Billing Code: 4510-45

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-741

RIN 1250-AA02

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

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is publishing revisions to the current regulations implementing the non-discrimination and affirmative action regulations of section 503 of the Rehabilitation Act of 1973, as amended. Section 503 prohibits discrimination by covered Federal contractors and subcontractors against individuals on the basis of disability, and requires affirmative action on behalf of qualified individuals with disabilities.

The final rule adopts several key revisions proposed in the notice of proposed rulemaking. The final rule strengthens the affirmative action provisions by, among other things, requiring data collection pertaining to applicants and hires with disabilities, and establishing a utilization goal for individuals with disabilities to assist in measuring the effectiveness of the contractor's affirmative action efforts. However, some of the NPRM's proposals, particularly with regard to the creation and maintenance of certain records and the conduct of certain affirmative action obligations, have been eliminated or made more flexible in order to reduce the compliance burden on contractors. To implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008, the final rule also adopts revisions to the definitions and to the nondiscrimination provisions of the implementing regulations. The specific revisions made, and the rationale for making them, are set forth in the Section-by-Section Analysis below.

DATES: Effective Date*:* These regulations are effective [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210. Copies of this rule in alternative formats may be obtained by calling (202) 693-0103 (voice) or (202) 693-1337 (TTY). The alternative formats available are large print and electronic file on computer disk. The rule also is available on the Internet on the

Regulations.gov website at http://www.regulations.gov or on the OFCCP website at http://www.dol.gov/ofccp.

SUPPLEMENTARY INFORMATION:

Executive Summary

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights, worker protection agency which enforces one Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.[1] Specifically, Federal contractors must engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, religion, color, national origin, and sex. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, prohibits employment discrimination against certain protected veterans. Section 503 of the Rehabilitation Act of 1973 (section 503), as amended, prohibits employment discrimination against individuals with disabilities.

OFCCP evaluates the employment practices of over 4,000 Federal contractors and subcontractors annually and investigates individual complaints. OFCCP also engages in outreach to employees of Federal contractors to educate them about their rights, and provides technical assistance to contractors on their nondiscrimination and affirmative

[1] Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, (section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).

action obligations. We estimate that our jurisdiction covers approximately 200,000 Federal contractor establishments, and more than 45,000 parent companies.[2]

Employment discrimination and underutilization of qualified workers, such as individuals with disabilities and veterans, contribute to broader societal problems such as income inequality and poverty. The median household income for "householders" with a disability, aged 18 to 64, was $25,420 compared with a median income of $59,411 for households with a householder who did not report a disability.[3] Controlling for age and race we find that workers with a disability, on average, earn less than private sector workers without a disability. The mean hourly wage of those with a disability is $17.62 (with a median of $13.73) compared to $21.67 (median $16.99) for those without a disability.[4] Controlling for age and race, male workers with a disability earn 23 percent less than males without a disability. The disability gap for females is 20 percent.[5] While 28.8 percent of individuals, ages 18 to 64, with a disability were in poverty in 2011, the data show that 12.5 percent of those individuals without a disability were in poverty.[6]

---

[2] This establishment estimate is based on a review of FY 2009 EEO-1 contractor establishment data and other contractor databases, including the Federal Procurement Data System (FPDS). Based on EEO-1 data, we determined that the ratio of parent companies to the number of establishments is approximately four establishments per parent company.

[3] Income, Poverty and Health Insurance Coverage in the United States*: 2011*, Current Population Reports, issued September 2012, http://www.census.gov/prod/2012pubs/p60-243.pdf (last accessed July 8, 2013), p. 10. A "householder" is the person (or one of the people) in whose name the home is owned or rented and the person to whom the relationship of other household members is recorded. Typically, it is the head of a household. Only one person per household is designated the "householder."

[4] OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was restricted to individuals aged 18 to 64 employed in the private sector. Individuals currently in the armed forces were not included in the sample. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

[5] Id.

[6] Income, Poverty and Health Insurance Coverage in the United States: 2011, Current Population Reports, issued September 2012, http://www.census.gov/prod/2012pubs/p60-243.pdf (last accessed July 8, 2013)

Based on our analysis of the Amrican Community Survey (ACS) 2008-2010 Public Use Microdata (PUMS), and controlling for age and race we found that:[7]

- Males with disability had a 7.2 percentage point higher unemployment rate than males without a disability.
- Females with disability had a 6.5 percentage point higher unemployment rate than females without a disability.
- Females with a disability had a 29.2 percentage point higher probability of not being in the labor force than females without a disability.

A 2009 report found that "having a disability is associated with lower earnings due to decreased ability to work, prejudice, and other factors."[8] There are a number of hypotheses concerning disparities in labor force participation, employment rates, and wages. While knowledge of opportunities, differences in access and attainment of training and education, and underutilization of individuals with disabilities likely contribute to these disparities, the culture of the typical workplace and discrimination are also factors in some employment settings. However, there is little empirical data upon which to base targeted interventions. Data collection remains a critical need.

The final rule is intended to provide contractors with the tools needed to evaluate their own compliance and proactively identify and correct any deficiencies in their employment practices. Because the existing regulations implementing section 503 do not

[7] OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was limited to individuals aged 18 to 64 employed in the private sector. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

[8] Changing Demographic Trends that Affect the Workplace and Implications for People with Disabilities, Executive Summary (Nov. 30, 2009), p. 4. "Studies agree that disability incidence is related to income and earnings. A number of intertwined relationships, however, make it somewhat difficult to sort out cause and effect."

provide contractors with adequate tools to assess whether they are complying with their nondiscrimination and affirmative action obligations to recruit and employ qualified individuals with disabilities, the revisions of the final rule will assist contractors in averting potentially expensive violation findings by OFCCP.

I. Statement of Legal Authority

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

The nondiscrimination and general affirmative action requirements of section 503 apply to all Government contractors with contracts or subcontracts in excess of $10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). See 41 CFR 60-741.4. The requirement to prepare and maintain an affirmative action program, the specific obligations of which are described at 41 CFR 60-741.44, apply to those contractors that have a contract or subcontract of $50,000 or more and 50 or more employees.

In the section 503 context, receipt of a Federal contract comes with a number of responsibilities, including compliance with the section 503 nondiscrimination and anti-retaliation provisions, meaningful and effective efforts to recruit and employ individuals with disabilities, creation and enforcement of personnel policies that support the contractor's affirmative action efforts, maintenance of accurate records on its affirmative action efforts, and OFCCP access to these records upon request. Failure to abide by these

responsibilities may result in various sanctions, including withholding of progress payments, termination of contracts, and debarment from receiving future contracts.

II. Major Provisions

The following major provisions in the Final Rule would:

- Establish, for the first time, a 7 percent workforce utilization goal for individuals with disabilities. This goal is not a quota or a ceiling that limits or restricts the employment of individuals with disabilities. Instead, the goal is a management tool that informs decision-making and provides real accountability. Failing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction. OFCCP is mindful that smaller contractors may find it more difficult to attain the goal in each of their job groups. Therefore, the final rule permits contractors with a total workforce of 100 or fewer employees to apply the 7 percent goal to their entire workforce, rather than to each job group.
- Require contractors to invite applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer. The purpose of this data collection is to provide contractors with useful information about the extent to which their outreach and recruitment efforts are effectively reaching people with disabilities.
- Require contractors to invite incumbent employees to voluntarily self-identify on a regular basis. The status of employees may change and a regular invitation to self-identify provides employees a way to self-identify for the first time, or to change their previously reported status. Providing a regular invitation should contribute to

increased self-identification rates. Improving data collection is important to assessing employment practices.

- Require contractors to maintain several quantitative measurements and comparisons for the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices. Having this data will enable contractors and OFCCP to evaluate the effectiveness of contractors' outreach and recruitment efforts, and examine hiring and selection processes related to individuals with disabilities.
- Require prime contractors to include specific, mandated language in their subcontracts in order to provide knowledge and increase compliance by alerting subcontractors to their responsibilities as Federal contractors.
- Implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of "disability" and certain nondiscrimination provisions of the implementing regulations.

III. Cost and Benefits

This is an economically significant and major rule. Individuals with disabilities make up 4.83 percent of the employed.[9] The section 503 rule establishes a utilization goal for employing individuals with disabilities of 7 percent. To meet the goal, OFCCP estimates that Federal contractors would hire an additional 594,580 individuals with disabilities. There are tangible and intangible benefits from investing in the recruitment and hiring of individuals with disabilities. Among them are employer tax credits, access

[9] U.S. Census Bureau, 2011 American Community Survey. There are a variety of sources for this estimate. The Current Population Survey estimates a lower rate, 3.5 percent, and the Survey of Income and Program Participation estimates 9.4 percent.

to a broader talent pool, an expanded pool of job applicants, access to new markets by developing a workforce that mirrors the general customer base, lower turnover based on increased employee loyalty, and lower training costs resulting from lower staff turnover.[10] According to the U.S. Business Leadership Network (USBLN), "corporate CEOs understand that it's cost effective to recruit and retain the best talent regardless of disability."[11] Broad public policy considerations also exist related to the decreased demand for and cost of social services as more people move into jobs and pay taxes.

These projected hires, some of whom will require reasonable accommodation, will not add significant costs for the employers. The requirement to provide reasonable accommodation exists under the ADA, and now exists under the ADA Amendments Act for employers. This is not a new obligation created by this rule. According to a study conducted by the Job Accommodation Network (JAN), of the employers who gave the researchers cost information related to accommodations they had provided, 57 percent said the accommodations needed by employees cost absolutely nothing. [12] For 43 percent of employers, the typical one-time expenditure by employers to provide a reasonable accommodation was $500. Finally, 2 percent reported that accommodations required a combination of one-time and annual costs.

In projecting the overall increase in Federal contractor employment of protected

---

[10] Job Accommodation Network, "Workplace Accommodations: Low Cost, High Impact," Sept. 1, 2012. Accommodation and Compliance Series, http://askjan.org/media/lowcosthighimpact.html (last accessed Aug. 9, 2013).

[11] USBLN Disability at Work, and U.S. Chamber of Commerce, "Leading Practices on Disability Inclusion," http://www.usbln.org/pdf-docs/Leading_Practices_on_Disability_Inclusion.pdf (last accessed Aug. 9, 2013). The USBLN and Chamber report shares best practices from larger corporations for hiring and providing reasonable accommodations.

[12] Job Accommodation Network, "Workplace Accommodations: Low Cost, High Impact," Sept. 1, 2012. Accommodation and Compliance Series, http://askjan.org/media/lowcosthighimpact.html (last accessed Aug. 9, 2013), p.3; "Fast Facts: Reasonable Accommodations & The Americans with Disabilities Act," U.S. Chamber of Commerce & the Virginia Commonwealth University, Rehabilitation Research and Training Center on Workplace Supports, http://www.worksupport.com/Topics/downloads/rrtcfactsheet2.pdf.

veterans under the VEVRAA rule and individuals with disabilities under the section 503 rule, there is likely to be an interaction between the two categories. Some of the newly hired individuals with disabilities will likely be protected veterans. There are 5.78 million people 18 years or older in the labor force with a disability, 822,000, or 14.21 percent, of whom are veterans.[13]

To meet the section 503 rule's utilization goal of 7 percent, Federal contractors would have to hire an additional 594,580 individuals with disabilities. Assuming that the number of disabled veterans hired will be proportional to their share of the disabled labor force, then we estimate that 84,490 of the newly hired individuals with disabilities will also be protected veterans.[14] Subtracting 84,490 protected veterans from the target of 205,500 leaves 121,010 non-disabled veterans needed to meet the hiring goal. Viewed independently, Federal contractors under VEVRAA would employ an additional 205,500 protected veterans and under section 503 employ an additional 594,580 individuals with disabilities. In the aggregate, we anticipate the overall number of hires across both rules will be closer to 715,590. We adjust the reasonable accommodation cost estimates based on the aforementioned assumptions. The total cost of providing reasonable accommodation to employees with disabilities who are not protected veterans is $114,770,291 in the year the target is met and $48,524,879 in recurring costs. The requirement to provide reasonable accommodation, however, existed under the ADA, and now exists under the ADAAA for employers. This is not a new obligation created by this

[13] Calculation based on unpublished table, Employment status of persons 18 years and over by veteran status, period of service, sex, race, Hispanic or Latino ethnicity, and disability status, Annual Average 2012 (Source: Current Population Survey).

[14] Because of data limitations, OFCCP is using the share of veterans as a proxy for "protected" veterans. For more information on the difference between protected and unprotected veterans, please visit, http://www.dol.gov/ofccp/regs/compliance/factsheets/vetrights.htm#Q2

rule. Nonetheless, the estimated cost of providing reasonable accommodations is included in this rule.

Employers often think providing a reasonable accommodation is more costly than it actually is. Sometimes an accommodation may be something as simple as allowing someone to have their instructions tape recorded, or allowing someone to wear ear phones so they are not distracted by noise around them, or allowing someone an empty office as space when they have difficulty with concentration or attention span. Employers must provide effective accommodations but are not expected to create an undue hardship for themselves by doing so. Individuals seeking reasonable accommodation beyond what is effective have the option of paying the difference between the cost of the more expensive accommodation and the cost of what the employer will pay for the effective reasonable accommodation.

	Final Rule Low[15]	**Final Rule High**
Total Cost	$349,510,926	$659,877,833
Cost Per Company	$7,550	$9,716
Cost Per Establishment	$2,040	$2,626
Cost Per New Hire	$588	$1,110

Present value costs over ten years for the final rule range from $1.84 billion to $3.91 billion using a 3 percent discount rate. If we use a 7 percent discount rate then the present value costs range from $1.53 billion to $3.25 billion. Annualizing these costs yields a cost range of $215 million to $459 million at the 3 percent discount rate and

[15] The high cost estimates in this chart are based on a contractor establishment count of 251.300 and 67,919 companies while the low estimates are based on 171,275 establishments and 46,291 companies.

$218 million to $463 million using a 7 percent discount rate.

	7% Discount Rate	3% Discount Rate
Benefits	Not Quantified	Not Quantified
Costs	$1.53 billion to $3.25 billion	$1.84 billion to $3.91 billion

Introduction

Strengthening the implementing regulations of section 503, whose stated purpose "requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities," is an important means by which the Government can contribute to reducing the employment disparity between those with and without disabilities. The objective of these regulations is to ensure that employers doing business with the Federal Government do not discriminate and that they take affirmative action to recruit, hire, promote and retain individuals with disabilities. More specifically, the final rule has the potential to reduce the employment gap in a number of ways. It adds and strengthens affirmative action requirements designed to improve outreach and recruitment of qualified individual with disabilities; establishes an aspirational goal for the employment of qualified individuals with disabilities that will allow contractors to measure and improve (where appropriate) the effectiveness of those affirmative efforts; provides for greater accountability regarding employment of individuals with disabilities through collection of several quantitative measures; and provides stronger dissemination of contractor obligations to subcontractors and unions. These measures, taken together, are designed to bring more qualified individuals with disabilities into the Federal contractor workforce and provide them with an equal opportunity to advance in employment.

OFCCP published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on December 9, 2011 (76 Federal Register (FR) 77056), seeking comment on a number of proposals that would strengthen the regulations implementing section 503. The NRPM was published for a 60-day public comment period. The NPRM proposed specific actions that contractors and subcontractors must satisfy to meet their section 503 obligations, including increased data collection obligations, and the establishment of a utilization goal for individuals with disabilities. After receiving several requests to extend the public comment period, OFCCP published a subsequent notice in the Federal Register on February 10, 2012 (77 FR 7108), extending the public comment period an additional 14 days.

OFCCP received more than 400 comments on the NPRM. Commenters represented diverse perspectives including: 185 individuals; 105 contractors; 41groups representing contractors; 48 disability and veterans' rights advocacy groups; and 11 governmental entities. The commenters raised a broad range of issues, including concerns with the cost and burden associated with the proposed rule, the extended recordkeeping requirements, the proposed utilization goal, and the new categories of data collection and analyses. OFCCP carefully considered all comments in the development of this final rule.

Pursuant to Executive Order (EO) 13563, the final rule was developed through a process that involved public participation. Indeed, prior to issuing an NPRM, OFCCP had previously issued an Advanced Notice of Proposed Rulemaking (ANPRM), 75 FR 43116 (July 23, 2010), requesting public comment regarding potential ways to strengthen the section 503 affirmative action regulations. During 2010 and 2011, OFCCP also

conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand the features of the section 503 regulations that work well, those that can be improved, and possible new requirements that could help to effectuate the overall objective of increasing employment opportunities for individuals with disabilities with Federal contractors.

Compliance with the Final Rule

Although this final rule becomes effective 180 days after publication, full compliance with the requirements of this final rule by current contractors will be phased in as follows. Current contractors subject to subpart C of the existing 41 CFR part 60-741 regulations that have written affirmative action programs (AAP) prepared pursuant to those regulations in place on the effective date of this final rule may maintain that AAP for the duration of their AAP year. Such contractors are required to update their affirmative action programs to come into compliance with the requirements of subpart C of this final rule at the start of their next standard 12-month AAP review and updating cycle. OFCCP will verify compliance with the requirements of this final rule when a contractor is selected for a compliance evaluation pursuant to § 60-741.60 or subject to a complaint investigation pursuant to § 60-741.61.

Overview of the Final Rule

The final rule incorporates several of the changes proposed in the NPRM. However, in order to focus the scope of the final rule more closely on key issues, and in

an effort to reduce the burden of compliance on contractors, the final rule also revises or declines to adopt some of the NPRM's proposals.

The final rule strengthens the affirmative action provisions for Federal contractors in a number of ways. The rule addresses the increased use of technology in the workplace by allowing for the electronic posting of employee rights and contractor obligations, and by codifying contractors' reasonable accommodation obligation to ensure that any use of electronic job application systems do not result in the denial of equal employment opportunity to individuals with disabilities. Further, the regulations establish a utilization goal, and increase data collection pertaining to applicants and hires, including modifying and standardizing the requirement to invite applicants and existing employees to self-identify as individuals with a disability. These revisions will help contractors better evaluate their outreach and recruitment efforts, and to modify them as needed, toward the end of increasing employment opportunities for individuals with disabilities by Federal contractors and subcontractors. Additionally, as proposed in the NPRM, changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008, Pub. L.110-325, and the subsequent amendment by the Equal Employment Opportunity Commission (EEOC) of their implementing regulations at 29 CFR part 1630 have been made to the rule's definitions and nondiscrimination provisions.

OFCCP revised or eliminated a number of provisions from the NPRM in response to the comments that were received, particularly with regard to the cost and burden of the rule, recordkeeping requirements, data collection and analyses, and the goal. These changes are discussed in full in the Section-by-Section Analysis. However, a summary of the most significant provisions is below.

OFCCP received approximately 130 comments concerning the burdens and costs of the proposed rule from contractor groups, contractors, individuals and government entities. Many of these commenters stated that OFCCP's estimates of costs and hours were too low. A few commenters also suggested that OFCCP's contractor universe was too small. In response to these concerns, OFCCP modified the burden and cost estimates for the final rule. These changes provide a more accurate estimation of the burden and costs associated with the final rule. As discussed in the NPRM, the overall contractor universe of 171,275 contractor and subcontractor establishments was derived from the Fiscal Year 2009 Employer Information Report EEO-1 (EEO-1), the Federal Procurement Data System-Next Generation (FPDS-NG) report data on contractor establishments, and other pertinent information. OFCCP notes that there were comments on the contractor universe recommending an establishment count of 285,390 using the Veterans Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending Information Collection Request.[16] As discussed in more detail below, OFCCP also made key changes to the recordkeeping requirements to minimize the burden on contractors.

The NPRM proposed that contractors maintain data pursuant to §§ 60-741.44(f)(4) (linkage agreements and other outreach and recruiting efforts) and 60-741.44(k) (collection of applicant and hire data) for five years. More than 50 commenters opposed these provisions. Several of the commenters were particularly

[16]OMB Control Number 1293-0005, Federal Contractor Veterans' Employment Report, VETS - 100/VETS-100A , http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003 (last accessed Aug. 13, 2013).

concerned about the burden associated with the five-year requirement. In response, OFCCP has reduced the proposed five-year recordkeeping requirement to three years in the final rule. Further, in light of the comments we received, the final rule does not incorporate the proposal in § 60-741.44(k) of the NPRM to maintain data related to referrals from State agencies and other organizations. Commenters expressed concern with this requirement, indicating that State agencies either cannot provide data or provide data inconsistently across the states. In reviewing the practical utility of the referral data in light of the burden that it would create on contractors, OFCCP has eliminated the requirement to collect and analyze referral data. Eliminating the referral data requirement and reducing the length of recordkeeping minimizes the burden on contractors, while still requiring contractors to keep adequate records to aid and inform their outreach and recruitment efforts.

The NPRM also proposed to require many of the affirmative action efforts that are only suggested in § 60-741.44 of the existing rule. Among these were proposals requiring contractors to: review personnel processes on an annual basis (§ 60-741.44(b)); review physical and mental qualification standards on an annual basis (§ 60-741(c)); establish linkage agreements with three disability-related agencies or organizations to increase connections between contractors and individuals with disabilities seeking employment (§ 60-741.44(f)); take certain specified actions to internally disseminate its affirmative action policy (§ 60-741.44(g)); and train personnel on specific topics related to the employment of individuals with disabilities (§ 60-741.44(j)). After consideration of the comments and taking into account the expected utility of these provisions in light of the burden that contractors would incur to comply with the proposals, OFCCP decided

not to incorporate the majority of these proposals into the final rule, and instead retains the language in the existing rule. These NPRM proposals, for the most part, would have required certain specific actions contractors must take to fulfill their already existing, general affirmative action obligations. These general affirmative action obligations - reviewing personnel processes and qualification standards on a periodic basis, undertaking appropriate outreach and positive recruitment activities, developing internal procedures to disseminate affirmative action policies, and training its employees on these policies – remain in the final rule. By eliminating the specific provisions but maintaining the general affirmative action obligations, the final rule provides the contractor flexibility and lesser burden, while still requiring the maintenance and implementation of a robust affirmative action program.

The final rule adopts, but modifies, the proposed establishment of a national utilization goal for individuals with disabilities. The NPRM proposed to establish a single utilization goal of 7 percent per job group. OFCCP also requested public comment on several issues, including the possible establishment of a sub-goal for specific targeted disabilities, the availability of alternative data sources, and a range of potential goal values between 4 percent and 10 percent and the justification for their use. As discussed in more detail in the preamble to § 60-741.45, below, OFCCP received approximately 250 comments on the proposed goal. Disability and veterans' organizations, as well as many individuals, supported the establishment of a goal, while most contractors and employer associations were generally opposed. Most commenters who opposed the proposed goal asserted that any goal would be arbitrary and ineffective because of deficiencies in source data regarding the availability of qualified individuals with

disabilities. In addition, some commenters stated their belief that the goals were illegal quotas and would adversely impact other protected groups. Supporters of the goal argued that the establishment of a goal was long overdue, given the long history of employment discrimination against individuals with disabilities, and the extremely low participation rate of people with disabilities in the labor force. The final rule retains the 7 percent per job group national utilization goal, but declines to adopt a sub-goal at this time. In response to commenters, the final rule clarifies that the failure to meet the goal, in and of itself, is not a violation of this part, and what contractors must do when the goal is not met. More specifically, the final rule identifies steps for the contractor to take to ascertain whether there are impediments to equal employment opportunity and, if impediments are found, to correct any identified problems. If no impediments are identified, then no corrective action is required. The goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

The NPRM proposed substantial changes to the requirement that contractors invite applicants to self-identify as individuals with disabilities by adding to the existing post-offer invitation requirement both a pre-offer invitation requirement and an annual survey of all employees. It also detailed proposed mandatory language for these invitations. As discussed in detail in the Section-by-Section Analysis, OFCCP received more than 130 comments on this provision from a broad range of perspectives. The final rule adopts the NPRM requirement to invite self-identification from applicants both before and after a job offer has been made. Instead of adopting the proposal for annual self-identification, the final rule adopts an every five year invitation for employees to

self-identify with an interim reminder to employees of their ability to change their status. In response to the comments, OFCCP will simplify the language of the invitations and consolidate them into a single form for contractors to use when inviting self-identification. When finalized, the form will be available on the OFCCP Web site.

The NPRM proposed to require that contractors develop and implement written procedures for processing requests for reasonable accommodation and prescribed specific mandatory elements that the procedures must contain. This proposal prompted strong support and strong criticism from commenters. After consideration of the comments, OFCCP decided not to require the development of written reasonable accommodation procedures and eliminated proposed § 60-741.45. Instead, the final rule notes that using written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. The final rule states that contractors are not required to use such procedures and will not be found in violation of this part for not using such procedures. However, for the benefit of contractors that choose to adopt this best practice, the final rule also contains a new Appendix B that provides guidance for contractors on establishing written reasonable accommodation procedures.

The final rule presents a significant revision of the section 503 regulations. The detailed Section-by-Section Analysis below identifies and discusses all of the final changes in each section. For ease of reference, part 60-741 will be republished in its entirety in the final rule.

SECTION-BY-SECTION ANALYSIS

41 CFR PART 60-741

Subpart A – Preliminary Matters, Equal Opportunity Clause

Section 60-741.1 Purpose, applicability, and construction

Section 60-741.1 of the current rule sets forth the scope of section 503 and the purpose of its implementing regulations. The NPRM proposed three minor changes to this section. Specifically, it proposed to add language to paragraph (a) referencing contractors' nondiscrimination obligation; to modify the citation to the "Americans with Disabilities Act of 1990" (ADA) in paragraph (c) to reflect that statute's amendments by the ADA Amendments Act of 2008; and to add a new paragraph (c)(2) (and renumber existing paragraph (c)(2) as (c)(3)) to reflect the ADAAA's affirmation, in section 6(a)(1), that nothing in the statute "alters the standards for determining eligibility for benefits" under State worker's compensation laws or under State and Federal disability benefit programs. We received no comments on these proposed changes. Accordingly, OFCCP adopts the proposed revisions in the final rule without alteration.

Section 60-741.2 Definitions

The NPRM incorporated the vast majority of existing definitions contained in §60-741.2 without change. However, OFCCP proposed several changes to the substance and structure of this section. With regard to structure, OFCCP proposed to reorder the definitions so that they are primarily in alphabetical order, rather than in order by subject matter.

With regard to substantive changes, the NPRM proposed several revisions relating to the definition of "disability" and its component parts resulting from the

passage of the ADAAA, which became effective on January 1, 2009, and which amends both the ADA and Section 503. These include revisions to the definitions of "disability" (paragraph (g)), "major life activities" (paragraph (m)), "mitigating measures" (paragraph (n)), "regarded as having such an impairment" (paragraph (v)), and "substantially limits" (paragraph (z)). It is OFCCP's intention that these terms will have the same meaning as set forth in the ADAAA, and as implemented by the EEOC in its revised regulations published at 76 FR 16978 (March 25, 2011). In addition to revisions related to the definition of "disability," the NPRM also proposed to replace the term "Deputy Assistant Secretary" with the term "Director," and added a definition of "linkage agreement." OFCCP received 18 comments on the proposed changes to § 60-741.2 from a variety of entities including individuals, contractors, and associations.

- Definitions related to "Disability"

Commenters generally commended OFCCP for its efforts to bring consistency to the definitions used in section 503 and those in the ADAAA, noting, for example, that the "contractor community and individuals with disabilities are well-served by a consistent and uniform approach." A few commenters asserted that the new definition of "disability" was overly broad and that, as a result, these commenters were concerned that "a majority of individuals in the labor force may consider themselves as disabled."

In amending the ADA, Congress made clear its intent to ensure a "broad scope of protection" for "disability," and to ensure that this broad scope is not unduly "narrowed" by administrative or court rulings. See ADAAA at section 2. OFCCP's revised definitions incorporate the ADAAA's requirements, which, as previously noted, apply

equally to section 503. We therefore adopt the NPRM's revised definitions related to "disability" into the final rule.

- Definition of "Director"

We received no comments on the new definition of "Director," and it is adopted into the final rule as proposed.

- Definition of "Linkage Agreement"

We received no comments on the proposed definition of "linkage agreement." However, as the final rule eliminates the requirement for contractors to enter into linkage agreements, there is no need for the regulation to contain a definition for it, and thus it is eliminated from the final rule. See discussion of § 60-741.44(f) below.

- Additional Definitions

Several commenters representing the contractor community requested that OFCCP add formal definitions for "applicant" and for "Internet applicant," as those terms are defined in the Executive Order 11246 (EO 11246) implementing regulations at 41 CFR part 60-1. While OFCCP does not formally adopt the definition of "Internet applicant" into the section 503 regulations, OFCCP is harmonizing the requirements of the section 503 regulations and the Internet Applicant Rule. OFCCP provides further guidance on this issue in the preamble discussion related to § 60-741.42.

Section 60-741.3 Exceptions to the definitions of "disability" and "qualified individual"

The NPRM proposed to modify this section by changing the terms "individual with a disability" and "qualified individual with a disability" in the section title, as well as throughout the section, to "disability" and "qualified individual," respectively, in

accordance with the ADAAA. No comments were received regarding these non-substantive changes, and OFCCP therefore adopts them in the final rule.

Section 60-741.4 Coverage and waivers

The proposed rule removed the text of paragraph (a)(2) as the "contract work only" exception applied to "employment decisions and practices occurring before October 29, 1992" and has now expired. Accordingly, the NPRM also renumbered paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4). No comments were received on this proposed revision and OFCCP adopts it into the final rule.

Section 60-741.5 Equal opportunity clause

The NPRM proposed several changes to the content of the Equal Opportunity (EO) Clause found in § 60-741.5, and to the manner in which the EO Clause is included in Federal contracts. We received a total of 23 comments on these proposals. The proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.

- EO Clause Paragraph 1 – Statement Requiring that Contractors Not Discriminate on the Basis of Disability

In paragraph 1 of the EO clause, the NPRM proposed to modify the phrase "to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability" to read "to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental

disability . . . ." This formulation more closely mirrors the language and intent of the ADAAA. Only two comments were received regarding this change. One requested that we also delete the word "because" from the first sentence of paragraph 1 for consistency with the ADAAA, while the other asked that we add the word "qualified" before the phrase "individuals with disabilities." OFCCP does not believe that the first sentence of paragraph 1 is inconsistent with the ADAAA and declines to make this change. OFCCP also declines to add the word "qualified" as requested. The phrase "qualified individuals with disabilities" is used in the ADAAA solely in the context of the entitlement to reasonable accommodation, which is not the subject of the revised sentence. Thus, it would not be consistent with the ADAAA to use that phrasing in this sentence. The NPRM's changes to paragraph 1 of the NPRM are adopted and set forth in the final rule as proposed.

- EO Clause Paragraph 4 – Electronic Notice Posting and Accessible Formats

In paragraph 4, we proposed two revisions. First, the proposed regulation revised the parenthetical at the end of the third sentence of this paragraph to replace the outdated suggestion of reading the notice to a visually impaired individual as an accommodation with the suggestion to provide the notice in Braille, large print, or other alternative formats, so that the individual with a disability may read the notice him/herself. The proposed regulation also addressed the electronic posting of notices by contractors to satisfy the contractors' posting obligation in the context of telecommuting, work arrangements that do not include a physical office setting, and the use of electronic or Internet-based application systems. It proposed that the contractor be able to satisfy its posting obligation through electronic means for employees who telework, provided that

the contractor provides computers to its employees or otherwise has actual knowledge that employees can access the notice. To clarify, "actual knowledge" does not mean actual knowledge that the employee accessed the notice, but rather actual knowledge that the notice was posted or disseminated in such a way that would be accessible to the employee. The NPRM further proposed that contractors that use an electronic application process be required to use an electronic posting, and be required to conspicuously store the electronic notice with, or as part of, the electronic application.

OFCCP received two comments regarding paragraph 4 of the EO Clause. One commenter expressed uncertainty as to what point in the hiring process a contractor is required to provide an alternative version of the notice. A contractor must provide an alternate version of the notice to an applicant with a disability at the same point in the process that it would provide the notice to applicants without disabilities, and upon request. The second commenter recommended that the EO Clause require that electronic notices be available in an accessible format. Paragraph 4 of the EO Clause clearly states that "The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee." Contractors are thus already expected to provide the notice in accessible format, if needed.

In the final rule, OFCCP has adopted the proposed changes to paragraph 4 of the EO Clause. We have also added a clarification stating that a contractor is able to satisfy its posting obligation by electronic means for employees who do not work at a physical location of the contractor, provided that the contractor provides computers or access to computers that can access the electronically posted notices. This clarifies that electronic

posting is appropriate not only for employees who telework, but also for those who share work space – and contractor provided computers– at a remote work center.

- EO Clause Paragraph 7- Contractor Solicitations and Advertisements

The proposed rule added a new paragraph 7 to the EO clause that would require the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of individuals with disabilities. A comparable clause already exists in the equal opportunity clause of Executive Order 11246 regulations. See 41 CFR 60-1.4(a)(2).

OFCCP received three comments objecting to this proposal. These commenters asserted that this requirement would be too burdensome since newspapers and other publications charge for each word of a solicitation and that the word "solicitation" was undefined and thus open to broad interpretation.

The word "solicitation" is also used, along with the word "advertisements," in the Executive Order regulations. It has been broadly construed for many years to refer to any job listing, announcement, or advertisement, and would have the same meaning in the section 503 regulations. With regard to the assertion of burdensomeness, as noted in the NPRM, contractors are already required under Executive Order 11246 to state in advertisements and solicitations that "all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin." See 41 CFR 60-1.4(a)(2). The requirement set forth in paragraph 7 of the NPRM would require adding the single word "disability" to the language that contractors are already required to use in advertisements. This is a very minor change involving nominal time and expense to contractors that will affirm to jobseekers and the public the fact that

individuals with disabilities are entitled to non-discrimination and affirmative action in the workplaces of Federal contractors. Accordingly, the language in paragraph 7 of the NPRM is adopted into the final rule as proposed.

- Inclusion of EO Clause in Federal Contracts (proposed 60-741.5(d)

Finally, the NPRM proposed requiring that the entire EO Clause be included verbatim in Federal contracts. This proposed change was to ensure that the contractor, and particularly any subcontractor, who often relies on the prime contractor to inform it of its nondiscrimination and affirmative action obligations, reads and understands the language in this clause. OFCCP received nineteen comments, all opposing the verbatim inclusion of the EO Clause in contracts. The commenters primarily asserted that this requirement would be too burdensome, as the length of the contract would increase significantly to perhaps double or even triple its original length in some instances.

In light of the comments and upon further consideration of the issue, the final rule does not require express inclusion of the entire EO Clause into Federal contracts. In addition to the burden concerns set forth by commenters, there is concern that the length of the EO Clause will dissuade, rather than promote, contractors and subcontractors from reading and taking note of their non-discrimination and affirmative action obligations. This is contrary to the intent behind the proposal in the NPRM.

However, the requirement in the existing regulations does little to notify contractors and subcontractors of the nature of their obligations to employ and advance in employment qualified individuals with disabilities, which was a primary objective of the NPRM proposal. Accordingly, in order to draw greater attention to the contractors' obligations under section 503 without the burden of including the entire section 503 EO

Clause, the final rule revises paragraph (d) of this section to require the following text, set in bold text, in each contract, following the reference to the section 503 regulations: "This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities."

Subpart B--Discrimination Prohibited

Section 60-741.21 Prohibitions

This section of the rule describes types of conduct that would violate the non-discrimination requirements of section 503. The NPRM renumbered the section's paragraphs, captioning the introductory sentence as (a), and renumbering existing paragraphs (a) through (i) as paragraphs (1) through (9). The NPRM also proposed several substantive changes, most of which are necessitated by the ADAAA. A new paragraph (iv) was added to paragraph (a)(6) regarding reasonable accommodation (§ 60-741.21(f) of the existing regulations) to clarify that a contractor is "not required" to provide reasonable accommodation to individuals who "satisfy only the 'regarded as having such an impairment' prong of the definition of disability." A new paragraph (ii) was added to paragraph (a)(7) regarding qualification standards (§ 60-741.21(g) of the existing regulations) to incorporate the ADAAA's specific prohibition on the use of qualification standards, employment tests, or other selection criteria that are "based on an individual's uncorrected vision" unless the standard, test, or other selection criteria, as

used by the contractor, "is shown to be job-related for the position in question and consistent with business necessity." We also proposed adding a sentence to paragraph (a)(9) regarding compensation (§60-741.21(i) of the existing regulations) to clarify that it would be impermissible for a contractor to reduce the compensation provided to an individual with a disability because of the "actual or anticipated cost of a reasonable accommodation the individual needs or may request." Lastly, the NPRM added a new subsection (b) to incorporate the ADAAA's prohibition on claims of discrimination because of an individual's lack of disability.

OFCCP received no comments regarding any of these proposed changes. We did, however, receive one comment suggesting we add "disparate work assignments" as an example of a method by which an employer may discriminate against an employee with a disability. While we agree with the point, we note that the nondiscrimination requirement of the rule already broadly encompasses "any other term, condition, or privilege of employment," including work assignments, as well as every other aspect of employment. See § 60-741.20(i). We therefore decline to make this suggested change, as discrimination in work assignments is already prohibited by the section 503 regulations. Accordingly, OFCCP adopts the revisions proposed in the NPRM into the final rule, except that proposed paragraph (a)(6)(iv) is renumbered paragraph (a)(6)(v) in the final rule.

In addition, the final rule adds two new paragraphs to paragraph (a)(6). The NPRM proposed, in section § 60-741.44(d), that as a matter of affirmative action, the contractor "must ensure" that its online job application systems are "compatible with" assistive technology used by individuals with disabilities. In response to concerns raised

by commenters, OFCCP decided not to include this provision in the final rule and to instead codify its publicly stated position that the nondiscrimination obligation to make reasonable accommodation includes contractors' use of electronic or online job application systems and requires that contractors ensure equal access to job opportunities. Although we are not including the proposed provision in the final rule, OFCCP notes in paragraph (a)(6)(iii) that it is a best practice for contractors to make their online systems accessible and compatible with assistive technologies used by individuals with disabilities. See the preamble to § 60-741.44(d), below, for a discussion of the comments. The codification of this position, first stated publicly in Directive 281, Federal Contractor's Online Application Selection System (July 10, 2008), on line at http://www.dol.gov/ofccp/regs/compliance/directives/dir281.htm, is in paragraph (a)(6)(iii) of the final rule.

Paragraph (a)(6)(vi) of § 60-741.21of the final rule is also new. The NPRM proposed a new § 60-741.45 requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation, and providing minimum elements that contractors' reasonable accommodation procedures must address. After further consideration of the burden associated with this provision, OFCCP has decided not to incorporate this obligation in the final rule. See the preamble to § 60-741.45, below, for a discussion of the comments regarding this section. Instead, in new paragraph (vi) to paragraph (a)(6) of § 60-741.21, the final rule notes that using written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. This paragraph states that contractors are not required to use such procedures and will not be found in violation of

this part for not using such procedures. However, for the benefit of contractors that choose to adopt this best practice, the final rule also contains a new Appendix B that provides guidance for contractors on establishing written reasonable accommodation procedures.

Section 60-741.23 Medical examinations and inquiries

The proposed rule modified paragraph (b)(4) to clarify that voluntary medical examinations and activities need not be job-related and consistent with business necessity, and revised paragraph (b)(5) to eliminate the existing paragraph's reference to (b)(4). We received no comments on these proposed changes and adopt them into the final rule as proposed.

Section 60-741.25 Health insurance, life insurance and other benefit plans.

The proposed rule revised paragraph (d) by changing the current rule's two references to "qualified individual with a disability" to "individual with a disability," as the ability to perform essential functions, inherent in the definition of "qualified individual," is not relevant to insurance considerations. We received no comments on this proposed change and adopt it into the final rule as proposed.

Subpart C--Affirmative Action Program

Section 60-741.40 General purpose and applicability of the affirmative action program requirement

The proposed rule proposed changes to the structure of this section by adding a statement of purpose in new paragraph (a), reordering and recaptioning existing

paragraphs (a), (b), (c), and (d), and revising the language of existing paragraph (c), renumbered as paragraph (b)(3) in the final rule, to require that the affirmative action program be reviewed and updated annually "by the official designated by the contractor pursuant to §60-741.44(i)."

- Paragraph (a): General Purpose

Proposed paragraph (a) stated that an affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. The proposed paragraph also noted that an affirmative action program "is more than a paperwork exercise," and "includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities."

A total of 22 comments were received from disability, veteran and employer associations, and from several individual employers about paragraph (a). Eighteen of the 22 comments expressed support for proposed paragraph (a) as "helpful," and asserted that the proposal would bring the section 503 regulations in line with the regulations implementing the affirmative action obligations of EO 11246 on behalf of minorities and women. These commenters also asserted that paragraph (a) would be strengthened by the addition of language that the AAP is designed to "effectuate" and measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities. In contrast, three comments from employers and an employer association expressed general opposition to the proposed paragraph. One commenter asserted the transportation industry should be exempt. Another commenter stated that the

proposed changes to the regulations would impose financial burdens on small and medium sized businesses.

OFCCP agrees with the majority of commenters that proposed paragraph (a) accurately describes the general purpose of contractors' affirmative action program obligations and is consistent with the implementing regulations of EO 11246. We believe it is important to clearly articulate OFCCP's expectation that contractors' affirmative action programs will result in progress toward effectuating equal employment opportunity objectives for individuals with disabilities. With respect to the comment requesting an exemption for the transportation industry, we note that such a request must be made to the Director as provided in § 60-741.4(b) of the regulations and cannot be sought through a public comment on the NPRM. OFCCP therefore declines to grant the requested waiver. Consequently, proposed paragraph (a) is adopted without change.

- Paragraph (b): Applicability of the affirmative action program

No comments were received regarding the addition to proposed new paragraph (b)(3), previously paragraph (c), indicating that the affirmative action program shall be reviewed and updated annually "by the official designated by the contractor pursuant to § 60-741.44(i)." Proposed paragraph (b) is adopted without change.

No comments were received regarding the reordering of § 60-741.40, and these changes are, likewise, adopted without change.

Section 60-741.41 Availability of affirmative action program.

The proposed regulation proposed requiring that, in instances where the contractor has employees who "telework" or otherwise do not work at the contractor's

physical establishment, the contractor shall inform these employees about the availability of the affirmative action program by means other than a posting at its establishment. This proposal in many respects mirrored the electronic notice requirements set forth in paragraph 4 of the EO Clause at § 60-741.5 of the rule.

A few commenters from the contractor community asserted that the NPRM's inclusion in the AAP of the data required to be collected and analyzed by proposed § 60-741.44(k) could result in the AAP including sensitive, trade secret, or proprietary information. These commenters expressed concern that this information would be available, under proposed § 60-741.41 to any applicant or employee.

In response to these comments, OFCCP revises the language for the final rule to state that "[t]he full affirmative action program, absent the data metrics required by § 60-741.44(k), shall be made available to any employee or applicant…" (revisions emphasized). This balances the interest in confidentiality of the contractor and its employees with the need for transparency regarding the contractor's affirmative action efforts. In addition, as part of the effort to focus the final rule on those elements that are of critical importance to OFCCP, while reducing the burden on contactors where possible, the final rule does not incorporate the NPRM proposals regarding informing off-site individuals about the availability of the contractor's affirmative action program. Rather, the final rule retains the language in the existing § 60-741.41 in that regard.

Section 60-741.42 Invitation to self-identify

The NPRM proposed five significant revisions to this section of the regulation: (1) requiring the contractor to invite all applicants to self-identify as having a disability prior

to an offer of employment, using the language and manner prescribed by the Director (paragraph (a)); (2) retaining but modifying the post-offer self-identification invitation requirement in the existing regulation (paragraph (b)); (3) requiring contractors to annually, and anonymously, survey their employees, using the language and manner prescribed by the Director (paragraph (c)); (4) emphasizing that the contractor is prohibited from compelling or coercing individuals to self-identify (paragraph (d)); and (5) requiring contractors to keep all information regarding self-identification as an individual with a disability confidential, and maintained in a data analysis file in accordance with § 60-741.23 of this part. The NPRM also proposed eliminating the sample invitation to self-identify in Appendix B of the existing rule, and invited public comment on potential language for the text of the mandated invitation to self-identify for contractors to use.

OFCCP received 136 comments on this section from a broad array of perspectives, including contractors, law firms, government agencies and individuals, as well as from organizations representing individuals with disabilities, veterans, and contractors. By and large, individuals with disabilities, and disability advocacy organizations were supportive of the three-step approach to voluntary self-identification of disability proposed in the NPRM, while contractors and contractor organizations opposed the proposed approach.

Commenters opposed to the proposed self-identification rubric raised various concerns, including: (1) that the pre-offer invitation to self-identify allegedly conflicts with the Americans with Disabilities Act (ADA); (2) the potential interplay between the pre-offer data collection requirement and the Internet Applicant Rule set forth in

regulations for Executive Order 11246; (3) the possibility of inaccurate self-reporting and underreporting; (4) the potential for contractors to be exposed to discrimination claims as a result of having knowledge about the existence of a disability; and (5) cost and burden issues. Additionally, some of those who favored the proposed self-identification approach joined those opposed in questioning the wording and readability of the proposed invitation to self-identify included in the NPRM preamble. The proposals, the comments regarding these proposals, and the revisions made in the final rule are discussed in turn below (with the exception of some specific comments on burden, which are addressed in the Regulatory Procedures section of the final rule).

- Paragraph (a): Pre-offer invitation to self-identify

Paragraph (a) of the NPRM proposed requiring the contractor to invite all applicants to voluntarily self-identify as individuals with disabilities whenever the applicant applies for or is considered for employment. As discussed in the NPRM, the primary reason for proposing a pre-offer invitation to voluntarily self-identify is to collect important data pertaining to the participation of individuals with disabilities in the contractor's applicant pools and workforces. This data would enable the contractor and OFCCP to better monitor and evaluate the contractor's hiring and selection practices with respect to individuals with disabilities. Furthermore, data related to the pre-offer stage of the employment process would be particularly helpful, as it would provide the contractor and OFCCP with valuable information regarding the number of individuals with disabilities who apply for jobs with contractors. In turn, this data would assist OFCCP and the contractor in assessing the effectiveness of the contractor's recruitment efforts over time, and in refining and improving the contractor's recruitment strategies, where necessary.

There was support for this provision, among individuals with disabilities and disability advocacy organizations. One commenter stated that a study conducted by the Cornell University ILR School and the American Association of People with Disabilities had found that applicants are most likely to self-identify as having a disability during the recruitment process. On the other hand, several other commenters expressed concern about this paragraph. Most prominently, commenters were concerned that requiring contractors to invite applicants to reveal whether they have a disability pre-offer could expose contractors to an increased risk of liability under the ADA, and that pre-offer self-identification conflicted with that statute's general ban on pre-offer inquiries about disability and guidance issued by EEOC and OFCCP.

OFCCP believes that concerns regarding the possibility of a conflict with the ADA or related guidance are based on an incorrect reading of the ADA and its regulations. As discussed in the NPRM, the ADA and section 503 regulations specifically permit the contractor to conduct a pre-offer inquiry about disability if it is "made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities," such as section 503. Furthermore, EEOC has clearly stated that "collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted" by the ADA or EEOC's implementing regulations. See 29 CFR 1630.13, 1630.14 and its Appendix; 41 CFR 60-741.42. EEOC has reiterated this exception to the prohibition on pre-offer inquiries about disability in sub-regulatory technical assistance guidance.[17] For example, EEOC's Title I Technical

[17] To assuage any remaining doubt on this matter, OFCCP obtained a letter from EEOC's Office of Legal Counsel in advance of the publication of this rule affirming that the pre-offer invitation to self-identify as

Assistance Manual, online at www.askjan.org/LINKS/ADAtam1.html, states:

> 5.5(c) Exception for Federal Contractors Covered by Section 503 of the Rehabilitation Act and Other Federal Programs Requiring Identification of Disability. Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

The ADA, thus, clearly allows the type of pre-offer self-identification invitation proposed in the NPRM.

Some commenters were also concerned that obtaining information about the disability status of an applicant could potentially expose contractors to claims of discrimination by disappointed job seekers. These commenters stated that obtaining information that an applicant has a disability would give them "knowledge" of the existence of a disability - a necessary component to any disparate treatment discrimination claim - and that the pre-offer invitation requirement eliminates an important protection for contractors.

---

an individual with a disability required by this final rule is permissible under the ADA and its implementing regulations. This letter will be posted on the OFCCP Web site.

OFCCP acknowledges that knowledge of the existence of a disability, like knowledge of a person's race, ethnicity, or gender, which are regularly self-reported and collected by contractors, is a component of an intentional discrimination claim. However, to find intentional discrimination it must be proven not only that the contractor knew that a person had a disability (or was of a particular race, ethnicity, or gender), but that the contractor treated the person less favorably because of his or her disability (or race, ethnicity, or gender). We note, moreover, that contractors have long had knowledge of the disabilities of applicants who have visible disabilities, such as blindness, deafness, or paraplegia, but that OFCCP has had no means of knowing of their presence in the applicant pool or their experience in the application and selection process. Requiring contractors to invite pre-offer self-identification will help fill this void. Lastly, OFCCP points out that, generally, self-identification information will be obtained by, and reside with, Human Resources (HR) offices and will not be provided to interviewing, testing, or hiring officials, as it is confidential information that must be kept separate from regular personnel records. This will help ensure that these officials do not, in fact, have knowledge of which applicants have chosen to self-identify as having a disability.

Several commenters were concerned that self-identification would be unreliable in truly measuring the number of individuals with disabilities in the applicant pool, as many applicants will not self-identify or will do so incorrectly. Indeed the same study cited above showed that at best, only about 50 percent of those with disabilities were likely to respond. Commenters also asked OFCCP to clarify whether contractors would be allowed to identify an individual as having a disability who does not self-identify. These commenters expressed concern that not permitting contractors to identify

applicants with known or obvious disabilities who do not self-identify as having a disability, would only increase the degree of underreporting, make it more difficult for contractors to meet the NPRM's proposed utilization goal, and possibly result in erroneous findings that the goal has not been met.

OFCCP concedes that there likely will be significant underreporting, especially at the beginning, meaning that self-reported data regarding disability will not give a full picture of the applicant pool. We disagree, though, that this is alone sufficient reason to eliminate the pre-offer invitation. While not perfect, the data that will result from the pre-offer invitation requirement will provide the contractor and OFCCP with important data that does not now exist pertaining to the participation of individuals with disabilities in the contractor's applicant pools. The hope is that this will allow the contractor and OFCCP to better identify, monitor, and evaluate the contractor's hiring and selection practices with respect to individuals with disabilities. We also believe that the response rate to the invitation to self-identify will increase over time, as people become accustomed to the invitation and workplaces become more welcoming to individuals with disabilities.

With regard to the question of contractors identifying individuals with disabilities who do not self-identify, we note that contractors subject to Executive Order 11246 have long been permitted to identify the race, gender, and ethnicity of applicants who do not voluntarily self-identify, but may not guess or speculate when so doing. See Frequently Asked Questions for the Employer, online at http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm#Q10. OFCCP believes that a comparable interpretation of the section 503 voluntary self-identification provisions

is appropriate. The final rule requires contractors to maintain several quantitative measurements regarding individuals with disabilities who have applied or been hired for jobs (§ 60-741.44(k)). Contractors are also required to annually assess their utilization of individuals with disabilities in each job group against a national utilization goal, and to take specific steps to ascertain the existence of, and correct, any impediments to equal employment opportunity if the goal is not met (§ 60-741.45). In light of these requirements and the overall objective of measuring progress toward equal employment opportunity for people with disabilities, it is important that the reporting of disability demographic information be as accurate as possible. OFCCP therefore believes that it is appropriate to allow contractors to identify an individual as having a disability for the purposes of §§ 60-741.44(k) and 60-741.45, if the individual does not voluntarily self-identify when: (1) the disability is obvious (e.g., someone is blind or missing a limb) or (2) the disability is known to the contractor (e.g., an individual says that he or she has a disability or requests reasonable accommodation for a disability).

OFCCP believes that this approach strikes the appropriate balance between the privacy concerns of those with disabilities and the need for reporting information to be as accurate as possible. Pursuant to the final rule, disability demographic information must be kept confidential and maintained in a data analysis file. Such information may not be included in an individual's personnel file. Contractors are also reminded that they may not guess or speculate when identifying an individual as having a disability. Nor may they assume that an individual has a disability because he or she "looks sickly" or behaves in an unusual way.

Another concern raised by several commenters is that the requirement to collect and maintain self-identification data from applicants does not comport with the Internet Applicant Rule found in the regulations to Executive Order 11246. See 41 CFR 60-1.3, 1.12. These commenters recommended that OFCCP add a definition of "applicant" and "Internet applicant" to this final rule and ensure that wherever in the regulations the term "applicant" is used, the term "Internet applicant" applies as well. OFCCP did not propose to add a definition of "applicant" or "Internet applicant" in its NPRM. Therefore, the final rule does not do so. However, the discussion that follows provides guidance about how contractors may invite Internet applicants to self-identify as an individual with a disability under section 503 in a manner consistent with demographic collection requirements under the Executive Order Internet Applicant Rule. Under this final rule, contractors will be able to invite applicants to self-identify as an individual with a disability at the same time the contractor solicits demographic data on applicants under the Executive Order 112146 Internet Applicant Rule. For Internet applicants this generally will be after the contractor has determined the individual has been screened for basic qualifications and meets other requirements for being an Internet applicant. Therefore, this rule does not require contractors to change their existing systems for screening Internet applicants so long as those systems comply with existing law.

By way of background, OFCCP's longstanding definition of "applicant" is contained in agency subregulatory guidance. See the Uniform Guidelines on Employee Selection Procedures (UGESP), Question and Answer 15, 44 FR 11996 (March 2, 1979).[18] According to that guidance, in general, an applicant is a person who has

[18] Question and Answer 15 reads: "Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines? A: The precise definition of the term "applicant" depends upon the user's

indicated an interest in being considered for hiring, promotion, or other employment opportunities, either in writing (by completing an application form or submitting a resume) or orally, depending upon the contractor's practice. The Internet Applicant Rule came into effect in February 2006, and pertains to recordkeeping by contractors on Internet-based hiring processes and the solicitation of race, gender, and ethnicity data, in conjunction with their recordkeeping obligations under the Executive Order implementing regulation at § 60-1.12. Under § 60-1.12, contractors' recordkeeping obligations include maintaining expressions of interest through the Internet that the contractor considered for a particular position, as well as applications and resumes. Contractors also are required to maintain, where possible, data about the race, sex, and ethnicity of applicants and Internet Applicants, as appropriate. The term Internet Applicant is defined in § 60-1.3 and generally means an individual who: (1) submitted an expression of interest in employment through the Internet; (2) is considered by the contractor for employment in a particular position; (3) possessed the basic qualifications for the position; and (4) did not remove himself or herself from consideration.

OFCCP has taken into account contractors' concerns about inviting self-identification for applications submitted electronically, particularly for those contractors who create resume databases which they mine for applicants when they have a job opening. In recognition of these concerns, and consistent with EO 13563's focus on simplifying and harmonizing requirements, OFCCP will permit contractors to invite applicants to self-identify as an individual with a disability at the same time as

---

recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice."

contractors collects the demographic data for applicants required under Executive Order 11246.

The Internet Applicant rule under EO 11246 generally allows contractors to do a "first cut" and screen out individuals whom they believe do not meet the basic qualifications of the position -- without capturing or retaining any demographic documentation on these individuals. There is the concern, however, that in doing this "first cut" contractors may be engaging in discrimination (e.g., if they are incorrectly applying their basic qualifications, or the basic qualifications have an adverse impact on a protected group and are not job-related and consistent with business necessity), and by not keeping the demographic information on the individuals they screened out they are eliminating evidence to prove that discrimination may be occurring. This concern is even greater in the section 503 context because these Executive Order "first cuts" are not designed to take into account the possibility that someone with a disability might be able to meet the qualification standard or perform the essential functions of the job with the provision of a reasonable accommodation.

Under existing law, it is unlawful under section 503 to use qualification standards, including at the "basic qualifications" screen stage, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard is shown to be job-related for the position in question and 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 a reasonable accommodation. See § 60-741.21(a)(7). These requirements, therefore, apply when contractors design and implement their "basic qualifications" screens. In addition,

after the initial screening for "basic qualifications," contractors must also ensure that they are complying with their duty to evaluate all applicants for jobs based on the applicant's ability to perform the essential functions of the job with or without reasonable accommodation.

OFCCP will treat the recordkeeping provisions of section 503 at § 60-741.80 in the same manner as the recordkeeping requirements under Executive Order 11246 at 41 CFR 60-1.12 as applied to Internet applicants. These recordkeeping requirements are not new and will impose no additional burden on contractors. The record retention requirements exist independently of whether and when individuals are invited to self identify under section 503.

The section 503 recordkeeping provisions require contractors to retain personnel or employment records made or kept by the contractor for one or two years depending on the size of the contractor and contract. Those records include the records contractors are required to maintain under 41 CFR 60-1.12. Section 60-1.12 requires contractors to maintain all expressions of interest through the Internet or related technologies considered by the contractor for a particular position, such as on-line resumes or internal resume databases, and records identifying job seekers contacted regarding their interest in a particular position. For purposes of recordkeeping with respect to internal resume databases, the contractor also must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. For purposes of recordkeeping with respect to external databases the contractor must maintain a record of the position

for which each search of the database was made, and corresponding to each search, the substantive criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. As with records retained under EO 11246 regulations, these records are to be maintained regardless of whether the job seeker is an Internet applicant.

If a contractor has a practice of welcoming unsolicited resumes regardless of current job openings, OFCCP will permit the contractor to invite self-identification only of those considered for employment, consistent with requirements under Executive Order 11246 and its regulations at 41 CFR 60-1.3 and 60-1.12. The obligation to invite self-identification is triggered by considering the job seeker for employment, not by including the resume in the resume database. For example, if a contractor has an internal resume database with 1,000 resumes and is looking for applicants to fill a job as an engineer in Omaha, the contractor could limit the pool of resumes under review by applying a "basic qualifications" screen that identifies those who have a masters degree in electrical engineering, at least three years of experience as an electrical engineer, and further limit the review to resumes submitted within the last three months. If that search produced a pool of 30 job seekers, the contractor might narrow the pool further by asking the 30 job seekers if they are interested in being considered for the job. If 10 job seekers indicate interest in being considered, they would be applicants and the contractor would invite the 10 job seekers to self-identify. In contrast, if a contractor has a practice of not accepting unsolicited resumes, job seekers who submit an unsolicited resume are not applicants. Accordingly, the contractor would have no obligation to invite them to self-identify as an individual with a disability.

It is also possible that potential and qualified job applicants with disabilities may not apply for jobs posted on contractors' online application systems because, for example, they are not aware that selection criteria concerning essential functions may not be used to exclude them if they can satisfy the criteria with a reasonable accommodation. Contractors seeking to fill jobs should seek to attract the best possible pool of applicants; this includes applicants with disabilities who could perform the job with or without reasonable accommodations. OFCCP notes that a best practice for ensuring a diverse, qualified pool of applicants for contractors using online application systems is posting a notice on their human resources webpage or online application portal that notifies job applicants that may need a reasonable accommodation to perform the functions of a job that they are entitled to one under the ADAAA. This best practice encourages qualified individuals with disabilities to pursue job vacancies, and provides contractors with access to a wide range of skills and talents.

In providing this guidance as to application of the self-identification requirement under section 503, contractors should be able to operate as they have been using their existing systems and processes because this rule does not change how contractors handle Internet applicants. This should allow contractors to avoid creating separate data collection and storage systems as many contractors feared. For those contractors that need further help determining which individuals must be given a pre-offer self-identification inquiry, OFCCP is available to provide technical guidance.

- Paragraph (a)(1): Requirement that the contractor invite self-identification using the language and manner prescribed by the Director

Paragraph (a)(1) of the NPRM proposed requiring contractors to invite applicants to self-identify using language prescribed by the Director and provided a sample of what that language might look like for public comment. Several commenters responded, the majority of which expressed support for the proposed text, but suggested that modifications be made to it.

Commenters asserted that the proposed language was too long, wordy and complex. Many of these commenters offered suggestions to simplify the language, thereby increasing the likelihood that the invitation would be read, understood and responded to. Commenters also suggested that we state that self-identifying is "voluntary" before, rather than after, individuals are asked to identify their disability status. OFCCP agrees with these criticisms and is developing a form that will address them. When finalized, the form will be available on the OFCCP web site.

Some commenters opposed the use of uniform language for the self-identification invitation, arguing that uniform language will not allow contractors flexibility to modify the self-identification language as necessary based on geographic location. They recommended that we provide a framework with suggested language and allow contractors the flexibility to design invitations they believed would maximize response rates. Other commenters expressed a willingness to use self-identification language prescribed by OFCCP, but only if the EEOC has approved the inquiry. As noted in the NPRM, OFCCP believes that the use of uniform language is needed to ensure consistency in all self-identification invitations, and to reassure individuals with

disabilities that the self-identification request is routine and executed pursuant to obligations created by OFCCP. Standardized language will also minimize any burden to contractors associated with this responsibility, and will facilitate contractor compliance. With respect to the concern about EEOC approval, pursuant to the rulemaking process, both the NPRM and this final rule were coordinated with EEOC, among other agencies, prior to their publication. EEOC will be asked for input in the process that Secretary uses to finalize the form.

Finally, few commenters commented on the portion of the text inviting applicants to request any needed accommodation in the application process. Those who did suggested that we either separate language concerning reasonable accommodation from the invitation, or include clarification that applicants are not being asked to disclose accommodations they need to perform the job they are seeking. We will address this issue when finalizing the language of the form.

- Paragraph (b): Post-Offer Invitation to Self-identify

Paragraph (b) of the NPRM proposed modifying, but retaining, the current rule's requirement that contractors invite individuals, after an offer of employment is extended, but before the applicant begins work, to voluntarily self-identify as an individual with a disability. As explained in the NPRM, we proposed to retain this requirement, in addition to the new pre-offer invitation requirement, so that individuals with hidden disabilities who fear potential discrimination if their disability is revealed prior to receiving a job offer will, nevertheless, have the opportunity to provide this valuable data. We received no comments on this paragraph. Accordingly, the language in the NPRM is adopted as proposed.

- Paragraph (c): Annual Employee Survey

Paragraph (c) proposed requiring that, on an annual basis, contractors invite all of their employees to voluntarily and anonymously self-identify as having a disability using the language and manner prescribed by the Director.

We received several comments that addressed whether the annual employee survey should be anonymous. Some of these commenters generally supported an anonymous survey. These commenters asserted that having the survey be anonymous would permit contractors to collect the data necessary to evaluate the effectiveness of their affirmative action efforts while ensuring that applicants and employees with disabilities are protected from discrimination. Others contended that an anonymous survey would be critical to increasing the likelihood that individuals would choose to self-identify.

Several other commenters opposed the anonymity requirement, arguing that it would impede the ability of contractors to comply with the NPRM's proposed requirements for collecting and analyzing data regarding individuals with disabilities. These commenters pointed out that contractors would be unable to comply with the goal requirement of proposed § 60-741.46 to determine their utilization of individuals with disabilities by job group from anonymous self-identification forms. Such assessments would require an individual's name and other identifying information. Moreover, without identifying information, it would not be possible for contractors to know whether any of the employees who self-identified had self-identified previously, leading to the possibility of double counting employees with disabilities.

OFCCP agrees that identifying information is needed in order for contractors to assess their utilization of individuals with disabilities by job group. We have,

accordingly, revised paragraph (c) to remove the word "anonymous." However, as noted previously, disability demographic information must be kept strictly confidential, apart from regular personnel files. We have also recaptioned paragraph (c) as "Employees" and removed the word "survey." This clarifies that contractors are to provide employees with the same invitation to voluntarily self-identify as an individual with a disability that is provided to applicants, and do not need to canvass their employees in some other fashion.

Divergent views were also expressed by commenters regarding the proposal to invite employees to voluntarily self-identify on an annual basis. Commenters supporting the annual requirement contended that it would provide an opportunity for employees who have become disabled since employment, or who were hesitant to self-identify during the hiring process, to be counted for affirmative action purposes. They also asserted that an annual employee survey would provide contractors with current information and enable them to measure the impact of changes in their hiring and employment practices.

Commenters opposed to the annual survey requirement contended that it would be superfluous in light of the requirement in the existing regulations for contractors to advise employees of their right to self-identify at any time. They also argued that it is redundant to require contractors to survey all employees annually in addition to the pre- and post-offer invitations to self-identify. These commenters argued that a single solicitation of applicants post- offer would be more appropriate, and would provide an opportunity for interactive discussions about reasonable accommodation. Other commenters opposed to the annual survey asserted that the inclusion of individuals who become disabled after

becoming employed would not help contractors in analyzing and improving recruiting and outreach efforts. These commenters also contended the annual survey would deter employees from participating in the interactive reasonable accommodation process, and make employees suspicious of management's persistence in asking them to identify their disability status, making them less likely to self-identify.

Finally, some commenters opposed to the annual employee survey proposed alternative ways to achieve the desired result. For example, one commenter recommended that we allow the contractor to post the invitation to self-identify in a conspicuous location and allow employees to self-identify at any time, rather than once per year, and require the contractor to record the data annually. Another proposal was to reduce the frequency of the survey to every two or three years instead of annually, or to make the annual survey optional, rather than mandatory.

As stated in the NPRM, because baseline data regarding the number of individuals with disabilities in the contractor's workforce is not available, it is important to provide all employees with an initial opportunity to self-identify. It is also important that contractors continue to have the most accurate data possible in order to be able to conduct meaningful self-assessments of their employment practices and recruitment efforts. This is especially important in the disability context because the status of employees may change over time and the snapshot of the makeup of the contractor's workforce may become outdated for planning and self-assessment purposes. In light of both the importance of employee data and the concerns raised by commenters, the final rule revises the requirement to invite employee self-identification as follows: the contractor is to invite employee self-identification during the first year it becomes subject to the requirements of this section,

and at five year intervals, thereafter. At least once during the years between each invitation, the contractor must remind their employees that they may voluntarily update their disability status at any time.

- Paragraph (d): Prohibits contractor from compelling or coercing individuals to self-identify

Proposed paragraph (d) emphasized that the contractor is prohibited from compelling or coercing individuals to self-identify. While a majority of commenters supported this proposal, a few commenters opposed it. Commenters opposing this paragraph argued that the adoption of any utilization goal should be predicated upon mandatory self-identification for applicants and employees to eliminate inaccurate reporting.

The language of the NPRM is adopted into the final rule as proposed. OFCCP notes that self-identification for affirmative action purposes has always been voluntary under section 503, and is, likewise, voluntary with regard to race, gender, and ethnicity under Executive Order 11246, which OFCCP also enforces. While the final rule adds a goal requirement to section 503 for the first time, we find this an insufficient reason to mandate self-identification by applicants and employees. Executive Order 11246 has long had a goal requirement, but has never mandated self-reporting by applicants or employees. Moreover, such a mandate would be virtually unenforceable as many disabilities are hidden and would not be known to the contractor. In addition, as previously discussed, OFCCP will permit contractors to identify as individuals with disabilities applicants and employees with known or obvious disabilities who decline to voluntarily self-identify. Permitting such identification by contractors for affirmative

action purposes, we believe, adequately addresses the concerns of commenters seeking a mandatory self-identification requirement. OFCCP, therefore, adopts paragraph (d) into the final rule as proposed.

- Paragraph (e): Requirement that information concerning disability be kept confidential

Proposed paragraph (e) emphasized that all information regarding self-identification as an individual with a disability shall be kept confidential and maintained in a data analysis file in accordance with § 60-741.23 of this part.

Some commenters offered recommendations to modify paragraph (e). Commenters suggested that a clear definition of what constitutes a "data analysis file" be provided and include clarification regarding who may have access to the information in such a file. It was also suggested that OFCCP expand the language of paragraph (e) to state that self-identification information should not be placed in an individual's personnel file. Still others suggested that self-identification information should be kept in the confidential medical file required by the ADA and the Genetic Information Nondiscrimination Act (GINA), and the implementing regulations for those statutes. OFCCP believes that paragraph (e) is sufficiently descriptive to instruct contractors to maintain self-identification information in a single confidential file maintained solely for the purpose of conducting data analysis required by section 503 and this part, and that a definition of "data analysis file" is not necessary. As section 503 already prohibits the maintenance of disability-related information in personnel files, there is no need to so state in this paragraph. See 41 CFR 60-741.23(d). Lastly, OFCCP rejects the suggestion that contractors be permitted to maintain self-identification information in employees'

individual confidential medical files. This would impede contractors' ability to use the data for the collective analysis for which the data are collected, and to provide the self-identification information to OFCCP when requested to do so.

Section 60-741.44 Required contents of affirmative action programs

The proposed rule contained significant revisions to several paragraphs of this section. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed below.

A total of 133 comments addressed the required contents of a section 503 affirmative action program (AAP). Commenters included disability, employer, veterans and other groups and associations, contractors, law firms, government offices, and individuals.

- Paragraph (a): Affirmative action policy statement

Proposed § 60-741.44(a) requires contractors to state their equal employment opportunity policy in the company's AAP. The NPRM proposed revising the second sentence of the existing paragraph to clarify the contractor's duty to provide notice of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It also proposed revising the parenthetical at the end of the sentence, replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions of the notice that allow persons with disabilities to read the notice themselves. The NPRM also proposed revising paragraph (a) to require the contractor's chief executive officer to clearly articulate his or her support for the

company's AAP in the policy statement.

OFCCP received sixteen comments on these proposed revisions, most of which supported the changes. Commenters noted that the requirement for contractors to provide accommodations such as large print, Braille and other means to enable individuals with visual impairments to read for themselves brings the regulation in line with current practice under the ADA and Rehabilitation Act.

An employer association questioned the feasibility of obtaining the required notice in Braille. This comment also stated that the proposed requirement would impose an insurmountable burden because providing notices that are understandable to an individual with a disability requires identification, understanding, and anticipation of the varying types and degrees of learning disabilities that individuals may possess.

OFCCP declines to revise § 60-741.44(a) with regard to the provision of alternative formats that are accessible and understandable to persons with disabilities. The proposed wording indicates that the listed alternative formats are simply examples of reasonable accommodation that may be needed by particular individuals; there may be other ways to comply with this requirement, depending on the specific circumstances. With regard to the concern that there may be varying types and degrees of learning disabilities requiring accommodation, OFCCP notes that paragraph (a) is consistent with the existing section 503 reasonable accommodation obligation that requires contractors to accommodate the specific limitations of their applicants and employees with disabilities, unless to do so would impose an undue hardship on its operations. See 41 CFR 60-741.21(f).

OFCCP, however, agrees with commenters' suggestion to revise the language of paragraph (a) to clarify the level of company leadership that must demonstrate their

support for the company's AAP. The purpose of this paragraph is to ensure that the statement of policy communicates to employees that support for the AAP goes to the very top of the contractor's organization. For contractors with foreign-based parent companies, it is appropriate to require the company leadership that is based in the United States to express that support. Therefore, § 60-741.44(a) of the final rule is revised to state "[t]he policy statement shall indicate the top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program …"

- Paragraph (b): Review of personnel processes

The NPRM proposed three changes to this paragraph. First, it required that the contractor review its personnel processes on at least an annual basis, rather than "periodically," to ensure that its obligations are being met.

Second, proposed paragraph (b) mandated certain specific steps (based on existing Appendix C) that the contractor must take, at a minimum, in the review of its personnel processes, including: (1) identifying the vacancies and training programs for which protected applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

Third, the NPRM proposed to require that the contractor "ensure that its use of information and communication technology is accessible to applicants and employees with disabilities." A footnote citing resources related to technological accessibility, such

as the Web Content Accessibility Guidelines (WCAG 2.0) and the regulations implementing the accessibility requirements for Federal agencies prescribed in section 508 of the Rehabilitation Act was also included.

OFCCP received 56 comments regarding these proposals. Some supported an annual review of personnel processes, while other commenters suggested a less frequent review, occurring every three or five years, would be sufficient. Several comments asserted that significant burden and costs would result from the proposed requirement, much greater than that calculated by OFCCP in the NPRM's Regulatory Procedures section. The comments also asserted that promotion and training opportunities, unlike hiring, are not as readily distinguishable for individual candidates. Such opportunities may be available to all employees, take a number of different forms, and may be noncompetitive. These commenters further objected to the requirement to create and maintain a statement of reasons for every instance in which an individual with a disability is denied a position or training as tantamount to requiring a drafted legal defense before any claims were brought, and warned that it could serve to "drive underground" the real reason for rejection. Lastly, the comments raised confidentiality concerns and cited difficulties the proposed requirement would create in terms of recordkeeping and access to human resource information systems currently used by contractors. The comments asserted that it would therefore be unreasonable to make the proposed procedures mandatory.

Based on the comments submitted, and questions about the efficacy of these requirements toward the end of increasing employment opportunities for individuals with disabilities, OFCCP does not adopt the proposal as drafted in the NPRM. Instead, the

final rule retains the language in existing § 60-741.44(b) that contractors shall review their personnel processes "periodically," but eliminates existing Appendix C. However, in so doing, OFCCP reiterates that existing paragraph (b) contains several requirements – including ensuring that its personnel processes are careful, thorough, and systematic; ensuring that these processes do not stereotype individuals with disabilities; and designing procedures that facilitate a review of the implementation of these requirements – that continue to apply to contractors. OFCCP will vigorously enforce these requirements.

With respect to the proposed technological accessibility requirement, some disability advocacy groups supported the proposed requirement. However, other commenters asserted that this requirement was too vague, and asked for clarification as to what they would have to do to comply and how OFCCP intended to enforce it. These commenters also asserted that there is not a single, accepted standard of "accessibility," that technology is constantly changing, and that it could be tremendously expensive and time-consuming for contractors to have to ensure on an annual basis that all of its information and communication technology are fully accessible and technologically up-to-date.

In response to these comments OFCCP has revised and clarified paragraph (b) in the final rule. It requires that the "contractor shall ensure" that applicants and employees with disabilities have "equal access to its personnel processes, including those implemented through information and communication technologies." The final rule requires, further, that contractors must provide "necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal employment opportunity

in the operation of personnel processes." Contractors are also "encouraged" to make their information and communication systems accessible, even in the absence of a specific accommodation request. To assist contractors in making their systems accessible, the final rule retains the footnote highlighting the Web Content Accessibility Guidelines (WCAG 2.0) and the regulations implementing the Federal sector accessibility requirements of section 508 of the Rehabilitation Act as examples of readily available accessibility resources.

- Paragraph (c): Physical and mental qualifications

The NPRM proposed three substantive revisions to this paragraph. First, it required that all physical and mental job qualification standards must be reviewed and updated, as necessary, on an annual, as opposed to a "periodic," basis. Second, paragraph (c)(1) of the NPRM required the contractor to document its annual review of physical and mental job qualification standards. Third, paragraph (c)(3) of the NPRM required the contractor to timely document those instances in which it believes that an individual would constitute a "direct threat" as understood under the ADA and defined in these regulations, and to maintain this document as set forth in the recordkeeping requirements in § 60-741.80.

OFCCP received 37 comments addressing the proposal to require annual reviews of physical and mental job qualification standards. Comments from disability and other associations, as well as a few law firms, supported the annual review requirement. Some of these commenters stated that all qualifications that needlessly screen out people with disabilities should be reviewed including such qualifications as having a driver's license. Contrasting comments from contractors, employer associations, and other law firms

stated that the requirement to review physical and mental qualifications of all jobs with openings during the AAP period would be burdensome because of the number of job openings, variety of jobs, time, staff and needed changes to HR systems. Several comments suggested less burdensome approaches. Most of these comments suggested reviewing the qualifications only when it is a new position or a significant change in the job occurs. Other commenters suggested that reviews occur on a three or five year basis.

With regard to the second proposed change in paragraph (c)(1) requiring that the contractor document its job qualification standard reviews, commenters questioned what evidence will be necessary to demonstrate that a review has been completed, including whether a job analysis and validation are needed. One of these comments noted that the proposed regulation lacks clarity as to how job-relatedness is evidenced and asserted that the ADA practice of examining "essential functions" of a job should be sufficient.

Finally, the third proposed change requires the contractor to timely document those instances in which it believes that an individual would constitute a "direct threat." Comments on this proposal were limited. One comment asserted that this proposed requirement would be burdensome and other comments expressed concern that contractors may become overzealous in documenting incidents involving persons with disabilities. In contrast, another commenter stated that documentation should be subject to disclosure to the individual.

We note at the outset that the existing regulation clearly prohibits the contractor from using a job qualification standard that screens out or tends to screen out an individual or class of individuals on the basis of disability unless the standard is job-related and consistent with business necessity. See 41 CFR 60-741.21(g), 60-

741.44(c)(2). This is a primary reason that the existing regulations require the contractor to periodically review its physical and mental job qualification standards. To the extent that contractors are not currently conducting these reviews at all, they are already in violation of the existing regulations.

With this in mind, and taking into account commenters' concerns about the burden associated with the proposal, the final rule does not adopt the proposal as drafted in the NPRM. Instead, the final rule retains the language in existing § 60-741.44(c), requiring that contractors adhere to a schedule for the "periodic review of all physical and mental job qualification standards," and providing that contractors have the burden to demonstrate that qualification standards that tend to screen out qualified individuals with disabilities are job-related and consistent with business necessity. The burden analysis in the Regulatory Procedures section of the final rule has been amended accordingly.

- Paragraph (d): Reasonable accommodation to physical and mental limitations.

The NPRM proposed a single revision to this provision of the regulations. The proposed change required the contractor to ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.

Thirteen comments were received on this proposed change. One of these comments asserted that OFCCP should require adoption of a universal design approach or of a regulatory scheme such as § 508. Commenters who opposed the requirement spoke to the potential burden the requirement would impose. One comment submitted by an employer association asserted that OFCCP's proposed change is premature and pointed out that the Department of Justice and the Access Board are currently examining

requiring website and technology accessibility and the availability of processes or technology to facilitate such access.

OFCCP has revised and clarified this requirement in the final rule, and determined that, as revised, this obligation is more appropriately addressed in § 60-741.21(a)(6)(iii) as part of the fundamental, nondiscrimination reasonable accommodation obligation of all contractors subject to section 503. This revised provision makes clear that the reasonable accommodation obligation extends to contractors' "use of electronic or online application systems." A contractor using such a system must provide necessary reasonable accommodation to "ensure" that qualified individuals with disabilities who are unable to fully utilize the system are provided "equal opportunity to apply and be considered for all jobs."

- Paragraph (f): Outreach and recruitment efforts

Existing paragraph (f) requires contractors to engage in outreach and recruitment of individuals with disabilities and suggests a number of outreach and recruitment efforts that the contractor could undertake to comply with this obligation. The NPRM proposed several changes to this paragraph: proposed paragraph (f)(1)(i) required that contractors promptly list all of their employment opportunities, with limited exceptions, with the nearest Employment One-Stop Career Center; paragraph (f)(1)(ii) required that the contractor enter into three linkage agreements with various entities to serve as sources of potential applicants with disabilities; paragraph (f)(2) included a list of additional suggested outreach and recruitment efforts that contractors could take; paragraph (f)(3) proposed a new requirement that the contractor conduct an annual self-assessment of

their outreach and recruitment efforts; and paragraph (f)(4) clarified the contractor's recordkeeping obligations with regard to these outreach and recruitment efforts.

Overall, OFCCP received 112 comments on the proposed changes to § 60-741.44(f). While a number of commenters praised OFCCP's efforts to strengthen Federal contractors' recruitment and outreach efforts, the majority of the comments expressed concerns about the proposed requirements. Commenters raised a variety of issues, including concerns about the burden associated with the proposed mandatory requirements, technical questions regarding the drafting of the proposed rule language, and the utility of some of the recommended provisions. We address the proposals in each subparagraph, and the comments to these proposals, in turn below.

Commenters voiced several concerns with the (f)(1)(i) proposed requirement that contractors promptly list all of their employment opportunities with the nearest Employment One-Stop Career Center. Commenters stated that the requirement to provide information about each job vacancy in the manner and format required by the appropriate One-Stop would be extremely burdensome because the One-Stops have a wide variety of different manners of submission and required formats. Some commenters suggested that OFCCP should establish a uniform format and manner for job listings or reestablish the national "job bank" that previously existed under VEVRAA.

As stated above, paragraph (f)(1)(ii) required contractors to enter into three linkage agreements with three different entities: specifically, the proposal required linkage agreements with (1) the State Vocational Rehabilitation Agency nearest the contractor's establishment or a local organization listed in the Social Security Administration's Ticket to Work Employment Network Directory; (2) at least one of

several other listed organizations and agencies for purposes of recruitment and developing training opportunities; and (3) an organization listed in the Employer Resources section of the National Resource Directory (NRD), an online collaboration among the Departments of Labor, Defense, and Veterans Affairs. Commenters expressed concern about the administrative and financial burden related to the linkage agreement requirement. Several commenters also opined that requiring contractors to have three linkage agreements per establishment could result in a Federal contractor with multiple establishments having to enter into hundreds of linkage agreements. Commenters also questioned the capacity of some of the organizations mentioned in the proposed rule to enter into a significant number of linkage agreements with contractors. Additionally, we received comments from contractors that were already party to linkage agreements with various groups. These commenters asked whether they would need to enter into three additional linkage agreements, or if their existing agreements could be used to satisfy the requirement. Some commenters stated that contractors should be allowed the flexibility to develop relationships with potential resource organizations that may better meet their needs but that were not among those listed in the NPRM. Finally, many commenters suggested adding other specific recruitment sources to those listed in the NPRM or on the NRD, such as State developmental disability, and mental health agencies. These commenters also suggested that the NPRM's reference to career offices of educational institutions and private recruitment sources be revised to specify that these be offices and recruitment sources that "specialize in the placement of individuals with disabilities."

In light of these comments, and in order to reduce the burden on contractors, the final rule does not incorporate the proposal to mandate contractors' listing of employment

opportunities with the One Stop Career Centers. Additionally, the final rule does not incorporate the proposal to require contractors to enter into linkage agreements. Rather, the final rule retains the existing language of § 60-741.44(f)(1)(i) which requires the contractor to undertake "appropriate outreach and positive recruitment activities," and provides a number of suggested resources, in paragraph (f)(2)(i), that contractors may utilize to carry out this general outreach and recruitment obligation. The final rule also includes, as suggested resources, the Employment One-Stop Career Centers (One-Stops) and American Job Centers, State mental health agencies, and State developmental disability agencies. Additionally, language was added to the recommended resources of "placement or career offices of educational institutions" and "private recruitment sources, such as professional organizations or employment placement services" to clarify that these should be resources "that specialize in the placement of individuals with disabilities."

The final rule's approach requires contractors to engage in outreach and recruitment efforts, but allows each individual contractor the flexibility to choose the specific resources they believe will be most helpful in identifying and attracting protected individuals with disabilities, given their particular needs and circumstances. It will also enhance contractors' capability to switch between and among different resources in order to find and maintain the resource "mix" that is most effective.

Lastly with regard to paragraph (f)(1), several commenters argued that OFCCP underestimated the burden hours associated with complying with the proposed paragraph (f)(1)(iii) (paragraph (f)(1)(ii) in the final rule), which requires the contractor to send written notification of company policy related to its affirmative action efforts to all

subcontractors, including subcontracting vendors and suppliers. OFCCP retains this requirement as proposed, as we believe it is crucial to effective implementation and enforcement of the regulations that subcontractors are aware of their section 503 affirmative action obligations. A discussion of commenters' concerns regarding the burden of compliance with this requirement is found in the Regulatory Procedures section of this final rule.

OFCCP received several comments regarding proposed paragraph (f)(2), which set forth additional suggested outreach efforts that contractors could engage in to increase the effectiveness of its recruitment efforts. These comments centered on paragraph (f)(2)(vi), which stated that contractors, in making hiring decisions, "shall" consider applicants who are known individuals with disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Commenters indicated that despite paragraph (f)(2)'s language that it contains "suggested outreach efforts," the word "shall" suggested that the contents of paragraph (f)(2)(vi) were mandatory. The use of "shall" in this paragraph was an inadvertent error in the NPRM. The content of proposed paragraph (f)(2) appears in paragraph (f)(2)(ii) of the final rule. The content of proposed (f)(2)(vi) appears in paragraph (f)(2)(ii)(F) of the final rule, revised to state that contractors "should consider applicants…" We also note that this suggested activity is intended to be a limited one. Contractors who choose to consider individuals with disabilities for jobs other than those for which they applied may exercise discretion to limit this consideration based on geography, the qualifications of the applicant, and other factors. Contractors may also exercise discretion with respect to

the time period for which they will consider applicants for other positions. This provision is intended to be flexible and is not required of contractors.

Paragraph (f)(3) of the NPRM proposed to require the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting individuals with disabilities, and document its review. Some commenters supported the proposed requirement, some suggested less frequent review, and others opposed this proposed requirement. Several commenters expressed concern about the utility of the suggested metrics for analyzing external outreach and recruitment efforts. One commenter stated that if the only standard used for assessing outreach and recruitment is the number of individuals with disabilities who are hired, the proposed rule would effectively become a quota system for hiring individuals with disabilities. Another commenter questioned whether overall hiring statistics would provide much useful information about the effectiveness of specific outreach efforts. Commenters also expressed concerns about the requirement to analyze hiring data for the current year as well as the previous two years. Commenters argued that the most recent year is the most relevant year in measuring effectiveness of affirmative action efforts. Finally, commenters also questioned OFCCP's calculation of the cost of compliance with this provision.

OFCCP declines to make changes to the proposed paragraph (f)(3). The purpose of the mandated self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and modifies its efforts as needed to ensure that its obligations are being met. OFCCP disagrees that the number of individuals with disabilities who are hired is the "only" standard for analyzing the effectiveness of

outreach efforts. The proposed rule made clear that the number of individuals with disabilities who are hired is to be a primary factor considered, given section 503's stated purpose to "employ and advance in employment" individuals with disabilities, but is not the only metric for contractors to use for analyzing the effectiveness of external outreach and recruitment efforts. Rather, as stated in the NPRM, the regulation requires the contractor to consider all the metrics required by § 60-741.44(k) (which includes both applicant and hiring data), and also clearly allows the contractor to consider any other criteria, including factors that are unique to a particular contractor, in determining the effectiveness of its outreach, so long as the criteria are reasonable and documented by the contractor so that OFCCP compliance officers can understand the rationale behind the contractor's self-assessment and the conclusions reached. OFCCP believes that this self-assessment is crucial to the contractor's section 503 affirmative action obligations, and that the final rule provides the contractor a significant amount of flexibility in meeting this requirement.

With regard to the lengthened timeframe of applicant and hire data that the contractor must consider when evaluating its outreach efforts, OFCCP notes that in response to comments, it has reduced this time period from 5 years to 3 years. As explained in the NPRM, the purpose of requiring consideration of additional data for the self-assessment is to provide more complete information with which a contractor can assess the effectiveness of its outreach and recruitment efforts over time. In short, the additional information will enable the contractor and OFCCP to more accurately review outreach and recruitment efforts to ensure that the affirmative action obligations of paragraph (f) are satisfied. Accordingly, we retain paragraph (f)(3) in the final rule as

proposed in the NPRM. The comments regarding the burden imposed by this provision, including a revised calculation of its cost, can be found in the Regulatory Procedures section of this final rule.

The final rule makes one minor change to the second to last sentence in paragraph (f)(3). As explained in the preamble to the NPRM, OFCCP proposed that the contractor's conclusion as to the effectiveness of its outreach efforts "shall be reasonable as determined by OFCCP in light of these regulations." The final rule replaces the word "shall" with "must," which more clearly describes the requirement.

- Paragraph (g): Internal dissemination of affirmative action policy

Paragraph (g) of the existing rule requires contractors to develop internal procedures to communicate to employees their obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. The NPRM proposed requiring the contractor to undertake many specific actions that are only suggested in the existing rule, including incorporating the affirmative action policy in company policy manuals, discussing the affirmative action policy during management training programs to ensure they are informed about the contractor's obligations, and if the contractor is a party to a collective bargaining agreement, meeting with union officials and employee representatives to inform them of the policy and ask for their cooperation. OFCCP received nine comments regarding § 60-741.44(g), including comments from a disability association, employer associations, contractors, and a law firm.

Several of these comments supported the proposed requirement, while others sought some clarification, and still others indicated that the requirement imposed an unnecessary burden.

Some commenters requested alternative options to including the affirmative action policy in the contractor's policy manual pursuant to the proposed 60-741.44(g)(2)(i). One commenter suggested instead, for example, that contractors be permitted to post the policy on the company's intranet where similar human resources and EEO pronouncements are found. One comment requested that OFCCP clarify how contractors could post their policy in the absence of having a policy manual.

The final rule adopts the proposed language in § 60-741.44(g)(1) without change. This paragraph sets out the general requirement that contractors internally disseminate their affirmative action policy and explains the reasons for the requirement. It clearly states that the procedures for internally disseminating affirmative action policies "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 remainder of paragraph (g) is streamlined and revised in the final rule to ease the burden on contractors, while ensuring that contractors must communicate their affirmative action obligations and policies internally. Two of the three actions the NPRM proposed in paragraph (g)(2) are maintained as requirements in paragraph (g)(2) of the final rule: (1) including the policy in the contractor's policy manual; and (2) informing union officials of the policy and requesting their cooperation, if the contractor is party to

a collective bargaining agreement. However, these requirements are modified slightly, based on the comments received. The first has been modified to allow contractors to include the affirmative action policy either in the contractor's policy manual, or to "otherwise make the policy available to employees." We believe that most companies generally have some form of document that provides guidance on human resources policies and procedures – either a policy manual, employee handbook, or similar document– that is available to employees that is an appropriate place to put the policy. OFCCP believes including the affirmative action policy in these documents will enhance the visibility of the contractor's commitment to individuals with disabilities. However, the final rule also allows contractors the flexibility to make the policy available to its employees through other means. This could include posting the policy on a company intranet, but this will only fulfill the requirement if all employees have access to this intranet. The second requirement, regarding informing union officials, is modified for consistency and clarity to reflect the requirement in § 60-741.5(a)(5) that the contractor "notify" union officials of its policy.

The remaining elements that were required in the NPRM or suggested in the existing rule now appear in paragraph (g)(3) of the final rule as actions that the contractor is "encouraged" to take. The recordkeeping provision that was in proposed paragraph (g)(3) is eliminated in the final rule. We note, however, that to the extent any activities undertaken pursuant to paragraph (g) involve the creation of records, they are subject to the general recordkeeping requirement of § 60-741.80 and contractors will be required to maintain such documents as specified by § 60-741.80.

- Paragraph (h): Audit and reporting system for affirmative action program

Paragraph (h) of the existing rule outlines the contractor's responsibility to design and implement an audit and reporting system for the company's AAP. It also requires, in paragraph (h)(2), that contractors undertake necessary action to bring deficient programs into compliance. The NPRM proposed a new requirement that contractors document the actions taken to comply with paragraph (h). The NPRM also proposed that contractors maintain the records of their documentation subject to the recordkeeping requirements of § 60-741.80. OFCCP received nine comments on this provision. Of these, seven asserted that the proposed recordkeeping requirement would be burdensome and require the development of new processes, while two supported this requirement recognizing the need for and benefits of self-audits.

This section is adopted into the final rule as proposed. The section requires the contractor to measure the effectiveness of its affirmative action program, indicate any need for remedial action, determine the degree to which the contractor's objectives have been attained, determine whether individuals with disabilities have had the opportunity to participate in all company professional and social activities, and measure the contractor's compliance with the affirmative action program's specific obligations. OFCCP believes that the proper conduct of the analysis required in paragraph (h) will necessitate the creation of documentation. Paragraph (h)(1)(vi) makes this expectation clear by requiring that the contractor document the actions it takes to comply with self-audit requirements of paragraph (h)(i). Contractors are further required to maintain this documentation in accordance with the recordkeeping requirements of § 60-741.80. OFCCP believes that this requirement will allow for a more effective assessment, by

contractors and by OFCCP, of whether the contractor is meeting its affirmative action obligations, including whether deficiencies have been identified and corrected.

- Paragraph (i): Responsibility for implementation

The NPRM proposed to modify existing paragraph (i) to require that the identity of the official responsible for a contractor's affirmative action activities appear on all internal and external communications regarding the contractor's affirmative action program. Upon further review, OFCCP does not believe that the benefit of this suggested change outweighs the potential burden that it would place on contractors. Accordingly, the final rule restores the text of the existing regulation, which states that the identity of the official responsible for a contractor's affirmative action activities "should" appear in all communications about the contractor's affirmative action program.

- Paragraph (j): Training

Paragraph (j) of the existing regulation requires that the contractor train "[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary and related processes… to ensure that the commitments in the contractor's affirmative action program are implemented." The NPRM proposed revising this paragraph to specify topics required to be included in this training, including: the business and societal benefits of employing individuals with disabilities; appropriate sensitivity toward recruits, applicants, and employees with disabilities; and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. The NPRM also proposed requiring the contractor to record which of its personnel receive this training, when they receive it, and the person(s) who administered the training, and to

maintain these records, along with all written or electronic training materials used, pursuant to the recordkeeping requirements of § 60-741.80.

OFCCP received 15 comments from disability and employer associations, contractors, and a law firm. Approximately half of the comments supported the proposed requirements, while the others opposed it. These latter comments raised concerns regarding the burden that training requirements place on contractors and the manner in which OFCCP calculated it. One comment noted specific concerns about what constitutes "sensitivity" training. Several commenters suggested that OFCCP develop a model training for contractors to use, instead of the contractor having to create additional training to what it currently provides.

In light of these concerns, and balancing the utility of the proposal against the burden that it would create for contractors, the final rule does not incorporate the NPRM proposal requiring specific training topics and the maintenance of all training materials pursuant to § 60-741.80. Instead, the final rule retains the existing rule's general requirement that "[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes" must be trained to ensure that the contractor's affirmative action commitments are implemented. However, we note that documents created by the contractor in connection with activities undertaken pursuant to paragraph (j) are subject to the general recordkeeping requirement of § 60-741.80.

- Paragraph (k): Data Collection Analysis

The proposed regulation added paragraph (k) to the rule, proposing to require that the contractor document and update annually the following information: (1) for referral data, the number of referrals of individuals with disabilities received from entities with

which the contractor has a linkage agreement and the number of referrals of individuals with disabilities received from employment service delivery systems; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known individuals with disabilities, and the "applicant ratio" of known individuals with disabilities who are applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the "hiring ratio" of known individuals with disabilities to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the "job fill ratio" of job openings to job openings filled.

The NPRM stated that OFCCP is also considering adding a reporting requirement, and invited public comment on this option. Under this proposal, contractors would be required to provide OFCCP with a report containing the measurements and computations required by proposed paragraph (k), including the percentage of applicants, new hires, and total workforce for each EEO–1 category. The report would be provided to OFCCP on an annual basis, regardless of whether the contractor has been selected for a compliance evaluation.

As stated in the NPRM, the impetus behind this new section is that no structured data regarding the number of individuals with disabilities who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any sort of objective, data-based assessments of how effective contractor outreach and recruitment efforts have been in attracting individuals with disabilities as candidates. Maintaining

this information will provide meaningful data to assist the contractor in evaluating and tailoring its recruitment and outreach efforts.

OFCCP received a total of 80 comments from disability, contractor and other associations, law firms, government offices, contractors, and individuals. Disability and other associations, and some contractors and individuals that commented supported the required data collection and the objectives behind it. The contractor community, by and large, opposed the proposal on varying grounds, including: concerns regarding the integrity of the data to be collected (particularly data on referrals); assertions that some of the data conflicts with the Internet Applicant Rule in the Executive Order regulations; and assertions that collecting, analyzing, and maintaining the data would be unduly burdensome. Several commenters from the construction and transportation industries asserted that they should be exempt from the requirement due to the unique nature of their respective industries. Finally, a number of commenters sought clarification of some of the processes set forth in paragraph (k). These issues are addressed below.

Several comments articulated data integrity concerns regarding the data to be used in calculating the referral ratio. Commenters characterized the state employment service delivery systems as "self-service," leaving source identification to the job candidates, thus making referral data unreliable and not meaningful. Examples were provided indicating that individuals frequently apply directly online with a company and may fail to identify that he or she was referred, and that he or she is an individual with a disability. These commenters also expressed concern that referral data may include referrals of individuals that are not qualified for the position(s) at issue. OFCCP believes that the points raised regarding the practical utility of the referral data have merit. Accordingly,

OFCCP has eliminated from the final rule the requirement, in proposed paragraphs (k)(1) and (k)(2), for contractors to collect, maintain, and analyze information on the number of referrals it receives.

Many of these comments also asserted data integrity concerns regarding the requirement to document and maintain applicant and hiring ratios, including that applicant data appears to be dependent upon self-identification, which is not reliable. These issues were previously addressed in the discussion of the requirement to invite applicants to self-identify as individuals with disabilities in § 60-741.42(a). In short, demographic data based on self-identification is not perfect, but it is nonetheless valuable and the best data that is available.

Another concern asserted by commenters is that the proposed data collection and analysis is not "aligned" with the availability analysis conducted when examining employment activities for females and minorities. However, as discussed in the preamble to the goal requirement in § 60-741.45, below, it is not feasible to have the data collection for section 503 exactly mirror that of the Executive Order 11246 regulations.

Commenters also questioned the purpose of the job opening/job filled ratio. Upon reconsideration, OFCCP agrees that it is not necessary for contractors to calculate the job fill ratio and has deleted from the final rule the requirement, in proposed paragraph (k)(5), for contractors to calculate and maintain the ratio of jobs filled to job openings. OFCCP has also eliminated the requirement to calculate an applicant ratio in proposed paragraph (k)(7), and the requirement to calculate a hiring ratio in proposed paragraph (k)(10). Thus, the final rule requires that contractors need only collect and maintain the raw data regarding the number of applicants with disabilities, the total number of job

openings and jobs filled, the total number of applicants, the number of applicants with disabilities hired, and the total number of applicants hired.

Several commenters also objected to the collection of data about the disability status of applicants because it differs from the recordkeeping requirements related to Internet applicants under the Executive Order 11246 implementing regulations at 41 CFR 60-1.12. In recognition of these concerns, and as explained in the preamble discussion of § 60-741.42(a), in an effort to harmonize requirements across the various regulations OFCCP enforces, OFCCP will permit contractors to invite applicants to self-identify as an individual with a disability at the same time as the contractor collects the demographic data for applicants required under the Executive Order. OFCCP will also treat the recordkeeping provisions of section 503 at 41 CFR 60-741.80 in the same manner as the recordkeeping requirements under the Executive Order at 41 CFR 60-1.12 as applied to Internet applicants. With regard to burden calculation issues, many commenters, including employer associations, contractors, and individuals, indicated that OFCCP had not correctly calculated the burden of this section. Specific cost information was provided by several commenters. A revised burden calculation is included in the Regulatory Procedures section of this final rule. We highlight a few points here, however, because it appears that the contractor community may misunderstand portions of the obligation they are expected to undertake. First, as stated above, the referral data metrics have been eliminated, which reduces the burden. We have also eliminated the calculation of the job fill, applicant, and hiring ratios. Second, job-specific hiring data is already collected and maintained by contractors pursuant to the Executive Order 11246 program. Moreover, hiring metrics are also maintained and calculated by Federal

contractors subject to VEVRAA pursuant to their existing obligation, under 41 CFR part 61-300, to file the VETS-100A form. Therefore, that portion of paragraph (k) requiring contractors to document the total number of job openings and total number of hires does not create any additional burden. The only "new" items are those pertaining to the self-identification applicant data. However, the burden for collecting and maintaining the applicant data is already partially calculated under § 60-741.42(a).

Also pertaining to burden, commenters for the construction and transportation industries asserted that they should be exempted from this section of the proposed regulation because of the unique nature of the industries. Traditionally, construction and transportation contractors who meet the basic coverage thresholds (contract amount and number of employees) of section 503 have not been exempted from any of its provisions. Accordingly, we decline to exempt construction and transportation contractors.

The majority of commenters also cited burden concerns with the proposed requirement to maintain the paragraph (k) computations for a period of five (5) years. As set forth in the discussions of § 60-741.44(f)(4) and § 60-741.80 herein, the final rule reduces the document retention requirement to three (3) years, and revises the language of paragraph (k) to reflect this change.

A few of the comments also raised clarification questions we would like to address, including: (1) whether the intent of the analyses is to measure change from year to year; (2) whether the ratios should be run by job group, job title, or establishment; and (3) how compliance determinations will be made. As to the first question, measuring change from year to year, and looking at two previous years of data, is a central intent of the analyses, as that can aid the contractor in seeing trends that may be associated with

certain of its outreach and recruitment efforts over time. However, as previously discussed with regard to the self-assessment required in paragraph (f)(3) of this section, contractors are also free to use any other reasonable criteria in addition to the applicant and hiring data they feel is relevant to evaluate the effectiveness of its efforts. As to the second question, the ratios in paragraph (k) will be calculated by establishment, and not by job groups or titles within a given establishment, unless OFCCP has approved the contractor's development and use of a functional affirmative action program (FAAP) pursuant to 41 CFR 60-2.1(d)(4).

With regard to the third question, compliance determinations for paragraph (k) will be made based simply on whether the contractor has completely and accurately documented and maintained the eight listed metrics in the final rule. OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with, and without, disabilities in this data. Rather, Compliance Officers will look to see whether the contractor has fulfilled its various obligations under § 60-741.44, including its obligation, pursuant to § 60-741.44(f)(3), to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) and any other reasonable criteria the contractor believes is relevant, and has pursued different or additional recruitment efforts if the contractor concludes that its efforts were not effective.

On the topic of OFCCP's invitation for public comments regarding the possible addition of a new annual reporting requirement, we received 20 comments. The majority

of these comments asserted that the proposed requirement would impose an unnecessary additional burden. Several commenters stated that OFCCP did not provide any support or justification for proposing the requirement. A few of these commenters indicated that such a report would serve no other purpose than to assist OFCCP in the scheduling of compliance reviews. A few commenters supported the proposed reporting requirement, asserting that the data is needed to better ensure equal employment opportunities for individuals with disabilities. After weighing the practical utility of this potential reporting requirement against its anticipated burden OFCCP has determined that the imposition of this new reporting requirement is not warranted at this time. Accordingly, this proposal is not adopted into the final rule.

Section 60-741.45 Reasonable Accommodation Procedures

The NPRM proposed a new provision at § 60-741.45 requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation. The proposal identified specific elements that the contractor's reasonable accommodation procedures, at a minimum, would be required to address. These included: 1) contact information for the official responsible for implementation of the procedures; 2) to whom a request for reasonable accommodation may be made; 3) a statement that requests for reasonable accommodation may be made orally or in writing by an applicant, employee, or third party on his or her behalf; 4) written confirmation of receipt of a reasonable accommodation request; 5) a timeframe for the processing of reasonable accommodation requests; 6) a description of the contractor's reasonable accommodation process and circumstances under which the contractor may request

medical documentation to support a reasonable accommodation request; and 7) provision of a written explanation by the contractor for any denials of reasonable accommodation.

OFCCP received 80 comments on this proposal from disability associations, employer associations, contractors, and law firms. The disability associations were strongly supportive of the proposed requirement. They asserted that it would foster contractor understanding of their reasonable accommodation obligation, encourage individuals who need reasonable accommodation to come forward and make a request, and promote efficiency in the processing of reasonable accommodation requests. Many of these commenters also recommended that the scope of the proposed requirement be expanded to encompass all Federal contractors subject to section 503 by relocating the requirement from the "affirmative action" subpart of the regulations (Subpart C) to the "nondiscrimination" subpart of the regulations (Subpart B).

In contrast, the majority of the contractor community objected to the new requirement for a variety of reasons. Many stated their belief that a mandated, "formal" process was unnecessary since most employers were already accustomed to making reasonable accommodations as required by the ADA. Some characterized the proposal as a "one size fits all" approach that would impede the ability of contractors to individually address reasonable accommodation requests, and to grant requests for accommodation informally (e.g., leave time for doctor visits or a modified work schedule to attend therapy sessions). Finally, commenters asserted that the requirement to develop written reasonable accommodation procedures, to provide written confirmation of reasonable accommodation requests, and to provide written explanations of any denials of reasonable accommodation was unduly burdensome.

Upon further consideration of the burden associated with this provision, OFCCP has decided not to incorporate this proposal into the final rule. OFCCP, however, notes in new paragraph (d)(2) to § 60-741.44 of the final rule, that the use of written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. The paragraph makes clear that contractors are not required to have or use such procedures, and that not having such procedures is not violation of this part. OFCCP has also added a new Appendix B entitled Developing Reasonable Accommodation Procedures providing specific guidance that contractors may use should they choose to adopt this best practice.

Although OFCCP is not incorporating the written reasonable accommodation procedures requirement into the final rule, we wish to note our disagreement with those commenters who assert that written procedures would prevent contractors from individually addressing reasonable accommodation requests. Rather, we believe that having such procedures would serve to reinforce the obligation to individually address each person's request for reasonable accommodation. Moreover, in OFCCP's view, written reasonable accommodation procedures would not hamper a contractor's ability to informally grant accommodation requests, such as leave for visits to the doctor or a modified work schedule to attend therapy sessions. If a contractor has flexible leave or scheduling policies, having written reasonable accommodation procedures would not interfere with the granting of requests for leave or modified work schedules by employees with disabilities simply because the request is made to accommodate a disability.

Section 60-741.46 Utilization Goals

Section 60-741.46 of the NPRM (renumbered as § 60-741.45 in the final rule) proposed a single, national 7 percent utilization goal for individuals with disabilities for each job group in a contractor's workforce. It proposed that covered contractors annually evaluate the representation of individuals with disabilities in each job group in the contractor's workforce against the 7 percent utilization goal. If the percentage of employees with disabilities in one or more job groups is less than the 7 percent utilization goal, the NPRM proposed that the contractor develop and execute action-oriented programs designed to correct any identified barriers to equal employment opportunity for qualified individuals with disabilities. Although it proposed a 7 percent goal, the NPRM invited the public to comment on a range of goal values between 4 percent and 10 percent. In addition, the NPRM alerted the public that OFCCP was considering an option of a sub-goal of 2 percent for individuals with certain particularly severe disabilities as part of the overall 7 percent goal, and invited public comment on this sub-goal option. Specifically, OFCCP requested comment on the concept of a sub-goal, as well as the disabilities to be included in the sub-goal.

OFCCP received 250 comments on this section from a broad range of perspectives, including contractors, law firms, government agencies, organizations representing individuals with disabilities and those representing contractors, as well as from individuals. The comments represented divergent views on the institution of a single, national utilization goal. In general, the disability community and those representing their interests were strongly in support of this new requirement. For these commenters, affirmative action efforts under section 503 have been largely meaningless

without, among other things, measurable goals for the employment of people with disabilities. By and large, these commenters urged OFCCP to increase the utilization goal from 7 percent to 10 percent and to adopt a sub-goal of 5 percent for individuals with severe disabilities. In contrast, commenters from the contractor community and those representing their interests were largely opposed to this provision and to the sub-goal option for various reasons, including: (1) OFCCP lacks authority to mandate the 7 percent goal; (2) the utilization goal is equivalent to a quota; (3) use of ACS data is arbitrary and ineffective; and (4) the goal approach is unworkable as proposed. The proposed utilization goal, comments to the proposal, and the subsequent revisions made in the final rule are discussed in turn below. Comments related to the burden estimates associated with this section are addressed in the Regulatory Procedures section of the final rule.

- Paragraph (a): Establishment of a single, national utilization goal

Paragraph (a) of the NPRM proposed to establish for the first time a single, national utilization goal of 7 percent for employment of individuals with disabilities for each job group within a contractor's workforce.[19] As explained in the NPRM, the current section 503 regulatory framework requires affirmative action but lacks a goal. This has been the case since the initial publication of the section 503 regulations in the 1970s, but the intervening years have seen little improvement in the unemployment and workforce participation rates of individuals with disabilities. OFCCP determined that affirmative action process requirements, without a quantifiable means of assessing whether progress

[19] OFCCP received several comments seeking clarification of the difference between a utilization goal and a placement goal. A placement or hiring goal relates to the percentage of new hires from a particular group, such as individuals with disabilities. In contrast, a utilization goal relates to the percentage of a contractor's workforce represented by a particular group, in this instance, individuals with disabilities.

toward equal employment opportunity is occurring, are insufficient. We therefore concluded that the establishment of a utilization goal would create more accountability within the contractor's organization and provide a much-needed tool to help ensure that progress toward equal employment opportunity is achieved.

- Methodology for Setting the Utilization Goal

As explained in the NPRM, the utilization goal established in this section is derived primarily from the disability data collected as part of the American Community Survey. The American Community Survey (ACS) was designed to replace the census "long form" of the decennial census, last sent out to U.S. households in 2000, to gather information regarding the demographic, socioeconomic and housing characteristics of the nation. Whereas the Census Bureau now only administers a very short survey for the decennial census, a more detailed view of the social and demographic characteristics of the population is provided by the ACS, which collects data from a sample of 3 million residents on a continuing basis.[20]

The ACS was first launched in 2005, after a decade of testing and development by the Census Bureau. Refinement of the questions designed to characterize disability status has been continuous, with the current set of disability-related questions incorporated into the ACS in 2008. Taken together, the six dichotomous ("yes" or "no") disability-related questions[21] comprise a function-based definition of "disability," used in the ACS and by

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

[21] The six questions are: Is this person deaf or does he/she have serious difficulty hearing? Is this person blind or does he/she have serious difficulty seeing even when wearing glasses? Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions? Does this person have serious difficulty walking or climbing stairs? Does this person have difficulty dressing or bathing? Because of a physical, mental, or emotional condition, does this person

most of the other major surveys administered by the Federal Statistical System.

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

In developing the utilization goal, OFCCP considered two general approaches. The first approach OFCCP considered aimed to mirror precisely the goals framework for minorities and women that is used by supply and service (non-construction) contractors subject to Executive Order (EO) 11246. Such an approach would have required individual contractor establishments to set their own goals for each of their job groups[22] based on the percentage of individuals with disabilities available in the particular recruitment area from which the contractor sought to fill the jobs in the job group. Where there are fewer than expected incumbent employees with disabilities in a job group given their availability percentage, a contractor would be required to establish a goal for the

---

have difficulty doing errands alone such as visiting a doctor's office or shopping? 2009 American Community Survey, Questions 17-19.

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

specific job group that is at least equal to the availability percentage in the job group's recruitment area. See 41 CFR 60-2.12 – 60-2.16 for a more detailed description of the EO 11246 goals provisions for supply and service contractors.

After careful consideration of the available data and consultation with the U.S. Census Bureau regarding the level of geographic aggregation at which the disability data could be analyzed, OFCCP became convinced that replicating the supply and service goals framework would not be the most effective approach for the establishment of goals for individuals with disabilities. Supply and service contractors establishing goals for minorities and women typically use the Special EEO Tabulation of census data to assist them. The results of the 2000 decennial census can be tabulated for 472 occupation categories and thousands of geographic areas. However, because the ACS disability data is based on sampling, and because the percentage of that sample who identify as having a disability is considerably smaller than the percentage that provide race and gender information, it cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender. That is, the confidence intervals on such estimates are large and the estimates are not statistically significant when broken down to the degree of detail required by the supply and service goals framework. Contractors therefore would not be able to use the job groups established under Executive Order 11246 to establish goals for individuals with disabilities, and would often be unable to utilize the geographic recruitment areas established under the Executive Order when determining the availability of individuals with disabilities (as queried in the ACS).[23] In

[23] On November 29, 2012, the Census Bureau released the new 2006-2010 EEO Tabulation (EEO Tab) to the public. The new EEO Tab replaces the 2000 Special EEO Tabulation. It is based on five years of demographic data from the ACS, rather than on a decennial census, tabulates data for 488 occupations including several occupations not previously included in the 2000 Special EEO Tabulation, and includes

addition, the Executive Order supply and service goals framework does not include consideration of discouraged workers in computing availability, a factor particularly important in the context of disability, as discussed below.

In light of the difficulties replicating the supply and service goals approach in the context of disability, OFCCP considered other options. OFCCP concluded that the establishment of a single, national goal[24] for all jobs in all geographic areas is a more viable approach to the establishment of a goal for individuals with disabilities. This approach allows for the continued use of the contractor's Executive Order 11246 job groups, and requires that those job groups be used to measure the representation of individuals with disabilities in the contractor's workforce, except in cases of contractors with fewer than 100 employees, where contractors will have the option to apply the goal to their workforce as a whole. The goal established in this section is based on the 2009

---

data by citizenship status. The EEO Tab is online at http://www.census.gov/people/eeotabulation/.

On March 14, 2013, the Census Bureau launched the first of its kind 2008-2010 Disability Employment Tabulation (Disability Tab) containing statistical information regarding the employment status, earnings, race, ethnicity and occupations of individuals with disabilities. The Disability Tab, online at http://www.census.gov/people/disabilityemptab/data, was sponsored by the U.S. Department of Labor and, in contrast to the EEO Tab, is intended to be a research resource rather than an enforcement tool. Although the Disability Tab includes data for each occupation in the EEO Tab, important differences between the tabs make the Disability Tab impractical for contractors to use to set individual placement goals for each of their Executive Order job groups. These differences include: 1) the Disability Tab uses three years of ACS data rather than the five years used in the EEO Tab; 2) the geographical designations of "county sets" and "places" (cities) are used in the EEO Tab but not in the Disability Tab; 3) the geographical designation of public use microareas (PUMAs) are used in the Disability Tab but not in the EEO Tab; and 4) the citizen-only tables in the Disability Tab contain occupation-specific data solely at the national level. In light of these differences, were we to require the establishment of individual disability placement goals using the Disability Tab many contractors would be forced to identify and utilize recruitment areas for this purpose different from those they currently use when establishing individual Executive Order goals. The creation of such a "parallel" process for the establishment of disability goals would be far more burdensome for contractors than the single, national utilization goal process established in this final rule.

[24] Disability rates by State for the civilian labor force has a mean of 6.32, median of 6.20, and standard deviation of 1.29. There are only two states, Alaska (9.0%) and Oklahoma (9.5%) that are outside the 95% confidence interval of this otherwise almost uniform distribution. This general uniformity is consistent with the use of a single national goal. See Table 15 in Affirmative Action for People with Disabilities – Volume I: Data Sources and Models, Economic Systems, Inc. (April 30, 2010) at 55.

ACS disability data for the "civilian labor force" and the "civilian population,"[25] first averaged by EEO-1 job category, and then averaged across EEO-1 category totals. Specifically, we used the mean across these EEO-1 groups to estimate that 5.7 percent of the civilian labor force has a disability as defined by the ACS.[26] However, OFCCP acknowledges that this number does not encompass all individuals with disabilities as defined under the broader definition in section 503 and the ADAAA. Therefore, 5.7 percent is an insufficient figure to use as an affirmative action goal for individuals with disabilities under section 503.

Even if the 5.7 percent represented a complete availability figure for all individuals with disabilities as defined under section 503, such an availability figure does not take into account discouraged workers, or the effects of historical discrimination against individuals with disabilities that has suppressed the representation of such individuals in the workforce. Discouraged workers are those individuals who are not now seeking employment, but who might do so in the absence of discrimination or other employment barriers. There are undoubtedly some individuals with disabilities who, for a variety of reasons, would not seek employment even in the absence of employment barriers. However, given the acute disparity in the workforce participation rates of those with and without disabilities, it is reasonable to assume that at least a portion of that gap is due to a lack of equal employment opportunity.

---

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

[26] Similarly, the Disability Tab found that between 2008 and 2010 individuals with disabilities were 6% of the civilian labor force. See Census Bureau press release, Workers with a Disability Less Likely to be Employed, More Likely to HoldJobs with Lower Earnings, Census Bureau Reports, (March 14, 2013) available online at http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb13-47.html.

To estimate the size of the discouraged worker effect, we compared the percent of the civilian population with a disability (per the ACS definition) who identified as having an occupation to the percent of the civilian labor force with a disability who identified as having an occupation. Though not currently seeking employment, it is reasonable to believe that those in the civilian population who identify as having an occupation, but who are currently not in the labor force, remain interested in working should job opportunities become available. Using the 2009 ACS EEO-1 category data, the result of this comparison is 1.7 percent.[27]

Adding this figure to the 5.7 percent availability figure above, resulted in 7.4 percent.[28] The national utilization goal prescribed in this section is derived from this total, rounded to 7 percent to avoid implying a false level of precision.

- Comments on paragraph (a)

Many of the comments received on the proposed utilization goal addressed OFCCP's methodology for arriving at the 7 percent availability estimate, including the use of a discouraged worker estimate within the 7 percent figure. In general, commenters in favor of the proposed single, national utilization goal accepted the methodology used by OFCCP to derive the goal but urged OFCCP to increase the goal from 7 percent to 10 percent given that the ACS data upon which the goal is based is only partially representative of those covered by section 503. As confirmation that the 7 percent figure is too low, these commenters referred to the Final Regulatory Impact Analysis for the EEOC regulations implementing the ADA Amendments Act which estimated that

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

[28] As it is derived from ACS data, the 1.7% is also a limited number that does not fully encompass all individuals with disabilities as defined in section 503 and the ADA.

somewhere between 20 percent and 64 percent of individuals covered by the ADA as amended participate in the labor force. Given this estimate, the commenters stated that OFCCP ought to aim higher than 7 percent. Within OFCCP's suggested range of between 4 percent and 10 percent, these commenters urged the goal be set at 10 percent.

With regard to OFCCP's use of the discouraged worker effect, commenters in favor of the proposal noted that discouraged workers are those who have not looked for work not because they lack the desire to work, but rather because they believe that no work is available for them. The goal requirement should reflect the assumption that new outreach and recruiting efforts will have some effect in correcting the notion among discouraged workers that no jobs are available for individuals with disabilities. A number of these commenters also noted that the 1.7 percent estimate used by OFCCP is likely under-inclusive since the value was derived from the ACS data.

OFCCP declines to adopt a 10 percent goal at this time. We recognize that 7 percent is an imprecise estimate based on a data set that is more narrow than the universe of individuals with disabilities protected under section 503. However, as explained above, this figure is derived from the best available source of workforce disability data that presently exists. In contrast, the 10 percent figure urged by many of the commenters is based solely on the general notion that 7 percent is too low, in light of the differing definitions of "disability" in the ACS and the ADA, and the EEOC's general estimate that somewhere between 20 percent and 64 percent of individuals covered by the ADA participate in the labor force. The commenters, however, did not suggest an alternative data base from which OFCCP could derive an appropriate utilization goal. Nor does the EEOC estimate, which juxtaposes the workforce participation rate of individuals with

disabilities with the overall workforce participation rate for all adults (with and without a disability) age 16 and older, provide sufficiently specific information on which OFCCP could rationally base a utilization goal for individuals with disabilities. Indeed, EEOC did not use this estimate for such a purpose. See 76 FR 16978, 16991 (March 25, 2011). Having said that, as indicated in the final rule at § 60-741.45(c), OFCCP will periodically review and update the utilization goal as data becomes more refined.

A substantial number of commenters from the contractor community objected to the proposed 7 percent utilization goal on the grounds that it is arbitrary. They argued that the 7 percent figure is based on ACS data that is based on a definition of "disability" that is narrower than the term used under section 503. Without consistent definitions, they argue, the results are meaningless for establishing a goal for utilization of individuals with disabilities. Furthermore, the figure fails to take into account variations in occupational requirements, geography, industry, and nature of disabilities. Many commenters asserted that there is no statistical evidence to support the idea that the population of those with disabilities is distributed equally across all geographic areas. Additionally, one commenter noted that across the board goals are unrealistic because certain job groups will have inherent limitations. The commenter noted that there are some jobs for which some individuals with certain disabilities will never qualify. For instance, a person who is blind, deaf, or paralyzed would not be granted a commercial pilot's license by the Federal Aviation Administration. Given these variations, even the best intentioned contractor may have significant challenges meeting the utilization goal across all job groups.

Still other commenters were opposed to applying a national goal to each job group because the goal as proposed represents an aggregate availability for individuals with disabilities across EEO category totals. Applying a number that represents the average availability across all categories to individual job groups would, thus, be inappropriate. Many of these commenters argued that OFCCP should delay imposing a utilization goal requirement until such time that data is available to enable goal setting in a manner similar to what is done under the EO 11246 supply and service affirmative action program.

Finally, several commenters expressed concern about OFCCP's discouraged worker estimate. These commenters questioned the accuracy of the estimate and posited that many of those discouraged are not actually interested in employment at all. They state that the most obvious explanation for an individual's departure from the workforce is the disability itself. One commenter also objected to OFCCP inclusion in the goal of a 1.7 percent figure to account for individuals with disabilities who have become discouraged workers and for the effects of historical discrimination. This commenter stated that the Bureau of Labor Statistics reports discouraged workers with disabilities account for only 0.1 percent of the workforce.

OFCCP recognizes that the 7 percent figure is less precise than the geographically specific availability information that contractors are familiar with under the Executive Order 11246 program, and that for some jobs in some locations availability of qualified individuals may be less than 7 percent. Furthermore, we recognize that the ACS data is based on a definition of disability that is narrower than that used under section 503. We disagree, however, that this is sufficient reason to eliminate the utilization goal. While

not perfect, the goal will provide a yardstick against which contractors will be able to measure the effectiveness of their equal employment opportunity efforts. It is our belief that the goal will enable contractors to think critically about their employment practices, including their outreach, recruitment, and retention efforts, and help them to assess whether and where any barriers to equal employment opportunity for individuals with disabilities remain. If barriers are identified, then the contractor can move to take corrective action. Because the goal is intended solely as a tool, the final rule clearly states that a failure to meet the goal will not, in and of itself, result in a violation of section 503 or a finding of discrimination. The goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. OFCCP will look at the totality of the contractor's affirmative action efforts to determine whether it is in compliance with its affirmative action obligations under this section. As discussed below, if the contractor has complied with the requirements of this part and no impediments to equal employment opportunity exist, then the fact that the contractor does not meet the goal will not result in a violation.

With regard to commenter concerns regarding the use of the discouraged worker effect, more than twenty years after the passage of the ADA and nearly forty years after the passage of the Rehabilitation Act, there continues to be a substantial discrepancy between the workforce participation and unemployment rates of working age[29] individuals with and without disabilities. According to the U.S. Department of Labor's Bureau of Labor Statistics (BLS), just 20.9 percent of working age individuals with certain functional disabilities were in the labor force in 2011, compared with 69.7 percent

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

of working age individuals without such disabilities. This same data also indicates that the unemployment rate for those with these disabilities was 15.0 percent, compared with an 8.7 percent unemployment rate for those without a disability. This acute disparity in the workforce participation and unemployment rates of working age individuals with disabilities persists, despite the many technological advances that now make it possible for a broad array of jobs to be successfully performed by individuals with severe disabilities. OFCCP therefore believes that at least a portion of this gap is due to discrimination and sought to take this gap into account in the establishment of the goal by including in its calculation a discouraged worker figure. OFCCP acknowledges that the 1.7 percent figure we included in the goal is different from the 0.1 percent BLS figure cited by a commenter. However, the BLS figure represents the number of discouraged workers with disabilities among the universe of discouraged workers, whereas the 1.7% figure we used approximates the number of discouraged disabled workers among the universe of individuals with disabilities.

In addition to the concerns about the methodology used to derive the goal, several commenters asserted that OFCCP lacked authority to mandate a 7 percent utilization goal. These commenters noted that section 503 requires affirmative action for qualified individuals with disabilities; they assert that there is no duty to take affirmative action with regard to a general category of "individuals with disabilities." Because section 503 requires affirmative action only for qualified individuals with disabilities, these commenters argue that a 7 percent utilization goal is impermissible unless the availability data revealed that underutilization of qualified individuals with disabilities exists for each job group in every geographic area.

It appears from these comments that the NPRM did not make explicit enough that the utilization goal requirement is for the utilization of qualified individuals with disabilities. OFCCP did not intend, nor do we believe that the proposed rule would have required, that a contractor employ and advance in employment individuals with disabilities who are not qualified for the position in question. Nevertheless, to address this confusion, we have revised paragraph (a) of the utilization goal requirement in the final rule by inserting the word "qualified" before the term "individuals with disabilities" to clarify that the 7 percent utilization goal is for the employment of qualified individuals with disabilities.

OFCCP also received a number of comments objecting to the proposed utilization goal set forth in paragraph (a) on the grounds that job group specific utilization goals are fundamentally unworkable as proposed. Commenters argued that anonymous self-identification will impede a contractor's ability to analyze utilization of individuals with disabilities and furthermore that such goals will ultimately belie any assurance of confidentiality as the identities of disabled persons would become evident as soon as the AAP data were produced to show the representation of individuals with disabilities in each job group. Moreover, commenters expressed concern that a utilization goal will be difficult to attain because many applicants and employees will be unwilling to disclose their disability, particularly hidden disabilities. Still others expressed concern that pre-offer self-identification will render companies vulnerable to lawsuits for wrongfully failing to hire an individual with a disability.

OFCCP disagrees that job group specific utilization goals are unworkable. First, with regard to the concerns that anonymous self-identification will hinder the contractor's

ability to perform a utilization analysis by job group, OFCCP concurs that identifying information is in fact needed in order for contractors to assess their utilization of individuals by job group. We have, therefore, revised § 60-741.42, the provision related to self-identification, by removing the anonymity requirement. Second, as explained above in the preamble for § 60-741.42, Invitation to Self-Identify, OFCCP concedes the possibility that self-reported data regarding disability will not be entirely accurate. While not perfect, the data that will result from the invitation to self-identify will provide the contractor and OFCCP with important data that do not now exist pertaining to the participation of individuals with disabilities in the contractor's applicant pools and labor force. This will allow the contractor and OFCCP to better identify and monitor the contractor's hiring and selection practices with respect to individuals with disabilities. Finally, regarding the concern that pre-offer self-identification will render contractors vulnerable to lawsuits for wrongfully failing to hire an individual with a disability, OFCCP is not persuaded. While knowledge of the existence of a disability is a component of an intentional discrimination claim, the contractor must not only have known of the person's disability, but must also have treated the person less favorably because of his/her disability. We note that contractors have long had knowledge of a person's race and gender. Having knowledge of a person's disability should be no different. In addition, we note that contractors have long had knowledge of the disabilities of applicants who have visible disabilities, such as blindness, deafness, or paraplegia, but that OFCCP has had no means of knowing of their presence in the applicant pool or their experience in the application process. Requiring contractors to invite pre-offer self-identification will help fill this void.

Finally, several commenters requested that OFCCP create an exemption from the goal requirement for industries with physically demanding jobs, namely the construction industry, and for safety-sensitive positions, including flight crewmembers, flight attendants, flight instructors, aircraft dispatchers, aircraft maintenance and preventive maintenance workers, ground security coordinators, aviation security screeners, and air traffic controllers. Another commenter requested that AbilityOne contractors be exempt from the goal requirement because they are already operating under high standards. This commenter stated that the AbilityOne program requires that at least 75 percent of the direct labor in a participating nonprofit agency be performed by people who are blind or have other significant disabilities.

OFCCP declines to adopt exemptions from the goal requirement in the final rule. Requests to exempt contractors from meeting the utilization goal for safety sensitive positions or for physically demanding jobs are fundamentally based on the flawed notion that individuals with disabilities as a group are incapable of working in these jobs. OFCCP does not support this belief and will not construct an avenue to permit contractors to avoid hiring individuals with disabilities for certain jobs. OFCCP acknowledges that some individuals with certain disabilities may not be able to perform some jobs, but does not believe exemptions are necessary for two reasons. First, neither section 503 nor this part require a contractor to hire an individual who cannot perform the essential functions of the job, or who poses a direct threat to the health or safety of the individual or others. Second, the goal is not a quota and failure to meet the goal will not, in and of itself, result in any violation or enforcement action. With regard to the request to exempt AbilityOne contractors from the goal requirement, we likewise do not believe

that a regulatory exemption is warranted. The final rule applies, not just to "direct labor," but to the entirety of a covered contractor's workforce, and to the entirety of covered subcontractors' workforces, as well. In short, the goal requirement is a management tool from which all contractors can benefit.

- Comments on sub-goal option

As noted above, in the NPRM OFCCP indicated that it was considering the option of including within the 7 percent goal for individuals with disabilities a sub-goal of 2 percent for individuals with certain particularly severe disabilities and invited public comment on the sub-goal concept, as well as on which disabilities should be included within the sub-goal. OFCCP specifically sought comments addressing 1) the data or research available that informs the design of an appropriate sub-goal, including which severe disabilities should be covered by the sub-goal and the appropriate sub goal target; 2) how a sub-goal furthers the overall objective of increasing employment opportunities for individuals with severe disabilities; and 3) the data or research available on the need for a sub-goal for specific disabilities.

OFCCP received 126 comments on this sub-goal option. Many commenters from the disability community favored such an approach but urged OFCCP to increase the sub-goal from 2 percent to 5 percent. These commenters stated that any serious effort to measure the effectiveness of one's affirmative action efforts must look not only at the overall group of individuals with disabilities but also at those within that group who have had the greatest barriers to employment and are most in need of affirmative action. Having only an overall goal for the extremely broad group of people with disabilities would permit contractors to employ individuals with less stigmatized disabilities, and

would do little to ensure that those individuals with the greatest history of exclusion from the workforce would benefit from affirmative action. These commenters urged OFCCP to increase the sub-goal to 5 percent, because they believe that the group of individuals who would likely be captured by a sub-goal would be greater than 2 percent of the labor force.

In response to OFCCP's request as to which disabilities to include in the sub-goal, a substantial number of commenters from the disability community emphasized the need to fashion a sub-goal that captures individuals "with the lowest employment rates and greatest barriers to employment." These commenters urged OFCCP to not rely on the "targeted disabilities" list the Federal government uses to monitor its internal hiring as the source of its sub-goal, but should instead develop its own, more expansive list of "targeted disabilities." Commenters proffered several approaches, discussed below, that OFCCP could use to create a section 503 sub-goal.

One approach would entail OFCCP working with experts from various universities to identify those categories of disabilities that have caused people to face the greatest employment barriers. OFCCP would then create a "targeted disabilities" list comprised of the identified disabilities. While several if not all of the conditions currently on the Federal government's list would be on this list, commenters anticipated that this new "targeted disabilities" list would also include conditions not on the current list, such as autism spectrum disorders and Down syndrome, among others.

A second approach recommended by these commenters was to base a sub-goal on the statutory definition of "significant disability," at 29 U.S.C. 705(21)(A), that is used for determining selection for vocational rehabilitation services. This definition not only

specifies a list of covered conditions, but also requires an assessment of whether each individual's condition is "a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, work skills) in terms of an employment outcome." There are 26 conditions on the covered conditions list, some of which are very specific, such as amputation, paraplegia, quadriplegia, blindness, and deafness. Other listed conditions, though, encompass broad categories of impairments that can vary widely in their nature and severity, such as arthritis, head injury, burn injury, heart disease, musculo-skeletal disorders, and neurological disorders.

A third approach commenters identified was for OFCCP to analyze a variety of data sources, including ACS, the Survey on Income and Program Participation (SIPP), the Current Population Survey (CPS), CDC data, and other data, to identify which individuals with disabilities experience the greatest employment barriers. OFCCP would then design a sub-goal focused on the disabilities associated with these individuals.

Many of the commenters opposed to the utilization goal requirement also opposed a sub-goal option. The reasons for their opposition were similar to those already expressed in opposition to the 7 percent utilization goal. Many asserted that the 2 percent figure was arbitrary and that it would be incongruous to hold contractors to a standard that the Federal government itself has proven unable to meet. The comments received also stated that there would be many industries for which those with severe disabilities would be unable to work. One commenter highlighted that the sub-goal for individuals with severe disabilities is inconsistent with the Federal Aviation Administration's regulatory scheme regarding medical certification of persons employed in certain safety

sensitive positions, and that if a safety exception is not recognized, then OFCCP should establish a lesser goal, because the availability of applicants with severe disabilities qualified for safety sensitive positions would necessarily be fewer. One advocacy organization for individuals with disabilities stated that a sub-goal was not necessary, because it would require a more detailed inquiry regarding the specific nature of an individual's disability by contractors, which would cause discomfort among people with disabilities. A sub-goal also disregards the fact that often the severity of the disability, not just the type of disability, significantly impacts an individual's employment opportunities.

OFCCP declines to adopt a sub-goal option at this time. Although the comments presented a variety of general approaches to designing a sub-goal, none provided a clear methodology or data source for the identification of a sub-goal target. Nor did they provide for the identification of a clear, practicable list of specific conditions that a sub-goal should encompass. We also note that the approach regarding the use of the vocational rehabilitation definition of "significant disability" as the basis of a sub-goal would require the application of a definition of "disability" that is different from that in section 503. Moreover, it would, in many instances require contractors to ask for detailed disability-related information, beyond the mere existence of a specific condition, so that the contractor could determine whether an individual has a "severe" physical or mental impairment that is encompassed by the sub-goal. This does not mean that contractors may not, on their own, establish appropriate mechanisms and goals to affirmatively seek to encourage the employment of individuals with significant or severe disabilities. However, these regulations do not include such requirements.

- Paragraph (b): Purpose

Proposed § 60-741.46(b) stated that the purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within each job group in its workforce. Proposed § 60-741.46(b) also stated that the utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

Many commenters opposed to the proposed utilization goal stated that the goal was equivalent to an inflexible "quota" because a contractor who fails to achieve the 7 percent utilization goal would be required to take specific measures to address the disparity. According to these commenters, there is nothing aspirational about this requirement and, unlike the Executive Order 11246 regulations implementing the affirmative action requirements for supply and service contractors, the NPRM implementing section 503 failed to state specifically that the utilization goal is not a rigid, inflexible quota nor does it state that quotas are expressly forbidden. Other commenters stated that any required objective or goal that imposes a penalty if not met is a quota. Still another intimated that
the utilization goal as proposed would fail to survive a constitutional challenge because such a requirement would be subject to the highest level of judicial scrutiny.

The proposed utilization goal is not an inflexible quota and should not be perceived as one. The goal is intended to serve as a management tool to help contractors measure their progress toward achieving equal employment opportunity for individuals with disabilities and to assess whether barriers to equal employment opportunity remain.

OFCCP recognizes that a failure to meet the 7 percent utilization goal does not necessarily mean that the contractor is discriminating against individuals with disabilities. It is for this reason that the NPRM stated in proposed § 60-741.46(f) that a contractor's determination that it has not attained the utilization goal in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part. Nevertheless, in light of the comments, OFCCP has revised the regulatory language to clarify that a failure to meet the utilization goal triggers an assessment of whether there is a barrier to equal employment opportunity, and if so, what the barrier is. Specifically, new paragraph (e) in the final rule states that when the goal has not been met in one or more job groups the contractor must "determine whether and where impediments to equal employment opportunity exist." This determination is to be based on reviews of the contractor's personnel processes and affirmative action efforts that the contractor is already required to perform. Only if a problem or barrier to equal employment opportunity is identified, must the contractor then develop and execute an action-oriented program to address the problem.

With regard to the comment that the proposed utilization goal would fail to survive a constitutional challenge because such a requirement would be subject to the highest level of judicial scrutiny, we again note that the utilization goal established herein is not a quota and does not require disability-based decision making. Rather, the goal is a tool to measure the effectiveness of the Federal contractor's employment practices as they relate to equal employment opportunity for qualified individuals with disabilities. A failure to meet the goal does not result in any violation; it triggers a critical review by the Federal contractor of its employment practices. Furthermore, even if a court were to

determine that the framework set forth herein required disability-based decision making, strict scrutiny review is not applied to decisions based on disability. Instead, classifications based on disability are subject to "rational basis review," and are legally permissible so long as the governmental action – in this case, the setting of a 7 percent utilization goal – is rationally related to a legitimate governmental interest. See, e.g., Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990 (3rd Cir. 1993) (applying rational basis review of a city ordinance that established goals for the participation of disability-owned businesses in city contracts); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 442-45 (1985). OFCCP believes that establishing a utilization goal of 7 percent for individuals with disabilities is clearly related to the legitimate governmental interest of increasing outreach to and employment opportunities for individuals with disabilities -- a segment of the population that suffers from staggering levels of unemployment and a significant history of discrimination.

- Paragraph (c): Periodic review of the goal

Proposed paragraph (c) stated that the Director of OFCCP will periodically review and update the 7 percent utilization goal requirement as appropriate. One commenter expressed concern that in light of the Federal government's current fiscal situation, future budget constraints would likely impede OFCCP from ever revising the proposed goal. OFCCP, like many other Federal agencies, has experienced fluctuations in its funding throughout its more than 40 years of continuous operation. We have no reason to anticipate, however, that such fluctuations would impede our ability to periodically review and update the goal, as appropriate, as provided in the final rule.

- Paragraph (d): Utilization analysis

Proposed paragraph (d) set forth the purpose of a utilization analysis and required that covered contractors annually evaluate the representation of individuals with disabilities in each job group in the contractor's workforce that the contractor uses for utilization analyses under Executive Order 11246 and compare the rate of representation for each group against the 7 percent utilization goal. For purposes of clarity and in response to numerous commenters' concern that the goal is really a quota, OFCCP has revised proposed paragraph (d)(1), which set forth the purpose of a utilization analysis, by deleting the sentence that states: "If individuals with disabilities are employed in a job group at a rate less than the utilization goal, the contractor must take specific measures to address this disparity." Paragraph (d)(1) is intended to state the purpose of the utilization analysis. This deleted sentence was unrelated to the purpose. Moreover, as explained earlier in the preamble, failure to meet the goal does not automatically trigger the execution of action-oriented programs. For this reason, we found the sentence misleading.

OFCCP received a number of alternatives to the proposed utilization goal, somewhat related to the utilization analysis. Several commenters requested that if the agency were to move forward with the goal requirement, the goal should apply to the entire corporation across all establishments rather than to each job group. One commenter suggested that two goals be implemented – one for supply and service contractors and another for construction contractors. Another recommended that the goal apply by AAP location or organizational unit. Still another suggested that OFCCP remove a set figure and allow each contractor to establish a reasonable utilization goal for

its establishments taking into account specific factors involved at each particular workplace. Finally, at least one commenter requested that a range of 4 percent to 10 percent be adopted to allow contractors the flexibility to account for variations in geography, occupational requirements, and nature of disabilities.

OFCCP declines to adopt these proposed alternatives. As explained in the NPRM, we did consider permitting contractors to compare the individuals with disabilities in its workforce as a whole to the proposed 7 percent goal. We decided against adopting this approach on a broad scale because of its potential for masking discrimination and segregation. For example, a contractor that has segregated all of its employees with disabilities into one or two low-paying jobs might be able to conceal this discrimination and satisfy this 7 percent goal if only a single whole-workforce comparison were required by this section.

However, we are mindful that certain small contractors may find it more difficult than other contractors to attain the goal if compelled to apply it to each of their job groups, simply because of their small size. In recognition of this fact, the final rule is revised, with the addition of paragraph (d)(2)(i), to create an exception that permits contractors with a total workforce of 100 or fewer employees to apply the 7 percent goal to their entire workforce as a whole, rather than to each job group. This will ensure that the burden on these small companies is minimized, while still providing them with a yardstick by which to measure the effectiveness of their efforts to recruit and hire individuals with disabilities. These contractors are reminded, though, that while they are permitted to measure their utilization of individuals with disabilities in their workforce as a whole, they may not attain the goal by engaging in the unlawful segregation of

employees with disabilities.[30]

OFCCP declines to adopt the other approaches proposed by contractors because they would all result in greater burden on contractors than the approach we have chosen. None of the alternative proposals would allow contractors to use their existing EO 11246 job groups, and all would require contractors to identify organizational units for the purpose of establishing or effectuating a goal, and to explain the factors they applied in making their determinations. A number of commenters expressed concern that contractors may be able to use their relationship with sheltered workshops to circumvent the goal requirement. Some of these commenters fear that contractors will be able to count toward their goal the employees of a sheltered workshop subcontractor. Some fear that contractors will be able to meet their goal by establishing their own sheltered workshop, or by counting toward the goal those individuals being trained for future employment at a sheltered workshop. Still others asked that OFCCP ban sheltered workshops and prohibit contractors from using them at all.

Sheltered workshops are segregated facilities that exclusively or primarily employ persons with disabilities. Many sheltered workshops are authorized to pay special minimum wages under an exemption in section 14(c) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 214(c), after receiving a certificate from the U.S. Department of Labor's Wage and Hour Division. The certificate allows the payment of special minimum wages to certain workers with disabilities for work being performed. The Department's Wage and Hour Division has jurisdiction over the administration of the FLSA, including the provisions of section 14(c). OFCCP thus has no authority to ban

[30] The exception created in paragraph (d)(2)(i) of this section is in addition to the existing exception under Executive Order 11246 that permits contractors with a total workforce of fewer than 150 employees to use the nine broad EEO-1 occupational categories as their job groups. See 41 CFR § 60-2.12(e).

sheltered workshops or prohibit contractors from using them. However, § 60-741.45 of the existing section 503 regulations (renumbered section 60-741.47 in the final rule) addresses the relationship between sheltered workshops and contractors' affirmative action obligations. Specifically, this section provides that "[c]ontracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified disabled individuals" in the contractor's workforce. Merely providing a subcontract to a sheltered workshop is, therefore, not a form of affirmative action. Section 60-741.45 further provides that a contract with a sheltered workshop may only be considered to be affirmative action "if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation" when they become qualified for the job(s) for which they are being trained. Only after these trainees become employees of the contractor and are receiving full compensation comparable to what other similarly situated employees who did not participate in a sheltered workshop are earning, may they be counted toward the contractor's goal. Contractors may not discriminate in compensation based on disability, which would include discriminating against an individual based on his or her past participation in a sheltered workshop.

Commenters also need not be concerned that contractors could circumvent the goal by means of a subcontractor relationship with a sheltered workshop or by establishing their own sheltered workshop. First, we note that contractors may only include in their AAPs and count toward their goal their own applicants and employees. Applicants and employees of subcontractors, whether or not that subcontractor is a sheltered workshop, may not be included in the contractor's AAP or counted toward the contractor's goal. Second, to comply with the goal requirement, contractors must apply

the goal to each of its job groups, not to its workforce as a whole. Consequently, even if a contractor established its own sheltered workshop inside the company, that would only satisfy the contractor's goal with respect to the specific job(s) performed by the sheltered workshop in the specific contractor facility where the sheltered workshop is located.

- Paragraph (e): Action-oriented programs

Proposed paragraph (e) directed that the contractor develop and execute action-oriented programs designed to correct any identified problem areas when underutilization is identified. The proposed rule stated that examples of such programs may include alternative or additional efforts from among those outreach efforts listed in §§ 60-741.44(f)(1) and 60-741.44(f)(2) and/or any other appropriate actions.

Many commenters opposed to the proposed utilization goal objected in part because proposed paragraph (e) required the development and execution of action-oriented programs when the percentage of individuals with disabilities in one or more job groups fell below the 7 percent utilization goal, regardless of the reason the goal was not met. These commenters argued that proposed paragraph (e) imposed a penalty and therefore, the goal acted more like a quota.

As explained earlier, the goal is not a quota. Nevertheless, it appears that many misunderstood the framework for the goal requirement. To allay these concerns, OFCCP has revised paragraph (e), renumbered it as paragraph (f), and inserted a new paragraph (e) into the final rule that clarifies that a failure to meet the utilization goal requires that the contractor make an assessment as to whether any impediments to equal employment opportunity exist. This assessment is to be based on reviews the contractor is already required to undertake as part of its annual review of its affirmative action program.

These include reviews of its personnel processes (§ 60-741.44(b)) and its external outreach and recruitment efforts (§ 60-741.44(f)), and the results of its affirmative action program audit (§ 60-741.44(h)) and any other areas that might affect the success of the affirmative action program. Paragraph (e) is, thus, captioned "Identification of problem areas." Proposed paragraph (e), entitled "Action-oriented programs" (paragraph (f) in the final rule) has been revised to direct the contractor to undertake action-oriented programs only when problem areas have been identified. Paragraph (f) also clarifies that action-oriented programs need not be limited to engaging in additional outreach and recruitment efforts. Rather, such programs may also include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities and/or other actions designed to correct the identified problem areas, such as improving retention of employees with disabilities.

- Paragraph (f): Failure to meet the goal does not constitute discrimination

Proposed paragraph (f) clarified that a contractor's determination that it has not attained the utilization goal in one or more job groups does not in and of itself constitute either a finding or admission of discrimination in violation of this part. OFCCP received no comments regarding this provision. We have adopted this provision, as proposed, in the final rule, renumbered as paragraph (g). Failure to meet the goal would not be a violation of this part and would not lead to a fine, penalty or sanction.

As previously noted, if a contractor does not meet the goal, the contractor must take steps to determine whether and where impediments to equal opportunity exist. When making this determination the contractor must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action

program audits, and any other areas that might affect the success of the affirmative action program. If the contractor reasonably determines there are no impediments, no further action is necessary. If, as a result of its review, the contractor identifies problem areas, then it must develop and execute action-oriented programs designed to correct the problems, as required by paragraph (f). The contractor may choose the programs to institute. The programs do not need to result in achieving the goal, so long as they are designed to remove obstacles to doing so.

So, for example, if a contractor does not meet the goal, but has developed and implemented an affirmative action program, including conducting outreach and positive recruitment of individuals with disabilities and has evaluated whether barriers to equal opportunity exist and, if they do, implemented action-oriented programs to correct and remove them, the contractor would not be found to be in violation of this part simply because it did not meet the goal.

On the other hand, if, for example, a contractor meets the goal, but fails to develop an AAP, the contractor could be cited for failure to develop an AAP. Goal achievement does not guarantee compliance with section 503 or this part, just as failure to meet the goal does not result in a violation of section 503 or this part.

- Paragraph (g): Utilization goal is not a quota or a ceiling

Proposed paragraph (g) stated that the goal proposed in this section must not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities. This paragraph is adopted, as proposed, in the final rule, renumbered as paragraph (h).

Section 60-741.47 Voluntary affirmative action programs for employees with disabilities

The proposed rule added a new section encouraging contractors to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment or hiring. The proposal provided examples of priority consideration programs, and required contractors who elect to implement such a program to include in their AAP a description of the program and an annual report describing activities taken pursuant to the program and their outcomes. In addition, the proposal cautioned that a priority consideration program cannot be used to segregate or restrict the employment opportunities of individuals with disabilities.

We received 28 comments concerning this section, primarily from employer groups, but also from disability groups, law firms, and others. The employer groups overwhelmingly opposed this section, asserting that priority consideration amounted to a quota or preferential treatment for persons with disabilities and contradicted equal employment opportunity principles. Contractors, they stated, should only hire the best qualified person for a job. Commenters opposed to this new provision asserted, further, that it would foster discrimination against other protected groups and generate increased employment discrimination litigation. A few commenters questioned how this section would be implemented; for example, how a contractor would establish a point system. Some commenters requested clarification on the definition of priority consideration.

Those commenters in favor of this section, mostly disability groups, stated that this section would assist in the employment of persons with disabilities and would not result in unlawful discrimination of any kind. They asserted, further, that this section does not violate section 503 or the ADA.

After consideration of the comments, OFCCP adopts the proposed provision into the final rule with modifications to address concerns raised by contractors. First several contractors were concerned that the provision would require contractors to provide priority consideration to individuals with disabilities, including addition "points" in the hiring process, that would amount to a quota. This is not OFCCP's intention. By way of background, several contractors in the past have asked OFCCP informally whether it would be permissible to establish a job training or employment program for individuals with specific disabilities, such as traumatic brain injury or developmental disabilities. It has been OFCCP's longstanding policy that such programs are permissible though not required. To address this concern we have clarified the section to refer to voluntary affirmative action programs for employees with disabilities, rather than as providing priority consideration in employment. In addition, we have removed the example of a program assigning a weighted value or additional "points" to job applicants who self-identify as having a disability. We reiterate that proposed § 60-741.47 (§ 60-741.46 in the final rule) creates no new obligations or responsibilities with which contractors must comply. Rather, it simply highlights the availability to contractors of an important affirmative action tool, and, provides a non-exhaustive list of examples of voluntary affirmative action programs for employees with disabilities that contractors are permitted to voluntarily develop and implement. A number of private companies have successfully used various types of voluntary affirmative action programs to increase training and employment opportunities for individuals with disabilities, and OFCCP desires to be clear that other companies also may consider their use. However, contractors who do not adopt such programs are not penalized in any way by OFCCP for that decision. OFCCP

believes these modifications will allay concerns that this provision amounts to a quota or requires preferential treatment.

We disagree with the suggestion that this provision would foster discrimination against other groups and generate increased litigation. As we noted in the NPRM, the ADA Amendments Act explicitly states that neither the ADA nor the Rehabilitation Act provides "the basis for a claim . . . that [an] individual was subject to discrimination because of the individual's lack of disability." ADAAA at sec. 6(a)(1)(g). We note, too, that having a disability is a characteristic that cuts across race, gender and ethnicity lines, and that affirmative efforts to increase employment opportunities for individuals with disabilities will, therefore, not impede affirmative efforts to include women and minorities. We have added a new paragraph (d) to make clear that this section should should not be used to foster discrimination against other groups by stating that this section shall not relieve a contractor from liability for discrimination under any of the laws enforced by OFCCP.

Section 60-741.48 Sheltered workshops

We proposed to make a single technical change to this existing regulation. Specifically, the NPRM proposed to replace the phrase "qualified disabled individuals" in the first sentence with "qualified individuals with disabilities" to be consistent with the terminology used elsewhere in this part. We received no comments on this change and it is adopted into the final rule as proposed, but the section is renumbered as § 60-741.47. Several commenters expressed concern about the interaction of this existing provision with the new utilization goal requirement in § 60-741.45 of the final rule (originally

proposed as § 60-741.46). Those comments are addressed in the preamble to § 60-741.46, above.

Subpart D--General Enforcement and Complaint Procedures

Section 60-741.60 Compliance evaluations

The proposed rule set forth several changes to the process the contractor and OFCCP will follow in conducting compliance evaluations. We received 28 comments concerning this section, including comments focusing on contractor burden, which are addressed in the Regulatory Procedures section of this preamble. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.

- Paragraph (a)

The NPRM modified the wording of paragraph (a) to more clearly state the section 503 obligation of the contractor to employ, "advance in employment and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices." We received no comments to this paragraph and adopt the language into the final rule as proposed.

- Paragraph (a)(1): Compliance review

The NPRM proposed adding a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP, stating that OFCCP "may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part." Most of the comments concerned this paragraph. Many of these commenters, primarily contractors, employer groups, and law firms, objected to this proposed change

and asked that it be withdrawn. These commenters asserted that the language of the proposed rule could result in "perpetual" audits of contractors, was contrary to a recent Administrative Law Judge (ALJ) decision in the case OFCCP v. Frito-Lay, Case No. 2010-OFC-00002, Recommended Decision and Order (ALJ July 23, 2010), and would lead to an increased burden for contractors.

As stated in the NPRM, the purpose of this proposal was to clarify that OFCCP may need to examine information after the date of the scheduling letter during the desk audit in order to determine, for instance, if violations are continuing or have been remedied. While the existing section 503 provision addresses the authority of the agency to conduct desk audits, it does not expressly state the temporal scope of these audits. It has been OFCCP's longstanding position that the agency has authority to obtain information pertinent to the review for periods after the date of the letter scheduling the review, including during the desk audit. However, in 2010 an ALJ disagreed in a recommended decision in the Frito-Lay case, in part because the parallel Executive Order 11246 desk audit regulation at issue in the case does not address the temporal scope of a desk audit. OFCCP v. Frito-Lay, Inc., Case No. 2010-OFC-00002, ALJ Recommended Decision and Order (July 23, 2010). On May 8, 2012, the Department's Administrative Review Board (ARB) reversed this recommended decision, concluding that a desk audit authorized by the regulation permitted OFCCP to request additional information relating to periods after the scheduling letter. The ARB concluded that the regulation does not have an inflexible temporal limitation. OFCCP v. Frito-Lay, Inc., Case No. 2010-OFC-00002, ARB Final Administrative Order (May 8, 2012). OFCCP views the Frito-Lay decision as equally applicable to desk audits concluded under its section 503 authority as

to those conducted under its Executive Order 11246 authority. Nevertheless, the final rule makes the clarification explicit in the text of the regulation. OFCCP notes that paragraph (a)(1) also authorizes OFCCP to request during the desk audit additional information pertinent to the review after reviewing the initial submission. See United Space Alliance v. Solis, 824 F.Supp.2d 68, 81-82 (D.D.C. 2011) (holding that agency's interpretation of its desk audit regulation to authorize additional information requests when necessary was entitled to deference).

Finally, commenters' concerns that this revision will lead to "never-ending" audits are unfounded. As stated above, the clarifying language set forth in the final rule does not change OFCCP's longstanding policy, or contractors' obligations, regarding the temporal scope of the desk audit. Further, because the clarification does not represent a change, concerns about increases in burden are similarly unfounded.

- Paragraphs (a)(3) and (a)(4): Compliance check and focused reviews

The NPRM revised paragraph (a)(3) to permit OFCCP to review documents pursuant to a compliance check either on-site or off-site, at OFCCP's option. Similarly, paragraph (a)(4) was revised to allow OFCCP to conduct focused reviews, at its discretion, either on-site or off-site. Many employer groups objected to this change, citing confidentiality concerns over the transfer, management, and maintenance of employment and medical records. Some commenters requested safeguards to protect these records, asked for additional guidance concerning confidentiality of medical records, or asked that these records not be subject to the Freedom of Information Act.

We received similar comments concerning the confidentiality of records with regard to § 60- 741.81, Access to records, and we address those comments in more detail

in the preamble to that section. Briefly, we note that the section 503 regulations have long required contractors to provide relevant medical and related records to OFCCP officials during a compliance evaluation or complaint investigation "upon request." § 60-741.23(d)(1)(iii). This regulation contains no requirement that OFCCP must request such records "on-site." We also note that there is significant precedent for OFCCP obtaining contractor records off-site, as the scheduling letter has long required that contractors scheduled for a compliance evaluation send their AAPs and supporting documentation to OFCCP. The final rule adopts the changes to these paragraphs as proposed.

- Paragraph (c): Pre-award compliance evaluations

Finally, the proposed rule added a new paragraph (c) to this section detailing a new procedure for pre-award compliance evaluations under section 503, much like the procedure that currently exists in the Executive Order regulations. See 41 CFR 60-1.20(d). A few employer groups objected to the change, asserting that the new paragraph was too prescriptive and questioned how the procedure would work in practice.

These concerns are misplaced. The pre-award compliance evaluation is a long-standing requirement under the Executive Order. This addition simply brings the section 503 regulations in line with the Executive Order regulations and assures that the pre-award compliance evaluation process will also encompass compliance with section 503. OFCCP adopts this new provision into the final rule as proposed.

Section 60-741.62 Conciliation Agreements

The proposed rule renumbered the existing rule as paragraph (a), and added a new paragraph (b) permitting the establishment of benchmarks in conciliation agreements as

one possible form of remedial action. As we stated in the NPRM, benchmarks may be established for outreach, recruitment, hiring, or other employment activities of the contractor, as appropriate, and will provide a quantifiable method for measuring the contractor's progress toward correcting identified violations or deficiencies.

We received five comments from employer groups concerning new paragraph (b). None favored the new provision. Some of these commenters asserted that remedial benchmarks for hiring are unnecessary, would be similar to a quota, and recommended that the paragraph be eliminated from the final rule. Others requested that we further define "benchmark," or clarify that a benchmark must be linked to a finding of discrimination.

The use of remedial benchmarks is not a new OFCCP policy or practice. Remedial benchmarks have long been included in conciliation agreements, when appropriate, to resolve violations under the Executive Order. New paragraph (b) simply clarifies that remedial benchmarks may also be used, when appropriate, to remedy violations of section 503. Lastly, we note that § 60-741.62(a) provides that conciliation agreements may be used when "OFCCP finds a material violation of the act or this part." We, therefore, do not believe that further clarification regarding when a benchmark may be used is warranted. Nor do we believe that additional definition of the term "benchmark," which the American Heritage Dictionary of the English Language defines "a standard by which something can be measured or judged," is necessary. Accordingly, paragraph (b) is adopted into the final rule as proposed.

Section 60-741.68 Reinstatement of ineligible contractors

The proposed rule added a sentence at the end of paragraph (a) to clarify that the Director shall issue a written decision on a contractor's request for reinstatement. No comments were received regarding this change, and OFCCP adopts it into the final rule as proposed.

Subpart E--Ancillary Matters

Section 60-741.80 Recordkeeping

This section describes the recordkeeping requirements that apply to the contractor under section 503, and the consequences for the failure to preserve records in accordance with these requirements. The NRPM modified this provision to incorporate the five (5) year records retention timeframe required under proposed § 60-741.44(f)(4) (linkage agreements and other outreach and recruiting efforts), and proposed § 60-741.44(k) (collection of referral, applicant and hire data).

While comments regarding the proposed recordkeeping requirements under § 60-741.44(f)(4) and § 60-741.44(k) are addressed in the discussions of those provisions, a total of 25 comments were received specific to § 60-741.80. Commenters included disability, employer, veterans and other associations, contractors, law firms, government offices and individuals. Generally, the disability and veterans associations favored the longer record retention period, while other commenters argued that this was overly burdensome, inconsistent with OFCCP's other recordkeeping requirements, and confusing.

As previously noted in this preamble, in response to comments regarding the burden associated with maintaining records for five years, the final rule reduces the recordkeeping requirements for §§ 60-741.44(f)(4) and 60-741.44(k) to three years. To reduce any potential for confusion, the final rule includes a new paragraph (b) in § 60-741.80 specifying in one place those records that have the three-year requirement, and renumbering paragraph (b) of the existing rule as paragraph (c). OFCCP feels strongly that extending the recordkeeping requirements for these particular provisions, which are primarily related to recruitment and outreach, will enable contractors to better determine the effectiveness of their recruitment and outreach activities over time. As noted in the NPRM, the absence of data makes it nearly impossible for contractors and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting candidates with disabilities. These records will give contractors historical data that can be used for analyzing their compliance efforts.

Paragraph (d) of the existing rule provides that the "requirements of this section shall apply only to records made or kept on or after August 19, 1996," the effective date of a previous amendment to the section 503 implementing regulations. The final rule deletes this paragraph, as it is now obsolete.

Section 60-741.81 Access to records

This section describes a contractor's obligations to permit OFCCP to access its records during compliance evaluations and complaint investigations. The NPRM

proposed two changes to the current regulation. First, it added a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of a compliance evaluation or complaint investigation. Second, it required that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the formats selected by OFCCP.

Sixteen comments were received from contractors, employer associations and law firms regarding this proposal. Most of the commenters requested that OFCCP eliminate the proposed changes. A few commenters objected specifically to the requirement to provide records in the format(s) OFCCP selects, and almost all expressed concern that allowing OFCCP access to records off-site raised potential confidentiality risks.

The final rule retains the proposed requirement that contractors provide OFCCP off-site access to materials upon request. As an initial matter, we note that access to company records off-site is not a novel approach, as Executive Order 11246 contains no limitation on the location of access to records for a scheduled compliance evaluation, and indeed specifically references off-site access. The final rule's general access regulation conforms to those principles. Moreover, in light of contractors' increased use of readily portable electronic records in multiple locations, this change will provide OFCCP with greater flexibility during evaluations and investigations, promoting increased efficiency.

However, OFCCP modified § 60-741.81 of the final rule in response to concerns regarding record confidentiality. Section 60-741.81 now includes the following language: "OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public

disclosure under the Freedom of Information Act, 5 U.S.C. 552." It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that release of the data would subject the contractor to commercial harm. This language affirms OFCCP's commitment to ensure confidentiality to the fullest extent allowed by law. Further, all OFCCP Compliance Officers receive training on the importance of keeping records confidential during compliance evaluations and complaint investigations. OFCCP will continue to stress this policy to ensure that contractor records are kept secure by the agency at all times.

The final rule also clarifies the provision regarding OFCCP's ability to request records in specific formats. The final rule states that: "[t]he contractor must provide records and other information in any of the formats in which they are maintained, as selected by OFCCP." This language makes clear that the provision will not require contractors to invest time or resources creating records in a specific format, or creating a documented "list" of the formats in which they have documents available. Rather, contractors merely need to inform OFCCP of the formats in which they maintain their records and other information, and allow OFCCP to select the format(s) in which the records or other information will be provided. This provision should result in more efficient OFCCP evaluations and investigations.

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

The proposed rule included several changes to Appendix A to reflect updated terminology and revisions made elsewhere in the regulations. Specifically, we: (1) proposed changing the term "otherwise qualified" to "qualified," in paragraph 1, to conform more closely to the terminology used in the ADA, as amended, and this part; (2) added a reference to the proposed new requirement, in proposed § 60-741.45, that contractors develop written reasonable accommodation procedures; (3) proposed revising paragraph 2 to reflect the new requirement, in § 60-741.42, that contractors invite applicants to self-identify as an individual with a disability at the pre-offer stage; (4) noted that the invitation to self-identify also invites individuals with disabilities to request any reasonable accommodation that they might need; (5) proposed requiring, in paragraph 4, that, in the event that a needed reasonable accommodation constitutes an undue hardship for the contractor, the individual with a disability be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor; (6) proposed revising paragraph 5 to require the contractor to seek the advice of the individual with a disability when providing reasonable accommodation; (7) proposed changing the reference to "§ 60-741.2(v)" in paragraphs 5 and 8 of the appendix to "§ 60-741.2(t)" to reflect the revised alphabetical structure of the rule's definitions; and (8) updated the reference to various information resources, and replaced the term "TDD" with "TTY" to reflect current technology.

Just one commenter addressed the proposed revisions to Appendix A. This commenter recommended that we add a network of State vocational rehabilitation

agencies to the examples of reasonable accommodation resources referenced in paragraph 5. OFCCP declines to add this reference as State vocational rehabilitation services agencies are already listed as a reasonable accommodation resource for contractors. OFCCP, therefore, adopts the proposed changes into the final rule with the following modifications: (1) the reference to the proposed requirement to establish written reasonable accommodation procedures is deleted, consistent with the elimination of proposed § 60-741.45; (2) the third sentence of paragraph 2 is revised to reflect the use of a single voluntary self-identification form for the pre-offer and post-offer invitations to self-identify as an individual with a disability; and (3) the reference to the definition of "reasonable accommodation" is renumbered § 60-741.2(s).