who is responsible for handling such a request, and the maximum amount of time within which the contractor must complete the processing of such a request.

Proposed paragraph (a) requires that any contractor that is obligated to develop an affirmative action program also develop and implement written reasonable accommodation procedures. It also encourages any contractor that is not required to develop an affirmative action program to consider adopting and implementing written reasonable accommodation procedures to assist it in meeting its nondiscrimination obligations under section 503. Proposed paragraph (a)(1) requires that the reasonable accommodation procedures be included in the section 503 affirmative action program and be developed and implemented in conformance with section 503 and its implementing regulations in this part.

Proposed paragraph (a)(2) states that the minimum elements that the contractor shall include or address in its reasonable accommodation procedures are described in paragraph (d). The purpose of including these elements is to ensure that applicants and employees know how to request a reasonable accommodation and the steps that will be taken by the contractor to process requests for accommodation; to ensure

that supervisors and managers know what to do should they receive a request; and to ensure that all accommodation requests are processed swiftly and within established timeframes.

Proposed paragraph (b) requires the contractor to designate an official to be responsible for the implementation of the reasonable accommodation procedures. This official may be the same official responsible for the implementation of the contractor’s affirmative action program, and shall have the authority, resources, support, and access to top management necessary to effectively implement the reasonable accommodation procedures.

Proposed paragraph (c) requires the contractor to disseminate its reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by inclusion in an employee handbook that is distributed to all employees and/or by email or electronic posting on a company Web page where work-related notices are ordinarily posted. Employees who work off-site shall be provided with notice of the reasonable accommodation procedures in the same manner that notice of other work-related matters is ordinarily provided to such employees. Proposed paragraph (c)(2) requires the contractor to inform all applicants of the reasonable accommodation procedures regarding the application process. Reasonable accommodation procedures regarding the application process is further addressed in proposed paragraph (d)(2)(iii).

Proposed paragraph (d) acknowledges that the specific requirements of a contractor’s reasonable accommodation procedures may vary depending upon the size, structure, and resources of the contractor. However, paragraph (d) lists specific elements that shall be included in every contractor’s reasonable accommodation procedures. These elements are:

(1) *Responsible official contact information.* The proposed rule requires inclusion of the name, title/office, and contact information of the official designated as responsible for implementation of the reasonable accommodation procedures pursuant to paragraph (b), and notes that this information should be updated when changes occur.

(2) *Requests for reasonable accommodation.* The proposed rule requires that the contractor’s reasonable accommodation procedures state that a request for accommodation may be either oral or written, and may be made

by an applicant, employee, or a third party on his or her behalf.

Proposed paragraph (d)(2)(i) requires that the contractor's reasonable accommodation procedures address instances of a recurring need for an accommodation, such as a sign language interpreter for a hearing impaired employee, and provides that an individual needing such an accommodation will not be required to repeatedly submit or renew his or her request for accommodation each time it is needed. In the absence of a reasonable belief that the individual's recurring need for the accommodation has changed, requiring the repeated submission of a request for the same accommodation could be considered harassment on the basis of disability in violation of this part.

Proposed paragraph (d)(2)(ii) requires the contractor to identify to whom a request for reasonable accommodation may be submitted. At a minimum, an employee in need of accommodation must be able to submit a request to any supervisor or management official in his or her chain of command, or to the official responsible for the implementation of the contractor's reasonable accommodation procedures.

Proposed paragraph (d)(2)(iii) requires that the contractor's procedures ensure that all applicants, including those using the contractor's online or other electronic application system, are made aware of the contractor's reasonable accommodation obligation, and are invited to request reasonable accommodation to enable their full participation in the application process. The contractor's procedures also must provide all applicants with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. With regard to applicants, the contractor's procedures must provide that reasonable accommodation requests are processed expeditiously, using timeframes tailored to the application process.

(3) *Written confirmation of receipt of a request.* The proposed rule requires that written confirmation of the contractor's receipt of an accommodation request be provided to each accommodation requester, by letter or email. The written confirmation shall include the date the accommodation request was received and be signed by the authorized decision maker or his or her designee.

(4) *Timeframe for processing requests of reasonable accommodations.* The proposed rule requires that the contractor's procedures indicate that requests for accommodation will be

processed as expeditiously as possible. The rule permits the contractor to set its own timeframes for completing the processing of requests, within certain parameters. Specifically, the proposed rule requires that the timeframe for processing requests shall not be longer than 5 to 10 business days if no supporting medical documentation is needed. If medical documentation is needed, or if special equipment must be ordered, the timeframe, excepting extenuating circumstances, shall not exceed 30 calendar days. Proposed paragraph (d)(4)(i) requires the contractor to provide written notice to the requester when the processing of their accommodation request will not be completed within the established timeframes. The notice shall include the reason(s) for any delay, project a date for processing completion, and be duly signed and dated.

(5) *Description of process.* The proposed rule requires that the reasonable accommodation procedures contain a description of the steps the contractor will take when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description shall identify this information. For example, the contractor's procedures may require that the contractor be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation before providing a reasonable accommodation. The description shall also indicate that the contractor may initiate an interactive process with the accommodation requester if the need for accommodation is not obvious, or if additional information is needed in order to provide the accommodation.

(6) *Supporting medical documentation.* The proposed rule requires that the contractor's procedures provide an explanation of the circumstances under which medical documentation may be requested and reviewed before a reasonable accommodation is provided. Paragraph (d)(6)(i) requires that the procedures explain that any request for medical documentation must be limited to documentation of the individual's disability and functional limitations for which reasonable accommodation is sought. Proposed paragraph (d)(6)(ii) requires that the procedures contain a statement that submission of medical

documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

(7) *Denial of reasonable accommodation.* The proposed rule requires that any denial or refusal to provide a reasonable accommodation must be provided by the contractor to the accommodation requester in writing. The written denial shall include the basis for the denial and a statement of the requester's right to file a complaint with OFCCP. The written denial shall be signed by the authorized decision maker or his/her designee and dated. The rule further states that if the contractor offers an internal appeal or reconsideration process, the written denial shall inform the requester about this process, and include a clear statement that participation in the internal process does not toll the time for filing a complaint with OFCCP or EEOC.

(8) *Confidentiality.* The proposed rule requires that the contractor's reasonable accommodation procedures indicate that requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as a confidential medical record and maintained in a separate medical file, in accordance with section 503.

Proposed paragraph (e) contains a training requirement. The effectiveness of the contractor's reasonable accommodation procedures is dependent upon the contractor's supervisors and managers being trained in their implementation. Contractors would be required to train all supervisors and managers on the accommodation procedures on an annual basis and upon significant changes in policy or procedure. The rule notes that the required training may be provided in conjunction with other required equal employment opportunity or affirmative action training.

Section 60-741.46 Utilization Goals

This section of the proposed rule is new and proposes to establish a single, national utilization goal for individuals with disabilities.⁸ A utilization goal is neither a hiring quota, nor a restrictive hiring ceiling. Rather, it is an equal employment opportunity objective, and

⁸ This provision, as well as all other provisions in subpart C of this part, applies only to those contractors that have 50 or more employees and a contract of \$50,000 or more. See 60-741.40(b).

an important tool for measuring the contractor's progress toward equal employment opportunity and assessing where barriers to equal employment opportunity remain.

The Need for a Goal

Before considering the appropriate methodology for such a goal, OFCCP first considered the option of not having any goal. The current section 503 regulations require affirmative action but lack a goal. This has been the case since their inception in the 1970's. As discussed, below, the intervening years have resulted in little improvement in the unemployment and workforce participation rates of individuals with disabilities. In light of the long-term and intractable nature of the substantial employment disparity between those with and without disabilities, we concluded that process requirements, without a quantifiable means of assessing whether progress toward equal employment opportunity is occurring, are insufficient. We concluded, therefore, that the establishment of a utilization goal for individuals with disabilities is warranted. Though aspirational, establishing a goal would create more accountability within the contractor's organization and might be key to ensuring that the goal is achieved.

Little Government data measuring the unemployment and workforce participation rates of individuals with disabilities exists prior to the 2000 Census. However, illustrative data can be found in the 1989 legislative history of the Americans with Disabilities Act. Explaining the need for inclusion of employment provisions in the then-pending legislation, the Senate reported that individuals with disabilities "experience staggering levels of unemployment." Senate Committee on Labor and Human Resources, S. Rep. No. 101-116, 101st Cong, 1st Sess. (1989) at 9. More specifically, the Senate reported that two-thirds of all disabled Americans of working age were not working at all, even though a large majority of those not working (66%) wanted to work. *Id.* (citing a poll by the Lou Harris company).

Today, more than twenty years later, there continues to be a substantial discrepancy between the workforce participation and unemployment rates of working age⁹ individuals with and without disabilities. According to the U.S. Department of Labor's Bureau of Labor Statistics (BLS), just 21.8% of

working age individuals with certain functional disabilities were in the labor force in 2010, compared with 70.1% of working age individuals without such disabilities. This same data also indicates that the unemployment rate for those with these disabilities was 14.8%, compared with a 9.4% unemployment rate for those without a disability.

Similarly, according to the U.S. Census Bureau's 2009 American Community Survey (the most recent year for which data are available), just 23% of individuals with certain functional disabilities age 16 and over¹⁰ were employed, compared to 65.8% of those 16 and over without such disabilities. The survey also reported that nearly three-quarters of individuals with these disabilities (72.2%) age 16 and over were not in the labor force, compared with just 27.3% of those age 16 and over without such disabilities.

The establishment of a utilization goal for individuals with disabilities is not, by itself, a "cure" for this longstanding problem. We believe, however, that the goal proposed in this section is a vital element that, in conjunction with other requirements of this part, will enable contractors and OFCCP to assess the effectiveness of specific affirmative action efforts, and to identify and address specific workplace barriers to employment.

Methodology for Setting the Utilization Goal

The utilization goal established in this section is derived, in part from the disability data collected as part of the American Community Survey. The American Community Survey (ACS) was designed to replace the census "long form" of the decennial census, last sent out to U.S. households in 2000, to gather information regarding the demographic, socioeconomic and housing characteristics of the nation. Whereas the Census Bureau now only administers a very short survey for the decennial census, a more detailed view of the social and demographic characteristics of the population is provided by the ACS, which collects data from a sample of 3 million residents on a continuing basis.¹¹

The ACS was first launched in 2005, after a decade of testing and

development by the Census Bureau. Refinement of the questions designed to characterize disability status has been continuous, with the current set of disability-related questions incorporated into the ACS in 2008. Taken together, the six dichotomous ("yes" or "no") disability-related questions¹² comprise the function-based definition of "disability," used in the ACS and by most of the other major surveys administered by the Federal Statistical System.

The definition of disability used by the ACS, however, is clearly not as broad as that of the Rehabilitation Act and the ADA. For example, since the ACS questions do not say that one should respond without considering mitigating measures (e.g., medication or aids), some individuals with disabilities that are well-controlled by medication (e.g., depression or epilepsy) or in remission might respond to the ACS in a way that leads them not to be coded as "disabled." Likewise, since the ACS questions do not include major bodily functions, an individual who has a disability that substantially limits a major bodily function such as HIV, cancer, or diabetes but does not limit an activity such as hearing, seeing or walking, might respond that he or she does not have a disability on the ACS. Despite its limitations, the ACS is the best source of nationwide disability data available today, and, thus, an appropriate starting place for developing a utilization goal.

In developing the utilization goal proposed in this section, OFCCP considered two general approaches. The first approach OFCCP considered aimed to mirror precisely the goals framework for minorities and women that is used by supply and service (non-construction) contractors subject to Executive Order (EO) 11246. Accordingly, it would require individual contractor establishments to set their own goals for each of their job groups¹³ based on the percentage of

¹⁰ See 2009 American Community Survey, Table S1811, Selected Economic Characteristics for the Civilian Noninstitutionalized Population by Disability Status (U.S. Census Bureau).

¹¹ A national sample of approximately 3 million addresses nationwide receives the ACS each year, with a portion of this total receiving the survey each month. For more information on the American Community Service visit the Census Bureau's ACS Web page at www.census.gov/acs.

¹² Job groups usually contain one to three jobs each. However, contractors with fewer than 150 employees may use the broader EEO-1 job categories in place of smaller job groups.

⁹ The working age population consists of people between the ages of 16 and 64, excluding those in the military and people who are in institutions.

individuals with disabilities available in the particular recruitment area from which the contractor sought to fill the jobs in the job group. Where there are fewer than expected incumbent disabled employees in a job group given their availability percentage, a contractor would be required to establish a goal for the specific job group that is at least equal to the availability percentage in the job group's recruitment area. See 41 CFR 60-2.12—60-2.16 for a more detailed description of the EO 11246 goals provisions for supply and service contractors.

After careful consideration of the available data and consultation with the U.S. Census Bureau regarding the level of geographic aggregation at which the data could be analyzed, OFCCP became concerned that replicating the supply and service goals framework might not be the most effective approach for the establishment of goals for individuals with disabilities. Supply and service contractors establishing goals for minorities and women typically use the Special EEO Tabulation of census data to assist them. The results of the 2000 decennial census can be tabulated for 472 occupation categories and thousands of geographic areas. However, the ACS disability data, which is based on sampling, cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender based on the decennial census. That is, the confidence intervals on such estimates are large and the estimates are not statistically significant when broken down to the degree of detail required by the supply and service goals framework. Contractors therefore would not be able to use the job groups established under EO 11246 to establish goals for individuals with disabilities, and would often be unable to utilize the geographic recruitment areas established under the Executive Order when determining the availability of individuals with the disabilities (as queried in the ACS). In addition, the Executive Order supply and service goals framework does not include consideration of discouraged workers in computing availability, a factor particularly important in the context of disability, as discussed below.

In light of the difficulties replicating the supply and service goals approach in the context of disability, OFCCP considered other options. For a variety of reasons, OFCCP believes that the establishment of a single, national goal¹⁴ for all jobs in all geographic areas

is a more viable approach to the establishment of a goal for individuals with disabilities. This approach would also allow for the continued use of the contractor's EO 11246 job groups, and require that those job groups be used to measure the representation of individuals with disabilities in the contractor's workforce.

OFCCP proposes to set a goal for individuals with disabilities, based on the most recent 2009 ACS disability data for the "civilian labor force" and the "civilian population,"¹⁵ first averaged by EEO-1 job category, and then averaged across EEO-1 category totals. Specifically, we use the mean across these EEO-1 groups (5.7%) as a starting point for deriving a range of values upon which we will take comment. 5.7% is OFCCP's estimate of the percentage of the civilian labor force that has a disability as defined by the ACS. However, OFCCP acknowledges that this number does not encompass all individuals with disabilities as defined under the broader definition in section 503 and the ADA; therefore, 5.7% should not be construed as an affirmative action goal for individuals with disabilities under these authorities, nor to convey a false sense of precision. Even if the 5.7% represented a complete availability figure for all individuals with disabilities as defined under the ADA, we are concerned that such an availability figure does not take into account discouraged workers, or the effects of historical discrimination against individuals with disabilities that has suppressed the representation of such individuals in the workforce. Discouraged workers are those individuals who are not now seeking employment, but who might do so in the absence of discrimination or other employment barriers. There are undoubtedly some individuals with disabilities who, for a variety of reasons, would not seek employment even in the absence of employment barriers. However, given the acute disparity in the workforce participation rates of those with and without disabilities, it is reasonable to assume that at least a

portion of that gap is due to a lack of equal employment opportunity.

One way one might go about estimating the size of the discouraged worker effect would be to compare the percent of the civilian population with a disability (per the ACS definition) who identified as having an occupation to the percent of the civilian labor force with a disability who identified as having an occupation. Though not currently seeking employment, it might be reasonable to believe that those in the civilian population who identify as having an occupation, but who are currently not in the labor force, remained interested in working should job opportunities become available. Using the 2009 ACS EEO-1 category data, the result of this comparison is 1.7%.¹⁶

Adding this figure to the 5.7% availability figure above, results in 7.4%.¹⁷ OFCCP uses this level, rounded to 7% to avoid implying a false level of precision, as its initial approximation of the availability for employment of individuals with disabilities. Because of the various data limitations and underlying measurement issues discussed above, OFCCP requests comment on using 7% as its utilization goal as well as on a range of values between 4% and 10%. The lower and upper bounds of this range are designed to take into account the variability across the EEO-1 categories, the potential for geographic variation in availability, and whether or not a discouraged worker effect should be taken into account.

OFCCP also takes comment on whether there might be other approaches for setting a utilization goal, particularly approaches to setting ranges that recognize that in some geographic areas and some occupations, there may be fewer people with disabilities. OFCCP requests comment on whether and, if so, how to take into account discouraged workers in assessing the availability of workers with disabilities. OFCCP is also very interested in public comment on whether there are empirically-based approaches that recognize that there are many more people who have disabilities as characterized by the ADA than the ACS and that there is likely a discouraged worker effect.

¹⁴This number was derived from an updated 2009 version of Table 24 in *Affirmative Action for People with Disabilities—Volume I: Data Sources and Models*, Economic Systems, Inc. (April 30, 2010) at 64. The original table uses ACS data from 2008.

¹⁵The civilian labor force is the sum of people who are employed and those who are unemployed and looking for work. The civilian population is the civilian labor force plus civilians who are not in the labor force, excluding those in institutions.

¹⁴Disability rates by State for the civilian labor force has a mean of 6.32, median of 6.20, and standard deviation of 1.29. There are only two

OFCCP recognizes that including a discouraged worker component in the establishment of a proposed goal is a new approach. We therefore invite public comment on the methodology used to calculate the discouraged worker effect, and on the application of the discouraged worker effect in the goal-setting context.

OFCCP believes that a single-goal approach will serve the equal opportunity and affirmative action objectives of the Rehabilitation Act and this part better than the supply and service approach of EO 11246. It will allow contractors to use their existing job groups and not require the use of multiple geographic availability comparisons as would the supply and service goals approach. OFCCP invites public comment on the impact of this proposal on contractors. In particular, we invite small businesses with current federal prime contracts or subcontracts, or those interested in future prime or subcontract work with the federal government, to identify any impacts unique to small businesses and to propose potential alternatives to alleviate the difficulties identified.

Section-by-Section Analysis

Paragraph (a) of the proposed rule states that the utilization goal for employment of individuals with disabilities is 7% for each job group in the contractor's workforce.

Proposed paragraph (b) states that the purpose of this section is to establish a benchmark against which contractors can measure the representation of individuals with disabilities within each of their job groups. The goal serves as an equal opportunity objective that should be attainable by complying with all of the affirmative action requirements of part 60–741.

Proposed paragraph (c) provides that the Director of OFCCP will periodically review and update, as appropriate, the utilization goal established in proposed paragraph (a) of this section.

Proposed paragraph (d) sets out the steps that the contractor must use to determine whether it has met the utilization goal. Proposed paragraph (d)(1) states that the purpose of a utilization analysis is to evaluate the representation of individuals with disabilities in each job group within a contractor's workforce and compare the rate against the utilization goal set forth in § 60–741.46(a).

Proposed paragraph (d)(2) clarifies that in evaluating the representation of individuals with disabilities in its workforce, the contractor must use the same job groups it established pursuant to EO 11246, either as prescribed in 41

CFR 60–2.12, or in accordance with 41 CFR part 60–4. OFCCP considered permitting contractors to compare the individuals with disabilities in its workforce as a whole with the proposed 7% goal. We decided against this approach because of its potential for masking discrimination and segregation. For example, a contractor that has segregated all of its employees with disabilities into one or two low-paying jobs might be able to conceal this discrimination and satisfy the 7% goal if only a single whole-workforce comparison were required by this section. Nevertheless, as we are mindful of the burden required of contractors in making the job group-by-job group comparisons required in this proposed paragraph, we are mandating the use of the EO 11246 job groups for this purpose, by eliminating the need for any geographic assessment, and by providing the single goal to which each job group will be compared.

Proposed paragraph (d)(3) requires that the contractor evaluate its utilization of individuals with disabilities in each job group annually.

When the percentage of employees with disabilities in one or more job groups is less than the utilization goal proposed in paragraph (a) of this section, proposed paragraph (e) requires that the contractor must develop and execute “action-oriented programs” designed to correct any identified problems and attain the established goal. Such programs may include additional efforts from among those listed in §§ 60–741.44(f)(1) and (f)(2) and/or any other appropriate actions.

Paragraph (f) of the proposed rule clarifies that a contractor's determination that it has not attained the utilization goal in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part. It is also important to point out that such a determination, whether by OFCCP or the contractor, will not impede or prevent OFCCP from finding that one or more unlawful discriminatory practices caused the contractor's failure to meet the utilization goal. In such a circumstance, OFCCP will take appropriate enforcement measures.

Lastly, proposed paragraph (g) states that the goal proposed in this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

Sub-Goal Option

OFCCP is considering the option of including within the 7% goal for individuals with disabilities a sub-goal of 2% for individuals with certain

particularly severe disabilities. The federal government currently monitors internal hiring with respect to a list of particularly severe disabilities, referred to as “targeted disabilities” in furtherance of its affirmative action obligation to employ and advance in employment individuals with disabilities in the Government pursuant to section 501 of the Rehabilitation Act. The list of targeted disabilities is defined in the President's July 2010 Executive Order “Increasing Federal Employment of Individuals with Disabilities,” as set forth in Standard Form 256 (SF256). Subject to updating, SF 256 currently identifies the following as “targeted/severe disabilities:” Total deafness, blindness, missing extremities (hand, foot, arm or leg), partial paralysis, complete paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism.¹⁸ If such a sub-goal is adopted, the Director would similarly prescribe the language and manner in which contractors should invite applicants and employees to self-identify. This will ensure consistency in all pre-offer invitations that are made, and will reassure applicants that the request is routine and executed pursuant to obligations created by OFCCP.

OFCCP invites comments from the public on this sub-goal option. If OFCCP adopts the use of a sub-goal, it will be included in the Final Rule.¹⁹ We are seeking public input and comment on both the concept of a sub-goal, as well as the disabilities to be included within that sub-goal. Comments on the questions below will be especially helpful.

1. What data or research is available that informs the design of an appropriate sub-goal including, but not limited to which severe disabilities should be covered by the sub-goal, and the appropriate sub-goal target?

2. How does a sub-goal further the overall objective of increasing employment opportunities for individuals with severe disabilities?

3. What data or research is available on the need for a sub-goal for specific disabilities?

¹⁸ See OPM Form SF 256 available on-line at http://www.opm.gov/forms/pdf_fill/sf256.pdf.

¹⁹ The adoption of the sub-goal option would also necessitate modification to the mandated text of the invitation to voluntarily self-identify as an individual with a disability in proposed section 60–741.42 to include voluntary self-identification as an individual with a disability encompassed in the sub-goal. In addition, the adoption of the sub-goal option would necessitate modification to the data collection analysis in proposed section 60–741.44(k) to provide for the collection and computation of data related to “targeted disabilities.”

Section 60-741.47 Providing Priority Consideration in Employment

This proposed new section encourages the contractor to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment and/or hiring. While the current regulations do not prohibit contractors from establishing such priority consideration programs, they fail to highlight the availability to contractors of this important affirmative action tool. In contrast, the proposed regulation would ensure the contractor's awareness of, and encourage the use of, voluntary strategies that may be used in their efforts to take affirmative action and increase employment opportunities for individuals with disabilities.

Providing priority consideration for individuals with disabilities does not violate the ADA or section 503, as it would not result in discrimination on the basis of disability. Furthermore, as explicitly stated in the ADA Amendments Act, neither the ADA nor the Rehabilitation Act provides "the basis for a claim * * * that [an] individual was subject to discrimination because of the individual's lack of disability." ADAAA at sec. 6(a)(1)(g). Thus, it is permissible for contractors to provide priority consideration to individuals with disabilities when selecting candidates for training, hiring, and/or promotion.

Proposed paragraph (a) encourages contractors to voluntarily develop and implement priority consideration programs as part of their affirmative action efforts. Examples of priority consideration programs are provided, but the contractor may, and is encouraged to, develop other types of programs that enhance their affirmative action efforts on behalf of individuals with disabilities.

Proposed paragraph (a)(1) requires that a contractor that elects to utilize a priority consideration program shall include a description of the program in its affirmative action program. An annual report describing the contractor's activities and outcomes pursuant to the priority consideration program should also be included in the contractor's affirmative action program. In proposed paragraph (a)(2) we note that contractors may use information garnered from the applicant and employee self-identification required by proposed § 60-741.42 to identify individuals who may be eligible to participate in the contractor's priority consideration program.

Proposed paragraph (b) prohibits contractors from using a priority

consideration program to segregate individuals with disabilities, or to limit or restrict the employment opportunities of any individual with a disability. Similarly, in paragraph (c), the proposed rule prohibits discrimination against any individual with a disability who has received priority consideration with respect to any term, condition or benefit of employment. Such discrimination would constitute discrimination on the basis of disability prohibited by section 503 and this part.

Section 60-741.48 Sheltered Workshops

This section has been relocated from § 60-741.45 of the existing regulation. The proposed rule replaces the phrase "qualified disabled individuals" in the first sentence of the current regulation with "qualified individuals with disabilities." This revised phrasing reflects the terminology used elsewhere in this part, but does not alter the meaning of the section.

Subpart D—General Enforcement and Complaint Procedures

Section 60-741.60 Compliance Evaluations

This section details the form and scope of the compliance evaluations of the contractor's affirmative action programs conducted by OFCCP. The proposed rule contains several changes to this section.

First, the proposed rule modifies the wording of paragraph (a) to more clearly state the section 503 obligation of the contractor to employ, "advance in employment and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices." Next, the proposal adds a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP. This new language merely clarifies OFCCP's long-standing policy that, in order to fully investigate and understand the scope of potential violations, OFCCP may need to examine information after the date of the scheduling letter in order to determine, for instance, if violations are continuing or have been remedied. The language does not represent a change in policy or new contractor obligations.

Third, the proposed rule contains a change to the nature of document production under paragraph (a)(3). This paragraph, which specifies a "compliance check" as an investigative procedure OFCCP can use to monitor a contractor's recordkeeping, currently states that the contractor may provide

relevant documents either on-site or off-site "at the contractor's option." The proposed regulation would eliminate this quoted clause and provide that OFCCP may request the documents to be provided either on-site or off-site.

The proposed rule also contains a minor change to the scope of "focused reviews" set forth in paragraph (a)(4). Focused reviews allow OFCCP to target one or more components of a contractor's organization or employment practices, rather than conducting a more comprehensive compliance review of an entire organization. Currently, the regulations provide that these focused reviews are "on-site," meaning they must take place at the contractor's place of business. The increased use of electronic records that are easily accessible from multiple locations affords compliance officers greater flexibility in conducting focused reviews. Therefore, we propose to delete the word "on-site" from this section, which will allow compliance officers to conduct reviews of relevant materials at any appropriate location.

Finally, the proposed rule contains a new paragraph (c) which details a new procedure for pre-award compliance evaluations under section 503. This proposed procedure is based on the pre-award compliance procedures contained in the Executive Order regulations (see § 60-1.20(d)).

Section 60-741.61 Complaint Procedures

This section outlines the manner in which applicants or employees who are individuals with disabilities may file complaints alleging violations of section 503 or its regulations.

The proposed rule revises the text of existing paragraph (c)(2) for clarity. The paragraph provides, in pertinent part, that when a written complaint is filed by an authorized representative on behalf of another person, the complaint need not identify the name of the person on whose behalf it is filed. However, the person's identity and contact information must be provided to OFCCP, which will then verify with the person their authorization of the complaint. The proposed rule's revision of this paragraph does not represent a change in policy or practice, but is merely a clarification of the language used to express the existing policy.

The proposed rule also revises the citation to the Americans with Disabilities Act to reflect its recent amendment by the ADA Amendments Act, and replaces the term "Deputy Assistant Secretary" with the term "Director" in paragraphs (b), (f)(1), (f)(2)

and (f)(3), for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.62 Conciliation Agreements

This section describes OFCCP's use of conciliation agreements as a means to correct violations and/or deficiencies by contractors. The proposed rule renumbers the current rule as paragraph (a) and adds a new paragraph (b) to § 60–741.62. Proposed paragraph (b) specifically permits the establishment of benchmarks in conciliation agreements as one possible form of remedial action. Benchmarks may be established for outreach, recruitment, hiring, or other employment activities of the contractor, as appropriate, and will provide a quantifiable method for measuring the contractor's progress toward correcting identified violations and/or deficiencies.

Section 60–741.64 Show Cause Notice

This section describes how OFCCP notifies a contractor when OFCCP believes the contractor has violated section 503 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.65 Enforcement Proceedings

This section describes the procedures for formal enforcement proceedings against a contractor in the event OFCCP finds a violation of section 503 or its regulations that has not been corrected. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a)(2) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. In paragraph (b)(2), the proposed rule replaces the term "Associate Solicitor for Civil Rights" with "Associate Solicitor for Civil Rights and Labor-Management" to reflect the reorganization of the Office of the Solicitor.

Section 60–741.66 Sanctions and Penalties

This section discusses the types of sanctions and penalties that may be assessed against a contractor if it is found to have violated the act or this part. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.67 Notification of Agencies

This section provides that agency heads will be notified if any contractors are debarred. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.68 Reinstatement of Ineligible Contractors

This section outlines the process by which a contractor that has been debarred may apply for reinstatement. The proposed rule adds a sentence at the end of paragraph (a) to clarify that the Director shall issue a written decision on a contractor's request for reinstatement. The proposed rule also replaces the term "Deputy Assistant Secretary" in paragraphs (a) and (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. The term "Associate Solicitor for Civil Rights" in proposed paragraph (b) of this section is replaced with "Associate Solicitor for Civil Rights and Labor-Management" to reflect the reorganization of the Office of the Solicitor.

Section 60–741.69 Intimidation and Interference

This section forbids the contractor from retaliating against individuals who have engaged in or may engage in certain specified protected activities, and describes the contractor's affirmative obligations in preventing retaliation. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–741.2. In proposed paragraphs (a)(2) and (a)(3) the term "disabled persons" is replaced with the term "individuals with disabilities" to reflect the terminology used elsewhere in this part.

Subpart E—Ancillary Matters

Section 60–741.80 Recordkeeping

This section describes the recordkeeping requirements that apply to the contractor under section 503, and the consequences for the failure to preserve records in accordance with these requirements. The proposed regulation adds a sentence at the end of paragraph (a) of this section clarifying that the newly proposed recordkeeping requirements set forth in proposed § 60–741.44(f)(4) (linkage agreements and other outreach and recruiting efforts), and in proposed § 60–741.44(k) (collection of referral, applicant and hire data) must be maintained for five (5)

years, for the reasons set forth in the discussion of those sections, *supra*.

Section 60–741.81 Access to Records

This section describes a contractor's obligations to permit access to OFCCP during compliance evaluations and complaint investigations. The proposed rule adds some language clarifying the contractor's obligations, particularly in light of the increased use of electronically stored records. First, the proposed rule adds a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of an evaluation or investigation. This change reflects the increasing use of electronic records from multiple locations, and accordingly gives OFCCP greater flexibility in conducting its evaluations and investigations.

Second, the proposed rule would require that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the format(s) selected by OFCCP. This change is proposed in light of numerous instances in which OFCCP has conducted extensive review and analysis of a contractor's records only to find subsequently that the records were available in more readily accessible formats. Specifying the variety of available formats upon request, and providing records to OFCCP in the format(s) it selects, will facilitate a more efficient investigation process.

Lastly, the proposed rule revises the citation to the Americans with Disabilities Act to reflect its recent amendment by the ADA Amendments Act.

Section 60–741.83 Rulings and Interpretations

In the current regulation, this section establishes that rulings and interpretations of section 503 will be made by the Deputy Assistant Secretary of OFCCP. The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director," for the reasons set forth in the discussion of § 60–741.2.

Section 60–741.84 Effective Date

This section of the current regulations established an effective date of August 29, 1996. The proposed rule deletes this section as it is now obsolete.

Appendix A to Part 60–741—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The proposed rule includes several changes to Appendix A that would mandate activities that previously were only suggested. These changes primarily

reflect proposed revisions to § 60–741.42 and the newly proposed § 60–741.45 regarding the contractor's adoption of written affirmative action procedures, *supra*, that would alter the contractor's responsibilities.

First, in paragraph 1, to conform more closely to the terminology used in the ADA, as amended, and this part, the term "otherwise qualified" would be changed to "qualified." The proposed rule also adds a reference to the new requirement, in proposed § 60–741.45, that the contractor develop, implement and disseminate procedures for processing requests for reasonable accommodation.

Next, in paragraph 2, the proposed rule changes the appendix to reflect the revision to § 60–741.42, requiring the contractor to invite applicants to voluntarily self-identify as an individual with a disability at both the pre-offer and post-offer stages of the selection process. The proposed rule also notes that the mandated invitation to self-identify also invites individuals with disabilities to request any reasonable accommodation that they might need.

In the last sentence of paragraph 4, the proposed rule requires, rather than merely encourages, that in the event an accommodation constitutes an undue hardship for the contractor, the individual with a disability in need of the accommodation be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor. In the fifth sentence of paragraph 5, we propose changing the language to require a contractor to seek the advice of the individual with a disability in providing reasonable accommodation.

Lastly, the proposed rule changes the reference to "§ 60–741.2(v)" in paragraphs 5 and 8 of the appendix to "§ 60–741.2(t)." This is to reflect the revised alphabetical structure of the definitions section in the proposed rule, as discussed in § 60–741.2, *supra*. The references to various information resources in paragraph 5 is also updated, and the term "TDD" is replaced with "TTY" to reflect current technology.

Appendix B to Part 60–741—Sample Invitation To Self-Identify

As previously noted, this proposal eliminates Appendix B of the current regulations. Appendix B provides a sample invitation to self-identify as an individual with a disability to assist the contractor in developing its own pre-employment self-identification invitation. Since § 60–741.42 of the proposed regulation mandates the text

that the contractor must use when inviting applicants and employees to voluntarily self-identify, there is no longer a need for a sample invitation.

Appendix C to Part 60–741—Review of Personnel Processes

The proposed rule eliminates Appendix C and moves its content, with some edits, to proposed § 60–741.44(b). See the Section-by-Section Analysis of § 60–741.44, *supra*, for further discussion.

Appendix D to Part 60–741—Guidelines Regarding Positions Engaged in Carrying Out a Contract

The proposed rule eliminates Appendix D as it applied only to the contractor's employment decisions and practices occurring prior to October 29, 1992.

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits (while recognizing that some benefits and costs are difficult to quantify), reducing costs, harmonizing rules, and promoting flexibility. This rule has been designated a "significant regulatory action," although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The Need for the Regulation

The guiding principle and overall benefit of this proposed regulation is to reduce barriers to equal employment opportunity for individuals with disabilities and alleviate the inefficiencies in the job market that these barriers create. This includes facilitating the process of connecting job seekers with disabilities with contractor employers looking to hire, and helping individuals with disabilities succeed once they are employed. As we have stated previously in this NPRM, the framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement have remained largely

unchanged since the section 503 implementing rules were first published. While DOL is not aware of any existing data that show the number or percentage of Federal contractor employees with disabilities, for the U.S. at large both the percentage of people with disabilities not in the labor force and the unemployment rate of people with disabilities have increased. These individuals possess valuable skills that are highly sought after in the job market. However, they face substantial obstacles in finding employment. Addressing these barriers is a high priority of the current Administration and, as discussed in the background section, has been the focus of a number of Federal efforts.

To help determine how we could assist individuals with disabilities in their search for employment, and facilitate contractors' satisfaction of affirmative action obligations designed to employ more individuals with disabilities, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with the public to determine how we could help to carry out the overall goal of increasing the employment opportunities for qualified individuals with disabilities with Federal contractors. From the information we received, we pinpointed specific changes that could be made to the implementing regulations of section 503 that would help increase employment opportunities for individuals with disabilities.

The changes set forth in this proposal create four broad categories of benefits. First and foremost, the proposed changes will help to connect job-seeking individuals with disabilities with contractors looking to hire. Many commenters suggested that mandatory listing be a part of the outreach requirements. Therefore, as an initial matter, the proposal adds a mandatory job listing requirement and requires contractors to provide additional, regularly updated information to employment service delivery systems to ensure their job openings are listed accurately. This will help to ensure that individuals with disabilities can easily learn about all available jobs with federal contractors in their state. The proposal also helps to ensure that contractors can find qualified applicants with disabilities by requiring contractors to engage in recruitment efforts and enter into linkage agreements with several disability-focused employment sources (many of which are specifically listed by OFCCP in the proposed rule), while allowing contractors flexibility to determine the sources that work best for them.

Second, many of the proposed changes ensure that the contractor understands and effectively communicates its affirmative action obligations to its workforce and the other entities with which it does business. While bringing job-seeking individuals with disabilities and employers together is an important first step, it is equally important that the contractors, their employees, and applicants with disabilities understand the protections and benefits of section 503. Accordingly, the proposed rule seeks to promote this clear communication in several ways, including:

- Requiring dissemination of the contractor's affirmative action policy in its internal policy manual and discussing the policy at employee orientation and training programs. These steps will facilitate a greater understanding of the purpose of the affirmative action policies among the contractor's employees, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities;
- Providing notices of rights under section 503 in accessible formats for those working offsite (*i.e.*, electronically-accessible postings) as well as those with visual impairments, so that all parties understand their respective rights and obligations under the law;
- Requiring contractors to review their personnel processes on an annual basis, and to document personnel actions taken with regard to individuals with disabilities to provide greater transparency between the contractor, its applicants/employees, and OFCCP as to the reasons for the contractor's personnel actions;
- Requiring the contractor to meet with and/or otherwise send notification of its AAP obligations to third parties with which it does business, such as union officials and subcontractors.

Third, the proposed rule provides increased mechanisms by which the contractor can assess its affirmative action efforts. Until now, contractors had few objective measures they could use to determine how the time and money they were spending on AAP compliance could be used most effectively. To that end, the proposed rule requires contractors to collect data by which contractors may more accurately assess their efforts. This includes collecting data on referrals and applicants so contractors know how many individuals with disabilities they are reaching. Contractors will be able to use this information to objectively

measure their recruitment efforts and determine which ones are most fruitful in attracting qualified disabled candidates.

Finally, the proposed rule's changes to the manner in which OFCCP conducts its compliance reviews will benefit both individuals with disabilities and contractors. These changes include a greater emphasis on identifying electronic data that OFCCP can review, greater flexibility in where reviews take place, and a new procedure allowing for a pre-award compliance review. The emphasis on using electronic data and flexibility will allow OFCCP to complete reviews far more efficiently.

Discussion of Impacts

OFCCP has separately determined the costs of compliance with those requirements of section 503 that fall under the scope of the Paperwork Reduction Act. *See Analysis of Paperwork Reduction Act burden, infra.* Additional costs outside the scope of the PRA, stemming from new or revised obligations in the proposed rule, are discussed below.

To determine the number of impacted contractor establishments, OFCCP reviewed the FY 2009 EEO-1 data on contractor establishments²⁰ with 50 or more employees, resulting in a total of 87,013 contractor establishments. This was then combined with an additional 10,518 establishments identified through a cross-check of other contractor databases for a total of 97,531 establishments. Lastly, since contractors subject to the written affirmative action plan (AAP) requirement must develop AAPs for all of their facilities, even those with fewer than 50 employees, we added in those 73,744 contractor establishments with fewer than 50 employees for a final total of 171,275 covered contractor establishments.

60-741.44(f)(3): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to review the effectiveness of its outreach and recruitment efforts on an annual basis. The general purpose of this self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and requiring the assessment will allow contractors to look at their measurable accomplishments, maintain methods

that are successful in recruiting individuals with disabilities, and reconsider unproductive methods. OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under EO11246 and VEVRAA. We estimate that adding the proposed section 503 review to these other similar assessments will take approximately 30 minutes. OFCCP further estimates that 1% of the 171,275 federal contractor establishments are first-time contractors during an abbreviated AAP year, and therefore would not be able to complete an annual outreach and recruitment effort. $171,275 \times .99 = 169,562$. $169,562 \times 30 \text{ mins}/60 \text{ mins} = 84,781 \text{ hours}$.

60-741.44(g): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to discuss the policy at employee orientation and training programs. This paragraph requires only that contractors discuss their affirmative action policies at any employee orientation or management training programs that they already provide. Consequently, the burden imposed by this requirement will be minimal. Specifically, OFCCP estimates that contractors will have a one-time preparation burden of 20 minutes and a recurring burden of 5 minutes for actually presenting the additional information at the training session. Therefore, the average burden per contractor establishment would be the following: $171,275 \times 20/60 = 57,092$ hours; $171,275 \times 5/60 = 14,273$ hours.

60-741.44(j): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would also require specific training for those involved in recruitment, screening, hiring, promotion, and related processes to ensure that they are making such decisions in compliance with section 503. Training on these issues will benefit contractors and individuals with disabilities by facilitating a greater understanding of the purpose of the affirmative action plan among decision makers for the contractor, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of individuals with disabilities. Furthermore, proactive training on these issues holds the real promise of reducing the number of section 503 violations. While this is a new requirement under section 503, the cost/benefit and PRA elements of this burden have already been partially incorporated under the equivalent provision in the Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance

²⁰ A single firm, business or "entity" may have multiple establishments or facilities. Thus, the number of contractor establishments or facilities is significantly greater than the number of parent contractor firms, or companies. Unless otherwise noted, the NPRM uses the term "contractor" to refer to establishments.

Act, published at 76 FR 23358 (April 26, 2011). As the same person will likely be identified to provide/coordinate the training for both section 503 and 4212 regulations, the only additional section 503-related burden would result from incorporating into the training those elements unique to section 503, such as the proposed reasonable accommodation procedures requirement. OFCCP estimates contractors would have a one-time development burden of 40 minutes and a recurring presentation burden of 20 minutes. Therefore, the burden costs for section 503 are calculated as follows: $171,275 \times 40/60 = 114,183$; $171,275 \times 20/60 = 57,092$.

60-741.45: As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require contractors to develop and implement specific reasonable accommodation procedures to be included as part of their written affirmative action plan. This requirement benefits both contractors and the disability community by ensuring consistent handling of requests for reasonable accommodation made by both applicants and employees. Although a contractor's obligation to consider/make reasonable accommodation upon request is covered under the ADA, as amended, and the implementing regulations published by EEOC, the requirement to develop a specific implementation plan is exclusive to OFCCP and new to the section 503 regulations and therefore is addressed herein. The documentation-related elements of this provision are covered under the PRA analysis, *infra*. Furthermore, based on comments received in response to the ANPRM (75 FR 43116 (July 23, 2010)) as well as information provided by ODEP, OFCCP estimates that approximately 10% of the contractor community will already have similar procedures in place and, therefore, the only burden will be the inclusion of those procedures in the AAP. Therefore, OFCCP estimates that initial development of procedures will affect 154,148 contractors and that these contractors will spend 2 hours on average to develop their procedures. The average non-PRA burden per contractor establishment would be the following: $171,275 \times .90 = 154,148$. $154,148 \times 2 \text{ hours} = 308,296 \text{ hours}$.

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for management, professional, and related occupations as \$50.07 per hour

and administrative support as \$22.67 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related occupations and 48% percent will be administrative support. We have calculated the total one-time, recurring, and overall estimated costs for the combined burden hours from the obligations described above (i.e., those that do not fall under the scope of the Paperwork Reduction Act) as follows:

One Time Costs:

$$\begin{aligned} \text{Mgmt. Prof.: } & 171,275 \text{ contractors} \times 3 \\ & \text{hours} \times .52 \times \$50.07/\text{hr} = \\ & \$13,378,153 \end{aligned}$$

$$\begin{aligned} \text{Adm. Supp.: } & 171,275 \text{ contractors} \times 3 \\ & \text{hours} \times .48 \times \$22.67/\text{hr} = \\ & \$5,591,238 \end{aligned}$$

$$\begin{aligned} \text{Total annualized cost estimate} = \\ & \$18,969,391 \end{aligned}$$

$$\begin{aligned} \text{Estimated annual average cost per} \\ \text{establishment is: } & \$18,969,391/ \\ & 171,275 = \$111 \end{aligned}$$

Recurring Costs:

$$\begin{aligned} \text{Mgmt. Prof.: } & 171,275 \text{ contractors} \times 0.9 \\ & \text{hours} \times .52 \times \$50.07/\text{hr} = \\ & \$4,013,446 \end{aligned}$$

$$\begin{aligned} \text{Adm. Supp.: } & 171,275 \text{ contractors} \times 0.9 \\ & \text{hours} \times .48 \times \$22.67/\text{hr} = \\ & \$1,677,371 \end{aligned}$$

$$\begin{aligned} \text{Total annualized cost estimate} = \\ & \$5,690,817 \end{aligned}$$

$$\begin{aligned} \text{Estimated annual average cost per} \\ \text{establishment is: } & \$5,690,817/ \\ & 171,275 = \$33 \end{aligned}$$

Therefore, the overall total cost (both one-time and recurring) per establishment would be: $\$18,969,391 + \$5,690,817 = \$24,660,208/171,275 = \144 .

Summary of Costs

While OFCCP seeks comments in this proposed rule regarding the effects of the rule and its cost estimates, OFCCP preliminarily estimates the overall annualized total cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$24,660,208 (or \$144 per contractor establishment). OFCCP estimates the total annual cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$54,583,152 (or \$319 per contractor establishment). *See Paperwork Reduction Act discussion, infra*. OFCCP further estimates the total annual operations and maintenance costs from this rule to be \$1,820,859 (or \$11 per contractor establishment). OFCCP estimates the total annual cost of the proposed rule is approximately \$81,064,219 (or \$473 per contractor establishment).

It should be noted however, that the above totals include both one-time (first

year only) and recurring costs as follows:

- **One-Time Costs:** OFCCP estimates the total one-time cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$18,969,391 (or \$111 per contractor establishment). OFCCP estimates the total one-time cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$10,543,855 (or \$62 per contractor establishment). *See Paperwork Reduction Act discussion, infra*. OFCCP further estimates the total one-time operations and maintenance costs from this rule to be \$0. Therefore, OFCCP estimates the total one-time cost of the proposed rule to be approximately \$29,513,246 (or \$172 per contractor establishment).

- **Recurring Costs:** OFCCP estimates the total recurring cost for complying with those provisions that fall outside the Paperwork Reduction Act to be \$5,690,817 (or \$33 per contractor establishment). OFCCP estimates the total recurring cost for complying with those provisions that fall under the Paperwork Reduction Act to be \$44,049,297 (or \$257 per contractor establishment). *See Paperwork Reduction Act discussion, infra*. OFCCP further estimates the total recurring operations and maintenance costs from this rule to be \$1,820,859 (or \$11 per contractor establishment). OFCCP estimates the total recurring cost of the proposed rule to be approximately \$51,550,973 (or \$301 per contractor establishment).

Summary of Benefits

In short, OFCCP believes that the societal benefits discussed in the Section-by-Section Analysis and in this section outweigh the societal costs of the proposed rule. These benefits include improved outreach to and recruitment of individuals with disabilities, the establishment of clear procedures to ensure that needed reasonable accommodations can be swiftly requested and promptly provided, and ensuring that those in the workplace understand their rights and respective obligations under section 503. In addition, the proposed rule will provide contractors with much needed tools, such as increased data, to measure the success of their affirmative action efforts and to determine whether refinements are needed to improve equal employment opportunity for individuals with disabilities.

Generally, these benefits will result from proposed requirements that will improve human resource functions. Improving such functions will

contribute to job market efficiencies and other efficiency gains. Employers subject to policies that improve human resource functions tend to provide more training and contribute to a more qualified workforce.²¹ A policy that utilizes an outreach program resulting in more recruits raises the competition for job openings and thus raises efficiency by employing the highest qualified individuals. The proposed rule would reduce barriers to equal employment opportunity for individuals with disabilities and alleviate the inefficiencies in the job market that these barriers create. Moreover, as more individuals with disabilities are hired, employers naturally create mentors and expand networking opportunities for such individuals. Mentors are essential not only for recruiting purposes but also as a retention strategy, because they provide a support mechanism for new hires. Retention is a direct benefit to employers because employers will not lose their initial investment in recruiting and training individuals with disabilities. Without improved affirmative action policies, individuals with disabilities may have fewer job opportunities. Because individuals with disabilities are almost three times more likely to live in poverty than other groups,²² improving employment opportunities will only help such individuals move out of poverty or working poor status. OFCCP invites comments from stakeholders on the cost/benefit analysis included in this section.

Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, requires agencies promulgating proposed rules to consider the impact they are likely to have on small entities. More specifically, the RFA requires agencies to “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations.” If a proposed rule is expected to have a “significant economic impact on a substantial number of small entities,” the agency must prepare an initial regulatory flexibility analysis (IRFA). However, if a proposed rule is not expected to have a significant economic impact on a substantial number of small entities, the

agency may so certify, and need not perform an IRFA.

Based on the analysis below, in which OFCCP has estimated the impact on small entities that are covered contractors of complying with the requirements contained in this proposed rule, OFCCP certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. OFCCP invites comments on its analysis, and requests that commenters provide any relevant additional data they may have.

In making this certification, OFCCP first determined the approximate number of small entities that have covered federal contracts and whether this is a substantial number of such entities. OFCCP’s review of the FY 2009 EEO-1 data revealed that 20,490 small entities (not establishments) with between 50 and 500 employees had federal contracts subject to the obligations of the proposed regulation.²³ The most recent data provided by the Small Business Administration Office of Advocacy reports that there are 27.4 million small entities in the United States.²⁴ See Firm Size Data at www.sba.gov/advo/research/data.html#us. The proposed rule will therefore impact less than 1%²⁵ of small entities nationwide.²⁶ Although the RFA does not specifically define “substantial number,” OFCCP has determined that an impact on less than 1% of small entities does not constitute a substantial number. See *A Guide for Government Agencies: How To Comply With the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration at 20 (“The interpretation of the term “substantial number” is not likely to be five small firms in an industry with more than 1,000 firms.”).

Having determined that a substantial number of small entities will not be impacted by the proposed rule, we need not assess whether the impact on those small entities affected would be economically significant. Nevertheless, we also conclude that the \$331 approximate cost of this rule per contractor establishment is not likely to have a significant economic impact on

the small entities subject to the proposed rule.

We note, too, the significant benefits of the proposed rule to both individuals with disabilities and federal contractors. These benefits are discussed extensively in the Section-by-Section Analysis section of this NPRM and in the discussion of this proposal’s conformity with Executive Order 12866. Generally, the proposed rule will benefit individuals with disabilities and the contractor by providing effective mechanisms, such as mandatory job listing requirements and linkage agreements with disability-related organizations that facilitate the ability of contractors to connect with qualified applicants with disabilities, who, with a workforce participation rate of just 21.8%, represent a largely untapped potential labor source. Tapping into this underutilized pool can help stabilize an aging and shrinking workforce, thereby maintaining (or even increasing) productivity. Increasing employment opportunities for individuals with disabilities will also likely result in a decrease in the number of individuals receiving Social Security Disability Insurance (SSDI) benefits and disability payments through contractor-sponsored insurance plans, as individuals with disabilities join the workforce and discontinue such payments. This will increase the incomes of these newly working individuals with disabilities, which, in turn, will likely increase the demand for goods and services, including those provided by small businesses.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a pre-clearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department’s collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA and displays a currently valid OMB control number. The public is not required to

²¹ Holzer, H. and Neumark, D., “Assessing Affirmative Action,” *Journal of Economic Literature*, Vol. XXXVII (2000).

²² World Institute on Disability, <http://www.wid.org/about-wid>.

²³ The EEO-1 data base separately identifies contractor entities and the facilities that comprise them. The FPDS-NG data base, by contrast, identifies contractor facilities, but does not identify the larger entities of which they are a part.

²⁴ This figure includes 6,049,655 employer firms and 21,351,320 non-employer firms.

²⁵ 20490 is .075% of 27.4 million and .34% of 6,049,655.

²⁶ Since federal contracts are not limited to specific industries, it is appropriate to assess the impact of this proposed rule on small entities nationwide.

respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. Until any final regulations become effective and OFCCP publishes a notice announcing OMB's approval of these proposed information collections, they will not take effect.

The information collection requirements contained in the existing section 503 regulations, with the exception of those related to complaint procedures, are currently approved under OMB Control No. 1250-0003 (Recordkeeping and Reporting Requirements-Supply and Service) and OMB Control No. 1250-0001 (Construction Recordkeeping and Reporting). The information collection requirements contained in the existing complaint procedures regulation are currently approved under OMB Control No. 1250-0002.

The proposed rule contains information collections that are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. This proposal includes several new requirements shown below with their respective burden estimates.

The information collections discussed below relate to Federal contractor and subcontractor responsibilities under section 503 as amended and its implementing regulations at 41 CFR 60-741. OFCCP invites the public to comment on whether each of the proposed collections of information:

- (1) Is necessary to the proper performance of the agency, including whether the information will have practical utility;
- (2) Estimates the projected burden, including the methodology and assumptions used, accurately; and
- (3) Is structured to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses).

Where estimates are provided or assumptions are described, contractors and other members of the public are encouraged to provide data they have that could help OFCCP refine the estimates of amount of time needed to fulfill specific requirements.

• 60-741.5

Contractor must provide Braille, large print, or other versions of the EEO poster so that visually impaired individuals may read the notice themselves (¶4 of EO Clause). Contractors may obtain copies of the joint EEOC-OFCCP EEO poster in accessible formats, upon request, from EEOC.

■ OFCCP used Bureau of Labor Statistics (BLS) Data, the "Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted" for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the US workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000, or 1,272,480 disabled individuals, works for a federal contractor. Data on visually impaired employed individuals is not separated out from the total of employed individuals with disabilities, therefore, OFCCP estimates 10% of disabled individuals are visually impaired, for an estimated total of 127,248 visually impaired individuals working for federal contractors. This total would include disabled veterans who should not be counted twice. OFCCP had previously estimated 6,200 visually impaired disabled veterans. OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:

The FY 2008 VETS-100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request and accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment.

Therefore, 127,248-6200 = 121,048. OFCCP estimates that it takes 5 minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing the notice in an alternative format, for a total of 10 minutes per request. Therefore, 10 minutes × 121,048 = 1,210,480 minutes/60 = 20,175 total Federal contractor hours.

Posting of notice for employees working at a site other than the contractor's physical location. (¶4 of EO Clause). OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the offsite notification for both section 4212 and section 503 occurs in the same EEO poster, which contractors may obtain, upon request, from OFCCP or EEOC. Therefore, no additional contractor burden exists for this paragraph.

Contractor must state in all solicitations and advertisements that it is an EEO employer of individuals with disabilities (¶7 of EO Clause). (This is a third party disclosure burden.) The contractor already must state that it is an EEO employer due to many state and federal requirements, including the Executive Order 11246 EEO requirements. This revision would simply

require the contractor to add individuals with disabilities to the list of categories of protected EEO groups. OFCCP estimates 5 minutes additional burden per contractor, or $171,275 \times 5 \text{ minute}/60 = 14,273$ total third party disclosure hours.

Contractor must include the entire clause verbatim in Federal contracts (d). (This is a third party disclosure burden.) OFCCP estimates 5 minutes per contractor to download and incorporate the required text, or $171,275 \times 5 \text{ minute}/60 = 14,273$ total third party disclosure hours.

• 60-741.41

Contractor must inform employees who do not work at contractor's physical establishment regarding the availability of AAP for review. OFCCP has counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the offsite notification for both section 4212 and section 503 would occur in the same notice. Therefore, no additional contractor burden exists for this paragraph.

• 60-741.42

.42(a) and (b)—The proposed regulation would require that the contractor invite all applicants to self-identify as a protected individual with a disability prior to and after an offer of employment. OFCCP provides mandatory text for the invitations to self-identify so that the contractor will not have the burden of creating these invitations. We estimate it will take 5 minutes for the contractor to download and save the prescribed text of the invitations to self-identify into a separate document that it can store electronically, include it in electronic applications or print out to include in a hard copy application package as needed. Therefore, $5 \text{ minute} \times 171,275 \text{ establishments}/60 = 14,273$ total Federal contractor hours adapting the self-identification forms for contractor use.

OFCCP estimates that protected individuals with disabilities will have zero burden complying with this proposal in the course of completing their applications for employment with a contractor and checking the appropriate boxes in the self-identification forms. No written documentation is required and the applicant need only check a box on a form already provided.

.42(c)—The proposed regulation would require that the contractor annually re-invite all employees to self-identify as an individual with a disability. We estimate it will take 5 minutes for the contractor to download and save the prescribed text of the invitation to self-identify into a separate document that it can store electronically and transmit to its employees. $5 \text{ minute} \times 171,275 \text{ establishments}/60 = 14,273$ total Federal contractor hours adapting the self-identification forms for contractor use.

OFCCP estimates that protected employees with disabilities will have zero burden complying with this proposal in the course of completing the annual resurvey. No

written documentation is required as the employee need only check a box on a form already provided.

.42(e)—Contractor must maintain self-identification data. The contractor was required to maintain some self-identification data prior to this proposed regulation. Reviewing the entire data collection process required under .42, we estimate that simply maintaining the completed self-identification forms, whether collected under (a), (b), or (c) of this section, will take 1 minute per contractor, or $171,275 \text{ minutes}/60 = 2,855$ total Federal contractor hours. No additional contractor burden has been calculated for processing/analyzing the self-identification results as the only requirement under this paragraph is that the contractor maintains the data to provide to OFCCP upon request. Any burden imposed by the actual use/analysis of the data would be covered under the appropriate analysis sections such as .44(h) (Audit and Reporting System) and/or .44(k) (Data Collection Analysis).

• 60–741.44

.44(a) Policy statement. Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired persons may read the policy themselves. OFCCP used Bureau of Labor Statistics (BLS) Data, the “Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted” for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the U.S. workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000 or 1,272,480 disabled individuals works for a federal contractor. Data on visually impaired employed individuals is not separated out from the total of employed individuals with disabilities, therefore, OFCCP estimates 10% of disabled individuals are visually impaired, for an estimated total of 127,248 visually impaired individuals working for federal contractors. This total would include disabled veterans who should not be counted twice. OFCCP previously estimated that there are 6,200 visually impaired disabled veterans in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:

The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request an accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment.

Therefore, $127,248 - 6200 = 121,048$. OFCCP estimates that it takes 5 minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing this document in an alternative format, for a total of 10 minutes. Therefore, $10 \text{ minutes} \times 121,048 = 1,210,480$ minutes/60 minutes = 20,175 total Federal contractor hours complying with this paragraph.

.44(b) Review of personnel processes. Contractor must review personnel processes annually, and is required to go through a

specific analysis for doing so which would include: (1) identifying the vacancies and training programs for which applicants and employees with disabilities were considered; (2) providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

■ The contractor needs to identify vacancies as part of the review. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the identified vacancies for both section 4212 and section 503 would be identical. Therefore, no additional contractor burden exists for this paragraph.

■ The contractor needs to identify training programs for individuals with disabilities applicants and employees. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would expend no additional hours under this NPRM, as the identified training programs for both section 4212 and section 503 would be identical. Therefore, no additional contractor burden exists for this paragraph.

■ For providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations, OFCCP estimates 30 minutes per contractor per year, or $30 \times 171,275/60 = 85,638$ total Federal contractor hours.

■ For describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs. OFCCP used Bureau of Labor Statistics (BLS) Data, the “Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted” for November 2010. This data shows 5,784,000 individuals with disabilities in the civilian labor force out of a total of 147,914,000. Since approximately 22% of the U.S. workforce works for a federal contractor, OFCCP estimates that 22% of 5,784,000 or 1,272,480 disabled individuals works for a federal contractor. This total would include disabled veterans who should not be counted twice. OFCCP previously estimated that there are 62,000 disabled veterans in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The calculations were as follows:

The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Thus, there will be a total of 62,000 inquiries. Therefore, $1,272,480 - 62,000 = 1,210,480$. OFCCP estimates 10% of referrals leading to

an accommodation request, and 30 minutes per accommodation request. Therefore, the hours would be $30 \times 1,210,480 \times 10\%/60 = 60,524$ total Federal contractor hours.

.44(c)(1) Physical and mental qualifications. Contractor must review physical and mental job qualifications annually to ensure that they are job-related and consistent with business necessity. This provision exists in the current section 503 regulations (as well as the current section 4212 regulations); the only difference is that the proposed regulations call for the review to occur “annually,” rather than “periodically.” Therefore, all existing or previous contractors should have experience in performing the required review.

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor’s review of physical and mental qualifications would occur only once for both section 4212 and section 503. Therefore, no additional contractor burden exists for this paragraph.

.44(c) Direct Threat. Contractor must document the results of its annual review of physical and mental job qualifications, and document any employment action taken on the basis of a believed “direct threat.”

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor’s documentation of its review of physical and mental qualifications would occur only once for both section 4212 and section 503. Therefore, no additional contractor burden exists for this paragraph.

• 60–741.44(f)

.44(f)(1)(i) Contractor must list job openings with the nearest Employment One-Stop Career Center.

OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans’ Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). A contractor would list the same job openings to comply with the section 4212 NPRM as it would for the section 503 NPRM. Therefore, no additional contractor burden exists for this paragraph.

.44(f)(1)(ii) Linkages. Contractor must enter into linkage agreements with:

■ Either a local State Vocational Rehabilitation Service Agency (SVRA) or an organization in the Ticket to Work Employment Network Directory;

■ One of the following organizations: (1) the Employer Assistance and Resource Network (EARN); (2) the nearest Employment One-Stop Career Center, established under the Workforce Investment Act; (3) the nearest Department of Veterans Affairs Regional Offices; (4) any other local disability group, organization or Centers for Independent Living that provide services to individuals with disabilities; (5) placement or career offices of educational institutions; or (6) private recruitment sources; and

■ One or more of the disabled veterans’ service organizations listed in the Employer

Resources section of the National Resource Directory (NRD), or any future service that replaces or complements it, other than the agencies listed above.

Therefore, each contractor must enter into 3 linkage agreements. Linkage Agreement means an agreement describing the connection between the contractor and appropriate recruitment and/or training sources. To assist contractors, OFCCP will provide a sample linkage agreement on its Web page.

The contractor has a variety of ways to establish section 503 linkage agreements. The contractor can receive nationwide assistance from OFCCP Compliance Officers (COs) to help it establish the 3 linkage agreements. Secondly, during the normal course of an OFCCP compliance review, the CO will contact all appropriate linkage resources to obtain specific information on availability of applicants and potential trainees for positions in the contractor's labor force. If possible, the CO will arrange a meeting between the recruitment/referral resources and the contractor.

Where a resource indicates that it can provide applicants or trainees, the CO will include the contractor's commitment to utilize the linkage source along with other actions in the Letter of Commitment or in the Conciliation Agreement.

OFCCP estimates that 30% of the contractors, or 51,383, will accept OFCCP assistance to help set up their linkage agreements and it will take these contractors on average 1.5 hours to establish one new linkage agreement. For the remaining 119,892 contractors, OFCCP estimates that establishing a new linkage agreement will take an average of 5.5 hours. Beyond the first year after this rule becomes effective, it is estimated the contractor will set up one new agreement a year. It is estimated that maintaining a single, ongoing linkage agreement will take an average of 15 minutes for all 171,275 contractors.

For those contractors setting up linkage agreements on their own, OFCCP estimates that on average, a contractor will establish one new agreement and maintain two ongoing agreements in a given year, which would be 5.5 hours + .25 hours + .25 hours = 6 hours. If the contractor establishes linkage agreements with OFCCP's assistance, we estimate an annual average of 1.5 hours per contractor to establish a new linkage agreement and .25 hours to maintain each of the two ongoing linkage agreements, which would be 1.5 hours + .25 hours + .25 hours = 2 hours. Therefore, 6 hours × 119,892 contractors = 719,352 hours, and 51,383 × 2 hours = 102,766 hours, for a total of 822,118 Federal contractor hours.

However, NRD is also used as a resource in the section 4212 NPRM, and those burden hours are already counted under the section 4212 NPRM and should not be counted twice. To adjust the section 503 burden hours accordingly, OFCCP reduced the total of 822,118 hours by one-third, for a total of 550,819 Federal contractor hours.

.44(f)(1)(iii) Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers. (This is a third party disclosure burden)

As the same provision exists in the section 4212 NPRM, and the creation of the notice is already counted there, OFCCP estimates that it would take the contractor an additional 5 minutes to revise the section 4212 notification to include the required reference to section 503. Therefore, 5 minutes per contractor × 171,275/60 minutes = 14,273 total third party disclosure hours.

.44(f)(3) Assessment. Contractor must document its review of outreach and recruitment efforts.

OFCCP estimates that documenting this required review of outreach and recruitment will take 10 minutes annually. OFCCP further estimates that 1% of federal contractors are first-time contractors during an abbreviated AAP year, therefore would not be able to complete an annual outreach and recruitment effort. Therefore, reducing the 171,275 by 1% (1,713 contractors) = 169,562 contractors, at 10 minutes each/60 = 28,260 total Federal contractor hours. The burden and cost of actually conducting the review does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

.44(f)(4) Linkage Recordkeeping. Contractor must document (f)(1) linkage agreements and maintain these documents for 5 years.

Since establishing a linkage agreement includes its documentation, there is no additional burden for this paragraph beyond that already set forth in the burden calculation for .44(f)(1)(i) and (ii).

.44(g) Internal Dissemination of Policy. Contractor is required to undertake efforts to internally disseminate its EEO policy, including, if the contractor is a party to a collective bargaining agreement, meeting with union officials to inform them of the policy. (This is a third party disclosure burden):

The January 22, 2010, Bureau of Labor Statistics News Release states that in 2009, union membership was 12.3%. In its most recent Supply and Service (S&S) PRA Justification, OFCCP estimated 30 minutes composition time for union notification. For this NPRM, we estimate 15 minutes preparation for this new notification requirement, as contractors party to a collective bargaining agreement already have a notification template in place. We also estimate 15 additional minutes to meet with union officials as they are already required to meet with union officials in S&S. The total third party disclosure burden hours would be 171,275 × 12.3% × 30 minutes/60 = 10,533 total Federal contractor hours.

The burden and cost of other requirements of .44(g) does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

.44(g)(3) Contractor must document internal dissemination efforts in (g), retain these documents as employment records subject to the recordkeeping requirements of § 60–741.80.

Since much of the documentation will occur during the preparation time, OFCCP estimates an additional 5 minutes of recordkeeping per contractor, which means 5 minutes × 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours.

.44(h) Audit and Reporting System. Contractor must document the actions taken to comply with audit and reporting system, and retain these documents as employment records subject to the recordkeeping requirements of § 60–741.80.

Since much of the documentation will occur when conducting the annual audit, OFCCP estimates an additional 5 minutes recordkeeping burden per contractor, which means 5 minutes × 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours.

.44(i) Responsibility for Implementation. Contractor must identify responsible official for AAP on all internal and external communications regarding the AAP. OFCCP counted these hours in its Notice of Proposed Rulemaking (NPRM) revising the regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act, published in 76 FR 23358 (April 26, 2011). The same person will likely be identified for both section 503 and section 4212 regulations. Therefore, no additional contractor burden exists for this paragraph.

.44(j) Training. Contractor must document its training efforts as set forth by the regulation, and maintain these documents as required by 60–741.80.

OFCCP estimates that much of the documentation will be included in the training preparation time. OFCCP estimates an additional 5 minutes recordkeeping time per contractor, which means 5 minutes × 171,275 = 856,375 minutes/60 = 14,273 total Federal contractor hours. The burden and cost of the actual training preparation and conducting the training does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866 and the Regulatory Flexibility Act.

.44(k) Data Collection Analysis.

Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; must maintain these records for 5 years:

(1) The number of referrals of individuals with disabilities that the contractor received from applicable employment service delivery system(s), such as State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers;

(2) The number of referrals of individuals with disabilities that the contractor received from other entities, groups or organizations with which the contractor has a linkage agreement pursuant to paragraph (f)(1)(i);

(3) The number of applicants who self-identified as individuals with disabilities pursuant to § 60–741.42(a), or who are otherwise known to be individuals with disabilities;

(4) The total number of job openings and total number of jobs filled;

(5) The ratio of jobs filled to job openings;

(6) The total number of applicants for all jobs;

(7) The ratio of applicants with disabilities to all applicants ("applicant ratio");

(8) The number of applicants with disabilities hired;

(9) The total number of applicants hired; and

(10) The ratio of individuals with disabilities hired to all hires ("hiring ratio").

The number of hires shall include all employees as defined in § 60–741.2.

The calculations for #4, 5, 6, and 9 are already included in the Executive Order 11246 AAP. Therefore, there is no additional burden for #4, 5, 6, and 9.

The remaining calculations, for #1, 2, 3, 7, 8, and 10, OFCCP estimates at 10 minutes each per contractor, or 60 minutes recordkeeping time per contractor. Therefore, the total burden would be $60 \text{ minutes} \times 171,275/60 = 171,275$ total Federal contractor hours.

- **60–741.45**

.45(a) Development and implementation. Contractor must develop and implement procedures for processing reasonable accommodation requests.

OFCCP estimates that much of the documentation will be included in the development and implementation of these procedures. OFCCP estimates an additional 30 minutes recordkeeping time per contractor, which means $30 \text{ minutes} \times 171,275 = 5,138,250 \text{ minutes}/60 = 85,638$ total Federal contractor hours. The burden and cost of the actual development and implementation does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866 and the Regulatory Flexibility Act. 1

.45(b) Designation of responsibility. Contractor must designate responsible official for implementing reasonable accommodation procedures.

That official should already be in place for current contractors. For 1% first time contractors, $171,275 \times 1\% = 1,713$ contractors, OFCCP estimates 5 minutes per contractor, or $1,713 \times 5 \text{ minutes} = 8,565 \text{ minutes}/60 = 143$ total Federal contractor hours.

.45(c) Dissemination of procedures. Contractor must disseminate its reasonable accommodation procedures to employees, including off-site employees, and applicants.

OFCCP estimates that it would take the contractor 15 minutes to post the procedures on its Web site in an accessible format. Therefore, 15 minutes per contractor $\times 171,275/60 \text{ minutes} = 42,819$ total Federal contractor hours.

.45(d) Required Elements. A contractor's reasonable accommodation procedures must include specific required elements, including official contact information, processing requests for employees and applicants, timeframes, and a description of these processes. These burden hours are already included in .45(a) Development and Implementation.

.45(e) Training. A contractor must train its managers and supervisors on reasonable accommodation.

OFCCP estimates that much of the documentation will be included in the training preparation time. OFCCP estimates an additional 5 minutes recordkeeping time per contractor, which means $5 \text{ minutes} \times 171,275 = 856,375 \text{ minutes}/60 = 14,273$ total Federal contractor hours. The burden and cost of the actual training preparation and conducting the training does not fall under the PRA, and is instead set forth in the sections on Executive Order 12866.

- **60–741.46**

Contractor must set a utilization goal of 7%.

Minimum Goal. OFCCP has established a utilization goal of 7% as a benchmark against which the contractor must measure the representation of individuals with disabilities within each job group in its workforce.

Since the goal is provided by OFCCP, OFCCP estimates 5 minutes recordkeeping time per contractor to document the goal requirement, which means $5 \text{ minutes} \times 171,275/60 = 14,273$ total Federal contractor hours.

Comparing incumbency to the goal: The contractor shall compare the percentage of its incumbent employees who are individuals with disabilities with the goal in paragraph (a) of this section on an annual basis. When making this comparison the contractor shall:

(1) Use the job groups it established pursuant to 41 CFR 60–2.12 or part 60–4. Supply and service contractors under OMB Information Collection Request OMB Control No. 1250–0003 (Recordkeeping and Reporting Requirements—Supply and Service) have already established job groups so there are no additional hours associated with developing job groups.

(2) Separately state the percentage of individuals with disabilities it employs in each job group. This rule requires contractors to invite all applicants to self-identify as individuals with disabilities prior to employment (.42(a) and (b)). The burden for self-identification is listed at (.42(a) and (b)). Therefore contractors will know whether their applicants are individuals with disabilities. In addition, contractors must annually survey its employees so that any employee may self-identify as an individual with a disability. The burden hours for the survey are at (.42(c)). However, burden hours must be assigned to identifying the percentage of individuals within each job group.

• As this is a new requirement, OFCCP estimates that it will take 60 minutes for contractors to determine whether they have met the goal the first year, and 30 minutes for all subsequent years. Therefore, $60 \times 171,275 \text{ Federal contractors}/60 \text{ minutes} = 171,275 \text{ hours.}; 30 \times 171,275/60 = 85,638$ hours.

This task is informed by the results of several other proposed requirements, including the review of the effectiveness of contractors' outreach and recruitment efforts required by section 60–741.44(f)(3) and the review of physical and mental job qualifications required by section 60–741.44(c). The burden and costs associated with these requirements are listed and discussed separately.

Action-oriented programs. When the percentage of individuals with disabilities in one or more job groups is less than the goal established in paragraph (a) of this section, the contractor must develop and execute action-oriented programs designed to correct any identified problems areas. Entering linkage agreements with recruitment sources is considered action-oriented programs. This NPRM already requires contractors to enter into 3 linkage agreements, in order to

increase the number of individuals with disabilities within their workforce. Burden hours have already been given for these programs under section (.44(f)(1)) and will not be duplicated for this action.

- **60–741.60**

.60(a)(3)—Contractor must provide documents to OFCCP on-site or off-site at OFCCP's request, not at the contractor's option.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) ("an administrative action, investigation, or audit involving an agency against specific individuals or entities").

.60(c)—New procedure for pre-award compliance evaluations.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) ("an administrative action, investigation, or audit involving an agency against specific individuals or entities").

- **60–741.80**

See new 5 year recordkeeping requirements in sections 741.44(f)(4) and 741.44(k).

No additional burden hours as they are included in the individual calculations above.

- **60–741.81**

Contractor must provide off-site access to documents if requested by OFCCP. Such records are never requested except during the course of a specific investigation of a particular contractor.

Consequently, these hours are not included in burden as they are excepted under 5 CFR 1320.4(a)(2) ("an administrative action, investigation, or audit involving an agency against specific individuals or entities").

Contractor must specify to OFCCP all formats in which its records are available.

These hours not included in burden as they are excepted under 5 CFR 1320.4(a)(2) ("an administrative action, investigation, or audit involving an agency against specific individuals or entities").

The Department has submitted a copy of the information collections associated with this proposed rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review and approval. In addition to filing comments with OFCCP, interested persons may submit comments about the information collections, including suggestions for reducing their burden, to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW., Room 10235, Washington, DC 20503. Attention: Desk Officer for DOL/OFCCP. To ensure proper consideration comments to OMB should reference ICR reference number: [insert the number from ROCIS when OFCCP creates the package]. Upon receiving OMB approval of the new information, the Department will submit non-substantive change requests to OMB Control Numbers 1250–0001 and 1250–0003 in order to remove regulatory citations for any information collected purely under the new collection.

TABLE 1—REPORTING, RECORDKEEPING, AND THIRD PARTY DISCLOSURE BURDEN

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must provide Braille, large print, or other versions of poster so that visually impaired may read the notice themselves (¶4 of EO Clause).	60-741.5	.....	.....	10 minutes per accommodation request. Total Hours 20,175.
Contractor must state in all solicitations and advertisements that it is an EEO employer of individuals with disabilities (¶7 of EO Clause). [Note: Burden is based on one-time action of adding “individuals with disabilities” to list of protected groups].	60-741.5	5 minutes per contractor. Total third party disclosure burden hours 14,273.		
Contractor must cite to EEO clause in Federal contracts using specific text provided by OFCCP (.5(d)) [Note: Burden is based on one-time action of downloading & saving text provided by OFCCP].	60-741.5	5 minutes per contractor. Total third party disclosure burden hours 14,273.		
Contractor must invite all applicants to self-identify as individuals with disabilities prior to and subsequent to offer of employment (.42(a) and (b)). [Note: Burden is based on one-time cost of downloading OFCCP-prescribed mandatory invitation language].	60-741.42	5 minutes per contractor. Total Hours 14,273.		
Contractor must annually survey its employees so that any employee may self-identify as an individual with a disability (.42(c)). [Note: Burden is based on one-time cost of downloading OFCCP-prescribed mandatory invitation language].	60-741.42	5 minutes per contractor. Total Hours 14,273.		
Contractor must maintain self-identification data (.42(e)).	60-741.42	.....	1 minute per contractor. Total Hours 2,855.	
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)).	60-741.44	.....	.....	10 minutes per accommodation request. Total Hours 20,175.
Contractor must review personnel processes annually, and is required to go through a specific analysis for doing so which would include: Providing a statement of reasons for rejecting individuals with disabilities describing the nature and type of accommodations for individuals with disabilities (.44(b)).	60-741.44	.....	30 minutes per contractor (statement of reasons). Subtotal Hours 85,638.	30 minutes per accommodation request. Subtotal Hours 60,524, Total Hours 146,162.
Contractor must enter into linkage agreement with nearest SVRA, one of the organizations listed in (f)(1), and an organization listed in the National Resource Directory (.44(f)(1)).	60-741.44	.....	Total Hours 550,819.	
Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers (.44(f)(1)(iii)).	60-741.44	.....	5 minutes per contractor. Total third party disclosure burden hours 14,273.	
Contractor must review outreach and recruitment efforts on an annual basis and evaluate their effectiveness; contractor must identify and implement further outreach efforts if existing efforts are found ineffective (.44(f)(3)).	60-741.44	.....	10 minutes per contractor (non first time contractors). Total Hours 28,260.	
If the contractor is a party to a collective bargaining agreement it must meet with union officials to inform them of the policy (.44(g)).	60-741.44	.....	30 minutes per unionized contractor. Total third party disclosure burden hours 10,533.	
Contractor must document internal dissemination efforts in (g) and retain these documents (.44(g)(4)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must document the actions taken to comply with audit and reporting system and retain these documents (.44(h)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must document its training efforts as set forth by the reg, and maintain these documents (.44(j)).	60-741.44	.....	5 minutes per contractor. Total Hours 14,273.	

TABLE 1—REPORTING, RECORDKEEPING, AND THIRD PARTY DISCLOSURE BURDEN—Continued

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; and must maintain these records (.44(k)).	60-741.44	.....	60 minutes per contractor. Total Hours 171,275.	
Contractor is required to develop and implement reasonable accommodation procedures (.45(a)).	60-741.45	.....	30 minutes per contractor. Total hours 85,638.	
Contractor must identify responsible official for reasonable accommodation procedures (.45(b)).	60-741.45	5 minutes per first time contractor. Total Hours 143.		
Contractor must disseminate reasonable accommodation procedures (.45(c)).	60-741.45	15 minutes per contractor. Total Hours 42,819.		
Contractor must train managers and supervisors (.45(e)).	60-741.45	.....	5 minutes per contractor. Total Hours 14,273.	
Contractor must set hiring goals (.46)	60-741.46	5 minutes per contractor (initial documentation). Subtotal Hours 14,273. 60 minutes per contractor (first year analysis). Subtotal hours 171,275.	30 minutes per contractor (analysis). Subtotal hours 85,638, Total hours 271,186.	
Total Recordkeeping burden hours	1,425,145			
Total Reporting burden hours.				
Total Third Party burden hours	53,352			
Total all hours	1,478,497			

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation

for management, professional, and related occupations as \$50.07 per hour and administrative support as \$22.67 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related

occupations and 48% percent will be administrative support. We have calculated the total one-time, recurring, and overall estimated annualized costs as follows:

One-Time Costs:			
Mgmt. Prof. 285,602 hours × .52 × \$50.07 =			\$7,436,048
Adm. Supp. 285,602 hours × .48 × \$22.67 =			3,107,807
Operations & Maintenance Cost (see discussion below)			0
Total cost estimate =			10,543,855
Estimated average cost per establishment is: \$10,543,855/171,275 =			62
Recurring Costs:			
Mgmt. Prof. 1,192,895 hours × .52 × \$50.07 =			31,058,691
Adm. Supp. 1,192,895 hours × .48 × \$22.67 =			12,980,606
Operations & Maintenance Cost (see discussion below)			1,820,859
Total annualized cost estimate =			45,860,156
Estimated average cost per establishment is: \$ 45,860,156/171,275 =			268
Total Costs:			
Mgmt. Prof. 1,478,497 hours × .52 × \$50.07 =			38,494,739
Adm. Supp. 1,478,497 hours × .48 × \$22.67 =			16,088,413
Operations & Maintenance Cost (see discussion below)			1,820,859
Total annualized cost estimate =			56,404,011
Estimated average cost per establishment is: \$56,404,011/171,275 =			329

Operations and Maintenance Costs

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the time burden calculated above associated with this collection.

60–741.5

Contractor must provide the EO poster for review by employees and applicants, including in alternative formats upon request such as Braille, large print, or other versions so that visually impaired individuals may read the notice themselves (¶ 4 of EO Clause). OFCCP does not expect the contractor to incur any cost for this element as the poster may be acquired from OFCCP or, in alternative formats from EEOC.

60–741.42

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitation to self-identify. The contractors must invite all applicants with the pre- and post-offer invitation, and must also survey its employees annually with an invitation to self-identify. Given the increasingly

widespread use of electronic applications, any contractor that uses such applications would not incur copy costs. However, to account for contractors who may still choose to use paper versions, we are including printing and/or copying costs.

Therefore, we estimate 1 page for the pre- and post-offer invitations printed for 60 applicants per year, and 1 page for the employee survey invitation printed for 60 employees per year. We also estimate an average copying cost of .08 cents per page. The estimated total cost to contractors will be: pre- and post-offer— $171,275 \times 1 \times 60 \times \$0.08 = \$822,120$; survey— $171,275 \times 1 \times 60 \times \$0.08 = \$822,120$; total cost $\$822,120 \times 2 = \$1,644,240$

60–741.44

Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)). OFCCP estimates that the contractor will have some operations and maintenance costs associated with providing the AA policy statement. We estimate that the cost of an alternative

format, such as Braille or audio, to be \$1.00 per contractor. The estimated total cost to contractors will be: $\$1.00 \times 171,275$ federal contractor establishments = $\$171,275$

60–741.44

Contractor must provide its AAP to OFCCP during a desk audit. Contractor must provide its AAP to OFCCP during a desk audit. In light of the increased use of electronic formats and the proposed requirement, in section 60–741.81, that contractors provide records to OFCCP in electronic format, where available, we estimate that only 30 percent of contractors will be submitting paper copies of their AAPs. Given an average copying cost of \$.08 per page and an average size of an AAP of 7 pages, the estimated total copying cost to contractors will be: $7 \text{ pages} \times \$0.08 \times 1,501$ (5,004 FY 2009 Compliance Evaluations—30%) = $\$841$ In addition, we estimate an average mailing cost of \$3.00 per contractor. The total mailing cost for contractors will be $\$3.00 \times 1,501 = \4503 . The total estimated costs would be $\$841 + \$4503 = \$5,344$

TABLE 3—OPERATIONS AND MAINTENANCE COSTS

Contractor must post EO poster for review by employees and applicants (¶ 4 of EO Clause)	60–741.5	\$0
Contractor must provide Braille, large print, or other versions of EO poster so that visually impaired individuals may read the notice themselves (¶ 4 of EO Clause)	60–741.5	0
Contractor must invite all applicants and employees to self-identify as an individual with a disability (.42(a)(b)(c))	60–741.42	1,644,240
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired individuals may read the notice themselves (.44(a))	60–741.44	171,275
Copying and mailing costs of AAPs (.44)	60–741.44	\$5,344
Total O&M Costs		1,820,859

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Disclosures and Recordkeeping Under Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities

OMB ICR Reference Number: [Provide from ROCIS].

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 171,275.

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 1,464,224.

Estimated Total Annual Burden Cost (Start-up, capital, operations, and maintenance): \$1,820,859.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this NPRM does not include any Federal mandate that may result in excess of \$100 million in expenditures

by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This proposed rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

This NPRM does not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The NPRM would not have substantial direct effects

on one or more Indian tribes, on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes.

Executive Order 13045 (Protection of Children)

This NPRM would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this NPRM in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and DOL NEPA procedures, 29 CFR part 11, indicates the NPRM would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This NPRM is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This NPRM is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This NPRM was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The NPRM was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Parts 60–741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, and

Reporting and recordkeeping requirements.

Patricia A. Shiu,
Director, Office of Federal Contract Compliance Programs.

For the reasons set forth in the preamble, OFCCP proposes to revise 41 CFR part 60–741 to read as follows:

PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

- 60–741.1 Purpose, applicability and construction.
- 60–741.2 Definitions.
- 60–741.3 Exceptions to the definitions of “disability” and “qualified individual.”
- 60–741.4 Coverage and waivers.
- 60–741.5 Equal opportunity clause.

Subpart B—Discrimination Prohibited

- 60–741.20 Covered employment activities.
- 60–741.21 Prohibitions.
- 60–741.22 Direct threat defense.
- 60–741.23 Medical examinations and inquiries.
- 60–741.24 Drugs and alcohol.
- 60–741.25 Health insurance, life insurance and other benefit plans.

Subpart C—Affirmative Action Program

- 60–741.40 General purpose and applicability of the affirmative action program requirement.
- 60–741.41 Availability of affirmative action program.
- 60–741.42 Invitation to self-identify.
- 60–741.43 Affirmative action policy.
- 60–741.44 Required contents of affirmative action programs.
- 60–741.45 Reasonable Accommodation Procedures.
- 60–741.46 Utilization goals.
- 60–741.47 Providing priority consideration in employment.
- 60–741.48 Sheltered workshops.

Subpart D—General Enforcement and Complaint Procedures

- 60–741.60 Compliance evaluations.
- 60–741.61 Complaint procedures.
- 60–741.62 Conciliation agreements.
- 60–741.63 Violations of conciliation agreements.
- 60–741.64 Show cause notices.
- 60–741.65 Enforcement proceedings.
- 60–741.66 Sanctions and penalties.
- 60–741.67 Notification of agencies.
- 60–741.68 Reinstatement of ineligible contractors.
- 60–741.69 Intimidation and interference.
- 60–741.70 Disputed matters related to compliance with the act.

Subpart E—Ancillary Matters

- 60–741.80 Recordkeeping.
- 60–741.81 Access to records.

- 60–741.82 Labor organizations and recruiting and training agencies.
- 60–741.83 Rulings and interpretations.

Appendix A to Part 60–741—Guidelines on a Contractor’s Duty To Provide Reasonable Accommodation

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60–741.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to set forth the standards for compliance with section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which prohibits discrimination against individuals with disabilities and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.

(b) *Applicability.* This part applies to all Government contracts and subcontracts in excess of \$10,000 for the purchase, sale or use of personal property or nonpersonal services (including construction): *Provided*, That subpart C of this part applies only as described in § 60–741.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part: *Provided*, That compliance shall also satisfy the employment provisions of the Department of Labor’s regulations implementing section 504 of the Rehabilitation Act of 1973 (see 29 CFR 32.2(b)) when the contractor is also subject to those requirements.

(c) *Construction—(1) In general.* Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act (ADA) of 1990, as amended, (42 U.S.C. 12101 *et seq.*) or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title (29 CFR part 1630). The Interpretive Guidance on Title I of the Americans with Disabilities Act set out as an appendix to 29 CFR part 1630 issued pursuant to that title may be relied upon for guidance in interpreting the parallel non-discrimination provisions of this part.

(2) *Benefits under State worker’s compensation laws.* Nothing in this part alters the standards for determining eligibility for benefits under State worker’s compensation laws or under

State and Federal disability benefit programs.

(3) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of individuals with disabilities as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60–741.2 Definitions.

For the purpose of this part:

(a) *Act* means the Rehabilitation Act of 1973, as amended, 29 U.S.C. 706 and 793.

(b) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of section 503 of the Rehabilitation Act of 1973.

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

(d) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract in excess of \$10,000.

(e) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

(f) *Director* means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(g) *Disability*—(1) The term disability means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment (as defined in paragraph (w) of this section).

(2) As used in this part, the definition of "disability" must be construed in favor of broad coverage of individuals, to the maximum extent permitted by law. The question of whether an individual meets the definition under this part should not demand extensive analysis.

(3) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(4) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(5) See paragraphs (n), (p), (u), (w), and (aa) of this section, respectively, for definitions of "major life activities," "physical or mental impairment," "record of such an impairment," "regarded as having such an impairment," and "substantially limits."

(6) See § 60–741.3 for exceptions to the definition of "disability."

(h) *Equal opportunity clause* means the contract provisions set forth in § 60–741.5, "Equal opportunity clause."

(i) *Essential functions*—(1) *In general.* The term *essential functions* means fundamental job duties of the employment position the individual with a disability holds or desires. The term *essential functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

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

(k) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term "Government contract" does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) *Construction*, as used in paragraphs (k) and (y)(1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) *Contracting agency* means any department, agency, establishment, or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

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

(4) *Nonpersonal services*, as used in paragraphs (k) and (y)(1) of this section, includes, but is not limited to, the following: Utility, construction, transportation, research, insurance, and fund depository.

(5) *Person*, as used in paragraphs (k), (q), (v), (y), and (z) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(6) *Personal property*, as used in paragraphs (k) and (y)(1) of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(l) *Individual with a disability*—See definition of “disability” in paragraph (g) of this section.

(m) *Linkage agreement* means an agreement describing the connection between contractors and appropriate recruitment and/or training sources. A linkage agreement is to be used by the contractor as a source of potential applicants with disabilities, as required in § 60-741.44(f). The contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority.

(n) *Major life activities*—(1) *In general*. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) *Major bodily functions*. For purposes of paragraph (n)(1) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(o) *Mitigating measures*—(1) *In general*. The term mitigating measures includes, but is not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(2) *Ordinary eyeglasses or contact lenses*. The term *ordinary eyeglasses or contact lenses* means lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(3) *Low-vision devices*. The term *low-vision devices* means devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses.

(4) *Auxiliary aids and services*. The term *auxiliary aids and services* includes—

(i) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(ii) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(iii) Acquisition or modification of equipment or devices; and

(iv) Other similar services and actions.

(p) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(q) *Prime contractor* means any person holding a contract in excess of \$10,000, and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a contract subject to the act.

(r) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(s) *Qualified individual* means an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. See § 60-741.3 for exceptions to this definition.

(t) *Reasonable accommodation*—(1) *In general*. The term *reasonable*

accommodation means modifications or adjustments:

(i) To a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires;¹ or

(ii) To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) That enable the contractor’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor’s other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation.² This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor’s duty to provide reasonable accommodation.)

(4) Individuals who meet the definition of “disability” solely under the “regarded as” prong of the definition of “disability” as defined in paragraph (w)(1) of this section are not entitled to receive reasonable accommodation.

¹ A contractor’s duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

² Before providing a reasonable accommodation, the contractor is strongly encouraged to verify with the individual with a disability that the accommodation will effectively meet the individual’s needs.

(u) *Record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An individual shall be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.

(v) *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.

(w) *Regarded as having such an impairment*—(1) Except as provided in paragraph (w)(4) of this section, an individual is “regarded as having such an impairment” if the individual is subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

(2) Except as provided in paragraph (w)(4) of this section, an individual is “regarded as having such an impairment” any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts, or may or does ultimately establish a defense to such action.

(3) Establishing that an individual is “regarded as having such an impairment” does not, by itself, establish liability for unlawful discrimination in violation of this part. Such liability is established only when an individual proves that a contractor discriminated on the basis of disability as prohibited by this part.

(4) *Impairments that are transitory and minor.* Paragraph (w)(1) of this section shall not apply to an impairment that is shown by the contractor to be transitory and minor. The contractor must demonstrate that the impairment is *both* “transitory” and “minor.” Whether the impairment at issue is or would be “transitory and “minor” is to be determined objectively. The fact that a contractor subjectively believed the impairment was transitory and minor is not sufficient to defeat an individual’s

coverage under paragraph (w)(1) of this section.

(i) An impairment is transitory if it has an actual or expected duration of six months or less.

(ii) [Reserved]

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

(y) *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.

(z) *Subcontractor* means any person holding a subcontract in excess of \$10,000 and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” any person who has held a subcontract subject to the act.

(aa) *Substantially limits*—(1) *In general.* The term “substantially limits” shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. “Substantially limits” is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered “substantially limiting.” Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual’s performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general

population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

(2) *Non-applicability to the “regarded as” prong.* Whether an individual’s impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of § 60-741.2(g)(1)(iii).

(3) *Ameliorative effects of mitigating measures.* Except as provided in paragraph (aa)(3)(i) of this section, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures as defined in § 60-741.2(o).

(i) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially limits a major life activity. See § 60-741.2(o)(2) for a definition of “ordinary eyeglasses or contact lenses.”

(ii) *Non-ameliorative effects of mitigating measures.* The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.

(4) In determining whether an individual is substantially limited the focus is on how a major life activity is substantially limited, and not on the outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(5) *Predictable assessments.* The determination of whether an impairment substantially limits a major life activity requires an individualized

assessment. However, the principles set forth in this section are intended to provide for generous coverage through a framework that is predictable, consistent, and workable for all individuals and contractors with rights and responsibilities under this part.

Therefore, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under §§ 60–741.2(g)(1)(i) or (ii). Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. With respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(i) *Examples of predictable assessments.* Applying the principles set forth in this section it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis (MS) substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may also substantially limit additional major life activities not explicitly listed above.

(ii) [Reserved]

(bb) *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 (bb)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(cc) *United States*, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 60–741.3 Exceptions to the definitions of “disability” and “qualified individual.”

(a) *Current illegal use of drugs*—(1) *In general.* The terms “disability” and “qualified individual” do not include individuals currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use.

(2) *“Drug” defined.* The term drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) *“Illegal use of drugs” defined.* The term *illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) *Construction.* (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude from the definition of *disability* or *qualified individual* an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must, as appropriate, satisfy the requirements of the definition of *disability* and *qualified individual*.

(5) *Drug testing.* It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60–741.24(b)(1).)

(b) *Alcoholics*—(1) *In general.* The terms *disability* and *qualified individual* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desire, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(c) *Contagious disease or infection*—(1) *In general.* The terms *disability* and *qualified individual* do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason

of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (c)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (c)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(d) *Homosexuality and bisexuality.* Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

(e) *Other conditions.* The term *disability* does not include:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 60-741.4 Coverage and waivers.

(a) *Coverage—(1) Contracts and subcontracts in excess of \$10,000.* Contracts and subcontracts in excess of \$10,000 are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, “call-type” contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will not be in excess of \$10,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal

opportunity clause shall be applied to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Employment activities within the United States.* This part applies only to employment activities within the United States and not to employment activities abroad. The term *employment activities within the United States* includes actual employment within the United States, and decisions of the contractor made within the United States, pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) *Waivers—(1) Specific contracts and classes of contracts.* The Director may waive the application to any contract of the equal opportunity clause in whole or part when he or she deems that special circumstances in the national interest so require. The Director may also grant such waivers to groups or categories of contracts: where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the act. When a waiver has been granted for any class of contracts, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) *National security.* Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Director in writing within 30 days.

(3) *Facilities not connected with contracts.* (i) Upon the written request of the contractor, the Director may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Director finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the act.

(ii) The Director's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract shall include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay, and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility, and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract; and

(F) Such other factors that the Director deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Director's findings as to whether granting a waiver will interfere with or impede the effectuation of the act shall include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the act;

(B) The contractor's compliance with the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Director deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the act.

(iv) A contractor granted a waiver under paragraph (b)(3) of this section shall:

(A) Promptly inform the Director of any changed circumstances not reflected in the contractor's waiver request; and

(B) Permit the Director access during normal business hours to the contractor's places of business for the purpose of investigating whether the facility granted a waiver meets the standards and requirements of paragraph (b)(3) of this section, and for inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation.

(v)(A) A waiver granted under paragraph (b)(3) of this section shall terminate on one of the following dates, whichever is earliest:

(1) Two years after the date the waiver was granted.

(2) When the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract.

(3) When the Director determines, based on information provided by the contractor under this section or upon any other relevant information, that the facility does not meet the requirements of paragraph (b)(3) of this section.

(B) When a waiver terminates in accordance with paragraph (b)(3)(v)(A) of this section the contractor shall ensure that the facility complies with this part on the date of termination, except that compliance with §§ 60–741.40 through 60–741.45, if applicable, must be attained within 120 days of such termination.

(vi) False or fraudulent statements or representations made by a contractor under paragraph (b)(3) of this section are prohibited and may subject the contractor to sanctions and penalties under this part and criminal prosecution under 18 U.S.C. 1001.

§ 60–741.5 Equal opportunity clause.

(a) *Government contracts.* Each contracting agency and each contractor

shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES

1. The contractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability in all employment practices, including the following:

i. Recruitment, advertising, and job application procedures;

ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

iii. Rates of pay or any other form of compensation and changes in compensation;

iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

v. Leaves of absence, sick leave, or any other leave;

vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor;

vii. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

viii. Activities sponsored by the contractor including social or recreational programs; and

ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

3. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

4. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at

a lower height for easy viewing by a person using a wheelchair). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

5. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, individuals with physical or mental disabilities.

6. The contractor will include the provisions of this clause in every subcontract or purchase order in excess of \$10,000, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

7. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability.

[End of Clause]

(b) *Subcontracts.* Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) *Adaption of language.* Such necessary changes in language may be made to the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

(d) *Inclusion of the equal opportunity clause in the contract.* It shall be necessary to include the equal opportunity clause verbatim in the contract.

(e) *Incorporation by operation of the act.* By operation of the act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the act and the

regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) *Duties of contracting agencies.* Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in § 60–741.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60–741.20 Covered employment activities.

The prohibition against discrimination in this part applies to the following employment activities:

- (a) Recruitment, advertising, and job application procedures;
- (b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (c) Rates of pay or any other form of compensation and changes in compensation;
- (d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (e) Leaves of absence, sick leave, or any other leave;
- (f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;
- (g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
- (h) Activities sponsored by the contractor including social and recreational programs; and
- (i) Any other term, condition, or privilege of employment.

§ 60–741.21 Prohibitions.

(a) The term *discrimination* includes, but is not limited to, the acts described in this section and § 60–741.23.

(1) *Disparate treatment.* It is unlawful for the contractor to deny an employment opportunity or benefit or

otherwise to discriminate against a qualified individual on the basis of disability.

(2) *Limiting, segregating and classifying.* Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. For example, the contractor may not segregate employees into separate work areas or into separate lines of advancement on the basis of disability.

(3) *Contractual or other arrangements—(i) In general.* It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(ii) *Contractual or other arrangement defined.* The phrase *contractual or other arrangement or relationship* includes, but is not limited to, a relationship with: An employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(iii) *Application.* This paragraph (a)(3) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

(4) *Standards, criteria or methods of administration.* It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

(i) Have the effect of discriminating on the basis of disability; or

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

(5) *Relationship or association with an individual with a disability.* It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association.

(6) *Not making reasonable accommodation.* (i) It is unlawful for the

contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability as defined in §§ 60–741.2(g)(1)(i) or (ii), unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(ii) It is unlawful for the contractor to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(iii) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

(iv) A contractor is not required to provide reasonable accommodation to an individual who satisfies only the “regarded as having such an impairment” prong of the definition of “disability,” as defined in § 60–741.2(w)(1).

(7) *Qualification standards, tests and other selection criteria—(i) In general.* It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude an individual with a disability or a class of individuals with disabilities on the basis of disability but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions.

(ii) *Qualification standards and tests related to uncorrected vision.* It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the contractor, is shown to be job-related for the position in question and consistent with business necessity. An individual challenging a contractor's application of a qualification standard, test, or other criterion based on uncorrected vision need not be an individual with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

(iii) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

(8) *Administration of tests.* It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(9) *Compensation.* In offering employment or promotions to individuals with disabilities, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related pension or other disability-related benefit the applicant or employee receives from another source. Nor may the contractor reduce the amount of compensation offered to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.

(b) *Claims of No Disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of the lack of disability, or because an individual with a disability was granted an accommodation that was denied to an individual without a disability.

§ 60-741.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the

essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60-741.2(e) defining *direct threat*.)

§ 60-741.23 Medical examinations and inquiries.

(a) *Prohibited medical examinations or inquiries.* Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(b) *Permitted medical examinations and inquiries—(1) Acceptable pre-employment inquiry.* The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) *Employment entrance examination.* The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(3) *Examination of employees.* The contractor may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an employee to perform job-related functions.

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site. These medical examinations and activities do not have to be job-related and consistent with business necessity.

(5) Medical examinations conducted in accordance with paragraph (b)(2) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees with disabilities as a result of such examinations or inquiries, the contractor must demonstrate that the

exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) *Invitation to self-identify.* The contractor shall invite the applicant to self-identify as an individual with a disability as specified in § 60-741.42.

(d) *Confidentiality and use of medical information.* (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, as amended, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

§ 60-741.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear

Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in sensitive positions subject to such regulations.

(b) *Drug testing*—(1) *General policy*. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of § 60–741.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees*. Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–741.23(b)(5) and (c).

§ 60–741.25 Health insurance, life insurance, and other benefit plans.

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with State law.

(b) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(c) The contractor may establish, sponsor, observe, or administer the

terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(d) The contractor may not deny an individual with a disability equal access to insurance or subject an individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b), and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

Subpart C—Affirmative Action Program

§ 60–741.40 General purpose and applicability of the affirmative action program requirement.

(a) *General purpose*. An affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. An affirmative action program institutionalizes the contractor's commitment to equality in every aspect of employment and is more than a paperwork exercise. Rather, an affirmative action program is dynamic in nature and includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities.

(b) *Applicability of the affirmative action program*. (1) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$50,000 or more.

(2) Contractors described in paragraph (b)(1) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

(3) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–741.44(i).

(c) *Submission of program to OFCCP*. The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

§ 60–741.41 Availability of affirmative action program.

The full affirmative action program 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. In the event that the contractor has employees who do not work at a physical establishment, the contractor shall inform such employees about the availability of the affirmative action program by other means.

§ 60–741.42 Invitation to self-identify.

(a) *Pre-offer*. (1) As part of the contractor's affirmative action obligation, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part. This invitation shall be provided to each applicant when the applicant applies or is considered for employment, whichever comes first. The invitation may be included in the application materials for a position, but must be separable or detachable from the application.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (a) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(b) *Post-offer*. (1) At any time after the offer of employment, but before the applicant begins his or her job duties, the contractor shall invite the applicant to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (b) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(c) *Survey of employees*. The contractor shall invite each of its employees to inform the contractor, in an anonymous manner, whether he or she believes themselves to be an individual with a disability as defined in § 60–741.2(g)(i) or (ii) of this part. This survey shall be conducted annually, using the language and manner prescribed by the Director and published on the OFCCP Web site.

(d) The contractor may not compel or coerce an individual to self-identify as an individual with a disability.

(e) The contractor shall keep all information on self-identification confidential, and shall maintain it in a data analysis file (rather than in the

medical files of individual employees) in accordance with § 60–741.23(d). The contractor shall provide self-identification information to OFCCP upon request. Self-identification information may be used only in accordance with this part.

(f) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees of whose disability the contractor has knowledge.

(g) Nothing in this section shall relieve the contractor from liability for discrimination in violation of section 503 or this part.

§ 60–741.43 Affirmative action policy.

Under the affirmative action obligations imposed by the act, contractors shall not discriminate because of physical or mental disability and shall take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–741.20.

§ 60–741.44 Required contents of affirmative action programs.

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

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees with disabilities are provided the notice in a form that is accessible and understandable to the individual with a disability (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). The policy statement shall indicate the chief executive officer's support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things that the contractor will: Recruit, hire, train, and promote persons in all job titles, and ensure that all other personnel actions are administered without regard to disability; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and

applicants shall not be subjected to harassment, intimidation, threats, coercion, or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of section 503 or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;

(3) Opposing any act or practice made unlawful by section 503 or its implementing regulations in this part, or any other Federal, State or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by section 503 or its implementing regulations in this part.

(b) *Review of personnel processes.*

The contractor must ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that its personnel processes do not stereotype individuals with disabilities in a manner which limits their access to all jobs for which they are qualified. In addition, the contractor shall ensure that its use of information and communication technology is accessible to applicants and employees with disabilities.³ The contractor shall review such processes on at least an annual basis 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. These procedures shall, at a minimum, include the following steps:

(1) For each applicant with a disability, the contractor must be able to identify:

(i) Each vacancy for which the applicant was considered; and

(ii) Each training program for which the applicant was considered.

(2) For each employee who is an individual with a disability, the contractor must be able to identify:

(i) Each promotion for which the employee was considered; and

(ii) Each training program for which the employee was considered.

(3) In each case where an applicant or employee who is an individual with a disability is rejected for employment, promotion or training, the contractor shall prepare a statement of the reason as well as a description of any accommodation considered. The statement of the reason for rejection (if the reason is medically related), and the description of accommodation(s) considered, shall be treated as confidential medical records in accordance with § 60–741.23(d). These materials shall 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 to place an individual with a disability on the job, the contractor shall make a record containing a description of the accommodation. The record shall be treated as a confidential medical record in accordance with § 60–741.23(d).

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to a schedule for the annual review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out individuals on the basis of disability, they are job-related for the position in question and are consistent with business necessity. The contractor shall document the methods used to complete the annual review, the results of the annual review, and any actions taken in response. These documents shall be retained as employment records subject to the recordkeeping requirements of § 60–741.80.

(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 individuals on the basis of

³ There are a variety of resources that may assist contractors in assessing and ensuring the accessibility of its information and communication technology. These include the Web Content Accessibility Guidelines (WCAG 2.0) of the World Wide Web Consortium Web Accessibility Initiative, online at <http://www.w3.org/WAI/intro/wcag.php>, and the regulations implementing the accessibility requirements for federal agencies prescribed in section 508 of the Rehabilitation Act. Information on section 508 may be found online at <http://www.section508.gov/index.cfm>. This web site also provides information about various State accessibility requirements and initiatives.

disability, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor has the burden to demonstrate that it has complied with the requirements of paragraph (c)(2) of this section.

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–741.2(e) defining direct threat.) Once the contractor believes that a direct threat exists, the contractor shall create a statement of reasons supporting its belief, addressing each of the criteria for “direct threat” listed in § 60–741.2(e). This statement shall be treated as a confidential medical record in accordance with § 60–741.23(d), and shall be retained as an employment record subject to the recordkeeping requirements of § 60–741.80.

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–741.21(a)(6), as a matter of nondiscrimination, the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, the contractor must ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software. Also as a matter of affirmative action, if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee’s disability. If the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed on the basis of disability.

(f) *External dissemination of policy, outreach, and positive recruitment.* (1) *Required outreach efforts.* The contractor shall undertake the outreach and positive recruitment activities listed below:

(i) The contractor shall promptly list all employment openings with the Employment One-Stop Career Center (One-Stops) nearest the contractor’s establishment. The contractor must provide the information about each job vacancy in the manner and format required by the appropriate One-Stop. The term *all employment openings* as used in this paragraph includes all full-time, part-time, and temporary positions *except* executive and senior management positions, positions that will be filled from within the contractor’s organization, and positions lasting three days or less.

(ii) The contractor shall establish linkage agreements enlisting the assistance and support of either the local State Vocational Rehabilitation Service Agency (SVRA) office nearest the contractor’s establishment or a local Employment Network (EN) organization (other than the contractor if the contractor is an EN) listed in the Social Security Administration’s Ticket to Work Employment Network Directory (<http://www.yourtickettowork.com/endir>); and at least one of the following persons and organizations in recruiting and developing training opportunities for individuals with disabilities to fulfill its commitment to provide meaningful employment opportunities to such individuals:

(A) Entities funded by the Department of Labor that provide recruitment or training services for individuals with disabilities, such as the services currently provided through The Employer Assistance and Resource Network (EARN) (<http://www.earnworks.com>);

(B) The Employment One-Stop Career Center (One-Stops) nearest the contractor’s establishment (any linkage agreement with the One-Stop must be in addition to the job listing requirement in paragraph (f)(1)(i));

(C) The Department of Veterans Affairs Regional Office nearest the contractor’s establishment (http://www.va.gov/landing2_locations.htm);

(D) Local disability groups, organizations, or Centers for Independent Living (CIL) near the contractor’s establishment;

(E) Placement or career offices of educational institutions; and

(F) Private recruitment sources, such as professional organizations or employment placement services.

(iii) The contractor shall also consult the Employer Resources section of the National Resource Directory (http://www.nationalresourcedirectory.gov/employment/employer_resources), or any future service that replaces or complements it, and establish a linkage

agreement with one or more of the disabled veterans’ service organizations listed on the directory, other than the agencies listed in (f)(1)(ii)(A) through (E) of this section, 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.

(iv) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) *Suggested outreach efforts.* The contractor should consider taking the actions listed below to fulfill its commitment to provide meaningful employment opportunities to individuals with disabilities:

(i) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company’s selection process, and recruiting literature should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor’s affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(ii) The contractor’s recruitment efforts at all educational institutions should incorporate special efforts to reach students who are individuals with disabilities.

(iii) An effort should be made to participate in work-study programs for students, trainees, or interns with disabilities. Such programs may be found through outreach to State and local schools and universities, and through EARN.

(iv) Individuals with disabilities should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(v) The contractor should take any other positive steps it deems necessary to attract individuals with disabilities not currently in the work force who have requisite skills and can be

recruited through affirmative action measures. These persons may be located through State and local agencies supported by the U.S. Department of Education's Rehabilitation Services Administration (RSA) (<http://www2.ed.gov/about/offices/list/osers/rsa>), local Ticket-to-Work Employment Networks (<http://www.yourtickettowork.com>), or local chapters of groups or organizations that provide services for individuals with disabilities.

(vi) The contractor, in making hiring decisions, shall consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(3) *Assessment of external outreach and recruitment efforts.* The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts shall be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

(4) *Recordkeeping obligation.* The contractor shall document all linkage agreements and all other activities it undertakes to comply with the obligations of this section, and retain these documents for a period of five (5) years.

(g) *Internal dissemination of policy.* (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. It

is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory, and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

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

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

(ii) Discuss the policy thoroughly in any employee orientation and management training programs;

(iii) If the contractor is a party to a collective bargaining agreement, it shall meet with union officials and/or employee representatives to inform them of the contractor's policy and request their cooperation;

(3) The contractor shall document those activities it undertakes to comply with the obligations of paragraph (g) of this section and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80.

(4) The contractor is encouraged to additionally implement and disseminate this policy internally by taking optional steps, such as the following:

(i) If the contractor has a company newspaper, magazine, annual report, or other paper or electronic publication distributed to employees, it should publicize its affirmative action policy in these publications, and include in these publications, where appropriate, features on employees with disabilities and articles on the accomplishments of individuals with disabilities, with their consent;

(ii) The contractor should discuss its affirmative action policies at employee meetings regarding personnel practices or equal employment opportunity;

(iii) The contractor should discuss its affirmative action policies with executive, management, and supervisory personnel at meetings regarding personnel practices or equal employment opportunity.

(h) *Audit and reporting system.* (1) The contractor shall design and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor's affirmative action program;

(ii) Indicate any need for remedial action;

(iii) Determine the degree to which the contractor's objectives have been attained;

(iv) Determine whether known individuals with disabilities have had

the opportunity to participate in all company sponsored educational, training, recreational, and social activities;

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

(vi) Document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity shall appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) *Training.* In addition to the training set forth in paragraph (g)(2)(ii) of this section, 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. This training shall include, but not be limited to: the benefits of employing individuals with disabilities, appropriate sensitivity toward applicants and employees with disabilities, and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. The contractor shall create contemporaneous records documenting the specific subject matter(s) covered in the training, who conducted the training, who received the training, and when the training took place. The contractor shall retain these documents, and any written or electronic materials used for the training required by this section, as employment records subject to the recordkeeping requirements of § 60-741.80.

(k) *Data Collection Analysis.* The contractor shall document and maintain the following computations or comparisons pertaining to applicants and hires on an annual basis:

(1) The number of referrals of individuals with disabilities that the contractor received from applicable employment service delivery system(s), such as State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers;

(2) The number of referrals of individuals with disabilities that the contractor received from other entities, groups, or organizations with which the contractor has a linkage agreement pursuant to paragraph (f)(1)(i).

(3) The number of applicants who self-identified as individuals with disabilities pursuant to § 60-741.42(a), or who are otherwise known to be individuals with disabilities;

(4) The total number of job openings and total number of jobs filled;

(5) The ratio of jobs filled to job openings;

(6) The total number of applicants for all jobs;

(7) The ratio of applicants with disabilities to all applicants (“applicant ratio”);

(8) The number of applicants with disabilities hired;

(9) The total number of applicants hired; and

(10) The ratio of individuals with disabilities hired to all hires (“hiring ratio”). The number of hires shall include all employees.

§ 60-741.45 Reasonable accommodation procedures.

(a) *Development and implementation.* The contractor shall develop and implement written procedures for processing requests for reasonable accommodation. Contractors that are not required to develop an affirmative action program pursuant to this subpart are encouraged to voluntarily develop and implement written reasonable accommodation procedures to assist the contractor in meeting its nondiscrimination obligations under subpart B of this part.

(1) The contractor’s reasonable accommodation procedures shall be included in the contractor’s affirmative action program, and shall be developed and implemented in compliance with section 503 and this part.

(2) Minimum required elements that shall be addressed or contained in the reasonable accommodation procedures are described in paragraph (d) of this section. Inclusion of these elements in all reasonable accommodation procedures will ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. It will also ensure that all of the

contractor’s supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly and within established timeframes.

(b) *Designation of responsibility.* The contractor shall designate an official to be responsible for the implementation of the reasonable accommodation procedures. The responsible official may be the same official who is responsible for the implementation of the contractor’s affirmative action program. The responsible official must have the authority, resources, support, and access to top management that is needed to ensure the effective implementation of the reasonable accommodation procedures.

(c) *Dissemination of procedures.* (1) The contractor shall disseminate its reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by their inclusion in an employee handbook that is disseminated to all employees and/or by email or electronic posting on a company Web page where work-related notices are ordinarily posted. Notice of the reasonable accommodation procedures shall be provided to employees who work off-site in the same manner that notice of other work-related matters is ordinarily provided to these employees.

(2) The contractor shall inform all applicants of its reasonable accommodation procedures regarding the application process. See paragraph (d)(2)(iii) of this section.

(d) *Required elements of reasonable accommodation procedures.* The specific requirements of a contractor’s reasonable accommodation procedures may vary depending upon the size, structure, and resources of the contractor. However, the contractor’s reasonable accommodation procedures shall, at a minimum, include the following elements:

(1) *Responsible official contact information.* The name, title/office, and contact information (telephone number and email address) of the official designated as responsible for implementing the reasonable accommodation procedures pursuant to paragraph (b) of this section. This information should be updated when changes occur.

(2) *Requests for reasonable accommodation.* The reasonable accommodation procedures shall specify that a request for reasonable accommodation may be oral or written and shall explain that there are no required words that must be used by the

requester to effectuate a request for accommodation. The procedures shall also state that requests for reasonable accommodation may be made by an applicant, employee, or by a third party on his or her behalf.

(i) *Recurring requests.* The reasonable accommodation procedures shall provide that in instances of a recurring need for an accommodation (e.g., a hearing impaired employee’s need for a sign language interpreter) the requester will not be required to repeatedly submit or renew their request for accommodation each time an interpreter is needed. In the absence of a reasonable belief that the individual’s recurring need for the accommodation has changed, requiring the repeated submission of a request for the accommodation could be considered harassment on the basis of disability in violation of this part.

(ii) *Submission of request.* The reasonable accommodation procedures shall identify to whom an employee (or a third party acting on his or her behalf) must submit an accommodation request. At a minimum, this shall include any supervisor or management official in the employee’s chain of command, and the official responsible for the implementation of the reasonable accommodation procedures.

(iii) *Requests made by applicants.* The reasonable accommodation procedures shall include procedures to ensure that all applicants, including those using the contractor’s online or other electronic application system, are made aware of the contractor’s reasonable accommodation obligation and are invited to request any reasonable accommodation needed to participate fully in the application process. All applicants shall also be provided with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. The contractor’s procedures shall provide that reasonable accommodation requests by or on behalf of an applicant are processed expeditiously, using timeframes tailored to the application process.

(3) *Written confirmation of receipt.* The reasonable accommodation procedures shall specify that written confirmation of receipt of a request will be provided to the requester, either by letter or email. The written confirmation shall include the date the accommodation request was received, and be signed by the authorized decision maker or his or her designee.

(4) *Timeframe for processing requests.* (i) The reasonable accommodation procedures shall indicate that requests for accommodation will be processed as

expeditiously as possible. Oral requests must be considered received on the date they are initially made, even if a reasonable accommodation request form has not been completed. A contractor may set its own timeframes for completing the processing of requests. However, if supporting medical documentation is not needed, that timeframe shall not be longer than 5 to 10 business days. If supporting medical documentation is needed, or if special equipment must be ordered, that timeframe shall not exceed 30 calendar days, except in the event of extenuating circumstances beyond the control of the contractor. The procedures shall explain what constitutes extenuating circumstances.

(ii) *Delay in responding to request.* If the contractor's processing of an accommodation request will exceed established timeframes, written notice shall be provided to the requester. The notice shall include the reason(s) for the delay and a projected date of response. The notice shall also be dated and signed by the authorized decision maker or his or her designee.

(5) *Description of process.* The contractor's reasonable accommodation procedures shall contain a description of the steps the contractor takes when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description shall identify this information. For example, the contractor's reasonable accommodation procedures may state that to obtain a reasonable accommodation, the contractor must be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation. The description shall also indicate that, if the need for accommodation is not obvious, or if additional information is needed, the contractor may initiate an interactive process with the requester.

(6) *Supporting medical documentation.* The reasonable accommodation procedures shall explain the circumstances, if any, under which medical documentation may be requested and reviewed by the contractor.

(i) The procedures shall explain that any request for medical documentation may not be open ended and must be limited to documentation of the individual's disability and the

functional limitations for which reasonable accommodation is sought.

(ii) The procedures shall also explain that the submission of medical documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

(7) *Denial of reasonable accommodation.* The contractor's reasonable accommodation procedures shall specify that any denial or refusal to provide a requested reasonable accommodation will be provided in writing. The written denial shall include the reason for the denial and must be dated and signed by the authorized decision maker or his or her designee. A statement of the requester's right to file a discrimination complaint with OFCCP shall also accompany or be included in the written denial. If the contractor provides an internal appeal or reconsideration process, the written denial shall inform the requester about this process. The written denial shall also include a clear statement that participation in the internal appeal or reconsideration process does not toll the time for filing a complaint with OFCCP or EEOC.

(8) *Confidentiality.* The contractor's reasonable accommodation procedures shall indicate that all requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as a confidential medical record and maintained in a separate medical file, in accordance with section 503 and this part.

(e) *Training.* The contractor shall provide annual training for its supervisors and managers regarding the implementation of the reasonable accommodation procedures. Training shall also be provided whenever significant changes are made to the reasonable accommodation procedures. Training regarding the reasonable accommodation procedures may be provided in conjunction with other required equal employment opportunity or affirmative action training.

§ 60-741.46 Utilization goals.

(a) *Goal.* OFCCP has established a utilization goal of 7% for employment of individuals with disabilities for each job group in the contractor's workforce.

(b) *Purpose.* The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of

individuals within each job group in its workforce. The utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

(c) *Periodic review of goal.* The Director of OFCCP shall periodically review and update, as appropriate, the utilization goal established in paragraph (a) of this section.

(d) *Utilization analysis—(1) Purpose.* The utilization analysis is designed to evaluate the representation of individuals with disabilities in each job group within the contractor's workforce with the utilization goal established in paragraph (a) of this section. If individuals with disabilities are employed in a job group at a rate less than the utilization goal, the contractor must take specific measures to address this disparity.

(2) *Grouping jobs for analysis.* The contractor must use the same job groups established for utilization analyses under Executive Order 11246, either in accordance with 41 CFR 60-2.12, or in accordance with 41 CFR part 60-4, as appropriate.

(3) *Annual evaluation.* The contractor shall evaluate its utilization of individuals with disabilities in each job group annually.

(e) *Action-oriented programs.* When the percentage of individuals with disabilities in one or more job groups is less than the utilization goal established in paragraph (a) of this section, the contractor must develop and execute action-oriented programs designed to correct any identified problems areas. These action-oriented programs may include alternative or additional efforts from among those listed in §§ 60-741.44 (f)(1) and (f)(2), and/or other actions designed to correct the identified problem areas and attain the established goal.

(f) A contractor's determination that it has not attained the utilization goal established in paragraph (a) of this section in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part.

(g) The utilization goal established in paragraph (a) of this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

§ 60-741.47 Providing priority consideration in employment.

(a) The contractor is encouraged to voluntarily develop and implement programs that provide priority consideration to individuals with

disabilities in recruitment and/or hiring. Examples of priority consideration programs include, but are not limited to, assigning a weighted value or additional “points” to job applicants who self-identify as being an individual with a disability, and developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury (TBI) or developmental disabilities and utilizing linkage agreements to recruit program trainees.

(1) If a contractor elects to implement a priority consideration program for individuals with disabilities, a description of the program and the policies governing the program, including the name and title of the official responsible for the program, shall be included in the contractor's written affirmative action program. An annual report describing the contractor's activities pursuant to the priority consideration program and identifying the outcomes achieved should also be included in the contractor's affirmative action program.

(2) Disability-related information from the applicant and/or employee self-identification request required by § 60-741.42 may be used to identify individuals with disabilities who are eligible to benefit from a priority consideration program.

(b) The contractor shall not use a priority consideration program to segregate individuals with disabilities or to limit or restrict the employment opportunities of any individual with a disability.

(c) The contractor shall not discriminate against an individual with a disability that has received priority consideration with respect to any term, condition, or benefit of employment, including, but not limited to, employment acts such as compensation, promotion, and termination, that are listed in § 60-741.20.

§ 60-741.48 Sheltered workshops.

Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities in the contractor's own work force. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become “qualified individuals with disabilities.”

Subpart D—General Enforcement and Complaint Procedures

§ 60-741.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review is conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the

contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of section 503 and its regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60-741.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60-741.62.

(c) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with section 503 within the preceding 24 months.

The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice, OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

§ 60-741.61 Complaint procedures.

(a) *Coordination with other agencies.* Pursuant to section 107(b) of the Americans with Disabilities Act of 1990, as amended (ADA), OFCCP and the Equal Employment Opportunity Commission (EEOC) have promulgated

regulations setting forth procedures governing the processing of complaints falling within the overlapping jurisdiction of both the act and title I of the ADA to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Complaints filed under this part will be processed in accordance with those regulations, which are found at 41 CFR part 60-742, and with this part.

(b) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint with the Director alleging a violation of the act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Complaints may be submitted to the OFCCP, 200 Constitution Avenue NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown.

(c) *Contents of complaints.* (1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;
(ii) Name and address of the contractor who committed the alleged violation;

(iii) The facts showing that the individual has a disability, a record or history of a disability, or was regarded by the contractor as having a disability;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* When a written complaint is filed by an authorized representative, that complaint need not identify by name the person on whose behalf it is filed. However, the authorized representative must nonetheless provide the name, address and telephone number of the person on whose behalf the complaint is filed to OFCCP, along with the other information specified in paragraph (c)(1)

of this section. OFCCP shall verify the authorization of such complaint with the person on whose behalf the complaint is filed. Any such person may request that OFCCP keep his or her identity confidential during the investigation of the complaint, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(d) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(e) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(f) *Resolution of matters.* (1) If the complaint investigation finds no violation of the act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60-741.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Director will review all determinations of no violation that involve complaints that are not also cognizable under title I of the Americans with Disabilities Act.

(3) In cases where the Director decides to reconsider the determination of a Notification of Results of Investigation, the Director shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60-741.62.

§ 60-741.62 Conciliation agreements.

(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 will 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) *Remedial benchmarks.* The remedial action referenced in paragraph (a) may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

§ 60-741.63 Violations of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

§ 60-741.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be

instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60–741.65).

§ 60–741.65 Enforcement proceedings.

(a) *General.* (1) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any combination of these outcomes. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance review. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service (IRS) for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–741.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure.* (1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions, and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any) whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management,

Regional Solicitors and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to “Executive Order 11246” shall mean section 503 of the Rehabilitation Act of 1973, as amended; references to “equal opportunity clause” shall mean the equal opportunity clause published at § 60–741.5; and references to “regulations” shall mean the regulations contained in this part.

§ 60–741.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Director so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the act or this part.

(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the act or this part.

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the act or this part subject to reinstatement pursuant to § 60–741.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months, but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–741.67 Notification of agencies.

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

§ 60–741.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among

other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the Director's decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–741.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;
(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the act or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;

(3) Opposing any act or practice made unlawful by the act or this part or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by the act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion, or discrimination. The sanctions and penalties contained in

this part may be exercised by the Director against any contractor who violates this obligation.

§ 60–741.70 Disputed matters related to compliance with the act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–741.80 Recordkeeping.

(a) *General requirements.* 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 must preserve all personnel records relevant to the complaint, compliance evaluation, or action until final disposition of the complaint, compliance evaluation or action. The term “personnel records relevant to the complaint, compliance evaluation, or

action” will include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. Records required by §§ 60–741.44(f)(4) and 60–741.44(k) shall be maintained by all contractors for a period of five years from the date of the making of the record.

(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 August 29, 1996.

§ 60–741.81 Access to records.

Each contractor must permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which its records and other information are available. The contractor must provide records and other information in any available format(s) requested by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the act, the Americans with Disabilities Act of 1990, as amended (ADA), and in furtherance of the purposes of the act and the ADA.

§ 60–741.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency, or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the act.

§ 60–741.83 Rulings and interpretations.

Rulings under or interpretations of the act and this part shall be made by the Director.

Appendix A to Part 60–741—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on title I of the Americans with Disabilities Act, as amended (ADA), set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent “free-standing” source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. See § 60–741.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under section 503, like reasonable accommodation required under the ADA, is a part of the nondiscrimination obligation. See EEOC appendix cited in this paragraph. Affirmative action is unique to section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of an employee with a known disability who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, unless the contractor can demonstrate that the accommodation would impose an undue

hardship on the operation of its business. As stated in § 60–741.2(s), an individual with a disability is qualified if he or she satisfies all the skill, experience, education, and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the individual with a disability is qualified with respect to that process. One is qualified within the meaning of section 503 if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions. Additionally, as provided in § 60–741.45, the contractor is required to develop, implement and disseminate to applicants and employees procedures for processing requests for reasonable accommodation. This will help ensure consistent and expeditious processing of all accommodation requests.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide reasonable accommodation for applicants and employees whose disabilities the contractor has actual knowledge. As stated in § 60–741.42, as part of the contractor's affirmative action obligation, the contractor is required to invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability both prior to an offer of employment, and after an offer of employment but before he or she begins his/her employment duties. That invitation also informs the applicant of the contractor's reasonable accommodation obligation and invites applicants with disabilities to request any accommodation they might need. Moreover, § 60–741.44(d) provides that if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees with disabilities to perform the essential

functions of the position held or desired; and (3) accommodations that enable employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term "undue hardship" refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source (e.g., a State vocational rehabilitation agency) or if Federal, State, or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the individual with a disability must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for "reasonable accommodation" in § 60–741.2(t) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are a number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the individual with a disability in deciding on the appropriate accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate State vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–(800) 669–4000 (voice) or 1–(800) 669–6820 (TTY)), the Job Accommodation Network (JAN)—a service of the U.S. Department of Labor's Office of Disability Employment Policy (1–(800) 526–7234 (voice) or 1–(877) 781–9403 (TTY)), private disability organizations, and other employers.

6. With respect to accommodations that can permit an employee with a disability to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire

equipment. For those visually-impaired, such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, Braille writers, talking calculators, magnifiers, audio recordings, and Braille or large print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids, and TTY machines. For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, mechanical page turners, and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter, or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by individuals with disabilities—including areas used by employees for purposes other than the performance of essential job functions—such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots, and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60–741.2(t) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified individual with a disability cannot perform to another position. Accordingly, if a clerical employee is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, *i.e.*, those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor that has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind individual with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the individual with a disability. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit individuals with disabilities who cannot work a standard schedule because of the need to obtain medical treatment, or individuals with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider known applicants with

disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassessments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A reasonable amount of time should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is

qualified with or without reasonable accommodation. The contractor may maintain the reassigned individual with a disability at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled. It should also be noted that the contractor is not required to promote an individual with a disability as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) Providing information regarding job vacancies in a form accessible to those with vision or hearing impairments (e.g., by making an announcement available in Braille, in large print, or on audio tape, or by responding to job inquiries via TTY); (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3)

appropriately adjusting or modifying employment-related examinations (e.g., extending regular time deadlines, allowing a blind person or one with a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her disability to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices); and (4) ensuring an applicant with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

[FR Doc. 2011-31371 Filed 12-8-11; 8:45 am]

BILLING CODE 4510-45-P