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41 CFR Parts 60–250 and 60–300

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans; Proposed Rule

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Parts 60–250 and 60–300**

RIN 1250-AA00

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

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to revise regulations implementing the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, which requires covered Federal contractors and subcontractors to take affirmative action in employment on behalf of specified categories of protected veterans. The proposed regulations would strengthen these affirmative action provisions, detailing specific actions a contractor must take to satisfy its obligations. They would also increase the contractor's data collection obligations, and require the contractor to establish hiring benchmarks to assist in measuring the effectiveness of its affirmative action efforts. Rescission of 41 CFR part 60–250 as obsolete is also proposed.

DATES: To be assured of consideration, comments must be received on or before June 27, 2011.

ADDRESSES: You may submit comments, identified by RIN number 1250-AA00, by any of the following methods:

- *Federal eRulemaking Portal:* www.regulations.gov. Follow the instructions for submitting comments.
- *Fax:* (202) 693–1304 (for comments of six pages or less).
- *Mail:* Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue, NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693–0102 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue, NW.,

Washington, DC 20210, or via the Internet at <http://www.regulations.gov>. Upon request, individuals who require assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking (NPRM) will be made available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

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

Telephone: (202) 693–0102 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:**Background**

Enacted in 1974, the purpose of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (Section 4212), is twofold. First, Section 4212 prohibits employment discrimination against specified categories of veterans by Federal government contractors and subcontractors. Second, it requires each covered Federal government contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

The nondiscrimination requirements and general affirmative action requirements of Section 4212 apply to all covered contractors. *See* 41 CFR 60–250.5, 60–300.5. The requirement to prepare and maintain an affirmative action program, the specific obligations of which are detailed at 41 CFR 60–250.44 and 60–300.44, apply to those contractors that meet the contract amount threshold and have 50 or more employees. In the Section 4212 context, with the awarding of a Federal contract comes a number of responsibilities, including compliance with the Section 4212 anti-discrimination and anti-retaliation provisions, meaningful and effective efforts to recruit and employ veterans protected under Section 4212, creation and enforcement of personnel policies that support its affirmative action obligations, maintenance of accurate records documenting its affirmative action efforts, and providing OFCCP access to these records upon request. Failure to abide by these responsibilities may result in various sanctions, from withholding progress

payments up to and including termination of contracts and debarment from receiving future contracts.

The framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement has remained unchanged since the Section 4212 implementing rules were first published in 1976. Meanwhile, increasing numbers of veterans are returning from tours of duty in Iraq, Afghanistan, and other places around the world, and many are faced with substantial obstacles in finding employment upon leaving the service. A March 2010 report from the Bureau of Labor Statistics found that the 2009 annual average unemployment rate for veterans 18 to 24 years old was 21.1%, compared with 16.6% for non-veterans in that age group. The unemployment rate for veterans 25 to 34 years old was 11.1%, compared with 9.8% for non-veterans in that age group. Addressing the barriers our veterans face in returning to civilian life, particularly with regard to employment, is the focus of a number of Federal efforts, such as the Work Opportunity Tax Credit established for employers who hire unemployed disabled veterans as part of the American Recovery and Reinvestment Act signed into law by President Obama in February 2009. Strengthening the implementing regulations of Section 4212, whose stated purpose is "to require Government contractors to take affirmative action to employ and advance in employment qualified covered veterans," will be another important means by which the government can address the issue of veterans' employment.

Prior to issuing this NPRM, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, veterans' organizations, and other interested parties to understand those features of Section 4212's regulations that work well, those that can be improved, and possible new requirements that could help to effectuate the overall goal of increasing the employment opportunities for qualified protected veterans with Federal contractors.

Accordingly, this NPRM proposes several major changes to parts 60–250 and 60–300. The VEVRAA regulations found at 41 CFR part 60–250 generally apply to Government contracts of \$25,000 or more entered into before December 1, 2003. The threshold amount for coverage is a single contract of \$25,000 or more; contracts are not aggregated to reach the coverage

threshold. If a Federal contractor received a government contract of at least \$50,000 prior to December 1, 2003, an AAP must be developed in accordance with the 41 CFR part 60–250 VEVRAA regulations. As explained below, some contracts that were entered into before December 1, 2003 will be subject to the regulations found at 41 CFR part 60–300.

The regulations found at 41 CFR part 60–300 apply to Government contracts entered into on or after December 1, 2003. The threshold amount for coverage and AAP threshold coverage is a single contract of \$100,000 or more, entered into on or after December 1, 2003; contracts are not aggregated to reach the coverage threshold. The regulations found at 41 CFR part 60–300 also apply to modifications of otherwise covered Government contracts made on or after December 1, 2003. Consequently, a contract that was entered into before December 1, 2003, will be subject only to the part 60–300 regulations if it is modified on or after December 1, 2003 and meets the contract dollar threshold of \$100,000 or more.

The detailed Section-by-Section Analysis below identifies and discusses all proposed changes in each section. Due to the extensive proposed revisions to the Section 4212 regulations, part 60–300 and the alternate part 60–250 (in the event part 60–250 is not rescinded, as discussed in the Summary section above and detailed in the part 60–250 Section-by-Section Analysis below) will be republished in their entirety in this NPRM for ease of reference. However, the Department is only accepting comments on the proposed revisions of the regulations detailed herein.

Section-by-Section Analysis

41 CFR Part 60–250

OFCCP is proposing two alternative approaches to part 60–250.

The first approach is to rescind part 60–250 in its entirety. As stated above, part 60–250 only covers those contracts of \$25,000 or more entered into prior to December 1, 2003—over seven years before the publication of this NPRM—that have been unmodified since that time, or have been modified while maintaining a total contract value between \$25,000 and \$100,000. Federal Acquisition Regulation 17.204 states that, in general, government contract duration should not exceed five (5) years. Further, all contracts under \$100,000 are subject to the simplified acquisition threshold and cannot be renewed. Thus, unless special excepted contracts exist, contracts covered

exclusively by part 60–250 would have expired by December 1, 2008.

It is for these reasons that we propose rescission of part 60–250. However, to ensure that we do not inadvertently deprive protected veterans of their Section 4212 rights, we seek comment from the public as to whether any contracts that are covered by part 60–250 still exist.

In the event that contracts are discovered that do fall under part 60–250's coverage, we will not seek to rescind part 60–250; rather, we propose a second approach: A revised part 60–250 that mirrors the changes that we have proposed to part 60–300. A Section-by-Section Analysis of this alternative follows below.

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–250.1 Purpose, Applicability and Construction

Paragraph (a) of the current rule sets forth the scope of Section 4212 and the purpose of its implementing regulations. We propose a few minor changes to this section. First, we propose deleting the reference to the “Vietnam Era Veterans’ Readjustment Assistance Act of 1974” or “VEVRAA,” and replacing it, in this section and throughout the regulation, with “Section 4212.” Referring to the operative law as “VEVRAA” is not entirely accurate, as Section 4212, where VEVRAA was initially codified, has been amended several times since VEVRAA was passed—most recently by the Jobs for Veterans Act of 2002 (JVA), which amended the categories of protected veterans and the dollar amount for contract coverage that subsequently led to the promulgation of the regulations found at part 60–300. Referring to the law as “Section 4212” clarifies that we are referring to the law as amended. This is more accurate than “VEVRAA” and should alleviate any further confusion.

Second, paragraph (a) discusses the contractor’s affirmative action obligations, but does not discuss another primary element of the regulations: The prohibition of discrimination against veterans protected under Section 4212. Accordingly, the proposed regulation adds language to the first sentence of paragraph (a) to include this important element.

Additionally, the proposed rule makes two minor language changes in order to comport with some of the newly proposed definitions in § 60–250.2. First, the term “other protected veterans” is amended to read “active duty wartime or campaign badge

veterans,” for the reasons detailed in the Section-by-Section Analysis of § 60–250.2. Second, all references to “covered veterans” is amended to read “protected veterans,” due to the inclusion of a definition for “protected veteran” in the proposed § 60–250.2.

Section 60–250.2 Definitions

The proposed rule incorporates the vast majority of the existing definitions contained in existing § 60–250.2 without change. However, OFCCP proposes some changes to the substance and structure of this section, as set forth below.

With regard to the structure of this section, the current rule lists the definitions in order of subject matter. However, for those who are unfamiliar with the regulations, this organizational structure makes it difficult to locate specific terms within this section. The proposed rule reorders the defined terms in alphabetical order, and then assigns each term a lettered subparagraph heading. This modified structure is proposed for ease of reference, and to facilitate citation to specific definitions. However, because of this reordering, the citation to specific terms may be different in the proposed rule than it is currently. For instance, the term “contract,” which is § 60–250.2(h) in the current regulations, is § 60–250.2(d) in the proposed regulation.

With regard to substantive changes, the proposed rule first clarifies the definitions pertaining to the classifications of veterans who are protected under part 60–250. The classifications of protected veterans in part 60–250 are those described in Section 4212 prior to the enactment of the JVA and are as follows: (1) Special disabled veterans; (2) veterans of the Vietnam era; (3) veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized; and (4) recently separated veterans. Currently, § 60–250.2 includes specific definitions for “special disabled veterans,” “veterans of the Vietnam era,” and “recently separated veterans.” See 41 CFR 60–250.2(n), (p), (r). It does not contain a specific definition for “veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.” Instead, this classification is included within the current “other protected veteran” definition. See 41 CFR 60–250.2(q). This anomaly has caused significant confusion, as many individuals who are unfamiliar with the regulations believe that the “other

protected veteran” category is a “catch-all” that includes all veterans. To address this issue, the proposed rule replaces the “other protected veteran” definition that is contained in the current regulation with the more precise classification language “active duty wartime or campaign badge veteran” that appears in the statute. This replacement will not change the scope of coverage. Instead, individuals currently covered under the “other protected veteran” classification as defined in the current rule will still be covered, but will fall under the more accurate “active duty wartime or campaign badge veteran” classification. It should be noted that this proposed rule does not revise the VETS-100 form, which is administered by the Department’s Veterans’ Employment and Training Service (VETS) and requires the contractor to tabulate the number of employees and new hires in each of the component categories of protected veterans under Section 4212. The VETS-100 form currently maintains the use of “other protected veteran” classification. After the final rule pertaining to these regulations is published, OFCCP will work with VETS to conform the VETS-100 forms to the new Section 4212 regulations. DOL will provide the public with an opportunity to comment on these changes, which will not become effective until approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995.

The current rule also lacks a clear, overarching definition of “protected veteran,” under part 60-250. Although it discusses the responsibilities of a contractor to all categories of protected veterans collectively, it also enumerates each classification of protected veteran several times throughout the regulation. Accordingly, the proposed rule includes a new definition of “protected veteran,” which includes all four classifications of protected veterans separately identified and defined in 60-250.2. This new term would replace the phrase “special disabled veteran(s), veterans of the Vietnam era, recently separated veteran(s), or other protected veteran(s)” used throughout the current rule to refer to these protected veterans in the aggregate. The individual categories of protected veterans continue to be separately identified in the first paragraph of the equal opportunity clause in § 60-250.5 to permit the identification of protected veterans in the context of the contract (*see* Section-by-Section Analysis of § 60-250.5, *infra*, for further explanation).

The proposed rule also replaces the term “Deputy Assistant Secretary,”

found currently at § 60-250.2(d), with “Director.” The current § 60-250.2(d) defines “Deputy Assistant Secretary” as “the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee.” Following the elimination of the Employment Standards Administration in November 2009, the head of OFCCP now has the title of Director. Accordingly, the proposed rule reflects this change, which will be made throughout part 60-250.

The proposed rule also adds a definition of employment service delivery system, defined in current § 60-300.2(y). Because the term “employment service delivery system” is mentioned in part 60-250, for example, in paragraph 2 of the equal opportunity clause found in § 60-250.5(a), we have added the definition for clarity.

The proposed rule also adds a definition of “linkage agreement,” now described in the OFCCP Federal Contract Compliance Manual. We propose adding a definition of “linkage agreement” to the regulations for clarity. The proposed regulation defines “linkage agreement” to mean an agreement between the contractor and appropriate recruitment and/or training sources. A linkage agreement is to be used by the contractor as a source of potential applicants to the covered groups in which the contractor is interested. The contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority.

Section 60-250.3 [Reserved]

Section 60-250.4 Coverage and Waivers

The proposed regulation replaces the term “Deputy Assistant Secretary,” found in paragraphs (b)(1), (b)(2), and (b)(3) of this section, with the term “Director,” for the reasons set forth in the discussion of § 60-250.2.

Section 60-250.5 Equal Opportunity Clause

Paragraph (a) contains the equal opportunity (EO) clause that must be included in all covered Government contracts and subcontracts. The proposed regulation includes numerous substantive changes.

First, the proposed regulation adds additional language to subparagraph 2 of the EO clause in this section clarifying the contractor’s responsibility to “list” jobs in the context of mandatory listing requirements. The mandatory job

listing requirement discussed in paragraphs 2 and 3 of the EO clause mandates that the contractor list all employment openings for the duration of the contract with an “appropriate employment service delivery system,” (hereinafter “employment service”). This listing not only provides a source for veterans to access job listings, but also allows the employment service to provide priority referrals of veterans for the Federal contractor jobs listed with the employment service. Following the publication of the most recent revisions to part 60-250 regulations, questions were raised as to the manner in which a contractor must provide information to an employment service in order to satisfy the requirement. There have been many instances in which a contractor provided job listings to an employment service in a manner or format that was unusable to that employment service. In order to satisfy the listing requirement, the contractor must provide job vacancy information to the appropriate employment service *in the manner that the employment service requires* in order to include the job in their database so that they may provide priority referral of veterans. OFCCP has long interpreted the listing responsibilities of a contractor in this manner. This change clarifies OFCCP’s policy.

The proposed regulation also adds a sentence to the end of paragraph 2 clarifying that, for any contractor who utilizes a privately-run job service or exchange to comply with its mandatory listing obligation, the information must be provided to the appropriate employment service in the manner that the employment service requires. This clarification is proposed for two reasons. First, contractors’ use of private job listing services has increased following the elimination of the Department’s America’s Job Bank listing service. Second, we have received feedback from officials in state employment services that some contractors provide job listing information to these private job listing services assuming that they have then fulfilled their listing obligations, but that the private job listing services do not always provide the information in the requisite manner in order to list the job opening in its database and provide priority referral of protected veterans.

The proposed regulations also add further detail to paragraph 4 of the EO clause with respect to the specific information the contractor must provide to state employment services in each state where the contractor has establishments. The current regulations require that the contractor provide the appropriate state employment service

with the name and location of each of the contractor's hiring locations. The proposed regulations require that the contractor provide the state employment service with the following additional information: (1) Its status as a Federal contractor; (2) the contact information for the contractor hiring official at each location in the state; and (3) its request for priority referrals of protected veterans for job openings at all its locations within the state. This information shall be updated on an annual basis. These three additional items are proposed in light of feedback received from state employment services that there is no centralized list of Federal contractors that they can consult in order to determine if a listing employer is a Federal contractor. If the Federal contractor does not specifically identify itself as such to the state employment service and further identify the hiring official, the state employment service often will not know if it should be providing priority referrals of protected veterans as required by § 60–250.84 or who to contact. Requiring the Federal contractor to provide this additional information will facilitate the priority referral process. The proposed regulation also adds a sentence clarifying that, if the contractor uses any outside job search companies (such as a temporary employment agency) to assist in its hiring, the contractor must also provide the state employment service with the contact information for these outside job search companies. Due to the widespread use of these outside job search companies, this proposed language is included to ensure that the state employment service has the ability to contact all individuals responsible for a contractor's hiring in order to effectively carry out its obligations under § 60–250.84. Finally, the proposed regulation replaces the terms “state employment security agency,” “state agency,” and “workforce agency” found in a few instances in this paragraph, with the term “employment service delivery system.” The terms are interchangeable as used in this paragraph, and as we propose to add “employment service delivery system” to the definitions in § 60–250.2, we use it instead.

The proposed regulation adds a new paragraph 5 to the EO clause which requires the contractor to maintain records, on an annual basis, of the total number of referrals it receives from state employment services, the number of priority referrals of protected veterans it receives, and the ratio of protected veteran referrals to total referrals. This is one of a few new data collection

requirements set forth in this NPRM that are proposed in order to give the contractor (as well as OFCCP, in the course of compliance evaluations) a quantifiable measure of the availability of protected veterans in the workforce. The contractor would be required to maintain these records on the number of referrals for five (5) years. We propose a five year record retention requirement for multiple reasons. First, because the proposed rule anticipates that the contractor will use the referral data in setting annual hiring benchmarks (*see* Section-by-Section discussion in 250.45, *infra*) we wanted to ensure that the contractor has sufficient historical data on the number of referrals it has received in years past to meaningfully inform the benchmarks it sets going forward. Further, because the proposed rule anticipates that the contractor will review its outreach efforts and adjust them to maximize recruitment of protected veterans (*see* Section-by-Section discussion in 250.44(f)(3), *infra*), we wanted to ensure that the contractor has sufficient historical data to recognize meaningful trends in recruitment and, subsequently, to identify effective recruitment efforts that corresponded with time periods of increased recruitment of protected veterans. If the contractor had fewer years of referral data on hand, it is less likely that the data would provide meaningful assistance to the contractor in these respects. We solicit public comment on the burden and practical utility of this requirement.

In paragraph 10 of the EO clause (currently paragraph 9; renumbered due to the newly proposed paragraph 5, above), we propose two revisions. The third sentence of this paragraph is revised to clarify the contractor's duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It also revises the parenthetical at the end of the sentence, replacing the outdated suggestion of “hav[ing] the notice read to a visually disabled individual” as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulations would also add the following sentences to the end of proposed paragraph 10 (current paragraph 9) of the EO clause: “With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides

computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees are otherwise able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.” The addition of these sentences is in response to the increased use of telecommuting and other work arrangements that do not include a physical office setting, as well as Internet-based application processes in which applicants never enter a contractor's physical office. These revisions therefore would permit equivalent access to the required notices for these employees and applicants.

For paragraph 11, which refers to the contractor's obligation to notify labor organizations or other worker representatives about its obligations under Section 4212, we propose adding language clarifying that these obligations include non-discrimination, in addition to affirmative action. The current paragraph 11 does not specifically mention the contractor's non-discrimination obligations.

The proposed regulations add a new paragraph 13 to the EO clause which would require the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of veterans protected under Section 4212. A comparable clause exists in the equal opportunity clause of the Executive Order 11246 regulations, *see* 41 CFR 60–1.4(a)(2), describing the protected classes under that Order. This proposed addition ensures consistency between the regulations and aids in communicating the contractor's EEO responsibilities to job seekers.

The proposed regulations amend paragraphs (d) and (e) of this section to require that the entire equal opportunity clause be included verbatim in Federal contracts. This is to ensure that the contractor and subcontractor read and understand the language in this clause. Feedback from town hall meetings and webinars conducted by OFCCP prior to the publication of this proposed rule indicated that some contractors, and especially subcontractors, are not aware of their EO Clause responsibilities. In the case of subcontractors, they often rely on the prime contractors to inform them of their nondiscrimination and

affirmative action program obligations. If the EO Clause is not written in full, subcontractors are disadvantaged and often unaware of their statutory obligations until audited by OFCCP. Particularly given the emphasis the administration and Congress have placed on veterans' employment issues, we believe it is important to take whatever steps will inform contractors and subcontractors of the obligations under the EO Clause. OFCCP solicits public comment on this proposal and any other steps that would increase the contractor community's awareness of its obligations.

The proposed regulation also replaces the term "Deputy Assistant Secretary," found in paragraph (f) of this section and in paragraphs 9 and 11 of the EO clause, with the term "Director," for the reasons set forth in the discussion of § 60–250.2. It also replaces the phrase "special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s)" found in the second sentence of Paragraph 1 and in Paragraph 9 of the EO clause, with the term "protected veteran," for the reasons set forth in the discussion of § 60–250.2. This phrase remains in the first sentence of Paragraph 1 (with "active duty wartime or campaign badge veteran" replacing "other protected veteran," as discussed in § 60–250.2, *supra*) of the EO clause so it is clear to those reading the clause independently from the rest of the regulation precisely which classifications of veterans are protected by this part of the Section 4212 regulations. Additionally, to ensure that the contractor is aware of the appropriate definitions, we propose adding a footnote to the title of the EO Clause stating explicitly that the definitions set forth in 41 CFR 60–250.2 apply to the EO Clause and are incorporated by reference. Finally, all references to "VEVRAA" are replaced with the term "Section 4212," for the reasons set forth in the discussion of § 60–250.1.

Subpart B—Discrimination Prohibited

Section 60–250.21 Prohibitions

This section of the rule defines and addresses prohibited discriminatory conduct under Section 4212. The proposed rule includes an additional clause at the end of paragraph (f)(3), qualifying that an individual who rejects a reasonable accommodation made by the contractor may still be considered a qualified disabled veteran if the individual subsequently provides and/or pays for a reasonable accommodation. For instance, if a

veteran knows that a certain piece of equipment that he or she already owns will allow him or her to perform the functions of the job, and that equipment would represent an undue burden for the contractor to provide, the veteran would be able to provide his or her own equipment and still be considered a qualified disabled veteran. We propose inserting this language to ensure consistency with the requirement in paragraph 4 of Appendix A to the proposed rule, which requires that individuals be allowed to pay for or provide their own accommodation if providing the accommodation for the employee would represent an undue burden to the contractor.

The proposed revisions also include minor language changes, replacing the phrase "special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s)" found in paragraphs (a), (b), (c)(1), (d)(1), (e), (g)(1), and (i) with the term "protected veteran," for the reasons set forth in the discussion of § 60–250.2, above.

Section 60–250.22 Direct Threat Defense

The proposed revisions change "§ 60–250.2(w)" in the parenthetical at the end of this section to "§ 60–250.2(f)," in light of restructuring the Definitions section in alphabetical order, as discussed in § 60–250.2, above.

Section 60–250.24 Drugs and alcohol

We propose a correction to paragraph (b)(3) of this section, to refer to § 60–250.23(d)(2) instead of (c).

Subpart C—Affirmative Action Program

Section 60–250.40 Applicability of the Affirmative Action Program Requirement

This section sets forth which contractors are required to maintain an affirmative action program, and the general timing requirements for its creation and submission to OFCCP. We propose a minor clarification to paragraph (c) of this section, specifying that the affirmative action program shall be reviewed and updated annually "by the official designated by the contractor pursuant to § 60–250.44(i)." While this is the intent of the existing language, the proposal clarifies this intention and ensures that company officials who are knowledgeable of the contractor's affirmative action activities and obligations are reviewing the program.

Section 60–250.41 Availability of Affirmative Action Program

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

Section 60–250.42 Invitation to Self-identify

The proposed revisions of this section make significant, substantive changes to the contractor's responsibilities and the process through which applicants are invited to self-identify as a veteran protected under the part 60–250 regulations, particularly those set forth in paragraphs (a) and (b). As described more fully below, these changes are proposed in order to collect enhanced data pertaining to protected veterans, which will allow the contractor and OFCCP to identify and monitor the contractor's employment practices with respect to protected veterans.

The current regulation requires the contractor to invite applicants, who are special disabled veterans as defined in 60–250.2, to self-identify only after making an offer of employment, subject to two exceptions. *See* § 60–250.42(a). For all other veterans protected by part 60–250, the current regulation requires the contractor to invite such applicants to self-identify "before they begin [their] employment duties." *See* § 60–250.42(b).

The two exceptions to the prohibition on inviting special disabled veterans to self-identify pre-offer contained in 41 CFR 250.42(a) are not proposed to change. The exceptions permit a contractor to invite special disabled veterans to self-identify prior to making a job offer when: (1) The invitation is made while the contractor actually is undertaking affirmative action for special disabled veterans at the pre-offer stage; or (2) the invitation is made pursuant to a Federal, state or local law requiring affirmative action for special disabled veterans. These two exceptions are identical to the exceptions to the prohibition on pre-offer disability-

related inquiries contained in the implementing regulations for Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503). See 41 CFR 60–741.42. Consequently, under existing Section 4212 regulations, the contractor is permitted, although not required, to create employment programs targeting special disabled veterans and inviting applicants to identify whether they are eligible for the program pre-offer. OFCCP is not proposing a change in this provision.

The proposed change requires the contractor to invite all applicants to self-identify as a “protected veteran” prior to the offer of employment. This proposed change would invite applicants to self-identify as a “protected veteran” at the pre-offer stage; it would not seek the specific protected classification of protected veteran (special disabled veteran, veteran of the Vietnam era, recently separated veteran, or active duty wartime or campaign badge veteran). The pre-offer invitation would not require protected veteran applicants to disclose their status as a protected veteran if they chose not to (see the proposed Sample Invitation to Self-Identify in Appendix B, *infra*). This new pre-offer self-identification step also would include the requirement, currently stated in paragraph (e) of this section, that the contractor maintain the pre-offer self-identification data and supply it to OFCCP upon request. Incorporating self-identification into the application process would allow the contractor, and subsequently OFCCP, to collect valuable, targeted data on the number of protected veterans who apply for Federal contractor positions. This data would enable the contractor and OFCCP to measure the effectiveness of the contractor’s recruitment and affirmative action efforts over time. Moreover, the contractor and OFCCP will be better equipped to improve and refine successful and effective recruiting mechanisms, thereby increasing the number of applications from protected veterans. Additionally, this data will enable OFCCP to identify and promote successful recruitment and affirmative efforts taken by the contractor community.

Through the various outreach efforts to stakeholders OFCCP has conducted in advance of this NPRM, an issue has been raised regarding the implementing regulations of Title I of the ADA and Section 503, which limit the extent to which employers may inquire about disabilities prior to an offer of employment. See 29 CFR 1630.13, 1630.14; 41 CFR 60–741.42. The concern is that requiring the contractor to invite applicants to self-identify as a

protected veteran would violate the general prohibition against pre-offer disability-related inquiries because some protected veterans will be special disabled veterans. This concern is misplaced, as the ADA and Section 503 regulations permit the contractor to conduct a pre-offer inquiry into disability status if it is ‘made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities,’ such as Section 4212 or Section 503. *Id.*

However, while it would be legally permissible to do so, OFCCP is not proposing that the pre-offer self-identification identify the specific category of protected veteran for three primary reasons. First, given that the overall population of protected veterans is already relatively small, dividing the pool of protected veterans into smaller component classifications would tend to reduce the ability of the contractor to engage in meaningful data analysis of applicants, such as that proposed in § 60–250.44(h) and (k). Second, a protected veteran may fall into several protected categories, which could create unnecessary complexity to data analysis. For example, the same individual could be a protected veteran because he or she is a special disabled veteran and a veteran of the Vietnam era. Finally, at the pre-offer stage under the proposed rule the contractor’s obligations would be the same with respect to each category of protected veteran, thus there is no apparent benefit to knowing the specific category of protected veteran to which an applicant belongs.

In addition to the pre-employment self-identification provisions in § 60–250.42(a) of the proposed rule, § 60–250.42(b) of the proposed rule also requires the contractor to invite individuals, after the offer of employment is extended, to self-identify as a member of one or more of the four classifications of protected veterans under part 60–250. Thus, post-offer identification will enable the contractor to capture refined data pertaining to each classification of protected veterans, as set forth in the VETS–100 form, which the contractor is required to maintain and submit. As is currently the case, the post-offer self-identification as a special disabled veteran would not require applicants to disclose the specific nature of their disability.

We propose to revise paragraph (c) of this section by deleting the second sentence of the parenthetical at the end of the paragraph. This sentence described the format of and rationale behind the current Appendix B, which has been substantially amended in light

of the new self-identification procedures proposed herein. For the same reasons, we propose revising paragraph (d) of this section to reflect the newly proposed self-identification process in which applicants will only identify themselves as special disabled veterans specifically after an offer of employment is made. Further, we propose revising paragraph (d) to require, rather than suggest, that the contractor seek the advice of the applicant regarding accommodation. Requiring this of the contractor will help initiate a robust interactive and collaborative process between the contractor and the employee or applicant to identify effective accommodations that will facilitate a special disabled veteran’s ability to perform the job. While the purpose of this requirement is to promote agreement between the contractor and employee or applicant regarding accommodations to be used, this proposed change would not require that, in the event that multiple reasonable accommodations exist, the contractor must utilize the reasonable accommodation preferred by the employee or applicant.

We also propose replacing the term “appropriate accommodation” in paragraph (d) with “reasonable accommodation.” We have always interpreted “appropriate accommodation” in this paragraph as substantively identical to the term “reasonable accommodation.” However, “reasonable accommodation” is already defined in these regulations and has a more broadly used and accepted legal definition, we propose using it here to avoid any confusion. This language change does not alter the contractor’s existing obligations.

Section 60–250.43 Affirmative Action Policy

This section outlines the contractor’s non-discrimination and affirmative action obligations under Section 4212. We propose two minor revisions to this section.

First, we propose replacing the phrase “because of status as a” in this section to “against,” in order to clarify that the non-discrimination requirements of Section 4212 are limited to protected veterans and that reverse discrimination claims may not be brought by individuals who do not fall under one of the categories of veterans protected by part 60–250. Second, we propose replacing the phrase “special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s),” used twice in this section, with the term “protected

veteran,” for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.44 Required Contents of Affirmative Action Programs

This section details the elements that the contractor’s affirmative action programs must contain. These existing elements include: (1) An equal employment opportunity policy statement; (2) a comprehensive annual review of personnel processes; (3) a review of physical and mental job qualifications; (4) a statement that the contractor is committed to making reasonable accommodations for persons with physical and mental disabilities; (5) a statement that the contractor is committed to ensuring a harassment-free workplace for protected veterans; (6) external dissemination of the contractor’s affirmative action policy, as well as outreach and recruitment efforts; (7) the internal dissemination of the contractor’s affirmative action policy to all of its employees; (8) the development and maintenance of an audit and reporting system designed to evaluate affirmative action programs; and (9) training for all employees regarding the implementation of the affirmative action program.

The first substantive proposed revisions to this section focus on the contractor’s policy statement as set forth in paragraph (a). The proposed regulation revises the second sentence to clarify the contractor’s duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It also revises the parenthetical at the end of the sentence, replacing the outdated suggestion of “hav[ing] the notice read to a visually disabled individual” as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulation also revises the third sentence of paragraph (a) regarding the content of the policy statement, replacing the inclusion of the “chief executive officer’s attitude on the subject matter” with “chief executive officer’s support for the affirmative action program.” This proposed change is made to clarify the intent of including a statement from the contractor’s CEO in the affirmative action policy statement, which is to signal to the contractor’s employees that support for the affirmative action program goes to the very top of the contractor’s organization.

In paragraph (b), the proposed rule requires that the contractor must review its personnel processes on at least an

annual basis to ensure that its obligations are being met. The current rule requires that the contractor review these processes “periodically.” This standard is vague and subject to confusion. Indeed, OFCCP’s efforts to enforce this requirement in recent years have been complicated by contractors’ various, subjective interpretations of what constitutes “periodic” review. This proposal sets forth a clear, measurable, and uniform standard that will be easily understood by the contractor and more easily enforced by OFCCP.

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

currently in Appendix C (which are incorporated into paragraph (b) in the proposed rule), and encourage the contractor to undertake any additional appropriate procedures to satisfy its affirmative action obligations.

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

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

Paragraph (c)(3) currently provides that, as a defense to a claim by an individual that certain mental or physical qualifications are not job-related and consistent with business necessity, the contractor may assert that the individual poses a “direct threat” to the health or safety of the individual or others in the workplace. The definition of “direct threat” in these regulations spells out the criteria that the contractor must consider in determining whether a “direct threat” exists. The proposed paragraph (c)(3) would require the contractor to contemporaneously create a written statement of reasons supporting its belief that a direct threat exists, tracking the criteria set forth in the “direct threat” definition in these regulations, and maintain the written statement as set forth in the recordkeeping requirement in § 60–250.80. Once again, this is to ensure that

the contractor's "direct threat" analysis—which is already required under these regulations, as well as regulations to Section 503 of the Rehabilitation Act and the Americans with Disabilities Act—is well-reasoned and available for review by OFCCP.

Finally, for both the proposed documenting requirements in paragraphs (c)(1) and (c)(3), the proposed regulation would require that the contractor treat the created documents as confidential medical records in accordance with § 60–250.23(d).

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

The current paragraph (f) suggests a number of outreach and recruitment efforts that the contractor can undertake in order to increase the employment opportunities for protected veterans. See 41 CFR 60–250.44(f)(1). The proposed paragraph (f) requires that the contractor engage in a minimum number of outreach and recruitment efforts as described in proposed paragraph (f)(1). The proposed paragraph (f) also includes a list of additional outreach and recruitment efforts that are suggested (proposed paragraph (f)(2)), a new requirement that the contractor conduct self-assessments of their outreach and recruitment efforts (proposed paragraph (f)(3)), and a clarification of the contractor's recordkeeping obligation with regard to its outreach and recruitment efforts (proposed paragraph (f)(4)).

In the proposed paragraph (f)(1), the contractor would be required to engage in three outreach and recruitment efforts. First, the contractor would be required to enter into linkage agreements and establish ongoing relationships with the Local Veterans' Employment Representative in the local employment service office nearest the contractor's establishment. The statute already requires contractors and subcontractors to send their job listings to the Local Veterans' Employment Representative in the local or state employment service office for listing and priority referral of protected veterans. The Local Veterans' Employment Representative is an existing government resource provided

for veterans to help them find employment.

Second, the contractor would be required to enter into a linkage agreement with at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities. The listed organizations and agencies are those that are listed in the current paragraph (f)(1), with one addition: The Department of Defense Transition Assistance Program (TAP), or any subsequent program that replaces TAP. This program is administered in part by the Department of Labor's Veterans' Employment and Training Service (VETS) in Family Services Offices or similar offices at military bases. (See http://www.dol.gov/vets/programs/tap/tap_fs.htm) According to the Department of Defense, there are 249 TAP offices in installations around the United States, and another 16 TAP offices located in installations abroad. The TAP was designed to "smooth the transition of military personnel and family members leaving active duty." The TAP includes employment workshops with the Department of Labor, and offers individualized employment assistance and training. It is currently required for all those serving in the Marine Corps, and is generally encouraged and supported by the other branches of the military. Accordingly, it provides an excellent existing source for identifying qualified protected veterans. TAP is a validated multi-government agency program that assists separating veterans in finding employment, from resume writing to interview techniques to dressing for success. OFCCP is aware, however, that not all contractors are located near a military base or similar facility which provides TAP; therefore, a contractor may select another organization or agency from the list that is more conducive to its recruiting efforts.

Third, paragraph (f)(1) would also require that the contractor consult the Employer Resources section of the National Resource Directory, a partnership with an online collaboration (http://www.nationalresource_directory.gov/employment/job_services_and_employment_resources) among the Departments of Labor, Defense, and Veterans Affairs. New contractors and subcontractors often inquire about how they can find qualified protected veterans to comply with their AAP obligations. The National Resource Directory is a leading government Web site that provides prospective employers of veterans access to veterans' service organizations, existing job banks of veterans seeking employment, and other

resources at the national, state and local levels. The NPRM gives contractors and subcontractors the flexibility to select any organization on the National Resource Directory for outreach and recruit purposes. Since this Web site is a great nationwide resource, any contractor would likely find it useful in fulfilling its affirmative action obligations, such as recruiting veterans. The contractor would be required to establish a linkage agreement with at least one of the many veterans' service organizations listed on the site (excluding organizations described in the previous paragraph) to facilitate referral of qualified protected veterans, as well as other related advice and technical assistance. We believe that these first two efforts that the proposed rule requires would assist the contractor in establishing a baseline level of contact with veteran and employment-related organizations, while providing the contractor with the flexibility to establish linkage agreements with organizations that are most tailored to the contractor's hiring needs. Finally, the proposed paragraph (f)(1) would also require that the contractor send written notification of company policy related to affirmative action efforts to its subcontractors, including subcontracting vendors and suppliers, in order to request appropriate action on their parts and to publicize the contractor's commitment to affirmative action on behalf of protected veterans. While the proposed regulations would not require that the contractor send written notification to vendors and suppliers who are not subcontractors as defined by these regulations, such disclosure remains an encouraged activity, just as it is under the current regulation. See 41 CFR 60–250.44(f)(6).

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

In paragraph (f)(2) of the proposed rule, we list a number of outreach and recruitment efforts that are suggested measures for increasing employment opportunities for protected veterans. The efforts listed in paragraph (f)(2) are largely identical to the efforts that are suggested in paragraphs (f)(2) through (f)(5) and (f)(7) through (f)(8) of the current rule. This includes: (1) Holding briefing sessions with representatives from recruiting resources; (2)

incorporating recruitment efforts for protected veterans at educational institutions; (3) considering applicants who are known protected veterans for all available positions when the position applied for is unavailable; and (4) any other positive steps the contractor believes are necessary to attract qualified protected veterans, including contacts with any local veteran-related organizations.

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

We recognize that the “effectiveness” of an outreach or recruitment effort is not easily defined, and may include a number of factors that are unique to a particular contractor establishment. Generally speaking, a review of the efficacy of a contractor’s efforts should include the number of protected veteran candidates each effort identifies. Recognizing that other unique and intangible characteristics may contribute to the assessment of the “effectiveness” of a given effort, the proposed regulation allows the contractor some flexibility in making this assessment. However, the proposed regulation requires that the contractor consider the numbers of protected veteran referrals, applicants, and hires for the current years and two previous years as criteria in evaluating its efforts, and document all other criteria that it uses to assess the effectiveness of its efforts, so that OFCCP compliance officers are able to understand clearly the rationale behind the contractor’s self-assessment. The contractor’s conclusion as to the effectiveness of its outreach must be reasonable as determined by OFCCP in light of these regulations. The primary indicator of effectiveness is whether qualified

veterans have been hired. Further, should the contractor determine that its efforts were not effective, the proposed rule requires the contractor to identify and implement one or more of the alternative efforts listed in proposed paragraphs (f)(1) and (f)(2) in order to fulfill its obligations. The general purpose of this self-assessment is to ensure that the contractor think critically about its recruitment and outreach efforts, identify and ascertain successful recruiting efforts, and modify its efforts to ensure that its obligations are being met.

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

Paragraph (g) of this section requires that the contractor develop internal procedures to communicate to its employees its obligation to engage in affirmative action efforts. The current paragraph (g)(2) contains several suggested methods by which the contractor may accomplish this. The proposed rule would mandate the following practices: (1) Include its affirmative action policy in its policy manual; (2) inform all applicants and employees of its affirmative action obligations; (3) conduct meetings with executive, management, and supervisory personnel to explain the intent of the policy and responsibility for its implementation; and (4) discuss the policy in orientation and management training programs. In addition, if the contractor is party to a collective bargaining agreement, then the proposed rule would require the contractor to meet with union officials and representatives to inform them about the policy and seek their cooperation. Other suggested elements in the current paragraph (g)(2) remain in the proposed rule at newly created paragraph (g)(3) as suggested additional dissemination efforts the contractor can make. This includes suggesting that the contractor use company newspapers, magazines, annual reports, handbooks, or other media to publicize its affirmative action obligations and feature protected veterans and their accomplishments. See current regulation at 41 CFR 60–250.44(g)(2)(iii), 60–250.44(g)(2)(vii); 60–250.44(g)(2)(viii).

As for the requirement to inform all applicants and employees of its affirmative action obligations (item (2) in the preceding paragraph), the proposed regulation would require that the contractor hold meetings with its employees at least once per year to discuss the contractor’s affirmative action policies and to explain contractor and individual employee responsibilities under these policies. These could be traditional in-person meetings, or meetings facilitated by technology such as webinars or videoconferencing. It would also require that the contractor describe individual employee opportunities for advancement in furtherance of the contractor’s affirmative action plan. Frequent establishment-wide training on affirmative action issues will facilitate a greater understanding of the purpose of the affirmative action plan among employees. This training will also enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. Finally, a newly proposed paragraph (g)(4) would require the contractor to document its activities in order to comply with paragraph (g), and retain these documents as records subject to the recordkeeping requirements of § 60–250.80. This will allow for a more effective review by the contractor and OFCCP to ensure that the affirmative action obligations of paragraph (g) are being met.

Paragraph (h) of this section details the contractor’s responsibilities in designing and implementing an audit and reporting system for its affirmative action program, including the specific computations and comparisons that are part of the audit. The proposed regulations add a new paragraph (h)(1)(vi) requiring the contractor to document the actions taken to comply with paragraphs (h)(1)(i)–(v), and maintain such documents as records subject to the recordkeeping requirements of § 60–250.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The only substantive proposed change in paragraph (i), requires that the identity of the officials responsible for a contractor’s affirmative action activities must appear on all internal and external communications regarding the contractor’s affirmative action program. In the current regulation, this disclosure is only suggested. Requiring this disclosure will increase transparency, making it clear to applicants, employees, OFCCP, and other interested parties which individual(s) are

responsible for the implementation of the contractor's affirmative action program.

Paragraph (j) requires that the contractor train those individuals who implement the personnel decisions pursuant to its affirmative action program. The proposed regulation specifies the topics that shall be included in the contractor's training: The benefits of employing protected veterans; appropriate sensitivity toward protected veteran recruits, applicants and employees; and the legal responsibilities of the contractor and its agents regarding protected veterans generally and special disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans. Training on these issues will facilitate a greater understanding of the purpose of the affirmative action plan among decision makers for the contractor, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. The proposed regulation would also require that the contractor record which of its personnel receive this training, when they receive it, and the person(s) who administer(s) the training, and maintain these records, along with all written or electronic training materials used, in accordance with the recordkeeping requirements of § 60–250.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The proposed regulation adds a new paragraph (k) requiring that the contractor maintain several quantitative measurements and comparisons regarding protected veterans who have been referred by state employment services, have applied for positions with the contractor, and/or have been hired by the contractor. The impetus behind this new section is that, as stated in the discussion of § 60–250.44(a), no structured data regarding the number of protected veterans who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of protected veterans in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. The proposed regulations provide for the collection of referral data (*see* § 60–

250.5, paragraph 5 of the EO clause), as well as applicant data (*see* § 60–250.42(a)). Hiring data is already maintained by the contractor in its VETS–100 forms, a requirement which is carried over into this proposal. Accordingly, paragraph (k) requires that the contractor document and maintain the following information: (1) For referral data, the total number of referrals, the number of priority referrals of protected veterans, and the “referral ratio” of referred protected veterans to total referrals; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known protected veterans, and the “applicant ratio” of protected veteran applicants to total applicants; (3) for hiring data, the total number of people hired, the number of protected veterans hired, and the “hiring ratio” of protected veteran hires to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled. The proposed regulation requires that the contractor must document these measurements on an annual basis, and maintain records of them for five (5) years. These basic measurements will provide the contractor and OFCCP with important information that does not currently exist. This will aid the contractor in evaluating and tailoring its recruitment and outreach efforts and in establishing hiring benchmarks as set forth in the discussion of the proposed § 60–250.45, *infra*.

Finally, the proposed regulation replaces the phrase “special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s),” with the term “protected veteran” in paragraphs (a), (a)(2), (a)(3), (b), (e), (f), (f)(1), (f)(3), (f)(4), (f)(5), (f)(7), (f)(8), (g), (g)(2)(ii), (g)(2)(vii), and (h)(1)(iv), for the reasons stated in the discussion of § 60–250.2. The proposed regulation also replaces the terms “Vietnam Era Veterans’ Readjustment Assistance Act of 1974” or “VEVRAA” with the term “Section 4212” throughout this section, for the reasons stated in the discussion of § 60–250.1.

Section 60–250.45 Contractor-Established Benchmarks for Hiring

The proposed regulation would require for the first time that the contractor establish annual hiring benchmarks, expressed as the percentage of total hires who are protected veterans that the contractor seeks to hire in the following year. As stated in paragraph (a) of the proposed rule and set forth more fully below, these hiring benchmarks would be

established by the contractor using existing data on veteran availability, while also allowing the contractor to take into account other factors unique to its establishment that would tend to affect the availability determination.

While the Bureau of Labor Statistics (BLS) and Census Bureau (Census) do not tabulate data pertaining to the specific classifications of protected veterans under part 60–250, there are other existing data sources that are instructive. For instance, BLS tabulates statewide data on the number of veterans in the civilian labor force and the unemployment rate of veterans in the labor force, and national data on the number of veterans with a service-related disability. The Department’s Veterans Employment and Training Service collects statewide data over a rolling, four quarter period of individuals who “participated” in the state employment services. The breakdown of this data includes the number of overall veterans, the number of overall veterans who are identified as being unemployed, and the number of veterans in some, although not all, of the specific categories of veterans protected by part 60–250.

Accordingly, the proposed rule would require that the contractor consult a number of different sources of information, which will be made easily available to the contractor, in establishing hiring benchmarks. As set forth in the proposed paragraph (b), these sources would include: (1) The percentage of veterans in the civilian labor force, tabulated by BLS and which will be published on OFCCP’s Web site; (2) the raw number of veterans who were participants in the state employment service in the State where the contractor’s establishment is located, which will also be published on OFCCP’s Web site; (3) the referral ratio, applicant ratio, and hiring ratios as expressed in the proposed § 60–250.44(k); (4) the contractor’s recent assessments of the effectiveness of its external outreach and recruitment efforts, as expressed in the proposed § 60–250.44(f)(3); and (5) any other factors, including but not limited to the nature of the contractor’s job openings and/or its location, which would tend to affect the availability of qualified protected veterans. The contractor would be required to consider and document each of these factors, *see* proposed paragraph (c) of this section, but would be given discretion to weigh the various factors in a manner that is reasonable in light of the contractor’s unique circumstances. We believe that this proposal creates a practical and workable mechanism for establishing

benchmarks that will allow the contractor to measure its success in recruiting and employing protected veterans. However, we seek input from stakeholders on this proposal and any additional measures that would make these benchmarks more meaningful, as well as any other measures that would otherwise increase employment opportunities for veterans.

Subpart D—General Enforcement and Complaint Procedures

Section 60–250.60 Compliance Evaluations

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

First, the proposal adds a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP. This language merely clarifies OFCCP's long-standing policy that, in order to fully investigate and analyze the scope of potential violations, OFCCP may need to examine information after the date of the scheduling letter in order to determine, for instance, if violations are continuing or have been remedied. The language does not represent a change in policy or new contractor obligations.

Second, the current paragraph (a)(2) relating to the off-site review of records incorrectly refers to the "requirements of the Executive Order and its regulations;" the proposed rule corrects this to read the "requirements of Section 4212 and its regulations."

Third, the proposed rule contains a change to the nature of document production under paragraph (a)(3). This paragraph, which specifies a "compliance check" as an investigative procedure OFCCP can use to monitor a contractor's recordkeeping, currently states that the contractor may provide relevant documents either on-site or off-site "at the contractor's option." The proposed regulation eliminates this quoted clause and provides that OFCCP may request that the documents to be provided either on-site or off-site.

Fourth, the proposed rule contains a minor change to the scope of "focused reviews" as set forth in paragraph (a)(4). Focused reviews allow OFCCP to target one or more components of a contractor's organization or employment practices, rather than conducting a more comprehensive compliance review of an entire organization. Currently, the regulations provide that these focused reviews are "on-site," meaning they must take place at the contractor's place

of business. The increased use of electronic records that are easily accessible from multiple locations affords compliance officers greater flexibility in conducting focused reviews. Therefore, we propose to delete the word "on-site" from this section, which will allow compliance officers to conduct reviews of relevant materials at any appropriate location.

Fifth, the proposed rule contains a new paragraph (d) which details a new procedure for pre-award compliance evaluation under Section 4212. This proposed rule is based on the pre-award compliance procedure contained in the Executive Order regulations (*see* 41 CFR 60–1.20(d)).

Finally, the proposed regulation replaces the phrase "special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s)," with the term "protected veteran" in paragraph (a) for the reasons stated in the discussion of § 60–250.2.

Section 60–250.61 Complaint Procedures

This section outlines the manner in which applicants or employees who are protected veterans may file complaints alleging violations of Section 4212 or its regulations.

The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director" in paragraphs (e)(1), (e)(2), and (e)(3), for the reasons set forth in the discussion of § 60–250.2. The proposed regulation also replaces the term "state employment security agency" in paragraph (a) with the term "employment service delivery system," for the reasons set forth in the discussion of § 60–250.5. Finally, the proposed regulation replaces the phrase "special disabled veteran(s), veteran of the Vietnam era, recently separated veteran(s), or other protected veteran(s)" with the term "protected veteran" in paragraph (b)(iii), for the reasons stated in the discussion of § 60–250.2.

Section 60–250.64 Show Cause Notice

This section describes the manner in which OFCCP notifies a contractor when it believes the contractor has violated Section 4212 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.65 Enforcement Proceedings

This section describes the procedures for formal enforcement proceedings against a contractor in the event OFCCP

finds a violation of Section 4212 or its regulations that has not been corrected. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a)(2) of this section with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.66 Sanctions and Penalties

This section discusses the types of sanctions and penalties that may be assessed against a contractor if it is found to have violated Section 4212 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a) of this section with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.67 Notification of Agencies

This section provides that agency heads will be notified if any contractors are debarred. The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.68 Reinstatement of Ineligible Contractors

This section outlines the process by which a contractor that has been debarred may apply for reinstatement. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraphs (a) and (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.69 Intimidation and Interference

This section forbids the contractor from retaliating against individuals who have engaged in or may engage in certain specified protected activities, and describes the contractor's affirmative obligations in preventing retaliation. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60–250.2. The proposed rule also replaces the phrase "special disabled veteran(s), veterans of the Vietnam era, recently separated veteran(s), or other protected veteran(s)," with the term "protected veteran" in paragraphs (a)(2) and (a)(3) for the reasons stated in the discussion of § 60–250.2.

Subpart E—Ancillary Matters

Section 60–250.80 Recordkeeping

This section describes the recordkeeping requirements that apply to the contractor under Section 4212,

and the consequences for the failure to preserve records in accordance with these requirements. The proposed regulation adds a sentence at the end of paragraph (a) of this section clarifying that the newly proposed recordkeeping requirements set forth in §§ 250.44(f)(4) (linkage agreements and other outreach and recruiting efforts), 250.44(k) (collection of referral, applicant and hire data), 250.45(c) (criteria and conclusions regarding contractor established hiring benchmarks), and Paragraph 5 of the equal opportunity clause in § 60–250.5(a) (referral data) must be maintained for five (5) years, for the reasons set forth in the discussion of those sections, *supra*.

Section 60–250.81 Access to Records

This section describes a contractor's obligations to permit access to OFCCP when conducting compliance evaluations and complaint investigations. The proposed rule adds some language clarifying the contractor's obligations, particularly in light of the increased use of electronically stored records. First, the proposed rule adds a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of an evaluation or investigation. This change reflects the increased use of electronic records from multiple locations, and accordingly gives OFCCP greater flexibility in conducting its evaluations and investigations. Second, the proposed rule requires that the contractor specify all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the format selected by OFCCP. This change is proposed in light of numerous instances in which OFCCP has conducted extensive review and analysis of a contractor's records only to find subsequently that the records were available in more readily accessible formats. Specifying the variety of available formats upon request, and providing records to OFCCP in the format it selects, will facilitate a more efficient investigation process.

Section 60–250.83 Rulings and Interpretations

This section establishes that rulings and interpretations of Section 4212 will be made by the Director of OFCCP. The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director," for the reasons set forth in the discussion of § 60–250.2.

Section 60–250.84 Responsibilities of Local Employment Service Offices

This section outlines the responsibilities of local employment service offices, including the obligation to give priority referral to protected veterans for jobs listed by a Federal contractor. The proposed rule replaces the phrase "special disabled veteran(s), veteran(s) of the Vietnam era, recently separated veteran(s), or other protected veteran(s)," with the term "protected veteran" for the reasons stated in the discussion of § 60–250.2.

Appendix A to Part 60–250—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The proposed rule includes four changes to Appendix A which would mandate activities that previously were only suggested. These changes primarily reflect proposed revisions to §§ 60–250.2 and 60–250.42(d), *supra*, that would alter the contractor's responsibilities.

First, in the third sentence of paragraph 2, we propose changing the language to reflect the change to § 60–250.42(d) requiring a contractor to seek the advice of special disabled veterans in providing reasonable accommodation. Second, in the last sentence of Paragraph 4, the proposed rule is changed to require that special disabled veterans, in the event an accommodation would constitute an undue hardship for the contractor, be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor. Third, in the fourth sentence of paragraph 5, we propose changing the language to require a contractor to seek the advice of special disabled veterans in providing reasonable accommodation. Finally, in the last sentence of paragraph 9, the proposed rule is changed to require that a contractor must consider the totality of the circumstances when determining what constitutes a "reasonable amount of time" in the context of available vacant positions.

Additionally, the proposed rule changes the reference to "§ 60–250.2(o)" in paragraph 1 of Appendix A to "§ 60–250.2(r)," and changes the references to "§ 60–250.2(t)" in paragraphs 5 and 8 of Appendix A to "§ 60–250.2(s)." This is to reflect the revised alphabetical structure of the definitions section in the proposed rule, as discussed in § 60–250.2, above. The proposed regulation also replaces the term "VEVRAA" with "Section 4212" for the reasons set forth in the discussion of § 60–250.1.

Appendix B to Part 60–250—Sample Invitation to Self-Identify

The proposed rule amends Appendix B consistent with the proposed changes to the self-identification regulation found at § 60–250.42. The first paragraph is amended simply to include detailed definitions of the four types of classifications of protected veterans. These definitions are to be included in a contractor's invitation to self-identify either at the pre-offer (proposed § 60–250.42(a)) or post-offer (proposed § 60–250.42(b)). We propose this change to clarify for the contractor and for applicants exactly which categories of veterans are protected by part 60–250.

The second paragraph of the Appendix contains the suggested model language for the self-identification of protected veterans. The current language has models to be used if they are being distributed to non-special disabled protected veterans exclusively, special disabled veterans exclusively, or to all protected veterans. In keeping with the proposed changes in § 60–250.42, we propose amending the second paragraph to include two models: one that will be given to all applicants at the pre-offer stage, and one that will be given at the post-offer stage to all individuals who have been offered employment by the contractor. For the pre-offer stage, the invitation refers to the definitions for each of the classifications of protected veterans and invites applicants to identify if they belong to any one (or more) of them generally. It does not provide for individuals to self-identify as a particular type of protected veteran (*e.g.*, a qualified special disabled veteran). For the post-offer stage, the invitation again refers to the definitions for each of the classifications of protected veteran and then invites applicants to indicate to which specific classifications of protected veteran they belong.

For both the pre-offer and post-offer invitations, we have proposed new language explaining to applicants that the information is being requested in order to measure the contractor's outreach and recruitment efforts required under part 60–250. This replaces the current language which only inquires whether individuals would like to be included under the contractor's affirmative action program. The post-offer invitation in Paragraph 2 also incorporates the language in the current paragraph 7 of the Appendix, which requests that special disabled veterans describe possible workplace accommodations, with the exception of replacing "elimination of certain duties relating to the job" with "changes in the

way the job is customarily performed.” We propose this change merely to clarify the nature of the interactive process, and to eliminate any confusion that might exist regarding the existing language that “elimination of certain duties” could be read to include eliminating essential functions of the job. It is a change in verbiage only, and does not alter the substantive obligations of the contractor or applicant in the interactive process.

Finally, the proposed regulation also replaces the term “VEVRAA” with “Section 4212” for the reasons set forth in the discussion of § 60–250.1.

Appendix C to Part 60–250—Review of Personnel Processes

The proposed rule deletes Appendix C and moves its content, with some edits, to § 60–250.44(b). See the Section-by-Section Analysis of § 60–250.44, *supra*, for further discussion.

41 CFR Part 60–300

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–300.1 Purpose, Applicability and Construction

Paragraph (a) of the current rule sets forth the scope of Section 4212 and the purpose of its implementing regulations. We propose a few minor changes to this section. First, we propose deleting the reference to the “Vietnam Era Veterans’ Readjustment Assistance Act of 1974” or “VEVRAA,” and replacing it, in this section and throughout the regulation, with “Section 4212”. Referring to the operative law as “VEVRAA” is not entirely accurate, as Section 4212, where VEVRAA was initially codified, has been amended several times since VEVRAA was passed—most recently by the Jobs for Veterans Act of 2002 (JVA), which amended the dollar amount for contract coverage and the categories of protected veterans, and subsequently led to the promulgation of the regulations found at part 60–300. One of the specific amendments made by the JVA was that “Vietnam Era veterans” was no longer a distinct protected category.¹ Therefore, there is concern that continued use of the term “VEVRAA” perpetuates confusion about which classifications of veterans are covered under the existing law. Referring to the law as “Section 4212” clarifies that we are referring to the law as amended. This is more accurate than

“VEVRAA” and should alleviate any further confusion.

Second, paragraph (a) discusses the contractor’s affirmative action obligations, but does not discuss another primary element of the regulations: The prohibition of discrimination against veterans protected under Section 4212. Accordingly, the proposed regulation adds language to the first sentence of paragraph (a) to include this important element.

Additionally, the proposed rule makes two minor language changes in order to comport with some of the newly proposed definitions in § 60–300.2. First, the term “other protected veterans” is amended to read “active duty wartime or campaign badge veterans,” for the reasons detailed in the Section-by-Section Analysis of § 60–300.2. Second, all references to “covered veterans” is amended to read “protected veterans,” due to the inclusion of a definition for “protected veteran” in the proposed § 60–300.2.

Section 60–300.2 Definitions

The proposed rule incorporates the vast majority of the existing definitions contained in existing § 60–300.2 without change. However, OFCCP proposes some changes to the substance and structure of this section, as set forth below.

With regard to the structure of this section, the current rule lists the definitions in order of subject matter. However, for those who are unfamiliar with the regulations, this organizational structure makes it difficult to locate specific terms within this section. The proposed rule reorders the defined terms in alphabetical order, and then assigns each term a lettered subparagraph heading. This modified structure is proposed for ease of reference, and to facilitate citation to specific definitions. However, because of this reordering, the citation to specific terms may be different in the proposed rule than it is currently. For instance, the term “contract,” which is § 60–300.2(h) in the current regulations, is § 60–300.2(e) in the proposed regulation.

With regard to substantive changes, the proposed rule first clarifies the definitions pertaining to the classifications of veterans who are protected under part 60–300. The Jobs for Veterans Act (JVA), which amended Section 4212 in 2002, defined the classes of veterans protected by part 60–300. The current classifications of protected veterans under the JVA, reflected in the part 60–300 regulation, are as follows: (1) Disabled veterans; (2)

veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized; (3) veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (known generally as “Armed Forces service medal veteran”); and (4) recently separated veterans. Currently, § 60–300.2 includes specific definitions for “disabled veterans,” “recently separated veterans,” and “Armed Forces service medal veterans.” See 41 CFR 60–300.2(n), (q), (r). It does not contain a specific definition for “veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.” Instead, this classification is included within the current “other protected veteran” definition. See 41 CFR 60–300.2(p). This anomaly has caused significant confusion, as many individuals who are unfamiliar with the regulations believe that the “other protected veteran” category is a “catch-all” that includes all veterans. To address this issue, the proposed rule replaces the “other protected veteran” definition that is contained in the current regulation with the more precise classification language “active duty wartime or campaign badge veteran” that appears in the statute. This replacement will not change the scope of coverage. Instead, individuals currently covered under the “other protected veteran” classification as defined in the current rule will still be covered, but will fall under the more accurate “active duty wartime or campaign badge veteran” classification. It should be noted that this proposed rule does not revise the VETS–100A form, which is administered by the Department’s Veterans’ Employment and Training Service (VETS) and requires the contractor to tabulate the number of employees and new hires in each of the component categories of protected veterans under Section 4212. The VETS–100A form currently maintains the use of the “other protected veteran” classification. After the final rule is published, OFCCP will work with VETS to conform the VETS–100 form to the new Section 4212 regulations. The public will be given an opportunity to comment on these revisions, which must be approved by the Office of Management and Budget under the Paperwork Reduction Act prior to becoming effective.

¹ However, the vast majority of individuals who fell under the “Vietnam Era veteran” category of part 60–250 would fall under one of the categories of protected veterans in part 60–300.

The current rule also lacks a clear, overarching definition of “protected veteran,” under part 60–300. Although it discusses the responsibilities of a contractor to all categories of protected veterans collectively, it also enumerates each classification of protected veteran several times throughout the regulation. Accordingly, the proposed rule includes a new definition of “protected veteran,” which includes all four classifications of protected veterans separately identified and defined in 60–300.2. This new term would replace the phrase “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)” used throughout the current rule to refer to these protected veterans in the aggregate. The individual categories of protected veterans continue to be separately identified in the first paragraph of the equal opportunity clause in § 60–300.5 to permit the identification of protected veterans in the context of the contract (*see* Section-by-Section Analysis of § 60–300.5, *infra*, for further explanation).

The proposed rule also replaces the term “Deputy Assistant Secretary,” found currently at § 60–300.2(d), with “Director.” The current § 60–300.2(d) defines “Deputy Assistant Secretary” as “the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee.” Following the elimination of the Employment Standards Administration in November 2009, the head of OFCCP now has the title of Director. Accordingly, the proposed rule reflects this change, which will be made throughout part 60–300.

The proposed rule also adds a definition of “linkage agreement,” now described in the OFCCP Federal Contract Compliance Manual. We propose adding a definition of “linkage agreement” to the regulations for clarity. The proposed regulation defines “linkage agreement” to mean an agreement describing the connection between the contractor and appropriate recruitment and/or training sources. A linkage agreement is to be used by the contractor as a source of potential applicants to the covered groups in which the contractor is interested. The contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority.

Section 60–300.3 [Reserved]

Section 60–300.4 Coverage and Waivers

The proposed regulation replaces the term “Deputy Assistant Secretary,” found in paragraphs (b)(1), (b)(2), and (b)(3) of this section, with the term “Director,” for the reasons set forth in the discussion of § 60–300.2.

Section 60–300.5 Equal Opportunity Clause

Paragraph (a) contains the equal opportunity (EO) clause that must be included in all covered Government contracts and subcontracts. The proposed regulation includes numerous substantive changes.

First, the proposed regulation adds additional language to subparagraph 2 of the EO clause in this section clarifying the contractor’s responsibility to “list” jobs in the context of mandatory listing requirements. The mandatory job listing requirement discussed in paragraphs 2 and 3 of the EO clause mandates that the contractor list all employment openings for the duration of the contract with an “appropriate employment service delivery system,” (hereinafter “employment service”). This listing not only provides a source for veterans to access job listings, but also allows the employment service to provide priority referrals of veterans for the Federal contractor jobs listed with the employment service. Following the publication of the most recent revisions to part 60–300 regulations, questions were raised as to the manner in which a contractor must provide information to an employment service in order to satisfy the requirement. There have been many instances in which a contractor provided job listings to an employment service in a manner or format that was unusable to that employment service. In order to satisfy the listing requirement, the contractor must provide job vacancy information to the appropriate employment service *in the manner that the employment service requires* in order to include the job in their database so that they may provide priority referral of veterans. OFCCP has long interpreted the listing responsibilities of a contractor in this manner. This change clarifies OFCCP’s policy.

The proposed regulation also adds a sentence to the end of paragraph 2 clarifying that, for any contractor who utilizes a privately-run job service or exchange to comply with its mandatory listing obligation, the information is subsequently must be provided to the appropriate employment service in the manner that the employment service requires. This clarification is proposed

for two reasons. First, contractors’ use of private job listing services has increased following the elimination of the Department’s America’s Job Bank listing service. Second, we have received feedback from officials in state employment services that some contractors provide job listing information to these private job listing services assuming that they have then fulfilled their listing obligations, but that the private job listing services do not always provide the information in the requisite in order to list the job opening in its database and provide priority referral of protected veterans.

The proposed regulations also add further detail to paragraph 4 of the EO clause with respect to the specific information the contractor must provide to state employment services in each state where the contractor has establishments. The current regulations require that the contractor provide the appropriate state employment service with the name and location of each of the contractor’s hiring locations. The proposed regulations require that the contractor provide the state employment service with the following additional information: (1) Its status as a Federal contractor; (2) the contact information for the contractor hiring official at each location in the state; and (3) its request for priority referrals of protected veterans for job openings at all its locations within the state. This information shall be updated on an annual basis. These three additional items are proposed in light of feedback received from state employment services that there is no centralized list of Federal contractors that they can consult in order to determine if a listing employer is a Federal contractor. If the Federal contractor does not specifically identify itself as such to the state employment service and further identify the hiring official, the state employment service often will not know if it should be providing priority referrals of protected veterans as required by § 60–300.84 or who to contact. Requiring the Federal contractor to provide this additional information will facilitate the priority referral process. The proposed regulation also adds a sentence clarifying that, if the contractor uses any outside job search companies (such as a temporary employment agency) to assist in its hiring, the contractor must also provide the state employment service with the contact information for these outside job search companies. Due to the widespread use of these outside job search companies, this proposed language is included to ensure that the state employment service has the ability

to contact any and all individuals in any way responsible for a contractor's hiring in order to effectively carry out its obligations under § 60–300.84. Finally, the proposed regulation replaces the terms “state workforce agency” and “state agency,” found in a few instances in this paragraph, with the term “employment service delivery system.” The terms are interchangeable as used in this paragraph, but the latter term is already specifically defined in § 60–300.2, so we use it instead.

The proposed regulation adds a new paragraph 5 to the EO clause which requires the contractor to maintain records, on an annual basis, of the total number of referrals it receives from state employment services, the number of priority referrals of protected veterans it receives, and the ratio of protected veteran referrals to total referrals. This is one of a few new data collection requirements set forth in this NPRM that are proposed in order to give the contractor (as well as OFCCP, in the course of compliance evaluations) a quantifiable measure of the availability of protected veterans in the workforce. The contractor would be required to maintain these records on the number of referrals for five (5) years. We propose a five year record retention requirement for multiple reasons. First, because the proposed rule anticipates that the contractor will use the referral data in setting annual hiring benchmarks (see Section-by-Section discussion in 300.45, *infra*) we wanted to ensure that the contractor has sufficient historical data on the number of referrals it has received in years past to meaningfully inform the benchmarks it sets going forward. Further, because the proposed rule anticipates that the contractor will review its outreach efforts and adjust them to maximize recruitment of protected veterans (see Section-by-Section discussion in 300.44(f)(3), *infra*), we wanted to ensure that the contractor has sufficient historical data to recognize meaningful trends in recruitment and, subsequently, to identify effective recruitment efforts that corresponded with time periods of increased recruitment of protected veterans. If the contractor had fewer years of referral data on hand, it is less likely that the data would provide meaningful assistance to the contractor in these respects.

In paragraph 10 of the EO clause (currently paragraph 9; renumbered due to the newly proposed paragraph 5, above), we propose two revisions. The third sentence of this paragraph is revised to clarify the contractor's duty to provide notices of employee rights and contractor obligations in a manner that

is accessible and understandable to persons with disabilities. It also revises the parenthetical at the end of the sentence, replacing the outdated suggestion of “hav[ing] the notice read to a visually disabled individual” as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulations would also add the following sentences to the end of proposed paragraph 10 (current paragraph 9) of the EO clause: “With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees are otherwise able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.” The addition of these sentences is in response to the increased use of telecommuting and other work arrangements that do not include a physical office setting, as well as Internet-based application processes in which applicants never enter a contractor's physical office. These revisions therefore would permit equivalent access to the required notices for these employees and applicants.

For paragraph 11, which refers to the contractor's obligation to notify labor organizations or other workers' representatives about its obligations under Section 4212, we propose adding language clarifying that these obligations include non-discrimination, in addition to affirmative action. The current paragraph 11 does not specifically mention the contractor's non-discrimination obligations.

The proposed regulations add a new paragraph 13 to the EO clause which would require the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of veterans protected under Section 4212. A comparable clause exists in the equal opportunity clause of the Executive Order 11246 regulations, see 41 CFR 60–1.4(a)(2), describing the protected classes under that Order. This proposed

addition ensures consistency between the regulations and aids in communicating the contractor's EEO responsibilities to job seekers.

Finally, the proposed regulations amend paragraphs (d) and (e) of this section to require that the entire equal opportunity clause be included verbatim in Federal contracts. This is to ensure that the contractor and subcontractor read and understand the language in this clause. Feedback from town hall meetings and webinars conducted by OFCCP prior to the publication of this proposed rule indicated that some contractors, and especially subcontractors, are not aware of their EO Clause responsibilities. In the case of subcontractors, they often rely on the prime contractors to inform them of their nondiscrimination and affirmative action program obligations. If the EO Clause is not written in full, subcontractors are disadvantaged and often unaware of their statutory obligations until audited by OFCCP. Particularly given the emphasis the administration and Congress have placed on veterans' employment issues, we believe it is important to take whatever steps will inform contractors and subcontractors of the obligations under the EO Clause. OFCCP solicits public comment on this proposal and any other steps that would increase the contractor community's awareness of its obligations.

The proposed regulation also replaces the term “Deputy Assistant Secretary,” found in paragraph (f) of this section and in paragraphs 9 and 11 of the EO clause, with the term “Director,” for the reasons set forth in the discussion of § 60–300.2. It also replaces the phrase “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)” found in the second sentence of Paragraph 1 and in Paragraph 9 of the EO clause, with the term “protected veteran,” for the reasons set forth in the discussion of § 60–300.2. This phrase remains in the first sentence of Paragraph 1 (with “active duty wartime or campaign badge veteran” replacing “other protected veteran,” as discussed in § 60–300.2, *supra*) of the EO clause so it is clear to those reading the clause independently from the rest of the regulation precisely which classifications of veterans are protected by this part of the Section 4212 regulations. Additionally, to ensure that the contractor is aware of the appropriate definitions, we propose adding a footnote to the title of the EO Clause stating explicitly that the definitions set forth in 41 CFR 60–300.2 apply to the EO Clause and are

incorporated by reference. Finally, all references to “VEVRAA” are replaced with the term “Section 4212,” for the reasons set forth in the discussion of § 60–300.1.

Subpart B—Discrimination Prohibited

Section 60–300.21 Prohibitions

This section of the rule defines and addresses prohibited discriminatory conduct under Section 4212. The proposed rule includes an additional clause at the end of paragraph (f)(3), qualifying that an individual who rejects a reasonable accommodation made by the contractor may still be considered a qualified disabled veteran if the individual subsequently provides and/or pays for a reasonable accommodation. For instance, if a veteran knows that a certain piece of equipment that he or she already owns will allow him or her to perform the functions of the job, and that equipment would represent an undue burden for the contractor to provide, the veteran would be able to provide his or her own equipment and still be considered a qualified disabled veteran. We propose inserting this language to ensure consistency with the requirement in paragraph 4 of Appendix A to the proposed rule, which requires that individuals be allowed to pay for or provide their own accommodation if providing the accommodation for the employee would represent an undue burden to the contractor.

The proposed revisions also include minor language changes, replacing the phrase “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)” found in paragraphs (a), (b), (c)(1), (d)(1), (e), (g)(1), and (i) with the term “protected veteran,” for the reasons set forth in the discussion of § 60–300.2, above.

Section 60–300.22 Direct Threat Defense

The proposed revisions change “§ 60–300.2(w)” in the parenthetical at the end of this section to “§ 60–300.2(g),” in light of restructuring the Definitions section in alphabetical order, as discussed in § 60–300.2, above.

Subpart C—Affirmative Action Program

Section 60–300.40 Applicability of the Affirmative Action Program Requirement

This section sets forth which contractors are required to maintain an affirmative action program, and the general timing requirements for its creation and submission to OFCCP. We

propose a minor clarification to paragraph (c) of this section, specifying that the affirmative action program shall be reviewed and updated annually “by the official designated by the contractor pursuant to § 60–300.44(i).” While this is the intent of the existing language, the proposal clarifies this intention and ensures that company officials who are knowledgeable of the contractor’s affirmative action activities and obligations are reviewing the program.

Section 60–300.41 Availability of Affirmative Action Program

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

Section 60–300.42 Invitation to Self-Identify

The proposed revisions of this section make significant, substantive changes to the contractor’s responsibilities and the process through which applicants are invited to self-identify as a veteran protected under the part 60–300 regulations, particularly those set forth in paragraphs (a) and (b). As described more fully below, these changes are proposed in order to collect enhanced data pertaining to protected veterans, which will allow the contractor and OFCCP to identify and monitor the contractor’s employment practices with respect to protected veterans.

The current regulation requires the contractor to invite applicants who are disabled veterans as defined in 60–300.2, to self-identify only after making an offer of employment, subject to two exceptions. See § 60–300.42(a). For all other veterans protected by part 60–300, the current regulation requires the contractor to invite such applicants to self-identify “before they begin [their] employment duties.” See § 60–300.42(b).

The two exceptions to the prohibition on inviting disabled veterans to self-identify pre-offer contained in 41 CFR 300.42(a) would not change. The exceptions permit a contractor to invite

disabled veterans to self-identify prior to making a job offer when: (1) The invitation is made while the contractor actually is undertaking affirmative action for disabled veterans at the pre-offer stage; or (2) the invitation is made pursuant to a Federal, state or local law requiring affirmative action for disabled veterans. These two exceptions are identical to the exceptions to the prohibition on pre-offer disability-related inquiries contained in the implementing regulations for Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503). See 41 CFR 60–741.42. Consequently, under existing Section 4212 regulations, the contractor is permitted, although not required, to create employment programs targeting disabled veterans and inviting applicants to identify whether they are eligible for the program pre-offer. OFCCP is not proposing a change in this provision.

The proposed change requires the contractor to invite all applicants to self-identify as a “protected veteran” prior to the offer of employment. This proposed change would not seek the specific protected classification of protected veteran (disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran). The pre-offer invitation would not require protected veteran applicants to disclose their status as a protected veteran if they chose not to (see the proposed Sample Invitation to Self-Identify in Appendix B, *infra*). This new pre-offer self-identification step also would include the requirement, currently stated in paragraph (e) of this section, that the contractor maintain the pre-offer self-identification data and supply it to OFCCP upon request. Incorporating self-identification into the application process would allow the contractor, and subsequently OFCCP, to collect valuable, targeted data on the number of protected veterans who apply for Federal contractor positions. This data would enable the contractor and OFCCP to measure the effectiveness of the contractor’s recruitment and affirmative action efforts over time. Moreover, the contractor and OFCCP will be better equipped to improve and refine successful and effective recruiting mechanisms, thereby increasing the number of applications from protected veterans. Additionally, this data will enable OFCCP to identify and promote successful recruitment and affirmative efforts taken by the contractor community.

Through the various outreach efforts to stakeholders OFCCP has conducted in advance of this NPRM, an issue has

been raised regarding the implementing regulations of Title I of the ADA and Section 503, which limit the extent to which employers may inquire about disabilities prior to an offer of employment. See 29 CFR 1630.13, 1630.14; 41 CFR 60-741.42. The concern is that requiring the contractor to invite applicants to self-identify as a protected veteran would violate the general prohibition against pre-offer disability-related inquiries because some protected veterans will be disabled veterans. This concern is misplaced, as the ADA and Section 503 regulations permit the contractor to conduct a pre-offer inquiry into disability status if it is "made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities," such as Section 4212 or Section 503. Id.

However, while it would be legally permissible to do so, OFCCP is not proposing that the pre-offer self-identification identify the specific category of protected veteran for three primary reasons. First, given that the overall population of protected veterans is already relatively small, dividing the pool of protected veterans into smaller component classifications would tend to reduce the ability of the contractor to engage in meaningful data analysis of applicants, such as that proposed in § 60-300.44(h) and (k). Second, a protected veteran may fall into several categories of protected categories, which could create unnecessary complexity to data analysis. For example, the same individual could be a protected veteran because he or she is a disabled veteran, a recently separated veteran and an Armed Service medal veteran. Finally, at the pre-offer stage under the proposed rule the contractor's obligations would be the same with respect to each category of protected veteran, thus there is no apparent benefit to knowing the specific category of protected veteran to which an applicant belongs.

In addition to the pre-employment self-identification provisions in § 60-300.42(a) of the proposed rule, § 60-300.42(b) of the proposed rule requires the contractor to invite individuals, after the offer of employment is extended, to self-identify as a member of one or more of the four classifications of protected veterans under part 60-300. Thus, post-offer identification will enable the contractor to capture refined data pertaining to each classification of protected veterans, as set forth in the VETS-100A form, which the contractor is required to maintain and submit. As is currently the case, the post-offer self-identification as a disabled veteran

would not require applicants to disclose the specific nature of their disability.

We propose to revise paragraph (c) of this section by deleting the second sentence of the parenthetical at the end of the paragraph. This sentence described the format of and rationale behind the current Appendix B, which has been substantially amended in light of the new self-identification procedures proposed herein. For the same reasons, we propose revising paragraph (d) of this section to reflect the newly proposed self-identification process in which applicants will only identify themselves as disabled veterans specifically after an offer of employment is made. Further, we propose revising paragraph (d) to require, rather than suggest, that the contractor seek the advice of the applicant regarding accommodation. Requiring this of the contractor will help initiate a robust interactive and collaborative process between the contractor and the employee or applicant to identify effective accommodations that will facilitate a disabled veteran's ability to perform the job. While the purpose of this requirement is to promote agreement between the contractor and employee or applicant regarding accommodations to be used, this proposed change would not require that, in the event that multiple reasonable accommodations exist, the contractor must utilize the reasonable accommodation preferred by the employee or applicant.

We also propose replacing the term "appropriate accommodation" in paragraph (d) with "reasonable accommodation." We have always interpreted "appropriate accommodation" in this paragraph as substantively identical to the term "reasonable accommodation." However, because "reasonable accommodation" is already defined in these regulations and has a more broadly used and accepted legal definition, we propose using it here to avoid any confusion. This language change does not alter the contractor's existing obligations.

Section 60-300.43 Affirmative Action Policy

This section outlines the contractor's non-discrimination and affirmative action obligations under Section 4212. We propose two minor revisions to this section.

First, we propose replacing the phrase "because of status as a" in this section to "against," in order to clarify that the non-discrimination requirements of Section 4212 are limited to protected veterans and that reverse discrimination claims may not be brought by

individuals who do not fall under one of the categories of veterans protected by part 60-300. Second, we propose replacing the phrase "disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)," used twice in this section, with the term "protected veteran," for the reasons set forth in the discussion of § 60-300.2.

Section 60-300.44 Required Contents of Affirmative Action Programs

This section details the elements that the contractor's affirmative action programs must contain. These existing elements include: (1) An equal employment opportunity policy statement; (2) a comprehensive annual review of personnel processes; (3) a review of physical and mental job qualifications; (4) a statement that the contractor is committed to making reasonable accommodations for persons with physical and mental disabilities; (5) a statement that the contractor is committed to ensuring a harassment-free workplace for protected veterans; (6) external dissemination of the contractor's affirmative action policy, as well as outreach and recruitment efforts; (7) internal dissemination of the contractor's affirmative action policy to all of its employees; (8) development and maintenance of an audit and reporting system designed to evaluate affirmative action programs; and (9) training for all employees regarding the implementation of the affirmative action program.

The first substantive proposed revisions to this section focus on the contractor's policy statement as set forth in paragraph (a). The proposed regulation revises the second sentence to clarify the contractor's duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It also revises the parenthetical at the end of the sentence, replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled individual" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. The proposed regulation also revises the third sentence of paragraph (a) regarding the content of the policy statement, replacing the inclusion of the "chief executive officer's attitude on the subject matter" with "chief executive officer's support for the affirmative action program." This proposed change is made to clarify the intent of including a statement from the contractor's CEO in the affirmative

action policy statement, which is to signal to the contractor's employees that support for the affirmative action program goes to the very top of the contractor's organization.

In paragraph (b), the proposed rule requires that the contractor must review its personnel processes on at least an annual basis to ensure that its obligations are being met. The current rule requires that the contractor review these processes "periodically". This standard is vague and subject to confusion. Indeed, OFCCP's efforts to enforce this requirement in recent years have been complicated by contractors' various, subjective interpretations of what constitutes "periodic" review. This proposal sets forth a clear, measurable and uniform standard that will be easily understood by the contractor and more easily enforced by OFCCP.

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

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

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

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

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

supporting its belief that a direct threat exists, tracking the criteria set forth in the "direct threat" definition in these regulations, and maintain the written statement as set forth in the recordkeeping requirement in § 60–300.80. Once again, this is to ensure that the contractor's "direct threat" analysis—which is already required under these regulations, as well as regulations to Section 503 of the Rehabilitation Act and the Americans with Disabilities Act—is well-reasoned and available for review by OFCCP.

Finally, for both the proposed documenting requirements in paragraphs (c)(1) and (c)(3), the proposed regulation would require that the contractor treat the created documents as confidential medical records in accordance with § 60–300.23(d).

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

The current paragraph (f) suggests a number of outreach and recruitment efforts that the contractor can undertake in order to increase the employment opportunities for protected veterans. See 41 CFR 60–300.44(f)(1). The proposed paragraph (f) requires that the contractor engage in a minimum number of outreach and recruitment efforts as described in proposed paragraph (f)(1). The proposed paragraph (f) also includes a list of additional outreach and recruitment efforts that are suggested (proposed paragraph (f)(2)), a new requirement that the contractor conduct self-assessments of their outreach and recruitment efforts (proposed paragraph (f)(3)), and a clarification of the contractor's recordkeeping obligation with regard to its outreach and recruitment efforts (proposed paragraph (f)(4)).

In the proposed paragraph (f)(1), the contractor would be required to engage in three outreach and recruitment efforts. First, the contractor would be required to enter into linkage agreements and establish ongoing relationships with the Local Veterans' Employment Representative in the local employment service office nearest the contractor's establishment. The statute already requires contractors and subcontractors to send their job listings

to the Local Veterans' Employment Representative in the local or state employment service office for listing and priority referral of protected veterans. The Local Veterans' Employment Representative is an existing government resource provided for veterans to help them find employment.

Second, the contractor would be required to enter into a linkage agreement with at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities. The listed organizations and agencies are those that are listed in the current paragraph (f)(1), with one addition: the Department of Defense Transition Assistance Program (TAP), or any subsequent program that replaces TAP. This program is administered in part by the Department of Labor's Veterans' Employment and Training Service (VETS) in Family Services Offices or similar offices at military bases. (See http://www.dol.gov/vets/programs/tap/tap_fs.htm) According to the Department of Defense, there are 249 TAP offices in installations around the United States, and another 16 TAP offices located in installations abroad. The TAP was designed to "smooth the transition of military personnel and family members leaving active duty." The TAP includes employment workshops with the Department of Labor, and offers individualized employment assistance and training. It is currently required for all those serving in the Marine Corps, and is generally encouraged and supported by the other branches of the military. Accordingly, it provides an excellent existing source for identifying qualified protected veterans TAP is a validated multi-government agency program that assists separating veterans in finding employment, from resume writing to interview techniques to dressing for success. OFCCP is aware, however, that not all contractors are located near a military base or similar facility which provides TAP; therefore, a contractor may select another organization or agency from the list that is more conducive to its recruiting efforts.

Third, paragraph (f)(1) would also require that the contractor consult the Employer Resources section of the National Resource Directory, a partnership with an online collaboration (http://www.nationalresourcedirectory.gov/employment/job_services_and_employment_resources) among the Departments of Labor, Defense, and Veterans Affairs. New contractors and subcontractors often inquire about how they can find

qualified protected veterans to comply with their AAP obligations. The National Resource Directory is a leading government Web site that provides prospective employers of veterans access to veterans' service organizations, existing job banks of veterans seeking employment, and other resources at the national, state and local levels. The NPRM gives contractors and subcontractors the flexibility to select any organization on the National Resource Directory for outreach and recruit purposes. Since this Web site is a great nationwide resource, any contractor would likely find it useful in fulfilling its affirmative action obligations, such as recruiting veterans. The contractor would be required to establish a linkage agreement with at least one of the many veterans' service organizations listed on the site (excluding organizations described in the previous paragraph) to facilitate referral of qualified protected veterans, as well as other related advice and technical assistance. We believe that these first two efforts that the proposed rule requires would assist the contractor in establishing a baseline level of contact with veteran and employment-related organizations, while providing the contractor with flexibility to establish linkage agreements with organizations that are most tailored to the contractor's hiring needs. Finally, the proposed paragraph (f)(1) would also require that the contractor send written notification of company policy related to affirmative action efforts to its subcontractors, including subcontracting vendors and suppliers, in order to request appropriate action on their parts and to publicize the contractor's commitment to affirmative action on behalf of protected veterans. While the proposed regulations would not require that the contractor send written notification to vendors and suppliers who are not subcontractors as defined by these regulations, such disclosure remains an encouraged activity, just as it is under the current regulation. See 41 CFR 60-300.44(f)(6).

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

In paragraph (f)(2) of the proposed rule, we list a number of outreach and recruitment efforts that are suggested measures for increasing employment

opportunities for protected veterans. The efforts listed in paragraph (f)(2) are largely identical to the efforts that are suggested in paragraphs (f)(2) through (f)(5) and (f)(7) through (f)(8) of the current rule. This includes: (1) Holding briefing sessions with representatives from recruiting resources; (2) incorporating recruitment efforts for protected veterans at educational institutions; (3) considering applicants who are known protected veterans for all available positions when the position applied for is unavailable; and (4) any other positive steps the contractor believes are necessary to attract qualified protected veterans, including contacts with any local veteran-related organizations.

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

We recognize that the "effectiveness" of an outreach or recruitment effort is not easily defined, and may include a number of factors that are unique to a particular contractor establishment. Generally speaking, a review of the efficacy of a contractor's efforts should include the number of protected veteran candidates each effort identifies. Recognizing that other unique and intangible characteristics may contribute to the assessment of the "effectiveness" of a given effort, the proposed regulation allows the contractor some flexibility in making this assessment. However, the proposed regulation requires that the contractor consider the numbers of protected veteran referrals, applicants, and hires for the current years and two previous years as criteria in evaluating its efforts, and document all other criteria that it uses to assess the effectiveness of its efforts, so that OFCCP compliance

officers are able to understand clearly the rationale behind the contractor's self-assessment. The contractor's conclusion as to the effectiveness of its outreach must be reasonable as determined by OFCCP in light of these regulations. The primary indicator of effectiveness is whether qualified veterans have been hired. Further, should the contractor determine that its efforts were not effective, the proposed rule requires the contractor to identify and implement one or more of the alternative efforts listed in proposed paragraphs (f)(1) and (f)(2) in order to fulfill its obligations. The general purpose of this self-assessment is to ensure that the contractor think critically about its recruitment and outreach efforts, identify and ascertain successful recruiting efforts, and modify its efforts to ensure that its obligations are being met.

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

Paragraph (g) of this section requires that the contractor develop internal procedures to communicate to its employees its obligation to engage in affirmative action efforts. The current paragraph (g)(2) contains several suggested methods by which the contractor may accomplish this. The proposed rule would mandate the following practices: (1) Include its affirmative action policy in its policy manual; (2) inform all applicants and employees of its affirmative action obligations; (3) conduct meetings with executive, management, and supervisory personnel to explain the intent of the policy and responsibility for its implementation; and (4) discuss the policy in orientation and management training programs. In addition, if the contractor is party to a collective bargaining agreement, then the proposed rule would require the contractor to meet with union officials and representatives to inform them about the policy and seek their cooperation. Other suggested elements in the current paragraph (g)(2) remain in the proposed rule at newly created paragraph (g)(3) as suggested additional dissemination efforts the contractor can make. This includes suggesting that the contractor use company newspapers, magazines, annual reports, handbooks,

or other media to publicize its affirmative action obligations and feature protected veterans and their accomplishments. See current regulation at 41 CFR 60–300.44(g)(2)(iii), 60–300.44(g)(2)(vii); 60–300.44(g)(2)(viii).

As for the requirement to inform all applicants and employees of its affirmative action obligations (item (2) in the preceding paragraph), the proposed regulation would require that the contractor hold meetings with its employees at least once per year to discuss the contractor's affirmative action policies and to explain contractor and individual employee responsibilities under these policies. These could be traditional in-person meetings, or meetings facilitated by technology such as webinars or videoconferencing. It would also require that the contractor describe individual employee opportunities for advancement in furtherance of the contractor's affirmative action plan. Frequent establishment-wide training on affirmative action issues will facilitate a greater understanding of the purpose of the affirmative action plan among employees. This training will also enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. Finally, a newly proposed paragraph (g)(4) would require the contractor to document its activities in order to comply with paragraph (g), and retain these documents as records subject to the recordkeeping requirements of § 60–300.80. This will allow for a more effective review by the contractor and OFCCP to ensure that the affirmative action obligations of paragraph (g) are being met.

Paragraph (h) of this section details the contractor's responsibilities in designing and implementing an audit and reporting system for its affirmative action program, including the specific computations and comparisons that are part of the audit. The proposed regulations add a new paragraph (h)(1)(vi) requiring the contractor to document the actions taken to comply with paragraphs (h)(1)(i)–(v), and maintain such documents as records subject to the recordkeeping requirements of § 60–300.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

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

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

Paragraph (j) requires that the contractor train those individuals who implement the personnel decisions pursuant to its affirmative action program. The proposed regulation specifies the specific topics that shall be included in the contractor's training: the benefits of employing protected veterans; appropriate sensitivity toward protected veteran recruits, applicants and employees; and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans. Training on these issues will facilitate a greater understanding of the purpose of the affirmative action plan among decision makers for the contractor, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. The proposed regulation would also require that the contractor record which of its personnel receive this training, when they receive it, and the person(s) who administer(s) the training, and maintain these records, along with all written or electronic training materials used, in accordance with the recordkeeping requirements of § 60–300.80. Again, this will allow for a more effective review by the contractor and OFCCP to ensure the affirmative action obligations of this paragraph are being met.

The proposed regulation adds a new paragraph (k) requiring that the contractor maintain several quantitative measurements and comparisons regarding protected veterans who have been referred by state employment services, have applied for positions with the contractor, and/or have been hired by the contractor. The impetus behind this new section is that, as stated in the discussion of § 60–300.44(a), no structured data regarding the number of protected veterans who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of

protected veterans in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. The proposed regulations provide for the collection of referral data (see § 60–300.5, paragraph 5 of the EO clause), as well as applicant data (see § 60–300.42(a)). Hiring data is already maintained by the contractor in its VETS–100A forms, a requirement which is carried over into this proposal.

Accordingly, paragraph (k) requires that the contractor document and update annually the following information: (1) For referral data, the total number of referrals, the number of priority referrals of protected veterans, and the “referral ratio” of referred protected veterans to total referrals; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known protected veterans, and the “applicant ratio” of known protected veteran applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known protected veterans hired, and the “hiring ratio” of known protected veteran hires to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled. The proposed regulation requires that the contractor must document these measurements on an annual basis, and maintain records of them for five (5) years. These basic measurements will provide the contractor and OFCCP with important information that does not currently exist. This will aid the contractor in evaluating and tailoring its recruitment and outreach efforts and in establishing hiring benchmarks as set forth in the discussion of the proposed § 60–300.45, *infra*.

Finally, the proposed regulation replaces the phrase “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s),” with the term “protected veteran” in paragraphs (a), (a)(2), (a)(3), (b), (e), (f), (f)(1), (f)(3), (f)(4), (f)(5), (f)(7), (f)(8), (g), (g)(2)(ii), (g)(2)(vii), and (h)(1)(iv), for the reasons stated in the discussion of § 60–300.2. The proposed regulation also replaces the terms “Vietnam Era Veterans’ Readjustment Assistance Act of 1974” or “VEVRAA” with the term “Section 4212” throughout this section, for the reasons stated in the discussion of § 60–300.1.

Section 60–300.45 Contractor-Established Benchmarks for Hiring

The proposed regulation would require for the first time that the

contractor establish annual hiring benchmarks, expressed as the percentage of total hires who are protected veterans that the contractor seeks to hire in the following year. As stated in paragraph (a) of the proposed rule and set forth more fully below, these hiring benchmarks would be established by the contractor using existing data on veteran availability, while also allowing the contractor to take into account other factors unique to its establishment that would tend to affect the availability determination.

While the Bureau of Labor Statistics (BLS) and Census Bureau (Census) do not tabulate data pertaining to the specific classifications of protected veterans under part 60–300, there are other existing data sources that are instructive. For instance, BLS tabulates statewide data on the number of veterans in the civilian labor force and the unemployment rate of veterans in the labor force, and national data on the number of veterans with a service-related disability. The Department’s Veterans’ Employment and Training Service collects statewide data over a rolling, four quarter period of individuals who “participated” in the state employment services. The breakdown of this data includes the number of overall veterans, the number of overall veterans who are identified as being unemployed, and the number of veterans in some, although not all, of the specific categories of veterans protected by part 60–300.

Accordingly, the proposed rule would require that the contractor consult a number of different sources of information, which will be made easily available to the contractor, in establishing hiring benchmarks. As set forth in the proposed paragraph (b), these sources would include: (1) The percentage of veterans in the civilian labor force, tabulated by BLS and which will be published on OFCCP’s Web site; (2) the number of veterans who were participants in the state employment service in the State where the contractor’s establishment is, which will also be published on OFCCP’s Web site; (3) the referral ratio, applicant ratio, and hiring ratios as expressed in the proposed § 60–300.44(k); (4) the contractor’s recent assessments of the effectiveness of its external outreach and recruitment efforts, as expressed in the proposed § 60–300(f)(3); and (5) any other factors, including but not limited to the nature of the contractor’s job openings and/or its location, which would tend to affect the availability of qualified protected veterans. The contractor would be required to consider and document each of these

factors, see proposed paragraph (c) of this section, but would be given discretion to weigh the various factors in a manner that is reasonable in light of the contractor’s unique circumstances. We believe that this proposal creates a practical and workable mechanism for establishing benchmarks that will allow the contractor to measure its success in recruiting and employing protected veterans. However, we seek input from stakeholders on this proposal and any additional measures that would make these benchmarks more meaningful, as well as any other measures that would otherwise increase employment opportunities for veterans.

Subpart D—General Enforcement and Complaint Procedures

Section 60–300.60 Compliance Evaluations

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

First, the proposal adds a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP. This language merely clarifies OFCCP’s long-standing policy that, in order to fully investigate and understand the scope of potential violations, OFCCP may need to examine information after the date of the scheduling letter in order to determine, for instance, if violations are continuing or have been remedied. The language does not represent a change in policy or new contractor obligations.

Second, the current paragraph (a)(2) relating to the off-site review of records incorrectly refers to the “requirements of the Executive Order and its regulations;” the proposed rule corrects this to read the “requirements of Section 4212 and its regulations.”

Third, the proposed rule contains a change to the nature of document production under paragraph (a)(3). This paragraph, which specifies a “compliance check” as an investigative procedure OFCCP can use to monitor a contractor’s recordkeeping, currently states that the contractor may provide relevant documents either on-site or off-site “at the contractor’s option.” The proposed regulation eliminates this quoted clause and provides that OFCCP may request that the documents to be provided either on-site or off-site.

Fourth, the proposed rule contains a minor change to the scope of “focused reviews” as set forth in paragraph (a)(4). Focused reviews allow OFCCP to target

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

Fifth, the proposed rule contains a new paragraph (d) which details a new procedure for pre-award compliance evaluation under Section 4212. This proposed rule is based on the pre-award compliance procedure contained in the Executive Order regulations (*see* 41 CFR 60-1.20(d)).

Finally, the proposed regulation replaces the phrase "disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)," with the term "protected veteran" in paragraph (a) for the reasons stated in the discussion of § 60-300.2.

Section 60-300.61 Complaint Procedures

This section outlines the manner in which applicants or employees who are protected veterans may file complaints alleging violations of Section 4212 or its regulations.

The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director" in paragraphs (e)(1), (e)(2), and (e)(3), for the reasons set forth in the discussion of § 60-300.2. The proposed regulation also replaces the term "state workforce agency" in paragraph (a) with the term "employment service delivery system," for the reasons set forth in the discussion of § 60-300.5. Finally, the proposed regulation replaces the phrase "disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)," with the term "protected veteran" in paragraph (b)(iii), for the reasons stated in the discussion of § 60-300.2.

Section 60-300.64 Show Cause Notice

This section describes the manner in which OFCCP notifies a contractor when it believes the contractor has violated Section 4212 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in this section with the term "Director," for the

reasons set forth in the discussion of § 60-300.2.

Section 60-300.65 Enforcement Proceedings

This section describes the procedures for formal enforcement proceedings against a contractor in the event OFCCP finds a violation of Section 4212 or its regulations that has not been corrected. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a)(2) of this section with the term "Director," for the reasons set forth in the discussion of § 60-300.2.

Section 60-300.66 Sanctions and Penalties

This section discusses the types of sanctions and penalties that may be assessed against a contractor if it is found to have violated Section 4212 or its regulations. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (a) of this section with the term "Director," for the reasons set forth in the discussion of § 60-300.2.

Section 60-300.67 Notification of Agencies

This section provides that agency heads will be notified if any contractors are debarred. The proposed rule replaces the term "Deputy Assistant Secretary" with the term "Director," for the reasons set forth in the discussion of § 60-300.2.

Section 60-300.68 Reinstatement of Ineligible Contractors

This section outlines the process by which a contractor that has been debarred may apply for reinstatement. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraphs (a) and (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60-300.2.

Section 60-300.69 Intimidation and Interference

This section forbids the contractor from retaliating against individuals who have engaged in or may engage in certain specified protected activities, and describes the contractor's affirmative obligations in preventing retaliation. The proposed rule replaces the term "Deputy Assistant Secretary" in paragraph (b) of this section with the term "Director," for the reasons set forth in the discussion of § 60-300.2. The proposed rule also replaces the phrase "disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s)," with the term "protected veteran" in paragraphs (a)(2) and (a)(3) for the

reasons stated in the discussion of § 60-300.2.

Subpart E—Ancillary Matters

Section 60-300.80 Recordkeeping

This section describes the recordkeeping requirements that applies to the contractor under Section 4212, and the consequences for the failure to preserve records in accordance with these requirements. The proposed regulation adds a sentence at the end of paragraph (a) of this section clarifying that the newly proposed recordkeeping requirements set forth in §§ 300.44(f)(4) (linkage agreements and other outreach and recruiting efforts), 300.44(k) (collection of referral, applicant and hire data), 300.45(c) (criteria and conclusions regarding contractor established hiring benchmarks), and Paragraph 5 of the equal opportunity clause in § 60-300.5(a) (referral data) must be maintained for five (5) years, for the reasons set forth in the discussion of those sections, *supra*.

Section 60-300.81 Access to Records

This section describes a contractor's obligations to permit access to OFCCP when conducting compliance evaluations and complaint investigations. The proposed rule adds some language clarifying the contractor's obligations, particularly in light of the increased use of electronically stored records. First, the proposed rule adds a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of an evaluation or investigation. This change reflects the increased use of electronic records from multiple locations, and accordingly gives OFCCP greater flexibility in conducting its evaluations and investigations. Second, the proposed rule requires that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the format selected by OFCCP. This change is proposed in light of numerous instances in which OFCCP has conducted extensive review and analysis of a contractor's records only to find subsequently that the records were available in more readily accessible formats. Specifying the variety of available formats upon request, and providing records to OFCCP in the format it selects, will facilitate a more efficient investigation process.

Section 60–300.83 *Rulings and Interpretations*

This section establishes that rulings and interpretations of Section 4212 will be made by the Director of OFCCP. The proposed revisions make minor changes, replacing the term “Deputy Assistant Secretary” with the term “Director,” for the reasons set forth in the discussion of § 60–300.2.

Section 60–300.84 *Responsibilities of Appropriate Employment Service Delivery Systems*

This section outlines the responsibilities of employment service delivery systems, including the obligation to give priority referral to protected veterans for jobs listed by a Federal contractor. The proposed rule replaces the phrase “disabled veteran(s), recently separated veteran(s), other protected veteran(s), or Armed Forces service medal veteran(s),” with the term “protected veteran” for the reasons stated in the discussion of § 60–300.2.

Appendix A to Part 60–300—Guidelines on a Contractor’s Duty to Provide Reasonable Accommodation

The proposed rule includes four changes to Appendix A which would mandate activities that previously were only suggested. These changes primarily reflect proposed revisions to §§ 60–300.2 and 60–300.42(d), *supra*, that would alter the contractor’s responsibilities.

First, in the third sentence of paragraph 2, we propose changing the language to reflect the change to § 60–300.42(d) requiring a contractor to seek the advice of disabled veterans in providing reasonable accommodation. Second, in the last sentence of Paragraph 4, the proposed rule is changed to require that disabled veterans, in the event an accommodation would constitute an undue hardship for the contractor, be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor. Third, in the fourth sentence of paragraph 5, we propose changing the language to require a contractor to seek the advice of disabled veterans in providing reasonable accommodation. Finally, in the last sentence of paragraph 9, the proposed rule is changed to require that a contractor must consider the totality of the circumstances when determining what constitutes a “reasonable amount of time” in the context of available vacant positions.

Additionally, the proposed rule changes the reference to “§ 60–300.2(o)”

in paragraph 1 of Appendix A to “§ 60–300.2(t),” and changes the references to “§ 60–300.2(t)” in paragraphs 5 and 8 of Appendix A to “§ 60–300.2(u).” This is to reflect the revised alphabetical structure of the definitions section in the proposed rule, as discussed in § 60–300.2, above. The proposed regulation also replaces the term “VEVRAA” with “Section 4212” for the reasons set forth in the discussion of § 60–300.1.

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

The proposed rule amends Appendix B consistent with the proposed changes to the self-identification regulation found at § 60–300.42. The first paragraph is amended simply to include detailed definitions of the four types of classifications of protected veterans. These definitions are to be included in a contractor’s invitation to self-identify either at the pre-offer (proposed § 60–300.42(a)) or post-offer (proposed § 60–300.42(b)). We propose this change to clarify for the contractor and for applicants exactly which categories of veterans are protected by part 60–300.

The second paragraph of the Appendix contains the suggested model language for the self-identification of protected veterans. The current language has models to be used if they are being distributed to non-disabled protected veterans exclusively, disabled veterans exclusively, or to all protected veterans. In keeping with the proposed changes in § 60–300.42, we propose amending the second paragraph to include two models: One that will be given to all applicants at the pre-offer stage, and one that will be given at the post-offer stage to all individuals who have been offered employment by the contractor. For the pre-offer stage, the invitation refers to the definitions for each of the classifications of protected veterans and invites applicants to identify if they belong to any one (or more) of them generally. It does not provide for individuals to self-identify as a particular type of protected veteran (e.g., a qualified disabled veteran). For the post-offer stage, the invitation again refers to the definitions for each of the classifications of protected veteran and then invites applicants to indicate to which specific classifications of protected veteran they belong.

For both the pre-offer and post-offer invitations, we have proposed new language explaining to applicants that the information is being requested in order to measure the contractor’s outreach and recruitment efforts required under part 60–300. This replaces the current language which only inquires whether individuals

would like to be included under the contractor’s affirmative action program. The post-offer invitation in Paragraph 2 also incorporates the language in the current paragraph 7 of the Appendix, which requests that disabled veterans describe possible workplace accommodations, with the exception of replacing “elimination of certain duties relating to the job” with “changes in the way the job is customarily performed.” We propose this change merely to clarify the nature of the interactive process, and to eliminate any confusion that might exist regarding the existing language that “elimination of certain duties” could be read to include eliminating essential functions of the job. It is a change in verbiage only, and does not alter the substantive obligations of the contractor or applicant in the interactive process.

Finally, the proposed regulation also replaces the term “VEVRAA” with “Section 4212” for the reasons set forth in the discussion of § 60–300.1.

Appendix C to Part 60–300—Review of Personnel Processes

The proposed rule deletes Appendix C and moves the its content, with some edits, to § 60–300.44(b). See the Section-by-Section Analysis of § 60–300.44, *supra*, for further discussion.

Regulatory Procedures

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

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

The Need for the Regulation

The guiding principle and overall benefit of this proposed regulation is plain: To facilitate the process of connecting veteran job-seekers with contractor employers who are seeking to hire protected veterans and helping these veterans succeed once they are

employed. As we have stated previously in this NPRM, the framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement have remained largely unchanged since the Section 4212 implementing rules were first published in 1976. Meanwhile, increasing numbers of veterans are returning from tours of duty in Iraq, Afghanistan, and other places around the world. These veterans possess valuable skills that are highly sought after in the job market. However, veterans face substantial obstacles in finding employment upon leaving the service and returning home. Addressing the barriers our veterans face upon returning to civilian life, particularly with regard to employment, is a high priority of the current Administration and, as discussed in the background section, has been the focus of a number of Federal efforts.

To ascertain how OFCCP could assist veterans in their search for employment, and facilitate the contractor's satisfaction of affirmative action obligations designed to employ more veterans, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with the public to determine how we could increase the employment opportunities for qualified protected veterans with Federal contractors. Based upon the information OFCCP received, we identified specific changes that could be made to the implementing regulations of Section 4212 that would help increase employment opportunities for veterans.

The changes set forth in this proposal create four broad categories of benefits. First and foremost, the proposed changes will connect job-seeking veterans with contractors looking to hire. Currently, there is much confusion regarding exactly how and with whom the contractor must list its jobs. Therefore, as an initial matter, the proposal clarifies the mandatory job listing requirements and requires the contractor to provide additional, regularly updated information to employment service delivery systems to ensure its job openings are listed accurately. This will help to ensure that veterans can easily learn about all available jobs with Federal contractors in their state. The proposal also helps to ensure that the contractor can find veterans, by requiring the contractor to engage in recruitment efforts and enter into linkage agreements with several veterans' employment sources (many of which are specifically listed by OFCCP in the proposed rule), while allowing the contractor the flexibility to determine the sources that work best.

Second, many of the proposed changes ensure that the contractor understands and effectively communicates its affirmative action obligations to its workforce and the other entities with which it does business. While bringing job-seeking veterans and employers together is an important first step, it is equally important that the contractor, its employees, and veteran applicants understand the protections and benefits of Section 4212. Accordingly, the proposed rule seeks to promote this clear communication in several ways, including:

- Holding annual meetings (whether in-person, or via webinar or videoconferencing) with all employees to discuss the AAP, contractor/individual responsibilities, and individual employee opportunities for advancement;
- Holding meetings with executive, management, and supervisory personnel to explain the intent of the AAP and responsibilities in implementing it; and discussing the policy at employee orientation and training programs.

These steps will facilitate a greater understanding of the purpose of the affirmative action policies among the contractor's employees, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. The proposed rule will also promote clearer communication of Section 4212 obligations by:

- Providing notices of rights under Section 4212 in accessible formats for those working offsite (*i.e.*, electronically-accessible postings) as well as those with visual impairments, so that all parties understand their respective rights and obligations under the law;
- Requiring the contractor to review its personnel processes on an annual basis, and to document personnel actions taken with regard to protected veterans to provide greater transparency between the contractor, its applicants/employees, and OFCCP as to the reasons for the contractor's personnel actions; and
- Requiring the contractor to meet with and/or otherwise send notification of its AAP obligations to third parties with which it does business, such as union officials and subcontractors.

Third, the proposed rule provides increased mechanisms by which the contractor can assess its affirmative action efforts. Until now, the contractor had few objective measures by which it could measure the extent to which the resources spent on AAP were effective or could be used most effectively. To

that end, the proposed rule requires the contractor to collect data—and OFCCP to provide some additional data—by which the contractor may more accurately assess its efforts. This includes collecting data on referrals and applicants so the contractor knows how many protected veterans it is reaching. The contractor will be able to use this information, as well as other veteran employment data provided by OFCCP, to set benchmarks by which the contractor can objectively measure its recruitment efforts and determine which ones are most fruitful in attracting qualified protected veteran candidates.

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

Discussion of Impacts

OFCCP has separately determined the costs of compliance with those requirements of Section 4212 falling under the scope of the Paperwork Reduction Act. *See* Analysis of Paperwork Reduction Act burden, *infra*. Additional costs outside the scope of the PRA, which are new obligations in the proposed rule, are as follows:

60–250.44(f)(3)/60–300.44(f)(3): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to review the effectiveness of its outreach and recruitment efforts on an annual basis. The general purpose of this self-assessment is to ensure that the contractor think critically about its recruitment and outreach efforts, and requiring it will allow the contractor to look at its measurable accomplishments, maintain methods that are successful in recruiting protected veterans, and reconsider unproductive methods. OFCCP estimates that this annual review will take approximately 20 minutes. OFCCP further estimates that 1% of the 108,288 Federal contractor establishments are first-time contractors during an abbreviated AAP year, and therefore would be unable to complete an annual outreach and recruitment effort.

60–250.44(g)/60–300.44(g): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require holding annual meetings (either in person, or in

technology-adapted formats such as webinars or videoconferencing) with all employees to discuss the AAP, contractor/individual responsibilities, and individual employee opportunities for advancement; meetings with executive, management, and supervisory personnel; and discussing the policy at employee orientation and training programs. Frequent establishment-wide training on affirmative action issues is a benefit to both the contractor and protected veterans, as it will enhance the visibility and facilitate a greater understanding of the importance of affirmative action to the recruitment, hiring, and advancement of protected veterans, creating a culture of compliance. It will also help to ensure that protected veterans themselves are aware of, and better able to avail themselves of, their rights. To decrease contractor burden, OFCCP will provide a sample training module. OFCCP estimates that 90% of contractors, or 97,459, will use this sample training, and that 10% of contractors, or 10,829, will create their own training. OFCCP further estimates that downloading the sample training will take 15 minutes and that creating training will take 10 hours. The average burden per contractor establishment would be the following: $97,459 \times 15/60/108,288 = .2$ hours; $10,829 \times 10/108,288 = 1$ hour. OFCCP estimates an average of 1.2 hours per contractor establishment for compliance with this requirement.

60–250.44(j)/60–300.44(j): As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would also require specific training for those involved in personnel decisions to ensure that they are making such decisions in compliance with Section 4212, detailing specific topics that must be addressed. Once again, training on these issues will benefit the contractor and veterans by facilitating a greater understanding of the purpose of the affirmative action plan among decision makers for the contractor, and will enhance the visibility and importance of affirmative action to the recruitment, hiring, and advancement of protected veterans. Furthermore, proactive training on these issues holds the real promise of reducing the number of Section 4212 violations. OFCCP estimates a total of 2 hours per contractor establishment for compliance with this requirement.

60–250.45/60–300.45: As discussed in the Section-by-Section Analysis of this paragraph, the proposed rule would require the contractor to establish benchmarks, based on a mix of data collected by the contractor and the

Department, as well as a subjective component to allow the contractor to take into account any unique aspects of the nature of the contractor's job openings and/or its location. This requirement benefits the contractor by providing a marker by which they can quantitatively measure the success of their outreach and recruitment efforts. OFCCP estimates (for the portion of this requirement not covered by the PRA analysis, *infra*) a total of 1 hour per contractor establishment for compliance with this requirement.

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (June 2010), which lists total compensation for management, professional, and related occupations as \$48.74 per hour and administrative support as \$23.25 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related occupations and 48% percent will be administrative support. We have calculated the total estimated annualized cost for the obligations described above (*i.e.*, those that do not fall under the scope of the Paperwork Reduction Act) as follows:

Mgmt. Prof.: $108,288 \text{ contractors} \times 4.5 \text{ hours} \times .52 \times \$48.74/\text{hr} = \$12,350,420$
 Adm. Supp.: $108,288 \text{ contractors} \times 4.5 \text{ hours} \times .48 \times \$23.25/\text{hr} = \$ 5,438,223$
 Total annualized cost estimate = \$17,788,643

Estimated annual average cost per establishment is: $\$17,788,643/108,288 = \164

OFCCP has calculated the annual average cost per establishment for complying with those provisions that fall under the Paperwork Reduction Act as \$396 per contractor establishment. See Paperwork Reduction Act discussion, *infra*. This means the total estimated annual cost per establishment of the proposed rule is approximately \$560. However, additional elements of the proposed rule should reduce the cost of compliance for the contractor. For instance, OFCCP estimates that proposed provisions allowing for electronic posting of employee rights under Section 4212 could save the contractor 10 minutes of administrative compliance time per year ($0.17 \text{ hours} \times \$23.25/\text{hr} = \$4$ annual savings per year). Proposals for streamlined compliance review mechanisms and greater focus on reviewing electronic records, rather than paper (*see* Section-by-Section Analysis of 60–250.60/300.60, 60–250.81/300.81), are also designed to reduce the time the

contractor and OFCCP spend on compliance and enforcement.

In short, OFCCP believes that the myriad benefits discussed in the Section-by-Section analysis and in this section—bringing veterans and contractors together, ensuring that those in the workplace understand the respective obligations under Section 4212, providing the contractor a tool to measure its affirmative action efforts through increased data collection, and more efficient compliance reviews—more than makes up for the cost we have calculated. OFCCP invites comments from stakeholders on the cost/benefit analysis included in this section.

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

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, (RFA) requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]."

Based on the analysis below, in which OFCCP has estimated the burdens to covered small contractors and subcontractors in complying with the requirements contained in this proposed rule, OFCCP believes that this rule will not have a significant economic impact on a substantial number of small Federal contractors and subcontractors but invites comments on its analysis, and requests that commenters provide any additional data they may have on costs and benefits.

The FY 2009 Equal Employment Data System Report (EEDS), which compiles information on Federal contractors for OFCCP, showed that there were 108,031 Federal contractor and subcontractor establishments under OFCCP jurisdiction. EEDS information concerning the number of contractor establishments is derived from the EEO–1 Report, which the Equal Employment Opportunity Commission submits to OFCCP annually. OFCCP also includes 257 post-secondary institutions under its jurisdiction, for a total of 108,288 contractor establishments. Based on data analyzed in the Federal Procurement Data System (fpds.gov), which compiles data about types of

contractors, of these 108,288 contractor establishments, approximately 35% would be “small entities” as defined by the Small Business Administration (SBA) size standards.² It should be noted that this number of “establishments” would likely be much larger than the number of “entities” or “contractors.” Entities generally equate to businesses, many of which may in fact have multiple establishments. However, given lack of any other data on the number of small Federal contractors, for the purposes of the RFA analysis OFCCP estimates that this rule will affect 37,901 small Federal contractors.

The primary goal of this NPRM is increased affirmative action to employ and advance in employment protected veterans, including proactive recruitment of protected veterans for jobs with Federal contractors and increased awareness by Federal contractors’ employees (including veterans) and managers of the non-discrimination and affirmative action protections afforded protected veterans. The benefits from this proposal (discussed in more detail throughout the Section-by-Section Analysis and in the discussion of Executive Order 12866, *supra*), particularly would accrue to

² The Federal Procurement Data System compiles data regarding small business “actions” and small business “dollars” using the criteria employed by SBA to define “small entities.” In FY 2008, small business actions accounted for 50% of all Federal procurement action. However, deriving a percentage of contractors that are small using the “action” data would overstate the number of small contractors because contract actions reflect more than just contracts; they include modifications, blanket purchase agreement calls, task orders, and Federal supply schedule orders. As a result, there are many more contract actions than there are contracts or contractors. Accordingly, a single small contractor might have hundreds of actions, e.g., delivery or task orders, placed against its contract. These contract actions would be counted individually in the FPDS, but represent only one small business.

Also reflected in FPDS, in FY 2008, small business “dollars” accounted for 19% of all Federal dollars spent. However, deriving a percentage of contractors that are small using the “dollars” data would understate the number of small contractors. Major acquisitions account for a disproportionate share of the dollar amounts and are almost exclusively awarded to large businesses. The top five Federal contractors, all large businesses, accounted for over 20% of contract dollars in FY 2008. As a result, because the largest Federal contractors disproportionately represent “dollars” spent by the Federal government, the FPDS’s data on small “dollars” spent understates the number of small entities with which the Federal government does business.

The Department concludes that the percentage of all Federal contractors that are “small” is likely between 19% and 50%. The upper and lower bounds are derived from the FPDS figures on small “actions” and small “dollars.” The mean of these two percentages is 35%, and the Department has used this figure to estimate how many of all Federal contractors are “small entities” in SBA’s terms.

veterans who might not have known about job openings or might not have been hired or promoted. As there were almost a million veterans unemployed in 2009 and many others not in the labor force who would likely want to be employed, increased efforts to employ veterans could help a significant number of veterans. The contractor also will benefit from access to a well-trained, job-ready employment pool.

This goal of increased employment of protected veterans is achieved through the changes to Part 60–300 outlined below. Conforming changes are also proposed to 41 Part 60–250 in the event that OFCCP learns of Federal contracts that are currently in effect that were entered into before December 1, 2003 and not modified since. For purposes of this analysis, even if there are a few such contracts still in effect, the number of contractors affected would be so small that any costs and benefits resulting from changes to Part 60–250 would be *de minimis*.

The significant benefits to protected veterans, as well as the contractor, have been discussed extensively in the Section-by-Section Analysis section of this NPRM and in the discussion of this proposal’s conformity with Executive Order 12866. Generally, the proposed rule will benefit veterans and the contractor by: Providing effective mechanisms, such as refined mandatory job listing requirements and linkage agreements with veteran-related organizations, so that qualified veterans and contractors find each other to their mutual benefit; ensuring that those in the workplace understand the respective obligations under Section 4212; providing the contractor with tools, through increased data collection, to quantifiably measure their affirmative action efforts and adjust them for maximum effect; and more efficient compliance reviews. The estimated costs associated with this proposal have been detailed in the sections discussing Executive Order 12866 and the Paperwork Reduction Act, herein. Below is a summary of those costs that will affect small Federal contractors, as defined in this section.

PRA Costs

Mgmt. Prof. 406,788 hours³ × .52 × \$48.74 = \$10,309,961
Adm. Supp. 406,788 hours × .48 × \$23.25 = \$4,539,754

³ This figure comes from taking the total burden for all contractors in the PRA section (1,162,251 hours) and multiplying it by 35%, which is our calculation of the number of contractors which can be classified as “small Federal contractors” as detailed in this section.

Operations & Maintenance Cost (for 35% of contractors) \$146,345
Total annualized cost estimate = \$14,996,060
Estimated average cost per establishment is: \$14,996,060/37,901 = \$396

Non-PRA Costs

Mgmt. Prof.: 170,554 hours⁴ × .52 × \$48.74/hr = \$4,322,657
Adm. Supp.: 170,554 hours × .48 × \$23.25/hr = \$1,903,383
Total annualized cost estimate = \$6,226,040
Estimated annual average cost per establishment is: \$6,226,040/37,901 = \$164

Therefore, the total estimated annual cost to small contractors nationwide is \$21,222,100, or approximately \$560 per small contractor.

The same obligations bind prime contractors and subcontractors under OFCCP jurisdiction. Therefore, for the purpose of determining time spent on compliance, OFCCP will not differentiate between the obligations of prime contractors and subsequent tiers of subcontractors; OFCCP assumes that all contractors, whether prime contractor or subcontractor, will spend equivalent amounts of time engaging in this compliance activity.

When considering the potential economic impact of a proposed regulation, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. *Id.* The universe of affected entities is all Federal contractors and the universe of affected small entities is all small entity contractors with 50 or more employees (37,901). The cost of this rule per entity (\$560) is not likely to have a significant economic impact for any (or a substantial number) of these small contractors. Although the number of small Federal contractors, at 37,901, may represent a substantial number of Federal contractors and subcontractors, OFCCP concludes that this economic impact on individual contractors is not significant. Further, the 2004 U.S. Census Bureau Statistics about Business Size (including Small Business), Employment Size of Firms, Table

⁴ This figure comes from taking the total burden for all contractors in the EO 12866 section (4.5 annual hours per contractor establishment, multiplied by 108,288 total Federal contractor establishments, for a total burden for all contractors nationwide of 487,296 hours), and multiplying it by 35%, which is our calculation of the number of contractors which can be classified as “small Federal contractors” as detailed in this section.

2a,⁵ indicate there are 526,355 Employer Firms with 20–99 employees compared to 5,255,844 firms with 0 to 19 employees. Employer firms with 20 to 500 or more employees equal 629,940 employers firms. Therefore, U.S. employer firms with 20 to 500 employees represents 11.9% of the total employer firms. As stated earlier, the threshold for the affirmative action provisions of this NPRM is 50 or more employees, which will affect approximately 11.9% of the employer firms.

Therefore, under 5 U.S.C. 605, OFCCP believes that the proposed rule will not have a significant economic impact on a substantial number of small entity contractors but invites comments on its analysis.

Paperwork Reduction Act

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

The Department notes that a Federal agency cannot conduct or sponsor a collection of information unless it is approved by OMB under the PRA, and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number. Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number. Until any final regulations become effective and OFCCP publishes a notice announcing OMB's approval of these proposed information collections, they will not take effect.

The information collection requirements contained in the existing Section 4212 regulations, with the exception of those related to complaint procedures, are currently approved

under OMB Control No. 1250–0003 (Recordkeeping and Reporting Requirements-Supply and Service) and OMB Control No. 1250–0001 (Construction Recordkeeping and Reporting). The information collection requirements contained in the existing complaint procedures regulation are currently approved under OMB Control No. 1250–0002.

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

The information collections discussed below relate to Federal contractor and subcontractor responsibilities under 38 U.S.C. 4212 as amended and its implementing regulations at 41 CFR 60–250 and 41 CFR 60–300. OFCCP invites the public to comment on whether the proposed collections of information:

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

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

• 60–250.5/300.5

○ Contractor must provide job vacancy information to appropriate employment service delivery system (ESDS) in usable format (§ 2 of EO Clause).

• The contractor's mandatory job listing obligations, which is required by 38 U.S.C. 4212(a)(2)(A) and promulgated in OFCCP's regulations at FR, Vol. 43, No. 204—Friday, October 20, 1978, requires federal contractors and subcontractors to list their job opening with the state or local employment service delivery system. To reduce the burden on the contractor, it has the flexibility to list its job openings at the state or local employment service delivery system concurrently with the contractor's use of any other recruitment source or effort. Further, to reduce the burden, the mandatory job listing requirement need not include (1) executive and top management positions, (2) positions

that will be filled from within the contractor's organization, and (3) positions lasting three days or less.

• The contractor must provide state or local employment service delivery system information that is sufficient to carry out its responsibilities under VEVRAA to give protected veterans priority referrals to federal contractor employment openings. This has always been a requirement under Section 4212 and its regulations. OFCCP estimates that the required gathering of records, reporting the job listing, and recordkeeping would take 15 minutes per job listing. The FY 2009 Equal Employment Data System Report (EEDS), which compiles information on Federal contractors for OFCCP, showed that there were 108,031 Federal contractor and subcontractor establishments under OFCCP jurisdiction. EEDS information concerning the number of contractor establishments is derived from the EEO–1 Report, which the Equal Employment Opportunity Commission submits to OFCCP annually. OFCCP also includes 257 post-secondary institutions under its jurisdiction, for a total of 108,288 contractor establishments. The number of listings provided by contractors may vary from year to year, from a low of zero to a high of one per month. OFCCP estimates that on average a contractor will provide 2 listings annually, or 30 minutes. Therefore, OFCCP estimates $108,288 \times 30/60 = 54,144$ total Federal contractor hours for gathering of records, reporting the job listing, and recordkeeping.

○ Contractor must provide ESDS additional information, updated on an annual basis (§ 4 of EO Clause) The current regulations require that the contractor provide the appropriate state employment service with the name and location of each of the contractor's hiring locations. The proposed regulations require that the contractor provide the state employment service with the following additional information: (1) Its status as a Federal contractor; (2) contact information for the contractor hiring official at each location in the state; and (3) its request for priority referrals by the state of protected veterans for job openings at all locations within the state. This information shall be updated on an annual basis. These three additional items are proposed in light of feedback received from state employment services and congressional testimony citing concerns about appropriate interface between federal contractors and state and local employment service delivery system staff. Using some form of electronic means (email, fax, etc), OFCCP estimates a total of 15 minutes to give the ESDS the information newly required by this regulation (status as a federal contractor, contact information for the contractor hiring official, and the request for priority referrals). The proposed regulation also adds a sentence clarifying that, if the contractor uses any outside job search organizations (such as a temporary employment agency) to assist in its hiring, the contractor must provide the state employment service with the contact information for these outside job search organizations. OFCCP further estimates 25% of contractors, or 27,072, will use outside job search organizations, and 5 additional

⁵ See <http://www.census.gov/epcd/www/smallbus.html>.

minutes for the contractor to notify state employment agencies concerning its outside job search organizations. The burden to give ESDS additional information is $108,288 \times 15 / 60 = 27,072$ hours. The burden to notify the state employment service about outside job search organizations is $27,072 \times 5 / 60 = 2,256$ hours. The sum of $27,072 + 2,256 = 29,328$ total Federal contractor hours.

○ Contractor must maintain records, for five years, of the total number of priority referral of veterans, and ratio of veteran referrals to total referrals (§ 5 of EO Clause). The contractors is already required to keep applicant data for either one or two years, depending on their size, see 41 CFR 60–300.80, thus the only changes proposed are that the contractor calculate the ratio of preferred veteran referrals and to maintain these records for an additional period of time. According to the ETA 9002 B Quarterly Report from July 1, 2008 to June 30, 2009, State employment office staff referred 75,657 protected veterans (campaign, special disabled, and recently separated veterans) to Federal contractor job vacancies. However, some contractors may receive no referrals (and have few or no job postings) while others will receive multiple referrals. It is expected that computing the ratio for multiple referrals is not significantly more time consuming than doing a ratio for a small number of referrals. OFCCP estimates that the contractor will take 30 minutes to analyze the ratio of veteran referrals. Therefore, the estimated maximum burden hours associated with calculating the ratio of veteran referrals would be $30 \times 75,657 / 60 = 37,829$ total Federal contractor hours.

Contractor must include the entire clause verbatim in Federal contracts (.5(d), .5(e)) (This is a third party disclosure burden.) A contractor may copy/paste the EO Clause from the OFCCP regulations into its contracts. Assuming each of the federal contractor establishments has a single contract would equal 108,288 times 1 minute of copy/paste time would equal 108,288 minutes divided by 60 minutes equals 1,805 total Federal contractor hours.

○ Contractor must provide Braille, large print, or other versions of notice so that visually impaired may read the notice themselves (§ 10 of EO Clause).

• The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request and accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment. OFCCP estimates that it takes 5 minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing the notice in an alternative format, for a total of 10 minutes per request. Therefore, 10 minutes times 6,200 SDVs equals 62,000 minutes divided by 60 minutes equals 1,033 total Federal contractor hours.

○ Posting of notice for employees working at a site other than the contractor's physical location. (§ 10 of EO Clause). OFCCP estimates one or more offsite locations at 10% of contractors, or 10,829, and posting a notice on the company's Web site so that offsite employees can access the notice. No additional hours for creation of the notice

since the notice is already required. OFCCP estimates 5 minutes for each contractor to post the notice on its Web site. Therefore, $10,829 \times 5$ minutes/60 = 902 total Federal contractor hours.

○ Contractor must state in all solicitations and advertisements that it is an EEO employer of veterans (§ 13 of EO Clause). (This is a third party disclosure burden.) The contractor already must state that it is an EEO employer due to many state and federal requirements, including the Executive Order EEO requirements. This revision would simply require the contractor to add protected veterans to the list of categories of protected EEO groups. OFCCP estimates 1 minute additional burden per contractor, or $108,288 \times 1$ minute/60 = 1,805 total Federal contractor hours.

• 60–250.41/300.41

□ Contractor must inform employees who do not work at contractor's physical establishment regarding the availability of AAP for review. OFCCP estimates one or more offsite location at 10% of contractors, or 10,829, and posting a notice on the company's Web site so that offsite employees can access the notice to find out about the availability of the AAP to review. OFCCP estimates 5 minutes to create this notice. (Posting time is accounted for in above § 10 of EO Clause, "Posting of notice for employees working at a site other than the contractor's physical location"). Therefore, $10,829 \times 5$ minutes/60 = 902 total Federal contractor hours.

• 60–250.42/300.42

□ The proposed regulation would require that the contractor invite all applicants to self-identify as a protected veteran generally prior to the offer of employment, and invite individuals who receive job offers to indicate the particular category or categories of protected veteran to which they belong (.42(a)). In Appendix B of the proposed regulation, OFCCP provides sample invitations to self-identify so that the contractor will not have the burden of creating these invitations. We estimate it will take 1 minute for the contractor to copy and paste the sample invitations to self-identify from the regulations into a separate document that it can store electronically and include in electronic applications or print out in paper applications as needed. Multiplying 1 minute by the 108,288 establishments equals 108,288 minutes/60 = 1,805 total Federal contractor hours adapting the self-identification forms in Appendix B for contractor use.

OFCCP estimates that protected veteran applicants will have a minimal burden complying with this proposal in the course of completing their application for employment with a contractor—specifically, providing their separation form, the DD–214, and checking the appropriate boxes in the self-identification forms. To calculate the total number of protected veteran applicants, OFCCP reviewed DOL/ETA's 9002 B Quarterly Reports for the period July 1, 2008 to June 30, 2009, which shows 75,657 total priority referrals to federal contractors nationwide. We therefore estimate 75,657

applicants. At 1 minute per applicant, the total applicant burden would be $75,657 \times 1 / 60 = 1,261$ total hours for documenting status as a protected veteran. Of course, veterans stand to benefit from this minimal time spent, as it will notify contractors of their status and the possibility that they may benefit from the protections of Section 4212. Further, the self-identification process is entirely voluntary, and veteran applicants may opt not to participate, and thus take on zero burden.

□ Contractor is required to seek advice of applicants regarding reasonable accommodations, when applicable (.42(d)). We estimate 1 minute for the contractor to note those applicants that have identified as a disabled veteran and to make the initial inquiry with the applicant about proper placement and reasonable accommodation. The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Thus, there will be a total of 62,000 minutes, or 1,033 total Federal contractor hours making this initial inquiry. OFCCP is aware that the contractor will undertake time to process these requests and keep records of these requests. However, processing these requests is covered by the ADA and recordkeeping is covered by Section 503 regulations, at 41 CFR 60–741.69.

OFCCP estimates that disabled veteran applicants will have a small amount of burden providing documentation concerning reasonable accommodation. The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request and accommodation. OFCCP estimates 10% of referrals will be associated with an accommodation request and that the affected disabled veterans will have on hand the needed documentation. Thus the only burden will be in providing the documentation to the contractor which is estimated to take 1 minute. We therefore estimate $62,000 \times 10\% = 6,200 \times 1$ minute/60 = 103 total hours of burden on certain applicants for providing documentation of reasonable accommodation. Again, however, disabled veterans stand to benefit from this disclosure requirement if they choose to participate, as it is intended to help the veteran secure an accommodation that will allow him or her to perform the job.

□ Contractor must maintain self-identification data (.42(e)). The contractor was required to maintain self-identification data prior to this proposed regulation. Reviewing the entire data collection process outlined in the first paragraph of this section, we estimate that simply maintaining the completed self-identification forms will take 1 minute per contractor, or 108,288 minutes/60 = 1,805 total Federal contractor hours.

• 60–250.44/300.44

□ Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)). The FY 2008 VETS–100 report identified 62,000 Special Disabled Veterans (SDVs). Not all SDVs will normally request and accommodation, therefore the estimate is 10% of the SDVs may request an accommodation due to visual impairment. OFCCP estimates that it takes 5

minutes for the contractor to receive the accommodation request and 5 minutes for recordkeeping and providing this document in an alternative format, for a total of 10 minutes. Therefore, 10 minutes times 6,200 SDVs equals 62,000 minutes divided by 60 minutes equals 1,033 total Federal contractor hours complying with this paragraph.

Contractor must review personnel processes annually, and is required to go through a specific analysis for doing so which would include: (1) Identifying the vacancies and training programs for which protected veteran applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for special disabled veterans who were selected for hire, promotion, or training programs (.44(b)).

- The contractor needs to identify vacancies as part of the review. According to the ETA 9002 B Quarterly Report from July 1, 2008 to June 30, 2009, State employment office staff referred 75,657 protected veterans (campaign, special disabled and recently separated veterans) to Federal contractor job vacancies. Therefore, OFCCP estimates Federal contractors and subcontractors will need to identify approximately 75,657 job vacancy listings during the above time period times 15 minutes per listing equals 75,657 × 15 minutes = 1,134,855 minutes/60 minutes = 18,914 total Federal contractor hours for gathering of records and recordkeeping.

- OFCCP estimates 15 minutes per contractor per year to identify training programs for veteran applicants and employees, which means 15 × 108,288/60 = 27,072 total Federal contractor hours.

- For providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and training programs and a description of considered accommodations, OFCCP estimates 30 minutes per contractor per year, or 30 × 108,288/60 = 54,144 total Federal contractor hours.

- For describing the nature and type of accommodations for disabled veterans who were selected for hire, promotion, or training programs. The FY 2008 VETS-100 report identified 62,000 Special Disabled Veterans (SDVs). Thus, there will be a total of 62,000 inquiries. OFCCP estimates 10% of referrals leading to an accommodation request, and 30 minutes per accommodation request. Therefore, the hours would be 30 × 62,000 × 10%/60 = 3,100 total Federal contractor hours.

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

For those contractors who have not previously performed the required review,

OFCCP estimates that 1% of federal contractors are first-time contractors required to develop initial standards for the employee workforce. Therefore, 108,288 total federal contractors times 1% equals 1,083 contractors. According to the Bureau of Labor Statistics (BLS), the 2010 Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases skills, education, and/or training, are grouped together. OFCCP estimates that the average federal contractor will only have 20% of the 461 broad occupations in their workforce, therefore, on average, the contractor will have 92 occupations for which to conduct an annual review. OFCCP estimates that the contractor will take 10 minutes to review mental and physical job qualifications for each of the average 92 occupations. Therefore, 92 occupations times 10 minutes equals 920 minutes, multiplied by the estimated 1,083 first time contractors/60 minutes per hour equals a total of 16,606 Federal contractor hours for first-time contractors spent complying with this paragraph.

OFCCP estimates that 90% of contractors, or 97,459, will have no changes to their job descriptions in a given year. Therefore, for contractors that have already performed the required review as set forth in the current regulations, and have not changed the job descriptions or physical/mental job qualifications, OFCCP estimates that the time required to update the reviews is 0.5 minutes per job title × 92 occupations = 46 × 97,459/60 = 74,719 total Federal contractor hours.

OFCCP estimates that the remaining 9% of contractors, or 9,746, will have some changes to their job descriptions in a given year. We estimate this 9% of contractors will have changes to an average of 20% of their job titles, and that it will take 10 minutes on average to review the mental and physical job qualifications for each. Therefore, 10 minutes × (20% of 92 job titles) × 9,746 contractors/60 minutes per hour = 29,888 total Federal contractor hours.

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

OFCCP estimates that it will take the contractor 1 minute per job qualification to save the information for recordkeeping purposes. Therefore, 1 minute × 92 occupations equals 92 minutes × 108,288 contractors/60 minutes equals 166,042 total Federal contractor hours.

Contractor must enter into linkage agreement with nearest LVER, one of the organizations listed in (f)(1), and an organization listed in the National Resource Directory (.44(f)(1)).

Therefore, each contractor must enter into 3 linkage agreements. Linkage Agreement

means an agreement describing the connection between the contractor and appropriate recruitment and/or training sources.

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

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

OFCCP estimates that 30% of the contractors, or 32,486, will accept OFCCP assistance to help set up their linkage agreements and it will take these contractors on average 1.5 hours to establish one new linkage agreement. For the remaining 75,802 contractors, OFCCP estimates that establishing a new linkage agreement will take an average of 5.5 hours. Beyond the first year after this rule becomes effective, it is estimated the contractor will set up one new agreement a year. It is estimated that maintaining a single, ongoing linkage agreement will take an average of 15 minutes for all 108,288 contractors.

For those contractors setting up linkage agreements on their own, OFCCP estimates that on average, a contractor will establish one new agreement and maintain two ongoing agreements in a given year, which would be 5.5 hours + .25 hours + .25 hours = 6 hours. If the contractor establishes linkage agreements with OFCCP's assistance, we estimate an annual average of 1.5 hours per contractor to establish a new linkage agreement and .25 hours to maintain each of the two ongoing linkage agreements, which would be 1.5 hours + .25 hours + .25 hours = 2 hours. Therefore, 6 hours times 75,802 contractors equals 454,812 hours, and 32,486 times 2 hours equals 64,972 hours, for a total of 519,784 Federal contractor hours to establish and maintain three linkage agreements under the proposed NPRM.

Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers (.44(f)(1)).

OFCCP estimates that it would take the contractor 5 minutes to prepare the notification and notify its subcontractors via the Internet in a group e-mail, and 1 minute to add or subtract any additions or deletions to the group. Therefore, 6 minutes per contractor times 108,288 equals 649,728 minutes, divided by 60 minutes equals 10,829 total Federal contractor hours.

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

OFCCP estimates that documenting this review of outreach and recruitment will take 5 minutes annually. OFCCP further estimates

that 1% of federal contractors are first-time contractors during an abbreviated AAP year, therefore would not be able to complete an annual outreach and recruitment effort. Therefore, reducing the 108,288 by 1% (1,083 contractors) equals 107,205 contractors, at 5 minutes each equals 536,025 minutes, or 8,934 total Federal contractor hours. The burden and cost of actually conducting the review does not fall under the PRA, and is instead set forth in the Sections on Executive Order 12866 and the Regulatory Flexibility Act.

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

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

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

The January 22, 2010 Bureau of Labor Statistics News Release states that in 2009, union membership was 12.3%. In its most recent Supply and Service (S&S) PRA Justification, OFCCP estimated 30 minutes composition time for union notification. For this NPRM, we estimate 15 minutes preparation for this new notification requirement, as contractors party to a collective bargaining agreement already have a notification template in place. We also estimate 15 additional minutes to meet with union officials as they already do so in S&S. The total third party disclosure burden hours would be $108,288 \times 12.3\% \times 30 \text{ minutes}/60 = 6,660$ total Federal contractor hours.

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

Contractor must document internal dissemination efforts in (g), retain these documents for 1–2 years (.44(g)(3))

Since much of the documentation will occur during the preparation time, OFCCP estimates an additional 5 minutes of recordkeeping per contractor, which means $5 \text{ minutes} \times 108,288 = 541,440 \text{ minutes}/60 = 9,024$ total Federal contractor hours.

Contractor must document the actions taken to comply with audit and reporting system, retain these documents for 1–2 years (.44(h))

Since much of the documentation will occur during the annual audit and reporting, OFCCP estimates an additional 5 minutes recordkeeping burden per contractor, which means $5 \text{ minutes} \times 108,288 = 541,440 \text{ minutes}/60 = 9,024$ total Federal contractor hours.

Contractor must identify responsible official for AAP on all internal and external communications regarding the AAP (.44(i))

That official should already be in place for current contractors. For 1% first time contractors, $108,288 \times 1\% = 1,083$ contractors, OFCCP estimates 5 minutes per

contractor, or $1,083 \times 5 \text{ minutes} = 5,415 \text{ minutes}/60 = 90$ total Federal contractor hours

Contractor must document its training efforts as set forth by the regulation, and maintain these documents as required by 60–250.80/60–300.80 (.44(j)).

OFCCP estimates that much of the documentation will be included in the training preparation time. OFCCP estimates an additional 5 minutes recordkeeping time per contractor, which means $5 \text{ minutes} \times 108,288 = 541,440 \text{ minutes}/60 = 9,024$ total Federal contractor hours. The burden and cost of the actual training preparation and conducting the training does not fall under the PRA, and is instead set forth in the Sections on Executive Order 12866 and the Regulatory Flexibility Act.

Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; must maintain these records for 5 years (.44(k))

(1) The number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery system(s);

(2) The number of total referrals that the contractor received from applicable employment service delivery system(s);

(3) The ratio of priority referrals of veterans to total referrals (referral ratio);

(4) The number of applicants who self-identified as protected veterans pursuant to § 60–300.42(a), or who are otherwise known as protected veterans;

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

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

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

(8) The ratio of protected veteran applicants to all applicants (applicant ratio);

(9) The number of protected veteran applicants hired;

(10) The total number of applicants hired; and

(11) The ratio of protected veterans hired to all hires (hiring ratio).

The calculations for #5, 6, 7, and 10 are already included in the Executive Order AAP. The calculations for #9 are included in the VETS–100/100A report. Therefore, there is no additional burden for #5, 6, 7, 9, and 10.

The remaining calculations, for #1, 2, 3, 4, 8, and 11, OFCCP estimates at 1 minute each per contractor, or 6 minutes recordkeeping time per contractor, which means $6 \text{ minutes} \times 108,288 = 649,728 \text{ minutes}/60 = 10,829$ total Federal contractor hours.

• 60–250.45/300.45

Contractor must set benchmarks for hiring annually, which would include reviewing numerous data sources. Contractor must document the benchmarks it sets and the specific criteria it uses, and maintain these records for 5 years. The non-documenting burden and cost associated with the actual setting of the benchmark does not fall under the PRA, and is instead set forth in the Sections on Executive Order 12866 and the Regulatory Flexibility Act.

OFCCP estimates 30 minutes recordkeeping time per contractor

documenting the benchmark calculations, which means $30 \text{ minutes} \times 108,288/60 = 54,144$ total Federal contractor hours.

• 60–250.60/300.60

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

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

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

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

• 60–250.80/300.80

See new 5 year recordkeeping requirements in previous sections.

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

• 60–250.81/300.81

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

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

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

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

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

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

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must provide job vacancy information to appropriate employment service delivery system (ESDS) in usable format (§2 of EO Clause).	60–250.5/300.5	.....	30 minute per contractor. Total Hours 54,144.	
Contractor must provide ESDS additional information, updated on an annual basis (§4 of EO Clause).	60–250.5/300.5	.....	15 minutes reporting burden per contractor for ESDS. Subtotal Hours 27,072. 5 minutes reporting burden per contractor for outside job search. Subtotal Hours 2,256. Total Hours 29,328.	
Contractor must maintain records, for five years, of the total number of, priority referral of veterans (already must keep applicant data), and ratio of veteran referrals to total referrals (§5 of EO Clause).	60–250.5/300.5	.....	.....	30 minutes per referral. Total Hours 37,829.
Contractor must include the entire clause verbatim in Federal contracts (.5(d), .5(e)).	60–250.5/300.5	.....	1 minute third party disclosure burden per contractor. Total Hours 1,805.	
Contractor must provide Braille, large print, or other versions of notice so that visually impaired may read the notice themselves (§10 of EO Clause)..	60–250.5/300.5	.....	.....	10 minutes per accommodation request. Total Hours 1,033.
Contractor must provide notice to offsite employees (§10 of EO Clause).	60–250.5/300.5	5 minutes per contractor. Total Hours 902.		
Contractor must state in all solicitations and advertisements that it is an EEO employer of veterans (§13 of EO Clause).	60–250.5/300.5	1 minute third party disclosure burden per contractor. Total Hours 1,805.		
Contractor must inform employees who do not work at contractor’s physical establishment regarding the availability of AAP for review (.41).	60–250.41/300.41	5 minutes per contractor. Total Hours 902.		
Contractor must invite all applicants to self-identify as protected veteran prior to offer of employment (.42(a)).	60–250.42/300.42	.....	.....	1 minute per application. Total Hours 1,805.
Contractor is required to seek advice of applicants regarding appropriate accommodations, when applicable (.42(d)).	60–250.42/300.42	.....	.....	1 minute per accommodation. Total Hours 1,033.
Contractor must maintain self-identification data (.42(e)).	60–250.42/300.42	.....	1 minute per contractor. Total Hours 1,805.	
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)).	60–250.44/300.44	.....	.....	10 minutes per accommodation request. Total Hours 1,033.

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

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must review personnel processes annually, and is required to go through a specific analysis for doing so which would include: (1) identifying vacancies and training programs; (2) providing a statement of reasons for rejecting protected veterans; and (3) describing the nature and type of accommodations for (special) disabled veterans (.44(b)).	60–250.44/300.44	.....	15 minutes per contractor (training) Subtotal Hours 27,072. 30 minutes per contractor (statement of reasons) Subtotal Hours 54,144.	15 minutes per job listing (vacancies). Subtotal Hours 18,914. 30 minutes per accommodation request Subtotal Hours 3,100. Total Hours 103,230. .5 minutes per occupation (no changes). Subtotal Hours 74,719. 10 minutes per occupation, 20% of occupations. Subtotal Hours 29,888. Total Hours 121,213. 1 minute per occupation. Total Hours 166,042.
Contractor must review physical and mental job qualifications annually (.44(c)).	60–250.44/300.44	10 minutes per occupation for first time contractors. Subtotal Hours 16,606.	.....
Contractor must document the results of its annual review of physical and mental job qualifications, and document any employment action taken on the basis of a believed “direct threat.” (.44(c)).	60–250.44/300.44	.....	.....
Contractor must enter into linkage agreement with nearest LVER, one of the organizations listed in (f)(1), and an organization listed in the National Resource Directory (.44(f)(1)).	60–250.44/300.44	.....	2 hours per contractor with OFCCP assistance. Subtotal Hours 64,972.	
			6 hours per contractor without OFCCP assistance. Subtotal Hours 454,812. Total Hours 519,784.	
Contractor must send written notification of company AAP policies to subcontractors, vendors, and suppliers (.44(f)(1)).	60–250.44/300.44	.....	6 minutes per contractor. Total Hours 10,829.	
Contractor must review outreach and recruitment efforts on an annual basis and evaluate their effectiveness; contractor must identify and implement further outreach efforts if existing efforts are found ineffective (.44(f)(3)).	60–250.44/300.44	.....	5 minutes per contractor (non first time contractors). Total Hours 8,934.	
If the contractor is a party to a collective bargaining agreement it must meet with union officials to inform them of the policy (.44(g)).	60–250.44/300.44	.....	30 minutes per unionized contractor. Total third party disclosure burden hours 6,660.	
Contractor must document internal dissemination efforts in (g), retain these documents for 1–2 years (.44(g)(3)).	60–250.44/300.44	.....	5 minutes per contractor. Total Hours 9,024.	
Contractor must document the actions taken to comply with audit and reporting system, retain these documents for 1–2 years (.44(h)).	60–250.44/300.44	.....	5 minutes per contractor. Total Hours 9,024.	

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

Burden description	Section of proposed regulation	One-time burden hours per contractor	Recurring burden hours per contractor	Recurring burden hours per element
Contractor must identify responsible official for AAP on all internal and external communications regarding the AAP (.44(i)).	60–250.44/300.44	5 minutes per first time contractor. Total Hours 90.		
Contractor must document its training efforts as set forth by the reg, and maintain these documents for 1–2 years (.44(j)).	60–250.44/300.44	.....	5 minutes per contractor. Total Hours 9,024.	
Contractor must make several quantitative tabulations and comparisons using referral data, applicant data, hiring data, and the number of job openings; must maintain these records for 5 years (.44(k)).	60–250.44/300.44	.....	6 minutes per contractor. Total Hours 10,829.	
Contractor must document the benchmarks it sets and the specific criteria it uses, and maintain these records for 5 years (.45).	60–250.45/300.45	.....	30 minutes per contractor. Total Hours 54,144.	
Total Recordkeeping burden hours.	1,122,653			
Total Reporting burden hours.	29,328			
Total Third Party burden hours.	10,270			
Total all hours	1,162,251			

TABLE 2—BURDEN FOR PROTECTED VETERANS

Burden description	Section of proposed regulation	Burden hours per protected veteran
Protected veteran must provide DD–214 to contractor to document status as a protected veteran.	60–250.42/300.42	1 minute per individual. Total hours 1,261.
Disabled veteran must provide documentation for reasonable accommodation.	60–250.42/300.42	1 minute per individual. Total hours 103.
Total Burden Hours .....	.....	1,364.

The estimated annualized cost to respondent contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (June 2010), which lists total compensation for management, professional, and related occupations as \$48.74 per hour and administrative support as \$23.25 per hour. OFCCP estimates that 52% percent of the burden hours will be management, professional, and related occupations and 48% percent will be administrative support. We have calculated the total estimated annualized cost as follows:

Mgmt. Prof. 1,162,251 hours × .52 × \$48.74 = \$29,457,019

Adm. Supp. 1,162,251 hours × .48 × \$23.25 = \$12,970,721

Operations & Maintenance Cost (see discussion below) \$ 418,129

Total annualized cost estimate = \$42,845,869
 Estimated average cost per establishment is: \$42,845,869/108,288 = \$396

Operations and Maintenance Costs

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

60–250.5/300.5

Contractor must provide EO Clause notices to employees and applicants, including alternative formats such as copy of Braille, large print, or other versions of notice so that visually impaired protected veterans may read the notice themselves (§ 10 of EO Clause). OFCCP estimates that the contractor will have some operations and maintenance cost associated with

posting the EO Clause. We estimate an average copying cost of 10 cents per page. We estimate the average size of the EO Clause to be 3 pages. The estimated total cost to contractors will be: 3 pages × \$.10 × 108,288 Federal contractor establishments = \$32,486.

OFCCP estimates that the contractor will have some operations and maintenance costs associated with providing the EO Clause in an alternative format. We estimate that the cost of an alternative format, such as Braille or audio, to be \$1.00 per contractor. The estimated total cost to contractors will be: \$1.00 × 108,288 Federal contractor establishments = \$108,288.

60–250.42/300.42

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitation to self-identify. The

contractors must invite all applicants with the pre-offer invitation, and must also invite those individuals who were offered positions and declared themselves protected veterans with the post-offer invitation. Given the increasingly widespread use of electronic applications, any contractor that uses such applications would not incur copy costs. Therefore, we estimate 1 page for the pre-offer invitation printed for 10 applicants per year, and 2 pages for the post-offer invitation printed for 2 applicants per year. We also estimate an average copying cost of 10 cents per page. The estimated total cost to contractors will be: pre-offer— $108,288 \times 1 \times 10 \times \$10 = \$108,288$; post-

offer— $108,288 \times 2 \times 2 \times \$10 = \$43,315$; total cost $\$108,288 + \$43,315 = \$151,603$.

60–250.44/300.44

Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a)). OFCCP estimates that the contractor will have some operations and maintenance costs associated with providing the AA policy statement. We estimate that the cost of an alternative format, such as Braille or audio, to be \$1.00 per contractor. The estimated total cost to contractors will be: $\$1.00 \times 108,288$ Federal contractor establishments = $\$108,288$.

60–250.44/300.44

Contractor must provide its AAP to OFCCP during a desk audit. For Supply & Service compliance evaluations, the contractor copies its AAPs and mails the AAPs to OFCCP. We estimate an average copying cost of \$.07 per page. We estimate the average size of an AAP to be 7 pages. The estimated total copying cost to contractors will be: $7 \text{ pages} \times \$0.07 \times 5,004$ (FY 2009 Compliance Evaluations) = $\$2,452$. In addition, we estimate an average mailing cost of \$3.00 per contractor. The total mailing cost for contractors will be $\$3.00 \times 5,004 = \$15,012$. The total estimated costs would be $\$2,452 + \$15,012 = \$17,464$.

TABLE 3—OPERATIONS AND MAINTENANCE COSTS

Contractor must provide EO Clause to employees and applicants (§10 of EO Clause)	60–250.5/300.5	\$32,486
Contractor must provide Braille, large print, or other versions of EO Clause so that visually impaired may read the notice themselves (§10 of EO Clause)	60–250.5/300.5	108,288
Contractor must invite all applicants to self-identify as protected veteran prior to offer of employment (.42(a))	60–250.42/300.42	151,603
Contractor must provide Braille, large print, or other versions of AA policy statement so that visually impaired may read the notice themselves (.44(a))	60–250.44/300.44	108,288
Copying and mailing costs of AAPs (.44)	60–250.44/300.44	17,464
Total O&M Costs		418,129

These paperwork burden estimates are summarized as follows:

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

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

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

OMB ICR Reference Number: [Provide from ROCIS].

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

Estimated Number of Annual Responses: [Provide total from ROCIS].

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 1,163,615.

Estimated Total Annual Burden Cost (Start-up, capital, operations, and maintenance): \$418,129.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement

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

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this NPRM does not include any Federal mandate that may result in excess of \$100 million in expenditures by state, local, and Tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

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

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

This NPRM does not have Tribal implications under Executive Order 13175 that would require a Tribal summary impact statement. The NPRM would not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal government and Indian Tribes or on the distribution of power and responsibilities between the Federal government and Indian Tribes.

Effects on Families

The undersigned hereby certifies that the NPRM would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045 (Protection of Children)

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

Environmental Impact Assessment

A review of this NPRM in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the

regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and DOL NEPA procedures, 29 CFR part 11, indicates the NPRM would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

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

Executive Order 12630 (Constitutionally Protected Property Rights)

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

Executive Order 12988 (Civil Justice Reform Analysis)

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

List of Subjects in 41 CFR Parts 60–250 and 60–300

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements, and Veterans.

Patricia Shiu,

Director, Office of Federal Contract Compliance Programs.

Accordingly, under authority of 38 U.S.C. 4212, Title 41 of the Code of Federal Regulations, Chapter 60, the second alternative proposed part 60–250 (as discussed in the Summary section) and part 60–300, is proposed to read as follows:

PART 60–250—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, RECENTLY SEPARATED VETERANS, AND ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

- 60–250.1 Purpose, applicability and construction.
- 60–250.2 Definitions.
- 60–250.3 [Reserved].
- 60–250.4 Coverage and waivers.
- 60–250.5 Equal opportunity clause.

Subpart B—Discrimination Prohibited

- 60–250.20 Covered employment activities.
- 60–250.21 Prohibitions.
- 60–250.22 Direct threat defense.
- 60–250.23 Medical examinations and inquiries.
- 60–250.24 Drugs and alcohol.
- 60–250.25 Health insurance, life insurance and other benefit plans.

Subpart C—Affirmative Action Program

- 60–250.40 Applicability of the affirmative action program requirement.
- 60–250.41 Availability of affirmative action program.
- 60–250.42 Invitation to self-identify.
- 60–250.43 Affirmative action policy.
- 60–250.44 Required contents of affirmative action programs.
- 60–250.45 Contractor established benchmarks for hiring.

Subpart D—General Enforcement and Complaint Procedures

- 60–250.60 Compliance evaluations.
- 60–250.61 Complaint procedures.
- 60–250.62 Conciliation agreements.
- 60–250.63 Violation of conciliation agreements.
- 60–250.64 Show cause notices.
- 60–250.65 Enforcement proceedings.
- 60–250.66 Sanctions and penalties.
- 60–250.67 Notification of agencies.
- 60–250.68 Reinstatement of ineligible contractors.
- 60–250.69 Intimidation and interference.
- 60–250.70 Disputed matters related to compliance with the Act.

Subpart E—Ancillary Matters

- 60–250.80 Recordkeeping.
- 60–250.81 Access to records.
- 60–250.82 Labor organizations and recruiting and training agencies.
- 60–250.83 Rulings and interpretations.
- 60–250.84 Responsibilities of local employment service offices.

Appendix A to Part 60–250—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

Appendix B to Part 60–250—Sample Invitation To Self-Identify

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 (2001) (amended 2002); 38 U.S.C. 4212 (2001) (amended 2002); E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60–250.1 Purpose, applicability and construction.

(a) *Purpose.* The purpose of the regulations in this part is to set forth the standards for compliance with 38 U.S.C. 4212 (Section 4212), which prohibits discrimination against protected veterans and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified protected veterans. Special disabled veterans, veterans of the Vietnam era, recently separated veterans, and active duty wartime or campaign badge veterans are protected veterans under Section 4212.

(b) *Applicability.* This part applies to any Government contract or subcontract of \$25,000 or more, entered into before December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction), except that the regulations in 41 CFR 60–300, and not this part, apply to such a contract or subcontract that is modified on or after December 1, 2003 and the contract or subcontract as modified is in the amount of \$100,000 or more: *Provided*, that subpart C of this part applies only as described in Sec. 60–250.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part.

(c) *Construction*—(1) *In general.* The Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) (42 U.S.C. 12101, *et seq.*) set out as an appendix to 29 CFR part 1630 issued pursuant to Title I may be relied upon for guidance in interpreting the parallel provisions of this part.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any state or political subdivision that provides greater or equal protection for the rights of special disabled veterans, veterans of the Vietnam era, recently separated veterans, or active duty wartime or

campaign badge veterans as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60–250.2 Definitions.

For the purpose of this part:

(a) *Act* means the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (2001).

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

(c) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of the Vietnam Era Veterans' Readjustment Assistance Act.

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

(e) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$25,000 or more.

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

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

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

(h) [Reserved].

(i) *Employment service delivery system* means a service delivery system

at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.

(j) *Equal opportunity clause* means the contract provisions set forth in § 60–250.5, "Equal opportunity clause."

(k) *Essential functions*—(1) *In general.* The term essential functions means fundamental job duties of the employment position the special disabled veteran holds or desires. The term essential functions does not include the marginal functions of the position.

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

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

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

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

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

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

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

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

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

(v) The terms of a collective bargaining agreement;

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

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

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

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

(1) *Construction*, as used in the definition of Government contract and subcontract of this section, means the construction, rehabilitation, alteration,

conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

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

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

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

(5) *Person*, as used in the definition of Government contract and subcontract of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

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

(n) *Linkage Agreement* means an agreement describing the connection between contractors and appropriate recruitment and/or training sources. A linkage agreement is to be used by contractors as a source of potential applicants for the covered groups the contractor is interested in, as required by § 60–250.44(f). The contractor's representative that signs the linkage agreement should be the company official responsible for the contractor's affirmative action program and/or has hiring authority.

(o) *Prime contractor* means any person holding a contract of \$25,000 or more, and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a contract subject to the Act.

(p) *Protected veteran* means a veteran who is protected under the non-discrimination and affirmative action provisions of the Act; specifically, a veteran who may be classified as a "special disabled veteran," "veteran of

the Vietnam era,” “recently separated veteran,” and/or an “active duty wartime or campaign badge veteran,” as defined by this section.

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

(r) *Qualified special disabled veteran* means a special disabled veteran who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such veteran holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

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

(i) Modifications or adjustments to a job application process that enable a qualified applicant who is a special disabled veteran to be considered for the position such applicant desires;⁶

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

(iii) Modifications or adjustments that enable the contractor’s employee who is a special disabled veteran to enjoy equal benefits and privileges of employment as are enjoyed by the contractor’s other similarly situated employees who are not special disabled veterans.

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

(i) Making existing facilities used by employees readily accessible to and usable by special disabled veterans; and

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

(3) To determine the appropriate reasonable accommodation it may be

necessary for the contractor to initiate an informal, interactive process with the qualified special disabled veteran in need of the accommodation.⁷ This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor’s duty to provide reasonable accommodation.)

(t) *Recently separated veteran* means any veteran during the one-year period beginning on the date of such veteran’s discharge or release from active duty.

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

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

(w)(1) *Special disabled veteran* means:

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

(A) Rated at 30 percent or more; or

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

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

(2) Serious employment handicap, as used in paragraph (w)(1)(B) of this section, means a significant impairment of a veteran’s ability to prepare for, obtain, or retain employment consistent with such veteran’s abilities, aptitudes and interests.

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

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

(2) Under which any portion of the contractor’s obligation under any one or

more contracts is performed, undertaken, or assumed.

(y) *Subcontractor* means any person holding a subcontract of \$25,000 or more and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” any person who has held a subcontract subject to the Act.

(z) *TAP* means the Department of Defense’s Transition Assistance Program, or any successor programs thereto. The TAP was designed to smooth the transition of military personnel and family members leaving active duty via employment workshops and individualized employment assistance and training.

(aa) *Undue hardship*—(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (2) of this section.

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

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

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

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

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

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

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

⁶ A contractor’s duty to provide a reasonable accommodation with respect to applicants who are special disabled veterans is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Special disabled veteran applicants must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

⁷ Contractors must engage in such an interactive process with a special disabled veteran, whether or not a reasonable accommodation ultimately is identified that will make the person a qualified individual. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

(cc) *Veteran* means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.

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

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

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

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

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

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

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

§ 60–250.3 [Reserved]

§ 60–250.4 Coverage and waivers.

(a) *General*—(1) *Contracts and subcontracts of \$25,000 or more.* Contracts and subcontracts of \$25,000 or more are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts for indefinite quantities.* With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, “call-type” contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than \$25,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any.

Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order is \$25,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) *Employment activities within the United States.* This part applies only to employment activities within the

United States and not to employment activities abroad. The term “employment activities within the United States” includes actual employment within the United States, and decisions of the contractor made within the United States pertaining to the contractor’s applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

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

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

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

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

§ 60–250.5 Equal opportunity clause.

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

Equal Opportunity for Section 4212 Protected Veterans⁸

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or active duty wartime or campaign badge veteran (hereinafter collectively referred to as “protected veteran(s)”) in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, including the following:

- i. Recruitment, advertising, and job application procedures.
- ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.
- iii. Rates of pay or any other form of compensation and changes in compensation.
- iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.
- v. Leaves of absence, sick leave, or any other leave.
- vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor.
- vii. Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.
- viii. Activities sponsored by the contractor including social or recreational programs.
- ix. Any other term, condition, or privilege of employment.

⁸ The definitions set forth in 41 CFR 60–250.2 apply to the terms used throughout this Clause, and they are incorporated herein by reference.

2. The contractor agrees to immediately list all employment openings which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one wherein the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local employment service office of the state employment security agency wherein the opening occurs. Further, listing employment openings with the state workforce agency job bank where the opening occurs or with the local employment service delivery system where the opening occurs will satisfy the requirements to list jobs with the appropriate employment service office. In order to satisfy the listing requirement described herein, contractors must provide information about the job vacancy in the manner and format required by the appropriate employment service delivery system to permit that system to provide priority referral of veterans protected by Section 4212 for that job vacancy. Providing information on employment openings to a privately run job service or exchange will satisfy the contractor's listing obligation only if the privately run job service or exchange provides the information to the appropriate employment service delivery system in that manner and format in which the employment service delivery system requires.

3. Listing of employment openings with the local employment service office pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a *bona fide* job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

4. Whenever a contractor becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the employment service delivery system in each state where it has establishments that: (a) It is a Federal contractor, so that the employment service delivery systems are able to identify them as such; and (b) it desires priority referrals from the state of protected veterans for job openings at all locations within the state. The contractor shall also provide to the employment service delivery system the name and location of each hiring location within the state and the contact information for the contractor official responsible for hiring at each location. In the event that the contractor uses any external job search organizations to assist in its hiring, the contractor shall also provide to the employment service delivery system the contact information for the job search organization(s). The disclosures required by this paragraph shall be updated on an annual

basis. As long as the contractor is contractually bound to these provisions and has so advised the employment service delivery system, there is no need to advise the employment service delivery system of subsequent contracts. The contractor may advise the employment service delivery system when it is no longer bound by this contract clause.

5. The contractor shall maintain records on an annual basis of the number of priority referrals of veterans protected by Section 4212 that it receives from each employment service delivery system, the total number of referrals it receives from each employment service delivery system, and the ratio of priority referrals to total referrals. The contractor shall maintain these records for a period of five (5) years.

6. The provisions of paragraphs 2 and 3 of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

7. As used in this clause: i. *All employment openings* includes all positions except executive and top management, those positions that will be filled from within the contractor's organization, and positions lasting three days or less. This term includes full-time employment, temporary employment of more than three days' duration, and part-time employment.

ii. *Executive and top management* means any employee: (a) Whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and (b) who customarily and regularly directs the work of two or more other employees therein; and (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) who customarily and regularly exercises discretionary powers; and (e) who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his or her hours of work in the work week to activities which are not directly and closely related to the performance of the work described in (a) through (d) of this paragraph 7.ii; Provided, that (e) of this paragraph 7.ii shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he or she is employed.

iii. *Positions that will be filled from within the contractor's organization* means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an employer decides to

consider applicants outside of his or her own organization.

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

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

10. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are protected veterans. The contractor must ensure that applicants or employees who are special disabled veterans are provided the notice in a form that is accessible and understandable to the special disabled veteran (e.g., providing Braille or large print versions of the notice, or posting the notice for visual accessibility to persons in wheelchairs). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

11. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of Section 4212 and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, protected veterans.

12. The contractor will include the provisions of this clause in every subcontract or purchase order of \$25,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to Section 4212, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

13. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive

consideration for employment without regard to their status as a protected veteran.

[End of Clause]

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

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

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

(e) *Incorporation by operation of the Act.* By operation of the Act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause.

(f) *Duties of contracting agencies.* Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the Act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the Act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the Act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in Sec. 60–250.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60–250.20 Covered employment activities.

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

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

§ 60–250.21 Prohibitions.

The term “discrimination” includes, but is not limited to, the acts described in this section and § 60–250.23.

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

(b) *Limiting, segregating and classifying.* Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of that individual's status as a protected veteran. For example, the contractor may not segregate protected veterans as a whole, or any classification of protected veterans, into separate work areas or into separate lines of advancement.

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

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

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

the contract which only affect that other party's employees or applicants.

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

(1) Have the effect of discriminating on the basis of status as a protected veteran; or

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

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

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

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

(3) A qualified special disabled veteran is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified special disabled veteran, unless the individual subsequently provides and/or pays for a reasonable accommodation as described in paragraph 4 of Appendix A of this part.

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

as protected veterans unless the standard, test or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude a special disabled veteran if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude individuals on the basis of their status as protected veterans but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant who is a special disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a protected veteran for an employment opportunity, the contractor may not rely on portions of such veteran's military record, including his or her discharge papers, which are not relevant to the qualification requirements of the opportunity in issue.

(2) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to 38 U.S.C. 4212 and are similarly inapplicable to this part.

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

(i) *Compensation.* In offering employment or promotions to protected veterans, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related and/or military-service-related pension or other disability-related and/or military-service-related benefit the applicant or employee receives from another source.

§ 60-250.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held

or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60-250.2(f) defining *direct threat*.)

§ 60-250.23 Medical examinations and inquiries.

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

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

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

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

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(5) Medical examinations conducted in accordance with paragraphs (b)(2) and (b)(4) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees who are special disabled veterans as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and

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

(c) *Invitation to self-identify.* The contractor shall invite applicants to self-identify as being covered by the Act, as specified in § 60-250.42.

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

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

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

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

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

§ 60-250.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor: (1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

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

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

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

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

Federal agencies regarding alcohol and the illegal use of drugs; and

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

(b) *Drug testing*—(1) *General policy*. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of Sec. 60–250.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

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

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–250.23(b)(5) and 60–250.23(d)(2).

§ 60–250.25 Health insurance, life insurance and other benefit plans.

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

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

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

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

(d) The contractor shall not deny a qualified special disabled veteran equal access to insurance or subject a qualified special disabled veteran to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

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

Subpart C—Affirmative Action Program

§ 60–250.40 Applicability of the affirmative action program requirement.

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

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

(c) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–250.44(i).

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

§ 60–250.41 Availability of affirmative action program.

The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment. In the event that the contractor has employees who do not work at a physical establishment, the contractor shall inform such employees about the availability of the affirmative action program by other means.

§ 60–250.42 Invitation to self-identify.

(a) *Pre-offer*. The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a protected veteran who may be covered by the Act.

This invitation may be included in the application materials for the position, but in any circumstance shall be provided to applicants prior to making an offer of employment to a job applicant. Additionally, the contractor may invite special disabled veterans to self-identify as such prior to making a job offer when:

(1) The invitation is made when the contractor actually is undertaking affirmative action for special disabled veterans at the pre-offer stage; or

(2) The invitation is made pursuant to a Federal, State, or local law requiring affirmative action for special disabled veterans.

(b) *Post-offer*. At any time after the offer of employment but before the applicant begins his or her job duties, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or active duty wartime or campaign badge veteran who may be covered by the Act.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitations also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the invitations shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the Act. (An acceptable form for such an invitation is set forth in Appendix B of this part.)

(d) If an applicant identifies himself or herself as a special disabled veteran in the post-offer self-identification detailed in paragraph (b) of this section, the contractor must inquire with the applicant whether an accommodation is necessary, and if so, must engage in an interactive process with applicant regarding reasonable accommodation. The contractor may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file in accordance with § 60–250.23(d) on persons who have self-identified as special disabled veterans.

(e) The contractor shall keep all information on self-identification

confidential. The contractor shall provide the information to OFCCP upon request. This information may be used only in accordance with this part.

(f) Nothing in this section relieves the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be protected veterans.

(g) Nothing in this section relieves the contractor from liability for discrimination under the Act.

§ 60–250.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act, contractors shall not discriminate against protected veterans, and shall take affirmative action to employ and advance in employment qualified protected veterans at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–250.20.

§ 60–250.44 Required contents of affirmative action programs.

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

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees who are special disabled veterans are provided the notice in a form that is accessible and understandable to the special disabled veteran (e.g., providing Braille or large print versions of the notice, or posting the notice for visual accessibility to persons in wheelchairs). The policy statement shall indicate the chief executive officer's support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things, that the contractor will: Recruit, hire, train and promote persons in all job titles, and ensure that all other personnel actions are administered, without regard to protected veteran status; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and applicants shall not be subjected to harassment, intimidation, threats, coercion or discrimination because they

have engaged in or may engage in any of the following activities:

(1) Filing a complaint;
 (2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the affirmative action provisions of Section 4212 or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by Section 4212 or its implementing regulations in this part or any other Federal, state or local law requiring equal opportunity for protected veterans; or

(4) Exercising any other right protected by Section 4212 or its implementing regulations in this part.

(b) *Review of personnel processes.* The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees who are known protected veterans for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a protected veteran is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, that is relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype protected veterans in a manner which limits their access to all jobs for which they are qualified. The contractor shall review such processes on at least an annual basis and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government. These procedures shall, at a minimum, include the following steps:

(1) For each applicant who is a protected veteran, the contractor shall be able to identify:

(i) each vacancy for which the applicant was considered; and
 (ii) each training program for which the applicant was considered.

(2) For each employee who is a protected veteran, the contractor shall be able to identify:

(i) each promotion for which the protected veteran was considered; and

(ii) each training program for which the protected veteran was considered.

(3) In each case where an employee or applicant who is a protected veteran is rejected for employment, promotion, or training, the contractor shall prepare a statement of the reason as well as a description of the accommodations considered (for a rejected special disabled veteran). The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, shall be treated as confidential medical records in accordance with § 60–250.23(d). These materials shall be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible to place a special disabled veteran on the job, the contractor shall make a record containing a description of the accommodation. The record shall be treated as a confidential medical record in accordance with § 60–250.23(d).

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the annual review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified special disabled veterans, they are job-related for the position in question and are consistent with business necessity. The contractor shall document the methods used to complete the annual review, the results of the annual review, and any actions taken in response. These documents shall be retained as employment records subject to the recordkeeping requirements of § 60–250.80.

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

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–

250.2(f) defining direct threat.) Once the contractor believes that a direct threat exists, the contractor shall create a statement of reasons supporting its belief, addressing each the criteria for "direct threat" listed in § 60–250.2(f). This statement shall be treated as a confidential medical record in accordance with § 60–250.23, and shall be retained as an employment record subject to the recordkeeping requirements of § 60–250.80.

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–250.21(f), as a matter of nondiscrimination the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified special disabled veteran unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee who is known to be a special disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee's disability; if the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed because of their status as a protected veteran.

(f) *External dissemination of policy, outreach and positive recruitment.*

(1) *Required outreach efforts.* The contractor shall undertake the outreach and positive recruitment activities listed below:

(i) The contractor shall establish linkage agreements enlisting the assistance and support of the Local Veterans' Employment Representative in the local employment service office nearest the contractor's establishment; and at least one of the following persons and organizations in recruiting and developing training opportunities for protected veterans to fulfill its commitment to provide meaningful employment opportunities to such veterans:

(A) The Department of Veterans Affairs Regional Office nearest the contractor's establishment;

(B) The veterans' counselors and coordinators (Vet-Reps) on college campuses;

(C) The service officers of the national veterans' groups active in the area of the contractor's establishment;

(D) Local veterans' groups and veterans' service centers near the contractor's establishment; and

(E) The Department of Defense Transition Assistance Program (TAP), or any subsequent program that, in whole or in part, might replace TAP.

(ii) The contractor shall also consult the Employer Resources section of the National Resource Directory (http://www.nationalresourcedirectory.gov/employment/employer_resources), or any future service that replaces or complements it, and establish a linkage agreement with one or more of the veterans' service organizations listed on the directory, other than the agencies listed in (A) through (E) above, for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have authority to approve or disapprove the acceptability of affirmative action programs.

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

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

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

(ii) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are protected veterans.

(iii) An effort should be made to participate in work-study programs with Department of Veterans Affairs rehabilitation facilities which specialize in training or educating special disabled veterans.

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

(v) The contractor should take any other positive steps it deems necessary to attract qualified protected veterans not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for any of the classifications of protected veterans.

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

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

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

(g) *Internal dissemination of policy.*

(1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation

in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified protected veterans. It is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

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

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

(ii) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified protected veterans. The contractor shall schedule meetings on an annual basis with all employees to discuss its affirmative action policies, explain contractor and individual employee responsibilities under these policies, and identify opportunities for advancement;

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

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

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

(3) The contractor is encouraged to additionally implement and disseminate this policy internally as follows:

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

(4) The contractor shall document those activities it undertakes to comply with the obligations of paragraph (g), and retain these documents as employment records subject to the

recordkeeping requirements of § 60–250.80.

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

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

(ii) Indicate any need for remedial action;

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

(iv) Determine whether known protected veterans have had the opportunity to participate in all company sponsored educational, training, recreational and social activities;

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

(vi) Document the actions taken to comply with the obligations of paragraphs (i) through (v) above, and retain these documents as employment records subject to the recordkeeping requirements of § 60–250.80.

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

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

(j) *Training.* In addition to the training set forth in paragraph (g)(2)(ii) of this section, all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented. This training shall include, but not be limited to, the benefits of employing protected veterans, appropriate sensitivity toward protected veteran applicants and employees, and the legal responsibilities of the contractor and its agents regarding protected veterans generally and special disabled veterans specifically, such as a reasonable accommodation for qualified special disabled veterans and the related and responsibilities of contractors and protected veterans. The contractor shall create contemporaneous records

documenting the specific subject matter(s) covered in the training, who conducted the training, who received the training, and when the training took place. The contractor shall retain these documents, and any written or electronic materials used for the training required by this section, as employment records subject to the recordkeeping requirements of § 60–250.80.

(k) *Data Collection Analysis.* The contractor shall document and maintain the following computations or comparisons pertaining to applicants and hires on an annual basis:

(1) The raw number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery system(s);

(2) The number of total referrals that the contractor received from applicable employment service delivery system(s);

(3) The ratio of priority referrals of veterans to total referrals (referral ratio);

(4) The number of applicants who self-identified as protected veterans pursuant to § 60–250.42(a), or who are otherwise known as protected veterans;

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

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

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

(8) The ratio of protected veteran applicants to all applicants (applicant ratio);

(9) The number of protected veteran applicants hired;

(10) The total number of applicants hired; and

(11) The ratio of protected veterans hired to all hires (hiring ratio). The number of hires shall include all employees as defined in § 60–250.2(h).

§ 60–250.45 Contractor established benchmarks for hiring.

(a) *Purpose:* The purpose of establishing benchmarks is to create a quantifiable method by which the contractor can measure its progress toward achieving equal employment opportunity for protected veterans.

(b) Hiring benchmarks, expressed as the percentage of total hires that are protected veterans that the contractor will seek to hire, shall be established by the contractor on an annual basis. In establishing these benchmarks, contractors shall take into account the following information:

(1) The average percentage of veterans in the civilian labor force in the State(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on OFCCP Web site;

(2) The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the State where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on OFCCP Web site;

(3) The referral ratio, applicant ratio, and hiring ratio for the previous year, as set forth in § 60–250.44(k);

(4) The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts, as set forth in § 60–250.44(f)(3); and

(5) Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

(c) The contractor shall document the hiring benchmark it has established each year, detailing each of the factors that it considered in establishing the hiring benchmark and the relative significance of each of these factors. The contractor shall retain this document for a period of five (5) years.

Subpart D—General Enforcement And Complaint Procedures

§ 60–250.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation

of potential violations of this Part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of Section 4212 and its regulations;

(3) *Compliance check.* A determination of whether the contractor has maintained records consistent with § 60–250.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60–250.62.

(c) VETS–100 Report. During a compliance evaluation, OFCCP may verify whether the contractor has complied with its obligation, pursuant to 41 CFR part 61–250, to file its annual Veterans' Employment Report (VETS–100 Report) with the Veterans' Employment and Training Service (VETS). If the contractor has not filed its report, OFCCP will request a copy from the contractor. If the contractor fails to provide a copy of the report to OFCCP, OFCCP will notify VETS.

(d) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally

advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with Section 4212 within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

§ 60–250.61 Complaint procedures.

(a) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint alleging a violation of the Act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown. Complaints may be submitted to OFCCP, 200 Constitution Avenue, NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Complaints may also be submitted to the Veterans' Employment and Training Service of the Department of Labor directly, or through the Local Veterans' Employment Representative (LVER) at the local employment service office. Such parties will assist veterans in preparing complaints, promptly refer such complaints to OFCCP, and maintain a record of all complaints which they receive and forward. OFCCP shall inform the party forwarding the complaint of the progress and results of its complaint investigation. The state

employment service delivery system shall cooperate with the Director in the investigation of any complaint.

(b) *Contents of complaints.*—(1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;

(ii) Name and address of the contractor who committed the alleged violation;

(iii) Documentation showing that the individual is a protected veteran. Such documentation must include a copy of the veteran's form DD-214, and, where applicable, a copy of the veteran's Benefits Award Letter, or similar Department of Veterans Affairs certification, updated within one year prior to the date the complaint is filed, indicating the veteran's level (by percentage) of disability, and whether the veteran has been determined by the Department of Veterans Affairs to have a serious employment handicap under 38 U.S.C. 3106;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made, and the other information specified in paragraph (b)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(c) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(d) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(e) *Resolution of matters.* (1) If the complaint investigation finds no violation of the Act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60-250.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

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

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

(4) If the investigation finds a violation of the Act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60-250.62.

§ 60-250.62 Conciliation agreements.

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

§ 60-250.63 Violation of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been

violated, the following procedures are applicable:

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

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

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

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

§ 60-250.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the Act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (*see* § 60-250.65).

§ 60-250.65 Enforcement proceedings.

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

behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–250.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure.*

(1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the Act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of exceptions and responses to exceptions to such decision (if any), whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights, Regional Solicitors, and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to “Executive Order 11246” shall mean the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212 (2001)); references to “equal opportunity clause” shall mean the equal opportunity clause published at § 60–250.5; and references to “regulations” shall mean the regulations contained in this part.

§ 60–250.66 Sanctions and penalties.

(a) *Withholding progress payments.*

With the prior approval of the Director, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the Act or this part.

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

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions

of the Act or this part subject to reinstatement pursuant to § 60–250.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–250.67 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–250.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the Act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor’s attitude towards compliance, the contractor’s past compliance history, and whether the contractor’s reinstatement would impede the effective enforcement of the Act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) *Petition for review.* Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor’s objections to the Director’s decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and shall include the decision as an appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for

reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–250.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Act or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by the Act or this part or any other Federal, state or local law requiring equal opportunity for protected veterans, or

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

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

§ 60–250.70 Disputed matters related to compliance with the Act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor’s compliance with the Act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor’s efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–250.80 Recordkeeping.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period will be one year from the date of

the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term *personnel records relevant to the complaint, compliance evaluation or action* would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. Records required by §§ 60–250.44(f)(4), 60–250.44(k), 60–250.45(c), and Paragraph 5 of the equal opportunity clause in § 250.5(a) shall be maintained by all contractors for a period of five years from the date of the making of the record.

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

that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

§ 60–250.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the Act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which its records and other information are available. The contractor must provide records and other information in any available format requested by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

§ 60–250.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, the Department of Veterans Affairs, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the Act.

§ 60–250.83 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Director.

§ 60–250.84 Responsibilities of local employment service offices.

(a) Local employment service offices shall refer qualified protected veterans

to fill employment openings listed by contractors with such local offices pursuant to the mandatory listing requirements of the equal opportunity clause, and shall give priority to protected veterans in making such referrals.

(b) Local employment service offices shall contact employers to solicit the job orders described in paragraph (a) of this section. The state employment security agency shall provide OFCCP upon request information pertinent to whether the contractor is in compliance with the mandatory listing requirements of the equal opportunity clause.

Appendix A to Part 60–250—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent “free-standing” source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. *See* § 60–250.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under Section 4212, like reasonable accommodation required under section 503 and the ADA, is a part of the nondiscrimination obligation. *See* EEOC appendix cited in this paragraph. Affirmative action is unique to Section 4212 and section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of a special disabled veteran who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of an “otherwise qualified” special disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–250.2(r), a special disabled veteran is qualified if he or she satisfies all the skill, experience, education and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the special disabled veteran is qualified with respect to that

process. One is “otherwise qualified” if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job’s essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees who are known to be special disabled veterans. As stated in § 60–250.42 (see also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they are placed on the contractor’s payroll, to indicate whether they are a special disabled veteran who may be covered by the Act and wish to benefit under the contractor’s affirmative action program. That section further provides that the contractor must seek the advice of special disabled veterans who “self-identify” in this way as to reasonable accommodation. Moreover, § 60–250.44(d) provides that if an employee who is a known special disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables a special disabled veteran to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee who is a special disabled veteran in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees who are special disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are special disabled veterans to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term “undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor’s business. The contractor’s claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to

provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., the Department of Veterans Affairs or a state vocational rehabilitation agency, or if Federal, state or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the special disabled veteran must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for “reasonable accommodation” in § 60–250.2(s) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are any number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor must consult with the special disabled veteran in deciding on the reasonable accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate state vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–800–669–4000 (voice), 1–800–669–6820 (TTY)), the Job Accommodation Network (JAN) operated by the Office of Disability Employment Policy in the U.S. Department of Labor (1–800–526–7234 or 1–800–232–9675), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a special disabled veteran to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For the visually-impaired such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and braille or large-print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck telephone

headsets, mechanical page turners and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by special disabled veterans—including areas used by employees for purposes other than the performance of essential job functions such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60–250.2(s) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified special disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a special disabled veteran is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, *i.e.*, those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor which has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind special disabled veteran with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the special disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit special disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or special disabled veterans with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

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

etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" must be determined in light of the totality of the circumstances.

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

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

Appendix B to Part 60-250—Sample Invitation to Self-Identify

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 4212 (Section 4212), as amended, which requires Government contractors to take affirmative action to employ and advance in employment: (1) Qualified special disabled veterans; (2) veterans of the Vietnam era; (3) recently separated veterans; and (4) active duty wartime or campaign badge veterans. These classifications are defined as follows:

- A "qualified special disabled veteran" means someone who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such veteran holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position, and also is one of the following:

- A veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to

compensation) under laws administered by the Department of Veterans Affairs for a disability:

- (A) Rated at 30 percent or more; or
- (B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap (defined as a significant impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes and interests.); or
- A person who was discharged or released from active duty because of a service-connected disability.

A "veteran of the Vietnam era" means a person who:

- Served on active duty for a period of more than 180 days, and was discharged or released therefrom with other than a dishonorable discharge, if any part of such active duty occurred:
 - In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
 - Between August 5, 1964, and May 7, 1975, in all other cases; or
 - Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed:
 - In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
 - Between August 5, 1964, and May 7, 1975, in all other cases.
- A "recently separated veteran" means any veteran during the one-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service.
- An "active duty wartime or campaign badge veteran" means a veteran who served in the U.S. military, ground, naval or air service during a war, or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.

2. [THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE "PRE-OFFER" INVITATION TO PROTECTED VETERANS REQUIRED BY 41 CFR 60-250.42(a). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERANS SET FORTH IN PARAGRAPH 1 MUST ACCOMPANY THIS SELF-IDENTIFICATION REQUEST.] If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below. As a Government contractor subject to Section 4212, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to Section 4212.

- I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERAN LISTED ABOVE
- I AM NOT A PROTECTED VETERAN
- I CHOOSE NOT TO PROVIDE THIS INFORMATION

[THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE "POST-OFFER" INVITATION TO PROTECTED VETERANS REQUIRED BY 41 CFR 60-250.42(b). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERANS SET FORTH IN PARAGRAPH 1 MUST ACCOMPANY THIS

SELF-IDENTIFICATION REQUEST.] As a Government contractor subject to Section 4212, we are required to submit a report (VETS-100) to the United States Department of Labor each year identifying the number of our employees belonging to each "protected veteran" category. If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below.

I BELONG TO THE FOLLOWING CLASSIFICATIONS OF PROTECTED VETERANS (CHOOSE ALL THAT APPLY):

- QUALIFIED SPECIAL DISABLED VETERAN
- VETERAN OF THE VIETNAM ERA
- RECENTLY SEPARATED VETERAN
- ACTIVE WARTIME OR CAMPAIGN BADGE VETERAN

I am a protected veteran, but I choose not to self-identify the classifications to which I belong.

I am NOT a protected veteran.

I choose not to provide this information.

If you are a special disabled veteran it would assist us if you tell us whether there are accommodations we could make that would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, changes in the way the job is customarily performed, provision of personal assistance services or other accommodations. This information will assist us in making reasonable accommodations for your disability.

3. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

4. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

5. The information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of special disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if you have a condition that might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by the Office of Federal Contract Compliance Programs, or enforcing the Americans with Disabilities Act, may be informed.

6. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

PART 60-300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

Subpart A—Preliminary Matters, Equal Opportunity Clause

Sec.

- 60-300.1 Purpose, applicability and construction.
- 60-300.2 Definitions.
- 60-300.3 [Reserved].
- 60-300.4 Coverage and waivers.
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Subpart B—Discrimination Prohibited

- 60-300.20 Covered employment activities.
- 60-300.21 Prohibitions.
- 60-300.22 Direct threat defense.
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Subpart C—Affirmative Action Program

- 60-300.40 Applicability of the affirmative action program requirement.
- 60-300.41 Availability of affirmative action program.
- 60-300.42 Invitation to self-identify.
- 60-300.43 Affirmative action policy.
- 60-300.44 Required contents of affirmative action programs.
- 60-300.45 Contractor Established Benchmarks for Hiring

Subpart D—General Enforcement and Complaint Procedures

- 60-300.60 Compliance evaluations.
- 60-300.61 Complaint procedures.
- 60-300.62 Conciliation agreements.
- 60-300.63 Violation of conciliation agreements.
- 60-300.64 Show cause notices.
- 60-300.65 Enforcement proceedings.
- 60-300.66 Sanctions and penalties.
- 60-300.67 Notification of agencies.
- 60-300.68 Reinstatement of ineligible contractors.
- 60-300.69 Intimidation and interference.
- 60-300.70 Disputed matters related to compliance with the Act.

Subpart E—Ancillary Matters

- 60-300.80 Recordkeeping.
- 60-300.81 Access to records.
- 60-300.82 Labor organizations and recruiting and training agencies.
- 60-300.83 Rulings and interpretations.
- 60-300.84 Responsibilities of local employment service offices.
- Appendix A to Part 60-300—Guidelines on a Contractor's Duty To Provide Reasonable Accommodation
- Appendix B to Part 60-300—Sample Invitation To Self-Identify

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

Subpart A—Preliminary Matters, Equal Opportunity Clause

§ 60-300.1 Purpose, applicability and construction.

(a) *Purpose.* The purpose of the regulations in this part is to set forth the standards for compliance with 38 U.S.C. 4212 (Section 4212), which prohibits discrimination against protected veterans and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified protected veterans. Disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans are protected veterans under Section 4212.

(b) *Applicability.* This part applies to any Government contract or subcontract of \$100,000 or more, entered into or modified on or after December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction): Provided, that subpart C of this part applies only as described in Sec. 60-300.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part. Any contractor or subcontractor whose only contract(s) for the purchase, sale or use of personal property and nonpersonal services (including construction) was entered into before December 1, 2003 (and not modified as described above) must follow part 60-250. Any contractor or subcontractor who has contracts for the purchase, sale or use of personal property and nonpersonal services (including construction) that were entered into before December 1, 2003 (and not modified as described above), and contracts that were entered into on or after December 1, 2003, must follow both parts 60-250 and 60-300.

(c) *Construction—(1) In general.* The Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) (42 U.S.C. 12101, *et seq.*) set out as an appendix to 29 CFR part 1630 issued pursuant to Title I may be relied upon for guidance in interpreting the parallel provisions of this part.

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

greater or equal protection for the rights of disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, or Armed Forces service medal protected veterans as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60-300.2 Definitions.

For the purpose of this part:

(a) *Act* means the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.

(b) *Active duty wartime or campaign badge veteran* means a veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

(c) *Armed Forces service medal veteran* means any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

(d) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of the Vietnam Era Veterans' Readjustment Assistance Act.

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

(f) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$100,000 or more.

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

- (1) The duration of the risk;

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

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

(4) The imminence of the potential harm.

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

(i) *Disabled veteran* means:

(1) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or

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

(j) [Reserved]

(k) *Employment service delivery system* means a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.

(l) *Equal opportunity clause* means the contract provisions set forth in § 60–300.5, “Equal opportunity clause.”

(m) *Essential functions*—(1) *In general.* The term essential functions means fundamental job duties of the employment position the disabled veteran holds or desires. The term essential functions does not include the marginal functions of the position.

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

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

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

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

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

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

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

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

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

(v) The terms of a collective bargaining agreement;

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

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

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

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

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

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

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

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

(5) *Person*, as used in the definition of Government contract and subcontract of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

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

(p) *Linkage Agreement* means an agreement describing the connection between contractors and appropriate

recruitment and/or training sources. A linkage agreement is to be used by contractors as a source of potential applicants for the covered groups the contractor is interested in, as required by § 60–300.44(f). The contractor’s representative that signs the linkage agreement should be the company official responsible for the contractor’s affirmative action program and/or has hiring authority.

(q) *Prime contractor* means any person holding a contract of \$100,000 or more, and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a contract subject to the Act.

(r) *Protected veteran* means a veteran who is protected under the non-discrimination and affirmative action provisions of the Act; specifically, a veteran who may be classified as a “disabled veteran,” “recently separated veteran,” “active duty wartime or campaign badge veteran,” and/or an “Armed Forces service medal veteran,” as defined by this section.

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

(t) *Qualified disabled veteran* means a disabled veteran who has the ability to perform the essential functions of the employment position with or without reasonable accommodation.

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

(i) Modifications or adjustments to a job application process that enable a qualified applicant who is a disabled veteran to be considered for the position such applicant desires;⁹ or

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

(iii) Modifications or adjustments that enable the contractor’s employee who is a disabled veteran to enjoy equal benefits and privileges of employment

⁹ A contractor’s duty to provide a reasonable accommodation with respect to applicants who are disabled veterans is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Disabled veteran applicants must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

as are enjoyed by the contractor's other similarly situated employees who are not disabled veterans.

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

(i) Making existing facilities used by employees readily accessible to and usable by disabled veterans; and

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

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified disabled veteran in need of the accommodation.¹⁰ This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(v) *Recently separated veteran* means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

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

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

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

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

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

(z) *Subcontractor* means any person holding a subcontract of \$100,000 or

more and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," any person who has held a subcontract subject to the Act.

(aa) *TAP* means the Department of Defense's Transition Assistance Program, or any successor programs thereto. The TAP was designed to smooth the transition of military personnel and family members leaving active duty via employment workshops and individualized employment assistance and training.

(bb) *Undue hardship*—(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (2) of this section.

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

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

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

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

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

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

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

(dd) *Veteran* means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom

under conditions other than dishonorable.

§ 60–300.3 [Reserved]

§ 60–300.4 Coverage and waivers.

(a) *General*—(1) *Contracts and subcontracts of \$100,000 or more.* Contracts and subcontracts of \$100,000 or more are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Contracts for indefinite quantities.* With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than \$100,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order is \$100,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

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

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

¹⁰ Contractors must engage in such an interactive process with a disabled veteran, whether or not a reasonable accommodation ultimately is identified that will make the person a qualified individual. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

in work on or under the contract or subcontract.

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

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

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

§ 60–300.5 Equal opportunity clause.

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

EQUAL OPPORTUNITY FOR SECTION 4212 PROTECTED VETERANS ¹¹

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran (hereinafter collectively referred to as “protected veteran(s)”) in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, including the following:

- i. Recruitment, advertising, and job application procedures.
- ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.
- iii. Rates of pay or any other form of compensation and changes in compensation.
- iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.
- v. Leaves of absence, sick leave, or any other leave.
- vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor.
- vii. Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.
- viii. Activities sponsored by the contractor including social or recreational programs.
- ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to immediately list all employment openings which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, with the appropriate employment service delivery system where the opening occurs. Listing employment openings with the state workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service delivery system. In order to satisfy the listing requirement described herein, contractors must provide information about the job vacancy in the manner and format required by the appropriate employment service delivery system to permit that system to provide priority referral of veterans protected by Section 4212 for that job vacancy. Providing information on employment openings to a privately run job

service or exchange will satisfy the contractor's listing obligation only if the privately run job service or exchange provides the information to the appropriate employment service delivery system in that manner and format in which the employment service delivery system requires.

3. Listing of employment openings with the appropriate employment service delivery system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a *bona fide* job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

4. Whenever a contractor, other than a state or local governmental contractor, becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the employment service delivery system in each state where it has establishments that: (a) It is a Federal contractor, so that the employment service delivery systems are able to identify them as such; and (b) it desires priority referrals from the state of protected veterans for job openings at all locations within the state. The contractor shall also provide to the employment service delivery system the name and location of each hiring location within the state and the contact information for the contractor official responsible for hiring at each location. In the event that the contractor uses any external job search organizations to assist in its hiring, the contractor shall also provide to the employment service delivery system the contact information for the job search organization(s). The disclosures required by this paragraph shall be updated on an annual basis. As long as the contractor is contractually bound to these provisions and has so advised the employment service delivery system, there is no need to advise the employment service delivery system of subsequent contracts. The contractor may advise the employment service delivery system when it is no longer bound by this contract clause.

5. The contractor shall maintain records on an annual basis of the number of priority referrals of veterans protected by Section 4212 that it receives from each employment service delivery system, the total number of referrals it receives from each employment service delivery system, and the ratio of priority referrals to total referrals. The contractor shall maintain these records for a period of five (5) years.

6. The provisions of paragraphs 2 and 3 of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

¹¹ The definitions set forth in 41 CFR 60–300.2 apply to the terms used throughout this Clause, and they are incorporated herein by reference.

7. As used in this clause: i. *All employment openings* includes all positions except executive and senior management, those positions that will be filled from within the contractor's organization, and positions lasting three days or less. This term includes full-time employment, temporary employment of more than three days' duration, and part-time employment.

ii. *Executive and senior management* means: (1) Any employee (a) compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (b) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (c) who customarily and regularly directs the work of two or more other employees; and (d) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight; or (2) any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

iii. *Positions that will be filled from within the contractor's organization* means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings which the contractor proposes to fill from regularly established "recall" lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of his or her own organization.

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

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

10. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are protected veterans. The contractor must ensure that applicants or employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran (e.g., providing Braille or large print versions of the notice, or posting the notice for visual accessibility to persons in wheelchairs). With respect to employees who do not work at a physical location of the

contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

11. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of Section 4212, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against protected veterans.

12. The contractor will include the provisions of this clause in every subcontract or purchase order of \$100,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to Section 4212 so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs, may direct to enforce such provisions, including action for noncompliance.

13. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to their status as a protected veteran.

[End of Clause]

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

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

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

(e) *Incorporation by operation of the Act*. By operation of the Act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause.

(f) *Duties of contracting agencies*. Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities

under the Act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the Act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the Act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in Sec. 60–300.66 as may be ordered by the Secretary or the Director.

Subpart B—Discrimination Prohibited

§ 60–300.20 Covered employment activities.

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

(a) Recruitment, advertising, and job application procedures;

(b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

§ 60–300.21 Prohibitions.

The term discrimination includes, but is not limited to, the acts described in this section and § 60–300.23.

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

(b) *Limiting, segregating and classifying*. Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way

that adversely affects his or her employment opportunities or status on the basis of that individual's status as a protected veteran. For example, the contractor may not segregate protected veterans as a whole, or any classification of protected veterans, into separate work areas or into separate lines of advancement.

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

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

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

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

(1) Have the effect of discriminating on the basis of status as a protected veteran; or

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

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

(f) *Not making reasonable accommodation.* (1) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a qualified disabled veteran, unless such contractor can

demonstrate that the accommodation would impose an undue hardship on the operation of its business.

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

(3) A qualified disabled veteran is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified disabled veteran, unless the individual subsequently provides and/or pays for a reasonable accommodation as described in paragraph 4 of Appendix A of this part.

(g) *Qualification standards, tests and other selection criteria*—(1) *In general.* It is unlawful for the contractor to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out individuals on the basis of their status as protected veterans unless the standard, test or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude a disabled veteran if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude individuals on the basis of their status as protected veterans but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant who is a disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a protected veteran for an employment opportunity, the contractor may not rely on portions of such veteran's military record, including his or her discharge papers, which are not relevant to the qualification requirements of the opportunity in issue.

(2) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to 38 U.S.C.

4212 and are similarly inapplicable to this part.

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

(i) *Compensation.* In offering employment or promotions to protected veterans, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related and/or military-service-related pension or other disability-related and/or military-service-related benefit the applicant or employee receives from another source.

§ 60-300.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60-300.2(g) defining *direct threat*.)

§ 60-300.23 Medical examinations and inquiries.

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

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

(2) *Employment entrance examination.* The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and

before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of their status as a disabled veteran.

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

(4) *Other acceptable examinations and inquiries.* The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(5) Medical examinations conducted in accordance with paragraphs (b)(2) and (b)(4) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees who are disabled veterans as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) *Invitation to self-identify.* The contractor shall invite applicants to self-identify as being covered by the Act, as specified in § 60–300.42.

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

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

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

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

(2) Information obtained under this section regarding the medical condition

or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

§ 60–300.24 Drugs and alcohol.

(a) *Specific activities permitted.* The contractor: (1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

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

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

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

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

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

(b) *Drug testing*—(1) *General policy.*

For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination.

Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of Sec. 60–300.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) *Transportation employees.* Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use

of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–300.23(b)(5) and 60–300.23(d)(2).

§ 60–300.25 Health insurance, life insurance and other benefit plans.

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

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

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

(d) The contractor shall not deny a qualified disabled veteran equal access to insurance or subject a qualified disabled veteran to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

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

Subpart C—Affirmative Action Program

§ 60–300.40 Applicability of the affirmative action program requirement.

(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$100,000 or more.

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

(c) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60–300.44(i).

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

§ 60–300.41 Availability of affirmative action program.

The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment. In the event that the contractor has employees who do not work at a physical establishment, the contractor shall inform such employees about the availability of the affirmative action program by other means.

§ 60–300.42 Invitation to self-identify.

(a) *Pre-offer.* The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a protected veteran who may be covered by the Act. This invitation may be included in the application materials for the position, but in any circumstance shall be provided to applicants prior to making an offer of employment to a job applicant. Additionally, the contractor may invite disabled veterans to self-identify as such prior to making a job offer when:

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

(2) The invitation is made pursuant to a Federal, State, or local law requiring affirmative action for disabled veterans.

(b) *Post-offer.* At any time after the offer of employment but before the applicant begins his or her job duties, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran who may be covered by the Act.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitations also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the

invitations shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the Act. (An acceptable form for such an invitation is set forth in Appendix B of this part.)

(d) If an applicant identifies himself or herself as a disabled veteran in the post-offer self-identification detailed in paragraph (b) of this section, the contractor must inquire with the applicant whether an accommodation is necessary, and if so, must engage in an interactive process with applicant regarding reasonable accommodation. The contractor may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file in accordance with § 60–300.23(d) on persons who have self-identified as disabled veterans.

(e) The contractor shall keep all information on self-identification confidential. The contractor shall provide the information to OFCCP upon request. This information may be used only in accordance with this part.

(f) Nothing in this section relieves the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be protected veterans.

(g) Nothing in this section relieves the contractor from liability for discrimination under the Act.

§ 60–300.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act, contractors shall not discriminate against protected veterans, and shall take affirmative action to employ and advance in employment qualified protected veterans at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–300.20.

§ 60–300.44 Required contents of affirmative action programs.

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

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy

statement on company bulletin boards. The contractor must ensure that applicants and employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran (e.g., providing Braille or large print versions of the notice, or posting the notice for visual accessibility to persons in wheelchairs). The policy statement shall indicate the chief executive officer's support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things, that the contractor will: Recruit, hire, train and promote persons in all job titles, and ensure that all other personnel actions are administered, without regard to protected veteran status; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and applicants shall not be subjected to harassment, intimidation, threats, coercion or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;
 (2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the affirmative action provisions of Section 4212 or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by Section 4212 or its implementing regulations in this part or any other Federal, state or local law requiring equal opportunity for protected veterans; or

(4) Exercising any other right protected by Section 4212 or its implementing regulations in this part.

(b) *Review of personnel processes.* The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees who are known protected veterans for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a protected veteran is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, that is relevant to the requirements of the opportunity in

issue. The contractor shall ensure that its personnel processes do not stereotype protected veterans in a manner which limits their access to all jobs for which they are qualified. The contractor shall review such processes on at least an annual basis and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government. These procedures shall, at a minimum, include the following steps:

(1) For each applicant who is a protected veteran, the contractor shall be able to identify:

- (i) each vacancy for which the applicant was considered; and
- (ii) each training program for which the applicant was considered.

(2) For each employee who is a protected veteran, the contractor shall be able to identify:

- (i) each promotion for which the protected veteran was considered; and
- (ii) each training program for which the protected veteran was considered.

(3) In each case where an employee or applicant who is a protected veteran is rejected for employment, promotion, or training, the contractor shall prepare a statement of the reason as well as a description of the accommodations considered (for a rejected disabled veteran). The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, shall be treated as confidential medical records in accordance with § 60–300.23(d). These materials shall be available to the applicant or employee concerned upon request.

(4) Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible to place a disabled veteran on the job, the contractor shall make a record containing a description of the accommodation. The record shall be treated as a confidential medical record in accordance with § 60–300.23(d).

(c) *Physical and mental qualifications.* (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the annual review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified disabled veterans, they are job-related

for the position in question and are consistent with business necessity. The contractor shall document the methods used to complete the annual review, the results of the annual review, and any actions taken in response. These documents shall be retained as employment records subject to the recordkeeping requirements of § 60–300.80.

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

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–300.2(g) defining direct threat.) Once the contractor believes that a direct threat exists, the contractor shall create a statement of reasons supporting its belief, addressing each the criteria for “direct threat” listed in § 60–300.2(f). This statement shall be treated as a confidential medical record in accordance with § 60–300.23, and shall be retained as an employment record subject to the recordkeeping requirements of § 60–300.80.

(d) *Reasonable accommodation to physical and mental limitations.* As is provided in § 60–300.21(f), as a matter of nondiscrimination the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled veteran unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee who is known to be a disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee’s disability; if the employee responds affirmatively, the contractor shall confidentially inquire whether the

employee is in need of a reasonable accommodation.

(e) *Harassment.* The contractor must develop and implement procedures to ensure that its employees are not harassed because of their status as a protected veteran.

(f) *External dissemination of policy, outreach and positive recruitment.*

(1) *Required outreach efforts.* The contractor shall undertake the outreach and positive recruitment activities listed below:

(i) The contractor shall establish linkage agreements enlisting the assistance and support of the Local Veterans’ Employment Representative in the local employment service office nearest the contractor’s establishment; and at least one of the following persons and organizations in recruiting and developing training opportunities for protected veterans to fulfill its commitment to provide meaningful employment opportunities to such veterans:

(A) The Department of Veterans Affairs Regional Office nearest the contractor’s establishment;

(B) The veterans’ counselors and coordinators (Vet-Reps) on college campuses;

(C) The service officers of the national veterans’ groups active in the area of the contractor’s establishment;

(D) Local veterans’ groups and veterans’ service centers near the contractor’s establishment; and

(E) The Department of Defense Transition Assistance Program (TAP), or any subsequent program that, in whole or in part, might replace TAP.

(ii) The contractor shall also consult the Employer Resources section of the National Resource Directory (http://www.nationalresourcedirectory.gov/employment/employer_resources), or any future service that replaces or complements it, and establish a linkage agreement with one or more of the veterans’ service organizations listed on the directory, other than the agencies listed in (A) through (E) above, for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have authority to approve or disapprove the acceptability of affirmative action programs.

(iii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including

subcontracting vendors and suppliers, requesting appropriate action on their part.

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

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

(ii) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are protected veterans.

(iii) An effort should be made to participate in work-study programs with Department of Veterans Affairs rehabilitation facilities which specialize in training or educating disabled veterans.

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

(v) The contractor should take any other positive steps it deems necessary to attract qualified protected veterans not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for any of the classifications of protected veterans.

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

(3) *Assessment of External Outreach and Recruitment Efforts.* The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified protected veterans. The contractor shall document each evaluation, including at a minimum the criteria it used to

evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective.

Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts shall be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified protected veterans, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

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

(g) *Internal dissemination of policy.* (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified protected veterans. It is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

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

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

(ii) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified protected veterans. The contractor shall schedule meetings on an annual basis with all employees to discuss its affirmative action policies, explain contractor and individual employee responsibilities under these policies, and identify opportunities for advancement;

(iii) Conduct meetings with executive, management, and supervisory personnel to explain the intent of the policy and

individual responsibility for effective implementation, making clear the chief executive officer's attitude;

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

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

(3) The contractor is encouraged to additionally implement and disseminate this policy internally as follows:

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

(4) The contractor shall document those activities it undertakes to comply with the obligations of paragraph (g), and retain these documents as employment records subject to the recordkeeping requirements of § 60–300.80.

(h) *Audit and reporting system.*

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

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

(ii) Indicate any need for remedial action;

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

(iv) Determine whether known protected veterans have had the opportunity to participate in all company sponsored educational, training, recreational and social activities;

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

(vi) Document the actions taken to comply with the obligations of paragraphs (i) through (v) above, and retain these documents as employment records subject to the recordkeeping requirements of § 60–300.80.

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

(i) *Responsibility for implementation.* An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity shall appear on

all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) *Training.* In addition to the training set forth in paragraph (g)(2)(ii) of this section, all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented. This training shall include, but not be limited to, the benefits of employing protected veterans, appropriate sensitivity toward protected veteran applicants and employees, and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of contractors and protected veterans. The contractor shall create contemporaneous records documenting the specific subject matter(s) covered in the training, who conducted the training, who received the training, and when the training took place. The contractor shall retain these documents, and any written or electronic materials used for the training required by this section, as employment records subject to the recordkeeping requirements of § 60–300.80.

(k) *Data Collection Analysis.* The contractor shall document and maintain the following computations or comparisons pertaining to applicants and hires on an annual basis:

- (1) The number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery system(s);
- (2) The number of total referrals that the contractor received from applicable employment service delivery system(s);
- (3) The ratio of priority referrals of veterans to total referrals (referral ratio);
- (4) The number of applicants who self-identified as protected veterans pursuant to § 60–300.42(a), or who are otherwise known as protected veterans;
- (5) The total number of job openings and total number of jobs filled;
- (6) The ratio of jobs filled to job openings;
- (7) The total number of applicants for all jobs;
- (8) The ratio of protected veteran applicants to all applicants (applicant ratio);
- (9) The number of protected veteran applicants hired;

(10) The total number of applicants hired; and

(11) The ratio of protected veterans hired to all hires (hiring ratio). The number of hires shall include all employees as defined in § 60–300.2.

§ 60–300.45 Contractor established benchmarks for hiring.

(a) *Purpose:* The purpose of establishing benchmarks is to create a quantifiable method by which the contractor can measure its progress toward achieving equal employment opportunity for protected veterans.

(b) Hiring benchmarks, expressed as the percentage of total hires that are protected veterans that the contractor will seek to hire, shall be established by the contractor on an annual basis. In establishing these benchmarks, contractors shall take into account the following information:

(1) The average percentage of veterans in the civilian labor force in the State(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP Web site;

(2) The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the State where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP Web site;

(3) The referral ratio, applicant ratio, and hiring ratio for the previous year, as set forth in § 60–300.44(k);

(4) The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts, as set forth in § 60–300.44(f)(3); and

(5) Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

(c) The contractor shall document the hiring benchmark it has established each year, detailing each of the factors that it considered in establishing the hiring benchmark and the relative significance of each of these factors. The contractor shall retain this document for a period of five (5) years.

Subpart D—General Enforcement and Complaint Procedures

§ 60–300.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals

without discrimination based on their status as a protected veteran in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this Part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of Section 4212 and its regulations;

(3) *Compliance check.* A determination of whether the contractor

has maintained records consistent with § 60–300.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) *Focused review.* A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60–300.62.

(c) *Reporting Requirements.* During a compliance evaluation, OFCCP may verify whether the contractor has complied with applicable reporting requirements required under regulations promulgated by the Veterans' Employment and Training Service (VETS). If the contractor has not complied with any such reporting requirement, OFCCP will notify VETS.

(d) *Pre-award compliance evaluations.* Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with Section 4212 within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award. .

§ 60–300.61 Complaint procedures.

(a) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an

authorized representative, file a written complaint alleging a violation of the Act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown. Complaints may be submitted to OFCCP, 200 Constitution Avenue, NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Complaints may also be submitted to the Veterans' Employment and Training Service of the Department of Labor directly, or through the Local Veterans' Employment Representative (LVER) at the local employment service office. Such parties will assist veterans in preparing complaints, promptly refer such complaints to OFCCP, and maintain a record of all complaints which they receive and forward. OFCCP shall inform the party forwarding the complaint of the progress and results of its complaint investigation. The state employment service delivery system shall cooperate with the Director in the investigation of any complaint.

(b) *Contents of complaints.*—(1) *In general.* A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;

(ii) Name and address of the contractor who committed the alleged violation;

(iii) Documentation showing that the individual is a protected veteran. Such documentation must include a copy of the veteran's form DD–214, and, where applicable, a copy of the veteran's Benefits Award Letter, or similar Department of Veterans Affairs certification, updated within one year prior to the date the complaint is filed;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) *Third party complaints.* A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made,

and the other information specified in paragraph (b)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(c) *Incomplete information.* Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(d) *Investigations.* The Department of Labor shall institute a prompt investigation of each complaint.

(e) *Resolution of matters.* (1) If the complaint investigation finds no violation of the Act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–300.65(a)(1), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

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

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

(4) If the investigation finds a violation of the Act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60–300.62.

§ 60–300.62 Conciliation agreements.

If a compliance evaluation, complaint investigation or other review by OFCCP finds a material violation of the Act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written

conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

§ 60–300.63 Violation of conciliation agreements.

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

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

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

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

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

§ 60–300.64 Show cause notices.

When the Director has reasonable cause to believe that the contractor has violated the Act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (*see* § 60–300.65).

§ 60–300.65 Enforcement proceedings.

(a) *General.* (1) If a compliance evaluation, complaint investigation or other review by OFCCP finds a violation of the Act or this part, and the violation has not been corrected in accordance

with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above in this sentence. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–300.5, including appropriate injunctive relief.

(b) *Hearing practice and procedure.*
(1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the Act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60–30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of exceptions and responses to exceptions to such decision (if any), whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management, Regional Solicitors, and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60–30 to “Executive Order 11246” shall mean the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended; references to “equal opportunity clause” shall mean the equal opportunity clause published at § 60–300.5; and references to “regulations” shall mean the regulations contained in this part.

§ 60–300.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Director, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the Act or this part.

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

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to § 60–300.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years.

(d) *Hearing opportunity.* An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

§ 60–300.67 Notification of agencies.

The Director shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

§ 60–300.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the Act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor’s attitude towards compliance, the contractor’s past compliance history, and whether the contractor’s reinstatement would impede the effective enforcement of the Act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The

Director shall issue a written decision on the request.

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

§ 60–300.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
- (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Act or any other Federal, state or local law requiring equal opportunity for protected veterans;
- (3) Opposing any act or practice made unlawful by the Act or this part or any other Federal, state or local law requiring equal opportunity for protected veterans, or
- (4) Exercising any other right protected by the Act or this part.

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

§ 60–300.70 Disputed matters related to compliance with the Act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the Act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's

efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E—Ancillary Matters

§ 60–300.80 Recordkeeping.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period will be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term *personnel records relevant to the complaint, compliance evaluation or action* would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected. Records required by §§ 60–250.44(f)(4), 60–250.44(k), 60–250.45(c), and Paragraph 5 of the equal

opportunity clause in § 250.5(a) shall be maintained by all contractors for a period of five years from the date of the making of the record.

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

(c) The requirements of this section shall apply only to records made or kept on or after the date that the Office of Management and Budget has cleared the requirements.

§ 60–300.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the Act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which its records and other information are available. The contractor must provide records and other information in any available format requested by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

§ 60–300.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, the Department of Veterans Affairs, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the Act.

§ 60–300.83 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Director.

§ 60–300.84 Responsibilities of appropriate employment service delivery system.

By statute, appropriate employment service delivery systems are required to refer qualified protected veterans to fill employment openings listed by contractors with such appropriate employment delivery systems pursuant to the mandatory job listing requirements of the equal opportunity clause and are required to give priority to protected veterans in making such referrals. The employment service delivery systems shall provide OFCCP, upon request, information pertinent to whether the contractor is in compliance with the mandatory job listing requirements of the equal opportunity clause.

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

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent “free-standing” source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. *See* § 60–300.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under Section 4212, like reasonable accommodation required under Section 503 and the ADA, is a part of the nondiscrimination obligation. *See* EEOC appendix cited in this paragraph. Affirmative action is unique to Section 4212 and Section 503, and includes actions above and beyond

those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of a disabled veteran who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of an “otherwise qualified” disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–300.2(t), a disabled veteran is qualified if he or she has the ability to perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the disabled veteran is qualified with respect to that process. One is “otherwise qualified” if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees who are known to be disabled veterans. As stated in § 60–300.42(a) (*see* also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they are placed on the contractor's payroll, to indicate whether they are a disabled veteran who may be covered by the Act and wish to benefit under the contractor's affirmative action program. Section 60–300.42(d) further provides that the contractor must seek the advice of disabled veterans who “self-identify” in this way as to reasonable accommodation. Moreover, § 60–300.44(d) provides that if an employee who is a known disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables a disabled veteran to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee who is a disabled veteran in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the “best” accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable

accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees who are disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are disabled veterans to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term “undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, *e.g.*, the Department of Veterans Affairs or a state vocational rehabilitation agency, or if Federal, state or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the disabled veteran must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for “reasonable accommodation” in § 60–300.2(u) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are any number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor must consult with the disabled veteran in deciding on the reasonable accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate state vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1–800–669–4000 (voice), 1–800–669–6820 (TTY)), the Job Accommodation Network (JAN) operated by the Office of Disability Employment Policy in the U.S. Department of Labor (1–800–526–7234 or 1–800–232–9675), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a disabled veteran to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For the visually-impaired such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and braille or large-print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck telephone headsets, mechanical page turners and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by disabled veterans—including areas used by employees for purposes other than the performance of essential job functions such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60–300.2(u) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a disabled veteran is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, i.e., those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor which has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind disabled veteran with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or disabled veterans with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In

general, reassignment should be considered only when accommodation within the disabled veteran's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider applicants who are known disabled veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees who are disabled veterans by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" must be determined in light of the totality of the circumstances.

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

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

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

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 4212 (Section 4212), as amended, which requires Government contractors to take affirmative action to employ and advance in employment: (1) Qualified disabled veterans; (2) recently

separated veterans; (3) active duty wartime or campaign badge veterans; and (4) Armed Forces service medal veterans. These classifications are defined as follows:

- A "qualified disabled veteran" means someone who has the ability to perform the essential functions of the employment position with or without reasonable accommodation, and also is one of the following:
 - a veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or
 - a person who was discharged or released from active duty because of a service-connected disability
- A "recently separated veteran" means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service.
 - An "active duty wartime or campaign badge veteran" means a veteran who served in the U.S. military, ground, naval or air service during a war, or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.
- An "Armed forces service medal veteran" means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985.

2. [THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE "PRE-OFFER" INVITATION TO PROTECTED VETERANS REQUIRED BY 41 CFR 60–300.42(a). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERANS SET FORTH IN PARAGRAPH 1 MUST ACCOMPANY THIS SELF-IDENTIFICATION REQUEST.] If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below. As a Government contractor subject to Section 4212, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to Section 4212.

[] I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERAN LISTED ABOVE
 [] I AM NOT A PROTECTED VETERAN
 [] I CHOOSE NOT TO PROVIDE THIS INFORMATION

[THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE "POST-OFFER" INVITATION TO PROTECTED VETERANS REQUIRED BY 41 CFR 60–300.42(b). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERANS SET FORTH IN PARAGRAPH 1 MUST ACCOMPANY THIS SELF-IDENTIFICATION REQUEST.] As a Government contractor subject to Section 4212, we are required to submit a report (VETS–100A) to the United States Department of Labor each year identifying the number of our employees belonging to each "protected veteran" category. If you

believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below.

I BELONG TO THE FOLLOWING CLASSIFICATIONS OF PROTECTED VETERANS (CHOOSE ALL THAT APPLY):

- QUALIFIED DISABLED VETERAN
 RECENTLY SEPARATED VETERAN
 ACTIVE WARTIME OR CAMPAIGN BADGE VETERAN
 ARMED FORCES SERVICE MEDAL VETERAN
-
- I am a protected veteran, but I choose not to self-identify the classifications to which I belong.
 I am NOT a protected veteran.
 I choose not to provide this information.

If you are a disabled veteran it would assist us if you tell us whether there are accommodations we could make that would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, changes in the way the job is customarily performed, provision of personal assistance services or other accommodations. This information will assist us in making reasonable accommodations for your disability.

3. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

4. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

5. The information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if you have a condition that might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by the Office of Federal Contract Compliance Programs, or enforcing the Americans with Disabilities Act, may be informed.

6. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

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