DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–741

RIN 1215–AA76

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

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs of the Department of Labor (OFCCP) is revising the regulations implementing section 503 of the Rehabilitation Act of 1973, as amended (section 503 or the act), which requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The final rule makes three general types of revisions to the section 503 regulations. First, the regulations' nondiscrimination provisions generally are conformed to the regulations published by the Equal Employment Opportunity Commission (EEOC) implementing title I of the Americans with Disabilities Act of 1990 (ADA). Second, the regulations incorporate recent amendments to section 503. Third, the regulations are revised to strengthen and clarify various existing provisions relating to affirmative action, recordkeeping, enforcement and other issues. In addition, the term ''Director'' that appears in the current regulations and the previous proposal has been replaced throughout the final rule with the term ''Deputy Assistant Secretary.''

The final rule partially withdraws a final rule published by the Department of Labor on December 30, 1980 (which was subsequently suspended) concerning section 503, Executive Order 11246 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended. The withdrawal applies only to those provisions of the rule which pertain to section 503.

EFFECTIVE DATE: These regulations will take effect on August 29, 1996.

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, OFCCP, 202–219–9475 (voice), 1–800–326–2577 (TDD). Copies of this final rule, including copies in alternative formats, may be obtained by calling OFCCP at 202–219–9430 (voice) or 1–800–326–2577 (TDD). The alternative formats available are: Large print, electronic file on computer disk, and audio-tape.

SUPPLEMENTARY INFORMATION:

Current Regulations and Rulemaking History

This final rule revises the current regulations (41 CFR part 60–741) implementing section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793) (section 503 or the act), which requires parties holding a Government contract or subcontract in excess of $10,000 to ''take affirmative action to employ and advance in employment qualified individuals with disabilities.'' These regulations establish specific affirmative action obligations for contractors (e.g., contractors are required to use effective practices to recruit qualified individuals with disabilities). The duty to undertake affirmative action encompasses a duty to refrain from discriminating against qualified individuals with disabilities.

On October 21, 1992, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a notice of proposed rulemaking (NPRM or the proposal), 57 FR 48084, proposing to revise the regulations implementing section 503. A notice correcting certain technical errors in the NPRM was issued on October 30, 1992. 57 FR 49160. The comment period ended November 20, 1992. Thirty-seven comments were received. A number of comments were submitted on behalf of several organizations and represented the views of various groups, employers, or individuals with disabilities. The comments have been analyzed and considered in the development of this final rule.

Regulatory Revisions

1. Conformance With Americans With Disabilities Act Standards

The final rule was precipitated, in part, by the passage of the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* The Americans with Disabilities Act provides comprehensive civil rights protections to individuals with disabilities in the areas of employment, public accommodations, State and local governmental services, and telecommunications. Title I of the Americans with Disabilities Act (ADA), which is enforced by the Equal Employment Opportunity Commission (EEOC), prohibits private and State and local governmental employers from discriminating against qualified individuals with disabilities in all aspects of employment. The EEOC published regulations implementing the ADA on July 26, 1991 (29 CFR part 1630). The ADA regulations establish comprehensive, detailed prohibitions regarding disability discrimination but do not address issues regarding affirmative action. The ADA and its implementing regulations became effective on July 26, 1992, with respect to employers with 25 or more employees; on July 26, 1994, this coverage was extended to employers with 15 or more employees.

This final rule conforms OFCCP's section 503 regulations to the EEOC's ADA regulations. This action ensures that OFCCP and EEOC will avoid the imposition of inconsistent legal standards when processing complaints of discrimination that fall within the overlapping jurisdiction of both section 503 and title I of the ADA, as is required by section 107(b) of the ADA and by a recent amendment to section 503. Section 107(b) of the ADA requires that OFCCP and EEOC establish procedures to ensure that administrative complaints filed under both laws are ''dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards.'' [1] Section 505(c) of the Rehabilitation Act Amendments of 1992 (Pub. L. 102–569, 106 Stat. 4344) (the 1992 amendments or the 1992 legislation) amended section 503 by adding a new paragraph (e) which expressly obligates the Secretary of Labor to develop these same procedures. Also, the 1992 amendments added a new paragraph (d) to section 503, which provides that ''The standards used to determine whether [section 503] has been violated in a complaint alleging nonaffirmative action employment discrimination under [section 503] shall be the standards applied under title I of the Americans with Disabilities Act of 1990.'' In conforming the section 503 regulations to the EEOC's ADA regulations, this rule effectively implements these requirements.

One of the comments submitted in response to the publication of the NPRM expressed the view that OFCCP's post-ADA role should be to focus its enforcement efforts on affirmative action matters, as distinguished from discrimination issues. The commenter's view is based on the assertion that

[1] Pursuant to that section, OFCCP and EEOC published joint regulations which set forth procedures governing the processing of complaints that fall within the overlapping jurisdiction of both title I of the ADA and section 503. 41 CFR part 60–742 (OFCCP) and 29 CFR part 1641 (EEOC). The joint rule requires, among other things, that OFCCP (acting as EEOC's agent) process and resolve complaints of employment discrimination based on disability for purposes of title I of the ADA (as well as for section 503) when there is jurisdiction under both statutes. OFCCP is required by the rule to apply legal standards that are consistent with the substantive legal standards applied under the ADA.

OFCCP's authority to engage in compliance activities under section 503 relating to issues of discrimination was limited by the passage of the ADA, which, the commenter contends, effectively transferred much of OFCCP's authority in this area to EEOC. OFCCP disagrees. OFCCP's role in the enforcement of the nondiscrimination requirements of section 503 was reaffirmed by the provisions of the ADA and the 1992 amendments requiring coordination of enforcement under the ADA and section 503 and the application of ADA standards in section 503 discrimination cases.

Nondiscrimination requirements are discussed in more detail in this final rule than in the current regulations, because the final rule incorporates the more expansive discussion of these requirements contained in the ADA regulations. However, OFCCP views the expanded discussion as a clarification of the general nondiscrimination requirements under the current regulations, rather than as a significant alteration of those requirements. Accordingly, in general, this final rule does not affect the applicability of case law (administrative and judicial) developed under section 503. (Thus, section 503 case law continues in effect unless inconsistent or in conflict with this rule.)

Because this final rule generally conforms the section 503 nondiscrimination regulations to the EEOC's ADA regulations, the Interpretative Guidance on Title I of the Americans with Disabilities Act set out as an appendix to the title I regulations—which provides guidance about key provisions of the regulations—is equally applicable with respect to the interpretation of the parallel provisions of these regulations. Similarly, the Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act issued by the EEOC may also be relied upon for guidance.

As is discussed later in this preamble, however, there are a number of differences, primarily of an editorial or technical nature, between this rule and EEOC's regulations. For instance, the rule uses the term ''contractor,'' which is specific to the section 503 program, rather than the analogous terms used by the ADA—''covered entity'' and ''employer.'' This final rule also contains a few explanatory footnotes, which are intended for clarity only. OFCCP wishes to reemphasize that it intends to apply its regulations consistently with parallel provisions of the ADA regulations.

2. Implementation of the 1992 Statutory Amendments

This rule also implements a number of recent legislative amendments to section 503, including—with one exception discussed below—the amendments set forth in the 1992 legislation. The 1992 legislation was signed into law on October 29, 1992, eight days after the issuance of the NPRM, and thus the amendments to section 503 contained in that legislation were not reflected in the proposal. The amendments to the current section 503 regulations that are necessitated by the 1992 legislation and are ministerial and technical in nature have been incorporated into this rule without substantive change. Publication in proposed form would serve no useful purpose and is unnecessary under the Administrative Procedure Act (5 U.S.C. 553(b)(B)). OFCCP, therefore, finds good cause to waive notice of proposed rulemaking with respect to the implementation of these amendments. The revisions to the regulations necessitated by the legislative amendments are described below.

The 1992 legislation amended the act's general jurisdictional provisions in two respects. First, section 505(a) of the 1992 legislation amended section 503(a) by raising the contract dollar amount threshold for covering a contractor from ''in excess of $2500'' to ''in excess of $10,000.'' Accordingly, this rule replaces all references to $2500 contained in the current regulations with references to $10,000.

Second, section 505(a) of the 1992 legislation also removed a provision in section 503 of the act limiting its coverage to the contractor's positions that are engaged in work related to Government contracts. Prior to this amendment, section 503(a) provided that Government contracts and subcontracts ''shall contain a provision requiring that, in employing persons to carry out such contract, the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with handicaps.'' The 1992 legislation struck out the phrase ''in employing persons to carry out such contract.'' The effect of this amendment is to apply the requirements of section 503 to all of a covered contractor's or subcontractor's work force at all of its facilities.

In response to the coverage amendment, the few references to the ''carry out the contract'' language contained in the NPRM are omitted from this final rule. Further, in order to reflect this amendment, proposed § 60–741.4(a)(2)—which expressly limited application of the regulations to positions that are engaged in carrying out a contract—has been revised in the final rule to clarify that such limitation applies only to the contractor's employment decisions and practices occurring before the amendment (see discussion in the section-by-section analysis below).

Moreover, section 505(b) of the 1992 legislation codified the ''separate facility'' waiver provision contained in the current regulations (§ 60–741.3(a)(5)) by expressly incorporating it (with minor editorial changes) into section 503. The provision permits the contractor to seek a waiver from the requirements of the regulations for facilities that are not connected to a Government contract. (The amendment added a new subsection (c)(2) to section 503 of the act; it supplemented existing subsection (c), which the amendment redesignated as subsection (c)(1), authorizing the granting of regulatory waivers in the national interest.) The legislative history of the waiver amendment indicates that it was included in the legislation in order to reaffirm the long-standing ''separate facility'' waiver policy codified in the regulations. S. Rep. 357, 102nd Cong., 2d Sess. 72 (1992).

This rule implements the waiver amendment by retaining the current regulations' separate facility waiver provision (without change); the final rule sets out the provision at § 60–741.4(b)(3). As is discussed above, the NPRM had replaced the current waiver provision with proposed § 60–741.4(a)(2), which is retained in this final rule with modifications (see discussion below).[2]

Also, the 1992 legislation (§ 102(f)(4)) clarified that homosexuality and bisexuality are not disabilities under section 503, and excluded from protection under section 503 certain conditions (e.g., transvestism, transsexualism, pedophilia and compulsive gambling) in order to conform the types of conditions protected from discrimination under section 503 and the ADA. These provisions are incorporated by the final rule in §§ 60–741.3(d) and (e), and are discussed in the section-by-section analysis below.

[2] Section 505(b) of the 1992 amendments also requires OFCCP to promulgate regulations that set forth the standards used for granting separate facility waivers. This final rule does not implement this requirement. OFCCP issued a separate proposed rule setting out proposed regulatory standards for granting separate facility waivers on February 14, 1996 (60 FR 5902).

Finally, the 1992 legislation substituted the term ''disability'' for the term ''handicap'' throughout the Rehabilitation Act, including section 503 (see, e.g., § 102(f)(2) of the 1992 legislation). This amendment, which did not affect the meaning or application of the term, conforms the terminology used by the Rehabilitation Act to that used in the ADA. The NPRM proposed a similar substitution in language throughout the section 503 regulations, which is carried forward in this final rule. (The proposed definition of ''individual with a disability'' clarified, at § 60–741.2(n)(2), that the regulations refer to that term rather than to the term ''individual with handicaps,'' which was then used in the Rehabilitation Act. This statement is omitted from this final rule.)

3. Partial Withdrawal of the 1980 Final Rule

This final rule also partially withdraws a final rule published by OFCCP on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), and deferred indefinitely on August 25, 1981 (46 FR 42865). That 1980 rule would have revised the regulations at 41 CFR chapter 60 implementing section 503 of the Rehabilitation Act as well as two other laws enforced by OFCCP—Executive Order 11246 (30 FR 12319, September 28, 1965), as amended (the Executive Order), and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212) (section 4212). The Executive Order requires Government contractors and subcontractors to assure equal employment opportunity without regard to race, color, religion, sex and national origin. Section 4212 mandates similar requirements with regard to the employment of certain disabled veterans and veterans of the Vietnam era.

The December 30, 1980, rule was to take effect on January 29, 1981. On January 28, 1981, the Department of Labor published a notice (at 46 FR 9084) delaying the effective date of the final rule until April 29, 1981, to allow the Department time to review the regulation fully. The Department published three subsequent deferrals of the rule in 1981 in order to fully review the regulations in accordance with Executive Order 12291, to permit consultation with interested groups, and to comply with intergovernmental review and coordination procedures. The Department again postponed the rule's effective date on August 25, 1981, until action could be taken on a proposed rule published on the same date (46 FR 42968). The August 25, 1981, proposal would have revised a number of provisions contained in the December 30, 1980, final rule as well as a number of provisions in 41 CFR chapter 60 which were not amended by that final rule. Final action has not been taken with respect to the proposed regulations issued on August 25, 1981, or, consequently, with respect to the 1980 final rule.

The substance of a number of the provisions contained in the 1980 final rule pertaining to the current section 503 regulations was incorporated into the NPRM and is carried forward by this final rule. However, as explained in the NPRM, OFCCP has determined not to go forward with some of the other revisions to the regulations. In order to avoid conflict with the 1980 final rule, this final rule withdraws all provisions of the 1980 rule that pertain to section 503.

4. Impact on the 1980 Proposed Rule

On December 30, 1980, OFCCP published a proposed rule (45 FR 86206), the primary purpose of which was to conform the regulations implementing section 503 and section 4212 (which were patterned after those implementing section 503) to the employment provisions of the Department of Labor's regulations implementing section 504 of the Rehabilitation Act, which appear at 29 CFR part 32. Because this final rule conforms the section 503 regulations to those implementing title I of the ADA, it supersedes the 1980 proposal insofar as the 1980 proposal would conform section 503's regulations to those implementing section 504.

Overview of Final Rule

This final rule consists of five subparts. Subpart A, ''Preliminary Matters, Equal Opportunity Clause,'' explains the purpose, application and construction of the regulations in general and contains an extensive definitions section. The definitions section incorporates the definitions contained in the EEOC regulations implementing title I of the ADA which are relevant to the enforcement of section 503 and contains a number of revisions to the current definitions as well. Subpart A also contains provisions relating to coverage under section 503, and coverage exemptions and waivers, as well as the equal opportunity clause, which delineates a covered contractor's general duties under the act. Subpart B is a new subpart, which specifies the employment actions that will be deemed to constitute prohibited discrimination under section 503. In general, this subpart is identical to the parallel provisions in the EEOC regulations. Some deletions and modifications have been made with respect to the EEOC regulations to conform to section 503 policies and procedures. Subpart C, which governs the applicability of the affirmative action program requirement, reorganizes, clarifies and strengthens the affirmative action provisions in the current regulations. This subpart is not paralleled in the ADA regulations, which mandate nondiscrimination requirements only. As stated in § 60–741.40(a) and discussed below, the requirements of subpart C apply only to Government contractors with 50 or more employees and a contract of $50,000 or more. All other subparts of the regulation are applicable to all contractors covered by section 503.[3] Subpart D covers general enforcement and complaint procedures. To help ensure an enforcement approach consistent with that used under the Executive Order, this subpart incorporates a number of provisions from the regulations implementing the Executive Order. Further, subpart D's provisions regarding complaint procedures are conformed to the counterpart provisions contained in procedural regulations applicable to the ADA. Subpart E, Ancillary Matters, incorporates revised provisions on recordkeeping (e.g., it extends the current one-year record retention period to two years for larger contractors and conforms the scope of the retention obligation to that applied by the EEOC under the ADA) and makes other revisions.

Finally, the rule contains two new appendices. One of the new appendices sets out guidance on positions engaged in carrying out a Government contract. This is an important concept in determining which of the contractor's positions are subject to part 60–741 with respect to its employment decisions and practices occurring before October 29, 1992. (As noted above, on that date, section 503, which had applied only insofar as the contractor was employing persons to carry out a contract, was amended to extend coverage thereunder to all of the contractor's positions—irrespective of their relation to the contract.) The second new appendix

[3] The NPRM specifically requested public input on the topic of affirmative action under section 503, including comment on the appropriateness of the affirmative action obligations contained in the proposal and suggestions regarding other obligations that might be imposed. The public input on these issues was quite limited. OFCCP is continuing to explore these issues and will consider whether further revisions to the regulations' affirmative action provisions would be appropriate.

sets out guidance on the duty to provide reasonable accommodation under the act. The appendix is consistent with the discussion of this issue contained in the Interpretative Guidance on Title I of the Americans with Disabilities Act which is set out as an appendix to the EEOC's ADA regulations.

A discussion of significant comments and an explanation of the changes made from the NPRM to this final rule (other than those discussed above) follows.

Section-by-Section Analysis of Comments and Revisions

Section 60–741.1 Purpose, Applicability and Construction

Section 60–741.1(b) Applicability

Proposed paragraph (b) stated in part that the regulations apply to Government contracts which are performed within the United States. Upon reconsideration, OFCCP believes that this statement is unnecessary in this context, inasmuch as a similar clarification is made in § 60–741.4(a)(4) (which, as discussed below, has been revised for clarity). Therefore, the statement is omitted in the final rule.

Section 60–741.2 Definitions

Section 60–741.2(a) Act

The citation of authority contained in the proposed definition has been revised to make reference to the Rehabilitation Act Amendments of 1992.

Section 60–741.2(d) Deputy Assistant Secretary

The current regulation defines the term ''Director.'' The Director has been given the new title of ''Deputy Assistant Secretary for Federal Contract Compliance''; the final rule has been revised accordingly.

Section 60–741.2(f) United States

The current regulation defines the United States as including the Panama Canal Zone. The proposal deleted the Panama Canal Zone, which by treaty is no longer part of the United States, and added the Northern Mariana Islands. The final rule further updates the definition by listing Wake Island and deleting the Trust Territory of the Pacific Islands.

Section 60–741.2(i) Government Contract

Four commenters objected to the clarification set forth in the definition of the term ''Government contract''—that contracts covered under section 503 include those under which the Government is a seller of goods or services as well as those under which it is a purchaser. In relevant part, the definition provides that a ''Government contract'' is ''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 NPRM proposed substitution of a reference to contracts for the ''purchase, sale or use'' of goods or services for the existing reference (§ 60–741.2) to the ''furnishing'' of goods or services. (The existing regulation also states that the term ''services,'' as used in the definition, applies irrespective of whether the Government is a purchaser or seller. This statement is unnecessary in light of the proposed revision, and thus was not carried forward in the NPRM.) The commenters contended that this interpretation is inconsistent with section 503(a), because the statute expressly or implicitly limits coverage to those contracts in which the Federal Government is procuring property or nonpersonal services, rather than those in which it is the supplier. For the reasons discussed below, OFCCP believes that the definition as proposed in the NPRM is consistent with the statute, and thus declines to modify it.

In relevant part, section 503(a) provides that coverage under the act applies to ''Any contract * * * entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction).'' OFCCP has long interpreted the statute to cover both contracts in which the Government is the seller of goods or services and those in which it is the purchaser. This interpretation is supported by the statute's use of the term ''any contract'' and by its broad remedial purpose. OFCCP believes that the statute's use of the term ''procurement'' simply refers to the subject matter of the contract, and does not restrict its application to situations in which the Government, rather than the contractor, is procuring goods or services. Further direct support is found in the act's legislative history—which describes section 503 as applying to ''*any* contract * * * entered into by any Federal department or agency for personal property or services'' (S. Rep. No. 318, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2142 (emphasis added)), and as ''a provision to ensure [that] any qualified handicapped individual shall be given full and fair consideration for employment by *any* contractor who seeks to contract with the Federal Government'' (*id., reprinted in* 1973 U.S. Code Cong. & Ad. News 2123 (emphasis added)). There is nothing in this legislative history suggesting that Congress intended to limit coverage under the act to contracts in which the Government is a purchaser.

Moreover, at least one court has upheld a similar interpretation under the Executive Order. *Crown Central Petroleum Corp.* v. *Kleppe*, 424 F. Supp. 744 (D. Md. 1976). In relevant part, the Executive Order (at section 202) provides that (with the exception of certain specified types of contracts), a provision obligating the contractor to comply with the Order shall be included in ''every Government contract.'' In *Kleppe*, the court held that the Executive Order is applicable to the Government's lease to Crown Central of rights to mine on Federal lands. The court ruled that the application of the Executive Order to this situation is consistent with the Order's literal language, and that an interpretation limiting the Order's application to only suppliers of goods or services would be inconsistent with the national policy of eliminating racial and other discrimination embodied in the Executive Order. 424 F. Supp. at 427–28. An analogous rationale applies to section 503 in view of Congress' clear intent that the contract coverage provisions of section 503 parallel those of the Executive Order. *See* S. Rep. No. 1297, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6427.

One commenter objected to the subdefinition of ''personal property'' (§ 60–741.2(i)(6)) as inconsistent with OFCCP's statutory authority. The definition states that the term, as used in connection with the terms ''Government contract'' and ''subcontract'' (§ 60–741.2(l)), ''includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).'' The commenter asserted that neither a plain reading of section 503 itself—which states that the act applies to contracts concerning personal property and nonpersonal services—nor its legislative history supports an interpretation that leasehold interests in real property are covered by the act.

The current definition of ''Government contract'' (at § 60–741.2) provides, in relevant part, that the term includes agreements ''for the furnishing of supplies or services or for the use of real or personal property including lease arrangements.'' As stated in the NPRM's preamble, the revision to the regulation was intended ''to make clear, consistent with the language of the act, that only contracts regarding personal property

(including those for the use of real property where such use constitutes personal property) and 'nonpersonal' services are covered.'' The subdefinition of ''personal property'' simply recognizes that real property leases constitute personal property under the common law, and applies that principle in defining the scope of coverage under section 503. *See, e.g., In re Wolverton Associates, Inc. v. Official Creditors' Committee,* 909 F.2d 1286 (9th Cir. 1990); *United States* v. *Dally,* 165 F. Supp. 194 (S.D.N.Y. 1958); *First National Bank of Kansas City* v. *Nee, 85 F. Supp. 840 (W.D. Mo. 1949), aff'd,* 190 F.2d 61 (8th Cir. 1951). The subdefinition is retained in the final regulation without modification.

Several commenters representing credit unions raised objections to OFCCP's position, as stated in the NPRM's preamble, that Federal deposit and share insurance constitutes a Government contract within the meaning of section 503, and thus subjects financial institutions with such insurance to coverage under the act. The statement in the NPRM's preamble regarding coverage of Federal deposit and share insurance as a Government contract did not reflect any change in the regulations implementing section 503—indeed, the NPRM did not propose any regulatory provisions regarding this issue. Rather, the preamble discussion merely restated and clarified the agency's long-standing position; it was noted that OFCCP stated this position in the purpose and application section (§ 60–741.1) of its 1980 final rule. (Similar opposition had been raised in response to the proposal preceding the 1980 final rule.) The preamble also stated that OFCCP continues to hold this view, and that OFCCP declined to incorporate into the proposal a similar statement regarding coverage of Federal deposit and share insurance, because OFCCP believed it is unnecessary to single out this contractual relationship from any other covered by the regulations. This statement, then, was merely intended to explain why the proposal differed from the 1980 final rule, and simply echoed OFCCP's long-standing policy on the issue. Nevertheless, OFCCP conducted a careful and detailed reevaluation of its position in light of changes in some of the statutes affecting the financial industry. Based upon that review, OFCCP continues to believe in the soundness of its position and does not modify it.

Additionally, these commenters asserted that coverage of Federal deposit and share insurance under section 503 would improperly interfere with the authority of the regulatory agencies of financial institutions to regulate credit unions. Also, some commenters asserted that such a position is invalid because to date OFCCP has failed to issue a rule codifying it; relatedly, some commenters requested that OFCCP seek public comment on the coverage issue, and others requested that the comment period for the NPRM be extended to permit additional public input on the issue. OFCCP believes that it need not expressly incorporate its policy into a regulatory provision or seek public comment, inasmuch as the policy merely reflects an interpretation of an existing regulatory provision (i.e., the definition of ''Government contract''); thus, it is exempt from the notice and comment procedures of the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(A).

OFCCP also wishes to reemphasize that it will continue to maintain its long-standing policy of imposing sanctions other than debarment of financial institutions from future deposit or share insurance, or cancellation, termination or suspension of a financial institution's deposit or share insurance for violations of section 503 (*see* § 60–741.66 Sanctions and penalties).

Section 60–741.2(l) ''Subcontract''

The final rule was revised slightly to correct a clerical error. The proposed definition of ''subcontract'' had inadvertently omitted the parenthetical phrase ''(including construction)''. The proposed and final definitions of the term ''Government contract'' (§ 60–741.2(i)(5)) confirm that the parenthetical phrase was intended to be included in the definition of ''subcontract'' the same as it is included in the definition of the term ''Government contract'' so that the definitions are parallel.

Section 60–741.2(q) ''Substantially limits''

The final rule was revised slightly to mirror the corresponding definition in the ADA regulations. The proposed rule had used the phrase ''within the normal range of abilities of persons in the general population'' in place of the ADA rule's reference to the ''average person in the general population.'' The proposal stated that the difference in language was intended for clarity only and that OFCCP intended to apply the definition and subdefinition in the same manner as they are applied under the ADA. However, in order to prevent any misunderstanding regarding OFCCP's intent, the final rule repeats the ADA language verbatim and includes a footnote further describing the definition.

Additionally, the subdefinition relating to substantial limitation in the major life activity of working has been revised slightly to conform to the corresponding ADA provision at 29 CFR 1630.2(j)(3). As revised, it refers to the average person in the general population having comparable training, skills, and abilities.

Section 60–741.2(v) ''Reasonable accommodation''

The final rule incorporates a definition identical to the ADA definition at 29 CFR 1630.2(o) (*see* appendix discussion related to § 1630.2(o)); the current section 503 regulations do not contain a definition of the term. The definition states that a reasonable accommodation is any change in the work environment or the way job duties are customarily performed that enables individuals with disabilities to perform the essential functions of the job in issue, or that ensures equal opportunity for individuals with disabilities with respect to the application process or the enjoyment of benefits and privileges of employment.

The proposal had contained a slight modification of the ADA definition. Paragraph (v)(1)(i) of the OFCCP proposal referred to modifications to the job application process that enable ''an applicant'' with a disability to be considered for a position, while the ADA definition uses the term ''qualified applicant'' in this context. However, the final rule repeats the ADA regulation verbatim, in order to clarify that the interpretation is meant to be the same. OFCCP now explains in a footnote that contractors should not draw the erroneous inference that their duty to provide a reasonable accommodation with respect to applicants with disabilities is limited to those who ultimately can demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation if they are qualified with respect to the application process (e.g., if they present themselves at the correct location and time to fill out an application). This is the same approach used under the ADA's definition.

The proposal contained a similar departure from the ADA regulation in paragraph (v)(3), which referenced an informal, interactive process with ''the individual with a disability.'' To clarify that the regulations are meant to be interpreted consistently, the final rule mirrors the ADA regulation and refers to a ''qualified'' individual. OFCCP now

explains in a footnote that contractors must engage in such an interactive process with individuals with disabilities because, until they have done so, they may be unable to determine whether a reasonable accommodation is available that will result in the person being qualified.

Section 60–741.2(y) Direct Threat

Two disability rights groups objected to the reference to the health or safety of the individual with a disability in the definition of ''direct threat.'' One group expressed the concern that the reference to the risk to the individual might result in direct threat determinations that are based on paternalistic or stereotypical views concerning persons with disabilities. The other group asserted that contractors might exempt themselves from the requirements of section 503 simply by invoking this rationale with little or no evidence of an actual threat. OFCCP believes that such concerns are unwarranted. The definition is identical to the parallel definition contained in EEOC's ADA regulations (§ 1630.2(r)), which, in turn, is based on the case law interpreting the Rehabilitation Act. As noted in EEOC's interpretative guidance, the employer's assessment of whether there is a risk to the individual with a disability, like its assessment of risk to others, must be based strictly on valid medical analyses or other objective evidence. The assessment must be made on a case-by-case basis relying on the factors set out in the definition, rather than on subjective perceptions, irrational fears, patronizing attitudes or stereotypes. *See Mantolete* v. *Bolger,* 767 F.2d 1416 (9th Cir. 1985); *Bentivegna* v. *U.S. Department of Labor,* 694 F.2d 619 (9th Cir. 1982); *E.E. Black, Ltd.* v. *Marshall,* 497 F.Supp. 1088 (D. Hi. 1980). OFCCP intends to ensure that contractors comply with this requirement. The final rule adopts the definition without change.

Section 60–741.3 Exceptions to the Definitions of ''Individual With a Disability'' and ''Qualified Individual with a Disability''

Section 60–741.3(a)(4) Construction

Paragraph (a)(4)(ii) clarifies that an individual is not necessarily protected by section 503 simply because he or she is a recovered or recovering drug abuser or is erroneously regarded as a current drug user. Such an individual must still satisfy the requirements for protection as a ''qualified individual with a disability.'' An individual erroneously regarded as illegally using drugs, for example, would have to show that he or she was regarded as a drug addict in order to demonstrate that he or she meets the definition of a ''qualified individual with a disability.''

Section 60–741.3(a)(5) Current Illegal Use of Drugs—Drug Testing

One commenter expressed a concern that this provision conflicts with the policy of the National Labor Relations Board (NLRB) relating to an employer's obligation to engage in collective bargaining with its employees' representatives regarding the imposition of a workplace drug testing policy. Paragraph (a)(5) provides that a contractor may seek reasonable assurances, through drug testing and other means, that a recovered or recovering drug user is no longer engaging in the illegal use of drugs. This paragraph merely clarifies that such drug testing does not conflict with the regulations implementing section 503. It does not require an employer to implement drug testing, and therefore does not conflict with the above NLRB policy.

Section 60–741.3(d) Homosexuality and Bisexuality

This paragraph of the final rule, which clarifies that homosexuality and bisexuality do not constitute disabilities under section 503, incorporates (with minor editorial changes) an amendment contained in the 1992 legislation (§ 102(f)(4)). (The amendment added a new paragraph (E) to the definition of ''individual with a disability'' set out at 29 U.S.C. 706(8).) The amendment parallels a provision contained in the ADA (42 U.S.C. 12211(a)), which is implemented in the EEOC's regulations at § 1630.3(e). The amendment was intended to facilitate the consistent application of section 503 and the ADA.

Section 60–741.3(e) Other Conditions

This paragraph, which specifies that section 503 does not apply to certain specified conditions—for instance, transvestism, transsexualism, pedophilia and compulsive gambling—incorporates (with minor editorial changes) an amendment contained in the 1992 legislation (§ 102(f)(4)). (The amendment added a new paragraph (F) to the statutory definition of ''individual with a disability.'') The paragraph parallels a provision contained in the EEOC's regulations (§ 1630.3(d)). The amendment was intended to conform the types of conditions excluded from protection under section 503 to those excluded from protection under the ADA (see 42 U.S.C. 12211(b)). (Paragraph (d) of the NPRM provided that the terms ''individual with a disability'' and ''disability'' do not apply to an individual solely because the individual is a transvestite. That clarification is subsumed within this paragraph of the final rule.)

Section 60–741.4 Coverage and Waivers

Section 60–741.4(a)(2) Coverage—Positions Engaged in Carrying out a Contract

The NPRM, among other things, provided (at paragraph (a)(2)(i)) that the regulations cover only positions of the contractor that are engaged in carrying out a Government contract, and (in paragraphs (a)(2)(i) (A) and (B)) set forth standards defining the circumstances under which a position shall be deemed to be engaged in carrying out a contract. Further, the proposal (in paragraphs (a)(2)(iii) (A) and (B)) required the contractor to make a determination as to which of its positions are covered by the regulations as well and a record of its determination, and (in paragraph (a)(2)(iii)(C)) provided that if a contractor fails to make this determination, it must extend the protections of the act and the regulations to all of its positions until such time as it makes the coverage determination for a particular position. The final rule revises these provisions consistent with the 1992 amendment to section 503 extending coverage under the act to the contractor's entire work force.

As stated in the preamble to the NPRM, the purpose of the provision limiting application of the regulations to positions that are engaged in carrying out a contract was to more closely conform the regulations to the jurisdictional limitation then-contained in section 503(a) as interpreted by the court in *Washington Metropolitan Area Transit Authority* v. *DeArment,* 55 EPD ¶40,507 (D.D.C. 1991). The 1992 legislation, by striking this jurisdictional limitation from section 503, amended the act to apply to all of a covered contractor's or subcontractor's work force. This amendment had prospective effect only.

In order to reflect this statutory amendment, the coverage limitation set forth in paragraph (a)(2)(i) of the NPRM has been revised in the final rule to provide that the limitation applies only to the contractor's employment decisions and practices occurring before the amendment's effective date—October 29, 1992. The proposed standards governing the determination whether a position is engaged in carrying out a contract have been carried forward in the final rule without

substantive change. (Stylistic revisions reflecting the jurisdictional limitation's retroactive application have been incorporated throughout paragraph (a)(2) as well as in appendix D, which sets out guidance regarding positions engaged in carrying out a contract.) Thus, for instance, in investigating whether a contractor covered by section 503 has discriminated against an individual with a disability in violation of the act, the issue whether the discriminatee was employed in, or was an applicant for, a position engaged in carrying out a Government contract will be relevant only if the alleged discrimination occurred before October 29, 1992. This section still has practical utility because there are a number of pending section 503 complaints involving alleged violations of the act which occurred before the amendment.

Moreover, the requirement contained in the NPRM that the contractor determine which of its positions carry out contracts (and thus are covered) and make a record of that determination has been eliminated in the final rule. As explained in the preamble to the NPRM, this determination was necessary in order to define the scope of the contractor's affirmative action and nondiscrimination obligations under the regulations. This determination, which was intended to be applied prospectively only, is no longer needed inasmuch as the act has been amended to extend those obligations to the contractor's entire work force.

Three commenters objected to ''prong A'' of the coverage test (paragraph (a)(2)(i)(A))—which provides that a position is engaged in carrying out a contract if its duties include work that fulfills a contractual obligation, or work that is necessary to, or that facilitates, performance of the contract or a provision of the contract. The commenters asserted that this provision is inconsistent with the jurisdictional limitation that was contained in the statute in that it would result in the coverage of positions with a tenuous connection to the contract. Further, these commenters stated that the regulation fails to provide sufficient guidance as to which positions are engaged in carrying out a contract. Two of these commenters also objected to the paperwork burdens associated with the coverage determination requirement.

OFCCP disagrees with the assertion that prong A is inconsistent with the jurisdictional limitation. As stated in the preamble to the proposed rule, prong A reflects the practical reality that performance of a contract generally requires the cooperation of a variety of individuals engaged in auxiliary and related functions beyond direct production of the goods or provision of the services that are the object of the contract. Therefore, OFCCP believes it reasonable to construe positions ''engaged in carrying out'' a contract as including those which perform work that is necessary to, or that facilitates, performance of the contract—even if the work is not directly required by an express contractual term. OFCCP also disagrees that the regulation fails to provide sufficient guidance on the application of prong A; OFCCP has attempted to provide contractors with as much guidance as possible on this issue in appendix D to the regulations. Finally, the commenters' concerns regarding increased burdens have been rendered moot in that the coverage determination requirement has been omitted in the final rule.

Section 60–741.4(a)(3) Contracts and Subcontracts for Indefinite Quantities

One commenter raised a concern that paragraph (a)(3) of this section will result in undue burdens on contractors in that it would require the incorporation of the equal opportunity clause (see § 60–741.5) into existing indefinite quantity contracts whenever an individual order under such contracts meets the jurisdictional amount for coverage. This concern is unwarranted. This provision does not require that an existing contract be revised or reissued to incorporate the clause physically in the contract in such a situation; it simply provides that the requirements of the clause shall apply to the contract (irrespective of whether the clause is physically incorporated into the contract).

Section 60–741.4(a)(4) Work Within the United States (Proposed)

Proposed § 60–741.4(a)(4) stated that the regulations apply only to ''employment within the United States.'' (For the sake of clarity, the final rule revises this section to substitute the phrase ''employment activities within the United States'' for the above language.)

Under current § 60–741.4(a)(3), the regulations are made applicable to work performed abroad by employees recruited within the United States. The final rule narrows the scope of that coverage. As discussed in the NPRM, the proposed narrowing was a response to the Supreme Court's decision in *EEOC* v. *Aramco,* 111 S. Ct. 1227 (1991), which held that title VII of the Civil Rights Act of 1964 (title VII) does not apply to United States citizens employed abroad by United States employers. OFCCP concluded that a similar coverage limitation applies to section 503. Upon reconsideration, OFCCP believes that proposal failed to clearly reflect OFCCP's policy with respect to the coverage of employment decisions made within the United States affecting employment opportunities abroad (issues which were not addressed by the *Aramco* decision). Accordingly, the final rule revises this section to clarify that the regulations cover 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. OFCCP's established policy is to treat these particular employment decisions as covered by section 503.

In the Civil Rights Act of 1991, Congress amended title VII and the ADA to provide expressly for extraterritorial application of those laws. We considered whether it is possible to apply a similar rule under section 503, and concluded that it is not. Although the Civil Rights Act of 1991 reversed the result of *Aramco* with respect to title VII and the ADA, it did not erase the longstanding legal principle repeated in that case that, absent contrary intent, legislation applies only within the borders of the United States. We are unaware of any such expressed intent regarding section 503.

Section 60–741.5 Equal Opportunity Clause

Section 60–741.5(a) Government Contracts

Proposed paragraph 4 of this section (one of the provisions of the equal opportunity clause, which must be included in all covered contracts and subcontracts) stated that the contractor agrees to post, in a form to be prescribed by the Director (now the Deputy Assistant Secretary for Federal Contract Compliance Programs), a notice regarding the rights of applicants and employees under section 503. The final rule revises this section to require the contractor to ensure that applicants and employees with disabilities are informed of the contents of the notice. In part, this revision responds to a suggestion by a disability rights group that the regulations be revised to require that the posting mandated by proposed § 60–741.80 (the contractor's equal opportunity policy statement) be accessible to persons with vision impairments. (As discussed below, this posting requirement has been transferred to § 60–741.44(a).) OFCCP believes that such an accessibility requirement should apply both to this

posting and the posting mandated by § 60–741.5(a) (paragraph 4); therefore, the final rule makes the requirement applicable to both notices. OFCCP concludes that the contractor must ensure that these notices are accessible to applicants and employees with disabilities to satisfy its duty to provide a reasonable accommodation. A contractor may make these notices accessible, for example, by having the notice read to a visually disabled individual or by lowering the posted notice so that it may be read by a person in a wheelchair.

Section 60–741.5(f) Duties of Contracting Agencies

The proposal provided in part that contracting agencies are required to cooperate with the Director (now Deputy Assistant Secretary for Federal Contract Compliance Programs) in the performance of his or her responsibilities under the act, including taking such actions for noncompliance as set forth in § 60–741.66 (Sanctions and penalties) as may be ordered by the Director (now Deputy Assistant Secretary). The final rule revises this section by incorporating references to the Secretary of Labor (in addition to the reference to the Deputy Assistant Secretary for Federal Contract Compliance Programs); this revision is intended to accurately reflect the role of the Secretary in the enforcement of the act.

Section 60–741.21(g) Prohibitions

The text of this subsection has been altered slightly from the proposal, to provide that exclusionary selection criteria that ''concern only marginal functions of the job,'' rather than those that ''do not concern an essential function of the job,'' would not be consistent with business necessity. This subtle distinction allows for the possibility that there may be selection criteria that do not relate to either essential or marginal functions, which are consistent with business necessity. Conforming changes have been made to §§ 60–741.44(c)(1) and (2).

Section 741.21(h) Administration of Tests

In the proposed rule this paragraph contained broader language than the comparable ADA provision. The NPRM specified that contractors must administer employment tests in an appropriate format to individuals with impaired ''sensory, manual, speaking, mobility or other skills.'' The ADA rule does not reference ''mobility and other skills.'' Our stated intent in including the additional language was to clarify that individuals with disabilities may not be excluded from a job that they can actually perform merely because they are hampered in the ability to complete or succeed on a test as a result of their impaired skills (resulting from their disability)—no matter what the impaired skills may be. Upon further consideration, we have decided to track more strictly the wording of the EEOC regulation, which in turn strictly tracks the wording of the ADA. We have added to appendix A on reasonable accommodation additional guidance on the administration of tests that is consistent with our proposed rule.

Section 741.23 Medical Examinations and Inquiries

Section 60–741.23(b) Permitted Medical Examinations and Inquiries

One commenter suggested that the regulations clarify that OFCCP will follow EEOC's interpretative guidance (relating to § 1630.14(a) of the ADA regulations) which provides that physical agility tests are not medical examinations, and thus may be given at any point in the application or employment process. OFCCP does indeed intend to follow this interpretation. As stated earlier, the EEOC's interpretative guidance is equally applicable with respect to the counterpart provisions of this rule, and it may be relied upon for guidance. See § 60–741.1(c)(1). Further, a phrase was deleted from the final rule as redundant.

Section 60–741.23(c) Invitation to Self-Identify

This paragraph of the NPRM stated that the contractor may invite applicants and employees to self-identify as individuals with disabilities as specified in § 60–741.42. This paragraph has been revised to reflect changes made by the final rule to § 60–741.42 (see discussion below).

Section 60–741.23(d) Confidentiality and Use of Medical Information

One commenter raised the concern that the requirement contained in proposed § 60–741.23(d), that information regarding the medical condition or history of an applicant or employee be treated as a confidential record, conflicts with an employer's obligation under the Railway Labor Act to provide such information to bargaining representatives under specified circumstances. OFCCP has not yet taken a position on this issue. The EEOC will be addressing similar issues under the ADA in future Compliance Manual sections and policy guidance. OFCCP intends to coordinate its policy under section 503 relating to this issue with the EEOC at an appropriate time in the future.

Further, to ensure greater confidentiality OFCCP has narrowed the scope of the requirement that confidential medical information be made available to Government officials. As revised, the rule provides access to Government officials enforcing the laws administered by OFCCP (i.e., section 503, Executive Order 11246, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. § 4212)), and those enforcing the ADA. A corresponding revision has been made in appendix B, which contains a sample invitation to self identify.

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

One commenter recommended that the regulations provide additional clarification regarding permissible coverage restrictions under benefit plans. OFCCP intends to develop future guidance on this and related issues in coordination with EEOC.

Subsection (a) has been slightly revised to refer to ''[a]n insurer * * *, or any agent or entity that administers benefit plans * * *.'' The proposal had erroneously deviated from the corresponding ADA provision, using the word ''contractor'' rather than ''entity.''

Subpart C—Affirmative Action Program

Several commenters made observations concerning this subpart as a whole. One, for example, recommended that the final rule clarify that nondiscrimination and affirmative action are separate and distinct concepts, and that affirmative action does not mean that an employer is required to grant a preference. Affirmative action and nondiscrimination are separate, but related, concepts. The duty to undertake affirmative action subsumes the duty to refrain from discrimination. Thus, for example, a contractor that is discriminating is not fulfilling its affirmative action obligations to identify, prevent and remedy discrimination. OFCCP also wishes to clarify that section 503 and these implementing regulations do not require employers to grant a preference to individuals with disabilities.

Subpart C requires covered contractors to institute a system of proactive measures designed to ensure equal employment opportunity for individuals with disabilities. For example, contractors are required to ensure that their personnel processes provide for careful consideration of the

job qualifications of known disabled individuals (§ 60–741.44(b)); periodically review job qualification standards to ensure that, to the extent they tend to screen out qualified persons with disabilities, such requirements are consistent with business necessity (§ 60–741.44(c)); and take appropriate efforts to effectively recruit workers with disabilities (§ 60–741.44(f)). These measures do not require the contractor to extend a preference for individuals with disabilities; rather, they are designed to create a working environment that actively welcomes qualified persons with disabilities at all levels in the contractor's work force.

Section 60–741.40 Applicability of the Affirmative Action Program Requirement

The NPRM contained a proposal (in paragraph (a)) to raise the threshold for the application of the written affirmative action program (AAP) requirement from the current (§ 60–741.5(a)) 50 or more employees and a Government contract of $50,000 or more, to 150 or more employees and a contract of $150,000 or more. Several commenters expressed approval of the NPRM proposal, one expressed disapproval, and two favored a higher threshold—250 employees and a Federal contract of $250,000 or more.

Upon further consideration, OFCCP believes it is in the public interest to maintain the threshold requirements imposed at current § 60–741.5(a). Raising the threshold as proposed would remove nearly two million workers from the protection of a Section 503 affirmative action program. Further, since a large proportion of new jobs are created in companies with fewer than 150 employees, relieving such companies from the affirmative action program requirement would have a significant impact on the employment opportunities of individuals with disabilities. Finally, OFCCP wishes to maintain consistency in its affirmative action program threshold among its three programs, and that threshold under both its Executive Order 11246 program (§§ 60–1.40(a), 60–2.1(a)) and 38 U.S.C. 4212 program (§ 60–250.5(a)) is 50 or more employees and a Government contract of $50,000 or more. Accordingly, the corresponding threshold in the current Section 503 regulations is carried forward in this final rule without change.

A number of commenters expressed concern regarding proposed paragraph (b) insofar as it requires contractors to prepare and maintain an AAP at each establishment. These commenters asserted that it would be overly burdensome to comply with this requirement at establishments which employ very few people. Although this paragraph, which is virtually identical to current § 60–741.5(a), does not define ''establishment,'' OFCCP has applied that term flexibly in order to accommodate small establishment issues. The Secretary of Labor's decision in *OFCCP* v. *Coldwell, Banker and Co.*, 78–OFCCP–12 (August 14, 1987), an Executive Order 11246 case, recognized that the term ''establishment'' generally means a physically distinct place of business or location. However, he also recognized that there may be circumstances where it is appropriate for OFCCP to approve the grouping of separate facilities for AAP purposes. Factors that may be relevant include whether there is centralized authority for personnel decisions, whether the facilities are in the same labor market or recruiting area, and the number of employees at the facilities. Contractors may request that OFCCP approve the grouping of particular facilities for AAP purposes.

Section 60–741.42 Invitation to Self-Identify

This section addresses a contractor's obligation to invite applicants and employees with disabilities to self-identify in order to benefit from the contractor's affirmative action program. Under the current regulations (41 CFR 60–741.5(c)(1)) contractors are required to invite employees and applicants to self-identify. Under paragraph (a) of the NPRM contractors would be permitted, but not required, to invite self-identification. The final rule differs from the proposed version, and is similar to the current rule, in that it makes the obligation to extend the invitation mandatory. The final rule takes a different approach from the current rule, however, in that it specifies that except in limited circumstances the invitation is to be extended after an employment offer has been made and before the applicant begins work.

OFCCP had explained in the preamble to the NPRM that it believed the invitation to self-identify should be permissive, rather than mandatory, in light of other proposed provisions (§§ 60–741.44(b) and (d)) which provide comparable protections. However, upon reconsideration, OFCCP believes that these provisions (which are carried forward in the final rule) do not provide protections comparable to a mandatory invitation to self-identify. Sections 60–741.44(b) and (d) are intended to ensure that the contractor will afford individuals with a known disability proper consideration for employment opportunities and reasonable accommodations. In contrast, the mandatory invitation to self-identify is designed to afford persons whose disabilities may not be known to the contractor a full opportunity to come forward to request an accommodation. Further, the mandatory invitation ensures that notice is provided of the contractor's obligations with respect to individuals with disabilities. Accordingly, the final rule carries forward the mandatory requirement from the current regulations.

Further, the proposed permissive invitation provision was based in part on the concern that a mandatory requirement might result in inadvertent violations of the ADA regulatory prohibitions regarding medical inquiries by employers subject to both laws. Those regulations generally prohibit inquiries (such as those required by § 60–741.42) whether an applicant or employee is an individual with a disability or as to the nature or severity of the disability but specify that such inquiries are permitted if required to satisfy the affirmative action requirements of section 503 (see § 1630.13 of the ADA regulations and the interpretative guidance relating to § 1630.14). At the time the NPRM was published, OFCCP was concerned that a contractor might inadvertently extend the invitation to workers who are not covered by section 503—and thus, such an invitation arguably would not fall within this exception to the medical inquiries prohibition. (As is discussed above, prior to the act's amendment by the 1992 legislation only employees who were employed in, or applicants for, positions that are engaged in carrying out a Government contract were covered.) OFCCP believed that a permissive invitation would permit the contractor to avoid extending the invitation where an applicant's or employee's coverage under section 503 was unclear. In view of the amendment extending coverage under the act to all of the contractor's positions, this issue no longer presents a significant concern.

The revised provision is intended to comport with EEOC regulations and guidance on pre-employment inquiries. Paragraph (a) of the rule requires the contractor to issue the invitation after making an offer of employment and before the applicant begins his or her employment duties. This approach is consistent with § 1630.14(b) of the EEOC's regulations, which provides that an employer may require a medical inquiry after making an offer of employment to a job applicant and

before the applicant begins his or her job duties, if all entering employees in the same job category are subjected to such an inquiry regardless of disability. Inviting an applicant to self-identify before an offer of employment has been made is permitted only in two limited circumstances: If the invitation is made when the contractor actually is undertaking affirmative action at the pre-offer stage; and if the invitation is made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities. EEOC's October 10, 1995, ''ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations'' authorizes pre-employment inquiries in these circumstances. Furthermore, in order to ensure consistency between the requirements of section 503 and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), OFCCP plans to issue an Interim Final Rule conforming the invitation to self-identify provision of VEVRAA with that in this rule.

Further, the rule has been revised (paragraph (b) of the final rule; paragraph (a) of the proposal) to require that the invitation inform the individual that the request to benefit under the contractor's affirmative action program may be made immediately or at any time in the future. This revision is intended to help ensure that the individual is aware that he or she is not precluded from making the request at any time in the future merely because an initial request was made or because he or she failed to make the request immediately in response to the invitation. For example, an individual with a disability simply may not choose to self-identify before beginning work, but may wish to do so later; after beginning work an individual may develop a disability; or a pre-existing minor disability may become more severe. Proposed paragraph (b), which set forth a similar clarification—but did not require that it be included in the invitation itself—has been omitted in the final rule.

Section 60–741.44 Required Contents of Affirmative Action Programs

Section 60–741.44(a) Policy Statement

Paragraph (a) of the proposal, which provided that the contractor shall include its equal opportunity policy statement in its affirmative action program, has been revised for clarity. As revised, this section states that the contractor shall post the policy statement on company bulletin boards, and specifies the type of information that should be included in the policy statement—both suggested (relevant information about the contractor's policy) and required (notification that the contractor is obligated, as specified in § 60–741.69, to refrain from harassment or intimidation). In this part, OFCCP uses the term ''shall'' when material is mandatory and ''should'' when the material is encouraged but not required. This revision largely conforms the provision to the counterpart Executive Order regulation (41 CFR 60–2.20(a)). The notice posting requirement was set out in proposed subpart E (Ancillary Matters) at § 60–741.80; that section also provided that the posting shall include a notification regarding the contractor's obligation to refrain from harassment or intimidation. For the sake of clarity, the substance of these provisions has been transferred to § 60–741.44(a). (Proposed §§ 60–741.81 through 60–741.85 have been redesignated as §§ 60–741.80 through 60–741.84, respectively.) OFCCP believes that the revisions establishing suggested guidance on the contents of equal opportunity notices, will simplify the process of preparing such notices. Additionally, as discussed in connection with § 60–741.5(a), the final rule revises this section to require the contractor to ensure that applicants and employees with disabilities are informed of the contents of the policy statement.

Section 60–741.44(d) Reasonable Accommodation to Physical and Mental Limitations

A few commenters objected to paragraph (d) of the proposal insofar as it provides that where an employee with a known disability is having difficulty performing his or her job, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation. The preamble to the proposal stated that the contractor is required to make the inquiry only in situations where it is reasonable to conclude that a performance problem may be related to a disability. These commenters asserted that it may be difficult to determine with certainty whether the employee's performance problem is the result of a disability. Consequently, the commenters argued, the requirement may compel some contractors to make potentially offensive inquiries regarding needed accommodations (i.e., inquiries based on unfounded and stereotypical assumptions).

In order to address this concern, paragraph (d) has been revised in the final rule to require the contractor to make an initial inquiry as to whether the performance problem has any connection to the employee's disability, and that a second inquiry about needed accommodations only be made where the individual indicates that the problem does have such a connection. Moreover, paragraph (d) has been revised to require the contractor to make the initial inquiry only where the employee is having significant difficulty performing the job and it is reasonable to conclude that the performance problem may be related to the known disability.

The revision requiring the contractor to make the initial inquiry only where the employee is having a significant job performance problem is intended to minimize the burden placed on the contractor while also helping to ensure that the accommodation issue is fully explored by both the employee and the contractor before the employee may be subject to adverse action.

One commenter suggested that, rather than imposing a requirement on contractors to inquire about the need for a reasonable accommodation where an individual with a known disability is having a job performance problem, OFCCP should encourage contractors to ensure that individuals with disabilities are aware of their rights under section 503, including their right to request a reasonable accommodation. The difficulty with this approach is that, notwithstanding a contractor's efforts to disseminate this information, some individuals with disabilities may remain unaware of their right to request a reasonable accommodation. Moreover, many individuals with disabilities may not perceive the need for an accommodation (for instance, a person with narcolepsy might fail to recognize the fact that his or her disability is so severe as to interfere with the performance of the job).

Section 60–741.44(f) External Dissemination of Policy, Outreach and Positive Recruitment

Some commenters viewed paragraph (f) as imposing too many burdensome requirements. OFCCP disagrees. Proposed paragraph (f), which is generally consistent with current § 60–741.6(f), does not impose any new appreciable obligations. It simply specifies that a contractor is required to engage in such outreach and recruitment activities—as appropriate to its circumstances (such as size, resources, and the adequacy of current procedures)—that are reasonably designed to effectively recruit qualified individuals with disabilities. The methods for doing so that are specified in paragraphs (f)(1) through (f)(7) are

suggested, rather than mandatory. This provision is carried forward in the final rule without change.

Section 60–741.60 Compliance Reviews

OFCCP did not receive any comments during the comment period regarding the proposed provision relating to compliance reviews. However, questions subsequently have arisen regarding whether this provision gives OFCCP new authority to conduct reviews or simply clarifies existing authority under section 503 and the present regulations. This provision simply reaffirms more clearly OFCCP's existing authority under the act and the regulations (see current § 60–741.25) to conduct compliance reviews to evaluate contractors' compliance with the law.

Section 60–741.61 Complaint Procedures

Section 60–741.61(b) Place and Time of Filing

OFCCP's paragraph (b) proposal to extend the current 180 day complaint filing period to 300 days is adopted in this final rule. The final rule provides a uniform national standard which will not be shorter than the complaint filing period under the ADA. Section 107(a) of the ADA, which incorporates the procedural requirements of section 706 of title VII, requires the EEOC to defer for 60 days to State or local agency processing of an ADA complaint if a State or local law prohibits the employment practice alleged to be unlawful, and the agency is authorized to grant or seek relief. In such jurisdictions, an ADA complaint may be filed with the EEOC within 30 days of the conclusion of the State or local agency processing or within 300 days of the date of the alleged violation, whichever occurs earlier. However, where there is no deferral (no State or local law prohibits the employment practice at issue, or no State or local agency is authorized to grant or seek relief), an ADA complaint must be filed with the EEOC within 180 days of the alleged violation.

The proposed 300 day filing period under section 503 thus ensured that in deferral jurisdictions a complaint covered by both section 503 and the ADA would be timely under both statutes. As discussed in the preamble to the NPRM, however, the 300 day section 503 period also would mean that in nondeferral jurisdictions complaints covered by both statutes and filed between 181 and 300 days of the alleged violation would be timely under section 503 but not under ADA. In such cases, the complainant would lose rights unique to ADA (such as the private right to file a law suit).

Some commenters objected to a blanket 300 day period because witnesses may not still be available, and if available, may no longer have a fresh recollection of pertinent events—particularly in the construction industry, where many projects are completed within 300 days. However, inasmuch as the ADA 300 day filing period in deferral jurisdictions is a statutory requirement (as it has been under title VII), contractors would encounter any such problem under the ADA irrespective of the time period adopted under section 503.

Another commenter objected to the proposal because, in its view, the 300 day period was developed for the convenience of the states rather than the Federal enforcement agencies, and thus it offers no support for extension of the filing period under section 503. However, OFCCP does not rely on the ADA filing period as legal support for extending the section 503 period to 300 days. Rather, OFCCP's decision to extend the period is based upon a desire to establish a uniform national standard which will be at least as long as the complaint filing period under the ADA. Because no frequently updated list of deferral jurisdictions is published and readily available, complainants and contractors may not know whether they are in a deferral jurisdiction. Therefore, a uniform national standard will result in ease of administration and public certainty regarding the filing deadline.

Section 60–741.61(c)(2) Contents of Complaints—Third Party Complaints

Five commenters objected to this paragraph, which provides in part that a complaint filed by an authorized representative need not identify by name the person on whose behalf the complaint is filed. The purpose of this provision, which is derived from the analogous ADA regulation (29 CFR 1601.7(a)), is to help prevent retaliation against persons seeking to exercise their rights under the act. The commenters asserted that in some cases contractors would have difficulty responding to the allegations of a complaint without knowing the identity of the person on whose behalf it is filed. OFCCP wishes to emphasize that in many cases it would not be necessary to disclose the individual's identity to enable the contractor to respond effectively. For example, where the complaint alleges a broad contractor policy or practice (such as the rejection of all applicants who have had a back injury or the use of an application form that requests pre-offer medical information), the contractor will be able to respond fully without knowing the name of the person(s) on whose behalf the complaint was filed. However, OFCCP acknowledges that where the complaint involves practices with limited applicability (such as a failure to provide reasonable accommodation for a specific disability in a specific job), it may not be possible to protect the individual's confidentiality. Therefore, the final rule reflects that confidentiality will be protected where possible, given the facts and circumstances in the complaint.

Additionally, the proposal stated that ''during the investigation'' of a third-party complaint OFCCP shall verify the authorization of the complaint by the person on whose behalf the complaint is made. The phrase ''during the investigation'' is omitted in the final rule. This revision is intended to permit OFCCP to verify the complaint's authorization at an earlier stage of its processing of the complaint—that is, before the contractor is provided notice that the complaint has been filed.

Section 60–741.61(f) Resolution of Matters

Paragraph (f)(1) has been revised to clarify that the notification required thereunder shall be provided to the contractor as well as to the complainant. This reflects current OFCCP practice.

Section 60–741.66 Sanctions and Penalties

Section 60–741.66(c) Debarment

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

OFCCP believes the fixed-term debarment sanction will be particularly effective in encouraging compliance among the recalcitrant contractors who repeatedly break their promises of future compliance with respect to affirmative action and recordkeeping

requirements. OFCCP views affirmative action and recordkeeping requirements as fundamental to section 503 compliance. These requirements provide the foundation for the contractor's affirmative action efforts and provide the basis for monitoring the contractor's compliance by both the contractor and OFCCP.

The current regulations (at § 60–741.50) require a showing that a debarred contractor will carry out employment policies and practices in compliance with section 503 and its regulations as one of the conditions of reinstatement. OFCCP has traditionally accepted a contractor's promise of future compliance as sufficient to meet this requirement. Unfortunately, OFCCP has found that, for some contractors, a promise is not enough. The sanction of debarment for a fixed-term of not less than six months but no more than three years establishes a minimum trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that will ensure continuing compliance with its section 503 obligations. See, e.g., *OFCCP* v. *Disposable Safety Wear*, 92–OFC–11 (Decision and Final Administrative Order of the Secretary of Labor, September 29, 1992). The express recognition of fixed-term debarment in the regulations is designed to put contractors on notice that an empty promise of future compliance will not be a sufficient premise for continued contracting with the Federal Government. Express regulatory recognition of the sanction of fixed-term debarment will strengthen the section 503 enforcement scheme by deterring contractors from engaging in violations ''based on a cold weighing of the costs and benefits of noncompliance.'' *Janik Paving & Construction* v. *Brock*, 828 F.2d 84 (2d Cir. 1987).

Accordingly, OFCCP has determined to retain in this final rule the authority to impose fixed-term debarments. However, after further consideration, OFCCP has decided to remove reference to willful or aggravated from the fixed-term debarment provision. Although a few commenters expressed concern that the proposal would fail to provide sufficient guidance as to the types of violations that would trigger the sanction, OFCCP believes that it is neither practicable nor necessary to precisely define the types of violations for which it would impose a fixed-term debarment, and declines to do so. Rather, OFCCP will retain discretion to make determinations on a case-by-case basis. In making such determinations, OFCCP will consider, among other factors, the severity of the violation, whether the violation can be fully remedied in the absence of a fixed-term debarment and the contractor's compliance history.

Section 60–741.69 Intimidation and Interference

One commenter objected to the references to state and local laws in paragraph (a) as exceeding OFCCP's jurisdiction. The objective of this provision is not, as the commenter suggests, to enforce a state or local law, but to proscribe activities which interfere with a person's exercise of his or her rights under a state or local law. OFCCP may seek the same range of sanctions for a violation of this provision (such as debarment and/or back pay) as it does for other violations of section 503.

Section 60–741.80 Posting of Notices (Proposed)

As discussed in connection with § 60–741.44(a), proposed § 60–741.80 is not carried forward in the final rule. Subsequent sections have been redesignated accordingly.

Section 60–741.80 Recordkeeping

Section 60–741.80(a) General Requirements

A number of commenters raised concerns regarding paragraph (a) of this section. This paragraph revises the current record retention obligation—which at § 60–741.52(a) provides that contractors are required to maintain for one year records relating to complaints against the contractor—by making it applicable to any personnel or employment record made or kept by the contractor. This revision conforms the obligation to the analogous requirement under EEOC's recordkeeping regulations (29 CFR 1602.14(a)) issued pursuant to title VII and the ADA. Paragraph (a) also specifies that when a contractor has been notified that a complaint has been filed, that a compliance review has been initiated or that an enforcement action has commenced, the contractor shall preserve all relevant personnel records until the final disposition of the action. Again, this requirement parallels the corresponding EEOC regulation issued pursuant to title VII and the ADA.

Paragraph (a) of the final rule varies slightly from the corresponding provision contained in the NPRM. The final rule does not carry forward the reference to records regarding coverage determinations contained in the provision's listing of examples of the types of records that must be preserved, inasmuch as contractors are no longer required to make such coverage determinations (see discussion regarding § 60–741.4(a)(2)). Further, the recordkeeping obligation in the final rule remains at one year for smaller contractors, instead of being increased to two years for all contractors as had been proposed. In order to provide regulatory relief for smaller contractors, only contractors that have 150 or more employees and a Government contract of $150,000 or more are required to maintain records for two years.

One commenter was concerned that paragraph (a) unjustifiably expands the types of records that must be kept beyond those required by EEOC. This concern is misplaced and was apparently based on the fact that the listing in paragraph (a) of examples of the types of personnel records that must be maintained varies somewhat from the corresponding listing contained in the EEOC regulation. OFCCP intends that this requirement apply to the same records as does the EEOC regulation—that is, to any personnel or employment record made or kept by the employer.

A number of commenters objected to the extension of the retention period on the grounds that it is inconsistent with the one-year retention period under EEOC's regulations applicable to title VII and the ADA. Some commenters objected that it would impose unreasonable record storage burdens on large companies that have many thousands of applicants and employees, and others stated that it would burden small and medium size contractors that have fewer personnel department resources, including small construction firms that have a fluid workforce and high turnover. With respect to the first concern, the longer retention period is justified by differences between the enforcement activities of OFCCP and EEOC. As explained in the proposal, a two year retention period provides greater assurance that relevant records will be available during OFCCP compliance reviews (during which the agency generally reviews employment practices and activity going back two years). In contrast, EEOC's enforcement of title VII and the ADA is triggered exclusively by charges—which must be filed within 180 days (or, in deferral jurisdictions, 300 days) of an alleged violation. Thus, EEOC's one-year retention period is adequate to ensure that relevant records are not discarded before the expiration of the filing period.

Turning to the second concern, OFCCP believes that overall there will be only a minimal increase in burden imposed on the larger contractors as a result of the extended record retention period. (EEOC reached a similar conclusion in 1991 (*see* 56 FR 35753

(July 26, 1991)) when it doubled its existing six-month retention period under title VII to one year—an obligation that applies to a significantly larger universe of employers than does the obligation under section 503, which applies only to contractors that have 150 or more employees and a Government contract of $150,000 or more.) Many large employers, and some small employers as well, are increasingly maintaining electronic records. Where this is the case, compliance with the requirement will impose little or no additional burden. Moreover, the decision to reduce the record retention period for small contractors to one year—the same period required by EEOC—will provide relief to small companies that are less likely to maintain electronic records.

Section 60–741.80(b) Failure to Preserve Records

Proposed paragraph (b) provided in part that where a contractor has destroyed or failed to preserve the records that it is required to preserve under paragraph (a), there shall be a presumption that such records would have been unfavorable to the contractor. However, proposed paragraph (b) contained a proviso which stated that the presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of its control. A number of commenters objected to this adverse inference provision on the grounds that it would deny due process and would be unduly harsh, especially, they asserted, because records are frequently misplaced or destroyed inadvertently through clerical error. One commenter requested that OFCCP clarify that the failure to preserve records must be willful.

OFCCP believes that this requirement is necessary to prevent OFCCP's compliance monitoring and enforcement efforts from being frustrated by the destruction or failure to preserve records. OFCCP intends to invoke the presumption selectively where the facts warrant (and reserves the right to do so, when warranted, even in cases where the contractor claims but cannot substantiate that the destruction or failure to preserve records was inadvertent). In recognition of this discretionary approach, the final rule revises this section to state that the presumption ''may'' be invoked. Contractors will have a full opportunity to submit evidence to rebut the inference.

Section 60–741.80(c)

The final rule changes the effective date of this section from the proposed 30 days after the date of publication to 120 days after the date of publication. This change in the effective date is due to amendments that altered the requirements of the Paperwork Reduction Act after OFCCP published the NPRM. OFCCP anticipates obtaining and publishing an OMB control number during the 120 day period.

Section 60–741.82 Labor Organizations and Recruiting and Training Agencies

One commenter expressed concern that this section may authorize OFCCP to compel the parties to a collective bargaining agreement to make modifications to the agreement. The commenter contended that such a position may be inconsistent with that of the EEOC under its regulations implementing the ADA. Section 60–741.82 does not make any substantive changes to the section 503 regulation that it replaces, and that regulation has been in effect since the first section 503 regulations were promulgated in 1976. Moreover, the regulation parallels an Executive Order 11246 regulation (§ 60–1.9) that has been in effect since 1968. Section 60–741.82 does not on its face require such modifications to collective bargaining agreements, and OFCCP normally does not have jurisdiction over the union.

The EEOC will be addressing various issues under the ADA related to collective bargaining agreements in future Compliance Manual sections and policy guidance. OFCCP, to the extent possible, intends to coordinate its policy under section 503 relating to collective bargaining agreements with the EEOC at an appropriate time in the future.

Section 60–741.84 Effective Date

The final rule was modified slightly to clarify that contractors presently holding Government contracts are required to update their affirmative action programs within 120 days of the effective date of these regulations only as required to comply with the changes made by the final rule. A complete annual updating of the programs is not required within 120 days. The proposal also had stated that the effective date would be 30 days after publication. However, OFCCP must display a valid OMB control number before the recordkeeping provisions in the final rule can become effective. Therefore, the effective date of the rule will be when OFCCP publishes the OMB control number in the Federal Register, which OFCCP anticipates will be between 90 and 120 days after publication of this final rule.

Appendix D to Part 60–741—Guidelines Regarding Positions Engaged in Carrying Out a Contract (Proposed as Appendix A)

Proposed appendix A was included in the NPRM to provide guidance on the application of proposed § 60–741.4(a)(2)(i)(A)—prong A of the regulatory test for determining which of the contractor's positions are engaged in ''carrying out'' a Government contract—and to assist contractors in making the coverage determinations required under proposed § 60–741.4(a)(2)(iii) (see discussion regarding § 60–741.4(a)(2) above). As noted above, as a result of an amendment to section 503, the issue whether the contractor's positions were engaged in carrying out a Government contract is relevant only with respect to the contractor's employment decisions and practices which occurred before October 29, 1992. On that date, the act, which had applied only insofar as the contractor was employing persons to carry out a contract, was amended to extend coverage thereunder to all of the contractor's positions—irrespective of their relation to the contract. Consequently, the proposed coverage determination requirement, which was intended to be applied prospectively to define the scope of the contractor's obligations under section 503, is omitted from the final rule as unnecessary. OFCCP has nevertheless determined to retain the appendix in the final rule to provide guidance on its policy relating to coverage with respect to the contractor's employment decisions and practices occurring before the act's amendment, and has revised the appendix to make this clarification.

This appendix still has practical utility because, as noted above, there are a number of pending section 503 complaints involving alleged violations of the act which occurred before the amendment. Moreover, it is OFCCP's general practice during its compliance reviews to examine the contractor's employment practices dating back two years immediately preceding the compliance review and, as applicable, to assess liability for violations occurring during that period. Once all matters involving employment practices and decisions occurring before October 29, 1992, are finally resolved, OFCCP will withdraw this appendix. In order to preserve the continuity of the letter designations for the appendices to the regulations at the time of the withdrawal, proposed appendix A has been redesignated as appendix D, and

proposed appendices B, C, and D have been redesignated as appendices A, B and C, respectively.

Proposed appendix A stated that a contract is not deemed covered unless, among other things, it is performed within the United States. This statement is omitted from the final rule to reflect the revision to § 60–741.1(b) (see discussion above). Also, the paragraphs of the appendix have been numbered for ease of reference.

Appendix A to Part 60–741—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation (Proposed as Appendix B)

The discussions of §§ 60–741.42 and 741.44(d) contained in paragraph 2 of proposed appendix B have been revised to reflect the revisions to those sections in the final rule (see discussion above regarding those sections). Additionally, the appendix has been renamed, and a paragraph of introductory text has been added, to clarify the differences between reasonable accommodation and affirmative action under section 503. As discussed above, this final rule redesignates this appendix as appendix A.

Appendix B to Part 60–741—Invitation to Self-Identify (Proposed as Appendix C)

Paragraph 1 has been revised to incorporate a clarification that the individual may make a request—immediately in response to the invitation or at any time in the future—to benefit under the contractor's affirmative action program (see discussion above regarding § 60–741.42). As discussed above, this final rule redesignates this appendix as appendix B. The appendix is renamed to clarify that it is a ''sample'' invitation. Finally, a note has been added at the beginning of the appendix to state that when the invitation to self-identify is being extended prior to an offer of employment, sample text relating to identification of reasonable accommodations should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which generally precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

Appendix C to Part 60–741—Review of Personnel Processes (Proposed as Appendix D)

As discussed above, this final rule redesignates this appendix as appendix C.

Regulatory Procedures

Executive Order 12866

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

Regulatory Flexibility Act

The final rule clarifies existing requirements for Federal contractors. In view of this fact and because the final rule does not substantively change existing obligations for Federal contractors, the rule will not have a significant economic impact on a substantial number of small business entities. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Unfunded Mandates Reform Act

This final rule does not include any Federal mandate that may result in the expenditure by state, local and tribal governments in the aggregate, or by the private sector, of $100,000,000 or more in any one year.

Paperwork Reduction Act

This final rule establishes new recordkeeping provisions that did not previously exist. The rule extends the current one-year record retention period to two years for those larger contractors that have 150 or more employees and a Government contract of $150,000 or more, and it makes this retention obligation applicable to a broader range of records. It requires that, for purposes of confidentiality, information obtained by contractors regarding the medical condition or history of any applicant or employee be collected and maintained on separate forms and in separate medical files. Lastly, it requires contractors to maintain a separate file regarding applicants who have identified themselves as individuals with disabilities.

The NPRM projected an increase of 1.1 million paperwork burden hours associated with contractors determining which positions carry out Government contracts. As discussed above, the 1992 legislation, by striking this jurisdictional limitation from Section 503, eliminates the need for contractors to determine which positions are covered. Therefore, contractors will not need to incur the estimated 1.1 million paperwork burden hours mentioned in the proposal. As stated in the NPRM, OFCCP does not believe the other recordkeeping requirements created by this rule will result in a net increase in burden hours as compared to the current regulation.

These recordkeeping requirements have been submitted to the Office of Management and Budget for clearance under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). OFCCP solicits comments concerning these recordkeeping requirements to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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.

Written comments on the recordkeeping requirements should be sent to Joe N. Kennedy, Deputy Director, OFCCP, Room C–3325, 200 Constitution Ave., N.W., Washington, D.C. 20210. To be assured of consideration, comments must be in writing and must be received on or before July 1, 1996. As a convenience to commenters, OFCCP will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is (202) 219–6195. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Receipts of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202) 219–9430 (voice), 1(800) 326–2577 (TDD).

These new recordkeeping requirements are not effective until OFCCP displays a currently valid OMB control number. Upon receipt of that number, which OFCCP anticipates will take between 90 and 120 days, OFCCP will publish a document in the Federal Register.

List of Subjects in 41 CFR Part 60–741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity,

Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, D.C., this 12th day of April, 1996.

Robert B. Reich,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, with respect to the rule amending 41 CFR chapter 60 published on December 30, 1980 (45 FR 86216), which was suspended indefinitely at 46 FR 42865, the revision of part 60–741 is withdrawn, and in parts 60–1 and 60–30, all references to section 503 of the Rehabilitation Act are withdrawn; with respect to title 41 of the Code of Federal Regulations, chapter 60 is amended as set forth below.

Part 60–741 is revised to read as follows:

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

Subpart A—Preliminary Matters, Equal Opportunity Clause

Subpart B—Discrimination Prohibited

Subpart C—Affirmative Action Program

Subpart D—General Enforcement and Complaint Procedures

Subpart E—Ancillary Matters

Authority: 29 U.S.C. 706 and 793; and 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 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 of 1990 (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 provisions of this part.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of 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.

(a) *Act* means the Rehabilitation Act of 1973, Pub. L. 93–112 (29 U.S.C 706 and 793), as amended by sec. 111, Pub. L. 93–516; sec. 103(d)(2)(B), Pub. L. 99–506; sec. 9, Pub. L. 100–259; sec. 512, Pub. L. 101–336 ; and secs. 102 and 505, Pub. L. 102–569.

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

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

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

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

(f) *United States,* as used 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.

(g) *Recruiting and training agency* means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

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

(i) *Government contract* means any agreement or modification thereof

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

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

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

(3) *Person,* as used in paragraphs (i) and (l) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

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

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

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

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

(k) *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.

(l) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

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

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

(m) *Subcontractor* means any person holding a subcontract 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.

(n)(1) *Individual with a disability* means any person who:

(i) Has a physical or mental impairment which substantially limits one or more of such person's major life activities;

(ii) Has a record of such an impairment; or

(iii) Is regarded as having such an impairment.

(2) See § 60–741.3 for exceptions to the definition in paragraph (n)(1) of this section.

(o) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or

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

(p) *Major life activities* means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(q) *Substantially limits*—(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; [1] or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working—

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (q)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of working:

(A) The geographic area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographic area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

(r) *Has a 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.

(s) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the contractor as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of

[1] People have a range of abilities with regard to many major life activities such as walking, lifting, and bending, and a range of such abilities may be considered average. Thus, the term ''average'' person in the general population does not indicate a need to determine a precise average ability, but rather reflects that a range of abilities may be considered average.

the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (o)(1) or (2) of this section, but is treated by the contractor as having a substantially limiting impairment.

(t) *Qualified individual with a disability* means an individual with a disability 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.)

(u) *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.

(v) *Reasonable accommodation*—(1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires; [2] or

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

(iii) Modifications or adjustments 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 adjustment 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.[3] This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(w) *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 (w)(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.

(x) *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.

(y) *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.

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[2] 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).

[3] Contractors must engage in such an interactive process with an individual with disabilities whether or not a reasonable accommodation ultimately is identified. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

§ 60–741.3 Exceptions to the definitions of ''individual with a disability'' and ''qualified individual with a disability.''

(a) *Current illegal use of drugs*—(1) *In general.* The terms *individual with a disability* and *qualified individual with a disability* 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 as an ''individual with a disability'' or as a ''qualified individual with a disability'' 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 satisfy the requirements of the definition of *qualified individual with a disability.*

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

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to property or 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 *individual with a disability* and *qualified individual with a disability* 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 or bisexuality.* The term *impairment* as defined in this part does not include homosexuality or bisexuality, and therefore the term *individual with a disability* as defined in this part does not include an individual on the basis of homosexuality or bisexuality.

(e) *Other conditions.* The term *individual with a disability* does not include an individual on the basis of:

(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) *Positions engaged in carrying out a contract.* (i) With respect to the contractor's employment decisions and practices occurring before October 29, 1992, this part applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a Government contract; with respect to employment decisions and practices occurring on or after October 29, 1992, this part applies to all of the contractor's positions irrespective of whether the positions are or were engaged in carrying out a Government contract. A position shall be considered to have been engaged in carrying out a contract if:

(A) The duties of the position included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract; or

(B) The cost or a portion of the cost of the position was allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31: *Provided,* That a position shall not be considered to have been covered by this part by virtue of this provision if the cost of the position was not allocable in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2%) portion of the cost of the position was allocable as an indirect cost to Government contracts, considered as a group.

(ii) *Application.* Where a contractor or a division or establishment of a contractor was devoted exclusively to Government contract work, all positions within the contractor, division, or establishment shall be considered to have been covered by this part. (Appendix D of this part provides guidance on positions engaged in carrying out a contract.)

(3) *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.

(4) *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).

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

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

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

(3) *Facilities not connected with contracts.* The Deputy Assistant Secretary may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities which he or she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the act. Such waivers shall be considered only upon the request of the contractor.

§ 60–741.5 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, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on 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 Deputy Assistant Secretary for Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The contractor must ensure that applicants and employees with disabilities are informed of the contents of the notice (e.g., the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

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 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 Deputy Assistant Secretary for Federal Contract

Compliance Programs may direct to enforce such provisions, including action for noncompliance.

[End of Clause]

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

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

(d) *Inclusion of the equal opportunity clause in the contract.* It is not necessary that the equal opportunity clause be quoted verbatim in the contract. The clause may be made a part of the contract by citation to 41 CFR 60–741.5(a).

(e) *Incorporation by operation of the act.* By operation of the act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

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

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.

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

(a) *Disparate treatment.* It is unlawful for the contractor to deny an employment opportunity or benefit or otherwise to discriminate against a qualified individual with a disability because of that individual's disability.

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

(c) *Contractual or other arrangements*—(1) *In general.* It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

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

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

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

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

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

(e) *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.

(f) *Not making reasonable accommodation.* (1) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability, unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

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

(3) 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.

(g) *Qualification standards, tests and other selection criteria*—(1) *In general.* It is unlawful for the contractor to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out 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 because 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.

(2) 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.

(h) *Administration of tests.* It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who 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.

(i) *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.

§ 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(y) 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.

(5) Medical examinations conducted in accordance with paragraphs (b)(2) and (b)(4) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees 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, 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 a qualified individual with a disability equal access to insurance or subject a qualified 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 Applicability of the affirmative action program requirement.

(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of $50,000 or more.

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

(c) The affirmative action program shall be reviewed and updated annually.

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

§ 60–741.41 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.

§ 60–741.42 Invitation to self-identify.

(a) The contractor shall, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the act and wishes to benefit under the affirmative action program. The contractor may invite self-identification prior to making a job offer only when:

(1) The invitation is made when the contractor actually is undertaking affirmative action for individuals with disabilities at the pre-offer stage; or

(2) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities.

(b) The invitation referenced in paragraph (a) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitation also shall summarize the relevant portions of the act and the contractor's affirmative action program. Furthermore, the invitation shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the act. If an applicant so identifies himself or herself, the contractor should also seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The contractor also may make such inquiries to the extent they are consistent with the ADA (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file on persons who have self-identified and provide that file to OFCCP upon request. This information may be used only in accordance with this part. (An acceptable form for such an invitation is set forth in Appendix B of this part. Because a contractor usually may not seek advice from an applicant regarding placement and accommodation until after a job offer has been extended, the invitation set forth in Appendix B of this part contains instructions regarding modifications to be made if it is used at the pre-offer stage.)

(c) 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.

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

§ 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 ingredients:

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees with

disabilities are informed of the contents of the policy statement (for example, the contractor may have the statement read to a visually disabled individual, or may lower the posted notice so that it may be read by a person in a wheelchair). The policy statement should indicate the chief executive officer's attitude on the subject matter, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy should state, among other things, that the contractor will: recruit, hire, train and promote persons in all job titles, and ensure that all other personnel actions are administered, without regard to 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 review, hearing, or any other activity related to the administration of section 503 of the Rehabilitation Act of 1973, as amended (section 503) or any other Federal, State or local law requiring equal opportunity for disabled persons;

(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 disabled persons; or

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

(b) *Review of personnel processes.* The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that its personnel processes do not stereotype disabled persons in a manner which limits their access to all jobs for which they are qualified. The contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government. (Appendix C of this part is an example of an appropriate set of procedures. The procedures in Appendix C of this part are not required and contractors may develop other procedures appropriate to their circumstances.)

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification standards tend to screen out qualified individuals with disabilities, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor shall have the burden to demonstrate that it has complied with the requirements of 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(y) defining *direct threat.*)

(d) *Reasonable accommodation to physical and mental limitations.* The contractor shall 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. 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 with disabilities are not harassed because of disability.

(f) *External dissemination of policy, outreach and positive recruitment.* The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraphs (f)(1) through (7) of this section that are reasonably designed to effectively recruit qualified individuals with disabilities. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraphs (f)(1) through (7) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should enlist the assistance and support of recruiting sources (including State employment security agencies, State vocational rehabilitation agencies or facilities, sheltered workshops, college placement officers, State education agencies, labor organizations and organizations of or for individuals with disabilities) for the contractor's commitment to provide meaningful employment opportunities to qualified individuals with disabilities. Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(2) The contractor's recruitment efforts at all schools should incorporate special efforts to reach students with disabilities. The contractor should engage in recruitment activities at educational institutions which participate in training of individuals with disabilities, such as schools for the blind, deaf, or learning disabled. An effort should be made to participate in work-study programs with rehabilitation facilities and schools which specialize in training or educating individuals with disabilities.

(3) The contractor should establish meaningful contacts with appropriate social service agencies, organizations of and for individuals with disabilities, and vocational rehabilitation agencies or

facilities, 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.

(4) The contractor should include individuals with disabilities when employees are pictured in consumer, promotional or help wanted advertising. Individuals with disabilities should be made available for participation in career days, youth motivation programs, and related activities in their communities.

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

(6) The contractor should take positive steps to attract qualified 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 the local chapters of organizations of and for individuals with disabilities.

(7) The contractor, in making hiring decisions, should consider applicants with known disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(g) *Internal dissemination of policy.* (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees, who may have had limited contact with individuals with disabilities in the past. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop internal procedures such as those listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (g)(2) of this section or that its activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing practices are adequate.

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

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

(ii) Periodically inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified individuals with disabilities. The contractor should schedule special meetings with all employees to discuss policy and explain individual employee responsibilities.

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

(iv) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude.

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

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

(vii) Include articles on accomplishments of disabled workers in company publications.

(viii) When employees are featured in employee handbooks or similar publications for employees, include individuals with disabilities.

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

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

(ii) Indicate any need for remedial action.

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

(iv) Determine whether individuals with known 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.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity should appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary top management support and staff to manage the implementation of this program.

(j) *Training.* All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented.

§ 60–741.45 Sheltered workshops.

Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified disabled individuals 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 reviews.

(a) OFCCP may conduct compliance reviews to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated in accordance with this part during employment. The compliance review shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60–741.62.

§ 60–741.61 Complaint procedures.

(a) *Coordination with other agencies.* Pursuant to section 107(b) of the Americans with Disabilities Act of 1990 (ADA), OFCCP and the Equal Employment Opportunity Commission 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 Deputy Assistant Secretary 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, N.W., Washington, D.C. 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 is disabled or has a 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.* A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made, and the other information specified in paragraph (c)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(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 Deputy Assistant Secretary decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–741.65(a)(l), the complainant and contractor shall be so notified. The Deputy Assistant Secretary, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Deputy Assistant Secretary will review all determinations of no violation that involve complaints that are not also cognizable under title I of the Americans with Disabilities Act.

(3) In cases where the Deputy Assistant Secretary decides to reconsider the determination of a Notification of Results of Investigation, the Deputy Assistant Secretary shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration, to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60–741.62.

§ 60–741.62 Conciliation agreements and letters of commitment.

(a) If a compliance review, complaint investigation or other review by OFCCP finds a material violation of the act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

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

§ 60–741.63 Violation of conciliation agreements and letters of commitment.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

(d) When OFCCP believes that a letter of commitment has been violated, the matter shall be handled, where appropriate, pursuant to § 60–741.64. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

§ 60–741.64 Show cause notices.

When the Deputy Assistant Secretary has reasonable cause to believe that the contractor has violated the act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring,

enforcement proceedings or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60–741.65).

§ 60–741.65 Enforcement proceedings.

(a) *General.* (1) If a compliance review, complaint investigation or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above in this sentence. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance 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 for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Deputy Assistant Secretary may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–741.5, 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, 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; to ''equal opportunity clause'' shall mean the equal opportunity clause published at 41 CFR 60–741.5; and 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 Deputy Assistant Secretary so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the act or this part.

(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the act or this part.

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the act or this part subject to reinstatement pursuant to § 60–741.68. 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Deputy Assistant Secretary also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the act or this part. Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance review of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the Deputy Assistant Secretary's decision. The petition shall be served on the Deputy Assistant Secretary and the Associate Solicitor for Civil Rights and shall include the decision as an appendix. The Deputy Assistant Secretary may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–741.69 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 review, hearing, or any other activity related to the administration of the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(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 disabled persons; or

(4) Exercising any other right protected by the act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by the Deputy Assistant Secretary against any contractor who violates this obligation.

§ 60–741.70 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 review has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance review or action until final disposition of the complaint, compliance review or action. The term ''personnel records relevant to the complaint, compliance review or action'' would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided,* That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(c) The requirements of this section shall apply only to records made or kept on or after August 29, 1996.

§ 60–741.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance reviews and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the act or this part. Information obtained in this manner shall be used only in connection with the administration of the act, the administration of the Americans with Disabilities Act of 1990 (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 Deputy Assistant Secretary.

§ 60–741.84 Effective date.

This part shall become effective August 29, 1996, and shall not apply retroactively. Contractors presently holding Government contracts shall update their affirmative action programs as required to comply with this part by December 27, 1996.

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 (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 an ''otherwise 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(t), 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 ''otherwise qualified'' if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees of whose disability the contractor has actual knowledge. As stated in § 60–741.42 (see also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they begin their employment duties, to indicate whether they may have a disability and wish to benefit under the contractor's affirmative action program. That section further provides that the contractor should seek the advice of individuals who ''self-identify'' in this way as to proper placement and appropriate accommodation. 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 should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. Section 60–741.2(v) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are any number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the 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–EEOC (voice), 1–800–800–3302 (TDD)), the Job Accommodation Network (JAN) operated by the President's Committee on Employment of People with Disabilities (1–800–JAN–7234), private disability organizations, 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 the visually-impaired such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and brailled or large print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck telephone headsets, mechanical page turners and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by individuals with a disability—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(v) 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 which 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 persons who cannot work a standard schedule because of the need to obtain medical treatment, or persons with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider known applicants with disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the

position is vacant within a reasonable amount of time. A ''reasonable amount of time'' should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned individual with a disability at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled. It should also be noted that the contractor is not required to promote an individual with a disability as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) providing information regarding job vacancies in a form accessible to the vision or hearing impaired, e.g., by making an announcement available in braille, in large print, or on audio tape, or by responding to job inquiries via TDDs; (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3) appropriately adjusting or modifying employment-related examinations, e.g., extending regular time deadlines, allowing a blind person or one with a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her disability, to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices; and (4) ensuring an applicant with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

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

Note: When the invitation to self-identify is being extended prior to an offer of employment, as is permitted in limited circumstances under § 60–741.42(a), paragraph 2(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to section 503 of the Rehabilitation Act of 1973, as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. If you have a disability and would like to be considered under the affirmative action program, please tell us. You may inform us of your desire to benefit under the program at this time and/or at any time in the future. This information will assist us in placing you in an appropriate position and in making accommodations for your disability. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.] Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. Information you submit about your disability will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of individuals with disabilities, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by OFCCP or the Americans with Disabilities Act, may be informed. The information provided will be used only in ways that are not inconsistent with section 503 of the Rehabilitation Act.

2. If you are an individual with a disability, we would like to include you under the affirmative action program. It would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations.

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

The following is a set of procedures which contractors may use to meet the requirements of § 60–741.44(b):

1. The application or personnel form of each known applicant with a disability should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

2. The personnel or application records of each known individual with a disability should include (i) the identification of each promotion for which the employee with a disability was considered, and (ii) the identification of each training program for which the individual with a disability was considered.

3. In each case where an employee or applicant with a disability is rejected for employment, promotion, or training, a statement of the reason should be appended to the personnel file or application form as well as a description of the accommodations considered. This statement should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place an individual with a disability on the job, the application form or personnel record should contain a description of that accommodation.

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

As stated in § 60–741.4(a)(2), with respect to the contractor's employment decisions and practices occurring before October 29, 1992, this part 60–741 applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a Government contract.[1] The regulatory definition has two prongs. Under § 60–741.4(a)(2)(i)(A) (''prong A''), positions are deemed to have been engaged in carrying out a Government contract if their duties included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract. Alternatively, under § 60–741.4(a)(2)(i)(B) (''prong B''), positions are deemed to have been engaged in carrying out a Government contract if, pursuant to principles set forth in the Federal Acquisition Regulation (FAR) at 48 CFR Ch. 1, part 31, the cost of the positions or a portion of their cost was allocable to a contract as a direct cost, or 2 percent or more of the cost was allocable as an indirect cost to Government contracts considered as a group. This appendix provides guidance as to the application of prong A of the definition.

1. The regulatory definition includes positions whose duties involved work that fulfilled a contractual obligation. Such work includes work producing the goods or providing the services that were the object of the contract and also work that fulfilled ancillary contract obligations. For example, if a contract required the contractor to keep certain cost records or to meet certain quality control standards, employees who were engaged in such functions were fulfilling a contractual obligation.

2. Positions are also included if their duties included work that was necessary to or that facilitated performance of the contract. The inclusion of work of this character is intended to reflect the practical reality that performance of a contract generally requires the cooperation of a variety of individuals engaged in auxiliary and related functions beyond direct production of the goods or provision of the services that are the object of the contract.

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[1] Prior to October 29, 1992, section 503 applied only insofar as the contractor was ''employing persons to carry out'' a Government contract. On that date, the act was amended to apply to all of a covered contractor's work force, irrespective of whether particular positions are engaged in carrying out a Government contract. Accordingly, the guidance contained in this appendix will be relied on by OFCCP in monitoring and enforcing compliance with section 503 only with respect to the contractor's employment decisions and practices occurring before October 29, 1992. (Moreover, prior to that date, section 503 covered only contractors holding a contract ''in excess of $2500''; this figure was amended on October 29, 1992 to ''in excess of $10,000.'' Consequently, this appendix makes reference to the $2500 threshold level.)

3. To give one example, a contract for production and sale of goods to the Government commonly requires the work not only of the production employees assembling the goods, but also of those engaged in functions such as repairing the machinery used in producing the goods; maintaining the plant and facilities; assuring quality control and security; storing the goods after production; delivering them to the Government; hiring, paying, and providing personnel services for the employees engaged in contract-related work; keeping financial and accounting records; performing related office and clerical tasks; and supervising or managing the employees engaged in such tasks. This list is not intended to be exhaustive, but only to illustrate that a variety of functions may commonly be involved in carrying out a contract.

4. Whether a particular position was engaged in carrying out a contract depends on the facts as to the nature of the duties that were actually performed and their relationship to contract performance. A position is included if its duties included work that furthered or contributed to the performance of the contract. The work need not have been essential or indispensable to performance of the contract. It is sufficient that it was useful or that it benefitted or contributed to carrying out the contract.

5. Nor is it material that the work was not required by an express contract term. For example, a contract to provide transportation services may not have explicitly incorporated terms requiring maintenance and repair of the means of transportation to keep them in safe operating condition. Such work, however, was implicitly necessary to carry out the contract.

6. It is irrelevant that the contractor could have performed the contract some other way, without making use of a particular function or particular employees, if the way the contractor chose to carry out the contract does in fact make use of them. For example, if a contractor employed three quality control inspectors, or used three quality control processes, to monitor the manufacture of goods for sale to the Government, all three were involved in carrying out the contract, notwithstanding any claim that two would have been sufficient. If a contractor manufactured goods at its plant in St. Louis for delivery in Chicago, employees who transported the goods were carrying out the contract, regardless whether the contractor could have made the goods locally at its plant in Chicago. If a contractor employed security guards or watchmen to protect its plant producing goods for the Government from vandalism or theft of equipment, because in its business judgment it was prudent to do so, employees who were engaged in those tasks were contributing to performance of the contract and were covered.

7. If a position's regular duties included work that contributed to the performance of the contract, and the contract met the act's dollar threshold for coverage, it is irrelevant that such work was only a portion of the position's total duties or that it took only a small amount of time. For example, a Government agency may have contracted to lease a photocopying machine under terms that obligated the leasing company to provide repair and maintenance service. The technician assigned to provide such service was ''carrying out the contract'' regardless whether he or she provided similar service for numerous private customers and spent only a small fraction of his or her time working on the agency's machine. Similarly, individuals who worked on an assembly line manufacturing automobiles, a portion of which were sold under contract to the Government, while the bulk were sold commercially, were covered. That 95% of the vehicles they produced were sold elsewhere does not negate the fact that the individuals were carrying out the contract to make vehicles for the Government.

8. A group of employees may also have performed duties that simultaneously contributed to performance of both Government and non-Government contracts. In this situation, if the contract exceeded $2500 and the duties of the position in fact contributed to carrying out the contract, the position was covered. For example, the Government may have contracted with airline carriers to provide transportation to Federal employees performing official duties. The contract was performed through the work of employees including the flight crew, the ground maintenance crew, the baggage handlers, the ticketing agents, the airport and gate staff, and other corporate personnel. Federal employees probably typically formed only a small percentage of an airline's passengers. Nonetheless, the pilots who flew the planes and the other staff were carrying out the terms of the contract.

9. These principles are illustrated by the final decision of the Department in *OFCCP* v. *Monongahela Railroad Co.*, 85–OFC–2 (Administrative Law Judge Recommended Decision, April 2, 1986), *aff'd*, (Deputy Under Secretary for Employment Standards, March 11, 1987). *Monongahela* involved the interpretation of the term ''necessary'' in the context of the definition of the term ''subcontract'' under this part 60–741. ''Subcontract'' is defined in relevant part as any agreement for the furnishing of supplies or services ''which in whole or in part is necessary to the performance of any one or more [Government] contracts.'' The decision held that a railroad company's transport of coal that was used by a power company to generate electricity was ''necessary'' to the performance of the power company's obligation to supply the Government with power and that the railroad company was therefore a covered ''subcontractor''. The decision reached this result even though numerous other carriers also transported coal to the power company, the coal that the carrier delivered was used to generate electricity for the Government and for nongovernmental customers alike, and the power company sold only a small fraction (less than 1%) of its output to the Government. That is, the decision found that the crucial factor is whether the activity contributes to the performance of a Government contract, regardless of whether the contractor could have performed the contract some other way, and regardless of whether the activity contributes as well, and predominantly, to carrying out non-Government contracts.

10. Although the act broadly reached all positions that contributed to or facilitated the performance of the Government contract, its coverage was not limitless. First, positions were covered only if they bore an appropriate relationship to a covered contract. The contract must have been for the purchase, sale, or use of personal property or nonpersonal services, must have been for an amount in excess of $2500, and must not have been otherwise exempt.

11. Second, the breadth of coverage depended to a large extent on how the contractor chose to organize its work force to perform its contract obligations. A contractor who segregated contract from noncontract work necessarily employed fewer persons to carry out its contracts than one who did not. To continue the example given above, if a plant with several assembly lines produced automobiles, some of which were shipped to the Government and others sold commercially, the application of section 503 would have been limited if the Government contract automobiles were made on only one of the assembly lines. In that case, employees who were on the other lines, which never produced automobiles for the Government, were outside the act. If, however, the contractor did not segregate the contract from noncontract production, the employees on each of the lines were covered.

12. Third, while the relationship between the work of a position and the performance of the contract need not have been direct, the relationship must have been real and not hypothetical. For example, a firm may have done substantial business with both the Government and private customers. Individuals who were employed to plan and design new facilities that were intended for use with non-Government work would not be deemed to have been covered merely because of the possibility that at some point in the future the facilities would be used to carry out Government contracts. Again, a firm may have been partly unionized and partly non-unionized. Assume the Government contract was performed exclusively in the non-union part of the work force. An individual who was assigned to represent management in dealing with the union would not have been covered simply because the arrangements he or she made with the union might subsequently influence the personnel practices followed for the nonunion employees as well.

13. Coverage depended on the regular or assigned duties and responsibilities of the position. A person that held a position did not go in and out of coverage as she performed first contract and then noncontract work if, throughout the period, one of the duties of the position was to perform contract-related work as the need or occasion arose. For example, the photocopy machine technician who was assigned responsibility to repair machines leased to the Government and to private firms was covered throughout the contract term, including the period before he or she first repaired the Government's machine. Discrimination against the employee was not permissible simply because the discrimination was effected on a

day when the technician was servicing a private firm. Likewise, workers who were on an assembly line whose products were shipped at times to the Government and at times to private customers were covered, as were employees of the airline carrier whose duties included at times helping to transport Federal employees pursuant to a contract.

14. On the other hand, a person whose duties were permanently changed may have gained or lost coverage as a result. For example, an engineer who had been working on developing weapons under a contract with the military, and who accordingly was covered, may have been transferred to work on development of civilian aircraft for private customers. If the new position did not include any contract-related duties, the individual lost protection under the act at the time of the transfer.

15. It is the position's regular or assigned duties that were controlling. If a portion, however small, of a position's regular duties was necessary to or facilitated carrying out a Government contract, the position was covered. On the other hand, the isolated and unanticipated performance, outside the position's regular duties, of a contract-related task will not result in a finding of coverage. For example, suppose another employee of the photocopy machine company, whose regular duties were in no way contract-related, was unexpectedly needed to substitute for the technician who repaired the machine leased to the Government. Assuming substitution in such situations was not one of the employee's regular or foreseeable duties, his or her isolated performance of the task on a particular occasion would not result in a finding of coverage. In some cases, there will be a formal written position description that will serve as evidence of the position's actual duties and responsibilities. In other cases, there may not be a written position description, or the position description may be inaccurate or incomplete. In all cases, however, it should be possible to identify the position's actual duties, and to make a determination of coverage on that basis.

16. The fact that a position is deemed not to have been engaged in carrying out a Government contract does not affect the individual's rights under the Americans with Disabilities Act of 1990.

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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–250

RIN 1215–AA62

Affirmative Action Obligations of Contractors and Subcontractors for Disabled Veterans and Veterans of the Vietnam Era; Invitation to Self-Identify

AGENCY: Office of Federal Contract Compliance Programs (OFCCP), Labor.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule modifies the OFCCP regulation requiring Government contractors to invite job applicants to inform the contractor whether the applicant believes that he or she may be covered by the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and wishes to benefit under the contractor's affirmative action program. These changes are substantively identical to OFCCP revisions, published elsewhere in this issue of the Federal Register, to the rule requiring invitations to self-identify under Section 503 of the Rehabilitation Act of 1973. Issuing identical rule changes will minimize regulatory burdens, because Government contractors will not need separate forms, notices and posters for inviting self-identification under the two affirmative action laws.

DATES: This interim rule will take effect on August 29, 1996.

OFCCP invites comments on this interim rule. To be assured of consideration, comments must be in writing and must be received on or before July 1, 1996.

ADDRESSES: Comments should be sent to Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C—3325–200 Constitution Avenue, N.W., Washington, D.C. 20210.

As a convenience to commenters, OFCCP will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is (202) 219–6195. Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202) 219–9430 (voice) or 1 (800) 326–2577 (TDD).

Comments received will be available for public inspection in Room C–3325, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from May 15, 1996 until this interim rule is published in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202) 219–9430 (voice) or 1 (800) 326–2577 (TDD).

Copies of this interim rule are available in the following alternative formats: large print, electronic file on computer disk and audio-tape. Copies may be obtained from OFCCP by calling (202) 219–9430 (voice) or 1 (800) 326–2577 (TDD).

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, D.C. 20210. Telephone: (202) 219–9475 (voice), 1 (800) 326–2577 (TDD).

SUPPLEMENTARY INFORMATION:

Background

The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (Section 4212, VEVRAA, or the Act), require parties holding Government contracts and subcontracts of $10,000 or more, to ''take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.'' OFCCP enforces Section 4212 and has published implementing regulations at 41 CFR Part 60–250. Covered disabled veterans include persons entitled to disability compensation under the laws administered by the Department of Veterans Affairs for disability rated at 30 percent or more, and persons whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty. 41 CFR 250.2.

Today's interim rule regarding the invitation to self-identify in 41 CFR 60–250.5(d), described in detail below, is prompted by OFCCP's publication, elsewhere in today's Federal Register, of a final rule revising the regulations at 41 CFR Part 60–741 implementing Section 503 of the Rehabilitation Act of 1973. Section 503 requires that Government contractors and subcontractors take affirmative action to employ and advance in employment qualified individuals with disabilities.

Because of the close similarity between VEVRAA and Section 503 in terms of their substantive protections and jurisdictional requirements, these two laws have been treated in tandem by OFCCP and often by Government contractors as well. For instance, OFCCP's regulations implementing the two laws historically have been parallel. Many contractors use the same notices and forms to comply with their regulatory duties under each law. One such obligation is that contractors extend to their employees and applicants an invitation to identify themselves as being covered under the law and wishing to benefit under the contractor's affirmative action program. Under the existing VEVRAA regulation at 41 CFR 60–250.5(d), contractors must extend the invitation to all job