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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-250, 41 CFR Part 60-300

RIN 1250-AA00

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans

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 implementing regulations of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, 38 U.S.C. 4212 (VEVRAA). OFCCP is responsible for enforcement of VEVRAA, which prohibits employment discrimination against protected veterans by covered Federal contractors and subcontractors. VEVRAA also requires each covered

Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

Contemporaneous with these revisions, OFCCP is also publishing revisions to the implementing regulations of Section 503 of the Rehabilitation Act of 1973 (section 503). OFCCP has historically viewed these regulations together, maintaining identity between the two regulations where possible and allowing contractors to prepare an Affirmative Action Plan that covers both laws jointly. Accordingly, the vast majority of the revisions announced here in the VEVRAA regulation are also present in the section 503 rule. The exceptions to this – mainly in the structure of the hiring benchmark/goal for the two rules, are discussed in further detail below.

The existing implementing regulations for VEVRAA are split into two separate parts: 41 CFR part 60-250 (part 60-250) and 41 CFR part 60-300 (part 60-300). Part 60-250 applies to any Government contract or subcontract of $25,000 or more entered into before December 1, 2003, while part 60-300 applies to any Government contract or subcontract of $100,000 or more entered into on or after December 1, 2003. The final rule rescinds the regulations at part 60-250, as discussed in full in the Section-by-Section Analysis below.

The final rule regarding part 60-300 retains many of the revisions set forth in the notice of proposed rulemaking (NPRM). The final rule strengthens several provisions that are intended to aid in recruitment and hiring efforts, such as clarifying the mandatory job listing requirements, requiring data collection pertaining to protected veteran applicants and hires, and establishing hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts. However, some of the proposals set forth

in the NPRM, particularly with regard to the creation and maintenance of certain records and specific mandated affirmative action obligations, have been eliminated or made more flexible in order to reduce the time and cost burden on contractors. 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.

EXECUTIVE SUMMARY:

I. Purpose of the Regulatory Action

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights, worker protection agency which enforces an 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. Section 503 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination against individuals with disabilities. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, (VEVRAA) prohibits employment discrimination against certain protected veterans.

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 action obligations. We estimate that our jurisdiction covers approximately 200,000 Federal contractor establishments, and an estimated 50,000 parent companies.[2]

Although progress has been made in the employment of veterans, the number of unemployed veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of veterans. The annual unemployment rate for post-September 2001 veterans, referred to as "Gulf War-era II veterans," is higher than the rates for all veterans and for nonveterans. BLS data on the 2012 employment situation of veterans show that about 2.6 million of the nation's

[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.).

[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.

veterans had served during Gulf War-era II.[3] In 2012, the unemployment rate for Gulf War-era II veterans was 9.9 percent compared to nonveterans at 7.9 percent.[4] However, the unemployment rate, in the same year, for male Gulf War-era II veterans age 18 to 24 was 20.0 percent, higher than the rate for nonveterans of the same age group (16.4 percent).[5]

OFCCP also found that, on average, wages of veterans (defined as anyone who is employed and reported serving in the military in the past) are higher than non-veterans. However, there are different age groups represented in each era, and because earnings generally increase with age, we controlled for age and race in a regression analysis. Using America Community Survey (ACS) data and conducting a regression analysis, OFCCP found that:

- Male veterans earn 2.7 percent less than non-veterans.
- Female veterans earn 6.3 percent than non-veterans.[6]

Controlling for the era of service, rather than just whether or not the person served, OFCCP finds that:

- Male Gulf War-era II veterans earn 1.4 percent less than non-veterans.
- Male Vietnam era veterans earn 6.9 percent less than non-veterans.[7]

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[3] U.S. Bureau of Labor Statistics, Economic News Release, "Employment Situation of Veterans Summary 2012," March 20, 2013, http://www.bls.gov/news.release/vet.nr0.htm (last accessed Aug. 8, 2013).
[4] Id., "Table A: Employment situation of the civilian non-institutionalized population 18 years and over by veteran status, period of service, and sex, 2011-2012 annual averages."
[5] Id.
[6] OFCCP's labor economist conducted the regression analysis. All models were run using the American Community Survey 2008-2010 Public Use Microdata (PUMS). The models that examine veterans only were also run with the ACS 2006-2010 files, but the results were largely the same, so we use the 2008-10 for all (since questions on disability were only available in 2008 and after). The analysis was run on the private sector.
[7] Females comprise an estimated 14.2% (nearly 167,000 women) in the enlisted ranks.

Though it is unclear what portion of these disparities is caused by discrimination, employment discrimination and underutilization of qualified workers, such as veterans and individuals with disabilities, contribute to broader societal problems such as income inequality and poverty.

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. These tools include, for example, removing barriers related to job postings so both contractors can effectively post or advertise their jobs, and jobseekers can take full advantage of these job opportunities. It also includes data collection to support meaningful self-assessments of employment practices and the ability for contractors to adjust their outreach and recruitment efforts for greater effectiveness and efficiency when needed.

II. Statement of Legal Authority

Initially enacted into law in 1974 and amended several times in the intervening years, the purpose of VEVRAA is twofold. First, VEVRAA prohibits employment discrimination against specified categories of veterans by Federal Government contractors and subcontractors. The universe of protected veterans includes disabled veterans, veterans who have separated from the military within the past three years (recently separated veterans), veterans who received an Armed Forces service medal while on active duty, and veterans who served in active duty during a war or in a campaign or expedition for which a campaign badge was authorized. Second, it requires each covered Federal Government contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

The VEVRAA regulations found at 41 CFR part 60-250 generally apply to Government contracts of $25,000 or more entered into before December 1, 2003. The threshold amount for coverage is a single contract of $25,000 or more; contracts are not aggregated to reach the coverage threshold. If a Federal contractor received a Government contract of at least $50,000 prior to December 1, 2003, an affirmative action program (AAP), the specific obligations of which are detailed at 41 CFR 60-250.44, must be developed. See 41 CFR 60-250.40.

The VEVRAA regulations found at 41 CFR part 60-300 apply to Government contracts entered into on or after December 1, 2003. The threshold amount for VEVRAA coverage and AAP threshold coverage is a single contract of $100,000 or more, entered into on or after December 1, 2003; contracts are not aggregated to reach the coverage threshold. Federal contractors and subcontractors that meet the coverage threshold and have 50 or more employees must develop an AAP. See 41 CFR 60-300.40. The regulations found at 41 CFR part 60-300 also apply to modifications of otherwise covered Government contracts made on or after December 1, 2003. Consequently, a contract that was entered into before December 1, 2003, will be subject only to the part 60-300 regulations if it is modified on or after December 1, 2003, and meets the contract dollar threshold of $100,000 or more.

In the VEVRAA context, receiving a Federal contract comes with a number of responsibilities, including compliance with the VEVRAA non-discrimination and non-retaliation provisions, meaningful and effective efforts to recruit and employ veterans protected under VEVRAA, creation and enforcement of personnel policies that support the contractor's affirmative action obligations, maintenance of accurate records

documenting the contractor's affirmative action efforts, and providing OFCCP access to these records upon request. Contractor compliance with these provisions is, therefore, vital to improving the employment opportunities of veterans protected by VEVRAA. And, given the unique skills and experiences that veterans have acquired as a result of their service, improving employment opportunities benefits not only the veterans and their families but also the contractor as an employer. Failure to abide by these responsibilities may result in various sanctions, including withholding progress payments, termination of contracts, and debarment from receiving future contracts. It also deprives the contractor of the opportunity to benefit from this uniquely qualified pool of applicants.

III. Major Provisions

The following major provisions in the final rule would:

- Provide contractors with a quantifiable means to measure their success in recruiting and employing veterans by requiring, for the first time, that contractors establish their own or adopt a predetermined annual hiring benchmark (currently 8 percent based on national labor force data).
- Create greater accountability for employment decisions and practices by requiring that contractors maintain several quantitative measurements and comparisons for the number of veterans who apply for jobs and the number of veterans they hire. Having this data will also assist contractors and OFCCP in measuring the effectiveness of contractors' outreach and recruitment efforts.
- Provide knowledge and support to veterans seeking jobs by improving the effectiveness of the VEVRAA requirement that contractors list their job openings

with the appropriate state employment service agency. Contractor job listings must be provided in a format that the state agency can access and use to make the job listings available to job seekers.

- Provide knowledge and increasing compliance by subcontractors with their obligations by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors.
- Create flexibility for contractors when they are establishing formal relationships with organizations that provide recruiting or training services to veterans. The relationships or "linkage agreements" can be established to meet the contractors' specific needs, while assuring outreach to veterans seeking employment.
- Clarify the contractor's mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected veterans.
- Repeal outdated and obsolete regulations at 41 CFR Part 60-250 that apply to contracts entered into before December 1, 2003 and not since modified. OFCCP believes that all such contracts have either expired or been modified, and that there is, therefore, no longer a need for the Part 60-250 regulations.

IV. Costs and Benefits

This is an economically significant and major rule. Veterans make up 7.25 percent of the employed population.[8] Under the VEVRAA rule, contractors have the option of

[8] 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)*. (10,233/141,050)*100=7.25%. The table is available on request from

establishing their own benchmark for employing protected veterans or meeting a benchmark set by OFCCP, currently 8 percent. Assuming all contractors will choose to meet the OFCCP benchmark of 8 percent, OFCCP estimates that Federal contractors would need to hire an additional 205,500 protected veterans.[9] Dividing our estimate of this rule's first-year cost by our estimate of the number of protected veterans expected to be hired in the first year because of this rule returns a cost of approximately $863 to $2,353 per new hire.

TOTAL COST OF THE FINAL RULE (Year One) [10]		
	Low	High
Total Cost of the Rule	$177,296,772	$483,560,138
Cost Per Company	$3,830	$7,120
Cost Per Establishment	$1,035	$1,924
Company Cost Per Hire	$863	$2,353

PROJECTED VETERAN HIRES					
	Year 1	**Year 2**	**Year 3**	**Year 4**	**Year 5**
Employees of Fed Contractors (assuming steady with	27,400,000.00	27,610,980.00	27,823,584	28,037,826.15	28,253,717.41

the Bureau of Labor Statistics at the Department of Labor. BLS does not release some tables for a variety of reasons, such as sample size or possibility of confusion. Finally, this estimate includes all veterans, not only the protected veterans.

[9] Based on data from the Bureau of Labor Statistics Quarterly Census of Employment and Wages, OFFCP estimates that approximately 27.4 million employees could be affected.

[10] The high cost estimates are based on the highest contractor establishment count of 251,300 and 67.919 companies while the low estimates are based on a contractor establishment count of 171,275 and 46,291 companies.

population)					
Veterans	2,192,000.00	2,208,878.40	2,225,886.76	2,243,026.09	2,260,297.39
Veterans Gap	205,500.00	207,082.35	208,676.88	210,283.70	211,902.88

Present value costs over ten years for the final rule range from $1.08 billion to $3.1 billion using a 3 percent discount rate. If we use a 7 percent discount rate then the present value costs range from $899 million to $2.57 billion. Annualizing these costs yields a cost range of $127 million to $363 million at the 3 percent discount rate and $128 million to $366 million using a 7 percent discount rate.

	7% Discount Rate	3% Discount Rate
Benefits	Not Quantified	Not Quantified
Costs	$899 million to $2.57 billion	$1.08 billion to $3.1 billion

These projected hires, some of whom will require reasonable accommodation, will not add significant costs for the employers. 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. [11] For 43 percent of employers, the typical one-time expenditure by employers to provide a reasonable

[11] 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 (last accessed August 12, 2013).

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 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.[12]

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.[13] 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 estimates based on the aforementioned assumptions. The total cost of providing reasonable accommodation

[12] 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*)*.

[13] 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

to protected veterans with disabilities is $19,010,209 in the year the target is met and $8,037,516 in recurring costs.

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 an effective reasonable accommodation.

We estimate the percentage of veterans in the civilian labor force with disabilities, with service-connected disabilities, to be 12 percent.[14] For all Gulf War-era veterans it is 19 percent but for Gulf War-era II veterans it is 24 percent.[15] We have not found projections on the percentage of these populations that are likely to seek reasonable accommodation. The requirement to provide reasonable accommodations to individuals with disabilities existed under the ADA, and now exists under the ADA Amendments Act for employers. This is not a new obligation created by this rule. However, because this rule seeks to increase employment of protected veterans, and some of those veterans are expected to meet the ADA's definition of disabled and, therefore, are entitled to a

[14] Bureau of Labor Statistics, Table 6:Employment status of veterans 18 years and over by presence of service-connected disability, reported disability rating, period of service, and sex, August 2012, not seasonally adjusted http://www.bls.gov/news.release/vet.t06.htm (last accessed July 9, 2013).
[15] Id.

reasonable accommodation, we estimate the cost of providing reasonable accommodations to those disabled protected veterans that we expect to be hired because of this rule.

There are tangible and intangible benefits to investing in the recruitment and hiring of disabled veterans. Among them are employer tax credits, access 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.[16] 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."[17] 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. We were not able to quantitatively assess these broad societal benefits.

INTRODUCTION

Addressing the barriers our veterans face in returning to civilian life, particularly with regard to employment, is the focus of a number of Federal efforts. Among these efforts is the VOW to Hire Heroes Act signed into law by President Obama on November 21, 2011, which provides tax credits for businesses that hire veterans who are unemployed or have service-connected disabilities and creates a new Veteran's

[16] 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).

[17] 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.

Retraining Assistance Program for unemployed veterans. Other Federal efforts presented during the August 2011 announcement by President Obama included a plan for the private sector to hire 100,000 veterans by the end of 2013 and creating a "career-ready military" which will "ensure that every member of the service receives the training, education, and credentials they need to transition to the civilian workforce or to pursue higher education." These efforts are now a part of the Administration's Joining Forces Initiative. Strengthening the implementing regulations of VEVRAA, whose stated purpose is "to require Government contractors to take affirmative action to employ and advance in employment qualified protected veterans," is another important means by which the government can address the issue of veterans' employment.

To that end, OFCCP published a notice of proposed rulemaking (NPRM) on April 26, 2011 in the Federal Register (76 FR 23358), seeking comment on a number of proposals that would strengthen the regulations implementing VEVRAA. The NRPM was published for a 60-day public comment period. The proposed regulations detailed specific actions that contractors and subcontractors must satisfy to meet their VEVRAA obligations, including increasing data collection obligations, and requiring covered Federal contractors and subcontractors to establish hiring benchmarks for protected veterans. The NPRM also proposed the rescission of 41 CFR part 60-250. After receiving several requests to extend the public comment period, OFCCP published a subsequent notice in the Federal Register on June 22, 2011 (76 FR 36482), extending the public comment period an additional 14 days.

OFCCP received over 100 comments on the NPRM. Commenters represented diverse perspectives including: approximately 40 individuals; ten groups representing

contractors; three disability rights advocacy groups; two veterans' associations; two unions; and two governmental entities. Commenters raised a broad range of issues, including concerns with the cost and burden associated with the proposed rule, the extended recordkeeping requirements, developing benchmarks, and the new categories of data collection and analyses. OFCCP carefully considered the 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. In addition to the 60-day public comment period, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, veterans' service organizations and other interested parties to understand the features of VEVRAA regulations that work well, those that can be improved, and possible new requirements that could help to effectuate the overall goal of increasing the employment opportunities for qualified veterans with Federal contractors.

I. 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 60-300 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 a contractor's compliance with the requirements of this final rule if the contractor is selected for a compliance evaluation pursuant to § 60-300.60 or subject to a complaint investigation pursuant to § 60-300.61. The effective date and the approach to compliance are the same as those set forth in the section 503 Final Rule. OFCCP believes that adopting similar approaches to the effective date and to compliance makes the most sense based on the similarity of the two rules, and will help contractors make required system and process changes at one time.

II. Overview of the Final Rule

As stated above, the final rule incorporates many of the proposed changes set forth 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 eliminates some of the NPRM's proposals. This discussion highlights the major provisions of the final rule and summarizes relevant comments. The fuller discussion of the provisions of the rule is in the Section-by-Section Analysis.

The final rule strengthens the affirmative action provisions for Federal contractors in several ways. The regulations reiterate the contractor's mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected veterans. The mandatory job listing obligation, which is set forth in and required by the VEVRAA statute, see 38 U.S.C. 4212(a)(2)(A), ensures that veterans seeking the assistance of state employment service delivery systems to find employment will be able to find job listings from Federal

contractors, and that the delivery systems will be able to provide priority referral of these veterans back to contractors. The final rule also addresses the increased use of technology in the workplace by allowing for the electronic posting of employee rights and contractor obligations under VEVRAA and updating the manner in which compliance evaluations are conducted. Further, the regulations enhance data collection pertaining to protected applicants and hires in order to provide contractors vital information against which they can effectively measure their recruitment efforts, and establish two mechanisms – the flexible approach set forth in the NPRM, or a more simplified, single national target – from which contractors may choose in order to establish a hiring benchmark. These revisions will help contractors better evaluate their outreach efforts and modify them as needed, toward the end of increasing employment opportunities for protected veterans by Federal contractors and subcontractors. Additionally, as proposed in the NPRM, part 60-250 of these regulations is rescinded. However, as we discuss further in the Section-by-Section Analysis, part 60-300 is revised to provide that any protected veteran as defined in the former part 60-250 regulations who is employed by or applies for a position with a part 60-250 covered contractor will still be protected under the anti-discrimination provisions of part 60-300, and will be able to file complaints with OFCCP regarding discriminatory treatment.

OFCCP revised or eliminated a number of provisions from the NPRM in response to the comments that were received, particularly as they relate to the cost and burden of the rule, recordkeeping requirements, data collection and analyses, and benchmarks. These changes are summarized below.

OFCCP received 55 comments concerning the overall burdens and costs of the proposed rule from several contractor groups and contractors, including 21 form letters. Most commenters stated that OFCCP's estimates in costs and hours were too low. Commenters also noted that OFCCP's contractor universe was too small. In response to these concerns, OFCCP modified the burden and costs estimates for the final rule. As discussed further in the Regulatory Procedures section, OFCCP also increased the overall contractor and subcontractor establishment count to 171,275 based on 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 information. These changes provide a more accurate depiction of the burden and cost associated with the final rule. As discussed in more detail below, OFCCP also made key changes to the recordkeeping requirements to minimize the burden on contractors.

We received comments on the estimated number of contractor establishments as well, including 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.[18]

The NPRM proposed that contractors maintain data pursuant to §§ 60-300.44(f)(4) (linkage agreements and other outreach and recruiting efforts), 60-300.44(k) (collection of referral, applicant, and hire data), and 60-300.45(c) (criteria and

[18]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).

conclusions regarding hiring benchmarks) for five years. Twenty-three commenters opposed these provisions. Several of the commenters were particularly concerned with the burden associated with the five-year requirement. In response, OFCCP reduces 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 under paragraph 5 of the Equal Opportunity (EO) Clause and § 60-300.44(k) of the NPRM to maintain data related to referrals from employment service delivery systems. The proposal required contractors to maintain quantitative measurements and comparisons regarding those protected veterans who were referred by state employment services. Commenters were concerned with the requirement to obtain referral data, as they indicated that the state employment delivery service either cannot provide data or provides data inconsistently across the states, and that acquiring the data and synthesizing it would be burdensome. 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 for the other provisions minimizes the burden on contractors yet still requires 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 § 60-300.44 of the existing rule. Among these were proposals requiring contractors to: review personnel processes on an annual basis (§ 60-300.44(b)); establish linkage agreements with three veteran-related organizations to increase connections between contractors and veterans seeking employment (§ 60-300.44(f)); take

certain specified actions to internally disseminate its affirmative action policy (§ 60-300.44(g)); and train all personnel on specific topics related to the employment of protected veterans (§ 60-300.44(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, and instead retains the language in the existing rule. The proposals in the NPRM, for the most part, required certain specific steps contractors must take to fulfill their already existing, general affirmative action obligations. These general affirmative action obligations – reviewing personnel processes 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 maintaining a robust affirmative action program.

The final rule also modifies the approach to setting benchmarks. The NPRM proposed requiring contractors to establish annual hiring benchmarks, expressed as the percentage of total hires who are protected veterans that the contractor seeks to hire in the following year. The hiring benchmarks were to be established by the contractor using existing data on veteran availability, while also allowing the contractor to take into account other factors unique to its establishment that would tend to affect the availability determination. OFCCP received a total of 38 comments on the proposed benchmarks. Twelve commenters questioned whether contractor established benchmarks would be arbitrary and ineffective because of concerns about the reliability of data on the number

of protected veterans in the workforce. Commenters also sought clarity on exactly how they should develop benchmarks based on the varying sources of data available. In addition, commenters asserted that the benchmarks were quotas that would adversely impact women and minorities since demographically veterans are predominantly white males. In response to these concerns, OFCCP has revised § 60-300.45 to provide a simpler, nationwide benchmark as another option that contractors can use, in addition to the flexible approach set forth in the NPRM. Further, the final rule addresses the incorrect assumptions – e.g., that goals represent a "quota" or will place contractors in jeopardy of violating the sex discrimination provisions of Executive Order 11246 – that many comments in the NPRM detailed.

Finally, in response to some comments and to further reduce costs, the final rule eliminates a few other minor requirements included in the NPRM. For instance, the final rule does not include the proposed requirement in § 60-300.42(d) of the NPRM that contractors affirmatively ask disabled veterans if they require a reasonable accommodation, retaining the requirement in the existing rule that contractors must take part in an interactive process regarding accommodation and should, but are not required to, seek the advice of the applicant regarding such accommodation. This aligns the rule with the obligations set forth in the Americans with Disabilities Act. Additionally, the final rule eliminates the specific obligation to inform off-site employees about the availability of the contractor's affirmative action plan, and instead retains the existing obligation that requires the affirmative action plan to be available upon request with the location and hours of availability posted publicly. As with the other changes discussed,

these revisions maintain the general obligations while reducing the burden of compliance for contractors.

The final rule presents the most substantial re-write of VEVRAA regulations since their inception. In light of these significant changes, and in response to contractors' requests to delay implementation due to these changes, the effective date of this final rule is set for 180 days after publication in the Federal Register. The detailed Section-by-Section Analysis below identifies and discusses all of the final changes in each section. For ease of reference, part 60-300 will be republished in its entirety in the final rule.

SECTION-BY-SECTION ANALYSIS

41 CFR PART 60-250

Rescission of part 60-250

The NPRM proposed two alternative approaches to updating part 60-250. The first approach proposed rescinding part 60-250 in its entirety. The second approach proposed revising part 60-250 so that it mirrors the proposed changes to part 60-300. OFCCP received 16 comments on these proposals from a variety of entities including individuals, law firms, contractors, and associations representing veterans, contractors, or individuals with disabilities.

OFCCP received few comments supporting retaining part 60-250. One commenter stated that it held several contracts that are covered under parts 60-250 and 60-300. One individual commenter stated that part 60-250 should remain in place as some major contractors have contracts spanning several decades that are still in force. The commenter also expressed concern about eliminating the definition of "special

disabled veteran." The commenter noted that 30 percent of disabled veterans may need additional affirmative action since it would be difficult to compete with a veteran that has no service connected disability.

OFCCP received 14 comments that either recommended rescinding part 60-250, indicated that the commenter was unaware of contractors that were subject to part 60-250, or stated that the commenter was neutral on the proposal to rescind part 60-250. Many commenters questioned whether there were any remaining active contracts that would still be covered by part 60-250. One commenter, an industry group, stated that one of its members has a continuing contract from the 1980s; however, that contract has since been modified and is no longer covered under part 60-250.

Commenters provided alternative recommendations to implementing a part 60-250 that mirrors part 60-300. An equal employment opportunity consulting firm recommended allowing contractors to combine their obligations under both parts 60-250 and 60-300 into a single AAP to eliminate unnecessary duplication. Another commenter recommended widening the scope of part 60-300 to incorporate contracts that are covered under part 60-250.

Part 60-250 is rescinded. As stated in the NPRM and echoed by many commenters, we do not believe that there are any remaining contracts for $25,000 or more entered into prior to December 1, 2003, that have not either terminated or since been modified (which, if over $100,000 in value, would fall under part 60-300's coverage). While the agency received one comment from a company that asserted that it held contracts that are subject to part 60-250, OFCCP's research revealed that the commenter is a grantee. However, out of an abundance of caution that any contracts

falling under part 60-250's coverage still exist, and to ensure that all veterans that are protected by part 60-250 (and not part 60-300 as well) will be able to pursue complaints of discrimination, the final rule includes a definition of "pre-JVA veteran" in § 60-300.2, and provides that such individuals continue to be protected by the non-discrimination prohibitions in § 60-300.21 and are able to file discrimination complaints pursuant to § 60-300.61. There is further discussion of this definition in the analysis of Section 60-300.2.

41 CFR PART 60-300

Subpart A-Preliminary Matters, Equal Opportunity Clause

Section 60-300.1 Purpose, applicability and construction

Section 60-300.1 of the current rule sets forth the scope of VEVRAA and the purpose of its implementing regulations. The NPRM proposed deleting references throughout the regulation to the "Vietnam Era Veterans' Readjustment Assistance Act of 1974" or "VEVRAA" and replacing it in this section and throughout the regulation with "Section 4212." OFCCP proposed the change due to concerns that the continued reference to "Vietnam era veterans" leads to confusion regarding the categories of veterans that are protected under the law. There were a total of six comments on the proposed revision.

Some commenters supported referring to the regulations as "Section 4212." One commenter stated that the change would be an important and positive step to clarifying the fact that the regulations are no longer focused on issues that only concern veterans of the Vietnam era. Another commenter believed that the proposed change would eliminate

confusion entirely regarding whether VEVRAA applied to only Vietnam era veterans. One commenter opposed the revision and argued that deleting the reference to "VEVRAA" would be an insult to Vietnam era veterans. Commenters also provided several recommendations for this section. One commenter suggested that if the agency is going to use the term "Section 4212," it should do so consistently. The commenter cited several examples where "Section 4212" was used inconsistently in the NPRM. Other commenters suggested that the agency utilize a name that connects "Section 4212" to the veterans who are protected, such as "Section 4212/Protected Veterans." The commenter that opposed the revision stated that OFCCP should invest resources into properly advertising the law rather than changing the name.

The final rule does not incorporate the proposal to use the term "Section 4212," and instead continues the use of the term "VEVRAA." While referring to the law as "Section 4212" had potential benefits as described in the NPRM, there was also concern that the new term "Section 4212" might invite further confusion. For instance, for those unfamiliar with the law, the term "Section 4212" does not indicate any relationship to veterans' rights on its face. Further, there was concern that some may think that "Section 4212" and "VEVRAA" were two unrelated laws. Accordingly, the final rule retains the term "VEVRAA," and in response to comments we have ensured that the term is used consistently throughout the regulation.

In addition, to address confusion among contractors and veterans regarding the scope of the various veterans' employment rights statutes, the final rule adds language to the discussion in paragraph (c)(2) of VEVRAA's "relationship to other laws." New paragraph (c)(2)(i) highlights that VEVRAA and the Uniformed Services Employment

and Reemployment Rights Act (USERRA) are separate laws with distinct obligations for contractors and distinct protections for employees who have past, present or future military service, status or obligations. It clarifies that this part does not limit the contractor's obligations, responsibilities, and requirements under USERRA, including the obligation to reemploy employees returning from qualifying military service, and emphasizes that compliance with this part is not determinative of compliance with USERRA.

Section 60-300.2 Definitions

The NPRM proposed clarifying several key definitions in part 60-300. The current classifications of protected veterans under VEVRAA include: 1) disabled veterans, 2) veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge was authorized, 3) veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985, and 4) recently separated veterans. The regulations define "disabled veteran," "recently separated veteran," and "Armed Forces service medal veteran." The definition of "other protected veteran" in the existing regulation applies to veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized. OFCCP proposed replacing "other protected veteran" with "active duty wartime or campaign badge veteran" to eliminate confusion regarding the veterans that are protected under this category. Some have interpreted erroneously the "other protected veteran" category as a "catch-all" that

includes all veterans. The proposed rule also added new definitions for "protected veteran" and "linkage agreement." OFCCP received a total of 18 comments on the proposed changes to § 60-300.2 from a variety of entities including individuals, law firms, contractors, and associations representing veterans, contractors, or disability rights.

- Definition for "Active Duty Wartime or Campaign Badge Veteran"

There were a total of eight comments on the proposal to change the category of veterans referred to as "other protected veteran" in the existing rule to "active duty wartime or campaign badge veteran." This category of veteran includes all those who served on active duty in the U.S. military, ground, naval, or air service either: (a) during a war; or (b) in a campaign or expedition for which a campaign badge was authorized by the Department of Defense (DOD). The proposal did not change which veterans are covered; we made the change so that the category name was more accurately descriptive of who it covered.

Most commenters supported the proposal. One commenter noted that the proposed language would more accurately reflect the language in the statute and alleviate some of the past confusion surrounding the wording. Another commenter stated that the proposed change is helpful in understanding the nature of veterans protected by this category.

A few commenters expressed concern about the proposed definition. One commenter argued that the law is quite clear on who is protected by VEVRAA and that the proposed term "active duty wartime or campaign badge veteran" does not provide any additional clarification. A human resources consulting company suggested that using "active duty" may lead to under-reporting. The company asserted that individuals may

interpret this to mean that they have to be on active duty to qualify. Commenters also stated that it is unclear who qualifies as a "wartime" or "campaign badge veteran." One commenter noted that the clearest guidance on who qualifies as a "campaign badge veteran" could only be found on the United States Department of Defense and Office of Personnel Management websites. The commenter further stated that many contractors do not want to directly reference the information on those sites because they are related to the Federal government's veterans' preference. The commenter requested that OFCCP develop guidance specifically for contractors clearly identifying which veterans are protected under the "wartime" or "campaign badge veteran" classification.

The final rule adopts the definition "active duty wartime or campaign badge veteran" as proposed in the NPRM. OFCCP believes that this is a more accurate description, and less subject to confusion, than the general "other protected veteran" classification. OFCCP notes that the Department of Defense and the individual services of the Armed Forces (e.g., Army; Navy) administer these campaign badges, and thus contractors should consult with DOD or the issuing military service if they have questions about whether a particular badge is a campaign badge that provides coverage under VEVRAA.

- Definition for "Protected Veterans," "Pre-JVA Veterans"

While commenters were generally supportive of the proposal to create a definition for "protected veteran," there were a few concerns regarding using the term "protected" to label the definition. One commenter argued that using the term "protected veteran" may cause further confusion since many mistakenly interpreted "other protected veteran" to mean all other veterans not protected under the other defined categories. Another

commenter argued that the definition should utilize the label "protected veteran," since this is the statutory language in VEVRAA.

The final rule retains the proposed definition for "protected veteran." As this final rule eliminates the "other protected veteran" definition and replaces it with a clearer, more specific alternative, we believe that the new "protected veteran" term will not be confused with the previous "other protected veteran" term. Further, while we understand that the VEVRAA statute uses the term "protected veterans" to describe the various categories of veterans protected by VEVRAA, we use the term "protected veteran" in the regulations for consistency with other regulations administered by OFCCP. The Executive Order 11246 and section 503 regulations, as well as the VEVRAA regulations to date, have used the term "protected" to refer to the individuals and groups of individuals who have rights under the various statutes (e.g., "protected classes"). Meanwhile, the term "covered" has typically referred to the contractors to whom the regulations apply (e.g., "covered contractor"). Therefore, in order to maintain word usage continuity with all of OFCCP's laws, we retain the term "protected veteran" as proposed in the NPRM.

One commenter suggested that OFCCP expand the types of veterans protected under VEVRAA to include Desert Storm-era veterans, veterans that served in a war zone and veterans who utilize service dogs. The categories of "protected veterans" are not set by OFCCP, but rather are defined by the VEVRAA statute codified at 38 U.S.C. 4212(a)(3). OFCCP cannot expand the categories beyond those set forth in the statute. We note that most of the types of veterans listed above are protected by the categories of veterans set forth in the statute. Veterans that served in the Desert Storm-era or otherwise

in a war zone likely will be protected under the "active duty wartime or campaign badge veteran" category of protected veteran, and possibly the "recently separated veteran" category as well. As for veterans who use service dogs, if they were discharged or released from active duty due to a service-connected disability, or are otherwise entitled to compensation for disability under laws administered by the Department of Veterans Affairs, they would already be protected under the "disabled veteran" classification.

Finally, as noted in the discussion on the rescission of part 60-250, the final rule also includes a definition for "pre-JVA veteran," which incorporates those individuals who were previously protected under part 60-250 into part 60-300. The definition is as follows:

"Pre-JVA veteran means an individual who is an employee of or applicant to a contractor with a contract of $25,000 or more entered into prior to December 1, 2003, and who is a special disabled veteran, veteran of the Vietnam era, pre-JVA recently separated veteran, or other protected veteran, as defined below:

(1) Special disabled veteran (also referred to in this regulation as 'Pre-JVA special disabled veteran') means:

(i) a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability:

(A) Rated at 30 percent or more; or

(B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap; or

(ii) A person who was discharged or released from active duty because of a service-connected disability.

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

(i) Served on active duty for a period of more than 180 days, and was discharged or released there from with other than a dishonorable discharge, if any part of such active duty occurred:

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

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

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

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

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

(3) Pre-JVA recently separated veteran means a pre-JVA veteran during the one-year period beginning on the date of the pre-JVA veteran's discharge or release from active duty.

(4) Other protected veteran means a person who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense."

As stated in the discussion of the rescission of part 60-250, references to "Pre-JVA veteran" are included in the discrimination prohibition section for the final rule (§ 60-300.21) and the complaint procedures section of the final rule (§ 60-300.61) to ensure that, if there are any individuals remaining who are protected solely by part 60-250, such individuals will be able to avail themselves of their rights and file complaints for

discrimination based on their veteran status just as "protected veterans" under part 60-300 are able to do. We do not include "pre-JVA veterans" along with "protected veterans" in the sections of the regulation pertaining to contractors' affirmative action obligations. As we have noted above, we have no evidence that there are any contracts remaining that fall solely under part 60-250's coverage, and thus requiring contractors to engage in affirmative action efforts pursuant to contracts that by all accounts no longer exist is not a good use of resources. Regardless, the protected veteran categories under part 60-300 include the vast majority of veterans who were protected under the part 60-250 categories – indeed, the part 60-300 categories are even broader with regard to recently separated veterans and disabled veterans. To the extent they do not, many of contractors' affirmative action obligations under part 60-300 would likely reach such individuals anyway (e.g., a contractor's recruitment and outreach effort, which could include a linkage agreement with a local veterans service group).

- Definition for "Linkage Agreements"

Commenters expressed a variety of concerns regarding the proposed definition of "linkage agreements." However, as the final rule eliminates the requirement for contractors to enter into linkage agreements – see discussion of § 60-300.44(f), below – there is no need for the regulation to contain a definition for it, and thus it is eliminated from the final rule.

- Additional Definitions

Commenters recommended adding certain definitions to § 60-300.2 for clarification purposes. Two commenters stated that OFCCP needed to clearly define "priority referral." One of the commenters, a law firm, expressed concern that

contractors are specifically directed to request "priority referrals" and conduct analyses of "priority referrals" in comparison to other referrals, but the regulations do not clearly define "priority referral." Another commenter requested that OFCCP define "external job search organizations" because the term has been broadly interpreted to encompass a broad range of organizations including online job search engines, veterans' service organizations, and other third parties that provide candidates for contractors.

OFCCP declines to include a definition of "priority referral" in § 60-300.2. OFCCP believes that it is clear from the statute that the term refers to individuals referred pursuant to a local employment services office's requirement to give "veterans priority in referral" for contractor employment listings. See 38 U.S.C. 4212(a)(2). Further, the requirement that the One-Stop service delivery systems provide priority referral of veterans is not administered and carried out by OFCCP, but by other agencies within the Department. The Department's Employment and Training Administration (ETA) and Veterans' Employment and Training Service (VETS) have published guidance on implementing priority of service requirements for veterans, including: the Training and Employment Guidance Letter 10-09 (accessible on ETA's web site at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816); Veterans' Program Letter 07-09; and Training and Employment Notice 15-10, "A Protocol for Implementing Priority of Service for Veterans and Eligible Spouses." However, we note that the final rule eliminates the proposed requirement to collect and maintain data on priority referrals, which should limit any concerns raised in response to the NPRM about how to specifically categorize priority referrals.

OFCCP also disagrees with the assertion that the agency should define "external job search organization." The NPRM noted in the discussion of the proposed Paragraph 4 of the EO Clause that if a "contractor uses any outside job search companies (such as a temporary employment agency) to assist in its hiring, the contractor must provide the state employment service with the contact information for these outside job search companies." This context clarifies the kinds of organizations that are considered "external job search organizations." OFCCP intends for "external job search organization" to be read as broadly as possible. "External job search organization" includes any entity not wholly owned and operated by the contractor that assists with its hiring.

Finally, the final rule appends additional language to the definition for "employment service delivery system" (ESDS). The existing rule references that the ESDS offers services in accordance with the Wagner-Peyser Act. The final rule adds some additional background and explanation of the Wagner-Peyser Act, stating that "[t]he Wagner-Peyser Act requires that these services be provided as part of the One-Stop delivery system established by the States under Section 134 of the Workforce Investment Act of 1998." The Wagner-Peyser Act of 1933 established a national network of Employment Service offices that provided labor exchange services to jobseekers and employers. The Workforce Investment Act of 1998 (WIA) amended the Wagner-Peyser Act and required states and localities to integrate employment and training programs into a single public workforce system. Thus, employment services and training programs are all provided through a national network of One-Stop Career Centers established in the local workforce investment areas of the states. The description of the Employment

Service's role in the public workforce system can be found at 20 CFR 652.202, and Section 7(e) of the Wagner-Peyser Act.

We also note that 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 VEVRAA regulations, OFCCP is harmonizing the requirements of these regulations and the EO 11246 Internet Applicant Rule. OFCCP provides further guidance on this issue in the preamble discussion related to § 60-300.42.

Section 60-300.5 Equal Opportunity Clause

The NPRM proposed several changes to the content of the Equal Opportunity Clause found in § 60-300.5, and the manner in which the Clause is included in Federal contracts. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.

- EO Clause Paragraph 2 – Clarification of Mandatory Job Listing Obligations

The NPRM proposed additional language to this paragraph clarifying that the contractor must provide job vacancy information to the appropriate employment service in the manner that the local employment service delivery system (ESDS) requires in order to include the job in their database so that they may provide priority referral of veterans. The NPRM also proposed additional language to this paragraph clarifying that, for any contractor who utilizes a privately-run job service or exchange to comply with its mandatory listing obligation, the information must be provided to the appropriate

employment service in the manner that the employment service requires. OFCCP received 14 comments concerning this section from an individual, law firms, contractors, contractor groups, a veteran's group, and others. As explained below, we adopt the language proposed in the NPRM for this paragraph with one minor revision.

The majority of the comments received asserted that posting jobs in the format required by a given ESDS was burdensome, as ESDSs in varying states and localities require different submission formats and information for their job listing system. On a related note, several commenters suggested that the Department reinstitute America's Job Bank, a nationwide job listing service operated and eventually eliminated several years ago by the Employment and Training Administration. OFCCP did not develop or maintain America's Job Bank, as one law firm commenter asserted.

A bit of historical background is perhaps helpful in addressing these comments. As was discussed in the NPRM, the requirement to list jobs with the appropriate ESDS is not a purely regulatory creation, but is established in the statute itself. See 38 U.S.C. 4212(a)(2)(A). The statute has long required that each contractor "shall immediately list all of its employment openings with the appropriate employment service delivery system." Id. The JVA, in amending VEVRAA in 2002, further specified that while contractors could also list a job with America's Job Bank or any additional or subsequent national electronic job bank established by the Department of Labor, this was not in and of itself sufficient to satisfy the job listing requirement. Id. at 4212(a)(2)(A). Accordingly, reinstitution of America's Job Bank or something similar would not change the statutory requirement that contractors list their jobs with the appropriate ESDS. OFCCP is obligated to comply with the statute as written.

Thus, the mandatory job listing requirement set forth in the NPRM is not a new creation; it merely clarified that contractors list their jobs with the ESDS "in the manner and format required" by the ESDS. This, for example, could include requiring electronic transmission through a web-based form or electronic document format (such as PDF), requiring paper transmission using mail or facsimile, or requiring the contractor to provide particular types of information in its submissions. As we stated in the NPRM, this clarification stems from numerous reports received by OFCCP that contractors were occasionally providing job listing information to the ESDS in an unusable format, such that their jobs were not being listed and the ESDS could not properly carry out the priority referral of veterans, which is required by VEVRAA and its regulations. We received input during the public comment period from individuals working for or with an ESDS that corroborated these reports. If the purpose of the mandatory job listing requirement is to help veterans find work with Federal contractors, then surely Congress did not intend to permit contractors to provide information about their job openings in an unusable format, completely defeating the purpose of the requirement. Some commenters were concerned that the proposed language in the NPRM required contractors to provide information about their job openings in one specific format mandated by the ESDS. This was not the intention of the proposal. Rather, the aim of the proposal was simply to ensure that contractors provide information about their job openings with the ESDS in a format that the ESDS can use to provide priority referrals of protected veterans to contractors. If an ESDS permits the contractor to provide this information in various formats, the contractor would be free to use any one of them. To clarify this requirement, the final rule revises the proposal's language (providing the

listing "in the manner or format required by the appropriate [ESDS]….") to require contractors to list their jobs "in a manner and format permitted by the appropriate [ESDS] which will allow that system to provide priority referral of veterans…."

Finally, a few commenters questioned whether the language proposed in the NPRM for the last sentence of this paragraph, which clarifies that any contractor using a privately-run job service or exchange to list its jobs is still required to have the job listed with the appropriate ESDS in a usable format, would forbid third parties from posting jobs for contractors or the use of private job boards. The language in the NPRM, now adopted into the final rule, does not prevent a contractor from utilizing a third party to list its jobs, so long as the job listing is submitted to the appropriate ESDS in any manner and format permitted by the ESDS. However, if the job is not listed by the third party with the appropriate ESDS in a permitted manner and format, the contractor will be held responsible. Similarly, the language in the NPRM, now adopted into the final rule, does not prevent a contractor from listing its jobs on any privately-run job boards it may deem worthwhile; however, it may only do so in addition to, and not instead of, the mandatory job listing requirement established by statute and set forth in the rule.

- EO Clause Paragraph 4 – Information Provided to State Employment Services

The NPRM proposed that the contractor, when it becomes obligated to list its job openings with the appropriate state employment service, must provide additional information, including its status as a Federal contractor, the contact information for the contractor hiring official at each location in the state, and its request for priority referrals of protected veterans for job openings at all its locations within the state, and that this information must be updated annually. These requirements were added in response to

feedback received from ESDSs that there is no centralized list of Federal contractors that they can consult in order to determine if a listing employer is a Federal contractor, and to ensure that these ESDSs have contact information for the listing contractor if there are any questions that need to be resolved in the job listing or priority referral process. The NPRM also required that the contractor provide the ESDS with the contact information for any outside job search companies (such as a temporary employment agency) assisting with its hiring process.

OFCCP received four comments specific to these proposed changes. One commenter stated that GSA has a list of Federal contractors and, therefore, the Federal Government should make this list available to the ESDS and not require listing companies to indicate whether or not they are a Federal contractor as defined by the VEVRAA regulations. While it is true that the GSA e-library website has a list of contractors, this list does not contain companies that have contracts with all agencies throughout the Federal Government, and in fact did not include certain contractors that OFCCP has investigated in recent years and for whom coverage is not disputed. Additionally, the library is not limited to those contracts entered into on or after December 1, 2003 with a value of $100,000 or more, the criteria for coverage under part 60-300 of the regulations. As such, this list is both under-inclusive and over-inclusive, and cannot be relied upon for VEVRAA enforcement purposes. In this context, and in the interest of insuring that Federal contractors are properly identified so an ESDS can fulfill its duty to give priority referral of protected veterans to contractors, we believe that requiring contractors to simply indicate “VEVRAA Federal Contractor” on its job listings facilitates the business engagement efforts of the ESDS and is not unduly burdensome for

either the contractor or the ESDS (this revision does not add any additional reporting requirements for the ESDS aside from those already set forth in the VEVRAA and these regulations). Accordingly, the final rule incorporates this proposal.

Some commenters stated that posting the contact information for "the contractor official responsible for hiring at each location" would be burdensome on that person, especially if recruiting nationwide, and might be confusing, as multiple persons could be involved in hiring. Among the alternative suggestions in the comments was using "chief hiring official," "HR contact," or "senior management contact" in the place of "contractor official responsible for hiring at each location."

As stated in the NPRM, the reason for requiring this information was to ensure that the ESDS had the contact information for someone working for the contractor that could answer any questions the ESDS may have about the listing to ensure it is processed appropriately and was the proper recipient of priority referrals of veterans. In order to make this requirement less vague and to provide contractors with greater flexibility, the final rule includes a sentence providing further guidance that the "contractor official" may be a chief hiring official, a Human Resources contact, a senior management contact, or any other manager for the contractor that can verify the information set forth in the job listing. Additionally, the final rule makes a small change to the reporting schedule for the information required by this paragraph. While the NPRM required that this information be reported annually, the final rule requires that contractors provide this information at the time of its first job listing, and then update it for subsequent job listings only if any of the provided information has changed. This will ensure that the ESDS has the information it needs while potentially limiting the reporting burden on contractors.

The NPRM also required that the contractor provide the ESDS with the contact information for any outside job search companies (such as a temporary employment agency) assisting with its hiring process, and replaced the term "state workforce agency" and "state agency" throughout the regulation with the term "employment service delivery system," which was already a defined term in the regulation. We did not receive any comments specific to these proposals, and thus they are adopted in the final rule as proposed.

- EO Clause Paragraph 5 – Maintaining Referral Data

The NPRM proposed an entirely new paragraph 5 to the EO Clause that would require contractors to collect and maintain data on the number of referrals and priority referrals they receive, in order to give the contractor and OFCCP a quantifiable measure of the availability of protected veterans and, therefore, provide part of a baseline for measuring the success of a contractor's outreach and recruitment programs. The NPRM also proposed that contractors maintain this data for five years, in order to ensure that contractors had enough historical referral data to consider when evaluating its outreach efforts (see § 60-300.44(f)(3)) and establishing benchmarks (see § 60-300.45).

OFCCP received several comments on this proposal, the majority of which stated that the data collection and five-year recordkeeping requirements were unduly burdensome. Other commenters believed that it would be difficult and perhaps impossible to obtain accurate referral data, and thus the practical utility of the data collection requirement was limited. For instance, one commenter asserted that accurate referral data would be difficult to obtain if an applicant filed directly with a contractor, and that referral data from private websites would not be counted as referral. Several

commenters representing the contractor community also asserted that requiring contractors to collect and maintain this data was inconsistent with the Internet Applicant rule set forth in the Executive Order 11246 regulations.

OFCCP has considered these comments and believes that the points raised by commenters regarding the practical utility of the referral data, in light of the burden of collecting it, have merit. Accordingly, the final rule deletes the proposed paragraph 5 and renumbers the subsequent paragraphs in the EO Clause accordingly.

- EO Clause Paragraph 10 (NPRM) / Paragraph 9 (Final Rule) – Providing Notice to People with Disabilities

In paragraph 10 of the EO Clause in the NPRM, we proposed two changes. First, we updated the contractor's duty to provide notices of rights and obligations that are accessible to individuals with disabilities, replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. OFCCP received one comment from a contractor asserting that there were "too many" types of notices possible for all types of disabilities. We respectfully disagree with this commenter's assertion. The context of the existing regulation and the proposed changes clearly and specifically refer to providing an alternative notice to individuals who are unable to read it due to visual impairment or visual inaccessibility (such as an individual who uses a wheelchair being unable to read the fine print of a notice posted high on a wall). The commenter did not specify any other disabilities for which contractors would need to create alternative notices, and we cannot conceive of any that would create any significant burden. Further,

any burden in providing a notice in Braille is slight given the fact that they are available from the EEOC's Office of Communications and Legislative Affairs, who may be contacted at 202-663-4191 or TTY 202-663-4494. See http://www1.eeoc.gov/eeoc/publications/. We have amended the language slightly in the final rule to clarify that among the "other versions" of the notice there are additional technological options available to contractors that would fulfill the requirement, such as providing it electronically or on computer disc.

Second, we proposed additional language detailing that a contractor can satisfy its posting obligations through electronic means for employees who use telework arrangements or otherwise do not work at the physical location of the contractor, provided that the contractor provides computers to its employees or otherwise has actual knowledge that employees can access the notice. The addition of this language is in response to several things: the increased use of telecommuting and other work arrangements that do not include a physical office setting; internet-based application processes in which applicants never enter a contractor's physical office; and a number of complaints received by OFCCP in recent years from individuals employed by contractors without a constant physical workplace – such as airline pilots – who assert that they were unaware of their rights under VEVRAA. OFCCP received two comments on this proposal, one from a law firm and one from a contractor, raising two separate issues.

The first issue raised by one of these comments was that "actual knowledge" of an off-site employee being able to access the notice is unduly burdensome. We respectfully disagree. First, 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. As set forth in the proposed language, for a contractor with employees who do not work at a physical location of the contractor, electronic notices that are posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees satisfies the posting obligations. In the example of electronic mail, "actual knowledge" could easily be documented merely by maintaining an electronic copy of the e-mail message sent to employees – something that is done (or can be done) automatically by virtually all enterprise-based email systems. Similarly, "actual knowledge" for postings on a company intranet can be verified simply by having an employee in personnel or IT periodically check the link to the electronic posting to ensure that it works and the posting is readable. Performing these types of checks on information posted on a company intranet is a common best practice that takes seconds to complete. In light of the numerous comments and complaints OFCCP has received from protected veteran employees of Federal contractors – particularly those without a traditional physical workplace – that they were unaware of their rights or their contractor's affirmative action obligations, we believe the importance of ensuring that employees have access to statements of their rights and the contractor's obligations far outweighs the slight burden that compliance creates.

The second issue raised in the comments pertained to the requirement that, for contractors using electronic or internet-based application processes, an electronic notice of employee rights and contractor obligations must be "conspicuously stored with, or as part of, the electronic application." One commenter opined that storing the electronic notice with the application would increase the size of applicant files. The potentially

small increase in the size of the electronic file does not outweigh the benefit of providing employees notice of their employment rights and protections.

Accordingly, for the reasons stated above, OFCCP has adopted the proposed changes to paragraph 10 of the EO Clause into paragraph 9 of the final rule. 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 11 (NPRM) / Paragraph 10 (Final Rule) – Providing Notice to Labor Organizations

The NPRM proposed additional language that a contractor, in addition to its existing obligation to notify labor organizations with which it has collective bargaining agreements about its affirmative action efforts, must also notify the labor organizations about its non-discrimination obligations as well. There were no comments specific to this minor change, and thus the language in paragraph 11 of the NPRM is adopted as paragraph 10 of the final rule as proposed.

- EO Clause Paragraph 13 (NPRM) / Paragraph 12 (Final Rule) – Contractor Solicitations and Advertisements

The proposed regulation added a new paragraph 13 to the EO clause which would require the contractor to state and thereby affirm in solicitations and advertisements that

it is an equal employment opportunity employer of veterans protected by VEVRAA, much like it is already required to do under the Executive Order 11246 regulations.

OFCCP received one comment from a contractor group, objecting to this proposal on the grounds that advertisements would cost more due to their increased word length. However, as stated 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 13 of the NPRM would require adding "protected veteran status," or an abbreviation thereof, 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 the public a fact that many do not know – that protected veterans are entitled to non-discrimination and affirmative action in the workplace of Federal contractors. Accordingly, the language in paragraph 13 of the NPRM is adopted as paragraph 12 of the final rule as proposed.

- Inclusion of EO Clause in Federal Contracts (proposed §§ 60-300.5(d) and (e))

Finally, the NPRM proposed requiring that the entire equal opportunity 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 nondiscrimination and affirmative action obligations, reads and understands the language in this clause. OFCCP received four comments – from two law firms, a contractor, and a contractor group – all of whom opposed this proposed new requirement. These commenters asserted that the requirement to incorporate the EO Clause into

Federal contracts was too burdensome, as the length of a contract would increase greatly in size to perhaps double or triple its original length. The commenters further opined that the increase in the length would cause contracts to be rewritten, and that the increase in paper that would accompany such a requirement was not environmentally friendly. Finally, the commenters asserted that cutting and pasting the text of the clause into the text of contracts was not a simple task, and would require time to reformat and otherwise edit the contract prior to signing it.

In light of the comments and upon further consideration of the issue, OFCCP withdraws and revises the proposal to incorporate 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 the non-discrimination and affirmative action obligations toward protected veterans. 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 protected veterans, which was a primary objective of the NPRM proposal. Accordingly, in order to draw greater attention to the contractors' obligations under VEVRAA without the burden of including the entire VEVRAA 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 VEVRAA required by the FAR:

> **"This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified**

protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans."

This requirement would apply to all contracts entered into after the effective date of the rule.

Lastly, the final rule does not incorporate the proposed change to paragraph (e), and instead reverts to the existing language in that subsection. The NPRM proposed eliminating the last clause of the paragraph ("whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor") to align with the proposed paragraph (d), which required incorporation of the entire EO Clause into Federal contracts. Because paragraph (d) of the final rule does not include this requirement, the final rule revises paragraph (e) accordingly back to its existing form.

Subpart B – Discrimination Prohibited

Section 60-300.21 Prohibitions

The proposed rule included clarifying language to paragraph (f)(3) of this section, qualifying that an individual who rejects a reasonable accommodation made by the contractor may still be considered a qualified disabled veteran if the individual subsequently provides or pays for a reasonable accommodation. One law firm commenter stated that the proposal to allow individuals to provide their own accommodations could lead to legal, safety, and equal treatment issues.

OFCCP opts to retain the proposed language in the final rule. First, this proposal is not "wholly inconsistent" with the ADA like the commenter suggested. Rather, it is entirely consistent with longstanding EEOC ADA reasonable accommodation policies. See, e.g., EEOC's "Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," October 17, 2002 ("to the extent that a portion of the cost of an accommodation causes undue hardship, the employer should ask the individual with a disability if s/he will pay the difference.") We likewise do not believe that safety concerns warrant a change in the regulation, as the provisions on "direct threat" in this regulation and any contractors' general workplace safety policies will guard against these concerns. Nor would a contractor have to permit a disabled veteran to provide an accommodation if the contractor can show that that accommodation would significantly disrupt the workplace or otherwise impose an undue hardship on its operations.

Finally, as set forth in the discussion of the new "pre-JVA veteran" definition in § 300.2, the final rule adds "or pre-JVA veteran" after each instance of "protected veteran" in this section, and adds "or pre-JVA special disabled veteran" after each instance of "disabled veteran" in this section. This incorporates the categories of veterans protected by the now rescinded part 60-250 into this part, ensuring that pre-JVA veterans, if any still exist, are protected by the anti-discrimination provisions of this section.

Subpart C – Affirmative Action Program

Section 60-300.40 Applicability of the affirmative action program requirement

The NPRM proposed one small change to paragraph (c) of this section, specifying

that a contractor's affirmative action program shall be reviewed and updated annually "by the official designated by the contractor pursuant to § 60-300.44(i)." We received no comments on this section. Accordingly, § 60-300.40 is adopted in the final rule as proposed.

Section 60-300.41 Availability of affirmative action program

The proposed regulation added a sentence requiring that, in instances where the contractor has employees who 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, in light of the increased use of telecommuting and other flexible workplace arrangements. This proposal in many respects mirrored the electronic notice requirements set forth in paragraph 10 of the EO Clause at § 60-300.5 of the rule. OFCCP received 6 comments from an individual, two law firms, two contractors and a contractor association regarding the proposed revisions to this section, discussed in turn below.

The comments from the two law firms assert that the proposed changes regarding data collection and analysis in §§ 60-300.44(f) and 60-300.44(k) change the character of the VEVRAA AAP by including potentially confidential information and should warrant excluding "data metrics" contained in the AAP when the AAP is accessible by applicants and employees. One of these comments indicated that even if data is aggregated, it may still identify an employee as a veteran violating confidentiality, e.g., one hire occurs for which the position is named and the individual is identified as a disabled veteran. Another comment similarly recommended that a "soft" copy of the AAP be made

available to those requesting a copy. Finally, one comment noted that the AAP should simply be made available at the convenience of the requesting applicant and/or employee, which is essentially the function of the existing rule.

In response to these comments, and as part of the effort to focus the final rule on those elements that are of critical importance to OFCCP and reduce burden on contractors where possible, the final rule does not incorporate the proposals in the NPRM 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 § 60-300.41 in that regard. Therefore, contractors must still make available their affirmative action programs to employees and applicants for inspection upon request. We further clarify, in light of the modern workplace in which more and more workplaces house information electronically, that contractors may respond to requests by making their AAPs available electronically, so long as the requester is able to access the electronic version of the information. In response to the law firm commenters' concerns about confidentiality and the AAP's "data metrics," OFCCP revises the language for the final rule to state that "[t]he full affirmative action program, <u>absent the data metrics required by § 60-300.44(k)</u>, 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.

Section 60-300.42 Invitation to self-identify

The NPRM included three significant revisions to this section: (1) requiring the contractor to invite all applicants to self-identify as a "protected veteran" prior to the offer of employment without disclosing the particular category of veteran; (2) in addition to the new pre-offer inquiry, requiring a post-offer self-identification process to collect more refined data regarding the specific category or categories of protected veteran to which an applicant belongs; and (3) requiring, rather than suggesting, that the contractor seek the advice of the applicant regarding accommodation. OFCCP received 28 comments on this section, 9 of which were in support of the self-identification proposals in the NPRM. For those that opposed portions of the NPRM, most comments centered on the issues of burden, the possibility of inaccurate self-reporting, alleged conflict between the pre-offer inquiry and requirement to seek accommodation advice with State and Federal laws (most notably the ADA and the ADAAA), and interplay between the pre-offer data collection requirement and the Internet Applicant Rule set forth in the regulations for Executive Order 11246. The proposals and the comments to these proposals, and the revisions made to 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

As discussed in the NPRM, the primary reason for proposing a pre-offer invitation to self-identify was to allow the contractor, and subsequently OFCCP, to collect valuable, targeted data on the number of protected veterans who apply for Federal contractor positions. The data would enable the contractor and OFCCP to measure the

effectiveness of the contractor's recruitment and affirmative action efforts over time, and thereby identify and promote successful recruitment and affirmative efforts taken by the contractor community.

At the outset, several commenters addressed the issue of whether a pre-offer invitation to self-identify as a protected veteran was legally permissible under the Americans with Disabilities Act regulations, which limit the extent to which employers may inquire about disabilities prior to an offer of employment. The vast majority of commenters addressing the issue – including disability rights groups, veterans groups, and two commenters representing the contractor community – stated that the proposed pre-offer inquiry was legally permissible. Two commenters representing contractors on EEO matters disagreed. One stated that its clients avoid pre-offer inquiries specifically to avoid "running afoul" of the ADA. The other stated that "[w]hile the ADA provides that an applicant can ask for a reasonable accommodation during the hiring process, employers cannot otherwise ask any questions about an individual's disability."

OFCCP believes the concerns of these two commenters are based on an incorrect reading of the ADA and its regulations. As we discussed in the NPRM, the ADA and section 503 regulations specifically permit the contractor to conduct a pre-offer inquiry into disability status if it is "made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities," such as VEVRAA. See 29 CFR 1630.13, 1630.14; 41 CFR 60-741.42. Further, as discussed in the NPRM, even though a pre-offer inquiry into disability status is legally permissible, the proposed pre-offer inquiry does not ask about disability status specifically; rather, it only asks that the applicant identify whether he or she is a protected veteran generally. Regardless, the

"affirmative action" exception carved into the ADA clearly allows the type of pre-offer self-identification proposed in the NPRM, and thus there is no legal reason to modify it.[19]

Among those commenters agreeing that the proposed pre-offer inquiry was legally permissible, however, two commenters – a disability rights association and a contractor – stated that the inclusion of paragraphs (a)(1) and (a)(2), which describe the conditions under which pre-offer invitations of disabled veterans are legally allowed, is confusing when they are stated "additionally" to the required pre-offer invitation in paragraph (a). One of these commenters stated it was unclear whether the inclusion of these paragraphs "intended to require pre-offer invitation for all protected veterans or only for non-disabled protected veterans." Given that the new regulation requires all contractors to conduct a pre-offer inquiry that is lawful under the ADA, this guidance is now largely superfluous. Accordingly, as suggested by these commenters, this language (i.e., the third sentence of paragraph (a), and subparagraphs (1) and (2)) are not included in the final rule.

The majority of those commenting upon the scope of the proposed pre-offer inquiry – requesting "protected veteran" status in the aggregate, as opposed to inviting individuals to identify as one or more of the categories of protected veteran – approved of it, but one HR consulting firm commenter stated that the pre-offer inquiry should ask individuals to denote the specific categories of veteran under which they fall, and that contractors could then aggregate the data for purposes of evaluating their outreach efforts and setting benchmarks. OFCCP declines to require contractors to collect data by

[19] 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 a requirement to invite pre-offer self-identification of disability is permissible under the ADA and its regulations. This letter will be posted on OFCCP's Web site.

protected veteran category at the pre-offer stage. We believe maintaining such refined data at this stage would be more burdensome on contractors than simply capturing whether interested job seekers are protected veterans or not, particularly given that the overall population of protected veterans is relatively small and that further division of the pool would tend to reduce the contractor's ability to engage in any meaningful data analysis. Further, as discussed in the NPRM, the contractor's obligations would be the same with respect to each category of protected veteran at the pre-offer stage, thus there is limited benefit at that stage to knowing the specific categories of protected veteran to which each individual belongs.

The majority of those commenters opposed to the proposed pre-offer inquiry expressed concerns about the accuracy of veteran self-identification data. First, several commenters from the contractor community asserted that not all protected veterans will self-identify – either due to privacy concerns, fear of reprisal, or a failure to understand that they fall within one of the four listed categories of protected veterans – which will result in an underreporting of actual protected veteran applicants. Second, the commenters asserted that some veterans that are not protected by VEVRAA may nevertheless choose to self-identify as a protected veteran due to a misunderstanding of the four categories of protected veterans, which could lead to an inaccurate over-reporting of protected veterans. While some commenters urged OFCCP to eliminate the pre-offer inquiry entirely on these grounds, others propounded suggestions for how to increase the accuracy of self-reporting. One commenter suggested that the invitation include language that the applicant must <u>know</u> he or she is a protected veteran in order to self-identify as such (rather than the model language in Appendix B, which asks

applicants to self-identify if they believe they are a veteran who may be protected), in order to "minimize the possibility of self-identification error." Several other commenters requested that OFCCP provide contractors (and, in turn, applicants) with more detailed descriptions of the protected veteran categories, including, for instance, the specific campaign badges or Armed Forces service medals that qualify a veteran as an "active duty wartime or campaign badge veteran" or "Armed Forces service medal veteran," respectively.

At the outset, while OFCCP concedes the possibility that self-reporting data on veterans will not be entirely accurate, OFCCP disagrees that this is sufficient reason to eliminate the pre-offer inquiry. Contractors already collect and report data on the number of protected veteran employees and new hires on an annual basis pursuant to the VETS-100A form. While this data is subject to the same accuracy concerns, it provides the Department with a useful measure for identifying and tracking the number of protected veteran new hires and employees among the Federal contractor workforce. Similarly, while self-reported applicant data will never be perfect, it is nonetheless a useful mechanism for collecting important information that currently goes completely unrecorded – the number of protected veterans who are able to connect to Federal contractors and submit an expression of interest in employment. With regard to more detailed descriptions of the protected veteran categories, we note that the campaign badges and service medals are created and administered by the Department of Defense and the individual services of the Armed Forces, and thus those with questions would be best served consulting with DOD or the issuing military service if they have questions

about whether a particular badge or medal is a campaign badge or service medal that provides coverage under VEVRAA.

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 a protected veteran under VEVRAA 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 a protected veteran 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 final 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).[20] According to that guidance, in general, an applicant is a person who has 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 contractors' 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 data bases which they mine for applicants when they have a job opening. In recognition of these concerns, and consistent with EO 13563's focus on

[20] 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 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."

simplifying and harmonizing requirements, OFCCP will permit contractors to invite applicants to self-identify as a protected veteran at the same time as the contractor collects the demographic data for applicants required under EO 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 with regard to disabled veterans 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 VEVRAA to use qualification standards, including at the "basic qualifications" screen stage, that screen out or tend to screen out a disabled veteran or class of disabled veterans 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 a disabled veteran if that individual could satisfy the criteria with a reasonable accommodation. See § 60-300.21(g). 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 VEVRAA at 60-300.80 in the same manner as the recordkeeping requirements under E O 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 VEVRAA.

The VEVRAA 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. These 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 the EO 11246, 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 E O11246 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 a protected veteran.

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 who are disabled veterans 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 who 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 VEVRAA, contractors should be able to operate as they have been using their existing systems and processes because this final 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.

One commenter expressed concern regarding possible liability in connection with storing large amounts of sensitive data, such as that disclosed in an applicant's pre-offer self-identification form. However, the current regulations have long required contractors

to maintain sensitive self-identification data that comes from post-offer inquiries, thus contractors should already have a mechanism in place for the proper storage of this information. While the additional pre-offer data increases the amount of data that contractors will need to maintain, this is largely a scope or resources question, not an information security issue. We have addressed the expected cost and burden of the pre-offer requirement in the revised Regulatory Procedures section of the final rule.

Finally, several commenters asserted that the new pre-offer inquiry would require significant lead time for contractors to change their current human resources information and applicant tracking systems so as to capture the pre-offer self-identification data. A revised burden analysis for these endeavors is included in the Regulatory Procedures section of the final rule. With regard to the amount of lead time necessary to incorporate the changes in this paragraph, one law firm commenter suggested that contractors be given "a substantial grace period, which we propose to be at least one to two years," so that contractors and their systems providers can get up to speed. Another law firm commenter was less specific with the time needed, but said that "90 days would not be enough time for some companies that do not have the internal resources to do it themselves." OFCCP has consulted with information systems analysts regarding an appropriate amount of preparation time, and on the basis of those discussions believes an effective date of 180 days after publication of the final rule is sufficient for contractors to incorporate Appendix B, or a substantially similar form, into their systems. Moreover, as noted in the Introduction to this preamble, contractors are permitted to update their affirmative action programs to come into compliance with the new requirements during their standard 12-month AAP review and updating cycle. If a contractor has prepared an

AAP under the old regulations it may maintain that AAP for the duration of the AAP year even if that AAP year overlaps with the effective date of this final rule.

- Paragraph (b): Post-offer invitation to self-identify

The NPRM created a new paragraph (b) to describe the contractor's duty to invite applicants to submit post-offer self-identification regarding the specific category of protected veteran to which the applicant belongs, and retain this information. As we explained in the NPRM, this self-identification requirement will enable the contractor to capture refined data pertaining to each category of protected veteran to foster the contractor's compliance with the requirement to report such data set forth in the Veterans' Employment and Training Service (VETS) regulations at 41 CFR part 61-300. Although OFCCP received no comments specific to new paragraph (b), the paragraph is revised in the final rule to make this intent explicit. Accordingly, paragraph (b) is revised to state that, post-offer, "the contractor shall invite applicants to inform the contractor" if they belong to one or more of the categories of protected veteran "for which the contractor is required to report pursuant to 41 CFR part 61-300." This clarifies that the contractor's paragraph (b) obligation to ask applicants to identify their specific protected veteran classification(s) is contingent upon their having an obligation to report that information on the VETS-100A, or other future form, pursuant to 41 CFR part 61-300.

- Paragraph (c): Content of invitations

The NPRM revised paragraph (c) of this section by deleting the second sentence of the parenthetical at the end of the paragraph. This sentence described the format of and rationale behind the current Appendix B, which has been substantially amended in light of the new self-identification procedures proposed herein. We received no

comments on this paragraph. Accordingly, the language in the NPRM is adopted as proposed. In addition, we revised the first sentence of paragraph (c) to say that invitations to self-identify "shall state that the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to the Act." This language replaces the statement in the existing regulation that "a request to benefit under the affirmative action program may be made immediately and/or at any time in the future." OFCCP believes that this statement could be misinterpreted to suggest that affirmative action must be "requested" by a protected veteran, thus confusing protected veterans and contractors alike.

- Paragraph (d): Requirement that contractor seek applicant's advice regarding accommodation

There were three proposed changes to paragraph (d). First, we revised the language to reflect the newly proposed self-identification process in which applicants will only identify themselves as disabled veterans at the post-offer self-identification stage. Second, we replaced the term "appropriate accommodation" in paragraph (d) with "reasonable accommodation," which is the more broadly used and accepted legal term. OFCCP received no comments on these two changes, and thus the language in the NPRM is adopted as proposed.

As for the third proposed change to paragraph (d), the NPRM required, rather than suggested, that the contractor seek the advice of the applicant regarding accommodation. As we explained in the NPRM, the idea was that this requirement would help to initiate a robust interactive and collaborative process between the contractor and the employee or applicant to identify effective accommodations that will

facilitate a disabled veteran's ability to perform the job. OFCCP received 10 comments from various organizations on this change, all of which opposed the proposal.

Several of these commenters argued that the proposed change is inconsistent with (and, according to some commenters, in violation of) the ADA, which states that an employer may ask all individuals if they require a reasonable accommodation, not just individuals that self-identify as disabled. Specifically, several commenters cited ADA enforcement guidance from the EEOC stating that if an employer asks post-offer disability-related questions to entering employees, it must ask the same question to all entering employees in the same job group, and not a single classification of employees (such as "disabled veterans"). However, as set forth in the discussion of paragraph (a) of this section, both herein and in the NPRM, the EEOC's interpretive guidance for its ADA regulations permits inquiries into disability status if made pursuant to another Federal law or regulation. It states that "[t]he ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law." See Appendix to 29 CFR part 1630. Accordingly, the proposed affirmative action obligation, in requiring contractors to inquire with disabled veterans offered employment to determine if they need a reasonable accommodation, is not inconsistent with the ADA.

However, other commenters, including a human resources association, asserted that disabled veterans should not be treated differently than disabled non-veterans with regard to reasonable accommodations, and that creating unique processes for veterans

could serve to stigmatize veterans rather than help them. One commenter argued that the proposed change implies that contractors should assume that just because an individual self-identifies as a disabled veteran, they are in need of an accommodation, which may have negative and unintended consequences. Several other comments suggested that the proposed change does not take into account the administrative burden associated with ascertaining whether an individual is legally entitled to an accommodation and to research alternative sources of funding for requested accommodations when the accommodation is financially burdensome. Since the contractor is to be proactive in determining whether an individual needs an accommodation, the contractor would potentially have to conduct this research for each person that self-identifies as having a disability.

The final rule does not incorporate the proposed requirement, and instead retains the existing rule's suggestion that contractors ask disabled veteran applicants whether an accommodation is necessary. The final rule also states that the contractor should engage in an interactive process with the applicant to help identify a reasonable accommodation, which is consistent with ADA guidance. Eliminating the proposed requirement alleviates the administrative burden concerns raised by some commenters, thus reducing the burden associated with the rule, while highlighting the importance of the reasonable accommodation obligation.

Finally, the final rule makes a technical, non-substantive change by eliminating the parenthetical at the end of the second sentence which provides an example of a post-offer inquiry. OFCCP finds that this language is unnecessary and potentially confusing.

Section 60-300.43 Affirmative action policy

The NPRM proposed replacing the phrase "because of status as a" in this section to "against," in order to clarify that the nondiscrimination requirements of VEVRAA are limited to protected veterans and that reverse discrimination claims may not be brought by individuals who do not fall under one of the protected veteran categories. We received no comments on this section. Accordingly, § 60-300.43 is adopted in the final rule as proposed.

Section 60-300.44 Required contents of affirmative action programs

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

- Paragraph (a): Affirmative action policy statement

Section 60-300.44(a) requires contractors to state their equal employment opportunity policy in the company's AAP. The NPRM proposed revising the section 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. The NPRM also proposed revising paragraph (a) to require the contractor's chief executive officer to clearly articulate their support for the company's AAP in the policy statement. OFCCP received three comments on the proposed revisions from an individual, a law firm and a human resources consulting group.

There were a variety of comments on this section. One individual suggested that the policy statement include 'retain' in the following sentence "…the contractor will:

Recruit, hire, train and promote persons in all job titles…" Another commenter, a law firm, recommended revising the language so that it is inclusive of contractors that have foreign parent companies by requiring the top United States based executive to attest to their support for the contractor's AAP. Finally, the human resources consulting group expressed concern that OFCCP seemed to dictate the terms of the policy statement, but did not provide a sample statement as an Appendix.

OFCCP declines to add the term "retain" to this section. The regulation currently states that the contractor's affirmative action policy must state that it will "recruit, hire, train and promote persons in all job titles, <u>and ensure that all other personnel actions are administered</u>, without regard to" protected veteran status. Given that the regulation already prohibits veteran status to be a consideration for "all other personnel actions," there is no need to delineate further specific personnel actions in the regulatory text.

OFCCP agrees with the suggestion to revise the language of this section to clarify the level of company leadership that must demonstrate their support for the company's AAP. The purpose of the proposed revision is to ensure that the statement 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, § 60-300.44(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 …"

OFCCP declines to make any modifications to the portion of § 60-300.44(a) related to the content of the policy statement. OFCCP outlined the required content of the policy statement when the agency issued the final rule implementing VEVRAA in 2007 (72 FR 44408). The NPRM did not propose any revisions to this language. OFCCP declines to append a policy statement to the rule. OFCCP believes that providing a policy statement in the Appendix may discourage contractors from proactively developing a policy statement that reflects the company's culture and values. If contractors need additional guidance on how to develop an equal opportunity policy statement, OFCCP staff is available to provide technical assistance.

- Paragraph (b): Review of personnel processes

The proposed rule made two changes to this paragraph. First, it required that the contractor review its personnel processes on at least an annual basis to ensure that its obligations are being met, as opposed to "periodically." Second, the proposed paragraph (b) mandated certain specific steps (carried over from the 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 veteran applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for disabled veterans who were selected for hire, promotion, or training programs.

OFCCP received 13 comments from contractors, contractor associations and law firms regarding these proposals. Eleven of the 13 comments asserted that a significant

burden was imposed by the proposed section, much greater than that calculated by OFCCP in the NPRM's Regulatory Procedures section. For instance, regarding compliance with item (1) above, the commenters indicated that for most contractors there are no such tracking systems in place and these will take time, staff, and money to establish. The comments also indicate that promotion and training opportunities, unlike hiring, are not as readily distinguishable for individual candidates. It is noted that these opportunities may be available to all employees, take a number of different forms, and may be noncompetitive. The comments indicate it is "unreasonable" to make this mandatory because it fails to recognize these differences and creates additional administrative and documentary burdens. These commenters further objected that the requirement to create and maintain a statement of reasons for every instance in which a protected veteran was denied a position or training activity was unreasonable and tantamount to requiring a drafted legal defense before any claims were brought, could serve to "drive underground" the real reason for the rejection, and treated protected veterans differently than protected classes under E O 11246 and section 503.

Based on the comments submitted and the questions raised about the efficacy of these requirements toward the end of increasing employment of protected veterans as compared to the burden that it creates, OFCCP does not adopt the proposal as drafted in the NPRM, and the final rule retains the existing language in § 60-300.44(b). However, in so doing, OFCCP reiterates that the existing paragraph (b) contains several requirements – including ensuring that its personnel processes are careful, thorough, and systematic, ensuring that these processes do not stereotype protected veterans, and designing some kind of procedures that facilitate a review of the implementation of these

obligations – that still apply to contractors. As they do currently, contractors may coordinate the periodic review of their personnel processes for compliance with both VEVRAA and section 503.

- 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 contemporaneously document those instances in which it believes that an individual would constitute a "direct threat" as understood under the ADA and as defined in these regulations.

As to the proposal to require annual reviews of physical and mental job qualification standards, OFCCP received 10 comments from contractors, a contractor association, employee and other associations, and law firms. Nine of the 10 comments 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 HRIS systems. One employment benefit consultant firm commenter characterized the burden as "one of the most burdensome requirements of the proposal." Additionally, one comment noted that the assumption that a description of the job's physical and mental requirements should already be available when a job opening occurs is a false assumption.

Five comments suggested less burdensome approaches. One comment suggested continuing to follow the current regulation and conducting periodic reviews. Three comments suggested reviewing the qualifications only when a change in the job occurs. One of the three comments also noted that an initial review should occur with the start of the covered contract along with reviews when changes occur. One comment suggested doing reviews of only "jobs filled," not all job openings.

We note at the outset that the existing regulation clearly prohibits the contractor from using job qualification standards that are not job related and consistent with business necessity and have the effect of discriminating (or perpetuating discrimination) against protected veterans. See 41 CFR 60-300.21(d), 60-300.44(c)(2). This is a primary reason that the affirmative action provisions require reviews of physical and mental job qualification standards. To the extent that contractors are not conducting these reviews at all, they are already in violation of the existing regulations.

With this in mind, and taking into account the 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)(1), 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.

With regard to the second proposed change in paragraph (c)(1) requiring that the contractor document its job qualification standard reviews, we received four comments. All of these commenters questioned what evidence will be necessary to demonstrate that

a review has been completed. 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. OFCCP declines to adopt this proposal into the final rule as well, and retains the existing provision. As for the comment that the "job relatedness" standard lacks clarity and should be replaced with an "essential functions" standard, we note that the "job related and consistent with business necessity" standard has been used in the existing VEVRAA regulations for several years, and is the same standard that is well-understood and applies to the section 503 regulations prohibiting discrimination on the basis of disability. We therefore decline to revise the standard in the final rule.

Finally, with regard to the third proposed change requiring the contractor to contemporaneously document those instances in which it believes that an individual would constitute a "direct threat," one comment raised the concern that the provision differed from the requirement in proposed § 300.44(b)(3) to disclose the "direct threat" determination to the affected applicant or employee. However, because proposed § 60-300.44(b)(3) was not adopted into the final rule, we decline to amend this paragraph to coordinate with it. Rather, we adopt paragraph (c)(3) as proposed in the NPRM.

- <u>Paragraph (f): Outreach and recruitment efforts</u>

Paragraph (f) as it existed prior to the NPRM suggested a number of outreach and recruitment efforts that the contractor could undertake in order to increase the employment opportunities for protected veterans. The NPRM proposed several changes to this paragraph: the proposed paragraph (f)(1) required that the contractor enter into three linkage agreements with veteran-related entities to serve as sources of finding

potential veteran applicants; 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 self-assessments 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 34 comments on the proposed changes to § 60-300.44(f). While a few commenters praised OFCCP's efforts to strengthen Federal contractors' recruitment and outreach efforts, the majority of the comments expressed concerns about the proposed rule. 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.

As stated above, paragraph (f)(1) required contractors to enter into three linkage agreements with three different veteran-related entities: specifically, the proposal required linkage agreements with (1) the Local Veterans' Employment Representative (LVER) in the local employment service office nearest the contractor's establishment; (2) one of several organizations listed in the existing regulation, with the addition of the Department of Defense Transition Assistance Program (TAP); and (3) an organization listed on the National Resource Directory (NRD), a website provided by the Departments of Labor, Defense, and Veterans Affairs. Commenters voiced several concerns with this proposal. Several commenters expressed concern about the administrative and financial burden related to requiring three linkage agreements. Further, a specific point made by one commenter echoed in general terms by several others was that, if the linkage

agreement requirement was to be a "per establishment" requirement rather than a "per contractor" requirement, a Federal contractor with multiple establishments could end up entering into hundreds of linkage agreements. Commenters also questioned the capacity of the organizations that are outlined in the proposed rule, noting that some of the entities listed in the NRD do not exist anymore, the DOD's TAP program does not reach all service members, and that some veterans' service organizations have difficulty generally getting through to staff or returning phone calls. While two commenters stated that entering into linkage agreements with LVERs was an appropriate requirement, several others raised the concern that LVERs, of which there are fewer than 1,000 in the entire country, may not have the capacity to enter into and manage linkage agreements with all Federal contractor establishments.

In light of these comments, and in order to reduce the burden on contractors, the final rule does not incorporate the proposal requiring contractors to enter into linkage agreements. Rather, the final rule retains the existing language of § 60-300.44(f), which requires that the contractor undertake "appropriate outreach and positive recruitment activities," in paragraph (f)(1)(i) of the final rule, and then provides a number of suggested resources in paragraph (f)(2)(i) that contractors should utilize to carry out their general recruitment obligations. Paragraph (f)(2)(i) of the final rule differs from the existing rule only in that it adds two additional resources discussed in the NPRM – the Department of Defense Transition Assistance Program (TAP) and the National Resource Directory – to the list of suggested resources that contractors should consult. This will allow contractors flexibility to choose the resources they feel will be most helpful in identifying and attracting protected veteran job seekers. It will also provide contractors

with greater flexibility to switch between and among different resources in order to find those that are the most effective, in light of the self-assessment obligation set forth in paragraph (f)(3) of the final rule. For those commenters who had concerns that the NRD contained resources that were out of date or did not contain additional resources that would be a good source for protected veteran job seekers, we note that the NRD is a dynamically-updated resource, and that contractors may suggest that additional veterans groups and service organizations be added to it through the "Suggest a Resource" link on the NRD's front page. On a related note, however, the reference to the specific URL address for the NRD's employment resources in the text of the regulation has been revised to refer to the NRD's home page. As one commenter noted, the URL listed in the regulation had changed since the publication of the NPRM, and may very well change again in the future, thus listing the URL address for a specific web page in the regulation text makes little sense.

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 VEVRAA's affirmative action obligations. Compliance with this requirement could be met by providing subcontractors with the affirmative action policy statement it is already required to post on company bulletin boards pursuant to § 60-300.44(a), either electronically or in paper

form. A discussion responding to commenters' concerns regarding the burden of compliance with this requirement is found in the Regulatory Procedures section of this final rule.

OFCCP received relatively few comments regarding the proposed paragraph (f)(2) (paragraph (f)(2)(ii) in the final rule), which set forth additional suggested outreach efforts that contractors could engage in to increase its recruitment efforts. These comments centered on the proposed paragraph (f)(2)(vi) (which is paragraph (f)(2)(ii)(F) in the final rule), which states that "the contractor, in making hiring decisions, shall consider applicants who are known protected veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable" (emphasis added). The commenters indicated that the word "shall" suggested that contents of that paragraph were mandatory. The use of "shall" in this paragraph was an inadvertent error in the NPRM. OFCCP intended the paragraph to state that contractors "should consider applicants…" and the final rule amends the NPRM in that regard. We also note that this suggested activity is intended to be a limited one. Contractors who choose to consider protected veterans 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 by which they will consider applicants for other positions. This provision is intended to be flexible and is not required of contractors.

The final rule adds an additional resource to paragraph (f)(2)(ii) that contractors are suggested to use, and that is the Veterans Job Bank. The Veterans Job Bank, created by the Obama Administration and launched in November 2011 as part of the National

Resource Directory website, is an easy-to-use tool aimed at helping veterans find job postings from companies looking to hire them. Through the Veterans Job Bank, veterans are able to search hundreds of thousands of jobs (500,000 at the time the Veterans Job Bank was launched) by location, keyword, and military occupation code (MOC). Further, the website provides detailed instructions for employers wishing to post their job openings with the Veterans Job Bank, so that the resource can continue to grow and become an even more effective resource for veterans seeking new job opportunities and employers seeking qualified workers.

Paragraph (f)(3) of the NPRM required the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting qualified protected veterans, and document its review. 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 veterans hired, the proposed rule would effectively become a quota system for hiring protected veterans. Another commenter questioned whether overall hiring statistics would provide much useful information about the effectiveness of specific outreach efforts. Commenters also had concerns about the requirement to analyze hiring data for the current year as well as the previous two years. One commenter stated that "[e]very other analytical requirement under the affirmative action regulations, including Executive Order 11246, focuses on reviewing the past one-year recordkeeping period." 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) in response to these comments. With regard to the comment suggesting that the number of veterans hired was the "only" standard for analyzing the effectiveness of outreach efforts, OFCCP respectfully disagrees. The proposed rule makes clear that the number of veterans hired should be a primary factor considered, given VEVRAA's stated purpose to "employ and advance in employment" protected veterans, but is far from the only metric used for analyzing external outreach and recruitment efforts. Rather, the proposed rule required that the contractor consider all the metrics required by § 60-300.44(k) (which includes applicant and hiring data), but also clearly allows the contractor to consider any other criteria, including "a number of factors that are unique to a particular contractor establishment," in determining the effectiveness of its outreach, so long as these criteria – whatever they are – are reasonable and documented so that OFCCP compliance officers can understand what they are. The purpose of the self-assessment is simply to ensure that the contractor thinks critically about how to evaluate and improve upon its recruitment and outreach efforts in order to maximize its connections to protected veterans seeking jobs. OFCCP strongly believes this is a worthy goal – indeed, a goal central to the very heart of VEVRAA's affirmative action obligations – and that the proposal provides the contractor a significant amount of flexibility to meet that goal.

With regard to the timeframe of applicant and hire data that a contractor must consider when evaluating its outreach efforts – the current year and two previous years – OFCCP understands that this is a longer period than that required by, for instance, the

Executive Order, which looks to hiring and applicant data over the previous year. However, VEVRAA is a different law with different analytic mechanisms. As explained in the NPRM, the purpose of considering a longer history of data under VEVRAA is because it will provide more complete information through which a contractor can understand which outreach efforts it has engaged in historically have tended to correspond with increased veteran applicants and hires. Further, we do not believe that requiring contractors to look at and compare a few additional numbers, which are already calculated pursuant to § 60-300.44(k), is onerous, particularly compared to the potential benefit. Accordingly, we retain the paragraph (f)(3) in the final rule as written in the NPRM. OFCCP has conducted an amended calculation of the cost of this provision in light of the comments provided, set forth in the Regulatory Procedures section of this final rule.

The final rule makes one small 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.

Finally, several commenters expressed concern about the five-year recordkeeping requirement set forth in paragraph (f)(4). As discussed previously in this final rule and in the discussion of recordkeeping in § 60-300.80, and for the reasons stated therein, OFCCP amends this to a three-year recordkeeping requirement. While this documentation may take several forms, such documentation may include, for example, the numbers and types of outreach and recruitment events, the targeted group(s) or types

of participants, when and where the events occurred, and who conducted and participated in the outreach and recruitment efforts on behalf of the contractor.

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

This section 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 protected veterans. 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, informing all applicants and employees of the contractor's affirmative action obligations, and conducting meetings with management and company leadership to ensure they are informed about the contractor's obligations. The NPRM also proposed requiring contractors to hold meetings with employees at least once a year to discuss the company's VEVRAA affirmative action policy. OFCCP received 17 comments on § 60-300.44(g) from a variety of groups, including a disability association, an employee association, four contractor associations, four law firms, and two individuals, among others.

One commenter proposed maintaining some of the language in the current § 60-300.44(g)(1). The commenter expressed concern about the NPRM's deletion of the following sentence: "[t]he scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing practices are adequate." The commenter asserted that deleting this sentence leaves the requirement without an applicable measure of compliance. The commenter recommended maintaining the language in the section and defining "adequate" to mean

"being received and understood by veterans, as determined in sample interviews."

The final rule adopts the proposed language in § 60-300.44(g)(1) without change because the rule provides a measure of compliance, thus making the suggested change unnecessary. This section 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." Further, the revisions clearly identify the actions that contractors must undertake to meet this obligation.

With regard to the remainder of paragraph (g), the existing rule has a single paragraph (g)(2) that lists eight separate actions that contractors were suggested to undertake to implement and internally disseminate their internal affirmative action policies. The NPRM proposed to mandate some of these actions and thus restructured the remainder of paragraph (g). Paragraph (g)(2) of the NPRM listed five internal dissemination efforts that would be required of all contractors: (i) including the contractor's affirmative action policy toward veterans in the contractor's policy manual; (ii) informing all employees and prospective employees of the contractor's affirmative action obligations and having annual meetings with employees to discuss these obligations; (iii) conducting meetings with executive, managerial and supervisory personnel to ensure they understood the intent of the policy and responsibility for its implementation; (iv) discussing the policy thoroughly in employee orientation and management training programs; and (v) if the contractor is party to a collective bargaining agreement, informing union officials and/or employee representatives of the

contractor's affirmative action policy and requesting the union's cooperation in implementing it. Paragraph (g)(3) of the NPRM listed additional dissemination efforts that would continue to be suggested efforts as in the existing rule, such as publicizing its affirmative action policy in company publications and including in these publications features and articles of protected veteran employees. Finally, paragraph (g)(4) of the NPRM set forth the recordkeeping obligations in connection with those actions contractors undertook.

We received many comments in response to the elements that were required in paragraph (g)(2) of the NPRM. Some commenters requested alternative options to including the affirmative action policy in the contractor's policy manual pursuant to the proposed § 60-300.44(g)(2)(i). A law firm suggested allowing for posting the policy on the company's intranet where similar human resources and EEO pronouncements are found. One comment requested that OFCCP clarify the requirement to make it optional for contractors that do not have policy manuals. Several of the comments expressed concern about the requirement in the proposed paragraph (g)(2)(ii) to hold a meeting at least once a year with employees to discuss affirmative action obligations. Commenters asserted the OFCCP miscalculated the burden associated with hosting these meetings, stating that requiring this element would incur a much higher burden. Commenters stated that OFCCP should allow contractors to disseminate the equal employment opportunity policy at regularly scheduled meetings and allow for electronic and web-based formats. Commenters also stated that it was unclear what would constitute adequate training and compliance with the newly required elements of paragraph (g)(2).

In response to the comments, and with an eye toward reducing the burden on

contractors, the final rule narrows the scope of the internal dissemination efforts that will be required of contractors from that set forth in the NPRM. Two of the five elements that the NPRM proposed to require are maintained as requirements in paragraph (g)(2) of the final rule: (1) including the policy in the contractor's policy manual; and (2) notifying (a change from "meeting with" in the NPRM, in order to facilitate compliance) union officials to inform them of the policy and request their cooperation, if the contractor is party to a collecting bargaining agreement. The first of these requirements is modified slightly from what was proposed in the NPRM based on comments received so as to allow contractors to include the affirmative action policy either in the contractor's policy manual, or to otherwise make the policy available to its 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 protected veterans. 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 remaining elements that were required in the NPRM and/or were suggested in the existing rule remain in paragraph (g)(3) of the final rule as actions that the contractor is suggested to take, with the exception of the recordkeeping provision, which has been eliminated. We note, however, that to the extent any activities undertaken pursuant to

paragraph (g) involve the creation of records that are subject to the general recordkeeping requirement of § 60-300.80, contractors will still be required to maintain such documents as specified by § 60-300.80.

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

Section 60-300.44(h) outlines the contractor's responsibility to design and implement an audit and reporting system for the company's AAP. The NPRM proposed requiring contractors to document the actions taken to comply with the section. The NPRM also proposed that contractors maintain the records of their documentation subject to the recordkeeping requirements of § 60-300.80. OFCCP received one substantive comment on the proposed revisions. The commenter, a human resources consulting group, stated that the documentation requirement would be potentially burdensome.

This section is adopted in the final rule as proposed. Many of the requirements of § 60-300.44(h) necessitate developing documentation. The section requires contractors 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 protected veterans have had the opportunity to participate in all company professional and social activities, and measure the contractor's compliance with the program's specific obligations. Section 60-300.44(h)(2) requires contractors to undertake necessary action to bring the program into compliance. In order to conduct this kind of analysis, many contractors will likely develop documentation. The final rule formalizes that process for all contractors and requires that the documentation be maintained in accordance with the recordkeeping requirements of § 60-300.80. OFCCP feels strongly that this requirement will allow for a more effective review of whether the

contractor's affirmative action obligations in this paragraph are being met.

- Paragraph (i): Responsibility for implementation

The only substantive proposed change in paragraph (i) required that the identity of the officials responsible for a contractor's affirmative action activities must appear on all internal and external communications regarding the contractor's affirmative action program. In the current regulation, this disclosure is only suggested. 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 does not incorporate the proposal, and the language in the existing regulation that contractors should, but are not required, to take this step is retained.

- Paragraph (j): Training

Paragraph (j) of the existing regulation already 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 identify specific topics that must be considered in this training, including: the benefits of employing protected veterans; appropriate sensitivity toward protected veteran recruits, applicants and employees; and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans. The NPRM also required that the contractor record which of its personnel receive this training, when they receive it, and the person(s) who administer(s) the training, and maintain these records, along with

all written or electronic training materials used.

OFCCP received 12 comments from law firms, disability and veterans associations, and contractors and contractor associations. The majority of these comments raised concern regarding the burden the training requirements places on contractors and the manner in which OFCCP calculated it. Several comments noted specific concerns about what constitutes "sensitivity" training. Two commenters suggested that OFCCP or OFCCP-approved training programs should be offered, instead of the contractor having to create additional training to what is done now.

Taking these comments into account, and balancing the utility of the proposal against the burden that it would create for contractors, the final rule does not incorporate the portion of the proposed rule listing specific training items that must be covered by contractors or the specific recordkeeping requirement. However, the final rule does retain 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. Further, we note that to the extent any activities undertaken pursuant to paragraph (j) involve the creation of records that are subject to the general recordkeeping requirement of § 60-300.80, contractors will still be required to maintain such documents as specified by § 60-300.80.

- <u>Paragraph (k): Data Collection Analysis</u>

The proposed regulation added paragraph (k) to the rule, requiring that the contractor document and update annually the following information: (1) for referral data, the total number of referrals, the number of priority referrals of protected veterans, and

the “referral ratio” of referred protected veterans to total referrals; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known protected veterans, and the “applicant ratio” of known protected veteran applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known protected veterans hired, and the “hiring ratio” of known protected veteran hires 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.

As stated in the NPRM, the impetus behind this new section is that no structured data regarding the number of protected veterans 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 protected veterans 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 protected veteran candidates. Conversely, maintaining this information will provide the contractor with much more meaningful data for evaluating and tailoring its recruitment and outreach efforts.

OFCCP received a total of 52 comments from veterans’ associations, a disability association, an employee association, contractor associations, medical and other associations, law firms, and contractors. The three veterans and disability associations that commented on the proposal supported the required data collection and the goal behind it. Virtually all commenters from the contractor community opposed the proposal on varying grounds, including: issues with the integrity of the data to be collected (and

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. Further, 19 commenters, all of whom were members of the construction industry, submitted form letters asserting that they should be exempted from the requirement due to the unique nature of their industry. Finally, a number of commenters sought clarification of some of the processes set forth in paragraph (k). These issues are considered in turn below.

With regard to the eleven data elements required by the proposed new section, 40 comments (total includes 19 form letters) articulated data integrity concerns regarding data to be used in calculating the referral ratio. Comments describe the state employment service delivery systems as "self-service," leaving source identification to the candidate for the job, and as such making data unreliable in terms of identifying referrals. Examples were provided indicating that veterans may apply directly online with a company and may fail to identify that he/she was referred and even that he/she is a veteran. These comments also raised the issue that the referral ratio does not account for referrals from sources other than the state employment service delivery systems and may include referrals of veterans that are not qualified for the position(s) at issue. For the reasons set forth in the discussion of the proposed paragraph 5 of the EO Clause (§ 60-300.5), OFCCP has eliminated from the final rule the requirement for contractors to collect, maintain, and analyze information on the number of referrals and the ratio of priority referrals of veterans to total referrals, i.e., paragraphs (k)(1), (k)(2), and (k)(3) in the NPRM. This eliminates many of the concerns commenters had with regard to this paragraph, and also serves to decrease the burden on contractors.

However, eight of these comments also discussed the requirement to document and maintain applicant and hiring ratios. These comments reiterated data integrity issues and questions about the purpose of conducting the calculations or comparisons. One of the primary issues identified by commenters is that applicant data appears to be dependent upon self-identification which is not reliable. These issues were addressed in the discussion of the invitation to self-identify proposals in § 60-300.42(a). In short, demographic data based on self-identification will never be perfect, but it is the best data that is available.

Another identified concern 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 stated previously in this preamble, VEVRAA and the Executive Order are different laws with different data calculation and enforcement schemes, largely because of the differences in the Census and other data available. It is, therefore, not feasible to pattern data collection after the Executive Order regulations.

Comments also questioned the purpose of the job opening/job filled ratio. On a related point, one comment from a law firm noted that there appears to be an underlying assumption that there will be jobs that are not filled which is seldom true in the current economic environment. While it may not be a common occurrence in the current economic environment: (a) this does not mean it never happens (and if it never does, the burden on the contractor to calculate a “job fill ratio” shrinks to virtually nothing); and (b) the current economic environment will not last forever, at which point these regulations will still be in effect. The job fill ratio is a commonly recorded metric by

companies and HR professionals, as it measures the effectiveness of a company's recruiting efforts. Also, in some cases, a particularly low job fill ratio could be an indicator that the company's hiring process is being conducted incorrectly. This is useful information for both the contractor and OFCCP. We have eliminated the requirement, however, that contractors document and maintain for three years the ratio of jobs filled to job openings and the ratio of protected veterans hired to all hires. The remaining data points permit OFCCP and the contractor to make those calculations; thus separate data collection is unnecessary. Several commenters also objected to the collection of data about protected veteran status of applicants because it differs from the recordkeeping requirements related to Internet Applicants under the EO 11246 implementing regulations at 41 CFR 60-1.12. We addressed this issue in the discussion of the pre-offer self-identification requirement, and incorporate by reference that discussion here, but we wish to reiterate the salient points here in response. 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 applicable. The term Internet Applicant is defined at § 60-1.3. The term "applicant" is defined in OFCCP subregulatory guidance. The Internet Applicant definition is limited to OFCCP recordkeeping and data collection requirements under the Executive Order implementing regulations in § 60-1.12.

In sum, after consideration of the comments received, the final rule retains the NPRM's proposal for contractors to document and maintain applicant, hiring, and job fill

ratio data, but eliminates the requirement for contractors to document and maintain referral data.

With regard to burden calculation issues, 43 of the 52 commenters, entirely from the contractor community, indicated that OFCCP had not correctly calculated the burden of this section. Specific cost information was provided by two commenters. A contractor association that combined comments from three such entities indicated that a survey conducted by the association found OFCCP's estimate of six minutes a year to collect, maintain and "in some cases" calculate the data elements should be stated more accurately as six hours. A revised burden calculation is included in the Regulatory Procedures section of this final rule, as well as the methodology behind the revised calculation, but we wish to highlight a few points here where we believe the contractor community may have misunderstood portions of the burden we proposed they undertake. First, as stated above, the referral data metrics have been eliminated, which reduces the burden. Second, the hiring metrics are already maintained and calculated by the contractor as part of its existing obligation under 41 CFR part 61-300; therefore, that portion of paragraph (k) does not create any additional burden. The only "new" items proposed were those pertaining to the self-identification applicant data and the job fill ratio.

Also pertaining to burden, 19 commenters from the construction industry asserted that they should be exempted from this section of the proposed regulation because of the unique nature of the industry, namely that it is project-based and its workers are transitory and seasonal. Traditionally, construction contractors who meet the basic coverage requirements (contract amount and number of employees) of VEVRAA have

not been exempted from any of its provisions. This includes the collection of data under part 61-300 for the VETS-100A report, which tracks the numbers of new hires and overall employees who are protected veterans, data which makes up a significant portion of the requirements under paragraph (k). Accordingly, we decline to exempt construction contractors.

Commenters from the contractor community 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 § 60-300.44(f)(4) and § 60-300.80 herein, the final rule reduces the document retention requirement to three (3) years, and revises the language of paragraph (k) to reflect this change.

Finally, a few of the comments 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, as set forth in the discussion of § 60-300.44(f)(3), 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 discussed in that 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 their 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. The number of protected veterans in the civilian workforce is relatively small (at least compared to the number of women or minorities

nationwide), and thus we believe that running analyses by job groups or titles is unlikely to provide any meaningful analysis.

With regard to the third question, compliance determinations for paragraph (k) will be made based simply on whether the contractor has documented and maintained the five 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 the Executive Order, and enforcement actions will not be brought solely on the basis of statistical disparities between veterans and non-veterans in this data. Compliance officers will look to see whether the contractor has fulfilled its obligations under § 60-300.44(f)(3) to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) as well as any other reasonable criteria the contractor believes is relevant, and has pursued different and/or additional recruitment efforts if the contractor concludes that its efforts were not effective.

Section 60-300.45 Benchmarks for hiring

The NPRM proposed that the contractor establish annual hiring benchmarks by using existing data on veteran availability from five different sources of information: (1) Bureau of Labor Statistics data of the average percentage of veterans in the civilian labor force in the State where the contractor is located; (2) the raw number of protected veterans who participated in the employment service delivery system (i.e., One-Stop Career Centers) in the State where the contractor is located; (3) the referral, applicant, and hire data collected by the contractor pursuant to § 60-300.44(k); (4) the contractor's recent assessments of its outreach and recruitment efforts as set forth in § 60-

300.44(f)(3); and (5) any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of protected veterans. The last of these factors would allow the contractor to take into account other factors unique to its establishment that would tend to affect the availability determination. The NPRM also proposed to require contractors to document the hiring benchmark it established each year, detailing each of the factors that it considered in establishing the hiring benchmark and the relative significance of each of these factors, and required the contractor to retain this document for a period of five years.

OFCCP received a total of 38 comments on the proposed new requirement to establish annual hiring benchmarks for protected veterans. Three comments from organizations representing employee interests, including a disability association and a veterans association, stated that requiring benchmarks using available statistics was an important development, and supported the proposed regulation in general terms. The remaining comments, virtually all of which were from contractors or those representing contractors, opposed the requirement for contractor-established benchmarks as proposed. The reasons set forth for their opposition fell into five general categories: (1) a belief that the benchmarks were equivalent to "quotas"; (2) hiring benchmarks for protected veterans would adversely impact women and minorities; (3) the benchmarks as proposed were arbitrary and ineffective given that the data to be relied upon is not specific to veterans protected by VEVRAA and does not correlate to specific job groups, skills, or geographical areas; (4) the proposed five-year recordkeeping requirement conflicts with equivalent requirements in other laws administered by OFCCP; and (5) that setting benchmarks as proposed in the NPRM was unduly burdensome for contractors, and

OFCCP underestimated the cost and burden of the proposal. Further, some commenters provided recommendations for how to amend the proposed benchmarks, and others submitted questions seeking clarification of aspects of OFCCP's proposal. As detailed below, the final rule contains a substantial revision, allowing contractors the option of using a benchmark based on national veteran data. This option would substantially decrease the burden on contractors.

Before addressing each of the issues raised by the commenters, providing some further context and explanation for the proposal and how OFCCP envisioned the proposed requirement would work in practice is appropriate.

The primary intent of the benchmark proposal was to provide the contractor a yardstick that could be used to measure progress in employing protected veterans. OFCCP recognized that data demonstrating the availability of protected veterans that is similar to the data used to compute availability and establish goals under the EO 11246 program does not exist. Owing to the imprecise nature of the data upon which benchmarks would be based, OFCCP did not propose additional affirmative action obligations (or OFCCP enforcement actions) if a contractor did not meet the benchmark that it set. To be sure, OFCCP would expect that as part of its annual recruitment and outreach assessment, the contractor would assess why it did not meet the benchmark and adjust its recruitment efforts for the following year based on what it has learned. However, the proposal would not have OFCCP undertake enforcement action solely on the basis of a disparity between the benchmark and the actual percentage of veterans hired.

Further highlighting the difference between the benchmark proposal and the availability and utilization calculations traditionally required under the Executive Order 11246 program, OFCCP designed the benchmark proposal to allow the contractor maximum flexibility to take into account any additional factors it thought would increase or decrease a reasonable benchmark and to weigh these factors in any reasonable manner it saw fit. For instance, the contractor might start with the average veteran population for its state, reduce this number slightly to account for the fact that this data was not limited to protected veterans, average this number with the percentage of protected veteran applicants it had received over the past three years, and increase the resulting percentage slightly in anticipation of additional recruiting efforts it knew it would be doing in the next year. Then, the contractor could adjust this number up or down depending on the overall nature of the work performed at the establishment and how that coincides with experience veterans generally have, whether the contractor knew that there was a particularly high or low number of veterans in the relevant hiring area, or any other reasonable factor. So long as the contractor adequately described and documented the factors it took into account, it would comply with the § 60-300.45 requirement.

Finally, OFCCP intended the benchmark proposal to raise awareness of the significant number of veterans who, having made enormous sacrifices defending our nation on our behalf, nevertheless continue to face considerable difficulties finding work upon their return home. These veterans are highly trained, highly skilled, disciplined, and possess considerable leadership and team-building experience – in other words, excellent candidates for employment. While recent Federal efforts have greatly helped veterans' employment prospects, the service of these veterans to our nation abroad is still

too often forgotten, and the lasting contribution they can make to our private sector at home is still too often unfulfilled. The proposed hiring benchmark, therefore, is a tool to address this pressing national issue and the important role Federal contractors have in addressing it.

The purposes and intentions of the benchmark proposal made clear, we turn to the concerns raised by commenters.

Five commenters stated that the proposed benchmarks were the equivalent of a "quota." One commenter stated that the benchmark requirement would make contractors feel the need to meet the data requirements by hiring protected veterans who may not be qualified in order to meet the benchmark. Another believed the benchmarks suggested "quotas" because the availability analysis factors proposed do not factor in the approximate percentage of qualified protected veterans by occupational codes or geographical areas. Still another asserted that the proposed benchmarks were "quotas" and thus unconstitutional, as they were not "narrowly tailored" to "a compelling governmental interest."

The proposed benchmarks are not quotas and should not be conceived as quotas. The benchmark is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden. We hope the discussion in the previous paragraphs clarifying that contractors have significant flexibility to set their own benchmarks, and will not be cited for violations solely for failing to meet the benchmarks they set, allay the fears of these commenters. Further, the omission of breaking down the benchmarks by occupational codes or geographical areas is merely a function of the fact that such data does not exist

for protected veterans; it does not evince an intent to set rigid quotas. Finally, we note that the legal standard raised by the final commenter regarding the constitutionality of the benchmarks is incorrect. The "narrowly tailored to a compelling governmental interest" standard, otherwise known as "strict scrutiny," is applied to race-based decision making. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1996). The benchmarks proposed in the VEVRAA regulations are not race-based. Classifications that are based on veteran status are subject to so-called "rational basis review," and are legally permissible so long as the government action – in this case, the setting of benchmarks – is "rationally related" to a "legitimate governmental interest." See, e.g., Sturgell v. Creasy, 640 F.2d 843, 852 (6th Cir. 1981). Clearly, requiring contractors to set benchmarks for the hiring of protected veterans – particularly benchmarks that afford the contractor significant flexibility in their establishment and are not rigidly applied so as to automatically create a violation of the law if they are not met – is rationally related to the legitimate governmental interest of increasing outreach to and employment opportunities for protected veterans.

Six commenters, including individuals, contractor associations, consultants, and human resource management firms, expressed concern that requiring contractors to establish annual hiring benchmarks for protected veterans would adversely impact women and minorities, and thus impede contractors' nondiscrimination efforts under EO 11246, due to low numbers of minorities and women among protected veterans. One commenter asked for clarity on whether contractor veteran affirmative action efforts could be used as an affirmative defense if those efforts result in adverse impact against women, because a large percentage of protected veterans are men. Finally, a commenter

asked whether OFCCP would still require contractors to establish annual hiring benchmarks for protected veterans if women and minorities were underutilized. OFCCP does not agree that contractor-established benchmarks will adversely affect women or minorities. As an initial matter, recent Department of Veterans Affairs (DVA) data indicate that for Gulf War-era I veterans 30.3 percent were minority; Gulf War-era II veterans 33.6 percent were minority; and Vietnam era veterans 16.4 percent were minority.[21] This compares quite closely with the 27 percent national non-white population figure calculated by recent Census data.[22] For this reason alone we do not anticipate any potential effect on minorities. Although the representation of women among veterans is lower than in the civilian labor force, as discussed in more detail below, the employment of women will not be adversely affected by VEVRAA affirmative action requirements.

The purpose of, and requirements related to, VEVRAA benchmarks do not serve to impact the hiring of women or minorities. The purpose of VEVRAA hiring benchmarks is simply to provide the contractor a quantifiable means to measure its progress towards achieving equal employment opportunity for protected veterans. The contractor's obligation under § 60-300.45 is to establish a benchmark and document that it has done so. Contractors will not be subject to an enforcement action or found to be in violation of the VEVRAA regulations for failing to meet the benchmark. Hiring preferences are not required, the rule does not state that contractors will be expected to

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[21] U.S. Department of Veteran Affairs, National Center for Veterans Analysis and Statistics, "Minority Veterans 2011," May 2013, http://www.va.gov/vetdata/docs/SpecialReports/Minority_Veterans_2011.pdf (last accessed Aug. 15, 2013).

[22] U.S. Census Bureau, Overview of Race and Hispanic Origin:2010, Table 1: Population by Hispanic or Latino Origin and by Race for the United States: 2000 and 2010, Mar. 11, 2011, http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf (last accessed Aug. 15, 2013).

achieve benchmarks, and the VEVRAA rule does not prescribe actions the contractor must take if the benchmark is not achieved. The benchmark simply provides the contractor a tool to measure its progress in employing protected veterans. Consequently, the VEVRAA enforcement scheme does not provide an incentive for contractors to disfavor non-protected veterans in employment. The point of the benchmark is to encourage contractors to be inclusive of protected veterans rather than to discriminate against nonveterans through preferences or quotas.

OFCCP sees no reason why a contractor's VEVRAA obligations would affect its nondiscrimination obligations under EO 11246 or Title VII. VEVRAA does not require hiring preferences or veteran quotas. Because contractors are not required to meet the VEVRAA benchmark, efforts by contractors to do so would not be a defense to a charge of employment discrimination, including adverse impact, under another law. Further, a contractor's obligations under other civil rights laws will not create a violation of VEVRAA. To avoid this problem § 60-300.1(c)(2) provides that it may be a defense to a charge of violation of VEVRAA regulations that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action that would be required by VEVRAA.

Finally, in response to the question about whether a contractor will need to establish a VEVRAA hiring benchmark regardless of its utilization of women and minorities, the answer is yes. The VEVRAA benchmark is to be established annually regardless of the contractor's utilization of any group of employees, including protected veterans. The hiring benchmark is simply a tool to allow contractors to measure their progress in providing equal opportunity to protected veterans.

A number of commenters objected to the proposed benchmarks on the grounds that the data upon which the contractors are required to rely generally is structurally incompatible with the contractor's workplace. For instance, one commenter asserted that it opposes hiring benchmarks because the metrics outlined in the proposal have no relationship at all to the population of qualified candidates eligible for employment. Additionally, an organization argued that just because there may be a high availability of veterans in a specific location, does not mean those same veterans are qualified for the types of jobs available in that same location. Furthermore, commenters in opposition to the proposed rule argued that the benchmark proposal is flawed because it contemplates facility-wide goals. Another organization explains that placement goals for an accounting firm will look very different than the placement goals for a manufacturing company, and the placement goals for entry-level production positions at the manufacturing company will look very different than the placement goals for management positions at the same company.

These comments are well-taken, and we submit that some of these issues are precisely why the benchmarks we proposed allowed the contractor such a significant amount of flexibility in creating them. This would allow, for instance, an accounting firm and a manufacturing firm in the same city to have different hiring benchmarks, depending on the types of positions available and the skill sets required for these positions. The decision to have the regulation require the contractor to create facility-wide benchmarks rather than goals tied to particular job codes or titles is dictated by the limited scope of the veteran data available.

A substantial number of commenters objected to the proposed benchmarks on the grounds that the specific categories of data which the contractors are required to consider are not specific to protected veterans, and otherwise do not provide clear guidance to contractors on how to arrive at an overall benchmark. With regard to the BLS data specified in paragraph (b)(1), commenters argued that relying on such data would inflate benchmarks because data collected by BLS and state employment services reflects all veterans in the civilian labor force – not just protected veterans, and that such data would be based on the entire state rather than a more narrow recruitment area. With regard to the VETS data specified in paragraph (b)(2), commenters contended that this statewide data would have limited relevance to the recruiting that occurs in most companies because contractors may recruit from a very local market for some positions and may recruit on a national basis for other positions. Additionally, commenters argued that to the extent contractors are required to rely on statewide data to inform localized hiring benchmarks, there are no assurances the statewide data is an accurate reflection of the composition of protected veterans in the subject locale. Regarding consideration of the contractor's own referral, applicant and hiring data of protected veterans in paragraph (b)(3), commenters generally questioned the reliability of the data, specifically the referral and applicant data, for reasons that have been thoroughly addressed in previous sections.

In response to the comments on the proposed data considerations in paragraphs (b)(1) and (b)(2), as previously discussed, OFCCP agrees that precise and statistically meaningful availability data specifically capturing veterans protected under VEVRAA at the local level, divided by job group, would be optimal in setting specific, refined goals.

However, such data does not exist. Accordingly, the proposal had contractors consider a variety of sources of data capturing large portions of the relevant population (including actual applicant flow and hiring data from the contractor's establishment), and provided contractors with the flexibility, in the proposed paragraphs (b)(4) and (b)(5), to take into account any other factors which could reasonably affect protected veteran availability. However, commenters also asserted that paragraphs (b)(4) and (b)(5) were unhelpfully vague and introduced a high degree of subjectivity into the entirety of the benchmark setting process that was uncomfortable. Multiple commenters suggested alternative methods for setting benchmarks, including a nationwide goal for hiring protected veterans. One commenter in particular, a consultant to contractors on EEO issues, proposed a mechanism by which aggregate annual VETS-100A data could be used to estimate the number of protected veterans in the civilian workforce, and by dividing this number by the total civilian workforce, arrive at a national goal for protected veterans.

OFCCP does not believe that VETS-100 data, as currently collected and reported, is an appropriate source for establishing benchmarks. However, should the VETS data collection and reporting structures change in the future, the VETS 100-A data may be a source contractors could use when establishing their own benchmarks or that is considered by OFCCP should it revise the national benchmark. First, the structure of the VETS-100 form is such that contractors do not record a total number of protected veteran employees or hires, but rather how many veterans fall within each of the four protected categories. Because a veteran may fall within multiple categories (e.g., a disabled veteran who is also recently separated and earned a campaign badge for his or her service), VETS-100 data can double, triple, or even quadruple-count the number of

protected veteran hires and employees. Also, VETS-100 data only reflects those protected veterans employed by Federal contractors, and not the population of protected veterans available for work. Accordingly, if a contractor's protected veteran recruitment efforts were deficient and resulted in an unreasonably small number of protected veteran hires and employees, this deficiency would therefore be incorporated into the contractor's benchmark.

However, in order to address the concerns of those commenters seeking greater clarity and objectivity in setting hiring benchmarks, the final rule contains a significant revision allowing contractors another method for establishing a hiring benchmark: simply using the national percentage of veterans in the civilian labor force, which will be published and updated annually on OFCCP's website, as the annual hiring benchmark. As of September 2011, the national percentage of veterans in the civilian labor force was 8.0 percent. OFCCP recognizes that this data captures all veterans, and not just veterans protected by VEVRAA, but OFCCP reiterates that the benchmark is not a quota. It serves primarily as a yardstick by which contractors can measure the effectiveness of their affirmative action efforts, and a tool for contractors to use in the evaluation of their outreach and recruitment efforts. Importantly, as with benchmarks calculated under the five-factor method set forth in the NPRM, contractors will not be cited simply for failing to meet it. For those commenters who asserted that the proposed five-factor approach to setting benchmarks was unduly burdensome, this approach will decrease the burden significantly, as set forth in the Regulatory Procedures section of this final rule.

For those contractors that would rather use the five-factor approach to setting benchmarks proposed in the NPRM, the final rule retains this as an option. This option,

however, is modified slightly to eliminate the consideration of referral data, which contractors are no longer required to collect and maintain in the final rule. For those who choose this method of setting benchmarks, OFCCP will provide technical assistance to contractors upon request.

With regard to commenters' concerns about the proposed five-year recordkeeping requirement in paragraph (c) of this section, the final rule reduces this to a three-year requirement, for the reasons set forth in the discussion of § 60-300.80 below and previous sections that had a proposed five-year recordkeeping requirement discussed above.

Some commenters questioned why the term "benchmarks" was used in this section as opposed to the term "goals" which is used in the EO 11246 program. We proposed a different term to avoid confusion and to highlight the difference in how the two concepts operate. The purposes of the EO 11246 placement goals are twofold: (1) "to serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work" and (2) "to measure progress toward achieving equal employment opportunity." 41 CFR 60-2.16(a). The benchmarks established under this regulation are intended to serve only the second of these two objectives, that is, they serve as a measure of progress and the effectiveness of a contractor's outreach and recruitment efforts. The Executive Order regulations state goals are "reasonably attainable" when sufficiently robust data exists describing the availability of women and minority workers, the groups for which goals may be established under the Executive Order program. As discussed previously in this section, however, we do not believe that the data currently available is sufficiently robust on the issue of the availability of protected veterans. Consequently, the purpose and function of

goals established in the Executive Order regulations differ from benchmarks under the VEVRAA regulations. Therefore, we use different terminology to distinguish the terms clearly. To further clarify this difference, the final rule slightly revises the language in paragraph (b) of this section. The proposal defined hiring benchmarks as "the percentage of total hires that are protected veterans that the contractor will seek to hire…." The final rule deletes the clause "that the contractor will seek to hire" from the text of paragraph (b) given the explanation above.

Finally, one commenter asked if the annual hiring benchmark it sets should be included in the text of the AAP or maintained on-site in the event of an OFCCP audit. It is OFCCP's position that annual hiring benchmarks should be included in both the text of the AAP and maintained on-site in the event of an OFCCP audit, for maximum transparency.

Subpart D – General Enforcement and Complaint Procedures

Section 60-300.60 Compliance evaluations

The proposed rule set forth several changes to the process the contractor and OFCCP will follow in conducting compliance evaluations. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.

- Paragraph (a)(1): Review of personnel processes

The NPRM added 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." Several commenters, including those from individuals, contractors, contractor associations, 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 "never-ending" audits for contractors, was contrary to a 2010 Administrative Law Judge (ALJ) decision in the case OFCCP v. Frito-Lay 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 VEVRAA 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 VEVRAA authority as to those conducted under its EO 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 inapposite. 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.

- Paragraph (a)(2): Off-site review of records

The NPRM sought to correct an error in the existing regulations in this paragraph, changing the reference to the "requirements of the Executive Order" to the "requirements of Section 4212." We received no comments on this proposed change, but in light of the discussion of § 60-300.2 above, we replace the reference to "Section 4212" with "VEVRAA."

- Paragraph (a)(3) and (a)(4): Nature of document production and scope of focused reviews

The NPRM revised these two paragraphs to allow OFCCP to review documents

pursuant to a compliance check and conduct focused reviews either on-site or off-site, at OFCCP's option. We received no comments on these specific paragraphs, and thus adopt the proposed language into the final rule as written.

- Paragraph (d): Pre-award compliance evaluation

Finally, the proposed rule added a new paragraph (d) to this section detailing a new procedure for pre-award compliance evaluations under VEVRAA, much like the procedure that currently exists in the Executive Order regulations (see 41 CFR 60-1.20(d)). We received one comment on this proposal that supported adding pre-award compliance evaluation options. Accordingly, this paragraph is adopted into the final rule as proposed.

Subpart E – Ancillary Matters

Section 60-300.80 Recordkeeping

Section 60-300.80 describes the recordkeeping requirements that apply to contractors under VEVRAA. The NPRM proposed adding a sentence at the end of paragraph (a) of this section clarifying that the newly proposed recordkeeping requirements set forth in §§ 60-300.44(f)(4) (linkage agreements and other outreach and recruiting efforts), 60-300.44(k) (collection of referral, applicant and hire data), 60-300.45(c) (criteria and conclusions regarding contractor established hiring benchmarks), and paragraph 5 of the EO Clause in § 60-300.5(a) (referral data) must be maintained for five years. OFCCP received twenty-four comments on the proposed provision from an individual, contractors, associations representing veterans or individuals with disabilities, law firms, industry groups, and human resources consulting firms. Twenty-three of the

commenters opposed the new requirement, citing burden and inconsistency with existing regulations.

In response to comments regarding the burden associated with maintaining records for five years, the final rule reduces the recordkeeping requirements for §§ 60-300.44(f)(4), 60-300.44(k), and 60-300.45(c) to three years. The final rule also eliminates the recordkeeping requirements for referral data under the proposed paragraph 5 of the EO Clause and § 60-300.44(k). The comments regarding the burden associated with the proposed revisions and OFCCP's response are discussed in further detail in the Regulatory Procedures section.

Commenters also expressed the view that all of the VEVRAA recordkeeping requirements should be consistent with EO 11246, section 503, and other laws that have recordkeeping obligations. Nearly all commenters believed the difference in timeframes would lead to confusion, and ultimately non-compliance, even for the most well-intentioned contractors. One comment asserted that the proposed provision is inconsistent with State laws that require employers to destroy personal information of job seekers after two years when records contain personal information. Several comments indicated that the proposed requirement contradicts the Internet Applicant rule, which sets forth certain requirements for applications received through the internet or related electronic data technologies.

In response to these comments, the final rule includes a three-year recordkeeping requirement, rather than the proposed five-year requirement, for §§ 60-300.44(f)(4), 60-300.44(k), and 60-300.45(c). In order to clearly indicate this, the final rule includes a new paragraph (b) specifying those records that have the three-year requirement, moving

paragraphs (b) and (c) in the existing rule to paragraphs (c) and (d), respectively. OFCCP feels strongly that extending the recordkeeping requirements for these particular provisions, all 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 protected veterans in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. These records will give contactors historical data that can be used for analyzing their compliance efforts. As to conflicts with other laws, particularly the Internet Applicant Rule, as set forth in detail in the discussion of § 60-300.42(a), the final rule harmonizes its requirements with the Internet Applicant Rule in the EO 11246 regulations. With regard to the comment vaguely referencing State law conflicts, generally speaking, State laws have provisions that acknowledge Federal preemption if there is a conflict, and thus we see no reason to change the proposal on that basis.

Commenters were particularly concerned about retaining referral data for five years under paragraph 5 of the EO Clause and § 60-300.44(k). As discussed previously, the final rule eliminates the recordkeeping requirements for referral data, eliminating this concern.

Section 60-300.81 Access to records

The NPRM made 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 an evaluation or 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. OFCCP received seven comments regarding the proposed § 60-300.81. All seven comments opposed the proposed changes, citing confidentiality and burden concerns.

Commenters expressed concerns about providing records in a format requested by OFCCP. Two commenters requested clarification regarding whether OFCCP will require contractors to convert records into formats requested by the agency. Several commenters stated that contractors should have the discretion to determine the format that is most efficient for records production based on organizational resources and sensitivity of information.

The final rule 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." The final rule language makes clear that the provision will not require contractors to invest time or resources creating records in a specific format, or to create 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 information will be provided. This provision should result in more efficient OFCCP investigations.

Commenters also criticized the proposal to allow OFCCP access to records off-site, particularly as it relates to the security of confidential records. One comment identified an alleged incident where an OFCCP Compliance Officer lost contractor information during a compliance evaluation. In light of this alleged security breach, the comment suggested that contractors should be permitted to determine how records are produced to OFCCP. This commenter did not provide further details of the incident, and OFCCP is unaware of any specific incident such as the one described. Another commenter noted that the language could be interpreted broadly to permit others outside of OFCCP to gain access to vendor data. Yet another comment stated that it may be difficult and time-consuming for contractors to make data accessible to OFCCP off-site.

In order to address the above-referenced concerns, commenters provided several recommendations to modify the proposed language of this section. One comment recommended that OFCCP clarify that the agency is the only entity that may be permitted access to information submitted. Another commenter recommended including language in the final regulation that states that OFCCP is committed to the confidentiality of contractor information and that confidential information related to individual employees is not subject to Freedom of Information Act requests.

The final rule retains the proposed requirement to provide OFCCP off-site access to materials by request. As an initial matter, it is worth noting that access to company records off-site is not a novel approach, as the Executive Order contains no limitation on the location of access for the compliance evaluation, and indeed specifically references off-site access. Thus, this general access regulation conforms to those principles. In light of contractors' increased use of electronic records in multiple locations, OFCCP feels that

this change will provide the agency greater flexibility during evaluations and investigations. However, OFCCP modified § 60-300.81 of the final rule in response to comments regarding record confidentiality. Section 60-300.81 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, and will work with contractors to respond to specific data confidentiality concerns they may have.

Appendix A to Part 60-300 -- Guidelines on a Contractor's Duty to Provide Reasonable Accommodation

The proposed rule included three changes to Appendix A which would mandate activities that previously were only suggested. First, in the third sentence of paragraph 2 and the fourth sentence of paragraph 5, we proposed changing the language to reflect the change to § 60-300.42(d) requiring a contractor to seek the advice of disabled veterans in

providing reasonable accommodation. Second, in the last sentence of paragraph 4, the NPRM proposed requiring that disabled veterans, in the event an accommodation would constitute an undue hardship for the contractor, be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor, consistent with the change to § 60-300.21(f)(3). Finally, in the last sentence of paragraph 9, the proposed rule is changed to require that a contractor must consider the totality of the circumstances when determining what constitutes a "reasonable amount of time" in the context of available vacant positions.

Comments describing concerns with the first and second proposed changes were addressed in the discussion of §§ 60-300.42(d) and 60-300.21(f)(3), respectively. We received no comments on the third proposed change. Accordingly, Appendix A is incorporated into the final rule as proposed, with small changes to update the references to specific accommodations to reflect current technology and terminology (such as replacing the reference to "telecommunication devices for the deaf (TDD)" to the more current "text telephones (TTYs)," and including modern technology such as speech activated software, and as set forth in the discussion of paragraph 9 of the EO Clause in § 60-300.5. Consistent with the change to § 60-300.42(c), we also deleted the words "and wish to benefit under the contractor's affirmative action program" from paragraph 1.

Appendix B to Part 60-300 -- Sample Invitation to Self-Identify

The proposed rule amends Appendix B consistent with the proposed changes to the self-identification regulation found at § 60-300.42. The majority of comments

pertaining to aspects of Appendix B were addressed in the discussion of § 60-300.42 above. Separately, three commenters stated specifically that the proposed Appendix B would be a useful tool for contractors. One commenter stated that OFCCP should make clear that a goal of a reasonable accommodation is to enable an individual with a disability "to perform the essential functions of the job," as this is the accepted legal standard, while the proposed paragraph 2 of Appendix B uses "to perform the job properly and safely." OFCCP adopts this commenter's language into the final rule. OFCCP also eliminates from paragraph 2 of the sample invitation to self-identify the option to "choose not to provide this information." This option may serve to discourage applicants from self-identifying, and is unnecessary, as applicants who wish not to reveal their protected veteran status may simply choose not to respond to the invitation. Consistent with the change to § 60-300.42(c), paragraph 3 is deleted, and paragraphs 4, 5, and 6 are renumbered, accordingly, as paragraphs 3, 4, and 5. In addition, to address confusion among veterans regarding the scope of the protections afforded by the various veterans' employment rights statutes, the final rule adds clarifying language to paragraph 1 of Appendix B. The new language explains that protected veterans with past, present or future military service, status or obligations may have additional rights under USERRA, including the right to be reemployed by an employer for whom they worked immediately prior to their military service.

Appendix C – Review of Personnel Processes

The NPRM proposed eliminating Appendix C and incorporating relevant parts of it into § 60-300.44(b). However, as stated in the discussion of § 60-300.44(b), we have

eliminated the proposal in the NPRM that required specific personnel process reviews. Accordingly, the final rule reinstates Appendix C, but substitutes the updated term "protected veteran" in paragraphs 1, 2, and 3, in place of "disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran."