was. But it must have been one-fifth or one-seventh of the wages of the United States.

I mention all of this simply to suggest that what we need in this area of labor-management relations is balance. I do not think the President's action takes away any of our prerogatives. The President's action does not pass what we turned down here, Senate Resolution 55, striker replacement. That called for a major overhaul of our labor-management relations. The President's action simply says, if you are going to have a Federal contract, you cannot have permanent striker replacements. I think that makes sense in labor-management relations. I think it also makes sense in terms of quality of product. If anyone thinks that permanent striker replacements provide the same quality of work as a former employee, take a look at baseball today. Striker replacements are not the same quality as those who played for the major leagues.

So I think it makes sense from the viewpoint of quality product that we buy. I think it makes sense from the viewpoint of labor-management relations.

I hope that—we have had one cloture vote and we are going to have at least one more—we continue to prevent the passage of the Kassebaum amendment. Again, my belief is that what we need is a careful balance between labor and management. I think things have moved somewhat out of balance.

I would add I also am a great believer in labor and management working together much more. The Germans have what they called mitbestimmung, where there is a labor representative on a corporate board who is there except when they talk about labor-management relations. Then he or she absents himself or herself. The advantage of that is they get to know the problems of the corporation and the corporation gets to understand the viewpoint of labor. I think we should not wait until we are near time for contracts to expire and then all of a sudden we sit down and start working together.

So my hope is that we will continue to block the passage of this amendment and that we can move ahead in a constructive direction, not only on this issue but on many other issues in labor-management relations.

Mr. President, I do not see anyone else seeking the floor right now. If so I question the presence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. DOLE. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AFFIRMATIVE ACTION

Mr. DOLE. Mr. President, to his credit, President Clinton has initiated a long-overdue review of all Federal affirmative action laws.

After nearly 30 years of government-sanctioned quotas, timetables, set-asides, and other racial preferences, the American people sense all too clearly that the race-counting game has gone too far. The President is responding to these pressures, and his review could not have come at a more propitious time.

But first things first. As the President conducts his review, he should also revisit some of the misguided affirmative action policies of his own administration.

For starters, he should take a few moments to read the Justice Department's brief in the Piscataway Board of Education case, which is now pending before the Third Circuit Court of Appeals.

In Piscataway, the Justice Department has taken the position that, when an employer is laying off employees, an individual American can legally be fired from her job because of her race. That is right: Our Nation's top law enforcement agency says that it is perfectly legal, as a way to achieve work force diversity, to tell a person that she can no longer keep her job because she happens to have the wrong skin color.

This is an insidious position—one that goes beyond current law and one that the President should emphatically reject.

I note that he had a little meeting as reported in the Washington Post last night with a number of people. I hope they discussed the Piscataway case, and I hope the President might respond to this Piscataway case.

The bottom line is that the President's affirmative action review cannot have credibility if the affirmative action policies of his own administration are fundamentally flawed. Correcting these policies, not reviewing old ones, should be the President's first priority.

With that said, let's remember that to raise questions about affirmative action is not to challenge our anti-discrimination laws. Discrimination is illegal. Those who discriminate ought to be punished. And those who are individual victims of illegal discrimination have every right to receive the remedial relief they deserve.

Unfortunately, America is not the color-blind society we would all like it to be. Discrimination continues to be an undeniable part of American life.

But fighting discrimination should never become an excuse for abandoning the color-blind ideal. Expanding opportunity should never be used to justify dividing Americans by race, by gender, by ethnic background.

Race-preferential policies, no matter how well-intentioned, demean individual accomplishment. They ignore individual character. And they are absolutely poisonous to race relations in our great country.

You cannot cure the evil of discrimination with more discrimination.

Mr. President, last December, I asked the Congressional Research Service to provide me with a list of every Federal law and regulation that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background. Frankly, I was surprised to learn that such a list had never been compiled before, which, I suppose, speaks volumes about how delicate this issue can be.

Earlier this year, the CRS responded to my request with a list of more than 160 preference laws, ranging from Federal procurement regulations, to the RTC's bank-ownership policies, to the Department of Transportation's contracting rules. Even NASA has gotten into the act, earmarking 8 percent of the total value of its contracts each year to minority-owned and female-owned firms on the theory that these firms are presumptively disadvantaged. They may not be disadvantaged at all.

As a follow-up to the CRS report, I have written to my colleagues, Senators BOND and KASSEBAUM, requesting hearings on the most prominent programs identified in the report—the Small Business Administration's section 8(A) program and Executive order 11246, which has been interpreted to require Federal contractors to adopt timetables and goals in minority- and female-hiring.

These hearings, I expect, will demonstrate that there are other, more equitable ways to expand opportunity, without resorting to policies that grant preferences to individuals simply because they happen to be members of certain groups. And unless the hearings produce some powerful evidence to the contrary, it is my judgment that the section 8(a) program should be repealed outright.

The hearings also provide us with the opportunity to rediscover the original purpose of Executive Order 11246. As signed by President Johnson, the Executive order required Government contractors to agree,

> * * * not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin * * * [and] to take affirmative action to ensure that applicants are employed * * * without regard to their race, creed, color, or national origin.

In other words, Executive Order 11246 defined affirmative action to mean ''non-discrimination.''

I believe in nondiscrimination. Everybody in this body should believe in nondiscrimination against race, color—and you can add disability to that list, too.

There was no mention of timetables or goals. No mention of racial preferences. These concepts were later grafted onto the Executive order not by Congress, but by regulation, the work of Federal bureaucrats.

At a minimum, we should restore the original purpose of Executive Order 11246: to ensure that Federal contractors do not discriminate. And if they do, they should be punished. However, if the Executive order continues to be used, and misused, as a hammer to force contractors to adopt race-based hiring practices, then it, too, should be repealed.

In fact, I intend to introduce legislation later this year that will force the Federal Government to live up to the color-blind ideal by prohibiting it from granting preferential treatment to any person, simply because of his or her membership in a certain favored group.

I might add, when I got this CRS study, we made it available to the White House. There has been a story about it. They asked for it and we were happy to give it to the White House. It saved duplication. We would be happy to work with the White House and anybody else. And we will be working with Representative J.C. WATTS of Oklahoma on overall legislation, maybe at some later date.

Of course, the Government should fight discrimination where it exists, but, at the same time, it should be color-blind, race-neutral, both in theory and in practice.

Mr. President, I am hopeful about America. And I am optimistic, as we head into the 21st century, that the American experiment will continue to be a model of self-government and a source of hope for millions the world over.

But leadership also requires a sense of common purpose. We cannot continue to lead the world, if we are divided here at home.

Yes, we should celebrate our own differences. Yes, we should take pride in our own rich ethnic heritage. It is a source of great strength in America.

But, at the same time, we should not devalue the common bonds that define us as Americans. Too often, we speak in terms of a hyphenated identity: it is Italian-Americans, German-Americans, African-Americans, Irish-Americans, and not just ''Americans.'' We are all just Americans.

Historian Arthur Schlesinger, Jr., probably put it best when he warned, and I quote:

> Instead of a nation composed of individuals making their own unhampered choices, America increasingly sees itself as composed of groups more or less ineradicable in their ethnic character. The multiethnic dogma abandons historic purposes, replacing assimilation by fragmentation, integration by separatism. It belittles unum and glorifies pluribus.

So, Mr. President, the coming debate over affirmative action will be much more than just a debate over reverse discrimination. It will be a debate that focuses us to answer a fundamental question: What kind of country do we want America to be?

Do we work toward a color-blind society? I hope so. A society that judges people by their talents, their sense of honor, their hopes and dreams, as individuals? Or do we continue down the path of group rights, group entitlements—special rights for some—judging people not by their character or intellect, but by something irrelevant: the color of their skin? Maybe it will extend to disabilities or something else.

America has always been a melting pot. But it should never become a place where race and ethnicity exclusively define who we are, how we think, and what we are supposed to believe.

Mr. President, I ask unanimous consent that my letters to Senators BOND and KASSEBAUM be printed in the RECORD, along with the report prepared by the Congressional Research Service.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
OFFICE OF THE MAJORITY LEADER,
Washington, DC, March 2, 1995.

Hon. NANCY LANDON KASSEBAUM,
Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.

DEAR NANCY: As part of our review of federal affirmative action policies, I am writing to request that you, as Chairman of the Labor and Human Resources Committee, convene hearings on Executive Order 11246. In a recent report prepared at my request, the Congressional Research Service has identified Executive Order 11246 among those federal programs that grant preferences to individuals on the basis of race, sex, national origin, or ethnic background.

Executive Order 11246 was initiated by President Johnson in 1965. The Executive Order states, in part, that ''[i]t is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency.''

As administered by the Department of Labor's Office of Federal Contract Compliance Programs, Executive Order 11246 requires most federal contractors to file written ''affirmative action'' plans with the federal government. These plans must include minority- and female-hiring ''goals'' and ''timetables.''

In my view, hearings should seek to answer the following questions: What was the original purpose of Executive Order 11246? Has this purpose been fulfilled over the years through the Executive Order's implementation? Has Executive Order 11246 operated to discriminate on the basis of race, ethnicity, or gender? Are there other, more equitable, ways to expand opportunity for all Americans, without resorting to strategies that rely on providing preferences for individuals simply because they belong to certain groups?

The bottom line is that no federal program should be immune from Congressional scrutiny.

Nancy, thank you for your prompt attention to this important matter. I look forward to hearing from you at your earliest convenience.

Sincerely,

BOB DOLE.

U.S. SENATE,
OFFICE OF THE MAJORITY LEADER,
Washington, DC, March 2, 1995.

Hon. CHRISTOPHER BOND,
Chairman, Committee on Small Business, U.S. Senate, Washington, DC.

DEAR KIT: As part of our review of federal affirmative action policies, I am writing to request that you, as Chairman of the Small Business Committee, convene hearings on the programs authorized by Sections 8(a) and 8(d) of the Small Business Act. In a recent report prepared at my request, the Congressional Research Service has identified these programs as programs that grant preferences to individuals on the basis of race, sex, national origin, or ethnic background.

As you may know, applicants for certification under Section 8(a) must demonstrate that they are either ''socially disadvantaged'' or that they ''have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities.'' The Small Business Administration ''presumes,'' absent contrary evidence, that small business owned and operated by members of certain racial and ethnic groups are ''socially disadvantaged.''

Section 8(d) requires prime contractors on major federal contracts to negotiate a ''subcontracting plan'' that includes ''percentage goals'' for the utilization of small socially- and economically-disadvantaged firms. To implement this policy, each prime contract must contain a clause stating that ''[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) . . . (emphasis added).''

In my view, hearings should seek to answer the following questions: What were the original purposes of the Section 8(a) and Section 8(d) programs? Have these purposes been fulfilled? Should the federal government be in the business of ''presuming'' that members of certain racial and ethnic groups are ''socially disadvantaged?'' Have these programs operated to discriminate on the basis of race or ethnic background? Are there other, more equitable, ways to expand opportunity for all Americans, without resorting to strategies that rely on providing preferences for individuals simply because they belong to certain groups?

The bottom line is that no federal program should be immune from Congressional scrutiny.

Kit, thank you for your prompt attention to this important matter. I look forward to hearing from you at your earliest convenience.

Sincerely,

BOB DOLE.

CONGRESSIONAL RESEARCH SERVICE,
Washington, DC, February 17, 1995.

To: Honorable Robert Dole.
From: American Law Division.
Subject: Compilation and overview of Federal laws and regulations establishing affirmative action goals or other preference based on race, gender, or ethnicity.

This is in response to your request, by letter dated December 22, 1994, for ''a comprehensive list of every federal statute, regulation, program, and executive order that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background. Preferences include, but are not limited to, timetables, goals, set-asides, and quotas.''

To compile the list of federal legal authorities contained in this memorandum, several

searches on LEXIS/NEXIS and WESTLAW legal databases were undertaken utilizing a variety of search strategies which incorporated legal terminology most frequently associated with federal affirmative action and minority set-aside programs. This yielded citations to several hundred statutory and regulatory programs which we then examined individually to determine whether they appeared to be of the nature described in your inquiry. The compilation of laws included in this memorandum reflects our efforts to be as ''comprehensive'' as possible, in accordance with your instructions. Consequently, we have included any statute, regulation, or executive order uncovered by our research which appears, in any manner, to prefer or consider race, gender, or ethnicity as factors in federal employment or the allocation of federal contracts or grants to individuals or institutions.[1] Several laws and regulations directed to ''socially and economically disadvantaged'' individuals and institutions are included because, as explained infra, that term has been defined administratively and by statute to presumptively apply to specific racial and ethnic minorities. As a background for understanding operation of the numerous listed federal laws and regulations, more extensive discussion is devoted at various points to the development of major ''affirmative action'' programs in federal grant, contract, and employment law.

FEDERAL GRANT AND PROCUREMENT LAW

Federal efforts to increase minority and female participation in contracting, federally assisted programs, and employment have been a major aspect of civil rights enforcement for more than three decades. Congress and the Executive Branch have crafted a wide range of federal laws and regulations authorizing, either directly or by judicial or administrative interpretation, race or gender ''conscious'' strategies in relation to jobs, housing, education, voting rights, and governmental contracting. The historical model for federal laws and regulations establishing minority participation ''goals'' may be found in Executive Orders which since the early 1960's have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Presently, Executive Order 11246 as administered by the Office of Federal Contract Compliance Programs (OFCCP) requires that all employers with federal contracts in excess of $50,000.00 must file written affirmative action plans with the government. These are to include minority and female hiring goals and timetables to which the contractor must commit it's ''good faith'' efforts. Similar affirmative action measures relating to federal government employment were enacted as part of the Equal Employment Opportunity Act Amendment of 1972[2] and the 1978 Civil Service Reform Act.[3]

Affirmative action for minority entrepreneurs soon became a focus of efforts by the Small Business Administration (SBA) and other federal agencies to assist ''socially and economically disadvantaged'' small businesses under a variety of federal programs. Increasingly, an ''affirmative action'' model, in the form of participation ''goals'' or ''set-asides'' for members of racial or ethnic minorities, and businesses owned or controlled by these or other ''disadvantaged'' persons, found legislative expression in a wide range of federal programs.

The Small Business Act, as amended, provides the statutory prototype for a host of federal programs to increase minority and female participation as contractors or subcontractors on federally funded projects. First, the ''Minority Small Business and Capital Ownership Development,'' or §8(a) program authorizes the Small Business Administration (SBA) to enter into all kinds of construction, supply, and service contracts with other federal departments and agencies. The SBA acts as a prime contractor and then ''subcontracts'' the performance of these contracts to small business concerns owned and controlled by ''socially and economically disadvantaged'' individuals, Indian Tribes or Hawaiian Native Organizations.[4]

Applicants for §8(a) certification must demonstrate ''socially disadvantaged'' status or that they ''have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities.''[5] The Small Business Administration ''presumes,'' absent contrary evidence, that small businesses owned and operated by members of certain groups—including Blacks, Hispanics, Native Americans, and Asian Pacific Americans—are socially disadvantaged.[6] Any individual not a member of one of these groups must ''establish his/her individual social disadvantage on the basis of clear and convincing evidence'' in order to qualify for §8(a) certification. The §8(a) applicant must, in addition, show that ''economic disadvantage'' has diminished its capital and credit opportunities, thereby limiting its ability to compete with other firms in the open market.[7]

The ''Minority Small Business Subcontracting Program'' authorized by §8(d) of the Small Business Act codified the presumption of disadvantaged status for minority group members that applied by SBA regulation under the §8(a) program.[8] Prime contractors on major federal contracts are obliged by §8(d) to maximize minority participation and to negotiate a ''subcontracting plan'' with the procuring agency which includes ''percentage goals'' for utilization of small socially and economically disadvantaged firms. To implement this policy, a clause required for inclusion in each such prime contract states that ''[t]he contractors shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to §8(a) . . .'' Accordingly, SBA has discretion in designating a firm or individual as socially and economically disadvantaged for purposes of both the §8(a) and §8(d) programs in conformity with specified criteria.[9]

These obligations, first codified in 1978 as an amendment to the SBA, were augmented a decade later by the Business Opportunity Development Reform Act of 1988.[10] Congress there directed the President to set annual, government-wide procurement goals of at least 20% for small businesses and 5% for disadvantaged businesses, as defined by the SBA. Simultaneously, federal agencies were required to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create ''maximum practicable opportunity'' for small disadvantaged businesses to sell their goods and services to the government. The goals may be waived where not practicable due to unavailability of disadvantaged business enterprises (DBEs) in the relevant area and other factors.[11] While the statutory definition of DBE includes a racial component, in terms of presumptive eligibility, it is not restricted to racial minorities but also includes persons subjected to ''ethnic prejudice or cultural bias.''[12] It also excludes businesses owned or controlled by persons who, regardless of race, are ''not truly socially and/or economically disadvantaged.''[13] Federal Acquisition Act amendments adopted in 1994 amended the 5% minority procurement goal, and the minority subcontracting requirements in §8(d), to specifically include ''small business concerns owned and controlled by women'' in addition to ''socially and economically disadvantaged individuals.''[14]

In addition, Congress has frequently adopted ''set-asides'' or other forms of statutory preference for ''socially and economically disadvantaged'' firms and individuals, following the definitions of the Small Business Act, or by designating minority groups and women as part of specific grant or contract authorization programs. Thus, targeted funding, in various forms, and minority or disadvantaged business set-asides or preferences have been included in major authorization or appropriation measures for agriculture, communications, defense, education, public works, transportation, foreign relations, energy and water development, banking, scientific research and space exploration, and other purposes. Other federal laws appear to authorize some consideration of race or gender to enhance the participation of minorities and women in federal programs or employment but without directly mandating preferential goals or set-asides.

The following statutes, regulations, and executive orders governing federal contracts and grant programs are, to the extent possible, grouped according to agency and subject matter.

Federal Acquisitions Regulations—General

48 C.F.R. §19.001(b) (1994): ''Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native American, Asian-Pacific Americans, Subcontinent-Asian Americans) are to be considered socially and economically disadvantaged'' for purposes of ''Socioeconomic Programs'' under the Federal Acquisitions Regulation (FAR).

48 C.F.R. §19.704 (1994): FAR requirement that ''[s]eparate percentage goals for using small business concerns and small disadvantaged business concerns as subcontractors'' be included in small disadvantaged business subcontracting plans.

48 C.F.R. §19.706(c)(2) (1994): FAR subcontracting assistance program states that ''[v]arious approaches may be used in the development of small and small disadvantaged business concerns subcontracting incentives. They can take many forms, from a fully qualified schedule of payments based on actual subcontract achievement to an award fee approach employing subjective evaluation criteria. . . The incentive should not reward the contractor for results other than those that are attributable to the contractor's efforts under the incentive subcontracting program.'' See also §19.705–1 (monetary incentives for exceeding goals).

48 C.F.R. §§52.219–8, 52.219–9 (1994): Prescribe clauses for inclusion in federal prime and subcontract which require, inter alia, ''[g]oal, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns and small disadvantaged business concerns as subcontractors.''

Agriculture

7 U.S.C.S. §3154(c): The Secretary of Agriculture is authorized ''to set aside a portion of funds'' appropriated for certain research on the production and marketing of alcohols and industrial hydrocarbons for grants to colleges and universities to achieve ''the objective of full participation of minority groups.''

7 C.F.R. §225.6(g)(xi) (1994): Food service management companies participating in the Summer Food Service Program must submit with appropriate state agency a registration

Footnotes at end of memorandum.

which is to include ''a statement as to whether the organization is a minority business enterprise'' managed and controlled by ''Blacks, Hispanics, American Indians, Alaskan Natives, Oriental and Aleuts. . . ''

7 C.F.R. §246.13(g) (1994): Financial management system maintained by state agencies participating in Special Supplemental Food Program for Women, Infants and Children are ''encouraged'' to use minority- and women-owned banks.

7 C.F.R. §272.4(b) (1994): Bilingual program information and certification, and interpreters must be provided in certain low income areas with specified percentages of non-English speaking minority households under Food Stamp and Food Distribution Program.

7 C.F.R. §1940.968(k)(3) (1994): States participating in certain rural economic development programs are ''encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.''

7 C.F.R. §1942.17(p)(3)(iii) (1994): Applicants for certain FmHA community facilities loans are ''encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.''

7 C.F.R. §1942.472(c) (1994): Grantees of certain rural housing and community development technical assistance and training grants are ''encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.''

7 C.F.R. §1944.526(a)(2)(i)(D) (1994): Preapplication process for Technical and Supervisory Assistance Grant program considers in determining applicant's eligibility ''the estimated number of low income and low income minority families the applicant will assist in obtaining affordable adequate housing.''

7 C.F.R. §1944.671(b) (1994): Equal Opportunity and outreach requirements applicable to FmHA Housing Preservation Grants program state that ''[a]s a measure of compliance, the percentage of the individuals served by the HPG grantee should be in proportion to the percentages of the population of the service area by race/national origin.''

7 C.F.R. §§3015.13, 3016.21(h) (1994): ''Consistent with the national goal of expanding opportunities for minority business enterprises, recipients and subrecipients'' of federal financial assistance administered by the Department of Agriculture ''are encouraged to use minority and women-owned banks. Upon request, awarding agencies will furnish a listing of minority and women-owned banks to recipients.''

7 C.F.R. 3051 Appendix A (1994): OMB Circular A–133, Audits of Institutions of Higher Education and Other Nonprofit Institutions. ''11. Small and Minority Audit Firms. Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this circular.'' See also OMB Circular A–128 (.19) (Uniform Audit Requirements for State and Local Governments), 29 C.f.R. part 96 Appendix A (1994).

7 C.F.R. §§3403.1, 3403.2 (1994): USDA regulations implementing small business innovation grants program which as one of its goals is to ''foster and encourage minority and disadvantaged in technological innovation.'' For purposes of this program ''minority and disadvantaged individual is defined as a member of any of the following groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, or Subcontinent Asian Americans.''

48 C.F.R. §§419.201–72(a), 419.202–71(a) (1994): The Department of Agriculture small disadvantaged business regulations state that ''[t]he Department is required . . . to establish fiscal year goals for the procurement preference programs'' and mandate ''[establishing aggressive minority and women-owned business goals based on the annual review of advance acquisition plans.''

48 C.F.R. §422.804–2 (1994): Affirmative action program provision relating to the Department of Agriculture which states that ''each contracting office awarding nonexempt construction contracts maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction.''

48 C.F.R. §452.215–71 (1994): Department of Agriculture instructions for the preparation of technical and cost or pricing proposals state that the contract offeror ''[i]ndicate what positive efforts your company will take to implement the concepts of equal employment under the proposed contract'' and state the extent of minority enterprise participation ''goals the contractor has set in the past five (5) years and his actual performance against these goals.''

Banking

12 U.S.C.S. §1441a(r–w): Provides for various incentives, including ''preference points'' on proposals and minority capital assistance programs, to preserve and expand bank ownership by minorities and women; authorizes establishment of Resolution Trust Corporation guidelines to achieve parity in distribution of RTC contracts, and ''reasonable goals'' for subcontracting, to minority and women-owned businesses and firms; and provides a ''[m]inority preference in acquisition of institutions in predominantly minority neighborhoods.''[15]

12 U.S.C.S. §1823(f)(12): Authorizes Federal Deposit Insurance Corporation (FDIC) approval of minority-controlled bank acquisitions by minority-controlled holding companies without regard to asset size.

12 U.S.C.S. §2219c: Requires that ''all institutions of the Farm Credit System with more than 20 employees shall establish and maintain an affirmative action program plan that applies the affirmative action standards otherwise applied to contractors of the Federal Government.''

12 U.S.C.S. §2907: Any donation or sale on favorable terms of bank branch in minority neighborhood to minority or women-owned depository institution shall be a factor in determining the seller or donor institution's compliance with the Community Reinvestment Act.

12 C.F.R. §4.63 (1994): Establishes Contracting Outreach Program for the Office of Comptroller of the Currency to ''ensure that minority and women-owned businesses have the opportunity to participate, to the maximum extent possible, in contracts awarded by the OCC.'' ''Minority means any African American, Native American . . ., Hispanic American, Asian-Pacific American, or Subcontinent-Asian American.''

12 C.F.R. Part 361, §§361.2, 361.10 (1994): Federal Deposit Insurance Corporation ''Minority and Women Outreach Program'' states ''policy of the FDIC that minorities and women and entities owned by minorities and women shall have maximum practicable opportunity to participate in [FDIC] contracts'' and requires prime contractors ''to carry out the FDIC minority and women-owned business contracting policy in the awarding of subcontracts to the fullest extent, consistent with the efficient performance of the awarded contract.'' For this purpose ''minority'' means ''any Black American, Native American Indian, Hispanic American, or Asian American.''

12 C.F.R. §§517.5, 517.7 (1994): The Minority, Women, and individuals with Disabilities Outreach Program of the Office of Thrift Supervision (OTS) defines ''[o]utreach activities'' to include ''identification and registration of minority-, women-owned (small and large) businesses'' and ''[m]onitoring proposed purchases to assure that OTS contracting staff understand and actively promote the outreach program.'' Contract awarded guidelines state that ''[t]he OTS Outreach Program Advocate shall work to facilitate the maximum participation of minority and women-owned . . . businesses . . . in the OTS procurement of goods and services.''

12 C.F.R. Part 1507 (1994): Minority and Women Contracting Outreach Program of the Thrift Depositor Protection Oversight Board requires the Board's staff to formulate guidelines providing opportunities, ''to the maximum extent possible, for the inclusion of minorities and women,'' and entities owned by them, in the performance of Board contracts; to undertake specified outreach activities; and to report periodically on minority and women-owned business participation in the contracting process, and as subcontractors on Board contracts. ''Minority'' means ''Black American, Native American, Hispanic American, or Asian American.''

12 C.F.R. Part 1617 (1994): Minority and Women Outreach and Contracting Program of the Resolution Trust Corporation (RTC) describes a variety of outreach activities (§1617.11); provides procedures for certification of minority and women-owned businesses (§1617.13); provides ''incentives'' and ''bonus considerations'' to RTC prime contractors ''who demonstrate a commitment to subcontract at least 25 percent or more of the work'' to minority or women-owned firms (§1617.30); and ''reserves the right to award a contract directly to a MWOB either by technical competition or by con-competitive award.'' ''Technical and cost bonus points'' may be awarded to contractors with an ''eligible subcontracting plan'' for women and minorities (§1617.60). A special outreach program is provided to promote participation of minority and women-owned law firms in RTC legal services contracting (§1617.90).

13 C.F.R. §§317.19(b), 317.35 (1994): ''No grant shall be made . . . for any project'' under the Local Public Works Capital Development and Investment Program ''unless at least 10 percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.'' All applications for assistance must contain certification to that effect. ''Minority group member means a citizen of the United States who is Negro, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut.'' (13 C.F.R. 317.2).

Commerce

Executive Order 11625 (1971): Directs the Secretary of Commerce ''[w]ith the participation of other Federal departments and agencies . . . [t]o develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by the order.'' *See also* Executive Order 12138 (Women-owned Business Enterprise Program).

15 C.F.R. §24.21(h) (1994): Grantees and subgrantees of certain grants and cooperative agreements to state and local government ''are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members).''

15 C.F.R. §917.11(d) (1994): A ''factor considered'' in the approval of proposals under the

Sea Grant Matched Funding Program ''will be the potential of the proposed program to stimulate interest in marine related careers among those individuals, for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest.''

15 C.F.R. §2301.3 (1994): The National Telecommunications and Information Administration of the Department of Commerce, in administering the Public Telecommunications Facilities Program, ''will give special consideration to applications that foster ownership and control of, operation of, and participation in public telecommunications entities by minorities and women.''

48 C.F.R. §1319.7003(a) (1994): Directs contracting officers of the Commerce Department to ''provide assistance to prime contractors to identify potential women-owned small businesses. Such assistance is intended to aid prime contractors in placing a fair proportion of subcontracts with women-owned businesses.''

Communications

47 U.S.C.S. §309(j)(4)(D): In radio licensing proceedings, the Federal Communications Commission is directed to prescribe regulations to ''ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures.''

47 C.F.R. §73.3555(d)(2)(ii) (1994): Federal Communications Commission (FCC) multiple ownership rules provide exemption for ''minority-controlled'' broadcast facilities from certain restrictions on the granting or transfer of commercial TV broadcast stations which result in an aggregate national audience exceeding twenty-five percent. ''*Minority* means Black, Hispanic, American Indian, Alaska Native, Asian and Pacific Islander.'' (*italics* in original).

47 C.F.R. §76.977 (a), (b), (e) (1994): Minority and educational programming used in lieu of deregulated commercial leased access capacity. ''A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. 532 may use any such channel for the provision of programming from a qualified minority programming source . . . whether or not such source is affiliated with cable operator.'' ''Qualified minority programming source'' means a source ''that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned.'' ''Minority'' includes ''Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.''

68 F.C.C. 2d 381, 411–412 (1978): FCC policy awards a quality enhancement credit for minority ownership and participation in station management in the comparative licensing process. When faced with mutually exclusive applications for the same broadcast channel, the FCC initiates a proceeding to compare the merits of the competing applicants based on specific factors including: diversification of control of mass media communications, full time participation in station management by owners, proposed program service, past broadcast record, efficient use of frequency, and character of the applicant. Under the FCC's preferred policy, ownership and active participation in station management by members of a minority group are considered a plus to be weighed in with the other comparative factors.

68 F.C.C. 2d 983 (1978): FCC ''Distress Sale'' Policy. Under this policy, existing licensees in jeopardy of having their licenses revoked or whose licenses have been designated for a renewal hearing are given the option of selling the license to a minority-owned or controlled firm for up to seventy-five percent of fair market value. The minority-assignee must meet the basic qualifications necessary to hold a license under FCC regulations and must be approved by the FCC before the transfer is consummated.

Defense

10 U.S.C.S. §2196(j)(8): Selection criteria for manufacturing engineering grant program established by the Secretary of Defense require proposal by applicant ''to achieve a significant level of participation by women, members of minority groups, and individuals with disabilities through active recruitment of students from among such persons.''

10 U.S.C.S. §2323: Establishes a goal of awarding five percent of the total value of Department of Defense procurement, research and development, military construction, and operation and maintenance contracts to ''socially and economically disadvantaged individuals,'' historically black colleges and universities, and minority institutions in each of the fiscal years from 1987 to 2000. This requirement was extended to contracting activities of the Coast Guard and the National Aeronautics and Space Administration by §7105 of the Federal Acquisition Act of 1994, P.L. 103–355, 108 Stat. 3243, 3369 (1994) which also added a requirement that ''[t]o the extent practicable,'' the head of each of these agencies is to ''maximize the number of minority small business concerns, historically Black colleges and universities, and minority institutions participating in the program.''

P.L. 103–335, 108 Stat. 2259, 2652, §8127(a) (1994): ''in entering into contracts with private entities to carry out environmental restoration and remediation of Kaho'olawe Island, Hawaii, and the waters surrounding that island, the Secretary of the Navy shall, to the maximum extent practicable, give a preference to small business concerns and small disadvantaged business concerns located in the State of Hawaii. In giving the preference, the Secretary shall give especial preference to businesses owned by Native Hawaiians.''

32 C.F.R. §3321(h) (1994): Department of Defense (DOD) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' DOD grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. §205.207(d)(iv) (1994): States that ''[f]or acquisition being considered for historically black college and university and minority institution set-aside, ''the proposed contract ''is being considered as a 100 percent set-aside for historically black colleges and universities (HBCUs) and minority institutions (MIs), as defined by the clause at §252.226–7000 of the Defense Acquisition Regulation Supplement.''

48 C.F.R. Part 219, §219.000 (1994): DOD regulation which implements ''goal'' in 10 U.S.C. 2323 to ''[a]ward five percent of contract and subcontract dollars to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs).'' Specific requirements include data collection and reporting (§219.202–5); eligibility criteria for program participation (§219.703); subcontracting plan goals for SDB concerns and institutions (§219.704); reviewing the subcontracting plan (§219.705–4); solicitation provisions and contract clauses (§219.708); and evaluation preference for small disadvantaged business concerns (''by adding a factor of ten percent to the price of all offers'') (§219.7002). See also 48 C.F.R. §226.7000 (implements the historically black college and university and minority institution provisions of 10 U.S.C. §2323; §252.219–7005) (small business and small disadvantaged business subcontracting plan on DOD contracts); §252.219.7005 (incentive for subcontracting with small businesses, small disadvantaged businesses, historically black colleges and universities, and minority institutions); §252.219–7006 (notice of evaluation preference for small disadvantaged business concerns); and §252.226–7000 (notice of historically black college or university and minority institution set-aside).

48 C.F.R. Chapter 2 Appendix I (1994): Pilot Mentor-Protege Program is to ''provide incentives to major DOD contractors, performing under at least one active approved subcontracting plan negotiated with DOD or other Federal agencies, to assist small disadvantaged businesses (SDBs) in enhancing their capabilities to satisfy DoD and other contract and subcontract requirements.''

Education

20 U.S.C.S. §1047: Authorizes grants and contracts by the Department of Education (ED) with ''historically black colleges and universit[ies]'' and other institutions of higher education serving a ''high percentage of minority students'' for the purpose of strengthening their library and information science programs, and establishing fellowships and traineeships for that purpose.[16]

20 U.S.C.S. §1063b: Authorizes ED grants to specified postgraduate institutions ''determined by the Secretary [of Education] to be making substantial contributions to the legal, medical, dental, veterinary, or other graduate education opportunities for Black Americans.''

20 U.S.C.S. §1069f(c): Reservation of 25% of the excess of certain educational appropriations for allocation ''among eligible institutions at which at least 60 percent of the students are African Americans, Hispanic Americans, Native Americans, Asian Americans, Native Americans, Native Hawaiians, or Pacific Islanders, or any combination thereof.''

20 U.S.C.S. §1070a-41: ''Priority'' in selection for Model Program Community Partnership and Counseling Grants given to program proposals ''directed at areas which have a high proportion of minority, limited English proficiency, economically disadvantaged, disabled, nontraditional, or at-risk students . . .''

20 U.S.C.S. §1112d(d): ''Special consideration'' to be given ''historically Black colleges and universities'' and to institutions having at least 50% minority enrollment in making grants for teacher training and placement.

20 U.S.C.S. §1132b-2: In awarding facilities improvement grants, the ED Secretary or each State higher education agency ''shall give priority to institutions of higher education that serve large numbers or percentages of minority or disadvantaged students.''

20 U.S.C.S. §1134e: In making grants for post-graduate study, the ED Secretary shall ''consider the need to prepare a larger number of women and individuals from minority groups, especially from among such groups which have been traditionally underepresented in professional and academic careers,'' and shall accord a ''priority'' for awards to ''individuals from minority groups and women'' pursuing study in specified professional and career fields.

20 U.S.C.S. §1134s: The ED Secretary ''shall carry out a program to assist minority, low-income, or educationally disadvantaged college students'' to pursue a degree and career in law through an annual grant or contract.

20 U.S.C.S. §§1135c, 1135d: The ED Secretary shall ''carry out a program of making

grants to institutions of higher education that are designed to provide and improve support programs for minority students enrolled in science and engineering programs as institutions with a significant minority enrollment (at least 10 percent).'' Eligibility for such grants is limited to ''minority institutions'' (minority enrollment in excess of 50%) or other public or private nonprofit institutions with at least 10 percent minority enrollment.

20 U.S.C.S. §1409(j)(2): The ED Secretary ''shall develop a plan for providing outreach services'' to historically Black colleges and universities, other higher educational institutions with at least 25% minority student enrollment, and ''underrepresented populations'' in order to ''increase the participation of such entities'' in competitions for certain grants, contracts, and cooperative agreements.

20 U.S.C.S. §1431(a)(3): ''Priority consideration'' for fellowships and traineeships in special education and related services shall be given to ''individuals from disadvantaged backgrounds, including minority and individuals with disabilities who are under represented in the teaching profession or in the specialization in which they are being trained.''

20 U.S.C.S. §2986(b): A portion of state allotment of critical skills improvement funds to be distributed for various purposes, including ''recruitment or retraining of minority teachers to become mathematics and science teachers.''

20 U.S.C.S. §3156(a): Program to assist local educational agencies ''which have significant percentages of minority students'' to conduct ''alternative curriculum'' schools which ''reflect a minority composition of at least 50 percent'' and contribute to school desegregation efforts.

20 U.S.C.S. §3916: Fifteen percent of National Science Foundation funds available for science and engineering education is to be allocated to faculty exchange and other programs involving higher educational institutions with ''an enrollment which includes a substantial percentage of students who are members of a minority group.''

20 U.S.C.S. §5205(d): No less than 10 percent of Eisenhower Exchange Fellowship Program funds ''shall be available only for participation by individuals who are representative of United States minority populations.''

20 U.S.C.S. §6031(c)(5): ED ''shall establish and maintain initiatives and programs to increase the participation'' of ''researchers who are women, African-American, Hispanic, American Indian and Alaskan Native, or other ethnic minorities'' in the activities of various authorized educational institutes.

42 U.S.C.S. §292g(d)(3): For a three-year period beginning on October 13, 1992, historically black colleges and universities are exempted from provision rendering certain institutions ineligible for student loan program based on high loan default rate.

42 U.S.C.S. §293a: ''Special consideration'' in scholarship grant program to be given ''health profession schools that have enrollments of under represented minorities above the national average for health profession schools.''

42 U.S.C.S. §293b(3): Institutional eligibility for faculty fellowship program based on ''ability to . . . identify, recruit and select individuals from under represented minorities in the health profession'' with potential for teaching and educational administration.

42 U.S.C.S. §1862d: At least 12 percent of amounts appropriated for the Academic Research Facilities Modernization Program shall be reserved for historically Black colleges and universities and other institutions which enroll a substantial percentage of Black American, Hispanic American, or Native American students.

34 C.F.R. §7412 (1994): Department of Education (ED) Uniform Administrative Requirements for Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations ''encourage'' ED grantees and subgrantees to use minority-owned banks. See also 34 C.F.R. §80.21(h)(1994).

34 C.F.R. §318.11(a)(15), (16) (1994): Includes ''[t]raining minorities and individuals with disabilities'' and ''minority institutions'' among several optional funding priorities under special education training program.

34 C.F.R. §461.33(a)(2)(ii) (1994): ''[P]articular emphasis'' placed on training ''minority'' adult educators under one aspect of adult education demonstration grant program.

34 C.F.R. Part 607, §607.2(b) (1994): An institution of higher education is eligible to receive a grant under the Strengthening Institutions Program even if it does not satisfy certain other generally applicable state authorization or accreditation requirements if its student enrollment consists of specified percentages of designated minority groups.

34 C.F.R. Parts 608, 609 (1994): ''the Strengthening Historically Black Colleges and Universities Program [HBCU] provides grants to Historically Black Colleges and Universities to assist these institutions in establishing and strengthening their physical plants, academic resources and student services so that they may continue to participate in fulfilling the goal of equality of educational opportunity.'' (§608.1).

34 C.F.R. §637.1 (1994): ''the Minority Science Improvement Program is designed to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of under represented ethnic minorities, particularly minority women, into scientific careers.''

34 C.F.R. §641.1 (1994): ''The Faculty Development Fellowship Program provides grants to institutions of higher education, consortia of institutions, and consortia of institutions and nonprofit organizations to fund fellowships for individuals from underrepresented minority groups to enter or continue in the higher education professorate.''

Energy

42 U.S.C.S. §7141: The Secretary of Energy ''may provide financial assistance in the form of loans to any minority business enterprise under such rules as he shall prescribe to assist such enterprises in participating fully in research, development, demonstration, and contract activities of the Department to the extent he considers appropriate.''

42 U.S.C.S. §13556: Provides that ''[t]o the extent practicable, the head of each agency shall provide that the obligation of not less than 10 percent of the total combined amounts obligated for contracts and subcontracts by each agency'' under the Energy Policy Act of 1992 ''shall be expended with'' socially and economically disadvantaged small businesses, historically Black colleges or universities, or college and universities with more than 20 percent Hispanic or Native American enrollment.

P.L. 103–160, 107 Stat. 1547, 1956, §3159 (1993): Provides, as a ''goal,'' that 5 percent of the combined total of funds obligated by the Department of Energy for purposes of carrying out national security programs for fiscal years 1994 through 2000 be allocated to contracts and subcontracts with socially and economically disadvantaged small businesses, historically black colleges and universities, and minority institutions.

10 C.F.R. §600.3 (1994): ''Socially and economically disadvantaged'' firm or individual, for purposes of Department of Energy (DOE) financial assistance rules, is defined to include ''Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and other specified minorities, or any other individual found to be disadvantaged by the Small Business Administration under §8(a) of the Small Business Act.''

10 C.F.R. §799.2, 799.7 (1994): A requirement of DOE loan guarantee program for waste projects that ''the borrower agree to take positive efforts to maximize the utilization of small and disadvantaged business concerns in connection with the project . . .'' For this purpose, ''[d]isadvantaged business concern means a concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals'' as defined by the Small Business Act.

10 C.F.R. Part 800, §800.003 (1994): Under DOE regulations setting forth policies and procedures for the award and administration of loans to minority small business enterprises, ''[a]n individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, and Aleut, or is a Spanish speaking individual of Spanish descent, is a member of a 'minority' . . .''

10 C.F.R. §1040.101(b)(1), (2) (1994): Under DOE regulations prohibiting discrimination in federally assisted programs, the agency is to select recipients for compliance reviews based, among other factors, on ''[t]he relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor market, and the percentage of minorities, women, or handicapped persons, employed by the recipient'' or ''in the population receiving program benefits.''

Environment

P.L. 101–549, 104 Stat. 2399, 2708, §1001 (1990): ''In providing for any research relating to the requirements of the amendments made by the Clean Air Act Amendments of 1990 which uses funds of the Environmental Protection Agency, the Administrator of the Environmental Protection Agency shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns,'' defined to mean any concern with 51% of the stock owned by Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women or Disabled Americans.

40 C.F.R. §33.240 (1994): Environmental Protection Agency (EPA) procurement requirements provide that ''[i]t is EPA policy to award a fair share of subagreements to small, minority, and women's businesses. The recipient must take affirmative steps to assure that small, minority, and women's businesses are used when possible as sources of supplies, construction, and services.''

40 C.F.R. §35.936–7 (1994): Grantees of EPA state and local assistance grants ''shall make positive efforts to use small business and minority owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds.'' See also 40 C.F.R. Part 35 APPENDIX C–1 (14.) (consulting engineering agreement).

40 C.F.R. §35.3145(d) (1994); State Water Pollution Control Revolving Fund requirement ''for the participation of minority and women owned businesses (MBE/WBEs) will apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the [regional administrator] will negotiate an overall 'fair share' objective with the State for MBE/WBE participation on these SRF funded activities. A fair share objective should be based on the amount of the capitalization grant award or

other State established goals.'' See also 40 C.F.R. §35.4066(g) (1994) (grants for technical assistance).

40 C.F.R. §35.6580 (1994): Recipients under Cooperative Agreements and Superfund State Contracts for Superfund Response Actions ''must comply with six steps . . . to insure that MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services,'' including establishment of ''an annual 'fair share' objective for MBE and WBE use.''

General Services Administration

41 C.F.R. §§105–71.121(j), 105–72.302(j) (1994): General Services Administration (GSA) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' recipients to use minority-owned and women-owned banks.

41 C.F.R. §105–72.504(b) (1994):[17] All recipients of GSA grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for ''positive efforts . . . to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible'' and to ensure that such businesses ''are utilized to the fullest extent practicable.''

48 C.F.R. §552.219–9 (1994): Small business subcontracting plan prescribed for General Service Administration contracts requires ''[g]oals, expressed in terms of percentages of total planned subcontracting dollars, for the use of small business concerns, small disadvantaged business concerns and, if an individual contract is involved, women-owned small business concerns as subcontractors.''

Health and Human Services

42 U.S.C.S. §3027: State plans for grant program on aging ''shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services.''

42 U.S.C.S. §3035d: Provides that the Assistant HHS Secretary ''shall carry out, directly or through grants or contracts, special training programs and technical assistance designed to improve services to minorities'' under the Older Americans Act.

42 C.F.R. §52c.2 (1994): Minority Biomedical Research Support Program makes grants to higher educational institutions with 50 percent or other ''significant proportion'' of ethnic minority enrollment.

42 C.F.R. §62.57(h) (1994): Among factors considered in making certain State loan repayment grants to State applicants is ''[t]he extent to which special consideration will be extended to medically underserved areas with large minority populations.''

42 C.F.R. §64a.105(d)(2) (1994): ''Preferred service'' for purposes of obligated service requirement for mental health traineeships includes service in any public or private nonprofit entity serving 50 percent or more specified racial or ethnic minorities.

45 C.F.R. §§74.12(h), 92.21(h), 602.21(h) (1994): Department of Health and Human Services (HHS) general administration requirements ''encourage'' grantees and subgrantees to use minority banks at least 50% owned by minority group members. Similar provisions may be found at 45 C.F.R. §§1050.13, 1157.21, 1174.21, 1183.21, and 1234.21.

45 C.F.R. §1010.30–2(c)(1),(2) (1994): Civil rights program requirements of Community Service Act grantees provide that the Office of Human Rights will consider when selecting for compliance reviews ''[t]he relative disparities between the percentage of eligible minority or female populations, if appropriate, receiving program benefits and the percentage of eligible minorities or females, if appropriate, in the eligible population.''

48 C.F.R. §319.705–4(d)(i)(ii) (1994): HHS small disadvantaged business subcontracting regulation require contracting officer to insure that ''[s]ubcontracing goals for small and small disadvantaged business concerns are specifically set forth in each contract or modification over the statutory thresholds . . .'' See also §§319.705–6, 319.706.

Housing and Urban Development

24 C.F.R. §84.22(j):[18] All recipients of Department of Housing and Urban Development (HUD) grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations ''shall be encouraged to use women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).'' Same provisions apply to use of lump-sum grants under this program, 24 C.F.R. §84.82(c)(2), a related HUD state and local grant and cooperative agreement program, 24 C.F.R. §85.21(h) (1994), and comprehensive planning assistance grants at 24 C.F.R. §600.410(k)(2) (1994).

24 C.F.R. §84.44(b): All recipients of HUD grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for ''positive efforts . . . to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible'' and to ensure that such businesses ''are utilized to the fullest extent practicable.'' Same provisions apply to procurement standards used by recipients for the procurement of supplies, equipment, real property and other services with federal funds. 24 C.F.R. §84.84(e)(2)(i).

24 CFR APPENDIX A and B to SUBTITLE A §425(a)(8) (1994): Rating factors for award of certain HUD Public and Indian Housing Home Ownership funds to accord maximum 10 points for ''[t]he extent to which the applicant demonstrates a firm commitment to promoting the use of minority business enterprises and women-owned businesses, especially resident-owned businesses'' . . . ''but may not include awarding contracts solely or in part on the basis of race or gender.''

24 F.F.R. §572.320(e) (1994): HUD will assign points in rating applications for certain single-family home ownership grants based on ''[t]he extent to which the applicant demonstrates a firm commitment to promoting the use of minority business enterprises and women-owned businesses'' . . . ''but may not include awarding contracts solely or in part on the basis of race or gender.''

24 C.F.R. §§850.33(o), .35(b), .39(b)(9) (1994): Applications for Section 8 Housing Assistance Programs and Section 202 Direct Loan Program must include a ''description of minority and women representation in the ownership of the project'' and ''a minority and women-owned business development plan which shall contain specific and measurable goals and an affirmative strategy to promote awareness and participation of such businesses in the contracting and procurement activities generated by the project.'' In addition ''[m]ore favorable consideration will be given to projects with a higher percentage of minority or women representation in the ownership of the project.''

24 C.F.R. §968.110(b) (1994): Public housing modernization program requirements include: ''the [public housing authority] shall take every action to meet Departmental goals for awarding modernization contracts to minority business enterprises. The PHA shall take appropriate affirmative action to assist women's business enterprises.''

24 C.F.R. §968.320(d)(7)(vii): Public Housing Modernization program includes requirement of comprehensive plan certifying that ''[t]he PHA has adopted the goal of awarding a specified percentage of the dollar value of the total of the modernization contracts, to be awarded during subsequent FFYs, to minority business enterprises and will take appropriate affirmative action to assist resident-controlled and women's business enterprises . . .''

48 C.F.R. §2419.901 (1994): Department of Housing and Urban Development (HUD) Office of Socially Disadvantaged Business Utilization is responsible for ''Department-wide goals'' for contract awards ''to women-owned businesses'' and monitoring and reporting with respect thereto.

48 C.F.R. §2426.101 (1994): States the policy of the Department of Housing and Urban Development ''to foster and promote Minority Business Enterprise (MBE) participation in its procurement program, to the extent permitted by law and consistent with its primary mission.'' For this purpose, ''minority'' is defined as ''Black Americans, Hispanic Americans, Native Americans, Asian Pacific Islanders and Asian Indian Americans, and Hasidic Jewish Americans.'' *See also* 48 C.F.R. §2452.219–70 (Small Business and Small Disadvantaged Business Subcontracting Plan to include percentage goals).

Interior

25 C.F.R. §276.3(c) (1994): Uniform administrative requirements for grants by the Bureau of Indian Affairs ''encourage'' grantees to use minority banks.

43 C.F.R. §§12.61(h), 12.922(j) (1994): Department of Interior Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' grantees and subgrantees to use minority banks at least 50% owned by minority group members.

43 C.F.R. §12.944(b) (1994): Department of Interior procurement requirements provide that ''[i]t is EPA policy to award a fair share of subagreements to small, minority, and women's businesses. The recipient must take affirmative steps to assure that small, minority, and women's businesses are used when possible as sources of supplies, construction, and services.''

43 C.F.R. §27.6 (1994): Affirmative action plan requirements for recipient of financial assistance from the Department of Interior include ''specific goals and specific timetables to which its efforts will be directed, to correct all deficiencies and thus to increase materially the participation of minorities and women in all aspects of its operation.''

43 C.F.R. §1419.901 (1994): Department of Interior socioeconomic program regulations state that ''[a]nnual goals for contract awards to women-owned businesses shall be established as prescribed in 1419.202–70.''

Justice

P.L. 103–322, 108 Stat. 1796, 1860, §31001 (1994): Not less than 10 percent of the amount paid from the Local Government Fiscal Assistance Fund created by the Violent Crime Control Act shall be expended on contracts or subcontracts with socially and economically disadvantaged and women-owned small businesses, historically Black colleges and universities, and higher educational institutions with more than 40 percent hispanic student enrollment.

28 C.F.R. §O.18a (1994): Provides that Director of the Office of Small and Disadvantaged Business Utilization within the Department of Justice shall ''[e]stablish Department goals for the participation by small businesses, including small businesses owned and controlled by socially and economically disadvantaged individuals, in Department procurement contracts.''

28 C.F.R. §42.206 (c)(1) (1994): Recipients of Criminal Justice Improvement Act funds shall be selected for post-award compliance reviews in part on the basis of ''[t]he relative

disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient.''

28 C.F.R. §66.21(h) (1994): Uniform requirements by the Justice Department for administration of state and local grants and cooperative agreements ''encourage'' grantees and subgrantees to use minority banks at least 50 percent owned by minority groups.

Labor

29 U.S.C.S. §718b(b): Directs the Commissioner of the Rehabilitation Services Administration to develop an ''outreach'' policy for ''recruitment of minorities into the field of vocational rehabilitation, counseling and related disciplines'' and for ''financially assisting Historically Black Colleges and Universities, Hispanic-serving institutions of higher education, and other institutions of higher education whose minority enrollment is at least 50 percent.''

29 U.S.C.S. §771a: Authorizes grants for personnel projects relating to training, traineeships and related activities to historically Black colleges and universities and other higher educational institutions with at least 50% minority student enrollment.

20 C.F.R. §627.430(g) (1994): Recipients and subrecipients of Job Training Partnership Act funds are ''encouraged to use minority-owned banks (a bank which is owned at least 50 percent by minority group members).''

20 C.F.R. §653.111 (a), (b)(3) (1994): State agencies participating in the administration of Services for Migrant and Seasonal Farmworkers, under the United States Employment Service, are to develop affirmative action plans which contain ''a comparison between the characteristics of the staff and the workforce and determine if the composition of the local office staff(s) is representative of the racial and ethnic characteristics of the workforce in the local office service area(s).'' ''On a statewide basis, staff representative of the racial and ethnic characteristics in the workforce shall be distributed in substantially the same proportion among (1) all 'job groups' . . . and (2) all offices in the plan(s).''

29 C.F.R. §§89.52(d), 89.72(d), 95.22(j), 97.21(h), 1470.21(h) (1994): Administrative requirements for Department of Labor (DOL) Project Grants to State and Local Governments, higher educational institutions, and other programs, ''encourage'' grantees to use minority banks.

29 C.F.R. §95.44(b) (1944):[19] All recipients of DOL grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for ''positive efforts . . . to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible'' and to ensure that such businesses ''are utilized to the fullest extent practicable.''

48 C.F.R. Part 2919, §1919.202–70 (1994): Small disadvantaged business program regulations of the Department of Labor require ''Heads of Contracting Activities [to] develop annual goals for each category of small business and small disadvantaged business utilization programs, which shall include projected acquisition awards to small businesses, minority businesses, 8(a) concerns, women-owned businesses, and HBCU.''

National Aeronautics and Space Administration

42 U.S.C.S. §2473b: NASA Administrator is required to annually establish a goal of at least eight percent of the total value of prime and subcontracts awarded in support of authorized programs to be made to small disadvantaged business and minority educational institutions.

48 C.F.R. §1819.705–4 (1994): Small disadvantaged business subcontracting regulation of the National Aeronautics and Space Administration (NASA) states that ''NASA contracting officers may accept as an element of a subcontracting plan the prime contractor's intention to use total small business, small disadvantaged business, women-owned business, historically black college and university, or minority educational institution set-asides in awarding subcontracts so long as such set-asides are competitive and awards are made at reasonable prices.'' See also §1819.7003 (agency goal of 8 percent of total value of prime and subcontracts for disadvantaged businesses); and §1815.219–76 (prescribed clause for NASA contracts incorporating 8 percent goal for ''small business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (including women), Historically Black Colleges and Universities, and minority education institutions'').

Small Business

41 U.S.C.S. §417a: ''Each Federal agency shall report to the Office of Federal Procurement Policy the number of small businesses owned and controlled by women and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency.''

13 C.F.R. §115.30(c) (1994): The Small Business Administration (SBA) Surety Bond Guarantee program indemnifies sureties for 90 percent of losses incurred on certain bonds ''issued on behalf of a small concern owned and controlled by socially and economically disadvantaged individuals,'' including ''Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and other minorities or any other individual found to be disadvantaged by SBA . . .''

13 C.F.R. 125.4 (1994): Small Business Administration requirement ''[t]hat separate goals for the participation by small business concerns and small disadvantaged business in Government procurement contracts and subcontracts thereunder shall be established annually by the head of each Federal agency following consultation with the SBA, and that the Administrator of the Office of Federal Procurement Policy shall establish the goal whenever there is disagreement between a Federal agency head and the SBA . . .''

13 C.F.R. §143.21(h) (1994): Grantees and subgrantees under SBA program of grants and cooperative agreements with state and local governments are ''encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members).''

State Department and Foreign Affairs

22 U.S.C.S. §4852(d): Not less than 10 percent of the amount appropriated for diplomatic construction or designed projects each fiscal year shall be allocated to the extent practicable for contracts with American minority contractors.

22 U.S.C.S. §4864(e): Not less than 10 percent of the amount of funds obligated for local guard contracts for Foreign Service buildings shall be allocated to the extent practicable for contracts with minority small business contractors.

P.L. 103–306, 108 Stat. 1608, §555 (1994): Provides for a 10 percent set-aside of the aggregate amount of certain appropriations to the Agency for International Development—the Development Assistance Fund, Population, Development Assistance, and the Development Fund for Africa—for socially and economically disadvantaged U.S. businesses and private voluntary organizations, historically black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollment.

Government procurement agreements. The United States has entered into procurement obligations under the North American Free Trade Agreement (NAFTA) (Chapter Ten) and the Uruguay Round Agreement on Government Procurement under which the United States agrees, among other things, to accord national treatment to products, services, and suppliers of other parties with respect to government contracts entered into by named agencies above certain threshold amounts. In both the NAFTA and the Uruguay Round Agreement (as well as in earlier trade agreements), the United States has taken a reservation stating that agreement obligations will not apply to set asides on behalf of small and minority businesses (NAFTA, Chapter 10, Annex 1001.2b, General Notes, Schedule of the United States, Note 1; Uruguay Round Agreement on Government Procurement, Annex of the United States, General Note 1).

22 C.F.R. §145.44(b) (1944): All recipients of Department of State grants and cooperative agreements awarded to institutions of higher education and other non-profit organizations are to establish written procurement procedures to provide for ''positive efforts . . . to utilize small businesses, minority-owned businesses, and women's business enterprises, whenever possible'' and to ensure that such businesses ''are utilized to the fullest extent practicable.'' Same provisions apply pursuant to uniform administrative requirements prescribed by 22 C.F.R. 518.44(b) (1994).

48 C.F.R. §652.219–70 (1994): Clause in Department of State contracts requiring disadvantaged and minority subcontracting goals. *See also* 48 C.F.R. §§619.201(b), 619.708–70.

48 C.F.R. §706.302–71 (1994): Agency for International Development (AID) requirement that ''[e]xcept to the extent otherwise determined by the Administrator, not less than ten percent of amounts made available for development assistance and for assistance for famine recovery and development in Africa shall be used only for activities of disadvantaged enterprises,'' which includes minorities and women.

48 C.F.R. Part 419 (1994): Socioeconomic Program policies of AID state that ''[w]here practicable and desirable, small business and minority goals will be established'' for procuring activities (§719.270(e)); and mandates that the AID Office of Small Disadvantaged Business develop ''a plan of operation designed to increase the share of contracts awarded to small business concerns, including small minority business enterprises'' (§719.271–2(6)). Disadvantaged enterprises include socially and economically disadvantaged concern, historically black colleges and universities and higher educational institutions with more than 40 percent Hispanic student enrollments (§§726.201, 752.226–1,2).

TRANSPORTATION

49 U.S.C.S. §47107(e)(1): Requires federally aided airport operators to insure ''to the maximum extent practicable'' that at least 10% of contracts for consumer services to the public be placed with ''small business concerns owned and controlled by a socially and economically disadvantaged individual . . .'' The statute incorporates the Small Business Act definition of that term ''except that women are presumed to be socially and economically disadvantaged.'' (49 U.S.C.A. §47113(a)(2)).

P.L. 102–240, 105 Stat. 1914, 1919, §1003(b) (1991): ''Except to the extent that the Secretary [of Transportation] determines otherwise, not less than 10 percent of the amounts authorized to be appropriated'' under various Titles of the Intermodal Surface Transportation Act of 1991 ''shall be expended with

small business concerns owned and controlled by socially and economically disadvantaged individuals;'' the statute incorporates the SBA presumption in favor of racial minorities (15 C.F.R. §637(d) and further provides that ''women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.''

49 C.F.R. Part 23, subpart C (1994): Minority-business enterprise program requirements for recipients and applicants under Department of Transportation financial assistance programs. DOT approved MBE affirmative action programs are to include recipient's ''overall goals and a description of the methodology to be used in establishing them'' (§23.43) and separate ''contract goals for firms owned and controlled by minorities and firms owned and controlled by women, respectively'' (§23.45). Rules for counting MBE participation toward meeting applicable goals (§23.47). The regulations further provide that a prime contractor unable to satisfy a particular contract's minority goal may nevertheless be awarded the contract if its ''best efforts'' were made to achieve the goal (§§23.45(g)(2)(ii), 23.45(h)). Several elements are considered in determining whether a prime contractor failing to meet its goal in fact made a good faith effort to comply (§23.45, app. A).

49 C.F.R. Part 23, subpart D (1994). Implementation of §105(f) of the Surface Transportation Assistance Act of 1982. DOT regulations establish a rebuttable presumption that women, Black-Americans, Hispanics, Native Americans, Asian-Pacific Americans, Asian-Americans and those individually certified under §8(a) of the Small Business Act are socially and economically disadvantaged (§23.62). Recipients of surface transportation funds must establish overall goal for disadvantaged business participation on funded projects (§23.64) and, absent a waiver by the DOT Secretary, must insure that at least ten percent of monies expended on federally assisted projects go to such enterprises (§§23.61(a), 23.63). ''If a recipient fails to meet an approved goal, it shall have the opportunity to explain to the Administrator of the concerned Department element why the goal could not be achieved and why meeting the goal was beyond the recipient's control,'' failing which the recipient is subject to ''appropriate remedial sanction'' (§23.68).

49 C.F.R. §23.95 *et seq.* (1994): Minority business enterprise participation standards under §511(A)(17) of the Airport and Airway Improvement Act of 1982 provide that sponsors of airport improvement projects ''shall establish an overrall goal for the participation of DBE's'' as concessionaires and ''[t]o the extent practicable, shall seek to obtain DBE participation in all types of concession activities.'' ''Where not prohibited by state or local law and determined . . . to be necessary to meet DBE goals, procedures to implement DBE set-asides shall be established. The DBE plan shall specify the concessions to be set-aside.''

49 C.F.R. §265.13 (1994): Federal Railroad Administration regulations barring discrimination in federally assisted programs require ''where there are deficiencies based on past practices, and with respect to future plans for hiring and promoting employees or awarding contracts, the development of specific goals and timetables for the prompt achievement and maintenance of full opportunities for minority persons and MBEs with respect to programs, projects and activities subject to this subpart.

Veterans Affairs

38 C.F.R. §43.21(h) (1994): Department of Veterans Affairs Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. §819.202–5(c) (1994): Department of Veterans Affairs regulations require ''all acquisition activities [to] submit information and procurement preference goals'' for ''minority direct business awards,'' ''women-owned business awards,'' and ''[s]ubcontracts to be awarded to small disadvantaged business concerns.''

Other

36 C.F.R. Part 906 (1994): Affirmative action policy and procedures, including goals and timetables for women and minorities, ''to assure full minority participation in activities and benefits that result from implementation of the Pennsylvania Avenue Plan—1974.''

36 C.F.R. §1207.21(h) (1994): National Archives and Records Administration Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' grantees and subgrantees to use minority banks at least 50% owned by minority group members.

44 C.F.R. §§13.21(h) (1994): Federal Emergency Management Agency Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments ''encourage'' grantees and subgrantees to use minority banks at least 50% owned by minority group members.

EQUAL EMPLOYMENT OPPORTUNITY LAWS

The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960's which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement of construction contracts in excess of $50,000, to make a ''good faith effort'' to attain ''goals and timetables'' to remedy underutilization of minorities and women. Another early Executive Order, No. 11478, was a precursor to the 1964 Civil Rights Act and mandates affirmative action hiring and employment policies by all federal executive department and agencies.

Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under Title VII of the 1964 Civil Rights Act.[20] Except as may be imposed by court order to remedy ''egregious'' violations of the law, or by consent decree to settle pending claims, however, there is no general statutory obligation on employers to adopt affirmative action measures. But the EEOC has issued guidelines to protect employers and unions from charges of ''reverse discrimination'' when they voluntarily take to correct the effects of past discrimination.[21] Federal departments and agencies, by contrast, are required to periodically formulate affirmative action plans for their employees and a ''minority recruitment program'' to eliminate minority ''underrepresentation'' in specific federal job categories.

Section 717 of 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the Equal Employment Opportunity Commission to enforce nondiscrimination policy in federal employment by ''necessary and appropriate'' rules, regulations, and orders and through ''appropriate remedies, including reinstatement or hiring of employees, with or without backpay.''[22] Each federal department and agency, in turn, is required to prepare annually a ''national and regional equal employment opportunity plan'' for submission to the EEOC as part of ''an affirmative program of equal employment opportunity for all . . . employees and applicants for employment.''[23]

Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms including a mandate for immediate development of a ''minority recruitment program'' designed to eliminate ''underrepresentation'' of minority groups in specific federal job categories.[24] The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan ''must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured.''[25]

In addition, the following statutes and regulations relate to employment policies of the federal government or under federal grant and assistance programs:

5 U.S.C. §4313(5): Performance appraisal in the Senior Executive Services to take account of individuals' ''meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with merit principles. . .''[26]

5 U.S.C. §7201: Establishes a ''Minority Recruitment Program'' for the Executive Branch and directs each Executive agency, ''to the maximum extent possible,'' to ''conduct a continuing program for the recruitment of members of minorities for positions in the agency . . . in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited.''

22 U.S.C. §4141(b): Establishes the Foreign Service Internship Program ''to promote the Foreign Service as a viable and rewarding care opportunity for qualified individuals who reflect the cultural and ethnic diversity of the United States. . .''

29 U.S.C. §1781(a): ''A contractor subject to the affirmative action obligations of Executive Order 11246 . . . may establish or participate in training programs pursuant to this section . . . which are designed to assist such contractors in meeting the affirmative action obligations of such Executive Order.''

42 U.S.C. §282(h): The Secretary of HHS, and the National Institutes of Health, ''shall, in conducting and supporting programs for research, research training, recruitment, and other activities, provide for an increase in the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities) in the fields of biomedical and behavioral research.''

45 U.S.C. §§797b, 907, 1004: First right to hire a certain previously separated or furloughed railroad employees subject to exceptions for vacancies covered by ''(1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan.''

Executive Order 11246: Prohibits employment discrimination because of race, color, religion, sex, or national origin by nonexempt federal government contractors and requires inclusion of an affirmative action clause in all covered federal contracts for procurement of goods and services. Pursuant to Labor Department regulations, larger federal contractors are required to

adopt goals and timetables to correct ''underutilization'' of minorities and women. See 41 C.F.R. Part 60 (discussed *infra*).

Executive Order 11478: States the policy of the United States government ''to provide equal opportunity in Federal employment for all persons, to prohibit discrimination because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive agency and department.''

Federal Regulations

5 C.F.R. Parts 729, 720 APP. (1994): Affirmative Employment Programs of the Office of Personnel Management and Guidelines for Development of A ''Minority Recruitment Program'' to Implement 5 U.S.C. §7201.

14 C.F.R. §152.407, .409, .411 (1994): All grantees, sponsors, or planning agencies, with 50 or more aviation employees who participate in projects which receive federal airport aid funds are required to maintain ''affirmative action'' plans containing ''goal and timetables'' derived from ''[a] comparison . . . of the percent of minorities and women in the employer's present aviation workforce . . . with the percent of minorities and women . . . in the total workforce'' in the SMSA or surrounding area.

23 C.F.R. §230.111(1994): On-the-job training program rules for federally assisted highway construction projects provide that ''[t]he Washington Headquarters shall establish and publish annually suggested minimum training goals . . . based on the Federal-aid apportioned amounts and the minority population, A State will have achieved its goal if the total number of training slots . . . equals or exceeds the State's suggested minimum annual goal.''

23 C.F.R. Part 230 APP. A (1994): State Highway Agency Equal Employment Opportunity Programs. Affirmative action plans are to set ''specific, measurable, attainable hiring and promotion goals, with target dates, in each area of underutilization'' of women and minorities.

29 C.F.R. §§30.3–30.8 (1994): Affirmative action requirements of the Department of Labor (DOL) for registered state apprenticeship programs include ''goals and timetable for women and minorities.'' ''Compliance with these requirements shall be determined by whether the sponsor has met its goals within it timetables, or failing that, whether it had made good faith efforts to meet its goal and timetables.''

32 C.F.R. Part 191, §191.5(a)(8) (1994): DOD Civilian Equal Employment Opportunity Program establishes affirmative action guidelines and procedures for all DOD components and directs the Assistant Secretary of Defense to ''[e]nsure that realistic goals that provide for significant continuing increases in the percentages of minorities, women, and people with disabilities in entry, middle, and higher grade positions in all organizations and occupations are set and accomplished until the overall DOD objective is met and sustained.''

34 C.F.R. Part 100 APPENDIX VII.C (1994): Department of Education guidelines for eliminating discrimination in vocational education programs provide that ''[w]henever the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.''

40 C.F.R. Part 8 (1994); Environmental Protection Agency (EPA) equal employment opportunity and affirmative action compliance requirements issued pursuant to E.O. 11246 as applied to EPA contracts and EPA assisted construction contracts.

41 C.F.R. Part 60 (1994): Sets forth the body of administrative rules issued by the Office of Federal Contract Compliance Programs within the Department of Labor to enforce the affirmative action requirements of E.O. 11246 on federal procurement and construction contractors. All contractors and subcontractors with federal contracts in excess of $10,000 are prohibited by the Executive Order from discriminating and required to take affirmative action in the employer of minority groups and women. Federal contractors and subcontractors with 50 or more employees and government contracts of $50,000 or more must develop written affirmative action compliance programs for each of their facilities. OFCCP rules direct these larger contractors to conduct a ''utilization analysis'' of all major job classifications and explain any underutilization of minorities and women by job category when compared with the availability of qualified members of these groups in the relevant labor area. Based on this analysis, the contractor's affirmative action plan must set forth appropriate goals and timetables to which the contractor must direct its ''good faith efforts'' to correct deficiencies. In addition, OFCCP has established nationwide hiring goals of 6.9 percent for women in construction, and regional and local goals for minorities in construction, which are set out in an appendix to the agency's affirmative action in construction regulations. 41 C.F.R. 60–4.

48 C.F.R. 22.804 (1994): Affirmative action program under Federal Acquisition Regulations requires written affirmative action plans of federal nonconstruction prime and subcontractors with 50 or more employees that comply with DOL regulations to assure equal opportunity in employment to minorities and women.

48 C.F.R. 52.222–23, 52.222–27 (1994): Prescribes clause for inclusion of federal contracts that requires ''[g]oals for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area'' and ''to make a good faith effort to achieve each goal under the plan in each trade in which its has employees.''

48 C.F.R. 922.804–2 (1984): Department of Energy regulations implementing the affirmative action plan requirements of E.O. 11246.

It is hoped that this is of assistance to you.

CHARLES V. DALE,
Legislative Attorney.

FOOTNOTES

[1] As per discussion with your staff, however, we have not included federal civil rights statutes, such as Title VI of the 1964 Civil Rights Act and related laws, that place nondiscrimination requirements upon recipients of federal financial assistance without mandating racial, ethnic, or gender preferences *per se*. Nor are regulations of the various federal departments or agencies under Title VI included for the similar reason that, although they almost uniformly authorize ''affirmative action'' by recipients to ''overcome the effects of prior discrimination'' or otherwise, they do not explicitly define the obligation in terms of ''goals'' or ''setasides,'' or other forms of preference for minorities or women. *See e.g.* 15 C.F.R. 15.3(b)(6)(1994) (Department of Agriculture Title VI regulations). Also beyond the scope of this study are the remedy provisions in federal laws like Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e-5(g)), or the Fair Housing Act, 42 U.S.C. §3613, which authorize ''affirmative'' relief by the courts in discrimination actions, and have been the basis for judicial preference orders in certain circumstances, but do not explicitly direct the imposition of ''timetables, goals, set-asides, and quotas'' on their face.

[2] 42 U.S.C. §2000e-16(b).

[3] 5 U.S.C. §7201.

[4] 15 U.S.C. §637(a).

[5] 15 U.S.C. §637(a)(5).

[6] 13 C.F.R. §124.105(b).

[7] The statute, 15 U.S.C. §637(a)(6)(A), defines economic disadvantage in terms of: socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.

[8] 15 U.S.C. §637(d). *See also* 13 CFR §124.106.

[9] 15 U.S.C. §637(d). Criteria set forth in the regulations permit an administrative determination of socially disadvantaged status to be predicated on ''clear and convincing evidence'' that an applicant has ''personally suffered'' disadvantage of a ''chronic and substantial'' nature as the result of any of a variety of causes, including ''long term residence in an environment isolated from the mainstream of American society,'' with a negative impact ''on his or her entry into the business world.'' 13 C.F.R. §124.105(c).

[10] P.L. 100–656, §502, 102 Stat. 3887, codified at 15 U.S.C. §644(g)(1).

[11] *See e.g.* 49 C.F.R. §§23.64(e), 23.65 (setting forth waiver criteria for the Department of Transportation).

[12] 15 U.S.C. §637(a)(5).

[13] *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

[14] P.L. 103–355, 108 Stat. 3243 , 3374, §7106 (1994).

[15] As amended by §3(a) of the Resolution Trust Completion Act, P.L. 103–204, 107 Stat. 2369, 2375 (1993).

[16] Opinions may reasonably differ as to whether federal programs that exclusively aid ''historically black colleges and universities'' or other minority institutions are a form of racial ''preference.'' Without expressing any view on that policy issue, however, such programs are included here only because they employ racial and ethnic criteria or classification as the basis for distribution of federal benefits and, accordingly, at least arguably fall within the ambit of your inquiry.

[17] 59 Fed. Reg. 47279 (September 15, 1994).

[18] The provisions listed in 24 C.F.R. Part 84 are not yet codified by may be found at 59 Fed. Reg. 47010 et seq. (September 13, 1994).

[19] 59 Fed. Reg. 38281 (July 27, 1994).

[20] 42 U.S.C. §§2000e *et seq.*

[21] 29 C.F.R. Part 1608 (the guidelines state the EEOC's position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination).

[22] 42 U.S.C. §2000e-16(b)

[23] 42 U.S.C. §2000e-16(b)(1).

[24] 5 U.S.C. §7201.

[25] 5 U.S.C. §720.205(b)(1991).

[26] As amended by P.L. 103–424, 108 Stat. 4361, §6 (1994).

Mr. DOLE. We have had a lot of requests for the CRS report, not just from Members of Congress on both sides of the aisle, but from a lot of people who would like to study it.

I hope, in the final analysis, that this would be a matter that we can discuss again in a bipartisan way.

I believe my civil rights record is impeccable, and I believe I have some credibility in this area. I am not out to destroy anybody or devastate anybody. I am out to take another look at what America should be. Can we have a color-blind society, which I think would meet the hopes and aspirations of 90 to 95 percent of all Americans? Some may want special rights and preferences. There may be some cases when we look over this document with 160-some different laws and regulations that have been compiled, where there may be some exception. There are some that should be continued. But

certainly we ought to review it and look at it.

As I said earlier, unless I am totally wrong, we ought to take another look at the Executive order signed by President Johnson and see if it has been distorted, magnified, or whatever. The goal should be nondiscrimination. That was the original intent of it. We ought to look at the Small Business Administration 8(a) program. It has been abused, no doubt about it. A lot of people have made a lot of money by finding someone in a minority group to sort of front for the effort. I do not believe that is right. I do not believe that is fair. So we have asked for hearings. We will be reviewing this process, hopefully, on a bipartisan basis, not only in the Senate but in the House. I assume there will be further discussion of this as we come to the floor with a tax bill that has been reported out by the Senate Finance Committee, which takes a step, I believe, in the right direction toward eliminating preferences.

Mr. SIMON addressed the Chair.

The PRESIDING OFFICER. The Senator from Illinois.

AFFIRMATIVE ACTION

Mr. SIMON. Mr. President, I hope we can work out some bipartisan efforts here on this issue, but let me add that there is a lot of talk attacking affirmative action that is just nonsense. I see Senator DOLE nodding that he is in agreement.

Affirmative action can be a very good thing. It is like religion—it can be abused. It does not mean religion is wrong. But regarding affirmative action, if there is a company that hires 1,000 people and they all happen to be white males, I do not think we ought to have to prove that there is some discrimination. We ought to be able to say to that company that there ought to be some diversity. You ought not to have to lower your standards at all. But there ought to be some minorities, there ought to be some disabled people and some women in your work force.

The case at hand—and I have to say I do not remember all of the details—but a high school which has a majority of minority students there in the business section of that high school had nine teachers, all of whom happened to be white.

They had to reduce the number of teachers. The two teachers who had the least amount of seniority both happened to be hired the same day. One was white and one was black. That school made a decision on the basis of race that they felt it was important to have minority representation in the business section of this school.

I am not saying that their decision was necessarily right, but I think it is an understandable decision and I think the situation has been distorted. I think there are times when there should be some agreement.

I dealt with a city in Illinois that had some civil rights violence. It was 40 percent black. They did not have a single black on the police force or the fire department. We worked out an agreement that the next person they would hire would be someone who was African-American. I think that just makes sense. We did not say, ''Lower the quality,'' or anything. That is affirmative action. I think it makes sense.

I am sure BOB DOLE, Senator FAIRCLOTH, Senator BAUCUS, like PAUL SIMON, you try to have some diversity in your office. You do not lower standards.

Two of the lawyers in my office are Jayne Jerkins and Carlos Angulo. I will put them up against any staff members in the U.S. Senate. One happens to be African-American; one happens to be Hispanic-American. They are just quality people.

But I have consciously in my office tried to have some diversity. And I think that is a healthy thing. That is affirmative action. It does not mean you lower standards or anything else.

So I think before we do too much attacking of affirmative action, let us recognize it can be a very good thing. Can it be abused? Yes, like any good things can be abused. But we should seek, as part of the American ideal, that we are going to have opportunities here for all Americans. I think that has to continue.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Senator from Kansas.

Mr. DOLE. Mr. President, I thank my colleague from Illinois. I know of his feelings in this area.

I think, in fact, we want to do the same thing he has already suggested through nondiscrimination and penalties for discrimination. I mean, if you discriminate there ought to be punishment.

Al Shanker of the American Federation of Teachers came out against the Justice Department's position on the Piscataway case. In fact, he has written a column about it. There was not any evidence of any discrimination by the school board. Next time, it could be a black person, a black woman or black man, who may lose their job.

So that is why I say if somebody discriminates, to me that is one thing. If somebody has 1,000 white males, as the Senator from Illinois suggested, and there were good Asian, Hispanic, and black applicants, there ought to be at least some presumption or some evidence that someone may have discriminated, and we ought to go after that person if there is any evidence.

We are talking about the same result. We may have a different way of approaching it.

But I think, in any case, when we have had laws on the books for 10, 15, 20, 25, 30 years around here, it might be time to go back and take a look to see what has worked, what has not worked, see if they have worked at all, or if they have been misused or abused, taken advantage of by some people who may not have been in any of those special groups. That has happened, too.

So I hope we can discuss this in a very reasonable way, because it is a very, very touchy subject. In the past, you know, if you had two equally qualified people, you used to flip a coin. One might be black, one might Asian; or one Hispanic, one white. You would say, ''Well, somebody has to go.'' You flipped a coin. And we have done a lot of that. I think we can all look back at the time we flipped coins. Sometimes we won; sometimes we lost.

In any event, it is a very important debate. There has been a lot of statements made that I think go over the edge; probably some from each side that go over the edge. That is not my purpose. I hope that, as we delve into this on the committee level, we will have a good discussion and maybe get some better results.

I yield the floor.

Mr. BAUCUS addressed the Chair.

The PRESIDING OFFICER. The Chair recognizes the Senator from Montana.

Mr. BAUCUS. Mr. President, what is the pending business?

The PRESIDING OFFICER. H.R. 889 is the pending business.

Mr. BAUCUS. Mr. President, I ask unanimous consent to speak as if in morning business for not to exceed 10 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

DOUG SWINGLEY WINS THE IDITAROD TRAIL SLED DOG RACE

Mr. BAUCUS. Mr. President, let me read from a story that appeared on today's AP wire:

> A quiet ''yahoo'' was the first thing Montana musher Doug Swingley uttered when he arrived at Nome, winning the Iditarod Trail Sled Dog Race in record time. Swingley is the first non-Alaskan winner of the race in 23 years.

Well, today, many Montanans are echoing that ''yahoo'' heard up north.

We are saying yahoo for Doug Swingley and the hard work, determination and endurance that helped him win.

We are saying yahoo for the family and friends—particularly his wife Nelda—who backed Doug up and helped him get to where he is today.

And we are even saying yahoo for Doug's lead dog, Elmer, and what is almost certainly the fastest team of sled dogs in the world.

They have all made Montana proud. And to Doug, his family and his friends, we say congratulations.

Yet I doubt there is a yahoo to be heard anywhere in the State of Alaska today. And that includes my good friends and colleagues from Alaska, Senators STEVENS and MURKOWSKI.

But I would urge them to not take this loss too hard. It is never easy to keep up with Montana. Perhaps all those cold, dark Alaska winters have just slowed the Alaska mushers down. And maybe, if Alaska wants to stay competitive in future Iditarods, they