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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; Final 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 Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is publishing revisions to the current implementing regulations of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, (VEVRAA). OFCCP is responsible for enforcement of VEVRAA, which prohibits employment discrimination against protected veterans by covered Federal contractors and subcontractors. VEVRAA also requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

The final rule strengthens several provisions that are intended to aid in recruitment and hiring efforts, such as clarifying the mandatory job listing requirements, requiring data collection pertaining to protected veteran applicants and hires, and establishing hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts. However, some of the proposals set forth in the NPRM, particularly with regard to the creation and maintenance of certain records and specific mandated affirmative action obligations, have been eliminated or made more flexible in order to reduce the time and cost burden on contractors. The specific revisions made, and the rationale for making them, are set forth in the Section-by-Section Analysis.

DATES: *Effective Date:* These regulations are effective March 24, 2014.

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

calling (202) 693-0104 (voice) or (202) 693-1337 (TTY). Copies of this rule in alternative formats may be obtained by calling (202) 693-0103 (voice) or (202) 693-1337 (TTY). The alternative formats available are large print and electronic file on computer disk. The rule also is available on the Internet on the Regulations.gov Web site at <http://www.regulations.gov> or on the OFCCP Web site at <http://www.dol.gov/ofccp>.

Executive Summary**I. Purpose of the Regulatory Action**

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights, worker protection agency which enforces an Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.¹ Specifically, Federal contractors must engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, religion, color, national origin, and sex. Section 503 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination against individuals with disabilities. The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, (VEVRAA) prohibits employment discrimination against certain protected veterans. Contemporaneous with these revisions, OFCCP is also publishing revisions to the implementing regulations of Section 503 of the Rehabilitation Act of 1973 (section 503). OFCCP has historically viewed these regulations together, maintaining identity between the two regulations where possible and allowing contractors to prepare an Affirmative Action Plan that covers both laws jointly. Accordingly, the vast majority of the revisions announced here in the VEVRAA regulation are also present in the section 503 rule. The exceptions to this—mainly in the structure of the hiring benchmark/goal for the two rules, are discussed in further detail below.

The existing implementing regulations for VEVRAA are split into two separate parts: 41 CFR part 60–250 (part 60–250) and 41 CFR part 60–300 (part 60–300). Part 60–250 applies to any Government contract or subcontract

of \$25,000 or more entered into before December 1, 2003, while part 60–300 applies to any Government contract or subcontract of \$100,000 or more entered into on or after December 1, 2003. The final rule rescinds the regulations at part 60–250, as discussed in full in the Section-by-Section Analysis below. With regard to part 60–300, however, the final rule retains many of the revisions set forth in the notice of proposed rulemaking (NPRM).

OFCCP evaluates the employment practices of over 4,000 Federal contractors and subcontractors annually, and investigates individual complaints. OFCCP also engages in outreach to employees of Federal contractors to educate them about their rights, and provides technical assistance to contractors on their nondiscrimination and affirmative action obligations. We estimate that our jurisdiction covers approximately 200,000 Federal contractor establishments, and an estimated 50,000 parent companies.²

Although progress has been made in the employment of veterans, the number of unemployed veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of veterans. The annual unemployment rate for post-September 2001 veterans, referred to as “Gulf War-era II veterans,” is higher than the rates for all veterans and for nonveterans. BLS data on the 2012 employment situation of veterans show that about 2.6 million of the nation's veterans had served during Gulf War-era II.³ In 2012, the unemployment rate for Gulf War-era II veterans was 9.9 percent compared to nonveterans at 7.9 percent.⁴ However, the unemployment rate, in the same year, for male Gulf War-era II veterans age 18 to 24 was 20.0 percent, higher than the rate for nonveterans of the same age group (16.4 percent).⁵

OFCCP also found that, on average, wages of veterans (defined as anyone who is employed and reported serving

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

³ U.S. Bureau of Labor Statistics, Economic News Release, “Employment Situation of Veterans Summary 2012,” March 20, 2013, <http://www.bls.gov/news.release/vet.nr0.htm> (last accessed Aug. 8, 2013).

⁴ *Id.*, “Table A: Employment situation of the civilian non-institutionalized population 18 years and over by veteran status, period of service, and sex, 2011–2012 annual averages.”

⁵ *Id.*

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

in the military in the past) are higher than non-veterans. However, there are different age groups represented in each era, and because earnings generally increase with age, we controlled for age and race in a regression analysis. Using America Community Survey (ACS) data and conducting a regression analysis, OFCCP found that:

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

Controlling for the era of service, rather than just whether or not the person served,

- OFCCP finds that: Male Gulf War-era II veterans earn 1.4 percent less than non-veterans.
- Male Vietnam era veterans earn 6.9 percent less than non-veterans.⁷

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

The final rule is intended to provide contractors with the tools needed to evaluate their own compliance and proactively identify and correct any deficiencies in their employment practices. These tools include, for example, removing barriers related to job postings so both contractors can effectively post or advertise their jobs, and jobseekers can take full advantage of these job opportunities. It also includes data collection to support meaningful self-assessments of employment practices and the ability for contractors to adjust their outreach and recruitment efforts for greater effectiveness and efficiency when needed.

II. Statement of Legal Authority

Initially enacted into law in 1974 and amended several times in the intervening years, the purpose of VEVRAA is twofold. First, VEVRAA prohibits employment discrimination against specified categories of veterans by Federal Government contractors and subcontractors. The universe of protected veterans includes disabled veterans, veterans who have separated

from the military within the past three years (recently separated veterans), veterans who received an Armed Forces service medal while on active duty, and veterans who served in active duty during a war or in a campaign or expedition for which a campaign badge was authorized. Second, it requires each covered Federal Government contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

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

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

In the VEVRAA context, receiving a Federal contract comes with a number of responsibilities, including compliance with the VEVRAA non-discrimination and non-retaliation provisions, meaningful and effective efforts to recruit and employ veterans protected under VEVRAA, creation and enforcement of personnel policies that support the contractor's affirmative action obligations, maintenance of accurate records documenting the contractor's affirmative action efforts, and providing OFCCP access to these records upon request. Contractor compliance with these provisions is, therefore, vital to improving the employment opportunities of veterans

protected by VEVRAA. And, given the unique skills and experiences that veterans have acquired as a result of their service, improving employment opportunities benefits not only the veterans and their families but also the contractor as an employer. Failure to abide by these responsibilities may result in various sanctions, including withholding progress payments, termination of contracts, and debarment from receiving future contracts. It also deprives the contractor of the opportunity to benefit from this uniquely qualified pool of applicants.

III. Major Provisions

The following major provisions in the final rule would:

- Provide contractors with a quantifiable means to measure their success in recruiting and employing veterans by requiring, for the first time, that contractors establish their own or adopt a predetermined annual hiring benchmark (currently 8 percent based on national labor force data).
- Create greater accountability for employment decisions and practices by requiring that contractors maintain several quantitative measurements and comparisons for the number of veterans who apply for jobs and the number of veterans they hire. Having this data will also assist contractors and OFCCP in measuring the effectiveness of contractors' outreach and recruitment efforts.
- Provide knowledge and support to veterans seeking jobs by improving the effectiveness of the VEVRAA requirement that contractors list their job openings with the appropriate state employment service agency. Contractor job listings must be provided in a format that the state agency can access and use to make the job listings available to job seekers.
- Provide knowledge and increasing compliance by subcontractors with their obligations by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors.
- Create flexibility for contractors when they are establishing formal relationships with organizations that provide recruiting or training services to veterans. The relationships or "linkage agreements" can be established to meet the contractors' specific needs, while assuring outreach to veterans seeking employment.
- Clarify the contractor's mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment

⁶ OFCCP's labor economist conducted the regression analysis. All models were run using the American Community Survey 2008–2010 Public Use Microdata (PUMS). The models that examine veterans only were also run with the ACS 2006–2010 files, but the results were largely the same, so we use the 2008–10 for all (since questions on disability were only available in 2008 and after). The analysis was run on the private sector.

⁷ Females comprise an estimated 14.2% (nearly 167,000 women) in the enlisted ranks.

services that provide priority referral of protected veterans.

- Repeal outdated and obsolete regulations at 41 CFR Part 60–250 that apply to contracts entered into before December 1, 2003 and not since modified. OFCCP believes that all such contracts have either expired or been modified, and that there is, therefore, no longer a need for the Part 60–250 regulations.

IV. Costs and Benefits

This is an economically significant and major rule. Veterans make up 7.25 percent of the employed population.⁸ Under the VEVRAA rule, contractors have the option of establishing their own benchmark for employing protected veterans or meeting a benchmark set by OFCCP, currently 8 percent. Assuming all contractors will

choose to meet the OFCCP benchmark of 8 percent, OFCCP estimates that Federal contractors would need to hire an additional 205,500 protected veterans.⁹ Dividing our estimate of this rule’s first-year cost by our estimate of the number of protected veterans expected to be hired in the first year because of this rule returns a cost of approximately \$863 to \$2,353 per new hire.

TOTAL COST OF THE FINAL RULE (YEAR ONE)¹⁰

	Low	High
Total Cost of the Rule	\$177,296,772	\$483,560,138
Cost Per Company	3,830	7,120
Cost Per Establishment	1,035	1,924
Company Cost Per Hire	863	2,353

PROJECTED VETERAN HIRES

	Year 1	Year 2	Year 3	Year 4	Year 5
Employees of Fed Contractors (assuming steady with population)	27,400,000.00	27,610,980.00	27,823,584	28,037,826.15	28,253,717.41
Veterans	2,192,000.00	2,208,878.40	2,225,886.76	2,243,026.09	2,260,297.39
Veterans Gap	205,500.00	207,082.35	208,676.88	210,283.70	211,902.88

Present value costs over ten years for the final rule range from \$1.08 billion to \$3.1 billion using a 3 percent discount rate. If we use a 7 percent discount rate

then the present value costs range from \$899 million to \$2.57 billion. Annualizing these costs yields a cost range of \$127 million to \$363 million at

the 3 percent discount rate and \$128 million to \$366 million using a 7 percent discount rate.

	7% discount rate	3% discount rate
Benefits	Not Quantified	Not Quantified.
Costs	\$899 million to \$2.57 billion	\$1.08 billion to \$3.1 billion.

These projected hires, some of whom will require reasonable accommodation, will not add significant costs for the employers. According to a study conducted by the Job Accommodation Network (JAN), of the employers who gave the researchers cost information related to accommodations they had provided, 57 percent said the accommodations needed by employees cost absolutely nothing.¹¹ For 43 percent of employers, the typical one-time expenditure by employers to

provide a reasonable accommodation was \$500. Finally, 2 percent reported that accommodations required a combination of one-time and annual costs.

In projecting the overall increase in Federal contractor employment of protected veterans under the VEVRAA rule and individuals with disabilities under the section 503 rule, there is likely to be an interaction between the two categories. Some of the newly hired individuals with disabilities will likely

be protected veterans. There are 5.78 million people 18 years or older in the labor force with a disability, 822,000, or 14.21 percent, of whom are veterans.¹²

To meet the section 503 rule’s utilization goal of 7 percent, Federal contractors would have to hire an additional 594,580 individuals with disabilities. Assuming that the number of disabled veterans hired will be proportional to their share of the disabled labor force, then we estimate that 84,490 of the newly hired

⁸ Calculation based on unpublished table, *Employment status of persons 18 years and over by veteran status, period of service, sex, race, Hispanic or Latino ethnicity, and disability status, Annual Average 2012* (Source: Current Population Survey). (10,233/141,050) * 100 = 7.25%. The table is available on request from the Bureau of Labor Statistics at the Department of Labor. BLS does not release some tables for a variety of reasons, such as sample size or possibility of confusion. Finally, this estimate includes all veterans, not only the protected veterans.

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

¹⁰ The high cost estimates are based on the highest contractor establishment count of 251,300 and 67,919 companies while the low estimates are based on a contractor establishment count of 171,275 and 46,291 companies.

¹¹ Job Accommodation Network. “Workplace Accommodations: Low Cost, High Impact,” Sept. 1, 2012. *Accommodation and Compliance Series*, <http://askjan.org/media/lowcosthighimpact.html>

(last accessed Aug. 9, 2013), p.3; “Fast Facts: Reasonable Accommodations & The Americans with Disabilities Act,” U.S. Chamber of Commerce & the Virginia Commonwealth University, Rehabilitation Research and Training Center on Workplace Supports,” <http://www.worksupport.com/Topics/downloads/rrtcfactsheet2.pdf> (last accessed August 12, 2013).

¹² Calculation based on unpublished table, *Employment status of persons 18 years and over by veteran status, period of service, sex, race, Hispanic or Latino ethnicity, and disability status, Annual Average 2012* (Source: Current Population Survey).

individuals with disabilities will also be protected veterans.¹³ Subtracting 84,490 protected veterans from the target of 205,500 leaves 121,010 non-disabled veterans needed to meet the hiring goal. Viewed independently, Federal contractors under VEVRAA would employ an additional 205,500 protected veterans and under section 503 employ an additional 594,580 individuals with disabilities. In the aggregate, we anticipate the overall number of hires across both rules will be closer to 715,590. We adjust the reasonable accommodation estimates based on the aforementioned assumptions. The total cost of providing reasonable accommodation to protected veterans with disabilities is \$19,010,209 in the year the target is met and \$8,037,516 in recurring costs.

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

We estimate the percentage of veterans in the civilian labor force with disabilities, with service-connected disabilities, to be 12 percent.¹⁴ For all Gulf War-era veterans it is 19 percent but for Gulf War-era II veterans it is 24 percent.¹⁵ We have not found projections on the percentage of these populations that are likely to seek reasonable accommodation. The requirement to provide reasonable accommodations to individuals with disabilities existed under the ADA, and

now exists under the ADA Amendments Act for employers. This is not a new obligation created by this rule. However, because this rule seeks to increase employment of protected veterans, and some of those veterans are expected to meet the ADA's definition of disabled and, therefore, are entitled to a reasonable accommodation, we estimate the cost of providing reasonable accommodations to those disabled protected veterans that we expect to be hired because of this rule.

There are tangible and intangible benefits to investing in the recruitment and hiring of disabled veterans. Among them are employer tax credits, access to a broader talent pool, an expanded pool of job applicants, access to new markets by developing a workforce that mirrors the general customer base, lower turnover based on increased employee loyalty, and lower training costs resulting from lower staff turnover.¹⁶ According to the U.S. Business Leadership Network (USBLN), "corporate CEOs understand that it's cost effective to recruit and retain the best talent regardless of disability."¹⁷ Broad public policy considerations also exist related to the decreased demand for and cost of social services as more people move into jobs and pay taxes. We were not able to quantitatively assess these broad societal benefits.

Introduction

Addressing the barriers our veterans face in returning to civilian life, particularly with regard to employment, is the focus of a number of Federal efforts. Among these efforts is the VOW to Hire Heroes Act signed into law by President Obama on November 21, 2011, which provides tax credits for businesses that hire veterans who are unemployed or have service-connected disabilities and creates a new Veteran's Retraining Assistance Program for unemployed veterans. Other Federal efforts presented during the August 2011 announcement by President Obama included a plan for the private sector to hire 100,000 veterans by the end of 2013 and creating a "career-ready military" which will "ensure that every member of the service receives the

training, education, and credentials they need to transition to the civilian workforce or to pursue higher education." These efforts are now a part of the Administration's Joining Forces Initiative. Strengthening the implementing regulations of VEVRAA, whose stated purpose is "to require Government contractors to take affirmative action to employ and advance in employment qualified protected veterans," is another important means by which the government can address the issue of veterans' employment.

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

OFCCP received over 100 comments on the NPRM. Commenters represented diverse perspectives including: Approximately 40 individuals; ten groups representing contractors; three disability rights advocacy groups; two veterans' associations; two unions; and two governmental entities. Commenters raised a broad range of issues, including concerns with the cost and burden associated with the proposed rule, the extended recordkeeping requirements, developing benchmarks, and the new categories of data collection and analyses. OFCCP carefully considered the comments in the development of this final rule.

Pursuant to Executive Order (EO) 13563, the final rule was developed through a process that involved public participation. In addition to the 60-day public comment period, OFCCP conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, veterans' service organizations and other interested parties to understand the features of VEVRAA regulations that

¹³ Because of data limitations, OFCCP is using the share of veterans as a proxy for "protected" veterans. For more information on the difference between protected and unprotected veterans, please visit, <http://www.dol.gov/ofccp/regs/compliance/factsheets/vetrights.htm#Q2>.

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

¹⁵ *Id.*

¹⁶ Job Accommodation Network, "Workplace Accommodations: Low Cost, High Impact," Sept. 1, 2012. *Accommodation and Compliance Series*, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013).

¹⁷ USBLN Disability at Work, and U.S. Chamber of Commerce, "Leading Practices on Disability Inclusion," <http://www.usbln.org/pdf-docs/LeadingPracticesonDisabilityInclusion.pdf> (last accessed Aug. 9, 2013). The USBLN and Chamber report shares best practices from larger corporations for hiring and providing reasonable accommodations.

work well, those that can be improved, and possible new requirements that could help to effectuate the overall goal of increasing the employment opportunities for qualified veterans with Federal contractors.

I. Compliance With the Final Rule

Although this final rule becomes effective 180 days after publication, full compliance with the requirements of this final rule by current contractors will be phased in as follows. Current contractors subject to subpart C of the existing 41 CFR part 60–300 regulations that have written affirmative action programs (AAP) prepared pursuant to those regulations in place on the effective date of this final rule may maintain that AAP for the duration of their AAP year. Such contractors are required to update their affirmative action programs to come into compliance with the requirements of subpart C of this final rule at the start of their next standard 12-month AAP review and updating cycle. OFCCP will verify a contractor's compliance with the requirements of this final rule if the contractor is selected for a compliance evaluation pursuant to § 60–300.60 or subject to a complaint investigation pursuant to § 60–300.61. The effective date and the approach to compliance are the same as those set forth in the section 503 Final Rule. OFCCP believes that adopting similar approaches to the effective date and to compliance makes the most sense based on the similarity of the two rules, and will help contractors make required system and process changes at one time.

II. Overview of the Final Rule

As stated above, the final rule incorporates many of the proposed changes set forth in the NPRM. However, in order to focus the scope of the final rule more closely on key issues, and in an effort to reduce the burden of compliance on contractors, the final rule also revises or eliminates some of the NPRM's proposals. This discussion highlights the major provisions of the final rule and summarizes relevant comments. The fuller discussion of the provisions of the rule is in the Section-by-Section Analysis.

The final rule strengthens the affirmative action provisions for Federal contractors in several ways. The regulations reiterate the contractor's mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected veterans. The mandatory job listing obligation, which is set forth in

and required by the VEVRAA statute, *see* 38 U.S.C. 4212(a)(2)(A), ensures that veterans seeking the assistance of state employment service delivery systems to find employment will be able to find job listings from Federal contractors, and that the delivery systems will be able to provide priority referral of these veterans back to contractors. The final rule also addresses the increased use of technology in the workplace by allowing for the electronic posting of employee rights and contractor obligations under VEVRAA and updating the manner in which compliance evaluations are conducted. Further, the regulations enhance data collection pertaining to protected applicants and hires in order to provide contractors vital information against which they can effectively measure their recruitment efforts, and establish two mechanisms—the flexible approach set forth in the NPRM, or a more simplified, single national target—from which contractors may choose in order to establish a hiring benchmark. These revisions will help contractors better evaluate their outreach efforts and modify them as needed, toward the end of increasing employment opportunities for protected veterans by Federal contractors and subcontractors.

Additionally, as proposed in the NPRM, part 60–250 of these regulations is rescinded. However, as we discuss further in the Section-by-Section Analysis, part 60–300 is revised to provide that any protected veteran as defined in the former part 60–250 regulations who is employed by or applies for a position with a part 60–250 covered contractor will still be protected under the anti-discrimination provisions of part 60–300, and will be able to file complaints with OFCCP regarding discriminatory treatment.

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

OFCCP received 55 comments concerning the overall burdens and costs of the proposed rule from several contractor groups and contractors, including 21 form letters. Most commenters stated that OFCCP's estimates in costs and hours were too low. Commenters also noted that OFCCP's contractor universe was too small. In response to these concerns, OFCCP modified the burden and costs estimates for the final rule. As discussed further in the Regulatory Procedures

section, OFCCP also increased the overall contractor and subcontractor establishment count to 171,275 based on Fiscal Year 2009 Employer Information Report EEO–1 (EEO–1), the Federal Procurement Data System-Next Generation (FPDS–NG) report data on contractor establishments, and other information. These changes provide a more accurate depiction of the burden and cost associated with the final rule. As discussed in more detail below, OFCCP also made key changes to the recordkeeping requirements to minimize the burden on contractors.

We received comments on the estimated number of contractor establishments as well, including recommending an establishment count of 285,390 using the Veterans Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending Information Collection Request.¹⁸

The NPRM proposed that contractors maintain data pursuant to §§ 60–300.44(f)(4) (linkage agreements and other outreach and recruiting efforts), 60–300.44(k) (collection of referral, applicant, and hire data), and 60–300.45(c) (criteria and conclusions regarding hiring benchmarks) for five years. Twenty-three commenters opposed these provisions. Several of the commenters were particularly concerned with the burden associated with the five-year requirement. In response, OFCCP reduces the proposed five-year recordkeeping requirement to three years in the final rule. Further, in light of the comments we received, the final rule does not incorporate the proposal under paragraph 5 of the Equal Opportunity (EO) Clause and § 60–300.44(k) of the NPRM to maintain data related to referrals from employment service delivery systems. The proposal required contractors to maintain quantitative measurements and comparisons regarding those protected veterans who were referred by state employment services. Commenters were concerned with the requirement to obtain referral data, as they indicated that the state employment delivery service either cannot provide data or provides data inconsistently across the states, and that acquiring the data and

¹⁸ OMB Control Number 1293–0005, Federal Contractor Veterans' Employment Report, VETS–100/VETS–100A, http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003 (last accessed Aug. 13, 2013).

synthesizing it would be burdensome. In reviewing the practical utility of the referral data in light of the burden that it would create on contractors, OFCCP has eliminated the requirement to collect and analyze referral data. Eliminating the referral data requirement and reducing the length of recordkeeping for the other provisions minimizes the burden on contractors yet still requires contractors to keep adequate records to aid and inform their outreach and recruitment efforts.

The NPRM also proposed to require many of the affirmative action efforts that are only suggested in § 60–300.44 of the existing rule. Among these were proposals requiring contractors to: review personnel processes on an annual basis (§ 60–300.44(b)); establish linkage agreements with three veteran-related organizations to increase connections between contractors and veterans seeking employment (§ 60–300.44(f)); take certain specified actions to internally disseminate its affirmative action policy (§ 60–300.44(g)); and train all personnel on specific topics related to the employment of protected veterans (§ 60–300.44(j)). After consideration of the comments and taking into account the expected utility of these provisions in light of the burden that contractors would incur to comply with the proposals, OFCCP decided not to incorporate the majority of these proposals, and instead retains the language in the existing rule. The proposals in the NPRM, for the most part, required certain specific steps contractors must take to fulfill their already existing, general affirmative action obligations. These general affirmative action obligations—reviewing personnel processes on a periodic basis, undertaking appropriate outreach and positive recruitment activities, developing internal procedures to disseminate affirmative action policies, and training its employees on these policies—remain in the final rule. By eliminating the specific provisions but maintaining the general affirmative action obligations, the final rule provides the contractor flexibility and lesser burden while maintaining a robust affirmative action program.

The final rule also modifies the approach to setting benchmarks. The NPRM proposed requiring contractors to establish annual hiring benchmarks, expressed as the percentage of total hires who are protected veterans that the contractor seeks to hire in the following year. The hiring benchmarks were to be established by the contractor using existing data on veteran availability, while also allowing the

contractor to take into account other factors unique to its establishment that would tend to affect the availability determination. OFCCP received a total of 38 comments on the proposed benchmarks. Twelve commenters questioned whether contractor established benchmarks would be arbitrary and ineffective because of concerns about the reliability of data on the number of protected veterans in the workforce. Commenters also sought clarity on exactly how they should develop benchmarks based on the varying sources of data available. In addition, commenters asserted that the benchmarks were quotas that would adversely impact women and minorities since demographically veterans are predominantly white males. In response to these concerns, OFCCP has revised § 60–300.45 to provide a simpler, nationwide benchmark as another option that contractors can use, in addition to the flexible approach set forth in the NPRM. Further, the final rule addresses the incorrect assumptions—*e.g.*, that goals represent a “quota” or will place contractors in jeopardy of violating the sex discrimination provisions of Executive Order 11246—that many comments in the NPRM detailed.

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

The final rule presents the most substantial re-write of VEVRAA regulations since their inception. In light of these significant changes, and in response to contractors’ requests to

delay implementation due to these changes, the effective date of this final rule is set for 180 days after publication in the **Federal Register**. The detailed Section-by-Section Analysis below identifies and discusses all of the final changes in each section. For ease of reference, part 60–300 will be republished in its entirety in the final rule.

Section-by-Section Analysis

41 CFR Part 60–250

Rescission of Part 60–250

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

OFCCP received few comments supporting retaining part 60–250. One commenter stated that it held several contracts that are covered under parts 60–250 and 60–300. One individual commenter stated that part 60–250 should remain in place as some major contractors have contracts spanning several decades that are still in force. The commenter also expressed concern about eliminating the definition of “special disabled veteran.” The commenter noted that 30 percent of disabled veterans may need additional affirmative action since it would be difficult to compete with a veteran that has no service connected disability.

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

Commenters provided alternative recommendations to implementing a part 60–250 that mirrors part 60–300. An equal employment opportunity consulting firm recommended allowing contractors to combine their obligations under both parts 60–250 and 60–300 into a single AAP to eliminate unnecessary duplication. Another

commenter recommended widening the scope of part 60–300 to incorporate contracts that are covered under part 60–250.

Part 60–250 is rescinded. As stated in the NPRM and echoed by many commenters, we do not believe that there are any remaining contracts for \$25,000 or more entered into prior to December 1, 2003, that have not either terminated or since been modified (which, if over \$100,000 in value, would fall under part 60–300’s coverage). While the agency received one comment from a company that asserted that it held contracts that are subject to part 60–250, OFCCP’s research revealed that the commenter is a grantee. However, out of an abundance of caution that any contracts falling under part 60–250’s coverage still exist, and to ensure that all veterans that are protected by part 60–250 (and not part 60–300 as well) will be able to pursue complaints of discrimination, the final rule includes a definition of “pre-JVA veteran” in § 60–300.2, and provides that such individuals continue to be protected by the non-discrimination prohibitions in § 60–300.21 and are able to file discrimination complaints pursuant to § 60–300.61. There is further discussion of this definition in the analysis of Section 60–300.2.

41 CFR Part 60–300

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–300.1 Purpose, Applicability and Construction

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

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

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

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

In addition, to address confusion among contractors and veterans regarding the scope of the various veterans’ employment rights statutes, the final rule adds language to the discussion in paragraph (c)(2) of VEVRAA’s “relationship to other laws.” New paragraph (c)(2)(i) highlights that VEVRAA and the Uniformed Services Employment and Reemployment Rights Act (USERRA) are separate laws with distinct obligations for contractors and distinct protections for employees who have past, present or future military service, status or obligations. It clarifies that this part does not limit the contractor’s obligations, responsibilities, and requirements under USERRA, including the obligation to reemploy employees returning from qualifying military service, and emphasizes that compliance with this part is not determinative of compliance with USERRA.

Section 60–300.2 Definitions

The NPRM proposed clarifying several key definitions in part 60–300. The current classifications of protected

veterans under VEVRAA include: (1) Disabled veterans, (2) veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge was authorized, (3) veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985, and (4) recently separated veterans. The regulations define “disabled veteran,” “recently separated veteran,” and “Armed Forces service medal veteran.” The definition of “other protected veteran” in the existing regulation applies to veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized. OFCCP proposed replacing “other protected veteran” with “active duty wartime or campaign badge veteran” to eliminate confusion regarding the veterans that are protected under this category. Some have interpreted erroneously the “other protected veteran” category as a “catch-all” that includes all veterans. The proposed rule also added new definitions for “protected veteran” and “linkage agreement.” OFCCP received a total of 18 comments on the proposed changes to § 60–300.2 from a variety of entities including individuals, law firms, contractors, and associations representing veterans, contractors, or disability rights.

• Definition for “Active Duty Wartime or Campaign Badge Veteran”

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

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

A few commenters expressed concern about the proposed definition. One commenter argued that the law is quite clear on who is protected by VEVRAA and that the proposed term “active duty wartime or campaign badge veteran” does not provide any additional clarification. A human resources consulting company suggested that using “active duty” may lead to under-reporting. The company asserted that individuals may interpret this to mean that they have to be on active duty to qualify. Commenters also stated that it is unclear who qualifies as a “wartime” or “campaign badge veteran.” One commenter noted that the clearest guidance on who qualifies as a “campaign badge veteran” could only be found on the United States Department of Defense and Office of Personnel Management Web sites. The commenter further stated that many contractors do not want to directly reference the information on those sites because they are related to the Federal government’s veterans’ preference. The commenter requested that OFCCP develop guidance specifically for contractors clearly identifying which veterans are protected under the “wartime” or “campaign badge veteran” classification.

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

• *Definition for “Protected Veterans,” “Pre-JVA Veterans”*

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

The final rule retains the proposed definition for “protected veteran.” As this final rule eliminates the “other

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

One commenter suggested that OFCCP expand the types of veterans protected under VEVRAA to include Desert Storm-era veterans, veterans that served in a war zone and veterans who utilize service dogs. The categories of “protected veterans” are not set by OFCCP, but rather are defined by the VEVRAA statute codified at 38 U.S.C. 4212(a)(3). OFCCP cannot expand the categories beyond those set forth in the statute. We note that most of the types of veterans listed above are protected by the categories of veterans set forth in the statute. Veterans that served in the Desert Storm-era or otherwise in a war zone likely will be protected under the “active duty wartime or campaign badge veteran” category of protected veteran, and possibly the “recently separated veteran” category as well. As for veterans who use service dogs, if they were discharged or released from active duty due to a service-connected disability, or are otherwise entitled to compensation for disability under laws administered by the Department of Veterans Affairs, they would already be protected under the “disabled veteran” classification.

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

“*Pre-JVA veteran* means an individual who is an employee of or applicant to a contractor with a contract of \$25,000 or more entered into prior to December 1, 2003, and who is a special disabled

veteran, veteran of the Vietnam era, pre-JVA recently separated veteran, or other protected veteran, as defined below:

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

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

(A) Rated at 30 percent or more; or

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

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

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

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

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

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

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

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

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

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

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

As stated in the discussion of the rescission of part 60–250, references to “Pre-JVA veteran” are included in the discrimination prohibition section for the final rule (§ 60–300.21) and the complaint procedures section of the final rule (§ 60–300.61) to ensure that, if there are any individuals remaining who are protected solely by part 60–250, such individuals will be able to avail themselves of their rights and file complaints for discrimination based on their veteran status just as “protected veterans” under part 60–300 are able to do. We do not include “pre-JVA veterans” along with “protected

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

- *Definition for “Linkage Agreements”*

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

- *Additional Definitions*

Commenters recommended adding certain definitions to § 60–300.2 for clarification purposes. Two commenters stated that OFCCP needed to clearly define “priority referral.” One of the commenters, a law firm, expressed concern that contractors are specifically directed to request “priority referrals” and conduct analyses of “priority referrals” in comparison to other referrals, but the regulations do not clearly define “priority referral.” Another commenter requested that OFCCP define “external job search organizations” because the term has been broadly interpreted to encompass a broad range of organizations including online job search engines, veterans’ service organizations, and other third parties that provide candidates for contractors.

OFCCP declines to include a definition of “priority referral” in § 60–300.2. OFCCP believes that it is clear from the statute that the term refers to individuals referred pursuant to a local employment services office’s requirement to give “veterans priority in referral” for contractor employment listings. See 38 U.S.C. 4212(a)(2). Further, the requirement that the One-

Stop service delivery systems provide priority referral of veterans is not administered and carried out by OFCCP, but by other agencies within the Department. The Department’s Employment and Training Administration (ETA) and Veterans’ Employment and Training Service (VETS) have published guidance on implementing priority of service requirements for veterans, including: the Training and Employment Guidance Letter 10–09 (accessible on ETA’s Web site at http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2816); Veterans’ Program Letter 07–09; and Training and Employment Notice 15–10, “A Protocol for Implementing Priority of Service for Veterans and Eligible Spouses.” However, we note that the final rule eliminates the proposed requirement to collect and maintain data on priority referrals, which should limit any concerns raised in response to the NPRM about how to specifically categorize priority referrals.

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

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

training programs into a single public workforce system. Thus, employment services and training programs are all provided through a national network of One-Stop Career Centers established in the local workforce investment areas of the states. The description of the Employment Service’s role in the public workforce system can be found at 20 CFR 652.202, and Section 7(e) of the Wagner-Peyser Act.

We also note that several commenters representing the contractor community requested that OFCCP add formal definitions for “applicant” and for “Internet applicant,” as those terms are defined in the Executive Order 11246 (EO 11246) implementing regulations at 41 CFR part 60–1. While OFCCP does not formally adopt the definition of “Internet applicant” into the section VEVRAA regulations, OFCCP is harmonizing the requirements of these regulations and the EO 11246 Internet Applicant Rule. OFCCP provides further guidance on this issue in the preamble discussion related to § 60–300.42.

Section 60–300.5 Equal Opportunity Clause

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

- *EO Clause Paragraph 2—Clarification of Mandatory Job Listing Obligations*

The NPRM proposed additional language to this paragraph clarifying that the contractor must provide job vacancy information to the appropriate employment service in the manner that the local employment service delivery system (ESDS) requires in order to include the job in their database so that they may provide priority referral of veterans. The NPRM also proposed additional language to this paragraph clarifying that, for any contractor who utilizes a privately-run job service or exchange to comply with its mandatory listing obligation, the information must be provided to the appropriate employment service in the manner that the employment service requires. OFCCP received 14 comments concerning this section from an individual, law firms, contractors, contractor groups, a veteran’s group, and others. As explained below, we adopt the language proposed in the NPRM for this paragraph with one minor revision.

The majority of the comments received asserted that posting jobs in the

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

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

Thus, the mandatory job listing requirement set forth in the NPRM is not a new creation; it merely clarified that contractors list their jobs with the ESDS "in the manner and format required" by the ESDS. This, for example, could include requiring electronic transmission through a web-based form or electronic document format (such as PDF), requiring paper transmission using mail or facsimile, or requiring the contractor to provide particular types of information in its submissions. As we stated in the NPRM, this clarification stems from numerous reports received by OFCCP that contractors were occasionally providing job listing information to the ESDS in an unusable format, such that their jobs were not being listed and the ESDS could not properly carry out the priority referral of veterans, which is required by VEVRAA and its regulations. We received input during the public comment period from individuals working for or with an ESDS that corroborated these reports. If the purpose of the mandatory job listing

requirement is to help veterans find work with Federal contractors, then surely Congress did not intend to permit contractors to provide information about their job openings in an unusable format, completely defeating the purpose of the requirement. Some commenters were concerned that the proposed language in the NPRM required contractors to provide information about their job openings in one specific format mandated by the ESDS. This was not the intention of the proposal. Rather, the aim of the proposal was simply to ensure that contractors provide information about their job openings with the ESDS in a format that the ESDS can use to provide priority referrals of protected veterans to contractors. If an ESDS permits the contractor to provide this information in various formats, the contractor would be free to use any one of them. To clarify this requirement, the final rule revises the proposal's language (providing the listing "in the manner or format required by the appropriate [ESDS] . . .") to require contractors to list their jobs "in a manner and format *permitted* by the appropriate [ESDS] which will allow that system to provide priority referral of veterans. . . ."

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

• *EO Clause Paragraph 4—
Information Provided to State
Employment Services*

The NPRM proposed that the contractor, when it becomes obligated to list its job openings with the appropriate state employment service, must provide

additional information, including its status as a Federal contractor, the contact information for the contractor hiring official at each location in the state, and its request for priority referrals of protected veterans for job openings at all its locations within the state, and that this information must be updated annually. These requirements were added in response to feedback received from ESDSs that there is no centralized list of Federal contractors that they can consult in order to determine if a listing employer is a Federal contractor, and to ensure that these ESDSs have contact information for the listing contractor if there are any questions that need to be resolved in the job listing or priority referral process. The NPRM also required that the contractor provide the ESDS with the contact information for any outside job search companies (such as a temporary employment agency) assisting with its hiring process.

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

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

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

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

• *EO Clause Paragraph 5—Maintaining Referral Data*

The NPRM proposed an entirely new paragraph 5 to the EO Clause that would require contractors to collect and maintain data on the number of referrals and priority referrals they receive, in order to give the contractor and OFCCP a quantifiable measure of the

availability of protected veterans and, therefore, provide part of a baseline for measuring the success of a contractor’s outreach and recruitment programs. The NPRM also proposed that contractors maintain this data for five years, in order to ensure that contractors had enough historical referral data to consider when evaluating its outreach efforts (*see* § 60–300.44(f)(3)) and establishing benchmarks (*see* § 60–300.45).

OFCCP received several comments on this proposal, the majority of which stated that the data collection and five-year recordkeeping requirements were unduly burdensome. Other commenters believed that it would be difficult and perhaps impossible to obtain accurate referral data, and thus the practical utility of the data collection requirement was limited. For instance, one commenter asserted that accurate referral data would be difficult to obtain if an applicant filed directly with a contractor, and that referral data from private Web sites would not be counted as referral. Several commenters representing the contractor community also asserted that requiring contractors to collect and maintain this data was inconsistent with the Internet Applicant rule set forth in the Executive Order 11246 regulations.

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

• *EO Clause Paragraph 10 (NPRM)/ Paragraph 9 (Final Rule)—Providing Notice to People with Disabilities*

In paragraph 10 of the EO Clause in the NPRM, we proposed two changes. First, we updated the contractor’s duty to provide notices of rights and obligations that are accessible to individuals with disabilities, replacing the outdated suggestion of “hav[ing] the notice read to a visually disabled individual” as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notice themselves. OFCCP received one comment from a contractor asserting that there were “too many” types of notices possible for all types of disabilities. We respectfully disagree with this commenter’s assertion. The context of the existing regulation and the proposed changes clearly and specifically refer to providing an alternative notice to individuals who are unable to read it due to visual

impairment or visual inaccessibility (such as an individual who uses a wheelchair being unable to read the fine print of a notice posted high on a wall). The commenter did not specify any other disabilities for which contractors would need to create alternative notices, and we cannot conceive of any that would create any significant burden. Further, any burden in providing a notice in Braille is slight given the fact that they are available from the EEOC’s Office of Communications and Legislative Affairs, who may be contacted at 202–663–4191 or TTY 202–663–4494. *See* <http://www1.eeoc.gov/eeoc/publications/>. We have amended the language slightly in the final rule to clarify that among the “other versions” of the notice there are additional technological options available to contractors that would fulfill the requirement, such as providing it electronically or on computer disc.

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

The first issue raised by one of these comments was that “actual knowledge” of an off-site employee being able to access the notice is unduly burdensome. We respectfully disagree. First, to clarify, “actual knowledge” does not mean actual knowledge that the employee accessed the notice, but rather actual knowledge that the notice was posted or disseminated in such a way that would be accessible to the employee. As set forth in the proposed language, for a contractor with employees who do not work at a physical location of the contractor, electronic notices that are posted in a conspicuous location and format on the company’s intranet or sent by electronic

mail to employees satisfies the posting obligations. In the example of electronic mail, “actual knowledge” could easily be documented merely by maintaining an electronic copy of the email message sent to employees—something that is done (or can be done) automatically by virtually all enterprise-based email systems. Similarly, “actual knowledge” for postings on a company intranet can be verified simply by having an employee in personnel or IT periodically check the link to the electronic posting to ensure that it works and the posting is readable. Performing these types of checks on information posted on a company intranet is a common best practice that takes seconds to complete. In light of the numerous comments and complaints OFCCP has received from protected veteran employees of Federal contractors—particularly those without a traditional physical workplace—that they were unaware of their rights or their contractor’s affirmative action obligations, we believe the importance of ensuring that employees have access to statements of their rights and the contractor’s obligations far outweighs the slight burden that compliance creates.

The second issue raised in the comments pertained to the requirement that, for contractors using electronic or internet-based application processes, an electronic notice of employee rights and contractor obligations must be “conspicuously stored with, or as part of, the electronic application.” One commenter opined that storing the electronic notice with the application would increase the size of applicant files. The potentially small increase in the size of the electronic file does not outweigh the benefit of providing employees notice of their employment rights and protections.

Accordingly, for the reasons stated above, OFCCP has adopted the proposed changes to paragraph 10 of the EO Clause into paragraph 9 of the final rule. We have also added a clarification stating that a contractor is able to satisfy its posting obligation by electronic means for employees who do not work at a physical location of the contractor, provided that the contractor provides computers “or access to computers” that can access the electronically posted notices. This clarifies that electronic posting is appropriate not only for employees who telework, but also for those who share work space—and contractor-provided computers—at a remote work center.

• *EO Clause Paragraph 11 (NPRM)/ Paragraph 10 (Final Rule)—Providing Notice to Labor Organizations*

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

• *EO Clause Paragraph 13 (NPRM)/ Paragraph 12 (Final Rule)—Contractor Solicitations and Advertisements*

The proposed regulation added a new paragraph 13 to the EO clause which would require the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of veterans protected by VEVRAA, much like it is already required to do under the Executive Order 11246 regulations.

OFCCP received one comment from a contractor group, objecting to this proposal on the grounds that advertisements would cost more due to their increased word length. However, as stated in the NPRM, contractors are already required under Executive Order 11246 to state in advertisements and solicitations that “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.” See 41 CFR 60–1.4(a)(2). The requirement set forth in paragraph 13 of the NPRM would require adding “protected veteran status,” or an abbreviation thereof, to the language that contractors are already required to use in advertisements. This is a very minor change involving nominal time and expense to contractors that will affirm to the public a fact that many do not know—that protected veterans are entitled to non-discrimination and affirmative action in the workplace of Federal contractors. Accordingly, the language in paragraph 13 of the NPRM is adopted as paragraph 12 of the final rule as proposed.

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

Finally, the NPRM proposed requiring that the entire equal opportunity clause be included verbatim in Federal contracts. This proposed change was to ensure that the contractor, and particularly any subcontractor, who often relies on the prime contractor to inform it of nondiscrimination and affirmative action obligations, reads and understands the language in this clause. OFCCP received four comments—from two law firms, a contractor, and a

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

In light of the comments and upon further consideration of the issue, OFCCP withdraws and revises the proposal to incorporate the entire EO Clause into Federal contracts. In addition to the burden concerns set forth by commenters, there is concern that the length of the EO Clause will dissuade, rather than promote, contractors and subcontractors from reading and taking note of the non-discrimination and affirmative action obligations toward protected veterans. This is contrary to the intent behind the proposal in the NPRM.

However, the requirement in the existing regulations does little to notify contractors and subcontractors of the nature of their obligations to employ and advance in employment protected veterans, which was a primary objective of the NPRM proposal. Accordingly, in order to draw greater attention to the contractors’ obligations under VEVRAA without the burden of including the entire VEVRAA EO clause, the final rule revises paragraph (d) of this section to require the following text, set in bold text, in each contract, following the reference to VEVRAA required by the FAR:

“This contractor and subcontractor shall abide by the requirements of 41 CFR 60–300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.”

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

Lastly, the final rule does not incorporate the proposed change to paragraph (e), and instead reverts to the existing language in that subsection. The NPRM proposed eliminating the last clause of the paragraph (“whether or not it is physically incorporated in

such contract and whether or not there is a written contract between the agency and the contractor”) to align with the proposed paragraph (d), which required incorporation of the entire EO Clause into Federal contracts. Because paragraph (d) of the final rule does not include this requirement, the final rule revises paragraph (e) accordingly back to its existing form.

Subpart B—Discrimination Prohibited Section 60–300.21 Prohibitions

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

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

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

by the anti-discrimination provisions of this section.

Subpart C—Affirmative Action Program Section 60–300.40 Applicability of the affirmative action program requirement

The NPRM proposed one small change to paragraph (c) of this section, specifying that a contractor’s affirmative action program shall be reviewed and updated annually “by the official designated by the contractor pursuant to § 60–300.44(i).” We received no comments on this section. Accordingly, § 60–300.40 is adopted in the final rule as proposed.

Section 60–300.41 Availability of affirmative action program

The proposed regulation added a sentence requiring that, in instances where the contractor has employees who do not work at the contractor’s physical establishment, the contractor shall inform these employees about the availability of the affirmative action program by means other than a posting at its establishment, in light of the increased use of telecommuting and other flexible workplace arrangements. This proposal in many respects mirrored the electronic notice requirements set forth in paragraph 10 of the EO Clause at § 60–300.5 of the rule. OFCCP received 6 comments from an individual, two law firms, two contractors and a contractor association regarding the proposed revisions to this section, discussed in turn below.

The comments from the two law firms assert that the proposed changes regarding data collection and analysis in §§ 60–300.44(f) and 60–300.44(k) change the character of the VEVRAA AAP by including potentially confidential information and should warrant excluding “data metrics” contained in the AAP when the AAP is accessible by applicants and employees. One of these comments indicated that even if data is aggregated, it may still identify an employee as a veteran violating confidentiality, *e.g.*, one hire occurs for which the position is named and the individual is identified as a disabled veteran. Another comment similarly recommended that a “soft” copy of the AAP be made available to those requesting a copy. Finally, one comment noted that the AAP should simply be made available at the convenience of the requesting applicant and/or employee, which is essentially the function of the existing rule.

In response to these comments, and as part of the effort to focus the final rule on those elements that are of critical importance to OFCCP and reduce

burden on contractors where possible, the final rule does not incorporate the proposals in the NPRM regarding informing off-site individuals about the availability of the contractor’s affirmative action program. Rather, the final rule retains the language in the existing § 60–300.41 in that regard. Therefore, contractors must still make available their affirmative action programs to employees and applicants for inspection upon request. We further clarify, in light of the modern workplace in which more and more workplaces house information electronically, that contractors may respond to requests by making their AAPs available electronically, so long as the requester is able to access the electronic version of the information. In response to the law firm commenters’ concerns about confidentiality and the AAP’s “data metrics,” OFCCP revises the language for the final rule to state that “[t]he full affirmative action program, *absent the data metrics required by § 60–300.44(k)*, shall be made available to any employee or applicant . . .” (revisions emphasized). This balances the interest in confidentiality of the contractor and its employees with the need for transparency regarding the contractor’s affirmative action efforts.

Section 60–300.42 Invitation to self-identify

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

turn below (with the exception of some specific comments on burden, which are addressed in the Regulatory Procedures section of the final rule).

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

As discussed in the NPRM, the primary reason for proposing a pre-offer invitation to self-identify was to allow the contractor, and subsequently OFCCP, to collect valuable, targeted data on the number of protected veterans who apply for Federal contractor positions. The data would enable the contractor and OFCCP to measure the effectiveness of the contractor's recruitment and affirmative action efforts over time, and thereby identify and promote successful recruitment and affirmative efforts taken by the contractor community.

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

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

allows the type of pre-offer self-identification proposed in the NPRM, and thus there is no legal reason to modify it.¹⁹

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

The majority of those commenting upon the scope of the proposed pre-offer inquiry—requesting “protected veteran” status in the aggregate, as opposed to inviting individuals to identify as one or more of the categories of protected veteran—approved of it, but one HR consulting firm commenter stated that the pre-offer inquiry should ask individuals to denote the specific categories of veteran under which they fall, and that contractors could then aggregate the data for purposes of evaluating their outreach efforts and setting benchmarks. OFCCP declines to require contractors to collect data by protected veteran category at the pre-offer stage. We believe maintaining such refined data at this stage would be more burdensome on contractors than simply capturing whether interested job seekers are protected veterans or not, particularly given that the overall population of protected veterans is relatively small and that further division of the pool would tend to reduce the contractor's ability to engage in any meaningful data analysis. Further, as discussed in the NPRM, the contractor's obligations would be the same with respect to each category of protected veteran at the pre-offer stage, thus there

¹⁹ To assuage any remaining doubt on this matter, OFCCP obtained a letter from EEOC's Office of Legal Counsel in advance of the publication of this rule affirming that a requirement to invite pre-offer self-identification of disability is permissible under the ADA and its regulations. This letter will be posted on OFCCP's Web site.

is limited benefit at that stage to knowing the specific categories of protected veteran to which each individual belongs.

The majority of those commenters opposed to the proposed pre-offer inquiry expressed concerns about the accuracy of veteran self-identification data. First, several commenters from the contractor community asserted that not all protected veterans will self-identify—either due to privacy concerns, fear of reprisal, or a failure to understand that they fall within one of the four listed categories of protected veterans—which will result in an underreporting of actual protected veteran applicants. Second, the commenters asserted that some veterans that are not protected by VEVRAA may nevertheless choose to self-identify as a protected veteran due to a misunderstanding of the four categories of protected veterans, which could lead to an inaccurate over-reporting of protected veterans. While some commenters urged OFCCP to eliminate the pre-offer inquiry entirely on these grounds, others propounded suggestions for how to increase the accuracy of self-reporting. One commenter suggested that the invitation include language that the applicant must *know* he or she is a protected veteran in order to self-identify as such (rather than the model language in Appendix B, which asks applicants to self-identify if they believe they are a veteran who may be protected), in order to “minimize the possibility of self-identification error.” Several other commenters requested that OFCCP provide contractors (and, in turn, applicants) with more detailed descriptions of the protected veteran categories, including, for instance, the specific campaign badges or Armed Forces service medals that qualify a veteran as an “active duty wartime or campaign badge veteran” or “Armed Forces service medal veteran,” respectively.

At the outset, while OFCCP concedes the possibility that self-reporting data on veterans will not be entirely accurate, OFCCP disagrees that this is sufficient reason to eliminate the pre-offer inquiry. Contractors already collect and report data on the number of protected veteran employees and new hires on an annual basis pursuant to the VETS–100A form. While this data is subject to the same accuracy concerns, it provides the Department with a useful measure for identifying and tracking the number of protected veteran new hires and employees among the Federal contractor workforce. Similarly, while self-reported applicant data will never be perfect, it is nonetheless a useful

mechanism for collecting important information that currently goes completely unrecorded—the number of protected veterans who are able to connect to Federal contractors and submit an expression of interest in employment. With regard to more detailed descriptions of the protected veteran categories, we note that the campaign badges and service medals are created and administered by the Department of Defense and the individual services of the Armed Forces, and thus those with questions would be best served consulting with DOD or the issuing military service if they have questions about whether a particular badge or medal is a campaign badge or service medal that provides coverage under VEVRAA.

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

By way of background, OFCCP’s longstanding definition of “applicant” is contained in agency subregulatory guidance. See the Uniform Guidelines on Employee Selection Procedures (UGESP), Question and Answer 15, 44

FR 11996 (March 2, 1979).²⁰ According to that guidance, in general, an applicant is a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities, either in writing (by completing an application form or submitting a resume) or orally, depending upon the contractors’ practice. The Internet Applicant Rule came into effect in February 2006, and pertains to recordkeeping by contractors on Internet-based hiring processes and the solicitation of race, gender, and ethnicity data, in conjunction with their recordkeeping obligations under the Executive Order implementing regulation at § 60–1.12. Under § 60–1.12, contractors’ recordkeeping obligations include maintaining expressions of interest through the Internet that the contractor considered for a particular position, as well as applications and resumes. Contractors also are required to maintain, where possible, data about the race, sex, and ethnicity of applicants and Internet applicants, as appropriate. The term Internet applicant is defined in § 60–1.3 and generally means an individual who: (1) Submitted an expression of interest in employment through the Internet; (2) is considered by the contractor for employment in a particular position; (3) possessed the basic qualifications for the position; and (4) did not remove himself or herself from consideration.

OFCCP has taken into account contractors’ concerns about inviting self-identification for applications submitted electronically, particularly for those contractors who create resume data bases which they mine for applicants when they have a job opening. In recognition of these concerns, and consistent with EO 13563’s focus on simplifying and harmonizing requirements, OFCCP will permit contractors to invite applicants to self-identify as a protected veteran at the same time as the contractor collects the demographic data for applicants required under EO 11246. The Internet Applicant Rule under EO 11246 generally allows contractors to do a “first cut” and screen out individuals whom they believe do not meet the basic qualifications of the position—

²⁰ Question and Answer 15 reads: “Q. What is meant by the terms “applicant” and “candidate” as they are used in the Uniform Guidelines? A: The precise definition of the term “applicant” depends upon the user’s recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice.”

without capturing or retaining any demographic documentation on these individuals. There is the concern, however, that in doing this “first cut” contractors may be engaging in discrimination (e.g., if they are incorrectly applying their basic qualifications, or the basic qualifications have an adverse impact on a protected group and are not job related and consistent with business necessity), and by not keeping the demographic information on the individuals they screened out they are eliminating evidence to prove that discrimination may be occurring. This concern is even greater with regard to disabled veterans because these Executive Order “first cuts” are not designed to take into account the possibility that someone with a disability might be able to meet the qualification standard or perform the essential functions of the job with the provision of a reasonable accommodation.

Under existing law, it is unlawful under VEVRAA to use qualification standards, including at the “basic qualifications” screen stage, that screen out or tend to screen out a disabled veteran or class of disabled veterans unless the standard is shown to be job-related for the position in question and consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude a disabled veteran if that individual could satisfy the criteria with a reasonable accommodation. See § 60–300.21(g). These requirements, therefore, apply when contractors design and implement their “basic qualifications” screens. In addition, after the initial screening for “basic qualifications,” contractors must also ensure that they are complying with their duty to evaluate all applicants for jobs based on the applicant’s ability to perform the essential functions of the job with or without reasonable accommodation.

OFCCP will treat the recordkeeping provisions of VEVRAA at 60–300.80 in the same manner as the recordkeeping requirements under EO 11246 at 41 CFR 60–1.12 as applied to Internet applicants. These recordkeeping requirements are not new and will impose no additional burden on contractors. The record retention requirements exist independently of whether and when individuals are invited to self identify under VEVRAA.

The VEVRAA recordkeeping provisions require contractors to retain personnel or employment records made or kept by the contractor for one or two years depending on the size of the contractor and contract. These records

include the records contractors are required to maintain under 41 CFR 60–1.12. Section 60–1.12 requires contractors to maintain all expressions of interest through the Internet or related technologies considered by the contractor for a particular position, such as on-line resumes or internal resume databases, and records identifying job seekers contacted regarding their interest in a particular position. For purposes of recordkeeping with respect to internal resume databases, the contractor also must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. For purposes of recordkeeping with respect to external databases the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. As with records retained under the EO 11246, these records are to be maintained regardless of whether the job seeker is an Internet applicant.

If a contractor has a practice of welcoming unsolicited resumes regardless of current job openings, OFCCP will permit the contractor to invite self-identification only of those considered for employment, consistent with requirements under EO 11246 and its regulations at 41 CFR 60–1.3 and 60–1.12. The obligation to invite self-identification is triggered by considering the job seeker for employment, not by including the resume in the resume database. For example, if a contractor has an internal resume database with 1,000 resumes and is looking for applicants to fill a job as an engineer in Omaha, the contractor could limit the pool of resumes under review by applying a “basic qualifications” screen that identifies those who have a masters degree in electrical engineering, at least three years of experience as an electrical engineer, and further limit the review to resumes submitted within the last three months. If that search produced a pool of 30 job seekers, the contractor might narrow the pool further by asking the 30 job seekers if they are interested in being considered for the job. If 10 job seekers indicate interest in being considered, they would be applicants and the contractor would invite the 10 job seekers to self-identify. In contrast,

if a contractor has a practice of not accepting unsolicited resumes, job seekers who submit an unsolicited resume are not applicants. Accordingly, the contractor would have no obligation to invite them to self-identify as a protected veteran.

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

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

One commenter expressed concern regarding possible liability in connection with storing large amounts of sensitive data, such as that disclosed in an applicant’s pre-offer self-identification form. However, the current regulations have long required contractors to maintain sensitive self-identification data that comes from post-offer inquiries, thus contractors should already have a mechanism in place for the proper storage of this information. While the additional pre-offer data increases the amount of data that contractors will need to maintain, this is

largely a scope or resources question, not an information security issue. We have addressed the expected cost and burden of the pre-offer requirement in the revised Regulatory Procedures section of the final rule.

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

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

The NPRM created a new paragraph (b) to describe the contractor’s duty to invite applicants to submit post-offer self-identification regarding the specific category of protected veteran to which the applicant belongs, and retain this information. As we explained in the NPRM, this self-identification requirement will enable the contractor to capture refined data pertaining to each category of protected veteran to foster the contractor’s compliance with the requirement to report such data set forth in the Veterans’ Employment and Training Service (VETS) regulations at 41 CFR part 61–300. Although OFCCP received no comments specific to new paragraph (b), the paragraph is revised

in the final rule to make this intent explicit. Accordingly, paragraph (b) is revised to state that, post-offer, “the contractor shall invite applicants to inform the contractor” if they belong to one or more of the categories of protected veteran “for which the contractor is required to report pursuant to 41 CFR part 61–300.” This clarifies that the contractor’s paragraph (b) obligation to ask applicants to identify their specific protected veteran classification(s) is contingent upon their having an obligation to report that information on the VETS–100A, or other future form, pursuant to 41 CFR part 61–300.

• *Paragraph (c): Content of invitations*

The NPRM revised paragraph (c) of this section by deleting the second sentence of the parenthetical at the end of the paragraph. This sentence described the format of and rationale behind the current Appendix B, which has been substantially amended in light of the new self-identification procedures proposed herein. We received no comments on this paragraph. Accordingly, the language in the NPRM is adopted as proposed. In addition, we revised the first sentence of paragraph (c) to say that invitations to self-identify “shall state that the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to the Act.” This language replaces the statement in the existing regulation that “a request to benefit under the affirmative action program may be made immediately and/or at any time in the future.” OFCCP believes that this statement could be misinterpreted to suggest that affirmative action must be “requested” by a protected veteran, thus confusing protected veterans and contractors alike.

• *Paragraph (d): Requirement that contractor seek applicant’s advice regarding accommodation*

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

As for the third proposed change to paragraph (d), the NPRM required, rather than suggested, that the

contractor seek the advice of the applicant regarding accommodation. As we explained in the NPRM, the idea was that this requirement would help to initiate a robust interactive and collaborative process between the contractor and the employee or applicant to identify effective accommodations that will facilitate a disabled veteran’s ability to perform the job. OFCCP received 10 comments from various organizations on this change, all of which opposed the proposal.

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

However, other commenters, including a human resources association, asserted that disabled veterans should not be treated differently than disabled non-veterans with regard to reasonable accommodations, and that creating unique processes for veterans could serve to stigmatize veterans rather than help them. One commenter argued that the proposed change implies that contractors should assume that just because an individual self-identifies as a disabled veteran, they are in need of

an accommodation, which may have negative and unintended consequences. Several other comments suggested that the proposed change does not take into account the administrative burden associated with ascertaining whether an individual is legally entitled to an accommodation and to research alternative sources of funding for requested accommodations when the accommodation is financially burdensome. Since the contractor is to be proactive in determining whether an individual needs an accommodation, the contractor would potentially have to conduct this research for each person that self-identifies as having a disability.

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

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

Section 60–300.43 Affirmative action policy

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

Section 60–300.44 Required contents of affirmative action programs

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

• *Paragraph (a): Affirmative action policy statement*

Section 60–300.44(a) requires contractors to state their equal

employment opportunity policy in the company's AAP. The NPRM proposed revising the section to clarify the contractor's duty to provide notice of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. The NPRM also proposed revising paragraph (a) to require the contractor's chief executive officer to clearly articulate their support for the company's AAP in the policy statement. OFCCP received three comments on the proposed revisions from an individual, a law firm and a human resources consulting group.

There were a variety of comments on this section. One individual suggested that the policy statement include 'retain' in the following sentence "* * * the contractor will: Recruit, hire, train and promote persons in all job titles * * *". Another commenter, a law firm, recommended revising the language so that it is inclusive of contractors that have foreign parent companies by requiring the top United States based executive to attest to their support for the contractor's AAP. Finally, the human resources consulting group expressed concern that OFCCP seemed to dictate the terms of the policy statement, but did not provide a sample statement as an Appendix.

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

OFCCP agrees with the suggestion to revise the language of this section to clarify the level of company leadership that must demonstrate their support for the company's AAP. The purpose of the proposed revision is to ensure that the statement communicates to employees that support for the AAP goes to the very top of the contractor's organization. For contractors with foreign-based parent companies, it is appropriate to require the company leadership that is based in the United States to express that support. Therefore, § 60–300.44(a) of the final rule is revised to state "[t]he policy statement shall indicate the top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program * * *."

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

- *Paragraph (b): Review of personnel processes*

The proposed rule made two changes to this paragraph. First, it required that the contractor review its personnel processes on at least an annual basis to ensure that its obligations are being met, as opposed to "periodically." Second, the proposed paragraph (b) mandated certain specific steps (carried over from the existing Appendix C) that the contractor must take, at a minimum, in the review of its personnel processes, including: (1) Identifying the vacancies and training programs for which protected veteran applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for disabled veterans who were selected for hire, promotion, or training programs.

OFCCP received 13 comments from contractors, contractor associations and law firms regarding these proposals. Eleven of the 13 comments asserted that a significant burden was imposed by the proposed section, much greater than that calculated by OFCCP in the NPRM's Regulatory Procedures section. For instance, regarding compliance with item (1) above, the commenters indicated that for most contractors there are no such tracking systems in place and these will take time, staff, and money to establish. The comments also indicate that promotion and training opportunities, unlike hiring, are not as readily distinguishable for individual candidates. It is noted that these opportunities may be available to all employees, take a number of different forms, and may be noncompetitive. The comments indicate it is "unreasonable" to make this mandatory because it fails

to recognize these differences and creates additional administrative and documentary burdens. These commenters further objected that the requirement to create and maintain a statement of reasons for every instance in which a protected veteran was denied a position or training activity was unreasonable and tantamount to requiring a drafted legal defense before any claims were brought, could serve to "drive underground" the real reason for the rejection, and treated protected veterans differently than protected classes under E O 11246 and section 503.

Based on the comments submitted and the questions raised about the efficacy of these requirements toward the end of increasing employment of protected veterans as compared to the burden that it creates, OFCCP does not adopt the proposal as drafted in the NPRM, and the final rule retains the existing language in § 60–300.44(b). However, in so doing, OFCCP reiterates that the existing paragraph (b) contains several requirements—including ensuring that its personnel processes are careful, thorough, and systematic, ensuring that these processes do not stereotype protected veterans, and designing some kind of procedures that facilitate a review of the implementation of these obligations—that still apply to contractors. As they do currently, contractors may coordinate the periodic review of their personnel processes for compliance with both VEVRAA and section 503.

- *Paragraph (c): Physical and mental qualifications*

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

As to the proposal to require annual reviews of physical and mental job qualification standards, OFCCP received 10 comments from contractors, a contractor association, employee and other associations, and law firms. Nine of the 10 comments stated that the requirement to review physical and mental qualifications of all jobs with

openings during the AAP period would be burdensome because of the number of job openings, variety of jobs, time, staff and needed changes to HRIS systems. One employment benefit consultant firm commenter characterized the burden as “one of the most burdensome requirements of the proposal.” Additionally, one comment noted that the assumption that a description of the job’s physical and mental requirements should already be available when a job opening occurs is a false assumption.

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

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

With this in mind, and taking into account the commenters’ concerns about the burden associated with the proposal, the final rule does not adopt the proposal as drafted in the NPRM. Instead, the final rule retains the language in existing § 60–741.44(c)(1), requiring that contractors adhere to a schedule for the “periodic review of all physical and mental job qualification standards,” and providing that contractors have the burden to demonstrate that qualification standards that tend to screen out qualified individuals with disabilities are job related and consistent with business necessity.

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

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

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

- Paragraph (f): Outreach and recruitment efforts

Paragraph (f) as it existed prior to the NPRM suggested a number of outreach and recruitment efforts that the contractor could undertake in order to increase the employment opportunities for protected veterans. The NPRM proposed several changes to this paragraph: the proposed paragraph (f)(1) required that the contractor enter into three linkage agreements with veteran-related entities to serve as sources of finding potential veteran applicants; paragraph (f)(2) included a list of additional suggested outreach and recruitment efforts that contractors could take; paragraph (f)(3) proposed a new requirement that the contractor conduct self-assessments of their outreach and recruitment efforts; and paragraph (f)(4) clarified the contractor’s recordkeeping obligations with regard to these outreach and recruitment efforts.

Overall, OFCCP received 34 comments on the proposed changes to § 60–300.44(f). While a few commenters praised OFCCP’s efforts to strengthen Federal contractors’ recruitment and outreach efforts, the majority of the comments expressed concerns about the proposed rule. Commenters raised a

variety of issues including concerns about the burden associated with the proposed mandatory requirements, technical questions regarding the drafting of the proposed rule language, and the utility of some of the recommended provisions.

As stated above, paragraph (f)(1) required contractors to enter into three linkage agreements with three different veteran-related entities: specifically, the proposal required linkage agreements with (1) the Local Veterans’ Employment Representative (LVER) in the local employment service office nearest the contractor’s establishment; (2) one of several organizations listed in the existing regulation, with the addition of the Department of Defense Transition Assistance Program (TAP); and (3) an organization listed on the National Resource Directory (NRD), a Web site provided by the Departments of Labor, Defense, and Veterans Affairs. Commenters voiced several concerns with this proposal. Several commenters expressed concern about the administrative and financial burden related to requiring three linkage agreements. Further, a specific point made by one commenter echoed in general terms by several others was that, if the linkage agreement requirement was to be a “per establishment” requirement rather than a “per contractor” requirement, a Federal contractor with multiple establishments could end up entering into hundreds of linkage agreements. Commenters also questioned the capacity of the organizations that are outlined in the proposed rule, noting that some of the entities listed in the NRD do not exist anymore, the DOD’s TAP program does not reach all service members, and that some veterans’ service organizations have difficulty generally getting through to staff or returning phone calls. While two commenters stated that entering into linkage agreements with LVERs was an appropriate requirement, several others raised the concern that LVERs, of which there are fewer than 1,000 in the entire country, may not have the capacity to enter into and manage linkage agreements with all Federal contractor establishments.

In light of these comments, and in order to reduce the burden on contractors, the final rule does not incorporate the proposal requiring contractors to enter into linkage agreements. Rather, the final rule retains the existing language of § 60–300.44(f), which requires that the contractor undertake “appropriate outreach and positive recruitment activities,” in paragraph (f)(1)(i) of the final rule, and then provides a number of suggested

resources in paragraph (f)(2)(i) that contractors should utilize to carry out their general recruitment obligations. Paragraph (f)(2)(i) of the final rule differs from the existing rule only in that it adds two additional resources discussed in the NPRM—the Department of Defense Transition Assistance Program (TAP) and the National Resource Directory—to the list of suggested resources that contractors should consult. This will allow contractors flexibility to choose the resources they feel will be most helpful in identifying and attracting protected veteran job seekers. It will also provide contractors with greater flexibility to switch between and among different resources in order to find those that are the most effective, in light of the self-assessment obligation set forth in paragraph (f)(3) of the final rule. For those commenters who had concerns that the NRD contained resources that were out of date or did not contain additional resources that would be a good source for protected veteran job seekers, we note that the NRD is a dynamically-updated resource, and that contractors may suggest that additional veterans groups and service organizations be added to it through the “Suggest a Resource” link on the NRD’s front page. On a related note, however, the reference to the specific URL address for the NRD’s employment resources in the text of the regulation has been revised to refer to the NRD’s home page. As one commenter noted, the URL listed in the regulation had changed since the publication of the NPRM, and may very well change again in the future, thus listing the URL address for a specific Web page in the regulation text makes little sense.

Lastly with regard to paragraph (f)(1), several commenters argued that OFCCP underestimated the burden hours associated with complying with the proposed paragraph (f)(1)(iii) (paragraph (f)(1)(ii) in the final rule), which requires the contractor to send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers. OFCCP retains this requirement as proposed, as we believe it is crucial to effective implementation and enforcement of the regulations that subcontractors are aware of VEVRAA’s affirmative action obligations. Compliance with this requirement could be met by providing subcontractors with the affirmative action policy statement it is already required to post on company bulletin boards pursuant to § 60–300.44(a), either electronically or in

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

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

The final rule adds an additional resource to paragraph (f)(2)(ii) that contractors are suggested to use, and that is the Veterans Job Bank. The Veterans Job Bank, created by the Obama Administration and launched in November 2011 as part of the National Resource Directory Web site, is an easy-to-use tool aimed at helping veterans find job postings from companies looking to hire them. Through the Veterans Job Bank, veterans are able to search hundreds of thousands of jobs (500,000 at the time the Veterans Job Bank was launched) by location, keyword, and military occupation code (MOC). Further, the Web site provides detailed instructions for employers wishing to post their job openings with the Veterans Job Bank, so that the resource can continue to grow and become an even more effective resource for veterans seeking new job opportunities and employers seeking qualified workers.

Paragraph (f)(3) of the NPRM required the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting qualified protected veterans, and document its review. Several commenters expressed concern about the utility of the suggested metrics for analyzing external outreach and recruitment efforts. One commenter stated that if the only standard used for assessing outreach and recruitment is the number of veterans hired, the proposed rule would effectively become a quota system for hiring protected veterans. Another commenter questioned whether overall hiring statistics would provide much useful information about the effectiveness of specific outreach efforts. Commenters also had concerns about the requirement to analyze hiring data for the current year as well as the previous two years. One commenter stated that “[e]very other analytical requirement under the affirmative action regulations, including Executive Order 11246, focuses on reviewing the past one-year recordkeeping period.” Commenters argued that the most recent year is the most relevant year in measuring effectiveness of affirmative action efforts. Finally, commenters also questioned OFCCP’s calculation of the cost of compliance with this provision.

OFCCP declines to make changes to the proposed paragraph (f)(3) in response to these comments. With regard to the comment suggesting that the number of veterans hired was the “only” standard for analyzing the effectiveness of outreach efforts, OFCCP respectfully disagrees. The proposed rule makes clear that the number of veterans hired should be a primary factor considered, given VEVRAA’s stated purpose to “employ and advance in employment” protected veterans, but is far from the only metric used for analyzing external outreach and recruitment efforts. Rather, the proposed rule required that the contractor consider all the metrics required by § 60–300.44(k) (which includes applicant and hiring data), but also clearly allows the contractor to consider any other criteria, including “a number of factors that are unique to a particular contractor establishment,” in determining the effectiveness of its outreach, so long as these criteria—whatever they are—are reasonable and documented so that OFCCP compliance officers can understand what they are. The purpose of the self-assessment is simply to ensure that the contractor

thinks critically about how to evaluate and improve upon its recruitment and outreach efforts in order to maximize its connections to protected veterans seeking jobs. OFCCP strongly believes this is a worthy goal—indeed, a goal central to the very heart of VEVRAA's affirmative action obligations—and that the proposal provides the contractor a significant amount of flexibility to meet that goal.

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

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

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

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

• *Paragraph (g): Internal dissemination of affirmative action policy*

This section requires contractors to develop internal procedures to communicate to employees their obligation to engage in affirmative action efforts to employ and advance in employment qualified protected veterans. The NPRM proposed requiring the contractor to undertake many specific actions that are only suggested in the existing rule, including incorporating the affirmative action policy in company policy manuals, informing all applicants and employees of the contractor's affirmative action obligations, and conducting meetings with management and company leadership to ensure they are informed about the contractor's obligations. The NPRM also proposed requiring contractors to hold meetings with employees at least once a year to discuss the company's VEVRAA affirmative action policy. OFCCP received 17 comments on § 60–300.44(g) from a variety of groups, including a disability association, an employee association, four contractor associations, four law firms, and two individuals, among others.

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

The final rule adopts the proposed language in § 60–300.44(g)(1) without change because the rule provides a measure of compliance, thus making the suggested change unnecessary. This section clearly states that the procedures for internally disseminating affirmative action policies “. . . shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary

actions to aid the contractor in meeting this obligation.” Further, the revisions clearly identify the actions that contractors must undertake to meet this obligation.

With regard to the remainder of paragraph (g), the existing rule has a single paragraph (g)(2) that lists eight separate actions that contractors were suggested to undertake to implement and internally disseminate their internal affirmative action policies. The NPRM proposed to mandate some of these actions and thus restructured the remainder of paragraph (g). Paragraph (g)(2) of the NPRM listed five internal dissemination efforts that would be required of all contractors: (i) Including the contractor's affirmative action policy toward veterans in the contractor's policy manual; (ii) informing all employees and prospective employees of the contractor's affirmative action obligations and having annual meetings with employees to discuss these obligations; (iii) conducting meetings with executive, managerial and supervisory personnel to ensure they understood the intent of the policy and responsibility for its implementation; (iv) discussing the policy thoroughly in employee orientation and management training programs; and (v) if the contractor is party to a collective bargaining agreement, informing union officials and/or employee representatives of the contractor's affirmative action policy and requesting the union's cooperation in implementing it. Paragraph (g)(3) of the NPRM listed additional dissemination efforts that would continue to be suggested efforts as in the existing rule, such as publicizing its affirmative action policy in company publications and including in these publications features and articles of protected veteran employees. Finally, paragraph (g)(4) of the NPRM set forth the recordkeeping obligations in connection with those actions contractors undertook.

We received many comments in response to the elements that were required in paragraph (g)(2) of the NPRM. Some commenters requested alternative options to including the affirmative action policy in the contractor's policy manual pursuant to the proposed § 60–300.44(g)(2)(i). A law firm suggested allowing for posting the policy on the company's intranet where similar human resources and EEO pronouncements are found. One comment requested that OFCCP clarify the requirement to make it optional for contractors that do not have policy manuals. Several of the comments expressed concern about the requirement in the proposed paragraph

(g)(2)(ii) to hold a meeting at least once a year with employees to discuss affirmative action obligations. Commenters asserted the OFCCP miscalculated the burden associated with hosting these meetings, stating that requiring this element would incur a much higher burden. Commenters stated that OFCCP should allow contractors to disseminate the equal employment opportunity policy at regularly scheduled meetings and allow for electronic and web-based formats. Commenters also stated that it was unclear what would constitute adequate training and compliance with the newly required elements of paragraph (g)(2).

In response to the comments, and with an eye toward reducing the burden on contractors, the final rule narrows the scope of the internal dissemination efforts that will be required of contractors from that set forth in the NPRM. Two of the five elements that the NPRM proposed to require are maintained as requirements in paragraph (g)(2) of the final rule: (1) Including the policy in the contractor's policy manual; and (2) notifying (a change from "meeting with" in the NPRM, in order to facilitate compliance) union officials to inform them of the policy and request their cooperation, if the contractor is party to a collective bargaining agreement. The first of these requirements is modified slightly from what was proposed in the NPRM based on comments received so as to allow contractors to include the affirmative action policy either in the contractor's policy manual, or to otherwise make the policy available to its employees. We believe that most companies generally have some form of document that provides guidance on human resources policies and procedures—either a policy manual, employee handbook, or similar document—that is available to employees that is an appropriate place to put the policy. OFCCP believes including the affirmative action policy in these documents will enhance the visibility of the contractor's commitment to protected veterans. However, the final rule also allows contractors the flexibility to make the policy available to its employees through other means. This could include posting the policy on a company intranet, but this will only fulfill the requirement if all employees have access to this intranet.

The remaining elements that were required in the NPRM and/or were suggested in the existing rule remain in paragraph (g)(3) of the final rule as actions that the contractor is suggested to take, with the exception of the recordkeeping provision, which has

been eliminated. We note, however, that to the extent any activities undertaken pursuant to paragraph (g) involve the creation of records that are subject to the general recordkeeping requirement of § 60–300.80, contractors will still be required to maintain such documents as specified by § 60–300.80.

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

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

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

• *Paragraph (i): Responsibility for implementation*

The only substantive proposed change in paragraph (i) required that the identity of the officials responsible for a contractor's affirmative action activities must appear on all internal and external communications regarding the contractor's affirmative action program. In the current regulation, this disclosure is only suggested. Upon further review, OFCCP does not believe that the benefit

of this suggested change outweighs the potential burden that it would place on contractors. Accordingly, the final rule does not incorporate the proposal, and the language in the existing regulation that contractors should, but are not required, to take this step is retained.

• *Paragraph (j): Training*

Paragraph (j) of the existing regulation already requires that the contractor train "[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary and related processes . . . to ensure that the commitments in the contractor's affirmative action program are implemented." The NPRM proposed revising this paragraph to identify specific topics that must be considered in this training, including: the benefits of employing protected veterans; appropriate sensitivity toward protected veteran recruits, applicants and employees; and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans. The NPRM also required that the contractor record which of its personnel receive this training, when they receive it, and the person(s) who administer(s) the training, and maintain these records, along with all written or electronic training materials used.

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

Taking these comments into account, and balancing the utility of the proposal against the burden that it would create for contractors, the final rule does not incorporate the portion of the proposed rule listing specific training items that must be covered by contractors or the specific recordkeeping requirement. However, the final rule does retain the existing rule's general requirement that "[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes" must be trained to ensure that the contractor's affirmative action

commitments are implemented. Further, we note that to the extent any activities undertaken pursuant to paragraph (j) involve the creation of records that are subject to the general recordkeeping requirement of § 60–300.80, contractors will still be required to maintain such documents as specified by § 60–300.80.

• *Paragraph (k): Data Collection Analysis*

The proposed regulation added paragraph (k) to the rule, requiring that the contractor document and update annually the following information: (1) For referral data, the total number of referrals, the number of priority referrals of protected veterans, and the “referral ratio” of referred protected veterans to total referrals; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known protected veterans, and the “applicant ratio” of known protected veteran applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known protected veterans hired, and the “hiring ratio” of known protected veteran hires to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled.

As stated in the NPRM, the impetus behind this new section is that no structured data regarding the number of protected veterans who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of protected veterans in the workforce, or to make any sort of objective, data-based assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. Conversely, maintaining this information will provide the contractor with much more meaningful data for evaluating and tailoring its recruitment and outreach efforts.

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

data conflicts with the Internet Applicant Rule in the Executive Order regulations; and assertions that collecting, analyzing, and maintaining the data would be unduly burdensome. Further, 19 commenters, all of whom were members of the construction industry, submitted form letters asserting that they should be exempted from the requirement due to the unique nature of their industry. Finally, a number of commenters sought clarification of some of the processes set forth in paragraph (k). These issues are considered in turn below.

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

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

Another identified concern is that the proposed data collection and analysis is not aligned with the availability analysis conducted when examining employment activities for females and minorities. However, as stated previously in this preamble, VEVRAA and the Executive Order are different laws with different data calculation and enforcement schemes, largely because of the differences in the Census and other data available. It is, therefore, not feasible to pattern data collection after the Executive Order regulations.

Comments also questioned the purpose of the job opening/job filled ratio. On a related point, one comment from a law firm noted that there appears to be an underlying assumption that there will be jobs that are not filled which is seldom true in the current economic environment. While it may not be a common occurrence in the current economic environment: (a) this does not mean it never happens (and if it never does, the burden on the contractor to calculate a “job fill ratio” shrinks to virtually nothing); and (b) the current economic environment will not last forever, at which point these regulations will still be in effect. The job fill ratio is a commonly recorded metric by companies and HR professionals, as it measures the effectiveness of a company’s recruiting efforts. Also, in some cases, a particularly low job fill ratio could be an indicator that the company’s hiring process is being conducted incorrectly. This is useful information for both the contractor and OFCCP. We have eliminated the requirement, however, that contractors document and maintain for three years the ratio of jobs filled to job openings and the ratio of protected veterans hired to all hires. The remaining data points permit OFCCP and the contractor to make those calculations; thus separate data collection is unnecessary. Several commenters also objected to the collection of data about protected veteran status of applicants because it differs from the recordkeeping requirements related to Internet Applicants under the EO 11246 implementing regulations at 41 CFR 60–1.12. We addressed this issue in the discussion of the pre-offer self-identification requirement, and incorporate by reference that discussion here, but we wish to reiterate the salient points here in response. Under § 60–1.12, contractors’ recordkeeping obligations include maintaining expressions of interest through the Internet that the contractor considered for a particular position, as well as applications and resumes. Contractors

also are required to maintain, where possible, data about the race, sex, and ethnicity of applicants and Internet Applicants, as applicable. The term Internet Applicant is defined at § 60–1.3. The term “applicant” is defined in OFCCP subregulatory guidance. The Internet Applicant definition is limited to OFCCP recordkeeping and data collection requirements under the Executive Order implementing regulations in § 60–1.12.

In sum, after consideration of the comments received, the final rule retains the NPRM’s proposal for contractors to document and maintain applicant, hiring, and job fill ratio data, but eliminates the requirement for contractors to document and maintain referral data.

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

Also pertaining to burden, 19 commenters from the construction industry asserted that they should be exempted from this section of the proposed regulation because of the unique nature of the industry, namely that it is project-based and its workers are transitory and seasonal. Traditionally, construction contractors who meet the basic coverage requirements (contract amount and number of employees) of VEVRAA have not been exempted from any of its provisions. This includes the collection

of data under part 61–300 for the VETS–100A report, which tracks the numbers of new hires and overall employees who are protected veterans, data which makes up a significant portion of the requirements under paragraph (k). Accordingly, we decline to exempt construction contractors.

Commenters from the contractor community also cited burden concerns with the proposed requirement to maintain the paragraph (k) computations for a period of five (5) years. As set forth in the discussions of § 60–300.44(f)(4) and § 60–300.80 herein, the final rule reduces the document retention requirement to three (3) years, and revises the language of paragraph (k) to reflect this change.

Finally, a few of the comments raised clarification questions we would like to address, including: (1) Whether the intent of the analyses is to measure change from year to year; (2) whether the ratios should be run by job group, job title, or establishment; and (3) how compliance determinations will be made. As to the first question, as set forth in the discussion of § 60–300.44(f)(3), measuring change from year to year, and looking at two previous years of data, is a central intent of the analyses, as that can aid the contractor in seeing trends that may be associated with certain of its outreach and recruitment efforts over time. However, as discussed in that section, contractors are also free to use any other reasonable criteria in addition to the applicant and hiring data they feel is relevant to evaluate the effectiveness of their efforts. As to the second question, the ratios in paragraph (k) will be calculated by establishment, and not by job groups or titles within a given establishment. The number of protected veterans in the civilian workforce is relatively small (at least compared to the number of women or minorities nationwide), and thus we believe that running analyses by job groups or titles is unlikely to provide any meaningful analysis.

With regard to the third question, compliance determinations for paragraph (k) will be made based simply on whether the contractor has documented and maintained the five listed metrics in the final rule. OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under the Executive Order, and enforcement actions will not be brought solely on the basis of statistical disparities between veterans and non-veterans in this data. Compliance officers will look to see whether the contractor has fulfilled its

obligations under § 60–300.44(f)(3) to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) as well as any other reasonable criteria the contractor believes is relevant, and has pursued different and/or additional recruitment efforts if the contractor concludes that its efforts were not effective.

Section 60–300.45 Benchmarks for hiring

The NPRM proposed that the contractor establish annual hiring benchmarks by using existing data on veteran availability from five different sources of information: (1) Bureau of Labor Statistics data of the average percentage of veterans in the civilian labor force in the State where the contractor is located; (2) the raw number of protected veterans who participated in the employment service delivery system (*i.e.*, One-Stop Career Centers) in the State where the contractor is located; (3) the referral, applicant, and hire data collected by the contractor pursuant to § 60–300.44(k); (4) the contractor’s recent assessments of its outreach and recruitment efforts as set forth in § 60–300.44(f)(3); and (5) any other factors, including but not limited to the nature of the contractor’s job openings and/or its location, which would tend to affect the availability of protected veterans. The last of these factors would allow the contractor to take into account other factors unique to its establishment that would tend to affect the availability determination. The NPRM also proposed to require contractors to document the hiring benchmark it established each year, detailing each of the factors that it considered in establishing the hiring benchmark and the relative significance of each of these factors, and required the contractor to retain this document for a period of five years.

OFCCP received a total of 38 comments on the proposed new requirement to establish annual hiring benchmarks for protected veterans. Three comments from organizations representing employee interests, including a disability association and a veterans association, stated that requiring benchmarks using available statistics was an important development, and supported the proposed regulation in general terms. The remaining comments, virtually all of which were from contractors or those representing contractors, opposed the requirement for contractor-established benchmarks as proposed. The reasons set forth for their opposition fell into five general categories: (1) A belief that

the benchmarks were equivalent to “quotas”; (2) hiring benchmarks for protected veterans would adversely impact women and minorities; (3) the benchmarks as proposed were arbitrary and ineffective given that the data to be relied upon is not specific to veterans protected by VEVRAA and does not correlate to specific job groups, skills, or geographical areas; (4) the proposed five-year recordkeeping requirement conflicts with equivalent requirements in other laws administered by OFCCP; and (5) that setting benchmarks as proposed in the NPRM was unduly burdensome for contractors, and OFCCP underestimated the cost and burden of the proposal. Further, some commenters provided recommendations for how to amend the proposed benchmarks, and others submitted questions seeking clarification of aspects of OFCCP’s proposal. As detailed below, the final rule contains a substantial revision, allowing contractors the option of using a benchmark based on national veteran data. This option would substantially decrease the burden on contractors.

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

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

Further highlighting the difference between the benchmark proposal and the availability and utilization calculations traditionally required under the Executive Order 11246 program, OFCCP designed the benchmark proposal to allow the

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

Finally, OFCCP intended the benchmark proposal to raise awareness of the significant number of veterans who, having made enormous sacrifices defending our nation on our behalf, nevertheless continue to face considerable difficulties finding work upon their return home. These veterans are highly trained, highly skilled, disciplined, and possess considerable leadership and team-building experience—in other words, excellent candidates for employment. While recent Federal efforts have greatly helped veterans’ employment prospects, the service of these veterans to our nation abroad is still too often forgotten, and the lasting contribution they can make to our private sector at home is still too often unfulfilled. The proposed hiring benchmark, therefore, is a tool to address this pressing national issue and the important role Federal contractors have in addressing it.

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

Five commenters stated that the proposed benchmarks were the equivalent of a “quota.” One commenter stated that the benchmark requirement would make contractors feel the need to meet the data requirements by hiring protected veterans who may not be qualified in order to meet the benchmark. Another believed the benchmarks suggested “quotas” because

the availability analysis factors proposed do not factor in the approximate percentage of qualified protected veterans by occupational codes or geographical areas. Still another asserted that the proposed benchmarks were “quotas” and thus unconstitutional, as they were not “narrowly tailored” to “a compelling governmental interest.”

The proposed benchmarks are not quotas and should not be conceived as quotas. The benchmark is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden. We hope the discussion in the previous paragraphs clarifying that contractors have significant flexibility to set their own benchmarks, and will not be cited for violations solely for failing to meet the benchmarks they set, allay the fears of these commenters. Further, the omission of breaking down the benchmarks by occupational codes or geographical areas is merely a function of the fact that such data does not exist for protected veterans; it does not evince an intent to set rigid quotas. Finally, we note that the legal standard raised by the final commenter regarding the constitutionality of the benchmarks is incorrect. The “narrowly tailored to a compelling governmental interest” standard, otherwise known as “strict scrutiny,” is applied to race-based decision making. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1996). The benchmarks proposed in the VEVRAA regulations are not race-based. Classifications that are based on veteran status are subject to so-called “rational basis review,” and are legally permissible so long as the government action—in this case, the setting of benchmarks—is “rationally related” to a “legitimate governmental interest.” *See, e.g., Sturgell v. Creasy*, 640 F.2d 843, 852 (6th Cir. 1981). Clearly, requiring contractors to set benchmarks for the hiring of protected veterans—particularly benchmarks that afford the contractor significant flexibility in their establishment and are not rigidly applied so as to automatically create a violation of the law if they are not met—is rationally related to the legitimate governmental interest of increasing outreach to and employment opportunities for protected veterans.

Six commenters, including individuals, contractor associations, consultants, and human resource management firms, expressed concern that requiring contractors to establish annual hiring benchmarks for protected veterans would adversely impact women and minorities, and thus impede

contractors' nondiscrimination efforts under EO 11246, due to low numbers of minorities and women among protected veterans. One commenter asked for clarity on whether contractor veteran affirmative action efforts could be used as an affirmative defense if those efforts result in adverse impact against women, because a large percentage of protected veterans are men. Finally, a commenter asked whether OFCCP would still require contractors to establish annual hiring benchmarks for protected veterans if women and minorities were underutilized. OFCCP does not agree that contractor-established benchmarks will adversely affect women or minorities. As an initial matter, recent Department of Veterans Affairs (DVA) data indicate that for Gulf War-era I veterans 30.3 percent were minority; Gulf War-era II veterans 33.6 percent were minority; and Vietnam era veterans 16.4 percent were minority.²¹ This compares quite closely with the 27 percent national non-white population figure calculated by recent Census data.²² For this reason alone we do not anticipate any potential effect on minorities. Although the representation of women among veterans is lower than in the civilian labor force, as discussed in more detail below, the employment of women will not be adversely affected by VEVRAA affirmative action requirements.

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

measure its progress in employing protected veterans. Consequently, the VEVRAA enforcement scheme does not provide an incentive for contractors to disfavor non-protected veterans in employment. The point of the benchmark is to encourage contractors to be inclusive of protected veterans rather than to discriminate against nonveterans through preferences or quotas.

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

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

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

Another organization explains that placement goals for an accounting firm will look very different than the placement goals for a manufacturing company, and the placement goals for entry-level production positions at the manufacturing company will look very different than the placement goals for management positions at the same company.

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

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

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

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

thoroughly addressed in previous sections.

In response to the comments on the proposed data considerations in paragraphs (b)(1) and (b)(2), as previously discussed, OFCCP agrees that precise and statistically meaningful availability data specifically capturing veterans protected under VEVRAA at the local level, divided by job group, would be optimal in setting specific, refined goals. However, such data does not exist. Accordingly, the proposal had contractors consider a variety of sources of data capturing large portions of the relevant population (including actual applicant flow and hiring data from the contractor's establishment), and provided contractors with the flexibility, in the proposed paragraphs (b)(4) and (b)(5), to take into account any other factors which could reasonably affect protected veteran availability. However, commenters also asserted that paragraphs (b)(4) and (b)(5) were unhelpfully vague and introduced a high degree of subjectivity into the entirety of the benchmark setting process that was uncomfortable. Multiple commenters suggested alternative methods for setting benchmarks, including a nationwide goal for hiring protected veterans. One commenter in particular, a consultant to contractors on EEO issues, proposed a mechanism by which aggregate annual VETS-100A data could be used to estimate the number of protected veterans in the civilian workforce, and by dividing this number by the total civilian workforce, arrive at a national goal for protected veterans.

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

protected veterans available for work. Accordingly, if a contractor's protected veteran recruitment efforts were deficient and resulted in an unreasonably small number of protected veteran hires and employees, this deficiency would therefore be incorporated into the contractor's benchmark.

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

For those contractors that would rather use the five-factor approach to setting benchmarks proposed in the NPRM, the final rule retains this as an option. This option, however, is modified slightly to eliminate the consideration of referral data, which contractors are no longer required to collect and maintain in the final rule. For those who choose this method of setting benchmarks, OFCCP will provide technical assistance to contractors upon request.

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

Some commenters questioned why the term "benchmarks" was used in this

section as opposed to the term "goals" which is used in the EO 11246 program. We proposed a different term to avoid confusion and to highlight the difference in how the two concepts operate. The purposes of the EO 11246 placement goals are twofold: (1) "to serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work" and (2) "to measure progress toward achieving equal employment opportunity." 41 CFR 60-2.16(a). The benchmarks established under this regulation are intended to serve only the second of these two objectives, that is, they serve as a measure of progress and the effectiveness of a contractor's outreach and recruitment efforts. The Executive Order regulations state goals are "reasonably attainable" when sufficiently robust data exists describing the availability of women and minority workers, the groups for which goals may be established under the Executive Order program. As discussed previously in this section, however, we do not believe that the data currently available is sufficiently robust on the issue of the availability of protected veterans. Consequently, the purpose and function of goals established in the Executive Order regulations differ from benchmarks under the VEVRAA regulations. Therefore, we use different terminology to distinguish the terms clearly. To further clarify this difference, the final rule slightly revises the language in paragraph (b) of this section. The proposal defined hiring benchmarks as "the percentage of total hires that are protected veterans that the contractor will seek to hire. . . ." The final rule deletes the clause "that the contractor will seek to hire" from the text of paragraph (b) given the explanation above.

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

Subpart D—General Enforcement and Complaint Procedures

Section 60-300.60 Compliance evaluations

The proposed rule set forth several changes to the process the contractor and OFCCP will follow in conducting compliance evaluations. These proposals, the comments to these

proposals, and the revisions made to the final rule are discussed in turn below.

• *Paragraph (a)(1): Review of personnel processes*

The NPRM added a sentence to paragraph (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP, stating that OFCCP “may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part.” Several commenters, including those from individuals, contractors, contractor associations, and law firms, objected to this proposed change and asked that it be withdrawn. These commenters asserted that the language of the proposed rule could result in “never-ending” audits for contractors, was contrary to a 2010 Administrative Law Judge (ALJ) decision in the case *OFCCP v. Frito-Lay* and would lead to an increased burden for contractors.

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

the text of the regulation. OFCCP notes that paragraph (a)(1) also authorizes OFCCP to request during the desk audit additional information pertinent to the review after reviewing the initial submission. See *United Space Alliance v. Solis*, 824 F.Supp.2d 68, 81–82 (D.D.C. 2011) (holding that agency’s interpretation of its desk audit regulation to authorize additional information requests when necessary was entitled to deference).

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

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

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

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

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

• *Paragraph (d): Pre-award compliance evaluation*

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

Subpart E—Ancillary Matters

Section 60–300.80 Recordkeeping

Section 60–300.80 describes the recordkeeping requirements that apply to contractors under VEVRAA. The

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

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

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

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

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

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

Section 60–300.81 Access to records

The NPRM made two changes to the current regulation. First, it added a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of an evaluation or investigation. Second, it required that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the formats selected by OFCCP. OFCCP received seven comments regarding the proposed § 60–300.81. All seven comments opposed the proposed changes, citing confidentiality and burden concerns.

Commenters expressed concerns about providing records in a format requested by OFCCP. Two commenters requested clarification regarding whether OFCCP will require contractors to convert records into formats requested by the agency. Several commenters stated that contractors

should have the discretion to determine the format that is most efficient for records production based on organizational resources and sensitivity of information.

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

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

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

The final rule retains the proposed requirement to provide OFCCP off-site access to materials by request. As an initial matter, it is worth noting that

access to company records off-site is not a novel approach, as the Executive Order contains no limitation on the location of access for the compliance evaluation, and indeed specifically references off-site access. Thus, this general access regulation conforms to those principles. In light of contractors' increased use of electronic records in multiple locations, OFCCP feels that this change will provide the agency greater flexibility during evaluations and investigations. However, OFCCP modified § 60–300.81 of the final rule in response to comments regarding record confidentiality. Section 60–300.81 now includes the following language:

“OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.” It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that release of the data would subject the contractor to commercial harm. This language affirms OFCCP's commitment to ensure confidentiality to the fullest extent allowed by law. Further, all OFCCP Compliance Officers receive training on the importance of keeping records confidential during compliance evaluations and complaint investigations. OFCCP will continue to stress this policy to ensure that contractor records are kept secure by the agency at all times, and will work with contractors to respond to specific data confidentiality concerns they may have.

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

The proposed rule included three changes to Appendix A which would mandate activities that previously were only suggested. First, in the third sentence of paragraph 2 and the fourth sentence of paragraph 5, we proposed changing the language to reflect the change to § 60–300.42(d) requiring a contractor to seek the advice of disabled veterans in providing reasonable accommodation. Second, in the last sentence of paragraph 4, the NPRM proposed requiring that disabled veterans, in the event an accommodation would constitute an undue hardship for the contractor, be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor, consistent with the change to § 60–300.21(f)(3).

Finally, in the last sentence of paragraph 9, the proposed rule is changed to require that a contractor must consider the totality of the circumstances when determining what constitutes a “reasonable amount of time” in the context of available vacant positions.

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

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

The proposed rule amends Appendix B consistent with the proposed changes to the self-identification regulation found at § 60–300.42. The majority of comments pertaining to aspects of Appendix B were addressed in the discussion of § 60–300.42 above. Separately, three commenters stated specifically that the proposed Appendix B would be a useful tool for contractors. One commenter stated that OFCCP should make clear that a goal of a reasonable accommodation is to enable an individual with a disability “to perform the essential functions of the job,” as this is the accepted legal standard, while the proposed paragraph 2 of Appendix B uses “to perform the job properly and safely.” OFCCP adopts this commenter’s language into the final rule. OFCCP also eliminates from paragraph 2 of the sample invitation to self-identify the option to “choose not to provide this information.” This option may serve to discourage applicants from self-identifying, and is unnecessary, as applicants who wish not to reveal their protected veteran status may simply choose not to respond to the invitation. Consistent with the change to § 60–300.42(c), paragraph 3 is deleted, and paragraphs 4, 5, and 6 are renumbered, accordingly, as paragraphs 3, 4, and 5. In addition, to address confusion among

veterans regarding the scope of the protections afforded by the various veterans’ employment rights statutes, the final rule adds clarifying language to paragraph 1 of Appendix B. The new language explains that protected veterans with past, present or future military service, status or obligations may have additional rights under USERRA, including the right to be reemployed by an employer for whom they worked immediately prior to their military service.

Appendix C—Review of Personnel Processes

The NPRM proposed eliminating Appendix C and incorporating relevant parts of it into § 60–300.44(b). However, as stated in the discussion of § 60–300.44(b), we have eliminated the proposal in the NPRM that required specific personnel process reviews. Accordingly, the final rule reinstates Appendix C, but substitutes the updated term “protected veteran” in paragraphs 1, 2, and 3, in place of “disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran.”

Regulatory Procedures

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

OFCCP is issuing this final rule in conformity with Executive Orders 13563 and 12866, which 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 is economically significant and major as it will have an annual effect on the economy of \$100 million or more. EO 12866 § 3(f). OFCCP estimates that first year costs in the rule to be in the range of \$177,296,772 to \$483,560,138. This includes (1) One-time costs; (2) recurring costs; (3) capital start-up costs; and (4) operations and maintenance costs.²³ The range of recurring costs of the final rule in subsequent years will be approximately \$120,386,058 to \$347,617,359.²⁴ This

²³ These costs include both establishment and contractor company level costs.

²⁴ The recurring costs include those related to the recurring substantive provisions and the copying

rule was reviewed by the Office of Management and Budget.

A. Introduction

The final regulatory impact analysis is substantially different from the preliminary regulatory impact analysis presented in the VEVRAA NPRM based on comments received during the public and interagency comment period. First, the final rule has been scaled down significantly in order to minimize the costs employers would incur under the rule. Second, OFCCP modified the contractor establishment count to more accurately reflect the number of contractors that would be impacted by the rule. Third, the analysis acknowledges that some establishments and or companies may incur higher costs under the final rule and illustrates a range of costs to implement several provisions.

1. Eliminated Several Provisions in the NPRM

While all the proposals in the NPRM had value, after assessing the comments received on the NPRM published on April 26, 2011, we made several changes in the final rule. OFCCP reconsidered whether the cost of several proposals in the NPRM could be justified by their potential benefits, and whether alternative methods or approaches could achieve comparable or acceptable benefits for less cost or burden. We retain in the final rule those provisions proposed in the NPRM that create greater contractor accountability through enhanced data collection and recordkeeping. Therefore, as an example, the final rule does not require each contractor to establish three “linkage” agreements with various veteran service organizations to facilitate recruitment.

Other examples of how the final rule takes a tailored approach include, but are not limited to, eliminating the proposal that contractors reproduce the entire equal opportunity clause in all contracts and subcontracts; the proposal that contractor staff training must cover a list of specific training items; the proposal to mandate annual reviews of personnel policies; and the proposal to mandate that contractors identify the official responsible for the affirmative action program on all communications are also eliminated in the final rule.

2. Increased the Contractor Establishment Count

In light of the comments concerning the size of the Federal contractor

costs identified in the Operations and Maintenance Costs section.

establishment universe, OFCCP reexamined the original number of 108,288 contractor establishments it used in the NPRM. For the final rule, we combined Equal Employment Data System (EEDS) data with several other information sources.²⁵ We used FY 2009 EEDS data to determine the number of Federal contractor establishments with 50 or more employees; this resulted in a total of 87,013 Federal contractor establishments.²⁶ An additional 10,518 establishments were identified through a cross-check of other contractor databases for a total of 97,531 establishments. Covered Federal contractors must develop AAPs for all of their establishments, even those with fewer than 50 employees. Therefore, OFCCP added an additional 73,744 establishments, using EEO-1 and FPDS data, for an adjusted total of 171,275 Federal contractor establishments affected by the final rule. This adjustment to the methodology for calculating the number of contractors and contractor establishments results in a 58 percent increase over the earlier estimate used in the NPRM.

We received comments on the estimated number of contractor establishments as well, including recommending an establishment count of 285,390 using the VETS annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300 for comparison. This number is based on 2010 VETS data from their pending Information Collection Request.²⁷

All costs and hours in the burden analysis of this final rule are calculated using adjusted numbers of Federal contractor establishments. Federally assisted construction contractors are not subject to these regulations and, therefore, are not included in this total.

²⁵ OFCCP determined that the VETS-100 database is not the most appropriate resource for calculating the number of federal contractors and contractor establishments. Among the concerns surrounding this data source are the use of contractor established 12-month reporting timeframes, the degree to which there is overlap or duplication in the VETS-100 and VETS-100A reports, and the absence of an employee threshold for reporting purposes.

²⁶ A single firm, business, or "entity" may have multiple establishments or facilities. Thus, the number of contractor establishments or facilities is significantly greater than the number of parent contractor firms or companies.

²⁷ OMB Control Number 1293-0005, Federal Contractor Veterans' Employment Report, VETS-100/VETS-100A, http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003 (last accessed Aug. 13, 2013).

See section 60-300.2(n) for the definition of "Government contract."

3. Revised and Increased Burden Estimates

OFCCP received 55 comments concerning overall burden hours from several employer groups and employers, including 21 form letters. Most stated that OFCCP's overall estimate of dollars and hours was much too low. Some commenters included estimates of their own for dollar costs and burden hours. Several commenters specifically expressed concern about the potential burden on smaller contractors, including smaller construction contractors, veteran owned businesses, and service-disabled veteran owned businesses.

OFCCP acknowledges that estimating the precise amount of time each company will take to engage in certain activities will be difficult. However in response to public comments, the final regulatory impact analysis attempts to account for the fact that smaller contractors may not have the same human resources capabilities as larger contractors. Specifically, OFCCP has provided low and high range estimates for certain requirements either based on the comparison of contractor establishment numbers, assumptions about the use of automated application systems and human resources information systems,²⁸ and/or other factors.

B. The Need for the Regulation

Some commenters stated that OFCCP did not adhere to the requirements of Executive Order 13563 or Executive Order 12866, which require Federal agencies to identify a specific need for any regulation they promulgate. These commenters asserted that the unemployment rate for veterans was an insufficient basis for such "extensive regulations." Another commenter questioned the need for new regulations and asserted that better enforcement of the current regulations would achieve the same goals. Commenters further stated that the anticipated benefits did not outweigh the overall costs of the NPRM.

The current regulations are simply not sufficient to facilitate the process of

²⁸ The human resources system low range estimates assume that most contractors have automated application systems and human resources information systems to meet the data collection requirements of the final rule. The high range estimate is based on the assumption that contractors with 50-100 employees may still use manual application or human resources processes. These contractors would likely expend more time conducting the kind of data collection and analysis required under the final rule.

connecting veteran job-seekers with Federal contractors seeking to hire qualified employees. The framework articulating a contractor's responsibilities with respect to affirmative action, recruitment, and placement of veterans has remained largely unchanged since the VEVRAA implementing rules were first published in 1976. Meanwhile, veterans are returning from tours of duty in Iraq, Afghanistan, and other places around the world. These veterans possess skills and personal qualities 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 is the focus of a number of Federal efforts, including these revised VEVRAA regulations.

Although progress has been made in the employment of veterans, the number of unemployed veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of veterans. Annual unemployment rate for post-September 2001 veterans, referred to as "Gulf War-era II veterans," is higher than the rates for all veterans and for non-veterans. In 2012, according to BLS data on the employment situation of veterans for that year, about 2.6 million of the nation's veterans had served during Gulf War era II. The unemployment rate for this category of veterans was 9.9 percent compared to nonveterans at 7.9 percent.²⁹ In this same year, the unemployment rate for male Gulf War-era II veterans age 18 to 24 was 20.0 percent, higher than the rate for nonveterans of the same age group (16.4 percent).

OFCCP found that process and institutional barriers, and data collection issues are factors contributing to veterans being underutilized in the Federal contractor workforce. We learned much from conducting multiple town hall meetings, webinars, and listening sessions with representatives of the contractor community, state employment services, veterans' organizations and other interested parties to understand those features of the current VEVRAA regulations that work well, those that can be improved, and whether there was a need for new requirements to help effectuate the regulations' goal of increasing

²⁹ U.S. Bureau of Labor Statistics, Economic News Release: Employment Situation of Veterans Summary, Table A: *Employment status of the civilian noninstitutional population 18 years and over by veteran status, period of service, and sex, 2011-2012 annual averages*, available online at <http://www.bls.gov/news.release/vet.nr0.htm>.

employment opportunities for qualified protected veterans with Federal contractors. We received information indicating that improvements to the regulations were needed to assist protected veterans in gaining and keeping employment. For instance, OFCCP learned that there were significant problems with contractors submitting their job listings to state agencies in usable formats—a requirement in the VEVRAA statute—which would impede the veteran’s ability to learn about job openings with Federal contractors and receive priority referral to contractors with available positions. In addition, the lack of veteran applicant data hindered contractors’ ability to assess the success of their outreach and recruitment efforts, and whether alternative outreach methods might attract greater numbers of protected veteran into their applicant pools.

Efforts to address veterans’ unemployment must be sustained, multi-faceted, and coordinated; these regulations create an enforcement structure that supports long-term

monitoring, self-assessment, data collection and accountability by employers doing business with the Federal government. The benchmark created by the regulations provides contractors with an aspirational hiring target against which they can measure the success of their efforts, and identify any impediments to hiring veterans. The regulations also provide more notice or knowledge to subcontractors by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors. This supports voluntary compliance by subcontractors and should increase job opportunities for veterans.

The regulations address concerns surrounding process and institutional challenges related to identifying available veteran job applicants. The regulations clarify the contractor’s mandatory job listing requirements and the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected veterans; and create flexibility

for contractors when they are establishing formal relationships with organizations that provide recruiting or training services to veterans. The relationships or “linkage agreements” can be established to meet the contractors’ specific needs, while assuring outreach to veterans seeking employment.

C. Discussion of Impacts

In this section, we present a summary of the costs associated with the revisions to part 60–300. The estimated cost to contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for management, professional, and related occupations as \$50.11 per hour and administrative support as \$23.72 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.

TABLE 1—CONTRACTOR NEW REQUIREMENTS—171,275 ESTABLISHMENTS

Provision	Low cost	High cost
EO Clause, Parag 12	\$240,495.10	\$240,495.10
EO Clause, Parag 10	534,418.00	534,418.00
300.42	2,101,102.72	2,583,328.54
300.45	2,404,913.60	2,404,913.60
Total	5,280,929.38	5,763,155.20
EO Clause, Parag 4	1,736,859.16	1,736,859.16
300.44(f)(1)	4,328,771.47	4,809,761.68
300.44(f)(3)	3,174,438.00	3,174,438.00
300.44(f)(4)	1,603,263.25	1,603,263.25
300.44(h)	1,068,842.17	1,068,842.17
300.44(k)	3,740,925.75	6,840,549.94
Total	17,256,363.05	20,836,977.45
Reasonable Accommodation	19,010,209.00	19,010,209.00
Capital and Start-up	31,457,911.40	43,429,423.20
Rule Familiarization	8,582,590.25	34,330,361.00
Operations and Maintenance	616,590.00	1,356,498.00
Costs to Companies	80,601,329.83	123,123,360.60

TABLE 2—CONTRACTOR NEW REQUIREMENTS—251,300 ESTABLISHMENTS

Provision	Low cost	High cost
EO Clause, Parag 12	\$352,851.59	\$352,851.59
EO Clause, Parag 10	784,114.64	784,114.64
300.42	3,102,510.41	3,814,616.30
300.45	3,528,515.87	3,528,515.87
Total	7,767,992.51	8,480,098.40
EO Clause, Parag 4	2,548,372.57	2,548,372.57
300.44(f)(1)	6,351,328.56	7,057,031.73
300.44(f)(3)	4,657,640.94	4,657,640.94
300.44(f)(4)	2,352,343.91	2,352,343.91
300.44(h)	1,568,229.27	1,568,229.27

TABLE 2—CONTRACTOR NEW REQUIREMENTS—251,300 ESTABLISHMENTS—Continued

Provision	Low cost	High cost
300.44(k)	5,488,802.46	10,036,667.35
Total	23,013,764.59	28,267,332.65
Reasonable Accommodation	19,010,209.00	19,010,209.00
Capital and Start-up	46,172,324.20	64,129,119.80
Rule Familiarization	12,592,643.00	50,370,572.00
Operations and Maintenance	904,680.00	1,990,296.00
Costs to Companies	108,650,099.89	171,436,114.44

TABLE 3—COMPLETING PRE-OFFER SELF-IDENTIFICATION

Provision	171,275 Establishments		251,300 Establishments	
	Low cost	High cost	Low cost	High cost
300.42(a)	\$96,695,442.00	\$212,729,213.00	\$141,874,556.25	\$312,124,023.75

1. Section 60–300.5 Equal Opportunity Clause

The Equal Opportunity Clause (EO Clause) in the current rule, as well as the VEVRRA statute itself, requires Federal contractors to list their job openings with the state or local employment service delivery system (employment service). See 38 U.S.C. 4212(a)(2)(a); 41 CFR 60–300.5(a)(2). Paragraph 2 of the EO Clause in the current regulations does not expressly address the manner in which contractors provide job openings to the employment delivery service system. The NPRM proposed requiring contractors to provide information to the employment service in the manner and format that the employment delivery service system requires. The NPRM estimated that collecting, informing the employment service delivery system and recordkeeping would take 15 minutes per job listing for an average of two listings per year. Some commenters asserted that OFCCP significantly underestimated the number of annual listings or the time required to post a listing, or both.

The final rule clarifies the intent of the provision by stating that contractors need only provide job openings in a format that the employment service delivery system will accept. The clarification in the final rule does not create a new requirement; rather it explains OFCCP’s longstanding position regarding the statutory requirement to list job openings. This position is explained in publically available Frequently Asked Questions (FAQs), published several years ago, addressing the various ways contractors must list job openings, the documentation contractors must maintain to demonstrate compliance, what

contractors should do if they send an email and it is returned from the state as undeliverable, and how to comply with the job listing requirement by using third parties.³⁰ Therefore, the final rule does not assess burden for complying with existing requirements concerning listing job openings in a manner permitted by the employment service delivery system. We also do not assess burden for new language clarifying that contractors may utilize privately run third-party services or exchanges to list its jobs, in addition to listing them with the employment service delivery system.

Paragraph 4 of the EO Clause of the current rule requires contractors to provide the appropriate employment service delivery system with the name and location of each of the contractor’s hiring locations. See 41 CFR 60–300.5(a)(4). The NPRM proposed requiring a contractor to inform the employment service delivery system that: (1) It is a Federal contractor; (2) it is requesting priority referrals of protected veterans; and (3) it is providing the contact information for the hiring official at each location in the state. The NPRM also proposed requiring contractors to provide the employment service with the contact information for each external job search organization used by the contractor. Several contractors use job search and human resources firms to fill job vacancies in the belief that using these firms saves them money, gives them

greater staffing flexibility and increases their access to talent. These firms can search for, recruit and even train contractors’ employees using human resource software solutions that work independently or that can be integrated into a contractor’s own human resources information system. The NPRM estimated that 25 percent of the Federal contractors use job search or similar firms and that 20 minutes would be required to provide the four types of information proposed in the NPRM. The status of the employer as a Federal contractor, the need for priority referrals, the hiring official’s contact information and the information identifying the contractor’s external job search firm are all pieces of information that should be readily available to the contractor and any job search or human resources firm the contractor uses. Transmission of the information via email or facsimile is not complex or time consuming and can be done from a desktop computer, standalone facsimile or business multi-function printer. We received no comments on this burden estimate.

The final rule adopts proposed paragraph 4 of the EO Clause and further clarifies the unchallenged burden analysis for this provision. OFCCP estimates a total of 15 minutes to ensure that the new information required by the regulation is provided to the employment service. Because submitting job openings is already required by paragraph 2 of the EO Clause, and burden was assessed for that provision, we are only assessing additional burden for including a few lines of text to identify the contractor as a “Federal contractor, request priority referrals, and identify the contractor’s official that is responsible for hiring.

³⁰ Office of Federal Contract Compliance Programs, Jobs for Veterans Act Frequently Asked Questions, Can a contractor satisfy the job listing requirement by sending to the appropriate employment delivery system a link to a specific job opening posted on the contractor’s Web site? <http://www.dol.gov/ofccp/regs/compliance/faqs/jvafaqs.htm#Q20> (last accessed April 16, 2012).

This calculation assumes that the required information is readily available within the contractor's human resources department, or the job search or similar firm used by the contractor, or both. It is also assumed that the language is being incorporated into a job listing template and stored electronically, and that this template or similar form is easily accessible for use and revision, as needed. The minimum recurring burden estimate for this provision is 42,819 hours (171,275 contractor establishments \times 15 minutes/60 = 42,819 hours). As in the NPRM, OFCCP estimates that 25 percent of contractors, or 42,819, will use outside job search organizations and incur an additional 5 minute burden to simultaneously notify the employment service of the contact information for its outside job search organizations when submitting the required job posting. The burden for this provision is 3,568 hours (42,819 contractor establishments \times 5 minutes/60 = 3,568 hours). The minimum cost for this provision is approximately \$1,736,859.³¹

Assuming there are 251,300 establishments that are impacted by the final rule, the recurring burden for updating existing mandatory job listing templates to include the required information would be 62,825 hours (251,300 contractor establishments \times 15/60 = 62,825 hours). The burden for providing information regarding job search organizations would be 5,235 hours (251,300 contractor establishments \times 25 percent \times 5 minutes/60 = 5,235 hours). The cost for this provision would be \$2,548,372.

Paragraph 9 of the EO Clause in the final rule clarifies that contractors have a duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. The final rule revises the parenthetical at the end of the sentence by replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled person" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notices themselves. The NPRM estimated that contractors would take 10 minutes to receive this accommodation

request, provide the document in an alternative format and maintain a record of its disposition of the request. Upon further consideration, OFCCP determines that there is no additional cost for this provision. We specifically note that the nondiscrimination requirements of VEVRAA currently require contractors to provide reasonable accommodation upon request. *See* 41 CFR 60–300.21(f). Therefore, this modification in the final rule simply updates the examples of possible accommodations that contractors may provide to a visually impaired person, and does not impose a new obligation on contractors.

Paragraph 9 of the final rule also allows, but does not require, contractors to post notices regarding employee rights and its equal employment opportunity obligations electronically if the contractor provides computers that can access the electronic posting to employees working remotely or has actual knowledge the employees have access to the postings. This provision simply provides contractors with another, more expedient, way to meet their existing obligations. OFCCP estimates no additional burden for contractors that opt to post relevant notices electronically.

Paragraph 9 of the final rule requires contractors to electronically post a notice of job applicants' rights if the contractor utilizes an electronic application. The existing regulations require contractors to post notices regarding employee rights and equal employment opportunity obligations in conspicuous places for employees and applicants. *See* 41 CFR 60–300.5(a)(9). The final rule clarifies how contractors can meet this existing obligation for on-line applicants. Therefore, there is no new burden for this provision.

The NPRM proposed adding a new paragraph 13 to the EO Clause that would require contractors to add to their solicitations and advertisements that they are an equal opportunity employer of veterans covered under VEVRAA. Under existing Federal requirements, including EO 11246, contractors are required to state in solicitations and advertisements that the company is an equal opportunity employer. *See* 41 CFR 60–1.4(a)(2). The final rule adopts the proposed requirement, now paragraph 12 of the EO Clause, requiring contractors to state in all solicitations and advertisements that they are equal opportunity employers of protected veterans. The NPRM estimated that it would take contractors 1 minute to comply with this provision. We received one comment from an employer group stating that ads would

cost more due to their increased word length. OFCCP acknowledges that some contractors may experience an increased cost in light of this requirement. However, based on the comments that OFCCP received on this issue, there is no indication that this would be a significant problem for a substantial number of contractors. In fact, the cost of some advertisements and solicitations are based on size (i.e., quarter-page, half-page, full-page) or number of lines, and the type of listing. Moreover, the cost of an advertisement will also depend on the publication's circulation and location. The number of words in the text actually appears to be a lesser factor when determining cost. After some research, OFCCP determined that the average cost per word nationally is between .10 and .20 cents for a classified advertisement. Therefore, the cost would not be greatly impacted by adding two words, "protected veterans," to the advertisement.

Information from OFCCP field staff indicates that many contractors already include "veterans" in their equal employment opportunity statement for solicitations, particularly universities and defense contractors. These entities are often seeking the particular skills and training that veterans receive while in the military. Therefore, based on field experience evaluating contractor practices, OFCCP estimates that approximately 55 percent of contractors, or 94,201, currently comply with this requirement. OFCCP estimates that the remaining 77,074 contractors will have a one-time burden of 5 minutes for amending their existing standard equal employment opportunity statement to include "protected veterans" or similar language. Though no commenter specifically objected to the 1 minute estimate of time required to incorporate the reference to veterans into an existing form or template, OFCCP determined that additional time appears justified and adjusted the time required from 1 minute to 5 minutes in the final rule to ensure that the document is revised, saved or uploaded so that it is readily available for use. Therefore, the total burden for this provision is 6,423 hours (77,074 contractor establishments \times 5 minutes/60 = 6,423 hours). The total cost of this provision is approximately \$240,495.

Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 9,424 hours (113,085 contractor establishments \times 5 minutes/60 = 9,424 hours). The total cost of the provision would be \$352,852.

Paragraph 10 of the EO Clause in the final rule, originally paragraph 11 in the

³¹ All of the estimated costs to contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for management, professional, and related occupations as \$50.11 per hour and administrative support as \$23.72 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.

NPRM, clarifies that the existing requirement to notify labor unions about a contractor's affirmative action efforts also includes notifying them of the contractor's nondiscrimination obligations. This provision in the NPRM is adopted as proposed. No additional burden is created by this clarification of an existing requirement.

Paragraphs 1, 3, 5–8, and 11–12 of the EO Clause in the final rule remain unchanged from the current rule. Consequently, no burden is created.

Section 41 CFR 60–300.5(d) currently allows contractors to incorporate the EO Clause into contracts by reference. Further, the EO Clause is considered part of every covered contract and subcontract even if it is not physically incorporated into the contract. *See* 41 CFR 60–300.5(e). The NPRM proposed requiring that the entire EO Clause be included verbatim in Federal contracts. The NPRM estimated that it would take 1 minute for contractors to copy and paste the clause into its contracts. We received six comments on the burden created by this paragraph, all opposing the requirement to include the entire EO Clause verbatim in contracts. The commenters stated that this requirement would be too burdensome, as the length of a contract, subcontract, or purchase order would increase greatly in size, causing contracts to be rewritten, and that the EO Clause could not, as we had suggested, be readily cut and pasted into these documents. Commenters requested retaining incorporation by reference, consistent with other statutory and equal opportunity requirements. In light of these comments, the final rule permits incorporation of the EO Clause, with the addition of some additional language that OFCCP has provided in the regulatory text summarizing VEVRAA's purpose. OFCCP estimates that contractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is included. The burden for this provision is 14,273 hours (171,275 contractor establishments × 5 minutes/60 = 14,273 hours). The cost for this provision is \$534,418.

Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 20,942 hours (251,300 contractor establishments × 5 minutes/60 = 20,942 hours). The cost for this provision would be \$784,115.

To align with the incorporation by reference approach in 41 CFR 60–300.5(d), the final rule section 60–300.5(e) reverts back to the current language in the regulations. That language considers the EO Clause a part

of the contract whether or not it is physically incorporated into a written contract and whether or not there is a written contract. No new burden is created by reverting back to the existing language.

2. Section 60–300.21 Prohibitions

The NPRM proposed clarifying that an individual who rejects a reasonable accommodation made by the contractor may still be considered a qualified disabled veteran if the individual subsequently provides or pays for a reasonable accommodation. *See* 41 CFR 300.21(f)(3). The final rule retains the proposals in the NPRM; however, no new burden is created.

3. Section 60–300.40 Applicability of the Affirmative Action Program Requirement

The final rule adopts the small change to paragraph (c) of this section. The change specifies that the official designated by the contractor pursuant to § 60–300.44(i) reviews and annually updates the contractor's affirmative action program. This change reflects the intent of the existing language. No burden is generated by this change.

4. Section 60–300.41 Availability of the Affirmative Action Program

Though changes to this section were proposed in the NPRM, OFCCP is not incorporating those proposals into the final rule. Instead, the final rule retains the language in the existing § 60–300.41, with a small adjustment to clarify that contractors do not need to include the data metrics required by § 60–300.44(k) in their AAP, due to commenters' concerns about confidentiality. This small clarification creates no new or additional burden.

5. Section 60–300.42 Invitation to Self-Identify

The current regulation requires the contractor to invite applicants who are disabled veterans, as defined in section 60–300.2, to self-identify only after making an offer of employment, subject to two exceptions. *See* 41 CFR 60–300.42(a). For all other veterans protected by part 60–300, the current regulation requires the contractor to invite the applicant to self-identify “before the applicant begins his or her employment duties.” *See* 41 CFR 60–300.42(b).

The final rule retains the mandatory pre-offer invitation to self-identify as a “protected veteran” in § 60–300.42(a), but eliminates the language proposed in paragraphs (a)(1) and (a)(2) describing the conditions under which pre-offer invitations of disabled veterans are

legally allowed because contractors found this language confusing. The post-offer invitation to self-identify that is in the existing rule remains in the final rule. Finally, instead of requiring contractors to seek input from applicants regarding accommodation, the final rule suggests that they should do so. The NPRM estimated that it would take contractors 1 minute to copy and paste an OFCCP sample invitation to identify into a separate form for electronic and paper applications. The NPRM also estimated burdens for veterans to fill out the self-identification form.

OFCCP received 11 comments opposing the proposed new pre-offer inquiry requirement in section 60–300.42(a). The comments generally stated that the estimated burden was too low because, even with the sample invitations OFCCP included as Appendix B to the regulation, contractors would still need to rewrite existing self-identification forms and modify or update their human resources or applicant tracking systems.

Based on feedback from commenters, OFCCP modified its approach to this calculation. OFCCP's estimate is based on the assumption that modifications to a contractor's application system would be conducted at the parent company level.³² This estimate distinguishes between contractors with web-based or automated application systems and those relying on manual or paper-based systems. Larger contractors, those with more than 100 employees are more likely to have web-based systems. OFCCP estimates that 72 percent of contractors utilize web-based application systems.³³ Working at the corporate level, contractors will take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample “as is” or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor's application form. This burden estimate

³² The EEO–1 data base separately identifies contractor entities (companies) and the facilities that comprise them. The FPDS–NG data base, by contrast, identifies contractor facilities, but does not identify the larger entities of which they are a part. OFCCP utilized the ratio (approximately 3.7) of parent companies to number of establishments from the EEO–1 data to determine that among the universe of 171,275 establishments there are approximately 45,996 Federal contractor companies.

³³ Based on EEO–1 data on the number of establishments 100 or fewer employees we determined that 28% were at this level and would likely have manual systems as “smaller” establishments. Moreover, we used a 100 employee threshold as a cut-off for small employers for application of the 7% goal at the workforce or EEO–1 job category level.

should be considered in conjunction with the start-up costs associated with this rule. OFCCP allotted 20 hours in the VEVRAA final rule to modify human resources information systems or establish a process to comply with the rules' new data collection requirements. This is in addition to costs specified for incorporating the invitation to self-identify in the application process. Taken together, contractors will have over 21 hours to modify their existing application process. The burden for these contractors would be 49,676 hours (33,117 contractor companies \times 1.5 hours = 49,676 hours). The remaining contractors would simply have to incorporate the invitation to self-identify in paper applications. OFCCP estimates this will take approximately 30 minutes. The burden for these contractors would be 6,440 hours (12,879 contractor companies \times 30 minutes/60 = 6,440 hours). The minimum cost for this provision is approximately \$2,101,103.

If all contractors used a web-based application the one-time burden of preparing the form and making the IT changes for this provision is 68,994 hours (45,996 contractor companies \times 90 minutes/60 = 68,994 hours). The maximum cost for this provision is \$2,583,328.

Assuming there are 251,300 establishments, or 67,919 contractor companies,³⁴ in OFCCP's jurisdiction, contractors working at the corporate level will take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample "as is" or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor's application form. The burden for these contractors would be 73,352 hours (48,901 contractor companies \times 1.5 hours = 73,352 hours). The remaining contractors would simply have to incorporate the invitation to self-identify in paper applications. OFCCP estimates this will take approximately 30 minutes. The burden for these contractors would be 9,509 hours (19,017 contractor companies \times 30 minutes/60 = 9,509 hours). The minimum cost for this provision would be approximately \$3,102,510.

If all contractors used a web-based application, the one-time burden of preparing the form and making the IT changes for this provision is 101,879

hours (67,919 contractor companies \times 90 minutes/60 = 101,879 hours). The maximum cost for this provision would be approximately \$3,814,616.

Applicants for available positions with covered Federal contractors will have a minimal burden complying with section 60–300.42(a) in the course of completing their application for employment with the contractor. Section 60–300.42(a), on pre-offer self-identification, requires contractors to invite all applicants to self-identify whether or not they are a protected veteran. OFCCP estimates that there will be a minimum of 15 applicants per job vacancy for on average 15 vacancies per year. OFCCP further estimates that it will take applicants approximately 5 minutes to complete the form. The burden for this provision is 3,211,406 hours (171,275 contractors \times 15 listings \times 15 applicants \times 5 minutes/60 = 3,211,406 hours). The minimum costs for this provision is \$96,695,442. OFCCP estimates that there will be a maximum of approximately 33 applicants per job vacancy for on average 15 vacancies per year per establishment. OFCCP further estimates that it will take applicants approximately 5 minutes to fill out the self-identification form. The burden for this provision is 7,065,093 hours (171,275 contractors \times 15 listings \times 33 applicants \times 5 minutes/60 = 7,065,093 hours). The maximum costs for this provision would be \$212,729,213.

Assuming there were 251,300 establishments impacted by the final rule, the minimum burden for this provision would be 4,711,875 hours (251,300 contractors \times 15 listings \times 15 applicants \times 5 minutes/60 = 4,711,875 hours). The minimum costs for this provision would be \$141,874,556. OFCCP estimates that there will be a maximum of approximately 33 applicants per job vacancy for on average 15 vacancies per year per establishment. OFCCP further estimates that it will take applicants approximately 5 minutes to fill out the self-identification form. The burden for this provision is 10,366,125 hours (251,300 contractors \times 15 listings \times 15 applicants \times 5 minutes/60 = 10,366,125 hours). The maximum costs for this provision would be \$312,124,024.

Several other changes to section 60–300.42 do not create new burdens or costs to contractors. Section 60–300.42(b) of the final rule carries forward the existing requirement that contractors invite voluntary self-identification of all applicants post-offer. Section 60–300.42(c) of the final rule revises paragraph (c) of this section by deleting the second sentence of the

parenthetical at the end of the paragraph. Neither of these provisions includes a new substantive requirement.

Section 60–300.42(d) of the final rule does not incorporate the proposal in the NPRM that would have required contractors to ask disabled veterans whether any necessary reasonable accommodation is needed, and if so, engage in an "interactive process" regarding reasonable accommodation. Instead, the final rule retains the language in the existing rules which is permissive and also eliminates the parenthetical text that provides an example of when a contractor could make an inquiry about a reasonable accommodation. The text is unnecessary and likely confusing. We note that several comments suggested that the proposed change in the NPRM does not take into account the administrative burden associated with ascertaining whether an individual is legally entitled to an accommodation and to research alternative sources of funding for requested accommodations when the accommodation is financially burdensome. We are using the existing regulatory language in the final rule and, therefore, are no longer creating a new burden.

6. Section 60.300.43 Affirmative Action Policy

The final rule clarifies that the nondiscrimination requirements of VEVRAA are limited to protected veterans and that claims of reverse discrimination may not be brought by individuals who do not fall into one of the "protected veteran" categories. No burden is incurred by this clarification because the final rule merely deleted the phrase ". . . because of status as a . . ."

7. Section 60–300.44 Required Contents of the Affirmative Action Program

Section 60–300.44(a) Policy Statement

Section 60–300.44(a) of the final rule clarifies the contractor's duty to make the equal opportunity policy statement accessible to all employees. The final rule revises the parenthetical at the end of the sentence by replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled person" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notices themselves. It also requires the policy statement to include the attitude of the top United States executive, such as the Chief Executive Officer (CEO) or the President of the United States Division of a foreign company, toward

³⁴ OFCCP utilized the same ratio (approximately 3.7) of parent companies to number of establishments from the EEO-1 data to determine that among the universe of 251,300 establishments there are approximately 67,919 Federal contractor companies

the contractor's affirmative action program.

The NPRM estimated that it would take contractors 10 minutes to receive the request, provide the document in an alternative format, and maintain records of compliance. OFCCP determines that there is no additional cost for this provision in the final rule. The nondiscrimination requirements of OFCCP's regulations currently require contractors to provide reasonable accommodation upon request. *See* 41 CFR 60-300.21(f). This modification simply updates the example of a possible accommodation that contractors may provide to a visually impaired person, and does not impose a new obligation on contractors. Similarly, no burden is associated with requiring that the contractor indicate the CEO's support for the affirmative action program rather than his or her "attitude on the subject matter."

Section 60-300.44(b) Review of Personnel Processes

Section 60-300.44(b) currently outlines the requirements for reviewing personnel processes to ensure that they provide for consideration of protected veteran applicants. The NPRM proposed requiring contractors to review their personnel processes on an annual basis to ensure that their obligations are being met, and mandated several steps that contractors must take as part of the review process, including: (1) Identifying the vacancies and training programs for which protected veteran applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and training programs; and (3) describing the nature and type of accommodations for special disabled veterans who were selected for hire, promotion, or training programs. The NPRM estimated that it would take contractors 15 minutes per listing to identify vacancies; 15 minutes to identify training programs; 30 minutes to provide a statement of the reasons for rejecting protected veterans for vacancies and training programs; and 30 minutes per accommodation request. Commenters stated that the burden for performing this review would be significantly higher than OFCCP estimated since contractors would have to update human resources information systems to track the relevant data.

In response to the comments received, the final rule does not adopt the proposals in the NPRM but retains the existing language in 60-300.42(b) and no new burden is created.

Section 60-300.44(c) Physical and Mental Qualifications

The current rule requires contractors to "periodically" review physical and mental job qualification standards to ensure that, to the extent the qualification standards screen out qualified, disabled veterans, they are job-related for the position in question and are consistent with business necessity. *See* 41 CFR 60-300.44(c)(1). The NPRM proposed modifying this section to require the reviews annually and contractors to document the methods used to complete the review, the results of the review, and any actions taken in response to the review.

We received several comments regarding this provision expressing concern that the revision would require contractors to review every job on an annual basis whether or not changes occurred, and that OFCCP underestimated the burden. In order to minimize the burden, the final rule retains the existing language in 41 CFR 60-300.44(c)(1). Therefore, there is no new burden for this provision.

Section 60-300.44(c)(3) of the final rule requires contractors to document the specific reasons behind its belief that the "direct threat" defense applies and maintain this document as a confidential medical record. The existing regulations allow contractors to use as a defense to an allegation that a job qualification screened out a disabled veteran that the disabled veteran poses a "direct threat" to the health or safety of the individual or others in the workplace. *See* 41 CFR 60-300.22. A contractor seeking to establish such a defense would have to document its rationale in order to do so. The final rule requires that the contractor create and maintain a summary of the statement of reasons for its direct threat finding. As contractors would already normally document these instances, we assess no burden for this provision.

Section 60-300.44(f) External Dissemination of Policy, Outreach and Positive Recruitment

Section 300.44(f)(1) of the current rule suggests a number of outreach and recruitment activities that a contractor can undertake in order to increase employment opportunities for protected veterans. The NPRM proposed requiring contractors to enter into linkage agreements with three veterans' recruitment sources: (1) The Local Veterans' Employment Representative (LVERs) in the local employment service office nearest the contractor's establishment; (2) one of several other listed organizations and agencies; and

(3) one of the veterans' service organizations listed in the National Resource Directory (NRD). The NPRM estimated that it would take an average of 1.5 hours to establish one new linkage agreement for contractors obtaining OFCCP Compliance Officer assistance. The NPRM further estimated that it would take contractors an average of 5.5 hours to establish a linkage agreement without such assistance.

We received 12 comments regarding the potential burden of this requirement. Commenters asserted that this requirement was more burdensome than we had projected. Commenters also asserted that the NPRM's requirement to enter into local agreements would not be practical for many establishments, especially for contractors that recruit in multiple states or nationally, and for contractors in remote locations. In addition, commenters expressed concern about how the proposed provision would impact existing linkages with organizations that may not be included among OFCCP's listed resources. Others objected to the five (5) year recordkeeping requirements.

In response to the comments, OFCCP revised the final rule in several ways. First, OFCCP eliminated the requirement to establish three linkage agreements. The final rule retains the existing language of § 60-300.44(f)(1)(i) which requires that the contractor undertake "appropriate outreach and positive recruitment activities," and then provides a number of suggested resources. No burden is created in the final rule by this provision.

Section 60-300.44(f)(1)(ii) of the final rule requires contractors to send written notification of the company's affirmative action program policies to subcontractors, vendors, and suppliers. The NPRM estimated that it would take contractors 5 minutes to prepare the notification and provide it to its subcontractors via the Internet in a group email and 1 minute to add or subtract any additions or deletions to the email group. The final rule recalculates the estimated burden of this provision. The existing regulations recommend that contractors send written notification of the company's affirmative action policies to subcontractors, vendors, and suppliers. *See* 41 CFR 60-300.44(f)(6). OFCCP's consultation with field staff indicates that approximately 10 percent of contractors, or 17,128, currently implement this recommendation so no additional burden is calculated for this population. At a minimum, OFCCP estimates that the remaining 154,147 contractors will take 15 minutes to prepare the notification and send it to

subcontractors, vendors, and suppliers, and an additional 15 minutes to execute the email address changes in the company's email system. The recurring burden for preparing the notice is 38,537 hours (154,147 contractor establishments \times 15 minutes/60 = 38,537 hours). Likewise, the IT burden is estimated at 38,537 hours (154,147 contractor establishments \times 15 minutes/60 = 38,537 hours). The minimum cost for this provision is \$4,328,771. Assuming that all 171,275 establishments incurred the combined 45 minute burden, the maximum cost of this provision is \$4,809,762.

Assuming 251,300 establishments would be impacted by the final rule, OFCCP estimates that 226,170 contractors will take 45 minutes to prepare the notification and send it to subcontractors, vendors, and suppliers. The burden for this provision would be 169,628 hours (226,170 contractor establishments \times 15 minutes/60 = 169,628 hours). The minimum cost for this provision would be \$6,351,328. Assuming that all 251,300 establishments incurred the combined 45 minute burden, the burden would be 188,475 hours (251,300 \times 45 minutes/60 = 188,475 hours). The maximum cost for the provision would be \$7,057,032.

Section 60–300.44(f)(2)(ii) in the final rule sets forth additional suggested outreach efforts that contractors could engage in to increase its recruitment efforts. The final rule adds an additional resource to paragraph (f)(2)(ii) that contractors are suggested to use, and that is the Veterans Job Bank. No burden is created by this change.

Section 60–300.44(f)(2)(ii)(F) in the final rule is different than in the NPRM, reverting back to the language in the existing regulation. The NPRM stated that contractors “must consider” protected veteran applicants for jobs other than the one for which they applied. The final rule states that contractors “should consider applicants . . .” and the final rule amends the NPRM in that regard. No burden is created by this provision.

Section 60–300.44(f)(3) of the final rule requires the contractor to review the effectiveness of its outreach and recruitment efforts annually. In response to comments that OFCCP underestimated the time necessary to conduct the annual review, the final rule increases the time to comply with this provision from 20 to 30 minutes. OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under EO 11246 and section 503 of the Rehabilitation Act (section 503). OFCCP believes that if a contractor

has been complying with its recruitment, outreach, data collection, and recordkeeping responsibilities throughout the affirmative action program year, as well as its general obligation under § 60–300.40(c) to review and update its affirmative action program on an annual basis (which includes its outreach and recruitment efforts, *see* § 60–300.44(f)), it will take an average of 30 additional minutes for the contractor to conduct the specific effectiveness assessment of its outreach and recruitment efforts, which would include a simple comparison of the annual raw data on applicants and hires that contractors collect pursuant to § 60–300.44(k) to previous years' data, as well as their hiring benchmark, and determining in light of these numbers and any other relevant circumstances whether adjustments in their outreach efforts is necessary. OFCCP estimates that 1 percent of contractors are first-time contractors during an abbreviated affirmative action program year and will be unable to complete the review. The recurring burden for this provision is 84,781 hours (169,562 contractor establishments \times 30 minutes/60 = 84,781 hours). The estimated cost for this provision is \$3,174,438.

Assuming that 251,300 establishments would be impacted by the final rule, the burden for this provision would be 124,394 hours (248,787 contractor establishments \times 30 minutes/60 = 124,394 hours). The cost for this provision would be \$4,657,641.

Section 60–300.44(f)(4) of the final rule is a recordkeeping provision. In the final rule, this provision requires contractors to document all the outreach and recruitment activities they undertake to comply with the obligations of this paragraph, and retain these documents for a period of 3 years. Under the existing regulations, contractors are required to establish meaningful outreach and recruitment contacts. Consequently, contractors' outreach and recruitment should already be the subject of some documentation. This documentation may take several forms. It may include, for example, the numbers and types of outreach and recruitment events, the targeted groups(s) or types of participants for each event, the dates or timeframes, location of the events, and who conducted and participated in the outreach and recruitment on behalf of the contractor. OFCCP estimates that it will take contractors 15 minutes to maintain this basic outreach and recruitment documentation, much of which would typically be generated as a result of their obligations pursuant to other provisions in the regulations. This

includes IT time to make the software configuration needed to tell the system to store the data for an additional year. The recurring burden for this provision is 42,819 hours (171,275 contractor establishments \times 15 minutes/60 = 42,819 hours). The estimated cost for this provision is \$1,603,263. Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 62,825 hours (251,300 contractor establishments \times 15 minutes/60 = 62,825 hours). The cost for this provision would be \$2,352,344.

Section 60–300.44(g) Internal Dissemination of Policy

The final rule adopts the proposed language in section 60–300.44(g)(1) without change. This section requires contractors to develop the internal procedures listed in paragraph (g)(2) of this section to communicate to employees its obligation to engage in affirmative action efforts to employ and advance in employment qualified protected veterans. No additional burden is assessed here because the existing regulations require the development of internal dissemination procedures.

The NPRM proposed, in paragraph (g)(2), making a number of currently suggested actions in this section mandatory, including incorporating the affirmative action policy in company policy manuals, informing all applicants and employees of the contractor's affirmative action obligations, and conducting meetings with management and company leadership to ensure they are informed about the contractor's obligations. The NPRM also proposed requiring contractors to hold meetings with employees at least once a year to discuss the company's affirmative action policy. The NPRM estimated that it would take contractors 15 minutes to download an OFCCP training module or 10 hours for contractors to develop their own training that communicates the company's affirmative action obligations.

We received 12 comments concerning the potential burden associated with this paragraph. Commenters asserted that the burden calculation was too low because it did not account for the cost of materials, class time and lost productivity. In order to decrease the cost of the provision, commenters suggested: (1) Allowing contractors to conduct the training during other existing meetings related to equal employment opportunity; (2) training managers only, who can then disseminate the information to their staff; or (3) specifically allowing

contractors to use Internet based training to satisfy the requirement.

The final rule narrows the scope of the internal dissemination efforts that will be required of contractors from that set forth in the NPRM in section 60–300.44(g)(2)(i). Two of the five elements that the NPRM proposed to require are maintained as requirements in paragraph (g)(2) of the final rule. The two provisions require (1) including the policy in the contractor's policy manual; and (2) notifying union officials of the policy and requesting their cooperation, if the contractor is party to a collective bargaining agreement. We assume that the majority of Federal contractors have employee manuals and other information stored and available electronically, and thus we believe no additional burden stems from this requirement. Further, the EO Clause currently requires contractors to notify unions of their affirmative action policy so there is no new burden associated with this requirement. See § 60–300.5, EO Clause paragraph 10 of the final rule. Section 60–300.44(g)(3) of the final rule suggests, but does not require, the elements that were proposed as requirements in the NPRM. Elements that were suggested in the existing rule remain in paragraph (g)(3) as suggestions in the final rule, with the exception of the recordkeeping provision, which has been eliminated. The provisions in the final rule are in the existing regulation so no new burden is created.

Section 60–300.44(h) Audit and Reporting System

The proposals in the NPRM for § 60–300.44(h) outline the contractor's responsibility for designing and implementing an audit and reporting system for the company's AAP. The only change proposed in the NPRM was for the contractor to document the actions taken to comply with the obligations set forth in this section and to maintain these documents subject to the requirements of § 60–300.80. This would allow both the contractor and OFCCP to evaluate the effectiveness of its audit and reporting system. The final rule adopts the proposal in the NPRM. Under the existing rule, most contractors should document and maintain their analysis of the AAPs as a normal part of their review and assessment process. Compliance officers report that, on request, they review or are provided a range of documents related to the analysis including, for example, reports, summaries and data. In many regards, this provision merely acknowledges and formalizes a current contractor practice. OFCCP estimates

that it will take contractors 10 minutes to document the actions taken to comply with section 60–300.44(h) and retain those documents. The recurring burden for this provision is 28,546 hours (171,275 contractor establishments × 10 minutes/60 = 28,546 hours). The estimated cost of this provision is \$1,068,842. Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 41,833 hours (251,300 establishments × 10 minutes/60 = 41,833 hours). The cost for this provision would be \$1,568,229.

Section 60–300.44(h)(2) requires contractors to undertake action necessary for bringing the program into compliance. This is an existing provision and generates no additional burden.

Section 60–300.44(i) Responsibility for Implementation

The final rule does not incorporate the proposal in the NPRM and the language in the existing regulation that contractors should, but are not required, to take this step is retained. Therefore, no burden is created.

Section 60–300.44(j) Training

The final rule restores the existing regulatory requirements. The final rule does not incorporate the portion of the proposed rule listing specific training items that must be covered by contractors or the specific recordkeeping requirement. However, it does retain the existing rule's general requirement that “[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes” be trained to ensure that the contractor's affirmative action commitments are implemented. Accordingly, no new burden is created by this provision in the final rule.

Section 60–300.44(k) Data Collection and Analysis

The NPRM proposed adding a new section 60–300.44(k) that would require contractors to 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 those that were hired by the contractor. The final rule retains the NPRM's proposal for contractors to document and maintain applicant and hire data, but eliminates from the final rule the requirement for contractors to collect, maintain, and analyze information on the number of referrals and the ratio of priority referrals of veterans to total referrals, *i.e.*, paragraphs (k)(1), (k)(2),

and (k)(3) in the NPRM. The final rule also does not require contractors to calculate applicant, hiring, and job fill ratios in this provision. This eliminates many of the concerns commenters had with regard to this paragraph, and also serves to decrease the burden on contractors. The other calculations mentioned in this section are already required by other sections of part 60–300 or by EO 11246. In response to the comments, OFCCP accounts for the costs of modifying human resources information systems in the Initial Capital and Start-up Costs section, *infra*.

Based on feedback received from public comments expressing concerns about the costs of modifying human resources information systems, OFCCP believes that most contractors will have the capability to conduct the required calculations electronically. Therefore, OFCCP estimates that it will, at a minimum, take contractors 25 minutes to tabulate the applicant data using an electronic database that is integrated with the contractors' human resources information database where the data is typically stored. In addition, we estimate that an additional 10 minutes is required to electronically or otherwise store the records (e.g., the report or other written documentation generated by the calculations that explain the methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations). The recurring burden for this provision is 99,910 hours (171,275 contractor establishments × 35 minutes/60 = 99,910 hours). The minimum cost for this provision is approximately \$3,740,926.

However, some commenters noted that companies may have to calculate this information manually. Commenters stated that these calculations could take more than 6 hours. OFCCP declines to adopt the 6 hour estimate for manual calculations in large part because the estimate and the requirements of this section are significantly scaled back from the proposed rule, as the final rule does not require contractors to tabulate referral data or applicant and hiring ratios. Accordingly, starting with the 6 hour estimate and scaling it back given the reduced burden of the final rule, OFCCP estimates that establishments without web-based application systems would take approximately 3 hours to tabulate the information required by this section. The burden for these establishments would be 102,765 hours (34,255 contractor establishments × 3 hours = 102,765). The remaining establishments would incur the 35

minute burden, for a total of 79,928 hours (137,020 contractor establishments \times 35 minutes/60 = 79,928 hours). The maximum cost for this provision would be approximately \$6,840,550.

Assuming there are 251,300 establishments impacted by the final rule, OFCCP estimates that it will, at a minimum, take contractors 25 minutes to tabulate the applicant data using an electronic database and an additional 10 minutes to electronically or otherwise store the records (e.g., the report or other written documentation generated by the calculations that explain the methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations). The recurring burden for this provision would be 146,592 hours (251,300 contractor establishments \times 35 minutes/60 = 146,592 hours). The minimum cost for this provision would be approximately \$5,488,802.

OFCCP estimates that establishments without web-based application systems would take approximately 3 hours to tabulate the information required by this section. The burden for these establishments would be 150,780 hours (50,260 contractor establishments \times 3 hours = 150,780 hours). The remaining establishments would incur the 35 minute burden, for a total of 117,273 hours (201,040 contractor establishments \times 35 minutes/60 = 117,273 hours). The maximum cost for this provision would be approximately \$10,036,667.

The NPRM also proposed requiring contractors to maintain that data for 5 years. In response to the comments, the final rule reduces the record retention requirement for section 60–300.44(k) to 3 years. Since some of the data calculations are already required by the implementing regulations for EO 11246, the NPRM estimated that it would take contractors 6 minutes to comply with the additional requirements of this provision. We received nine comments concerning section 60–300.44(k). Generally, these commenters asserted that OFCCP's burden estimate was too low. More specifically, some commenters asserted that OFCCP did not include the costs of new software to collect the data. No new software needs are anticipated; however, a software switch or configuration may be required to tell the system to retain the records for the additional time period. According to an IT professional, this is a simple configuration and should take about 15 minutes to execute. No new

burden is added because the change required by the § 60–300.44(f)(4) recordkeeping provision would include this IT change and they would benefit from the economy of scale.

8. Section 60–300.45 Benchmarks for Hiring

The NPRM proposed requiring contractors to establish annual hiring benchmarks, expressed as the percent of total hires who are protected veterans that the contractor seeks to hire in the following year. The NPRM proposed allowing contractors to consult a number of different data sources to develop benchmarks that reflect the contractor's unique hiring circumstances. It also required contractors to document the annual hiring benchmark and detail the factors they considered when establishing the benchmark and significance of each of the factors. The NPRM proposed requiring that contractors retain these records for five years.

The NPRM estimated a total of 1 hour per contractor establishment for compliance with this requirement. The NPRM further estimated that it would take contractors 30 minutes to maintain records of the benchmark calculation. We received 10 comments on the proposed requirement. Some commenters asserted that OFCCP significantly underestimated the burden hours and dollar costs of this provision. Commenters stated that OFCCP did not account for the number of openings per contractor per year, costs for software, and data storage. One commenter stated that the burden would be lower than for EO 11246 because OFCCP did not propose to require availability or utilization analysis.

The final rule, in consideration of the comments received, requires the contractor to establish benchmarks in one of two ways. A contractor may use the national percentage of veterans in the civilian labor force as the benchmark, or, the contractor may establish its own benchmark using the method proposed in the NPRM that fits the company's specific needs. OFCCP will provide, and periodically update on its public Web site, the national percentage of veterans in the civilian labor force.

In light of the significant revisions to this section in the final rule, we revised the burden estimate. OFCCP estimates that 90 percent of contractors, or 154,147, will use the national benchmark provided on the OFCCP Web site because it is the easiest approach. The remaining 10 percent of contractors, or 17,128, will likely opt to develop their own benchmarks using the various

data sources described in the final rule. We estimate that it will take 5 minutes to access, view and print the national benchmark we will make available on the OFCCP Web site, and another 5 minutes to maintain the relevant documentation for the 90 percent of contractors that use the national average provided by OFCCP. The relevant documentation could, for example, include but is not limited to any information showing the official adoption of the national benchmark by the appropriate officials and how that was communicated to the appropriate staff. We propose creating a specific Web page to make locating the information easy for contractors; moreover, updating the information is the responsibility of OFCCP and not the contractors.

The one-time burden for using the national benchmark is 12,846 hours (154,147 contractor establishments \times 5 minutes/60 = 12,846 hours). The burden for maintaining the relevant documentation is 12,846 hours (154,147 contractor establishments \times 5 minutes/60 = 12,846 hours).

OFCCP further estimates that it will take the remaining 10 percent of contractors 2 hours to establish their own benchmark and 15 minutes to maintain documentation demonstrating how the benchmark was determined. We expect that this type of documentation would ordinarily be generated during the process of establishing the contractor's benchmark and obtaining its approval by the appropriate internal officials. The amount of detail included in this documentation remains in the discretion of the contractors, but OFCCP suggests that the documentation provide adequate information as to how the benchmark was developed, approved and communicated to the appropriate officials and staff. The one-time burden for these contractors is 34,256 hours (17,128 contractor establishments \times 2 hours = 34,256 hours). The burden for maintaining the associated documentation is 4,282 hours (17,128 contractor establishments \times 15 minutes/60 = 4,282 hours). The total cost for this provision is approximately \$2,404,914.

Assuming that 251,300 establishments would be impacted by the final rule, one-time burden for using the national benchmark would be 37,695 hours (226,170 contractor establishments \times 10 minutes/60 = 37,695 hours). The burden for contractors that choose to establish their own benchmarks would be 56,543 hours (25,130 contractor establishments \times 2.25 hours = 56,543 hours). The total cost for this provision would be \$3,528,516.

Veterans make up 7.25 percent of the employed population.³⁵ Under the rule, contractors have the option of establishing their own benchmark for employing protected veterans or meeting a benchmark set by OFCCP, currently 8 percent. Assuming all contractors will choose to meet the OFCCP benchmark, OFCCP estimates that Federal contractors would need to hire an additional 205,500 protected veterans.³⁶ This amounts to approximately one veteran per establishment or three veterans per company. According to research conducted by the Job Accommodation Network (JAN), employers in the study reported that a high percentage (57 percent) of accommodations cost absolutely nothing. For the remaining 43 percent, the typical cost of providing a reasonable accommodation was approximately \$500.³⁷ Assuming that disabled veteran hiring will be consistent with their share of the disabled labor force that consists of individuals with disabilities, then we estimate that 36,330 veterans with disabilities may need accommodations with a total cost of \$19,010,209 in the year the target is met and \$8,037,516 in recurring costs. The cost of providing these reasonable accommodations is included in the cost of this rule.

9. Section 60–300.60 Compliance Evaluations

The proposed rule set forth several changes to the process the contractor and OFCCP will follow in conducting compliance evaluations. The NPRM added a sentence to paragraph 60–300.60 (a)(1)(i) regarding the temporal scope of desk audits performed by OFCCP, stating that OFCCP “may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part.” The final rule adopts this proposal. No

³⁵ Calculation based on unpublished table, *Employment status of persons 18 years and over by veteran status, period of service, sex, race, Hispanic or Latino ethnicity, and disability status, Annual Average 2012* (Source: Current Population Survey). (10.233/141,050)*100=7.25%. The table is available on request from the Bureau of Labor Statistics at the Department of Labor. BLS does not release some tables for a variety of reasons, such as sample size or possibility of confusion. Finally, this estimate includes all veterans, not only the protected veterans.

³⁶ Based on data from the Bureau of Labor Statistics Quarterly Census of Employment and Wages. OFCCP estimates that approximately 27.4 million employees could be affected.

³⁷ Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” Sept. 1, 2012. *Accommodation and Compliance Series*, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013).

burden is created by this provision, as it merely clarifies existing agency policy to ensure that it is understood and interpreted correctly.

The NPRM, in § 60–300.60(a)(2), proposed correcting an error in the existing regulations in this paragraph, changing the reference from the “requirements of the Executive Order” to the “requirements of Section 4212.” The final rule adopts this proposal and replaces the reference to “Section 4212” with “VEVRAA.” No burden is created by this change.

Sections 60–300.60(a)(3) and (a)(4) in the NPRM revised these two paragraphs to allow OFCCP to review documents pursuant to a compliance check and conduct focused reviews either on-site or off-site, at OFCCP’s option. The proposals are adopted in the final rule but no burden is created.

The NPRM proposed adding a new paragraph (d) to § 60–300.60 detailing a new procedure for pre-award compliance evaluations under VEVRAA, much like the procedure that currently exists in the Executive Order regulations (*see* 41 CFR 60–1.20(d)). This proposal is adopted in the final rule without creation of additional burden.

10. Section 60–300.80 Recordkeeping

Section 60–300.80 describes the recordkeeping requirements that apply to contractors under VEVRAA. The final rule also eliminates the recordkeeping requirements for referral data under the proposed paragraph 5 of the EO Clause and § 60–300.44(k). Consequently, we assess no burden for these provisions.

The final rule includes a three-year recordkeeping requirement, rather than the proposed five-year requirement, for §§ 60–300.44(f)(4), 60–300.44(k), and 60–300.45(c). No new burden is assessed under this section because it is carried under the burden assessed for §§ 60–300.44(f)(4) and 60–300.44(k) and the contractors benefit from the economy of scale. In that section, we determined that no new software needs are anticipated; however, a software switch or configuration may be required to tell the system to retain the records for the additional time period.

11. Section 60–300.81 Access to Records

Section 60–300.81 of the final rule requires contractors to specify all available records formats and allow OFCCP to select preferred record formats from those identified by the contractor during a compliance evaluation. OFCCP completed 4,014 compliance evaluations in Fiscal Year 2011. We estimate fewer evaluations for Fiscal Year 2012. Upon request, the

contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information. No burden is assessed as there are no recordkeeping or document production requirements.

Commenters criticized the proposal to allow OFCCP access to records off-site, particularly as it relates to the security of confidential records. The final rule retains the proposed requirement to provide OFCCP off-site access to materials by request. However, OFCCP modified § 60–300.81 of the final rule in response to comments regarding record confidentiality.

12. Appendix A, Guidelines on Reasonable Accommodation

We received one comment from an employer association that asserted contractors would have a burden if they were to be assessed liability and costs associated with accommodations to be determined by employees.

Although an individual’s preference for a particular reasonable accommodation should be given primary consideration, a contractor is not obligated to provide an employee with the accommodation of his or her choice, as long as the accommodation the contractor provides is effective. Nor does a contractor have to provide an employee with an accommodation that would impose an undue hardship on its operations, create a “direct threat” for the employee or others, or result in a violation of another Federal law. Accordingly, no additional burden is created as asserted by the commenter.

Appendix A is incorporated into the final rule as proposed, with small changes to update the references to specific accommodations to reflect current technology and terminology (such as replacing the reference to “telecommunication devices for the deaf (TDD)” with the more current “text telephones (TTYs),” and including modern technology such as speech activated software, and as set forth in the discussion of paragraph 9 of the EO Clause in § 60–300.5). Consistent with the change to § 60–300.42(c), we also deleted the words “and wish to benefit under the contractor’s affirmative action program” from paragraph 1. Because it does not contain new requirements there is no burden associated with Appendix A.

13. Initial Capital or Start-up Costs Human Resource Information Systems

Several commenters noted that the new data collection requirements in the

proposed rule would require modifications to existing human resources information systems (HRIS). In order to estimate the start-up costs for the final rule, OFCCP considered what would be required to modify existing HRIS to track the number of protected veteran applicants and hires. Because contractors must already maintain information on their employees by race/ethnicity and sex, contractors should have some mechanism in place to track the newly required information.

OFCCP assumes that modifications to contractor HRIS will be done at the parent company level. The minimum cost for modifying HRIS is based on the estimate that 72 percent of contractors utilize this kind of electronic system.³⁸ Based on information from IT professionals, OFCCP estimates it would take each contractor company on average 20 hours to make the needed systems modifications to track applicant and hiring information for protected veterans. This includes IT and administrative professionals to make the changes. The estimated costs for these modifications are based on data from the Bureau of Labor Statistics in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for a professional of \$47.21 per hour. Therefore, the minimum estimated burden for the capital and start-up costs is 666,340 hours (33,317 contractor companies \times 20 hours = 666,340 hours). We calculate the total minimum estimated start-up costs as \$31,457,911.40 (666,340 hours \times \$47.21/hour = \$31,457,911.40) or \$944 per parent company. Assuming all contractor companies utilize HRIS, the maximum burden would be 919,920 hours (45,996 contractor companies \times 20 hours = 919,920 hours). We calculate the total maximum estimated start-up costs as \$43,429,423 (919,920 hours \times \$47.21/hour = \$43,429,423) or \$944 per parent company.

Assuming there are 251,300 establishments in OFCCP's jurisdiction, or 67,919 companies, the minimum estimated burden for the capital and start-up costs would be 978,020 hours (48,901 contractor companies \times 20 hours = 978,020 hours). The total minimum estimated start-up costs would be \$46,172,324 (978,020 hours \times \$47.21/hour = \$46,172,324) or \$944 per parent company. Assuming all contractor companies utilize HRIS, the maximum burden would be 1,358,380 hours

(67,919 contractor companies \times 20 hours = 1,358,380 hours). We calculate the total maximum estimated start-up costs as \$64,129,120 (1,358,380 hours \times \$47.21/hour = \$64,129,120) or \$944 per parent company.

5 CFR 1320.3(b)(1)(i)—Reviewing Instructions

Several commenters noted that the proposed rule did not quantify the burden of reading and understanding the VEVRAA revisions on contractors. OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish several compliance assistance materials including factsheets and "Frequently Asked Questions." OFCCP will also host webinars for the contractor community that will describe the key provisions in the final rule.

OFCCP estimates it will take, at a minimum, 1 hour to have a management professional at each establishment either read compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn about the new requirements of the final rule. OFCCP believes that this is a reasonable estimate since there are substantially fewer new requirements in the final rule than proposed in the NPRM. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for a management professional at \$50.11. Therefore, the estimated burden for rule familiarization is 171,275 hours (171,275 contractor establishments \times 1 hour = 171,275 hours). We calculate the total estimated minimum start-up costs as \$8,582,590 (171,275 hours \times \$50.11/hour = \$8,582,590) or \$50 per establishment.

Commenters suggested that reviewing the requirements of the final rule would take up to 6 hours. OFCCP declines to adopt this calculation since it is based reviewing the proposed rule which included a significant number of additional requirements that are not in the final rule. Therefore, OFCCP estimates the maximum for reviewing the rule would be 4 hours for a total of 685,100 (171,275 contractor establishments \times 4 hour = 685,100 hours). We calculate the total maximum estimated start-up costs as \$34,330,361 (685,100 \times \$50.11/hour = \$34,330,361) or \$200 per establishment.

Assuming there are 251,300 establishments impacted by the final rule, the estimated minimum burden for the capital and start-up costs would be 251,300 hours (251,300 contractor establishments \times 1 hour = 251,300 hours). The total estimated minimum costs would be \$12,592,643 (251,300 hours \times \$50.11/hour = \$12,592,643) or \$50 per establishment. OFCCP estimates the maximum for reviewing the rule would be 4 hours for a total of 1,005,200 hours (251,300 contractor establishments \times 4 hour = 1,005,200 hours). The total maximum estimated maximum costs would be \$50,370,572 (1,005,200 hours \times \$50.11/hour = \$50,370,572) or \$200 per establishment.

Operations and Maintenance Costs

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the burden calculated above.

60–300.42 Invitation to Self Identify

OFCCP estimates that the contractor will have some operations and maintenance costs associated with the invitations to self-identify. The contractor must invite all applicants to self-identify at both the pre-offer and post-offer stage of the employment process. Given the increasingly widespread use of electronic applications, any contractor that uses such applications to invite self-identification would not incur copy costs. However, to account for contractors who may still choose to use paper applications, we are including printing and/or copying costs. Therefore, we estimate a single one page form for both the pre- and post-offer invitation. The final rule reduced the number of forms to one instead of two to make the self-identification process less paperwork intensive and to reduce costs. We also estimate an average copying cost of \$.08 per page. Assuming contractors using a paper-based application system, used 15 applications for an average of 15 listings per establishment, the minimum estimated total cost to contractors will be \$616,590 (34,255 establishments \times 225 copies \times \$.08 = \$616,590). Assuming contractors using a paper-based application system, used 33 applications for an average of 15 listings per establishment, the maximum estimated cost to contractors will be \$1,356,498 (34,255 establishments \times 495 copies \times \$.08 = \$1,356,498).

Assuming that 50,260 of 251,300 establishments with a paper-based application system, used 15 applications for an average of 15 listings per establishment, the minimum

³⁸ Utilizing EEO-1 data, OFCCP estimates that 72 percent of regulated contractor companies have greater than 100 employees and will likely use an electronic human resources system.

estimated total cost to contractors will be \$904,680 (50,260 contractor establishments × 225 copies × \$.08 = \$904,680). Assuming contractors using a paper-based application system, used 33 applications for an average of 15 listings per establishment, the maximum estimated cost to contractors will be \$1,990,296 (50,260 contractor establishments × 495 copies × \$.08 = \$1,990,296).

D. Summary of Benefits

OFCCP's analysis of the benefits of this proposal emphasizes the non-monetary benefits. Pursuant to Executive Order 13563, agencies "may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity* * *" in their analysis of the costs and benefits of a proposed regulation. E.O. 13563 § 1(c).

As revised, the final rule creates a number of benefits that will further the equal employment opportunity and affirmative action objectives of VEVRAA. First, the final rule will facilitate the connection of job-seeking veterans with contractors looking to hire. The final rule 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 clarification will help to ensure that veterans can easily learn about all available jobs with Federal contractors in their state.

Second, the final rule will ensure that the contractor understands and effectively communicates its affirmative action obligations to its workforce and the other entities with which it does business. This, in turn, will facilitate a greater understanding of the purpose of the affirmative action policies among the contractor's employees and business associates and promote their active support for the contractor's affirmative action efforts.

The final rule also provides increased tools with which the contractor can assess its affirmative action efforts. Until now, the contractor had few objective criteria by which it could measure the effectiveness of its affirmative action efforts. To that end, the final rule requires the contractor to collect data that will enable the contractor and OFCCP to more accurately assess the contractor's efforts. This includes collecting data about applicants so the contractor knows how many protected veterans it is reaching. The final rule also calls for the establishment of a benchmark that can serve as a tool to

help the contractor objectively evaluate its recruitment efforts and determine which ones are fruitful in attracting qualified protected veteran candidates, and which ones need to be changed.

Finally, the final rule modifies requirements regarding the manner in which OFCCP conducts its compliance reviews of contractor establishments. These changes include a greater emphasis on OFCCP review of available electronic data, greater flexibility in where reviews take place, and a new procedure for a pre-award compliance review like that currently contained in the EO 11246 regulations. These revisions will allow OFCCP to conduct contractor compliance reviews far more efficiently.

E. Conclusion

OFCCP concludes in the final regulatory impact analysis that the costs of the final rule will range and likely exceed \$100 million annually. The variations in costs depend on the number of establishments impacted by the final rule and applicants who respond to the pre-offer invitation to self-identify. Costs will also vary by company depending on their existing infrastructure. We estimate that the lower end costs would be \$177,296,772 assuming that there are approximately 171,275 establishments impacted by the final rule. The lower end estimate also relies on the assumption that many of these establishments have some form of electronic application and human resources information systems that would make complying with the rules requirements more efficient. The higher end estimate of \$483,560,138 assumes that there are 251,300 establishments impacted by the final rule. The higher end further assumes that a portion of those contractors, primarily smaller ones with fewer employees, would have to expend more personnel time complying with the rules requirements. Therefore, the rule will have a significant economic impact. However, OFCCP believes that the final rule will have extensive benefits for veterans who are prospective and current employees of Federal contractors and Federal contractors. As such, OFCCP concludes that the benefits of the rule justify the costs.

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

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, requires agencies promulgating rules to consider the impact they are likely to have on small entities. More specifically, the RFA requires agencies to "review rules

to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations." If a rule is expected to have a "significant economic impact on a substantial number of small entities," the agency must prepare an initial regulatory flexibility analysis (IRFA). If, however, a rule is not expected to have a significant economic impact on a substantial number of small entities, the agency may so certify, and need not perform an IRFA.

Based on the analysis below, in which OFCCP has estimated the impact on small entities that are covered by contractors of complying with the requirements contained in this rule, OFCCP certifies that this rule will not have a significant economic impact on a substantial number of small entities.

In making this certification, OFCCP first determined the approximate number of small regulated entities that would be subject to the rule. OFCCP's review of the FY 2009 EEO-1 data revealed that the final rule directly impacts 20,490 Federal contractors with between 50 and 500 employees.³⁹ OFCCP also analyzed the number of small entities impacted by the rule as compared to the agency's entire universe of regulated entities of approximately 45,996 Federal contractors.⁴⁰ OFCCP estimates that approximately 44 percent of the total number of Federal contractors, or 20,490, are small entities with between 50 and 500 employees. OFCCP further refined the analysis to compare the impacted small entities to just the universe of 21,541 small entities in OFCCP's jurisdiction. Under this scenario, approximately 95 percent of small entities would be impacted by the requirements of the rule. Utilizing these comparisons, the final rule may have an impact on a substantial number of small entities.

OFCCP has determined, though, that the impact on entities affected by the

³⁹The Small Business Administration (SBA) Office of Advocacy reports that there are 27.4 million small entities in the United States. Since Federal contracts are not limited to specific industries, OFCCP assessed the impact of this final rule on small entities overall. If OFCCP used this approach, the final rule will impact less than .07% of non-employer firms and .34% of employer firms nationwide.

⁴⁰The EEO-1 data base separately identifies contractor entities (companies) and the facilities that comprise them. The FPDS-NG data base, by contrast, identifies contractor facilities, but does not identify the larger entities of which they are a part. OFCCP utilized the ratio (approximately 3.7) of parent companies to number of establishments from the EEO-1 data to determine that among the universe of 171,275 establishments there are approximately 45,996 Federal contractor companies.

final rule would not be significant. In order to further inform our analysis of the economic impact of this rule on small entities, we considered the cost impact of the rule on 2 sizes of entities. We estimated the compliance costs of the final rule on Federal contractors with 50 to 100 employees and 100 to 500 employees. Contractors with less than 50 employees will not be subject to the new affirmative action requirements in subpart C of the final rule. OFCCP's analysis of the impact on small entities compared the estimated cost of compliance with the final rule for small entities to the estimated annual receipts of these entities as provided by the SBA. If the estimated compliance costs are less than 1 percent of the estimated revenues, OFCCP considers it appropriate to conclude that there is no significant economic impact.⁴¹

Contractors with 50–100 Employees

We estimate the first year cost of this rule to a contractor with 50 to 100 employees to be approximately \$1536. The first year cost of the rule is the year with the highest compliance cost as the contractor is incurring the start-up costs of the rule. This primarily includes the time contractors will expend reviewing the new requirements of the rule and the costs of any reasonable accommodations provided to newly hired disabled veterans.

In order to estimate the cost of this rule on an entity with 50 to 100 employees, we are applying the same type of compliance cost structure previously described in the above cost analysis. However, for this small contractor, we assume they would have a manual application process and not require costly human resources information systems changes. We further assume these contractors would expend: 3 hours manually conducting the data analysis required by the new 41 CFR 60–300.44(k); 2 hours establishing their own benchmark; 4 hours having a manager review the new requirements of the rule; and incur approximately \$40 in copying costs in order to print out the newly required pre-offer invitation to self-identify for applicants. This also includes a cost of approximately \$1,000 for providing reasonable accommodation to two newly hired disabled veterans.⁴²

⁴¹ *Id.* at 18: “The impact could be significant if the costs of compliance with the rule “exceeds 1% of the gross revenues of the entities in a particular sector.”

⁴² To close the current gap that exists between the target rate of employment as proposed in VEVRAA for veterans and the actual rate, firms would need to hire an additional 205,000 veterans. This amounts to approximately 1 veteran per

Utilizing data from the SBA Office of Advocacy regarding average receipts for firms, OFCCP determined that entities with 50 to 100 employees average receipts of approximately \$14,079,844 per year.⁴³ The \$1,536 costs of compliance with the final rule in the first year would be approximately .01 percent of the average value of receipts for these entities. Therefore, there is not a significant economic impact on contractors with 50 to 100 employees.

Contractors with 100–500 Employees

We estimate the first year cost of this rule to contractors with 100 to 500 employees to be approximately \$2,518. The first year cost is the year with the highest compliance cost as the contractor is incurring the start-up costs of the rule. The start-up for contractors with 100 to 500 employees primarily includes modifying any existing web-based application and human resources information systems to include the pre-offer invitation to self-identify, becoming familiar with the new requirements of the rule, and providing reasonable accommodations to any newly hired disabled veterans.

In order to estimate the cost of this rule on contractors with 100 to 500 employees, we are applying the same type of compliance cost structure previously described in the above cost analysis. However, for this small contractor, we assume they may incur more costs analyzing data, establishing benchmarks, and modifying human resources information systems. Specifically, we assume these contractors would expend: 3 hours manually conducting the data analysis required by the new 41 CFR 60–300.44(k); 2 hours establishing their own benchmark; 4 hours having a manager review the new requirements of the rule; and incur approximately \$40 in copying costs in order to print out the newly required pre-offer invitation to self-identify for applicants. We further assume these contractors will spend

establishment or 3 veterans per company, assuming 251,300 establishments and 67,919 companies. Moreover, 14.21% of disabled workers in the labor force are veterans. According to research conducted by the Job Accommodation Network (JAN), employers in the study reported that a high percentage (57%) of accommodations cost absolutely nothing. For the remaining 43%, the typical cost of providing a reasonable accommodation was approximately \$500.

⁴³ In order to calculate this figure, OFCCP averaged the total receipts of firms with 50 to 99 employees provided by the SBA, Office of Advocacy. See Firm Size Data, available at www.sba.gov/advo/research/data.html#us. Since the data was issued in 2007, OFCCP utilized a compound 2007–2008 Consumer Price Index inflation rate equaling 6.8% (1.0285 × 1.0385) to calculate the 2009 average receipts of \$14,079,844 per year.

approximately \$994 modifying their human resources information systems to accommodate the new pre-offer invitation to self-identify. OFCCP estimates that these contractors would spend approximately \$1,000 providing reasonable accommodations to approximately two newly hired disabled veterans.

Utilizing data from the SBA Office of Advocacy regarding average receipts for firms, OFCCP determined that entities with 100 to 500 employees average receipts of approximately \$43,547,170 per year.⁴⁴ The \$2,518 costs of compliance with the final rule in the first year would be approximately .005 percent of the average value of receipts for these entities. Therefore, there is not a significant economic impact on contractors with 50 to 500 employees.

Notwithstanding our determination that there is not a significant impact as a result of this rule, OFCCP considered and implemented a number of alternatives in the final rule as compared to what was proposed in the NPRM. As noted in the preamble, the final rule no longer requires linkage agreements, increased review of personnel processes, increased review of physical and mental job qualifications, and prescribed training on the nondiscrimination and affirmative action obligations for veterans. These changes were made in large part to substantially decrease the burden on small entities.

The significant benefits to covered veterans, as well as to contractors, are discussed extensively in the Section-by-Section and Executive Order 12866 analyses of the final rule. Although the primary objective of the final rule is to strengthen the affirmative action requirements of VEVRAA to employ and advance in employment protected veterans, the rule will benefit both veterans and contractors. As modified, the final rule provides contractors mechanisms for collecting data on protected veteran applicants and employees and promotes accountability by requiring contractors to review the effectiveness of their affirmative action efforts. The benefits of proactive recruitment particularly will accrue to veterans who may face significant barriers in returning to civilian employment. The revisions will also

⁴⁴ In order to calculate this figure, OFCCP averaged the total receipts of firms with 100 to 499 employees provided by the SBA, Office of Advocacy. See Firm Size Data, available at www.sba.gov/advo/research/data.html#us. Since the data was issued in 2007, OFCCP utilized a compound 2007–2008 Consumer Price Index inflation rate equaling 6.8% (1.0285 × 1.0385) to calculate the 2009 average receipts of \$43,547,170 per year.

promote access to a well-trained, job-ready employment pool for contractors.

Paperwork Reduction Act

DATES: Effective Date: This final rule is effective _____.

Compliance Dates: Affected parties do not have to comply with the new information collection requirements in §§ 60–300.5(a)(4); 60–300.42; 60–300.44(f)(4); 60–300.44(g)(3); 60–300.44(k); 60.300.45; and 60–300.80(a) (requirement to maintain records under sections 60–300.44(f)(4), 60–300.44(k), and 60–300.45(c)) until the Department publishes a Notice in the **Federal Register** stating that the Office of Management and Budget (OMB) has approved these information collection requirements under the Paperwork Reduction Act of 1995 (PRA), or until this rule otherwise takes effect, whichever date is later.

The Department notes that no person is required to respond to a collection of information request unless the collection of information has a valid OMB Control Number. The new collections of information contained in this rulemaking have been submitted for review to OMB, in accordance with the PRA, under Control Number 1250–0004. That review is ongoing; consequently, the Control Number has not been activated. OFCCP will publish a Notice in the **Federal Register** announcing the results of OMB's review and the date the information collection requirements will take effect.

The information collection requirements in this final rule relate to the information required to be maintained by contractors regarding their nondiscrimination and affirmative action obligations concerning protected veterans and disclosures workers may make to their employers.

Sections 60–300.40 through 60–300.44 contain currently approved collections of information. Section 60–300.40 requires contractors with 50 or more employees (and contracts of \$100,000 or more entered into or modified after December 1, 2003, as set forth in § 60–300.1(b)) to develop a VEVRAA affirmative action program. An affirmative action program is a written program in which contractors annually outline the steps the contractor will take and has already taken to ensure equal employment opportunity for protected veterans. Section 60–300.41 describes a contractor's responsibility to make the affirmative action program available to all employees. Section 60–300.42 outlines 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. Section 60–300.43 describes the breadth of the contractor's affirmative action obligation required by VEVRAA.

Section 60–300.44 outlines the required contents of the affirmative action program. Contractors must develop and include an equal opportunity policy statement in the program. Contractors must also periodically review their personnel processes to ensure that qualified, protected veterans are provided equal opportunity and that the contractor is engaged in outreach to recruitment sources. Further, contractors must develop procedures for disseminating the policy internally and externally and establish an audit and reporting system to measure the effectiveness of the affirmative action program.

The currently approved collections of information for these sections are OMB Control Numbers 1250–0001 (construction) and 1250–0003 (supply and service).⁴⁵ Information collection package 1250–0001 covers the construction aspects of OFCCP's EO 11246, VEVRAA, and section 503 programs. The construction information collection package estimates that first-time contractors will take 18 hours to develop and document a joint section 503/VEVRAA written affirmative action program. It estimates that existing contractors take 7.5 hours to document and maintain material evidence of annually updating the affirmative action program. These estimates are based on previously approved information collection requests that quantified the estimated time to develop and maintain a joint section 503/VEVRAA written affirmative action program. Information collection 1250–0003 covers the supply and service aspects of OFCCP's program. This package outlines the burden required for contractors to develop and maintain an affirmative action program for women and minorities based on the contractor's number of employees, and also references the current VEVRAA requirements. The burden for first-time contractors to develop a written affirmative action program is between 73 and 186 hours. The burden for all other contractors to maintain documentation of annually updating the affirmative action program is between 18 and 105 hours. The VEVRAA portion of these information collections will be

⁴⁵ OMB Control Number 1250–0001 for construction is approved through December 31, 2014. OMB Control Number 1250–0003 is currently on a month-to-month renewal and is approved through April 30, 2012.

eliminated from these control numbers once the final rule becomes effective.

Paperwork Burden Hours and Related Costs

OFCCP's new information collection request under Control Number 1250–0004 for VEVRAA includes the burden hours and costs for the existing regulations and the new information collection requirements outlined in the final rule. This presentation separately states existing requirements currently approved under other OMB Control Numbers that will now be included under the 1250–0004 Control Number.

A. Number of Respondents

In light of the comments received on the VEVRAA NPRM regarding the "Federal contractor establishment universe, OFCCP reexamined the original number of 108,288 contractor establishments it used in the NPRM. For the final rule and this information collection request, we combined Equal Employment Data System (EEDS) data with several other information sources.⁴⁶ We used FY 2009 EEDS data to determine the number of Federal contractor establishments with 50 or more employees; this resulted in a total of 87,013 Federal contractor establishments.⁴⁷ An additional 10,518 establishments were identified through a cross-check of other contractor databases for a total of 97,531 establishments. Covered Federal contractors must develop AAPs for all of their establishments, even those with fewer than 50 employees. Therefore, OFCCP added an additional 73,744 establishments, using EEO–1 and FPDS data, for an adjusted total of 171,275 Federal contractor establishments affected by the final rule. This adjustment to the methodology for calculating the number of contractors and contractor establishments results in a 58 percent increase over the earlier estimate used in the NPRM.

However, OFCCP received comments on the estimated number of contractor establishments as well, including recommending an establishment count of 285,390 using the Veterans

⁴⁶ OFCCP determined that the VET–100 database is not the most appropriate resource for calculating the number of federal contractors and contractor establishments. Among the concerns surrounding this data source are the use of contractor established 12-month reporting timeframes, the degree to which there is overlap or duplication in the VETS–100 and VETS–100A reports, and the absence of an employee threshold for reporting purposes.

⁴⁷ A single firm, business, or "entity" may have multiple establishments or facilities. Thus, the number of contractor establishments or facilities is significantly greater than the number of parent contractor firms or companies.

Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending information collection request.⁴⁸

For the purposes of this information collection request, OFCCP averaged the 171,275 and 251,300 establishment figures to come up with a total of 211,287 establishments that will have to respond to the information collection requirements. All costs and hours in the burden analysis of this final rule are calculated using this adjusted number of Federal contractor establishments. Further, the burden for several information collection requirements in the final rule is presented in ranges. These estimates are also averaged for this information collection request.

B. Information Collections

Section 60–300.5 Equal Opportunity Clause

Paragraph 2 of the Equal Opportunity Clause (EO Clause) requires contractors to list their job openings with the state or local employment service delivery system (employment service). OFCCP estimates that gathering records and providing the job listing to the employment service will take 25 minutes for approximately 15 listings per year. The burden for this third-party disclosure is 1,320,544 hours (211,287 contractor establishments \times 25 minutes \times 15 listings/60 = 1,320,544 hours). This is a third-party disclosure.

Paragraph 4 of the EO Clause requires contractors to provide the appropriate employment service with the name and location of each of the contractor's hiring locations, a statement of its status as a Federal contractor, the contact information for the hiring official at each location in the state, and a request for priority referrals of protected veterans. Paragraph 4 also requires contractors that use job search organizations to provide the employment service with the contact information for each job search organization. OFCCP estimates a total of 15 minutes to ensure that the information newly required by this regulation is provided to the employment service. The annual burden for this provision is 52,822 hours

(211,287 contractor establishments \times 15 minutes/60 = 52,822 hours). OFCCP further estimates that 25 percent of contractors, or 52,821, will use outside job search organizations and incur an additional 5-minute burden to notify the employment service of the contact information for its outside job search organizations. The annual burden for this provision is 4,402 hours (52,821 contractor establishments \times 5 minutes/60 = 4,402 hours). This is a third-party disclosure.

Section 60–300.42 Invitation to Self-Identify

Section 60–300.42(a) requires contractors to extend a pre-offer invitation to self-identify as a “protected veteran.” OFCCP estimates that contractors working at the company level will take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample “as is” or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor's application form. The burden for this provision is 85,656 hours (57,104 contractor companies \times 1.5 hours = 85,656 hours).

Applicants for available positions with covered Federal contractors will have a minimal burden complying with § 60–300.42(a) in the course of completing their application for employment with the contractor. Section 60–300.42(a), on pre-offer self-identification, requires contractors to invite all applicants to self-identify whether or not they are a protected veteran. OFCCP estimates that there will be an average of 24 applicants per job vacancy for on average 15 vacancies per year. OFCCP further estimates that it will take applicants approximately 5 minutes to complete the form. The burden for this provision is 6,388,610 hours (211,287 contractor establishments \times 15 listings \times 15 applicants \times 5 minutes/60 = 6,388,610 hours). This is a third-party disclosure.

Section 60–300.44 Required Contents of the Affirmative Action Program

OFCCP estimates that it takes existing contractors, or 209,174, approximately 7.5 hours to document and maintain material evidence of annually updating a joint section 503 and VEVRAA affirmative action program. The burden for this requirement is 1,568,805 hours (209,174 contractor establishments \times 7.5 hours = 1,568,805 hours).

OFCCP estimates that 1 percent of all contractors, or 2,112, are new contractors that will need to initially develop a joint section 503 and VEVRAA affirmative action program.

OFCCP estimates that it takes approximately 18 hours to document and maintain material evidence of developing the program. Therefore, the recordkeeping burden for this provision is 38,016 hours (2,112 contractor establishments \times 18 hours = 38,016 hours).

Section 60–300.44(f) External Dissemination of Policy, Outreach and Positive Recruitment

Section 60–300.44(f)(1)(ii) of the final rule requires contractors to send written notification of the company's affirmative action program policies to subcontractors, vendors, and suppliers. The existing regulations recommend that contractors send written notification of the company's affirmative action policies to subcontractors, vendors, and suppliers. See 41 CFR 60–300.44(f)(6). OFCCP estimates that contractors will take 15 minutes to prepare the notification and send it to subcontractors, vendors, and suppliers, and an additional 15 minutes to execute the email address changes in the company's email system. Likewise, the burden for any information technology assistance needed to send the written communication is estimated at 15 minutes. The burden for this request is 158,465 hours (211,287 contractor establishments \times 45 minutes/60 = 158,465 hours).

Section 60–300.44(f)(4) of the final rule requires contractors to document all activities it undertakes to comply with the obligations of this paragraph, and retain these documents for a period of 3 years. OFCCP estimates that it will take contractors 15 minutes to retain the required documentation. Retaining these records means storing the records generated either electronically or in hardcopy, consistent with the contractor's existing business practices for how to store records. The annual recordkeeping burden for this provision is 52,822 hours (211,287 contractor establishments \times 15 minutes/60 = 52,822 hour).

Section 60–300.44(h) Audit and Reporting System

Section 60–300.44(h)(1)(vi) requires contractors to document the actions taken to meet the requirements of 60–300.44(h), as mandated in the current regulations. OFCCP estimates that it will take contractors 10 minutes to document compliance with this existing provision to create an audit and reporting system. Documentation may include, as an example, the standard operating procedure of the system including roles and responsibilities, and audit and reporting timeframes and

⁴⁸ OMB Control Number 1293–0005, Federal Contractor Veterans' Employment Report, VETS–100/VETS–100A, http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003 (last accessed Aug. 13, 2013).

lifecycles. Because contractors are currently required to have an audit and reporting system, it is expected that some documentation of the process and operation of the system audit already exists. The annual recordkeeping burden of this provision is 35,215 hours (211,287 contractor establishments × 10 minutes/60 = 35,215 hours).

Section 60–300.44(k) Data Collection and Analysis

Section 60–300(k) of the final rule requires contractors to collect and analyze certain categories of data.

Based on feedback received from public comments expressing concerns about the costs of modifying human resources information systems, OFCCP believes that most contractors will have the capability to conduct the required calculations electronically. However, some companies may have to calculate this information manually. Therefore, OFCCP estimates that the average time to conduct the analysis and maintain the relevant documentation would be 1 hour 25 minutes. Relevant documentation could include the report or other written documentation generated by the calculations that explain the methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations. The recurring burden for this provision is 299,233 hours

(251,300 contractor establishments × 85 minutes/60 = 299,233 hours).

No new software needs are anticipated for compliance with section 60–300.44(k); however, a software switch or configuration may be required to tell the system to retain the records for the additional required time period. The estimated time needed for making this switch is included with the burden estimate for section 60–300.44(f)(4).

Section 60–300.45 Benchmarks for Hiring

The final rule requires the contractor to establish benchmarks in one of two ways. A contractor may use as its benchmark the national average number of veterans in the civilian labor force, which OFCCP will provide (and periodically update) on its public Web site. Or, alternatively, the contractor may establish its own individual benchmark using the five-factor method proposed in the NPRM (and retained in the final rule) to develop a benchmark that fits the company’s specific needs. OFCCP estimates that it will take contractors on average 10 minutes to maintain material evidence of compliance with this provision. The burden of this provision would be 35,215 hours (211,287 establishments × 10 minutes/60 = 35,215 hours).

Section 60–300.81 Access to Records

Section 60–300.81 of the final rule requires contractors who are the subject

of a compliance evaluation or complaint investigation to specify all available record formats and allow OFCCP to select preferred record formats from those identified by the contractor during a compliance evaluation. Pursuant to 5 CFR 1320.4(a)(2), this information collection is excluded from the PRA requirements because it is related to an “administrative action, investigation, or audit involving an agency against specific individuals or entities.”

C. Summary of Costs

The estimated cost to contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for management, professional, and related occupations as \$50.11 per hour and administrative support as \$23.72 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.

TABLE 1—TOTAL BURDEN FOR §§ 60–300.5; 60–300.42; 60–300.44; AND 60–300.45

Recordkeeping Burden Hours ..	2,029,395
Reporting Burden Hours	0
Third Party Disclosure Burden Hours	7,960,499
Total Burden Hours	9,989,894

TABLE 2—SUMMARY OF BURDEN HOURS AND COSTS FOR CONTRACTORS

Existing requirements	Burden hours	Total
EO Clause, Parag 2 (Mandatory Job Listing)	1,320,544	\$49,444,855.52
Current Existing Contractors (Written Affirmative Action Program)	1,568,805	58,740,451.85
Current New Contractors (Written Affirmative Action Program)	38,016	1,423,425.48
Total	2,927,365	109,608,732.86
New requirements	Burden hours	Burden costs
EO Clause, Parag 4 (Mandatory Job Listing)	52,822	1,977,794.22
EO Clause, Parag 4 (Mandatory Job Listing)	4,402	164,813.84
300.42 (Invitation to Self-Identify)	85,656	2,342,234.35
300.44(f)(1) (Notice to Subcontractors, etc.)	158,465	5,933,382.66
300.44(f)(4) (Outreach and Recruitment Recordkeeping)	52,822	1,977,794.22
300.44(h) (Affirmative Action Program Audit Recordkeeping)	35,215	1,318,529.48
300.44(k) (Data Collection Analysis)	299,323	11,207,500.59
300.45 (Benchmarks Recordkeeping)	35,215	1,318,529.48
Total	3,651,284	135,849,311.71

TABLE 3—SUMMARY OF NON-CONTRACTOR BURDEN HOURS AND COSTS

Existing requirement	Burden hours	Burden costs
Section 60–300.42 (Self-Identification)	6,338,610	\$190,855,547

The total estimated cost for applicants to fill out the self-identification form is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (September 2011), which lists an average total compensation for all civilian workers as \$30.11.

D. Initial Capital or Start-up Costs

Human Resources Information Systems

OFCCP estimates on average it will take each contractor, working at the company level, on average 20 hours to have a professional make the needed systems modifications to track applicant and hiring information for protected veterans. This includes IT and administrative professionals to make any necessary changes. The estimated costs for these modifications are based on data from the Bureau of Labor Statistics in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for a professional of \$47.21 per hour. The cost for these modifications is \$53,917,597 (57,104 contractor companies × \$47.21 = \$53,917,597).

5 CFR 1320.3(b)(1)(i)—Reviewing Instructions

Several commenters noted that the proposed rule did not quantify the burden of reading and understanding the VEVRAA revisions on contractors. OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish several compliance assistance materials including factsheets and "Frequently Asked Questions." OFCCP will also host webinars for the contractor community that will describe the key provisions in the final rule.

OFCCP estimates it will take, on average, 2.5 hours to have a management professional at each establishment either read compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn about the new requirements of the final rule. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication "Employer Costs for Employee Compensation" (September 2011), which lists total compensation for a management professional at \$50.11. Therefore, the estimated burden for rule familiarization is 528,217 hours (211,287 contractor establishments × 2.5

hours = 528,217 hours). We calculate the total estimated cost for rule familiarization as \$26,468,979 (528,217 hours × \$50.11/hour = \$26,468,979).

Operations and Maintenance Costs

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the burden calculated above.

60–300.42 Invitation to Self Identify

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitations to self-identify. The contractor must invite all applicants to self-identify at both the pre-offer and post-offer stage of the employment process. Given the increasingly widespread use of electronic applications, any contractor that uses such applications would not incur copy costs. However, to account for contractors who may still choose to use paper applications, we are including printing and/or copying costs. Therefore, we estimate a single one page form for both the pre- and post-offer invitation. Assuming contractors using a paper-based application system, used 24 applications for an average of 15 listings per establishment, the minimum estimated total cost to contractors will be \$1,217,002 (42,257 establishments × 360 copies × \$.08 = \$1,217,002).

E. Transfer of Burden From OMB Control Numbers 1250–0001 and 1250–0003 to 1250–0004

As a result of the final rule, the information collection requirements of VEVRAA will be placed under a separate information collection package. OMB Control Numbers 1250–0001 for the agency's construction enforcement program and 1250–0003 for its supply and service program currently include the annual burden hours and related costs for the time contractors take to document the contents of the written affirmative action program under VEVRAA. When the information collection requirements in this Final Rule become effective, the Department will submit non-substantive change requests for Control Numbers 1250–0001 and 1250–0003 to reflect the fact that the VEVRAA portions of burden hours and costs are included in this separate information collection package, OMB Control Number 1250–0004.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

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

Title: Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002, 38 U.S.C. 4212 (VEVRAA).

OMB ICR Reference Number: 1250–0004.

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

Estimated Number of Annual Responses: xxxx.

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours: 9,989,894.

Estimated Total Initial and Other Costs: \$408,308,436.

The estimated \$408,308,436 is the total of the PRA costs resulting from the existing requirements of part 60–300 and the new requirements of this final rule.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule may 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 final rule includes a Federal mandate that may result in excess of \$100 million in expenditures in the private sector in any one year. Accordingly, in compliance with 2 U.S.C. 1532, OFCCP provides the following written statement. All references to other sections of this final rule are incorporated by reference pursuant to 2 U.S.C. 1532(c).

(1) The final rule is authorized by the Vietnam Era Veterans' Readjustment Assistance Act, as amended, 38 U.S.C. 4212.

(2) A qualitative and quantitative assessment of the anticipated costs and benefits of this rule, including the costs and benefits to the private sector, are set forth in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act) and the Section-by-Section Analysis in the preamble to the final rule. OFCCP anticipates no effect of the final rule on health, safety, and the natural environment not otherwise

discussed in the sections set forth above.

(3) Estimates of future compliance costs are set forth in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act). OFCCP anticipates none of the disproportionate budgetary effects of the rule set forth in 2 U.S.C. 1532(a)(3)(B).

(4) To the extent feasible and relevant, OFCCP has estimated the effect of the rule on the national economy in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act).

(5) The provisions of 2 U.S.C. 1532(a)(5) do not apply to this final rule.

Finally, OFCCP identified, considered, and implemented a reasonable number of regulatory alternatives that were the least burdensome alternative. In those cases where OFCCP did not select the least burdensome alternative, it has provided an explanation of the reasons these suggestions were not adopted in the corresponding section of the Section-by-Section Analysis in the preamble to the final rule and/or the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act).

Executive Order 13132 (Federalism)

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This 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 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The final rule does 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 final rule 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 final rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this final rule 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 final rule 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 final rule 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 final rule 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 final rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The final rule 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 Part 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 A. 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, is amended to read as follows:

PART 60–250 [REMOVED]

- 1. Remove Part 60–250
- 2. Revise Part 60–300 to read as follows:

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.
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- 60–300.5 Equal opportunity clause.

Subpart B—Discrimination Prohibited

- 60–300.20 Covered employment activities.
- 60–300.21 Prohibitions.
- 60–300.22 Direct threat defense.
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- 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 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 appropriate employment service delivery system.

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

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 the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, (VEVRAA), which prohibits discrimination against protected veterans and pre-JVA veterans as defined in this part, 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 VEVRAA.

(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 § 60–300.40(a); and that the non-discrimination protections in § 60–300.21 and the right to file complaints alleging discriminatory conduct set forth in § 60–300.61 also apply to “pre-JVA veterans” as defined in § 60–300.2, who are applicants or employees of a contractor with a Government contract of \$25,000 or more entered into prior to December 1, 2003, and unmodified since to a contract amount of \$100,000. 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 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.

(i) *Uniformed Services Employment and Reemployment Rights Act.* This part does not invalidate or limit the obligations, responsibilities, and requirements of the contractor pursuant to the Uniformed Services Employment and Reemployment Rights Act (USERRA) (38 U.S.C. 4301, *et seq.*). This includes the obligation under USERRA to reemploy employees of the contractor following qualifying service in the uniformed services in the position the employee would have obtained with reasonable certainty had the employee been continuously employed during the period of uniformed service. Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with USERRA, and compliance with USERRA will not necessarily determine its compliance with 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, also referred to throughout this regulation as “VEVRAA.”

(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 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) *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. The Wagner-Peyser Act requires that these services be provided as part of the One-Stop delivery system established by the

States under Section 134 of the Workforce Investment Act of 1998.

(k) *Equal opportunity clause* means the contract provisions set forth in § 60–300.5, “Equal opportunity clause.”

(l) *Essential functions*—(1) *In general.* The term essential functions means fundamental job duties of the employment position the disabled veteran holds or is seeking. 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.

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

(n) *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).

(o) *Pre-JVA veteran* means an individual who is an employee of or applicant to a contractor with a contract of \$25,000 or more entered into prior to December 1, 2003 and unmodified since to \$100,000 or more, and who is a special disabled veteran, veteran of the Vietnam era, pre-JVA recently separated veteran, or other protected veteran, as defined below:

(1) *Special disabled veteran* means:

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

(A) Rated at 30 percent or more; or

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

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

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

(i) Served on active duty for a period of more than 180 days, and was discharged or released therefrom with

other than a dishonorable discharge, if any part of such active duty occurred:

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

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

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

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

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

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

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

(p) *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.

(q) *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,” or an “Armed Forces service medal veteran,” as defined by this section.

(r) *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.

(s) *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.

(t) *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;¹ or

¹ A contractor’s duty to provide a reasonable accommodation with respect to applicants who are

(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 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.² 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.)

(u) *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.

(v) *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.

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).

²Contractors 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.

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

(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 \$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.

(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.

(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.

§ 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 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 VEVRAA PROTECTED VETERANS³

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 any manner and format permitted by the appropriate employment service delivery system which will allow that system to provide priority referral of veterans protected by VEVRAA for that job vacancy. Providing information on employment openings to a privately run job service or exchange will satisfy the contractor's listing obligation if the privately run job service or exchange provides the information to the appropriate employment service delivery system in any manner and format that the employment service delivery system permits which will allow that system to provide priority referral of protected veterans.

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. The "contractor official" may be a chief hiring official, a Human Resources contact, a senior management contact, or any other manager for the contractor that can verify the information set forth in the job listing and receive priority referrals from employment service delivery systems. 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 made simultaneously

³ 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.

with the contractor's first job listing at each employment service delivery system location after the effective date of this final rule. Should any of the information in the disclosures change since it was last reported to the employment service delivery system location, the contractor shall provide updated information simultaneously with its next job listing. 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 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.

6. 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.

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

8. 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.

9. 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, posting the notice for visual accessibility to persons in wheelchairs, providing the notice electronically or on computer disc, or other versions). 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.

10. 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 VEVRAA, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, protected veterans.

11. 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 VEVRAA 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.

12. 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 protected veteran status.

[End of Clause]

(b) *Subcontracts*. Each contractor shall include the equal opportunity

clause in each of its subcontracts subject to this part.

(c) *Adaptation 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 is not necessary to include the equal opportunity clause verbatim in the contract. The clause shall be made a part of the contract by citation to 41 CFR 60–300.5(a) and inclusion of the following language, in bold text, after the citation: **“This contractor and subcontractor shall abide by the requirements of 41 CFR 60–300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.”**

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

(f) *Duties of contracting agencies*. Each contracting agency shall cooperate with the 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 § 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 or pre-JVA 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 or pre-JVA veteran. For example, the contractor may not segregate protected veterans as a whole, or any classification of protected veterans or pre-JVA 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 or pre-JVA 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 pre-JVA 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 or pre-JVA 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 or pre-JVA 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 disabled veteran or pre-JVA 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 disabled veteran or pre-JVA 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 disabled veteran or pre-JVA special disabled veteran.

(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 or pre-JVA 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 or pre-JVA 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 or pre-JVA special disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a protected veteran or pre-JVA 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 or pre-JVA 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 or pre-JVA 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 § 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, absent the data metrics required by § 60–300.44(k), shall be made available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

§ 60–300.42 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.

(b) *Post-offer.* In addition to the invitation in paragraph (a) of this section, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she belongs to one or more of the specific categories of protected veteran for which the contractor is required to report pursuant to 41 CFR part 61–300. Such an invitation shall be made at any time after the offer of employment but before the applicant begins his or her job duties.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to the Act. 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 should inquire of the applicant whether an accommodation is necessary, and if so, should engage with the 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, *et seq.* 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 top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program, 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 VEVRAA or any other Federal, state or local law requiring equal opportunity for protected veterans;

(3) Opposing any act or practice made unlawful by VEVRAA 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 VEVRAA 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, 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 periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government (Appendix C of this part is an example of an appropriate set of procedures. The procedures in Appendix C are not required and contractors may develop other procedures appropriate to their circumstances.)

(c) *Physical and mental*

qualifications. (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified disabled veterans, they are job-related

for the position in question and are consistent with business necessity. (2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification standards tend to screen out qualified 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.) (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.*

(i) The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit protected veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) of this section or that its activities will be limited to those listed. The scope of the

contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(ii) 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) *Examples of outreach and recruitment activities.* Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section. This is an illustrative list, and contractors may choose from these or other activities, as appropriate to their circumstances.

(i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for veterans, in order to fulfill its commitment to provide meaningful employment opportunities for such veterans:

(A) The Local Veterans' Employment Representative in the local employment service office (i.e., the One-Stop) nearest the contractor's establishment;

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

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

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

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

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

(G) Any organization listed in the Employer Resources section of the National Resource Directory (<http://www.nationalresourcedirectory.gov/>), or any future service that replaces or complements it.

(ii) The contractor should also consider taking the actions listed below, as appropriate, to fulfill its commitment to provide meaningful employment opportunities to protected veterans:

(A) 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.

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

(C) 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.

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

(E) 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.

(F) The contractor, in making hiring decisions, should 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.

(G) The contractor should consider listing its job openings with the National Resource Directory's Veterans Job Bank, or any future service that replaces or complements it.

(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 must 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 activities it undertakes to comply with the obligations of this section, and retain these documents for a period of three (3) 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 or otherwise make the policy available to employees;

(ii) If the contractor is party to a collective bargaining agreement, it shall notify 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) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for protected veterans;

(ii) Publicize it in the company newspaper, magazine, annual report and other media;

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

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

(v) When employees are featured in employee handbooks or similar

publications for employees, include disabled veterans.

(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 should 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.* 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.

(k) *Data collection analysis.* The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

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

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

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

(4) The number of protected veteran applicants hired; and

(5) The total number of applicants hired.

§ 60–300.45 Benchmarks for hiring.

The benchmark is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(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 shall be set by the contractor on an annual basis. Benchmarks shall be set using one of the two mechanisms described below:

(1) Establish a benchmark equaling the national percentage of veterans in the civilian labor force, which will be published and updated annually on the OFCCP Web site; or

(2) Establish a benchmark by taking into account:

(i) 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;

(ii) 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;

(iii) The applicant ratio and hiring ratio for the previous year, based on the data collected pursuant to § 60–300.44(k);

(iv) 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

(v) 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. If the contractor sets its benchmark using the procedure in paragraph (b)(2) of this section, it shall document 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 these records for a period of three (3) 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 VEVRAA 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 VEVRAA 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 or pre-JVA 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.* Except as set forth in paragraph (b) of this section, 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, except as set forth in paragraph (b) of this section. 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.

(b) *Records with three-year retention requirement.* Records required by §§ 60–300.44(f)(4), 60–300.44(k), and 60–300.45(c) shall be maintained by all contractors for a period of three years from the date of the making of the record.

(c) *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.

(d) 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 the contractor maintains its records and other information. The contractor must provide records and other information in any of the formats in which they are maintained, as selected 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. OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.

§ 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 VEVRAA, 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 VEVRAA 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(s), 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(b) (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 protected by the Act. 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(t) 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 text telephones (TTYs). For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, speech activated software and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, sign language 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(t) 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 computer disc, or by responding to job inquiries via TTYs; (2) providing readers, sign language 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, as amended by the Jobs for Veterans Act of 2002, 38 U.S.C. 4212 (VEVRAA), which requires Government contractors to take affirmative action to employ and advance in employment: (1) 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 "disabled veteran" 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 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.
- 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.

Protected veterans may have additional rights under USERRA—the Uniformed Services Employment and Reemployment Rights Act. In particular, if you were absent from employment in order to perform service in the uniformed service, you may be entitled to be reemployed by your employer in the position you would have obtained with reasonable certainty if not for the absence due to service. For more information, call the U.S. Department of Labor's Veterans Employment and Training Service (VETS), toll-free, at 1-866-4-USA-DOL.

2. [THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING THE "PRE-OFFER" INVITATION AS 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 VEVRAA, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to VEVRAA.

I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERAN LISTED ABOVE

I AM NOT A PROTECTED VETERAN

[THE FOLLOWING TEXT SHOULD BE USED IF REQUIRED TO EXTEND THE "POST-OFFER" INVITATION DESCRIBED IN 41 CFR 60-300.42(b). THE DEFINITIONS OF THE SEPARATE CLASSIFICATIONS OF PROTECTED VETERAN INCLUDED IN THE POST-OFFER INVITATION MUST ACCOMPANY THIS SELF-IDENTIFICATION REQUEST.]

As a Government contractor subject to VEVRAA, we are required to submit a report to the United States Department of Labor each year identifying the number of our employees belonging to each specified "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):

- 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.

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 essential functions of the job, 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. 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.

4. 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.

5. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

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

The following is a set of procedures which contractors may use to meet the requirements of § 60-300.44(b):

1. The application or personnel form of each known applicant who is a protected veteran should be annotated to identify each vacancy for which the applicant was

considered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

2. The personnel or application records of each known protected veteran should include (i) the identification of each promotion for which the protected veteran was considered, and (ii) the identification of 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 should 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, should be treated as confidential medical records in accordance with § 60-300.23(d). These materials should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place a disabled veteran on the job, the contractor should make a record containing a description of the accommodation. The record should be treated as a confidential medical record in accordance with § 60-300.23(d).

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