DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–250

RIN 1215–AA62

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans and Vietnam Era Veterans

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Proposed Rule.

SUMMARY: The proposal published today would revise the current regulations implementing the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA). VEVRAA requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. Today's proposal makes two general types of revisions to the VEVRAA regulations. First, it would generally conform the VEVRAA regulations to the Office of Federal Contract Compliance Programs' final rule revising the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503). Second, it would withdraw portions of a final rule published by the Department of Labor on December 30, 1980 (which was subsequently suspended) concerning VEVRAA, Executive Order 11246, and Section 503. The withdrawal applies only to those provisions of the rule which pertain to VEVRAA.

DATES: Comments are invited from the public and other Federal agencies regarding both the proposal to revise the current VEVRAA regulations and the proposal to partially withdraw the final rule of 1980. To be assured of consideration, comments must be in writing and must be received on or before November 25, 1996.

ADDRESSES: Comments should be sent to Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

As a convenience to commenters, the Office of Federal Contract Compliance Programs will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is (202) 219–6195. Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Comments sent by FAX in excess of six pages will not be accepted. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling the Office of Federal Contract Compliance Programs at (202) 219–9430.

Comments received will be available for public inspection in Room C3325, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from October 8, 1996 until the Department publishes this rule in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202) 219–9430 (voice), 1–800–326–2577 (TDD).

Copies of this notice of proposed rulemaking are available in the following alternative formats: large print, electronic file on computer disk, and audio-tape. Copies may be obtained from the Office of Federal Contract Compliance Programs by calling (202) 219–9430 (voice) or 1–800–326–2577 (TDD).

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room C3325, Washington, D.C. 20210. Telephone: (202) 219–9475 (voice), 1–800–326–2577 (TDD).

SUPPLEMENTARY INFORMATION:

Overview of Proposed Rule

1. Revision of Current Regulations

The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (Section 4212 or VEVRAA) require parties holding Government contracts and subcontracts of $10,000 or more, to ''take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.'' (VEVRAA, which was originally codified at 38 U.S.C. 2012, was redesignated as 38 U.S.C. 4212 by Section 5(a) of the Department of Veterans Affairs Codification Act, Public Law 102–83, August 6, 1991; no substantive change to VEVRAA resulted from this legislation.) The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which has exclusive authority to enforce Section 4212, has published regulations implementing the Act at 41 CFR Part 60–250. These regulations, consistent with the statute's mandate, establish various affirmative action obligations for contractors (e.g., contractors are required to use effective practices to recruit special disabled veterans and veterans of the Vietnam era). The regulations require that contractors refrain from discriminating against special disabled veterans and veterans of the Vietnam era in all aspects of employment inasmuch as this prohibition is an indispensable component of affirmative action. Another central requirement of the current regulations is that contractors make reasonable accommodation to the known physical or mental limitations of a qualified special disabled veteran applicant or employee, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. An accommodation is, for example, any change in the work environment (e.g., the modification or acquisition of equipment) or in the way a job is customarily performed (e.g., changes in work assignments) that enables a qualified special disabled veteran to enjoy equal employment opportunities.

Today's proposal is precipitated, in part, by OFCCP's publication of a final rule revising the regulations implementing Section 503 of the Rehabilitation Act of 1973. (61 FR 19336, May 1, 1996). Section 503 requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. In turn, the revision to the Section 503 regulations was designed, in part, to conform those regulations to those published by the Equal Employment Opportunity Commission (EEOC) implementing Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* See 29 CFR Part 1630. Title I of the ADA, which is enforced by the EEOC, prohibits private and state and local governmental employers with 15 or more employees from discriminating against qualified individuals with disabilities in all aspects of employment. The ADA regulations establish comprehensive, detailed prohibitions regarding disability discrimination but do not require affirmative action. OFCCP has modeled its regulations implementing Section 4212 on those implementing Section 503. This reflects the close similarity between the statutes in terms of their substantive protections and jurisdictional requirements. For instance, Section 4212, like Section 503, protects disabled individuals, albeit a more narrow class of disabled persons—that is, ''special disabled veterans'' (see the discussion regarding proposed § 60–250.2(n) below). The current VEVRAA

regulations are identical to the former Section 503 regulations except where differences are necessary because of the nature of the protected class or differences in the statutes, to assure that covered contractors were subject to consistent requirements under both laws. In order to retain that consistency and avoid confusion and conflict, OFCCP believes that the Section 4212 regulations should continue to parallel the Section 503 regulations. Accordingly, OFCCP proposes to revise the Section 4212 regulations to conform them to the Section 503 final rule. Thus, today's proposal, similar to the final Section 503 regulations, adopts the standards contained in the regulations implementing the ADA regarding disability discrimination; but applies these standards with respect to special disabled veterans and veterans of the Vietnam era.

Specific changes are discussed in the Section-by-Section Analysis below.

2. Partial Withdrawal of the 1980 Final Rule

OFCCP also proposes to partially withdraw a final rule published by the Agency on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), and deferred indefinitely on August 21, 1981 (46 FR 42865). That 1980 rule would have revised the regulations at 41 CFR Chapter 60 implementing Section 4212 as well as two other laws enforced by OFCCP—Executive Order 11246 (30 FR 12319, September 28, 1965), as amended, and Section 503. Executive Order 11246 requires Government contractors and subcontractors to assure equal employment opportunity without regard to race, color, religion, sex and national origin. As noted above, Section 503 mandates similar requirements with regard to the employment of individuals with disabilities.

The December 30, 1980, rule was to take effect on January 29, 1981. On January 28, 1981, the Department of Labor published a notice (at 46 FR 9084) delaying the effective date of the final rule until April 29, 1981, to allow the Department time to review the regulation fully. The Department published three subsequent deferrals of the rule in 1981 in order to fully review the OFCCP regulations in accordance with Executive Order 12291, to permit consultation with interested groups, and to comply with new intergovernmental review and coordination procedures. The Department again postponed the rule's effective date on August 25, 1981, until action could be taken on a proposed rule published on the same date (46 FR 42968). The August 25, 1981, proposal would have revised a number of provisions contained in the December 30, 1980, final rule as well as a number of provisions in 41 CFR Chapter 60 which were not amended by that final rule. Final action has not been taken with respect to the proposed regulations issued on August 25, 1981, or, consequently with respect to the 1980 final rule.

The substance of a number of the provisions contained in the 1980 final rule pertaining to the current Section 4212 regulations has been incorporated into today's proposal. However, OFCCP has determined not to go forward with some of the other revisions to the regulations. For instance, unlike today's proposal (and the current regulations), the 1980 final rule would have consolidated a number of the provisions of the Section 4212 regulations with common provisions implementing Executive Order 11246 and Section 503 into 41 CFR Part 60–1, which currently sets out the general obligations under the Executive Order.

Significant differences between this proposal, the current regulations and the 1980 final rule are discussed in detail in the Section-by-Section Analysis below. (Provisions contained in the 1980 final rule which are substantially similar to the parallel provisions in the current regulations are not separately discussed.) In order to avoid conflict between today's proposal and the 1980 final rule, OFCCP proposes to withdraw all provisions of the 1980 rule that pertain to Section 4212.

Request for Comments

Interested parties, including public and private veterans' organizations and employers, are invited to participate in this proposed rulemaking by submitting written views.

Section-by-Section Analysis

This proposed rule consists of five subparts. Subpart A, ''Preliminary Matters, Equal Opportunity Clause,'' explains the purpose, application and construction of the regulations in general and contains an extensive definitions section. The definitions section incorporates the definitions contained in the Section 503 final rule which are relevant to the enforcement of Section 4212 as well as a revision to the definition of ''special disabled veteran.'' Subpart A also contains provisions relating to coverage under Section 4212, and coverage exemptions and waivers, as well as the equal opportunity clause, which delineates a covered contractor's general duties under the Act. Subpart B is a new subpart, which specifies the employment actions that will be deemed to constitute prohibited discrimination under Section 4212. In general, this subpart is substantially identical to the parallel provisions in the Section 503 final rule. Where appropriate, references to special disabled veterans and veterans of the Vietnam era have been substituted for the references in the Section 503 regulations to individuals with disabilities. Subpart C, which governs the applicability of the affirmative action program requirement, reorganizes, clarifies and strengthens the affirmative action provisions in the current regulations. These revisions parallel those found in the Section 503 final rule. As stated in proposed § 60–250.40(a), the requirements of Subpart C apply only to Government contractors with 50 or more employees and a contract of $50,000 or more. All other subparts of the regulation are applicable to all contractors covered by Section 4212. Subpart D covers general enforcement and complaint procedures. In order to help ensure that OFCCP uses a consistent enforcement approach with that used under Executive Order 11246 (which OFCCP also enforces), this subpart, again paralleling the changes in the Section 503 final rule, incorporates a number of provisions from the regulations implementing the Executive Order. Further, Subpart D's provisions regarding complaint procedures, like the counterpart provisions in the Section 503 final rule, are in part based on the procedural regulations applicable to the ADA. These procedures are also revised to reflect an amendment to Section 4212. Subpart E, Ancillary Matters, incorporates revised provisions on recordkeeping (e.g., it extends the current one-year record retention period to two years for larger contractors and conforms the scope of the retention obligation to that applied by the EEOC under the ADA and by OFCCP under Section 503), adds a mandatory notice posting requirement, and makes other revisions. Finally, the proposal contains a new appendix which sets out guidance on the duty to provide reasonable accommodation under the Act. The appendix is substantially identical to the counterpart appendix contained in the Section 503 final rule. In turn, that appendix is consistent with the discussion of the issue of reasonable accommodation contained in the Interpretative Guidance on Title I of the Americans with Disabilities Act, which is set out as an appendix to the EEOC's ADA regulations. Accordingly, the EEOC appendix may be relied on for

guidance with respect to parallel provisions of this proposal.

The following analysis focuses on a comparison of today's proposal with the current Section 4212 regulation and the 1980 final rule. The analysis discusses the parallel changes in the Section 503 final rule where necessary to place today's proposal in context. This proposal uses a long form amending procedure in which all sections of the regulations are republished (except for those deleted in their entirety), including sections for which no changes are proposed and sections for which the only proposed change would be the section number. Use of the long form procedure ensures maximum clarity.

Subpart A—Preliminary Matters, Equal Opportunity Clause

Section 60–250.1 Purpose, Applicability and Construction

This section is derived from current § 60–250.1 (''Purpose and application'') and is generally consistent with that section. A number of clarifying revisions are proposed. As reflected in its Purpose and application section (§ 60–1.1), the 1980 final rule would have consolidated provisions (e.g., its definitions provisions) which are applicable to both Section 4212 and Executive Order 11246 into 41 CFR Part 60–1. Further, § 60–1.1 of the 1980 final rule would have established some common enforcement procedures under all of the laws enforced by OFCCP by making certain procedures (e.g., the show cause notice), which were previously applicable only to the Executive Order, applicable to Section 4212. Today's proposal does not consolidate any of the Section 4212 regulations with those implementing the Executive Order. OFCCP believes that consolidation of provisions in this way is not practical at this time. However, like the 1980 final rule, today's proposal incorporates some of the Executive Order enforcement procedures, including the show cause notice procedure.

Proposed paragraph (a) states in part that Section 4212 requires contractors to take affirmative action with respect to the employment of qualified ''special disabled veterans.'' Section 60–250.1 of the current regulations makes reference instead to ''disabled veterans.'' This proposed change in terminology is based on amendments to VEVRAA which have not been previously incorporated into the Section 4212 regulations (see § 60–250.2(n) defining ''special disabled veteran'').

Paragraph (b) clarifies that contracts under which the Government is a purchaser as well as those under which it is a seller are covered by the Act. (See discussion regarding the definition of ''Government contract'' contained in § 60–250.2(i).) Additionally, paragraph (b) provides that compliance by a covered contractor with Part 60–250 will not generally determine its compliance with other statutes, and that the reverse is also true.

The purpose and application section of the 1980 final rule (§ 60–250.1) states that Part 60–250 applies to all Government contracts, ''including Federal deposit and share insurance.'' The preamble to the 1980 final rule (45 FR 86218) states that OFCCP believes that Federal deposit and share insurance are contracts within the meaning of Section 4212. In the course of preparing its 1996 final rule implementing Section 503, OFCCP conducted a careful and detailed reevaluation of its position in light of changes in some of the statutes affecting the financial industry. Based upon that review, OFCCP continues to believe in the soundness of its position.

However, today's proposal differs from the 1980 final rule in that it does not expressly state that the regulations cover Federal deposit and share insurance. The proposal does not otherwise make reference to the precise subject matter of particular types of covered contracts, and therefore OFCCP no longer considers it necessary to single out deposit and share insurance for express mention in the regulations.

OFCCP wishes to reemphasize that it will continue to maintain its long-standing policy of imposing sanctions other than debarment of financial institutions from future deposit or share insurance, or cancellation, termination or suspension of a financial institution's deposit or share insurance for violations of Section 4212.

Paragraph (c)(1) states that the interpretative guidance set out as an appendix to the EEOC's ADA regulations may be relied on in interpreting the parallel provisions of this part. This provision reflects the fact that Part 60–250, as revised, incorporates the large majority of the EEOC's nondiscrimination regulations without substantive change (i.e., it incorporates the standards contained in the Section 503 final rule, which, in turn, adopted the EEOC's standards).

The first sentence of paragraph (c)(2), relationship to other laws, states that Part 60–250 does not invalidate or limit the protections or procedures of other laws that provide greater or equal protection for the rights of special disabled veterans or veterans of the Vietnam era. This parallels a provision of the Section 503 final rule (first sentence of § 60–741.1(c)(2)), which, in turn, is based on an analogous provision in the EEOC regulations (§ 1630.1(c)(2)).

The second sentence of paragraph (c)(2) is modeled on parallel provisions of the Section 503 regulation, which parallels § 1630.15(e) of the EEOC regulations. Paragraph (c)(2) of today's proposal provides that the contractor may take an action which would violate Part 60–250 or refrain from taking an action required by that part where such action or omission is required or necessitated by another Federal law or regulation. This provision would permit, for example, the use of medical and safety standards or inquiries that are mandated or necessitated by other Federal laws or regulations. For instance, under this provision, contractors would be permitted to comply with requirements relating to the collection, analysis and disclosure of certain medical information which are imposed by the Mine Safety and Health Act (MSHA) and the Occupational Safety and Health Act (OSHA) (and related state laws which have been approved by the Occupational Safety and Health Administration). Some of these standards necessitate the review and analysis of workers' medical information by employers as well as by agency officials; such action by a contractor, absent this provision, might violate proposed § 60–250.23 on Medical examinations and inquiries.

Section 60–250.2 Definitions

The proposal substantially supplements the definitions section contained in the current Section 4212 regulations (§ 60–250.2) by incorporating a number of new terms and by modifying or deleting a number of existing terms. Most notably, the proposal incorporates into the definitions section relevant terms and definitions from the Section 503 final rule at § 60–741.2 without substantive change. This was done to foster consistency between the two sets of regulations. A number of these terms were adopted by the Section 503 final rule from the ADA's regulations (''essential functions,'' ''reasonable accommodation,'' ''undue hardship,'' ''qualification standards,'' and ''direct threat''). Accordingly, the interpretative guidance contained in the EEOC's ADA regulations may be consulted regarding the application of these specific terms (with the exception of ''qualification standards,'' which the guidance does not address). A number of existing definitions also would be deleted or revised in order to conform to the parallel provisions in the Section 503

final rule. Similarly, several definitions that are not in the existing VEVRAA rule, but were included in the 1980 final rule, would not be carried forward here. Further, the proposal incorporates amendments that have been made to Section 4212 since the regulations were originally issued in 1976. Moreover, in contrast to the existing rule, which sets out the defined terms in alphabetical order, the proposal arranges the definitions by subject matter, and sets out each defined term as a letter-designated paragraph. This change in organization is intended to make the terms more easily understandable and to conform to the Section 503 final rule.

Section 60–250.2(a) ''Act''

This definition of ''Act'' is substantially identical to the current definition.

Section 60–250.2(b) ''Equal Opportunity Clause''

OFCCP proposes to substitute the term ''equal opportunity clause'' for the term ''affirmative action and nondiscrimination clause''—which is used in the current regulations and refers to a specific set of obligations imposed under Section 4212 that must be set out in all contracts and subcontracts covered by the Act (*see* proposed § 60–250.5). The purpose of this revision is to conform the terminology used in the Section 4212 regulations with that used in OFCCP's regulations implementing Executive Order 11246 (*see* 41 CFR Part 60–1) (which also is adopted by the Section 503 final rule).

Section 60–250.2(c) ''Secretary''

OFCCP proposes to revise the definition of ''Secretary''—which refers to the Secretary of Labor in the current regulations—to include a designee of the Secretary. This revision would permit the Secretary to delegate authority under Section 4212 to the Deputy Secretary and other subordinates. The definition of the term ''Assistant Secretary,'' which appears in the current regulations, is therefore no longer necessary, and thus is omitted in this proposal. Similarly, the definition of ''rules, regulations and relevant orders of the Secretary of Labor'' contained in the current regulations, which makes reference to the designee of the Secretary, also is omitted as it is unnecessary.

Section 60–250.2(d) ''Deputy Assistant Secretary''

OFCCP proposes to substitute a definition of ''Deputy Assistant Secretary'' for the definition of ''Director'' in the current regulations to reflect a corresponding redesignation of the position effective February 14, 1994. This substitution is made throughout the proposal.

Section 60–250.2(e) ''Government''

The proposed definition of this term is substantially identical to the current definition.

Section 60–250.2(f) ''United States''

OFCCP proposes to revise the current definition of ''United States'' by deleting the references contained therein to the Panama Canal Zone and the Trust Territory of the Pacific Islands, and by incorporating references to the Northern Mariana Islands and Wake Island.

Section 60–250.2(g) ''Recruiting and Training Agency''

The proposal incorporates the current definition of this term without change.

Section 60–250.2(h) ''Contract''

The proposed definition of ''contract'' revises the current regulatory definition—''any Government contract''—to subsume the term ''subcontract.'' This approach is consistent with that used in the 1980 final rule (§ 60–1.3), and is intended to obviate the need to make a separate reference to ''subcontract'' each time ''contract'' is referenced to demonstrate that a particular provision applies to both contracts and subcontracts. Accordingly, the proposal generally references the term ''subcontract'' only when necessary to the context.

Section 60–250.2(i) ''Government Contract''

The definition of ''Government contract'' is revised, consistent with the definition of the term contained in the Section 503 final rule, to clarify that covered contracts include those under which the Government is a seller of goods or services as well as those under which it is a purchaser. Hence, the proposal substitutes a reference to contracts for the ''purchase, sale or use'' of goods or services for the existing reference to the ''furnishing'' of goods or services. The proposal also revises the definition to make it clear, consistent with the language of the Act, that only contracts regarding personal property (including those for the use of real property where such use constitutes personal property) and ''nonpersonal'' services are covered. Further, the proposed revision consolidates within the definition of ''Government contract'' definitions for four terms referenced therein which are separately defined in the current regulations (''modification,'' ''contracting agency,'' ''person,'' and ''construction''), and establishes a subdefinition for ''personal property,'' which is not contained in the current regulations. (The definition of the term ''agency'' in the current regulations—''any contracting agency of the government''—has been deleted as unnecessary; references to ''contracting agency'' have been substituted in this proposal for references to ''agency'' wherever appropriate to the context.) The relevant subdefinitions are made applicable to the definition of ''subcontract'' at § 60–250.2(l) as well. Under the 1980 final rule, the definition of ''Government contract'' contains a clarification with regard to the coverage of personal property, which is similar to, but less precise than, the clarification contained in today's proposal.

Section 60–250.2(j) ''Contractor''

Currently, the term is defined as a prime contractor or subcontractor; the proposal revises the definition to refer to a prime contractor or subcontractor ''having a contract of $10,000 or more.'' Because the term ''contractor'' encompasses the term ''subcontractor,'' references to the latter term generally have been deleted from the regulations by the proposal.

Section 60–250.2(k) ''Prime Contractor''

The proposal revises the definition of ''prime contractor'' to incorporate a reference to persons holding a contract ''of $10,000 or more.''

Section 60–250.2(l) ''Subcontract''

The proposal incorporates changes which conform the current definition of ''subcontract'' to the proposed definition of ''Government contract'' (§ 60–250.2(i)); that is, as revised, the definition references agreements for the ''purchase, sale or use of personal property or nonpersonal services (including construction).''

Section 60–250.2(m) ''Subcontractor''

The proposed definition is substantially identical to the current regulatory definition. The 1980 final rule's definition contains a subdefinition of ''First-tier subcontractor.'' OFCCP no longer believes that such a subdefinition is necessary.

Section 60–250.2(n) ''Special Disabled Veteran''

The current regulations (at § 60–250.2) make reference to the term ''disabled veteran'' rather than the term ''special disabled veteran,'' which is employed by the proposal. ''Disabled

veteran'' is defined under current § 60–250.2 as a person entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30 percent or more, or a person whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty. The proposed definition incorporates amendments to Section 4212 and the Act's definitional section (42 U.S.C. 4211) which resulted in a change in terminology and an expansion of the class of veterans protected under the Act. See the Veterans' Rehabilitation and Education Amendments of 1980 (Pub. L. 96–466, 94 Stat. 2207); the Veterans' Compensation, Education, and Employment Amendments of 1982 (Pub. L. 97–306, 96 Stat 441); the Veterans' Compensation and Program Improvements Amendments of 1984 (Pub. L. 98–223, 98 Stat. 43); and the Department of Veterans Affairs Codification Act (Pub. L. 102–83, 95 Stat. 403).

The 1980 amendments substituted the term ''special disabled veteran'' for ''disabled veteran'' and a reference to a service-connected disability for the reference to a disability incurred or aggravated in the line of duty. The 1982 amendments revised the definition of ''special disabled veteran'' so as to include veterans who are not in receipt of compensation from the Veterans Administration because they have elected to receive military retirement pay in lieu thereof. The 1984 amendments expanded the term to include veterans with disability ratings of 10 or 20 percent. Finally, in order to reflect the redesignation of the name of the Veterans' Administration, the 1991 amendments substituted a reference to laws administered by the Secretary of the Department of Veterans Affairs—for the reference to laws administered by the Veterans Administration. For the sake of clarity, the proposal incorporates a subdefinition (at subparagraph (2)) for the term ''serious employment handicap,'' which is derived from the definition of the term contained in 38 U.S.C. 3101).

Section 60–250.2(o) ''Qualified Special Disabled Veteran''

Currently, the regulations define the term as one who is capable of performing a particular job with reasonable accommodation. The proposal parallels the counterpart definition (''qualified individual with a disability'') contained in the Section 503 final rule, which was modeled on the counterpart ADA definition. The proposal specifies that one is ''qualified'' if he or she satisfies the job-related requirements of the position held or sought, and can perform the essential functions of the position with or without reasonable accommodation. It should be noted that, with respect to the application process, an applicant will be deemed qualified if he or she meets eligibility requirements applicable to that process with or without reasonable accommodation.

Section 60–250.2(q) ''Essential Functions''

The proposal incorporates the Section 503 definition of ''essential functions,'' which states that the term refers to the fundamental job duties, but not marginal functions, of the position in question. The current regulations do not contain an analogous definition.

Section 60–250.2(r) ''Reasonable Accommodation''

The proposal incorporates a definition which parallels the Section 503 final rule definition. The current Section 4212 regulations do not contain a definition of the term. However, the adoption of the definition does not represent a change in OFCCP policy. Appendix A should be consulted for general guidance on a contractor's duty to provide reasonable accommodation.

Section 60–250.2(s) ''Undue Hardship''

The proposal adopts the Section 503 final rule definition, which provides that ''undue hardship'' means a significant difficulty or expense related to the provision of an accommodation, as determined in light of specific enumerated factors, including the net cost of the accommodation (after deducting available outside funding) and the overall financial resources of the facility providing the accommodation and of the contractor. Although ''undue hardship'' is not defined in the current regulations, there is a reference to the concept in current § 60–250.6(d). That section, similar to the proposal, states that a contractor must make a reasonable accommodation for a special disabled veteran, unless such accommodation would impose an undue hardship, and that the extent of the accommodation duty is determined based on such factors as business necessity and financial cost. Thus, the proposed definition is consistent with current OFCCP requirements.

Section 60–250.2(t) ''Qualification Standards''

The proposal adopts the definition set forth in the Section 503 final rule. The current regulations do not contain an analogous definition, but the proposed definition does not represent a change in current OFCCP policy.

Section 60–250.2(u) ''Direct Threat''

The definition found in the Section 503 final rule has been incorporated. The definition states that a ''direct threat'' is a significant safety or health risk—as determined based on an individualized assessment in light of specified factors—that cannot be eliminated or reduced by reasonable accommodation. The factors considered include the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur and the imminence of the potential harm. OFCCP's current regulations do not contain a parallel definition. However, OFCCP has relied on essentially the same concept when applying its current regulations. Section 60–250.6(c)(2) of the current regulations requires that when a contractor uses a job qualification requirement which tends to screen out special disabled veterans, the contractor shall demonstrate that such requirement is consistent with business necessity and safe performance of the job in question. In determining whether a particular health or safety risk is sufficient to justify, consistent with the requirements of that section, the exclusion of a special disabled veteran from an employment opportunity, OFCCP currently considers essentially the same factors (the likelihood, seriousness and imminence of potential injury associated with the disability) as are set out by the proposal.

Section 60–250.3 Exceptions to the Definitions of ''Special Disabled Veteran'' and ''Qualified Special Disabled Veteran''

Paragraph (a)(1) establishes an exclusion from the Act's protection with respect to alcoholics whose current use of alcohol prevents performance of the essential functions of the job in question or which would pose a direct threat to property or to health or safety. A parallel exclusionary proviso is contained in the Section 503 final rule at § 60–741.3(a). This Section 503 provision was derived from an amendment to the Rehabilitation Act by Section 512(a) of the ADA providing that the terms ''individual with a disability'' and ''qualified individual with a disability'' do not include alcoholics whose current alcohol use poses such a threat. The revision does not represent a substantive change in the scope of protection for special disabled veterans under Section 4212 or a change in OFCCP policy. Rather, the proposal merely clarifies that when a special disabled veteran's current

alcohol use would prevent performance of the essential functions of the job in question or would pose a direct threat to property or to health or safety, he or she is not protected under the statute. It is axiomatic that such individuals would not be otherwise protected under this proposal (and under the current regulations) because their alcohol use either prevents performance of essential job functions, and thus renders them ''unqualified'' (see definition of ''Qualified special disabled veteran'' at § 60–250.2(o)), or constitutes a direct threat (see definition of ''Direct threat'' at § 60–250.2(u) and Direct threat defense at § 60–250.22). Paragraph (a)(2) clarifies that the contractor has the same obligation to provide a reasonable accommodation for the mental and physical limitations of an alcoholic—in an effort to enable the individual to perform the essential functions of the job in question or to eliminate or reduce the direct threat posed by an alcoholic's current use of alcohol—as the contractor has with respect to any other disabling condition. OFCCP believes that this provision is necessary to clarify that paragraph (a)(1) does not create a blanket exclusion for all alcoholics whose condition presents a direct threat.

Paragraph (b) establishes an exclusion from the Act's protection with respect to currently contagious diseases or infections that is analogous to the exclusion regarding alcoholics set forth in paragraph (a)(1). The provision is patterned after a proviso set out in the Section 503 final rule at § 60–741.3(c) (which was derived from a 1988 amendment to the Rehabilitation Act by the Civil Rights Restoration Act, Public Law 100–259, 29 U.S.C.A. 706(8)(D) (West Supp. 1992)). The proviso does not represent a substantive change in the scope of protection under Section 4212 or a change in OFCCP policy.

Rather, it merely provides a clarification regarding the scope of protection under the Act similar to that set out in paragraph (a)(1).

Paragraph (c)(2) sets out a clarification regarding a contractor's duty to provide reasonable accommodation for a covered veteran with a currently contagious disease or infection which is analogous to paragraph (a)(2) above.

Today's proposal does not adopt the Section 503 final rule's exclusion regarding illegal drug use (see § 60–741.3(a) of those regulations). That provision states that the terms ''individual with a disability'' and ''qualified individual with a disability'' do not include a person who is currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use. The language was derived from an amendment to the definition section of the Rehabilitation Act by Section 512(a) of the ADA (29 U.S.C.A. 706(8)(C)(i) (West Supp. 1992)) which significantly altered the existing coverage provisions for drug users under Section 503. The statutory amendment did not affect Section 4212, and OFCCP declines to adopt an analogous regulatory exclusion with respect to Section 4212.

Section 60–250.4 Coverage and Waivers

Proposed paragraph (a)(1), which sets out the general monetary jurisdiction requirement, is derived from existing § 60–250.3(a)(1), and is substantially identical to that section.

Proposed paragraph (a)(2), which relates to contracts for indefinite quantities, is derived from existing § 60–250.3(a)(2), and is substantially identical to that section.

Proposed paragraph (a)(3) narrows the existing provision regarding the applicability of Part 60–250 to work performed outside the United States. The proposal is consistent with the Section 503 final rule. It makes VEVRAA applicable only to employment activities within the United States, which includes actual employment within the United States and, in limited circumstances, decisions made within the United States regarding employment abroad. Proposed paragraph (a)(4) is identical to current § 60–250.3(a)(4), and proposed paragraph (a)(5) is identical to current § 60–250.3(a)(5).

For the sake of clarity, proposed paragraph (b) consolidates current §§ 60–250.3(b)(1) and (3), which relate to waivers and withdrawal of waivers, respectively. The portion of the paragraph relating to the grant of waivers has been revised to permit the Deputy Assistant Secretary for Federal Contract Compliance Programs to unilaterally grant waivers in the national interest. Currently, § 60–250.3(b)(1) permits the head of an agency to grant such a waiver with the concurrence of the Deputy Assistant Secretary. When this provision was issued, enforcement responsibilities under the Act were carried out by individual Federal compliance agencies as well as by OFCCP. During this period, the granting of waivers was coordinated between these compliance agencies and OFCCP. All compliance responsibility was consolidated into OFCCP in 1978; accordingly, such a requirement is no longer appropriate.

Proposed paragraph (b)(2), which relates to national security waivers, is substantially identical to current § 60–250.3(b)(2). Paragraph (5) of the current rule, '' Facilities not connected with contracts,'' has been integrated as subparagraph (b)(3) to provide clarity and be consistent with Section 503.

Section 60–250.5 Equal Opportunity Clause

This section is derived from current § 60–250.4. The current heading for the section, ''Affirmative action clause,'' has been revised to read ''Equal opportunity clause,'' in order to conform it with the analogous provision contained in the Section 503 final rule (§ 60–741.5) and the regulations implementing Executive Order 11246 (41 CFR 60–1.4). The heading for the clause itself has been revised to reference ''Equal Opportunity'' rather than ''Affirmative Action.'' With respect to paragraph (a)1 (current paragraph (a)), the proposal expands and reorganizes the listing of the prohibited types of disability discrimination to conform to the parallel provisions in the Section 503 final rule, which in turn, were derived from analogous provisions in the EEOC ADA regulations (§ 1630.4). Further, in contrast to the current paragraph (a), the proposal states that the discrimination prohibition applies also to apprenticeship and on-the-job training under 38 U.S.C. 3687. This provision, which is set out in current § 60–250.6(a) Affirmative action policy, practice and procedures, is more properly included in the equal opportunity clause. (The statutory citation has been revised to reflect an amendment which resulted in its redesignation.)

Proposed paragraph (a)2, which is based on current paragraph (b), provides that the contractor shall immediately list its employment openings with the local office of the state employment service system. In contrast to the proposal, current paragraph (b) states that the contractor shall also provide other reports to such local office as may be required. It is not possible to ascertain burden reduction since the requirement was suspended by OMB on January 29, 1982 (47 FR 4258). OFCCP has found that this additional reporting requirement is unnecessary, and therefore, declines to carry the provision forward. Further, current paragraph (b) exempts state and local government agencies covered by Section 4212 from the reporting requirements set out in paragraphs (d) and (e). As discussed below, the reporting requirement in current paragraph (d) is not carried forward by this proposal, and therefore, the reference to that requirement is omitted from the proposed equal opportunity clause.

Proposed paragraph 3 is identical to current paragraph (c). Current paragraph (d) is not carried forward by today's proposal. That paragraph requires that the contractor file, on a quarterly basis, reports with the state employment service system regarding the number of disabled veterans and veterans of the Vietnam era that the contractor hired during the reporting period. This provision was suspended on January 29, 1982 (47 FR 4258) because the reporting requirement had not been approved by OMB under the Paperwork Reduction Act. The suspension was to remain in effect pending final action on the Department's 1980 proposal to amend Part 60–250. A similar annual reporting requirement is currently imposed on contractors covered under Section 4212 pursuant to 41 CFR Part 61–250; that requirement is administered by the Department's Office of the Assistant Secretary for Veterans' Employment and Training. Accordingly, the requirements set out in current paragraph (d) are no longer necessary.

Proposed paragraphs 4 and 5 are identical to current paragraphs (e) and (f), with the exception of a few minor editorial changes. The provisions of current paragraph (g) have been incorporated into proposed paragraph 6. Proposed paragraphs 6 (i), (ii) and (iv), which define terms used in connection with the mandatory listing requirement, are identical to the current paragraphs (h) (1), (2) and (3), with the exception of one minor editorial change. Proposed paragraph 6(iii), which defines the term ''executive and top management,'' is new. Section 702 of the Veterans' Benefits Improvements Act of 1994, Public Law 103–446, permits the exemption of the contractor's ''executive and top management'' positions from the mandatory job listing requirement. Our proposed definition of ''executive and top management'' is based upon the definition of ''executive'' found in the regulations implementing the Fair Labor Standards Act, 29 CFR 541.1, except that we do not propose to adopt the compensation levels specified in subsection (f) of that regulation. Proposed paragraphs 7, 8, 10 and 11, which set out additional contractor requirements, are substantially identical to current paragraphs (i) through (m), respectively, with the exception of a number of editorial changes. For instance, proposed paragraph 10 (current paragraph (l)) makes reference to a ''labor organization'' rather than to a ''labor union.''

Proposed paragraph 9, regarding contractor posting of notices, is similar to current paragraph (k). In conformance with the final Section 503 rule, the posting requirement specifically commits the contractor to ensure that the notices are accessible to applicants and employees who are special disabled veterans. A contractor may make these notices accessible, for example, by having the notice read to a visually disabled individual or by lowering the posted notice so that it may be read by a person in a wheelchair.

Further, current §§ 60–250.20 to 60–250.24 have been consolidated (without substantive change) into this section as paragraphs (b)–(f), respectively. These provisions, which relate to the equal opportunity clause, are more logically included here than as separate sections. Proposed paragraph (d) provides that the contractor may make the equal opportunity clause a part of the contract by simply citing to § 60–250.5. In contrast, current § 60–250.22 states that the equal opportunity clause may be incorporated into the contract by reference. The intent of the proposal is to clarify the current requirement. The proposal does not use the term ''incorporation by reference,'' inasmuch as the regulations of the Office of Federal Register at 1 CFR Part 51 preclude the use of the term in this context.

Subpart B—Discrimination Prohibited

Section 60–250.20 Covered Employment Activities

This section, which lists various types of employment practices to which Part 60–250 applies, is substantially identical to § 60–741.20 of the Section 503 final rule. In turn, the Section 503 regulation is patterned after § 1630.4 of the EEOC regulations. The current Section 4212 regulations contain a similar, but less detailed, listing in the affirmative action clause (§ 60–250.4(a)).

Section 60–250.21 Prohibitions

This section, which sets out in detail the various types of prohibited discriminatory practices, parallels the Section 503 final rule (§ 60–741.21), which, in turn, generally adopts and consolidates the EEOC regulations at § 1630.5 through 1630.11. A number of the prohibitions set out in this section are paralleled in the current Section 4212 regulations or are implicit from those regulations. However, the analogous existing provisions are organized under the rubric of ''affirmative action policy, practices, and procedures'' (§ 60–250.6). As noted above, today's proposal reorganizes the regulations so as to clearly define which obligations are components of the affirmative action program requirement, and thus applicable only to contractors that employ 50 or more persons and hold a contract valued at $50,000 or more (*see* discussion of Subpart C below).

The introductory sentence of this section, which states that ''discrimination'' includes the acts described in proposed §§ 60 250.21 and 60–250.23, is patterned after the final sentence of § 1630.4 of the EEOC regulations. Paragraph (a), which sets out a general prohibition regarding disparate treatment discrimination, is patterned after § 60–741.21(a) of the Section 503 regulations. The Section 503 final rule has no direct counterpart in the EEOC regulations, but rather was proposed to clarify that disparate treatment is one form of prohibited discrimination under those regulations. Paragraphs (b) through (h), which specify other types of prohibited discrimination, are new to the Section 4212 regulations and parallel their EEOC and Section 503 final rule counterparts, except as discussed below.

Proposed paragraph (f)(1), which provides that it is unlawful to fail to make reasonable accommodation, unless the contractor can demonstrate an undue hardship, is substantially similar to current § 60–250.6(d). As stated in the discussion in the EEOC's interpretative guidance appendix, the contractor is not required to provide a reasonable accommodation unless the special disabled veteran informs the contractor that an accommodation is needed. However, if an employee who is a known special disabled veteran is having difficulty performing his or her job, the contractor may inquire whether the employee is in need of a reasonable accommodation. (This contrasts with the duty of a contractor covered by the written affirmative action program requirement; such a contractor must inquire about the need for an accommodation in that circumstance. See proposed § 60–250.44(d).) Further, although proposed paragraph (f)(2), which states that it is unlawful to deny employment opportunities based on the need to make a reasonable accommodation, is not paralleled in the current regulations, that obligation is implicit in current § 60–250.6(d).

The first sentence of proposed paragraph (g)(1)—which prohibits the use of selection criteria that screen out special disabled veterans or veterans of the Vietnam era, unless the selection criteria are shown to be job-related and consistent with business necessity—is essentially the same as the requirements contained in parallel provisions of the Section 503 final rule (§ 60–741.21(g)(1)) and the EEOC regulation (§ 1630.10), as well as the current VEVRAA regulation

(§ 60–250.6(c)(2)). The last sentence in that paragraph, which limits the purposes for which a contractor may rely on a covered veteran's military record, is substantially similar to language contained in current § 60–250.6(b). Paragraph (g)(2) provides that the Uniform Guidelines on Employee Selection Procedures (which, among other things, set out certain requirements for validating employee selection procedures which adversely affect particular race, sex or ethnic groups) do not apply to Part 60–250. An analogous statement is made by EEOC in its appendix discussion of the parallel EEOC regulation (§ 1630.10).

Paragraph (h) requires that the contractor administer employment tests to eligible applicants or employees with impaired sensory, manual, or speaking skills in a format that does not require the use of the impaired skills, unless such skills are the factors that the test purports to measure. This provision is substantially identical to the counterpart provision in the Section 503 final rule, which, in turn, is derived from § 1630.11 of the EEOC regulations.

Paragraph (i), compensation, is derived from current § 60–250.6(e), and (with the exception of some editorial changes) is substantially similar to that section.

Section 60–250.22 Direct Threat Defense

This section clarifies that a contractor may exclude from employment opportunities persons who cannot perform essential functions without posing a direct health or safety threat to themselves or others. This provision is substantially identical to the parallel provision in the Section 503 final rule (§ 60–741.22), which is derived from, and substantially similar to, § 1630.15(b)(5) of the EEOC regulations.

Section 60–250.23 Medical Examinations and Inquiries

This section incorporates the Section 503 final rules' provisions regarding prohibited and permitted medical examinations and inquiries (§ 60–741.23), which, in turn, are patterned after the counterpart provisions in the EEOC's regulations (§§ 1630.13 and 1630.14).

The provisions contained in this section generally have no counterpart in the current Section 4212 regulations. In some cases, the provisions in this section significantly contrast with the current regulations. In this regard, proposed paragraph (b)(2) permits the contractor to require an employment entrance medical examination or inquiry after making an offer of employment to a job applicant and to condition an offer of employment on the results of such an examination or inquiry if all similarly situated employees are subjected to such an examination or inquiry, and proposed paragraph (b)(3) permits a contractor to require a job-related medical examination or inquiry of an employee. Proposed paragraph (b)(5) specifies that examinations conducted pursuant to paragraph (b)(2) need not be job-related; however, if a special disabled veteran is screened out from an employment opportunity as a result of such examination or as the result of another examination, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity. In contrast, the current Section 4212 regulations do not limit the use of medical examinations to the post-employment-offer context or require that examinations or inquiries of employees be job-related. Rather, current § 60–250.6(c)(3) states that a contractor may conduct a pre-employment medical examination, provided that the results of such examination are used consistently with other requirements in § 60–250.6 (Affirmative action policy, practices, and procedures). However, similar to proposed paragraph (b)(5), current § 60–250.6(c)(2) provides that the contractor may not use physical or mental qualification requirements to screen out qualified disabled veterans, unless such requirements are shown to be job-related and consistent with business necessity.

Proposed paragraph (c), Invitation to self-identify, references § 60–250.42, which specifies that a contractor shall invite applicants to self-identify as being covered by the Act and wishing to benefit under the affirmative action program. Proposed paragraph (d) specifies, with certain limited exceptions, that information obtained under this section shall be kept confidential.

Section 60–250.24 Drugs and Alcohol

Proposed paragraph (a), which sets out permitted types of contractor practices relating to the regulation of workplace drug and alcohol use, and proposed paragraph (b), which governs the permissible use of drug testing, are identical to the revised Section 503 regulation (60–741.24), which, in turn, is patterned after the EEOC regulations at §§ 1630.16(b) and (c), respectively. As discussed below, paragraphs (a) and (b) contain minor technical changes (as well as a number of editorial changes) from the EEOC rule. This section is not paralleled by any provisions contained in the current Section 4212 regulations. Sections 1630.16(b)(5) and (6) of the EEOC regulations state that employees may be required to comply with the regulations of the Departments of Defense and Transportation and of the Nuclear Regulatory Commission regarding alcohol and drugs. In contrast, proposed paragraphs (a)(5) and (a)(6) state that employees also may be required to comply with similar regulations of other Federal agencies.

Paragraph (b)(3) states that any medical information obtained from a drug test, except information regarding the illegal use of drugs, is subject to the requirements of §§ 60–250.23(b)(5) and (d). In turn, proposed § 60–250.23(b)(5) states that the contractor must demonstrate that criteria which are used to screen out special disabled veteran applicants or employees are job-related and consistent with business necessity; and proposed § 60–250.23(d) provides for certain confidentiality requirements with regard to medical information. The parallel EEOC regulation (§ 1630.16(c)(3)) fails to reference medical confidentiality requirements, but the EEOC appendix discussion regarding the section notes that the information in question should be treated as a confidential medical record.

Section 60–250.25 Health Insurance, Life Insurance and Other Benefit Plans

Proposed paragraphs (a), (b), (c) and (e) of this section provide that the contractor may administer benefit plans in a manner which is not inconsistent with state law, or administer a benefit plan that is not subject to state laws that regulate insurance, provided that such activities are not used as a subterfuge to evade the purposes of Part 60–250. These provisions are substantially identical to the Section 503 final rule at § 60–741.25. Paragraphs (a), (b), (c) and (e) of those regulations, in turn, are patterned after EEOC's regulations at § 1630.16(f)(1)–(f)(4), respectively. Proposed paragraph (d), which provides that the contractor may not deny a qualified special disabled veteran equal access to insurance based on disability alone if the disability does not pose increased risks, is derived from the EEOC appendix discussion regarding § 1630.16(f).

Subpart C—Affirmative Action Program

Subpart C is derived from §§ 60–250.5 (Applicability of the affirmative action program requirement) and 60–250.6 (Affirmative action policy, practice, and procedures) of the current Section 4212 regulations. This subpart revises and reorganizes those sections to incorporate only obligations which are applicable to

contractors with a written affirmative action program requirement, i.e., those that employ 50 or more employees and hold a contract of $50,000 or more. See proposed § 60–250.40(a). Provisions currently in § 60–250.6 that are applicable to all covered contractors have been incorporated into proposed Subparts B (Discrimination Prohibited) or E (Ancillary Matters).

Section 60–250.40 Applicability of the Affirmative Action Program Requirement

Paragraph (a), which has no parallel in the current Section 4212 regulations, clarifies the application of the requirements of Subpart C. Paragraphs (b) and (c)—which specify the contractor's duties with regard to the preparation and maintenance of its affirmative action program (AAP), and the updating of its AAP, are derived from current §§ 60–250.5(a) and (b), respectively. Minor clarifying changes or organizational changes have been made with respect to these provisions. For instance, current § 60–250.5(a) states that the AAP shall set forth the contractor's policies, practices and procedures ''in accordance with § 60–250.6 of this part.'' The reference to this particular section has been omitted to clarify that the contractor's AAP should address all relevant practices under Part 60–250, not only those that relate to this particular section. Current § 60–250.5(a) also states that contractors presently holding contracts shall update their AAPs within 120 days of the effective date of Part 60–250. This provision has been incorporated into a separate effective date section (§ 60–250.86). Current § 60–250.5(d), which sets out the ''self-identification'' procedures, has been incorporated with revisions at proposed § 60–250.42.

Paragraph (d) states that the contractor shall generally submit its AAP within 30 days of a request by OFCCP and that it shall also make the document promptly available on-site upon such request. These provisions, which are not contained in the current regulations, have been included in order to help ensure that OFCCP has access to the contractor's AAP as soon as needed.

Section 60–250.41 Availability of Affirmative Action Program

With the exception of some stylistic differences, this section, which provides that the AAP shall be available to any applicant or employee at a location and time which shall be posted at each establishment, is identical to current § 60–250.5(c).

Section 60–250.42 Invitation to Self-identify

On _____, 1996, OFCCP published (_____ F.R. _____) an interim rule amending § 60–250.5(d) of the current regulations relating to invitations to self-identify. The purpose of the interim rule was to conform the invitation to self-identify requirement under VEVRAA with the requirement contained in the new Section 503 final rule (_____ F.R. _____).

This proposal mirrors the VEVRAA interim rule and the Section 503 final rule. Paragraph (a) requires the contractor, after making an offer of employment and before the applicant begins his or her employment duties, to invite applicants to self-identify in order to benefit from the contractor's affirmative action program. In addition, under paragraphs (b) and (c) a pre-offer invitation is permitted only in two limited circumstances: if the invitation is made when the contractor actually is undertaking affirmative action at the pre-offer stage; and if the invitation is made pursuant to a Federal, state or local law requiring affirmative action for special disabled or Vietnam era veterans. This approach is consistent with § 1630.14(b) of the EEOC's regulations, and the EEOC's October 10, 1995, ''ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations.''

Paragraph (d) of the proposed rule requires that the invitation inform the individual that the request to benefit under the contractor's affirmative action program may be made immediately or at any time in the future. This is intended to help ensure that the individual is aware that he or she is not precluded from making the request at any time in the future merely because an initial request was made or because he or she failed to make the request immediately in response to the invitation. For example, a special disabled veteran simply may not choose to self-identify before beginning work, but may wish to do so later.

The contractor may develop its own invitation for this purpose, although an acceptable form of such invitation is set forth in Appendix B.

Section 60–250.43 Affirmative Action Policy

This section, which sets out the contractor's fundamental affirmative action obligations, clarifies that such obligations include a duty to refrain from discrimination; that the contractor is required to take affirmative action efforts with respect to all levels of employment, including the executive level; and that such requirements apply to all employment activities. This provision is substantially similar to current § 60–250.6(a) (which does not contain the reference to the prohibition against discrimination). The remaining paragraphs of current § 60–250.6 are comprised of the specific required affirmative action policy, practices and procedures. As discussed below, these provisions have been incorporated with modification into proposed § 60–250.44.

Section 60–250.44 Required Contents of Affirmative Action Programs

The provisions contained in this section were derived from existing § 60–250.6, and have been organized, as stated in this section's introductory sentence, to set out the minimum required AAP ingredients. Although a number of the requirements are also applicable to contractors that do not have a written AAP obligation, i.e., those contractors that do not employ 50 or more employees and hold a contract of $50,000 or more, all requirements applicable to AAP contractors are included in this section for the sake of clarity. In addition, this section sets out suggested affirmative action activities that the contractor is encouraged to undertake in order to comply with the specified minimum affirmative action requirements. The contractor has discretion in undertaking these suggested activities or other activities in satisfying the mandatory requirements. In some cases, obligations that are not mandatory under the current regulations have been made mandatory in this proposal and vice versa.

Paragraph (a) states that the contractor's AAP shall include an equal opportunity policy statement and specifies the contents—both suggested (relevant information about the contractor's policy) and required (notification that the contractor is obligated, as specified in proposed § 60–250.69, to refrain from harassment or intimidation). The proposal is intended as a clarification of an existing regulatory provision. Current § 60–250.6(g) states that the contractor should adopt, implement and disseminate an equal opportunity policy (through various enumerated methods), but does not expressly require that it be included in the contractor's AAP or indicate what should be contained in the statement.

With the exception of its third sentence, paragraph (b), which specifies that the contractor must ensure that its personnel processes provide for careful consideration of the job qualifications of known special disabled veterans or veterans of the Vietnam era, is substantially similar to existing § 60–

250.6(b). The third sentence of the paragraph, which states that the contractor shall ensure that its personnel processes are free from stereotyping, is derived from current § 60–250.6(i)(2), except that the requirement is made mandatory in the proposal, and is a suggested method of compliance in the current regulation. OFCCP believes that this requirement is central to the Act's affirmative action obligation, and therefore should be mandatory.

Paragraphs (c)(1) and (2) are substantially similar to current §§ 60–250.6(c)(1) and (2), respectively. Like current § 60–250.6(c)(1), proposed paragraph (c)(1) requires that the contractor periodically review all physical and mental job qualification standards to ensure that qualification standards that tend to screen out special disabled veterans are job-related for the position in question and consistent with business necessity. In contrast to the proposal, the current regulation also states that such standards must be consistent with safe performance of the job. It is unnecessary to incorporate the reference to ''safe performance'' in the proposal because that concept is subsumed by the concept of business necessity. Proposed paragraph (c)(1), also in contrast with the current regulation, clarifies that the contractor must ensure that such exclusionary job standards concern essential functions of the job in issue. This clarification is based on the counterpart provision in the Section 503 final rule (§ 60–741.44(c)(1)), which, in turn, is based on the EEOC's interpretation of analogous requirements under the ADA. (See the discussion regarding § 1630.10 in the appendix to the ADA's regulations.) Proposed paragraph (c)(2) requires that the contractor demonstrate that its use of physical or mental selection standards which tend to screen out qualified special disabled veterans is job-related and consistent with business necessity. This paragraph contains the same type of modifications that have been incorporated into proposed paragraph (c)(1).

Paragraph (c)(3) incorporates, for the sake of clarity, a statement similar to the statement in proposed § 60–250.22 that the contractor may exclude from employment opportunities persons who pose a direct threat to health or safety.

Paragraph (d) requires the contractor to make reasonable accommodation for a known otherwise qualified special disabled veteran, unless it can demonstrate an undue hardship on the operation of its business. The proposal is similar to current § 60–250.6(d) (first sentence), except that it clarifies that the accommodation duty is owed only to an ''otherwise qualified'' special disabled veteran. As stated in proposed Appendix B, a special disabled veteran 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. The second sentence of the current regulation, which sets out factors that are relevant to the determination of the extent of the contractor's accommodation obligation, is not incorporated in proposed paragraph (d). A similar more detailed listing of factors is included in the proposed definition of ''undue hardship'' (§ 60–250.2(s)(2)). Proposed paragraph (d) also requires that where an employee who is a known special disabled veteran is having 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 inquire whether the employee is in need of a reasonable accommodation. The current regulations do not contain a parallel provision. This requirement is an essential component of the contractor's affirmative action duty. Absent such a requirement, the contractor would be free to take adverse action against a known special disabled veteran (who might be otherwise qualified) merely because the veteran failed to request an accommodation. A special disabled veteran who is in need of an accommodation may fail to seek out an accommodation for any number of reasons; for instance, he or she may not perceive the need for an accommodation or may be unaware of his or her right to obtain an accommodation. Because the provision applies only to an employee the contractor knows to be a special disabled veteran (that is, in the situation where it is reasonable to conclude that a performance problem may be related to a veteran's disability) and does not require the contractor to speculate about the need for accommodation in equivocal situations, OFCCP believes that it fairly balances the rights of both the veteran and employer.

Paragraph (e) provides that the contractor must develop procedures to ensure that its employees are not harassed because of their disability or Vietnam era veteran status. The current regulations, at § 60–250.6(h)(1)(ii), contain a similar provision which is not mandatory (supervisors ''should'' be advised that the contractor is obligated to prevent harassment). Upon reconsideration, OFCCP believes that harassment is a sufficiently important issue to warrant mandatory affirmative steps to ensure that it does not occur.

Paragraph (f) provides that the contractor has a duty to take actions such as outreach and recruitment activities to effectively recruit special disabled veterans and veterans of the Vietnam era as are appropriate in light of the circumstances, including the contractor's size and resources and the extent to which existing practices are adequate. The paragraph also sets out a listing of appropriate activities that contractors should take in this regard, and specifies that the contractor has discretion in undertaking these or other activities. This section is generally consistent with current § 60–250.6(f), but incorporates a number of clarifying modifications. Some of the suggested outreach and recruitment activities listed in the current regulations concern policies regarding the internal dissemination of the contractor's policy, and therefore have been incorporated into proposed § 60–250.44(g), which addresses that subject.

Also, the proposal consolidates into paragraph (f) (without substantive change) some portions of current § 60–250.6(f) (positive recruitment and external dissemination of policy), and § 60–250.6(i) (development and execution of AAPs). Proposed paragraph (f)(1), which states that the contractor should obtain assistance from specified types of recruitment sources, is derived from current § 60–250.6(f)(4). That provision has been edited for clarity and references to recruitment sources have been updated. Proposed paragraph (f)(2), which states that the contractor should conduct formal briefing sessions with recruitment source representatives, is derived from current § 60–250.6(i)(4). Proposed paragraph (f)(3), which relates to recruitment efforts at educational institutions, consolidates current §§ 60–250.6(i)(7) and (8). Proposed paragraph (f)(5), which specifies that special disabled veterans and veterans of the Vietnam era should participate in outreach and recruitment activities, is based on current §§ 60–250.6(i)(6).

Proposed paragraph (f)(8) establishes a new suggested recruitment activity (which parallels § 60–741.44(f)(7) of the Section 503 final rule) that has no counterpart in the current regulations. That paragraph states that the contractor, in making hiring decisions, should consider applicants who are known special disabled veterans or veterans of the Vietnam era for other positions for which they may be qualified when the position applied for is unavailable. OFCCP believes that such a practice will be effective in helping to maximize the employment

opportunities of special disabled veterans and veterans of the Vietnam era. In many cases, the consideration of applicants for such alternative jobs will not place any added burdens on the contractor's personnel system (because, for instance, that practice is already standard for applicants in general). Indeed, this practice may frequently benefit a business inasmuch as it can obviate the need to seek additional qualified candidates.

Proposed paragraph (g)(1), which sets out requirements which are complementary to proposed paragraph (f), states that the contractor must develop internal procedures to assure supervisory, management and other employee cooperation and participation in the contractor's efforts to implement its affirmative action obligation. Like paragraph (f), paragraph (g)(2) lists suggested procedures that the contractor should undertake to communicate its affirmative action obligation internally. For the most part, the provisions in these paragraphs are derived from existing § 60–250.6(g). However, in contrast to the proposal, that section provides that the contractor's duty to engage in internal dissemination activities is not mandatory. Upon reconsideration, OFCCP concludes, as stated in proposed paragraph (g)(1) itself, that the contractor's outreach program will not be effective without internal support, which, in turn, requires that the contractor engage in reasonable efforts to disseminate its affirmative action policy to all employees. Accordingly, OFCCP believes that the internal communication duty should be mandatory. Further, paragraph (g)(1) incorporates a clarification (like that contained in proposed paragraph (f)) that the scope of the contractor's efforts shall depend on all the relevant circumstances.

Moreover, as noted above, relevant provisions from current § 60–250.6(f) are consolidated (without substantive change) into this paragraph as well: proposed paragraph (g)(1) combines provisions from current §§ 60–250.6(f)(1) and (g) (introductory sentence). Proposed paragraph (g)(2)(ii), which states that the contractor should inform all employees and prospective employees of its affirmative action policy and schedule employee meetings to discuss the policy, is derived from current §§ 60–250.6(f)(3) and (g)(4). Current § 60–250.6(g)(9) states that the contractor, as a suggested internal dissemination procedure, should post its affirmative action policy, including a statement that employees and applicants who are special disabled veterans are protected from disability-related harassment, on company bulletin boards. Today's proposal incorporates this provision as a mandatory requirement at § 60–250.44(a).

Paragraph (h), which requires the contractor to implement an audit system to measure the effectiveness of its AAP and to undertake necessary action to bring its program into compliance, is derived (without substantive modification) from current § 60–250.6(h)(3) (where the provision is set out as one of several specified responsibilities of the contractor's affirmative action manager). In contrast to the current regulation, today's proposal sets out the provision as a separate subsection in order to emphasize its importance. Further, the proposal clarifies that the requirement is mandatory.

Paragraph (i) provides that the contractor shall designate an official of the company as an affirmative action manager and provide that individual with necessary top management support and staff. This provision is derived from current § 60–250.6(h). In view of the importance of designating an official as responsible for the implementation of the contractor's AAP, the proposal, in contrast to the current regulation, provides that the contractor's duty in this regard is mandatory. Additionally today's proposal does not incorporate the current regulation's listing of activities in which the affirmative action manager should engage, inasmuch as such a listing would unnecessarily duplicate other provisions contained in the proposal.

Paragraph (j), which is based on current § 60–250.6(i)(3), requires the contractor to train all employees involved in the personnel process to ensure that the contractor's AAP commitments are implemented. Because of the importance of this requirement, the proposal, in contrast to the current regulations, specifies that it is mandatory and sets it out as a separate subsection.

Subpart D—General Enforcement and Complaint Procedures

As stated above, this subpart expands the current provisions contained in Subpart B of the current regulations and conforms many of those provisions to the parallel provisions contained in the regulations implementing Executive Order 11246 (41 CFR Part 60–1, Subpart B), which have been incorporated in the Section 503 final rule. Upon careful consideration, OFCCP has concluded that in the specific instances where the regulations are conformed there is no reason to apply different procedures under the Act, the Executive Order or Section 503. Further, this subpart incorporates one stylistic change throughout. The current regulations in some instances make reference to violations of (or compliance with) the affirmative action clause (i.e., equal opportunity clause) and/or to violations of (or compliance with) the Act or this part. For the sake of consistency, the proposal generally makes reference to violations (or compliance with) ''the Act or this part.''

OFCCP recognizes that differences and disputes about the requirements of the Act and the regulations may arise between contractors and special disabled veterans and veterans of the Vietnam era as a result of misunderstandings. Such disputes frequently can be resolved more effectively through informal negotiation or mediation procedures, rather than through the formal enforcement process set out in the regulations. Accordingly, OFCCP will encourage efforts to settle such differences through alternative dispute resolution, provided that such efforts do not deprive any individual of legal rights under the Act or the regulations. (See the Department of Labor's policy on the use of alternative dispute resolution. 40 FR 7292, Feb. 28, 1992.)

Section 60–250.60 Compliance Reviews

Paragraph (a) of this section clarifies existing regulatory authority for OFCCP to conduct compliance reviews with regard to contractors' implementation of their affirmative action obligations, and provides that the review shall consist of a comprehensive analysis of all relevant practices, and that recommendations for appropriate sanctions shall be made. Paragraph (b) specifies that where deficiencies are found, reasonable conciliation efforts shall be made pursuant to § 60–250.62. Paragraph (c) provides that, during a compliance review, OFCCP will verify whether the contractor has properly filed its annual Veterans' Employment Report (VETS–100) with the Assistant Secretary for Veterans' Employment and Training (OASVET) (as required under 41 CFR Part 61–250), and that OFCCP will notify OASVET if the contractor has not done so.

Paragraphs (a) and (b) have no parallel in the current section 4212 regulations, but are generally patterned after selected portions of the compliance review provisions of the regulations implementing Executive Order 11246 (41 CFR 60–1.20(a) and (b), respectively). However, the statement

authorizing OFCCP to conduct compliance reviews in proposed paragraph (a), which is included for the sake of clarity, is a new provision and is not contained in the Executive Order regulations. Proposed paragraphs (a) and (b) are consistent with OFCCP's existing authority under Section 4212 and § 60–250.25 of the current regulations, and with current OFCCP practice.

Proposed paragraphs (a) and (b) are generally consistent with the relevant provisions of the 1980 final rule at § 60–1.20. The final rule, however, does not contain an express statement regarding OFCCP's authority. Further, in contrast to the proposal, the 1980 final rule, in §§ 60–1.20(a) and (b), discusses various technical internal agency procedures regarding the conduct of compliance reviews (e.g., noting in paragraph (a) that compliance reviews normally are conducted in three stages). Upon further consideration, OFCCP has determined that it is unnecessary to incorporate these procedural statements into today's proposal.

Moreover, today's proposal does not adopt the 1980 final rule's preaward compliance reviews provision (§ 60–1.21), which is essentially a modified version of the preaward procedures contained in the Executive Order regulations (§ 60–1.21(d)). The current Section 4212 regulations do not contain a similar provision. In substance, the 1980 final rule would have required that all prospective nonconstruction contractors and subcontractors seeking contracts exceeding $1 million be subject to a compliance review under the Act before the award of the contract. The 1980 final rule also would have specified criteria that OFCCP should apply in establishing priorities for the conduct of preaward reviews, and would have established requirements regarding the clearance of the contract. OFCCP has determined not to adopt a preaward compliance review procedure in today's proposal because it believes, upon reconsideration, that the diversion of necessary resources to support such a compliance initiative would unduly impair its ability to effectively conduct other compliance activities.

Paragraph (c) has no parallel in the current regulations. The proposal, however, reflects current OFCCP practice.

Section 60–250.61 Complaint Procedures

Paragraph (a), a provision not paralleled in the current regulations, cross-references OFCCP's and EEOC's procedural regulations at 41 CFR Part 60–742 which govern the processing of complaints cognizable under both Section 503 and the ADA, and specifies that complaints filed under Part 60–250 that are cognizable under Section 503 and the ADA will be processed in accordance with those regulations. All other procedural provisions contained in paragraphs (b) through (f) of this proposed section shall be applicable with regard to the processing of such complaints as well. The procedural regulations require, among other things, that OFCCP (acting as EEOC's agent) process and resolve complaints of employment discrimination based on disability for purposes of the ADA (as well as for Section 503) when there is jurisdiction under both statutes. In doing so, OFCCP is required to apply legal standards which are consistent with the substantive legal standards applied under the ADA. (It should be understood that OFCCP has no enforcement authority under the ADA beyond that specified in the procedural regulations.) The purpose of the proposal is to ensure that an aggrieved individual's rights under the ADA are preserved, including the right to file a private lawsuit. (Section 4212 does not provide for a private right of action. The complaint procedures provide the only means by which an individual may seek redress for a violation of the Act.)

The proposal drops the provision in current § 60–250.25 that the Director of OFCCP shall be primarily responsible for the investigation of complaints and other matters as necessary to ensure the effective enforcement of the Act. The intent of this provision, which was included in the regulations prior to the delegation of all compliance authority under Section 4212 to OFCCP, was to ensure that OFCCP had primary control with regard to the administration of the Act. The provision is no longer necessary. The 1980 final rule would have established similar provisions in § 60–1.27 to state that the Director may assume jurisdiction over any matter when necessary to the enforcement of Section 4212, and that the Director may reconsider any pending matter under the Act. OFCCP concludes that these provisions are unnecessary, and thus declines to incorporate them in today's proposal. Further, the provision from the 1980 final rule (§ 60–1.48) that states that a contractor which has complied with the recommendations or orders of OFCCP which it believes to be erroneous may request a hearing and review of the alleged erroneous action, is unnecessary and is not carried forward. That provision relates to preaward compliance reviews (specifically, it is a means by which a contractor can avoid a contract ''pass over'' while still contesting OFCCP's review findings) and is not needed because, as stated above, OFCCP will not be conducting preaward reviews under the Act.

Paragraph (b), which is derived from current § 60–250.26(a), specifies that a person may, personally or by an authorized representative, file a written complaint alleging an individual or class-wide violation of the Act or the regulations within 300 days of the alleged violation with OFCCP (at a specified location) or with the Veterans' Employment and Training Service (VETS) directly or through the Local Veteran's Employment Representative (LVER) or his or her designee at the local state employment service office. The provision also specifies that such parties will assist veterans in preparing complaints and will promptly refer them to the OFCCP. In contrast to the proposal, current § 60–250.26(a) provides that an individual may file a complaint only with VETS (current § 60–250.26(a) is otherwise identical in substance to the proposal with regard to the responsibilities of LVERs and the state employment service). OFCCP's proposal is based on an amendment to the complaint procedure set out in Section 4212(b) by section 509 of the Veterans' Rehabilitation and Education Amendments of 1980. Public Law 96–466, 94 Stat. 2207. The amendment deleted from Section 4212(b) a provision that specified that complaints may be filed with the Veterans' Employment Service and promptly referred to the Secretary of Labor, and substituted a provision that specifies that complaints may be filed with the Secretary, who shall promptly investigate such complaints and take appropriate action. The intent of this amendment was to permit the Secretary of Labor the flexibility to designate a representative, in addition to VETS, to receive complaints directly from aggrieved individuals. See H.R. Rep. No. 1154, 96th Cong., 2d Sess. 77 (1980). The Department has determined, in view of OFCCP's current role in processing complaints, that the agency should act in that capacity. (The Secretary previously delegated authority for enforcement of Section 4212 to the Department's Employment Standards Administration, the parent agency of OFCCP. 52 FR 48466, December 22, 1987.)

The current regulation requires that the complaint be filed within 180 days of the alleged violation, and does not indicate the location where the complaint should be filed. The proposal adopts a 300-day filing deadline, which

is consistent with the complaint-filing deadline in the Section 503 final rule. The current provision, unlike the proposal, does not specify the office at which the complaint may be filed. The location for filing is included to assist the complainant.

Further, the proposal does not incorporate the internal review procedure contained in current § 60–250.26(b) or in the 1980 final rule (§ 60–250.23(f)). The current regulation provides that, when an employee of a contractor files a complaint, and the contractor has an internal review procedure, the contractor will be permitted 60 days to process the complaint under that procedure. If there is no resolution of the matter which is satisfactory to the complainant within 60 days, the complaint then is processed by OFCCP. The 1980 final rule would have provided that the complaint may be referred to the contractor for internal review with the employee's consent. OFCCP has found that the current procedure has not been particularly effective in providing expeditious and satisfactory complaint resolutions. Therefore, OFCCP has decided not to carry forward either a mandatory or voluntary complaint referral procedure. Although there is no regulatory requirement regarding informal resolution of complaints, OFCCP nevertheless strongly encourages parties to attempt to do so whenever possible.

Paragraph (c)(1) specifies the required contents of complaints, and generally is consistent with current § 60–250.26(c). In contrast to the current regulation, the proposal specifies that the complainant must state the pertinent dates concerning the alleged violation (the information need only be provided to the best of the complainant's recollection). Also, the description of the documentation that the individual must submit to show that he or she is a special disabled veteran or a veteran of the Vietnam era has been updated (see proposed paragraph (b)(1)(iii)). The proposal drops current § 60–250.7, which specifies the type of documentation that a complainant must submit regarding his or her special disabled status, because it is unnecessarily duplicative of proposed paragraph (b)(1)(iii).

Paragraph (c)(2) establishes new Section 4212 procedures regarding third party complaints. The procedures are patterned after the analogous provisions of the Section 503 final rule (§ 60–741.61(c)(2)), and the EEOC's procedural regulations applicable to the ADA (29 CFR 1601.7(a)). This paragraph specifies that a third party complaint need not identify by name the person on whose behalf it is filed, although the person filing the complaint shall provide identifying information to OFCCP and other information required under paragraph (c)(1); and that OFCCP shall verify the authorization of the complaint by the person on whose behalf it is made, who may request that his or her identity remain confidential. The purpose of these provisions is to help prevent retaliation against persons seeking to exercise rights protected under the Act by preserving the confidentiality of the complaint process while also ensuring both that OFCCP has sufficient information to properly investigate the complaint and that the complaint is properly authorized. The 1980 final rule would have provided (at § 60–250.23(c)) that signed third party complaints will be accepted whether or not the third party signing the complaint is the authorized representative. Upon reconsideration, OFCCP believes that authorization to file a complaint is an appropriate requirement.

Paragraph (d), which establishes procedures for handling a complaint which contains insufficient information, is substantially identical to current § 60–250.26(d).

Paragraph (e), which is based on the first sentence of current § 60–250.26(e), provides that the Department of Labor shall promptly investigate complaints. OFCCP has determined not to incorporate the statement contained in the second sentence of the current regulation regarding the contents of a complete case record, inasmuch as this is primarily an internal procedural matter, and thus need not be a part of the regulations.

Paragraph (f)(1), which states that the complainant and the contractor shall be notified where the complaint investigation finds no violation or the Deputy Assistant Secretary decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor, is consistent with the first sentence of current § 60–250.26(g). However, the proposal does not incorporate the final sentence of that provision, which states that the complainant may request that the Deputy Assistant Secretary review the finding or decision. Instead, the paragraph incorporates a provision which specifies that the Deputy Assistant Secretary, on his or her own initiative, may reconsider the finding or decision. OFCCP has found that the existing review procedure has not been productive and has therefore determined to drop the procedure.

Paragraph (f)(2) provides that the Deputy Assistant Secretary will review all determinations of no violation that involve complaints that are not also cognizable under the ADA. This will help ensure accuracy of determinations regarding claims raised by persons who would not have an opportunity to seek relief in Federal court. OFCCP believes that the proposed review procedure will provide an adequate check on its no violation findings and decisions not to initiate proceedings.

Paragraph (f)(3) sets out notification procedures regarding the Deputy Assistant Secretary's reconsideration of investigative findings.

Paragraph (f)(4), which states that the contractor shall be invited to participate in conciliation pursuant to § 60–250.62 where there is a finding of violation, is substantially similar to the first sentence of current § 60–250.26(g)(2). As discussed immediately below, the proposal incorporates (with modification) other portions of that section into a separate section on conciliation agreements.

Section 60–250.62 Conciliation Agreements and Letters of Commitment

The purpose of this section is to conform the Section 4212 regulatory procedures regarding conciliation agreements and letters of commitment to the substance of the parallel procedures contained in the Executive Order regulations (41 CFR 60–1.33). Proposed paragraph (a), which incorporates without substantive change paragraph (a) of the Executive Order regulation, requires OFCCP, where it finds a material violation of the Act, to enter into a written agreement with the contractor which provides for appropriate remedial action, provided that the contractor is willing to do so and OFCCP determines that settlement on that basis (rather than referral for potential enforcement) is appropriate. The proposal is conceptually similar to the corresponding current Section 4212 regulation (§ 60–250.26(g)(2)), but incorporates a number of clarifying changes which reflect current OFCCP practice under Section 4212. For instance, although the current regulation, like the proposal, provides for the use of written settlement agreements under which the contractor shall commit to take corrective action, it does not: use the term ''conciliation agreement''; expressly state that ''make whole remedies'' shall be addressed by the agreement; or expressly require that OFCCP determine that settlement through such an agreement (rather than referral for potential enforcement) is appropriate. The last sentence of the proposal, which is derived from the current Section 4212 regulation,

provides that the agreement shall specify the date for the completion of the needed remedial action, which shall be the earliest date possible.

However, the proposal does not incorporate the provision from the current regulation which states that the contractor may be considered in compliance on condition that the commitments contained in the agreement are kept. Further, the proposal does not incorporate a related provision from the 1980 final rule. The 1980 rule, at § 60–1.20(c), states the taking of corrective actions by the contractor pursuant to a conciliation agreement does not preclude OFCCP from making future determinations of noncompliance where OFCCP either finds that the contractor's actions are not sufficient to achieve compliance, or it uncovers violations not previously revealed in an investigation. Upon reconsideration, OFCCP concludes that these provisions are unnecessary and should not be incorporated into the regulations, because the concerns they reflect are addressed by general legal principles.

Paragraph (b), which clarifies the distinction between conciliation agreements and letters of commitment, is incorporated without substantive change from paragraph (b) of the Executive Order regulation (41 CFR 60–1.33(b)).

The 1980 final rule (at § 60–1.26(a)) is substantially similar to proposed paragraph (a), but would have made a number of technical revisions that are not reflected in the proposal (e.g., paragraph (c) of the final rule clarified when a conciliation agreement becomes effective). OFCCP has determined not to incorporate these technical revisions, inasmuch as relevant guidance is already provided in OFCCP's Federal Contract Compliance Manual.

Section 60–250.63 Violation of Conciliation Agreements and Letters of Commitment

This section, which specifies the required notification and enforcement procedures relating to the contractor's violation of a conciliation agreement or letter of commitment, is derived from the Executive Order regulations (41 CFR 60–1.34), and contains a number of clarifying modifications. Most notably, paragraph (a)(4) of the proposal contains a clarification that in enforcement proceedings related to violation of a conciliation agreement, OFCCP is not required to present proof of the underlying violations resolved by the agreement. The intent of this provision is to remove any doubt that OFCCP need not litigate claims that have already been resolved through the agreement. Although the current Section 4212 regulations do not contain provisions parallel to the proposal, the proposal reflects OFCCP's current practice under the Act.

Section 60–250.64 Show Cause Notices

This section is substantially identical to § 60–1.28 of the Executive Order regulations. It provides that when the Deputy Assistant Secretary finds a violation he or she may issue to the contractor a notice requiring it to show cause, within 30 days, why enforcement proceedings should not be instituted; the provision also states that such a notice is not a prerequisite to enforcement proceedings. The current Section 4212 regulations do not contain a comparable provision. The 1980 final rule (at § 60–1.25) would have incorporated considerably more detailed procedures regarding show cause notices than are contained in the proposal; for instance, that rule would have incorporated specific rules on the issuance of the notice and its contents. OFCCP believes that it is more appropriate to incorporate such procedures into its Compliance Manual, and has done so.

Section 60–250.65 Enforcement Proceedings

This section generally conforms the provisions governing Section 4212 enforcement proceedings to those under the Executive Order regulations (§ 60–1.26(a)(2)), and reflects OFCCP's long-standing practice under the Act. Similar to the Executive Order regulation, proposed paragraph (a)(1) provides, in part, that where a violation has not been corrected in accordance with applicable conciliation procedures, an administrative enforcement proceeding may be instituted to enjoin the violations, to seek appropriate make whole relief and to impose appropriate sanctions. The current Section 4212 regulations are consistent with this part of proposed paragraph (a)(1), but do not expressly state what relief will be sought in the proceedings. *See* §§ 60–250.26(g)(3) and 60–250.28(a) (the contractor shall be provided a formal hearing where a violation has not been resolved by informal means) and 60–250.29(a) (an opportunity for a formal hearing shall be provided where a violation is not resolved informally and a hearing is requested or the Director proposes to impose a sanction). The above-referenced provisions from the current regulations are subsumed within proposed paragraph (a)(1), and therefore are not separately adopted by the proposal. The proposal at paragraph (a)(1) also differs from the current Section 4212 regulations as well as the Executive Order regulation in the following respects: It provides that enforcement proceedings also may be instituted where OFCCP determines that referral for formal enforcement (rather than settlement) is appropriate; and it specifies that the enforcement referral will be made to the Solicitor of Labor. Further, paragraph (a)(1) of the proposal clarifies that OFCCP may seek relief for aggrieved individuals identified either during a compliance review or a complaint investigation whether or not such individuals have filed a complaint with OFCCP. This clarification responds to an argument that has sometimes been raised by contractors that relief under the Act is available only to persons who have filed a complaint with OFCCP. OFCCP concludes that such a limitation on available relief is clearly inconsistent with the Act.

Finally, paragraph (a)(1) (paralleling the counterpart provision in the Section 503 final rule at § 60–741.65(a)(1)), again contrasting with both the current Section 4212 regulations and the Executive Order regulations, states that interest on back pay shall be compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes. This provision responds to the ruling of the Department of Labor's Assistant Secretary for Employment Standards in *OFCCP* v. *Washington Metropolitan Area Transit Authority*, 84–OFC–8 (orders dated August 23 and November 17, 1989) that simple interest, rather than compounded interest, should be used in the calculation of back pay awards under Section 503. The rationale of that ruling is equally applicable to Section 4212. OFCCP had a longstanding policy of requiring that interest on back pay awards under Section 4212 be compounded; such policy is consistent with the case law under Title VII of the Civil Rights Act of 1964. OFCCP believes that it must reinstate this policy in order to ensure that aggrieved individuals obtain ''make whole'' relief.

Proposed paragraph (a)(2) provides that the Deputy Assistant Secretary, in addition to the use of administrative enforcement proceedings, may seek appropriate judicial action, including injunctive relief, to enforce the contractual provisions set forth in the regulations' equal opportunity clause. This provision is substantially identical to current § 60–250.28(b).

The proposal differs substantively from the 1980 final rule's enforcement procedures, which appear at § 60–1.29, in that it does not incorporate the

procedures contained in paragraphs (i) and (j) of that section. Paragraph (i) of that section provides that the Department may refer alleged violations of the Act by financial institutions to an appropriate financial regulatory agency, and states that such agency may take whatever action it deems appropriate. OFCCP considers this provision unnecessary at this time, and therefore does not propose to carry it forward. Paragraph (j) states an enforcement policy under which the Department will not debar financial institutions from future Federal deposit or share insurance, or cancel, terminate or suspend existing Federal deposit or share insurance. OFCCP wishes to reassure the public that it does not intend to debar or cancel a financial institution's deposit or share insurance. This has been OFCCP's long-standing policy, even in the absence of a regulation mandating that result. Indeed, OFCCP has repeatedly stated on the record in litigation regarding financial institutions that it does not seek debarment or cancellation of deposit and share insurance. OFCCP will maintain that policy. Upon reconsideration, however, OFCCP believes that it is unnecessary to specify this policy in the regulations. The regulations do not generally specify the precise manner in which the agency will exercise its enforcement powers with regard to particular types of contractors.

Proposed paragraph (b), which pertains to hearing practice and procedure under the Act, is derived from § 60–250.29(b) of the current Section 4212 regulations. Proposed paragraph (b)(1), like current paragraph (b)(1), provides that hearings conducted under the Act shall be governed by the hearing rules applicable to enforcement of Executive Order 11246 (41 CFR Part 60–30). Proposed paragraph (b)(1), revising current paragraph (b)(1), states that the Rules of Evidence set out in the hearing rules applicable to the Department's Administrative Law Judges shall also apply to such hearings. These rules, which were issued in 1990, are generally applicable to the Department's formal adversarial adjudications. In contrast to the current regulation, proposed paragraph (b)(1) requires that the Department's final administrative order under a Section 4212 case be issued within one year from the date of the issuance of the Administrative Law Judge's recommended decision, or the submission of the parties' exceptions and responses to exceptions to such decision (if any), whichever is later. OFCCP believes that this time limit is needed in order to ensure that aggrieved individuals obtain expeditious relief.

Proposed paragraph (b)(2), which designates the specific officials in the Office of the Solicitor who may file administrative complaints, corresponds to the last sentence of current paragraph (b)(1). This proposed paragraph incorporates some changes in nomenclature.

Proposed paragraph (b)(3), which incorporates conforming changes to the terminology in the hearing rules for purposes of Part 60–250, is substantially identical to current paragraph (b)(2).

Section 60–250.66 Sanctions and Penalties

Paragraphs (a) and (b), which respectively specify that OFCCP may seek to withhold progress payments on a contract or terminate a contract to enforce compliance with the Act, are substantially identical to current §§ 60–250.28 (c) and (d). Similarly, proposed paragraph (d), which provides that the contractor shall be provided an opportunity for a formal hearing before the imposition of sanctions or penalties, is substantially similar to current § 60–250.29(a).

Proposed paragraph (c) authorizes OFCCP to impose fixed-term debarments. However, proposed paragraph (c)—which provides that a contractor may be debarred from future contracts for either a fixed period of not less than six months but no more than three years—contrasts with the current regulations, which expressly permit only indefinite-period debarments. In this regard, the current regulations (at § 60–250.28(e)) simply establish authority for the imposition of debarments, and (at § 60–250.50) provide that a debarred contractor may be reinstated as an eligible contractor by demonstrating that it has established and will continue to carry out employment practices in compliance with the Act. Explicit regulatory authority to impose debarment for a minimum fixed-term is necessary to ensure the continued future compliance of some contractors. OFCCP wishes to ensure the regulated community that it does not intend to seek a fixed term debarment for minor, technical violations of the law. (This change is consistent with § 60–741.66(c) of the Section 503 final rule.)

OFCCP believes the fixed-term debarment sanction will be particularly effective in encouraging compliance among the limited class of recalcitrant contractors who repeatedly break their promises of future compliance with respect to affirmative action and recordkeeping requirements. Fixed-period debarments will serve as a more effective deterrent in these cases than the current practice of reinstating the contractor upon its demonstration of compliance. Under the current procedure the contractor may be reinstated without incurring any economic loss for some violations (e.g., a contractor which has failed to develop an AAP can simply do so to be eligible for reinstatement, provided that it can demonstrate that it will remain in compliance). As discussed below, pursuant to proposed § 60–250.68, a contractor debarred for a fixed term will not be automatically reinstated upon such a showing. In making his or her determination as to whether reinstatement of such a contractor is appropriate under proposed § 60–250.68, the Deputy Assistant Secretary shall additionally consider, among other factors, the severity of the violation which resulted in the debarment and whether the contractor's reinstatement would impede the effective enforcement of the Act or this part.

The proposal drops the provision contained in current § 60–250.27 that noncompliance with the contractor's affirmative action clause obligations is a ground for taking appropriate action for noncompliance. This issue is already addressed in proposed § 60–250.66.

Section 60–250.67 Notification of Agencies

This proposed section, which provides that OFCCP shall ensure that the heads of all agencies are notified of debarments, is substantially similar to current § 60–250.30, which requires the Director to notify agencies ''of any action for noncompliance taken against a contractor.'' However, in contrast to the proposal, current § 60–250.30 also addresses the granting by a contracting agency of waivers in the national interest. This provision is not carried forward, because, as discussed above (see discussion regarding proposed § 60–250.4(b)(1)), OFCCP unilaterally grants such waivers, and no longer shares enforcement under Section 4212 with other agencies.

Moreover, the proposal drops current § 60–250.31, which requires the Director to distribute a list of debarred contractors to all executive departments and agencies. This function is currently performed by the General Services Administration. The 1980 final rule would have required (at § 60–1.30) that OFCCP promptly notify the Comptroller General of the United States regarding contract cancellations and debarments. OFCCP, which currently follows this practice, does not believe it necessary to

incorporate this provision into the regulations. Further, that section of the final rule would have required that OFCCP take appropriate steps to notify prime contractors of the debarred contractor's ineligibility for subcontracts. Upon reconsideration, OFCCP concludes that the incidence of prime contractors contracting with debarred firms is not significant enough to justify the administrative burdens this provision would place on the agency.

Section 60–250.68 Reinstatement of Ineligible Contractors

This section provides that a contractor that is debarred for an indefinite period may request reinstatement at any time, and that a contractor debarred for a fixed period may request reinstatement after six months. In the case of either type of debarment the contractor is required to show that it has established and will carry out employment practices in compliance with the Act. Additionally, in determining whether reinstatement is appropriate for a contractor that has been debarred for a fixed period, the Deputy Assistant Secretary also shall consider such factors as 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. The section is derived from current § 60–250.50. The current regulation, in contrast to the proposal, does not address fixed-period debarments and does not provide the contractor an opportunity to appeal a denial of its request for reinstatement.

As discussed above, OFCCP believes that the use of fixed-term debarments is necessary to provide an effective deterrent with regard to aggravated or willful violations, including failure to make or maintain records (see discussion regarding proposed § 60–250.66(c)). Thus, contractors that have committed such violations should not be reinstated based merely upon a showing that they are and will remain in compliance, as in the case of indefinite-term debarments. Rather, in addition to this showing, the Deputy Assistant Secretary's determination should be made on a case-by-case basis after consideration of the additional specified factors. OFCCP believes that imposing a mandatory six-month waiting period during which the reinstatement request may not be submitted will help deter such violations. The proposed appeal procedure in paragraph (b) for contractors whose reinstatement requests are denied is intended to ensure that contractors' requests receive full and fair consideration. The proposal adopts some of the 1980 final rule's reinstatement procedures (§ 60–1.31). For instance, like the final rule, the proposal specifies that the contractor may be subject to a compliance review before it is reinstated, and that the matter may be referred to an Administrative Law Judge before a final determination is made on the reinstatement request. In contrast to the final rule, the proposal permits the contractor to submit a petition to the Secretary appealing a denial of a reinstatement request. The final rule would have provided for a review by the Secretary (pursuant to the post-hearing procedures set out in 41 CFR Part 60–30) of the Director's denial of a request only where the Director decided to remand the matter to an Administrative Law Judge. The final rule would have established some additional detailed procedures that OFCCP, upon reconsideration, does not believe need be incorporated into the regulations.

Section 60–250.69 Intimidation and Interference

Currently, the regulations provide (at § 60–250.51) that the sanctions and penalties contained therein may be exercised against any contractor which fails to ensure that no person intimidates, threatens, coerces or discriminates against any individual because he or she files a complaint or otherwise participates in compliance activity under the Act. The proposal contains a similar prohibition but specifies that the contractor itself shall not engage in such activities and that the contractor shall ensure that all persons under its control do not do so, that the prohibition applies with respect to participation in compliance activities under a Federal, state or local law which requires equal opportunity for special disabled veterans and Vietnam era veterans and that harassment is also prohibited. Moreover, the proposal states that the prohibition applies with respect to an individual's opposition to any practice that is unlawful under the Act or similar Federal, state or local laws, and to the exercise of any other right protected by the Act. The proposal is substantially similar to the counterpart provision in the 1980 final rule (§ 60–1.28). The intent of the proposal is to incorporate strengthened provisions that ensure that individuals fully enjoy all rights protected under the Act, the regulations and comparable Federal, state and local laws without the threat of harassment or intimidation. OFCCP may seek the same range of sanctions for a violation of this provision (such as debarment and/or back pay) as it does for other violations of the Act.

Section 60–250.70 Disputed Matters Related to Compliance With the Act

This section clarifies that the regulations govern disputes relative to the compliance under the Act but not other incidental disputes such as those relating to contract costs connected with the contractor's efforts to comply with the Act. The proposal is substantially identical to current § 60–250.32.

Subpart E—Ancillary Matters

Section 60–250.80 Responsibilities of State Employment Service Offices

This section is substantially identical to current § 60–250.33 (with the addition of a few editorial changes).

Section 60–250.81 Recordkeeping

Under the current regulations (§ 60–250.52(a)), contractors are required to maintain for one year records relating to complaints and actions taken by the contractor in connection with such complaints. Paragraph (a) of the proposal revises this obligation in several ways: first it makes the record retention obligation applicable to any personnel or employment record made or kept by the contractor, and sets out a listing of examples of the types of records that must be retained. This provision conforms to the analogous recordkeeping requirement under the Section 503 (§ 60–741.81(a)), which, in turn, is consistent with the requirements under Title VII of the Civil Rights Act of 1964. (Thus, most contractors are already required to comply with this requirement.) OFCCP proposes this change because it believes that to monitor and enforce the Act effectively it must be assured that it can obtain all of the contractor's personnel records (not only those involving complaints). Access to these records will better enable OFCCP to effectively investigate compliance with the Act by, for instance, allowing it to evaluate the contractor's employment policies and practices with respect to applicants and employees who are special disabled veterans or veterans of the Vietnam era in comparison to policies and practices that have been applied to similarly situated applicants and employees who are not covered veterans.

Second, proposed paragraph (a) extends the required record retention period from one to two years for larger contractors. In this context, larger contractors are those that have 150 or more employees and a Government

contract of $150,000 or more. This approach is consistent with the Section 503 final rule. OFCCP believes that a two-year period provides greater assurance that relevant records will be available during compliance reviews (during which the agency generally reviews employment practices and activity going back two years).

Third, proposed paragraph (a) requires that when a contractor has been notified that a complaint has been filed, that a compliance review has been initiated or that an enforcement action has been commenced, the contractor shall preserve all relevant personnel records until the final disposition of the action. This provision conforms to the corresponding recordkeeping requirement applicable to the Section 503 final rule, which, in turn, is based on the requirement applicable to the ADA and Title VII. The purpose of this requirement is obvious—to ensure that OFCCP can obtain all relevant documents during a compliance investigation or enforcement action.

Proposed paragraph (b), which is generally consistent with current § 60–250.52(b), provides that the failure to preserve the records required by proposed paragraph (a) constitutes noncompliance with the Act. Additionally, proposed paragraph (b), in a provision that is not paralleled in the current regulations, states that where a contractor has destroyed or failed to preserve required records, there may be a presumption that such records would have been unfavorable to the contractor. Paragraph (b) further specifies, however, that the presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of its control. This provision is consistent with the corresponding provision in the Section 503 final rule (§ 60–741.81(b)), which is consistent with § 632.3(b)(2)(ii) of EEOC's Compliance Manual. The intent of this provision is to deter contractors from deliberate attempts to frustrate OFCCP's compliance monitoring and enforcement efforts by destroying or failing to preserve records. The adverse inference established by paragraph (b) would be used by OFCCP in both investigations of compliance and in enforcement litigation.

Proposed paragraph (c), which has no parallel in the current regulations, clarifies that the contractor is obligated to preserve only those records which are created or kept on or after the effective date of the regulations. The record retention requirements under the current regulations remain in effect until this proposal becomes effective in final form.

Section 60–250.82 Access to Records

This section provides that the contractor shall permit OFCCP access to its place of business in order to conduct investigations and to inspect and copy relevant records, and that the information obtained in this manner shall be used only in connection with the administration of the Act. The proposal is generally consistent with the current corresponding Section 4212 regulation (§ 60–250.53). For the sake of consistency and clarity, this section tracks the language in the parallel Executive Order regulation (41 CFR 60–1.43).

Section 60–250.83 Labor Organizations and Recruiting and Training Agencies

The proposal provides at paragraph (a) that when a revision of a collective bargaining agreement may be required to conform it to the requirements of the Section 4212 regulations, labor organizations which are parties to such an agreement shall be given adequate opportunity to present their views to OFCCP. Paragraph (b) states that OFCCP shall make efforts to cause labor organizations involved with work performed by a contractor to cooperate in the implementation of the Act. The proposal is substantially identical to the current regulations at § 60–250.9. Similarly, proposed paragraphs (a) and (b) are substantially identical to §§ 60–1.9(c)(2) and (a), respectively, of the 1980 final rule. However, the 1980 final rule would have implemented some additional provisions: § 60–1.9(b) of that rule states that the Director of OFCCP may hold hearings with regard to the practices and policies of labor organizations to ensure compliance with Section 4212; § 60–1.9(c)(1) provides that collective bargaining representatives shall be given written notice of any on-site compliance investigations; and § 60–1.9(d) states that the Director may notify any Federal, state or local agency of his or her conclusions with respect to any labor organization's failure to cooperate with the implementation of the Act, and that he or she may notify appropriate Federal agencies regarding violations of Federal law. Upon further consideration, OFCCP does not believe these additional provisions need be incorporated into the regulations.

Section 60–250.84 Rulings and Interpretations

The proposal, which provides that rulings and interpretations of the Act and the regulations shall be made by the Deputy Assistant Secretary, contrasts with the corresponding current regulation (§ 60–250.54), which provides that the Secretary or his or her designee shall perform this function. The proposal designates the Deputy Assistant Secretary as the responsible official in order to reflect current OFCCP practice.

Section 60–250.85 Effective Date

The first sentence of this provision specifies when the regulations take effect, and that they do not apply retroactively. The second sentence is substantially identical to the last sentence of current § 60–250.5(a) (Applicability of the affirmative action program requirement), but it clarifies that contractors presently holding Government contracts are required to update their affirmative action programs within 120 days of the effective date of these regulations only to the extent necessary to comply with the changes made by the final rule.

Appendix A—Guidelines on a Contractor's Duty to Provide Reasonable Accommodation

It has been OFCCP's experience that one of the most difficult issues that contractors encounter in attempting to comply with Section 4212 relates to the duty to provide reasonable accommodation for special disabled veterans, and that the absence of readily accessible clear and concise guidance on the subject has contributed to this difficulty. The intent of proposed Appendix A, which parallels a corresponding appendix contained in the Section 503 final rule, is to provide such guidance. The current regulations contain no comparable guidance. As stated at the end of the appendix, it is largely derived from and is consistent with the discussion on the duty to provide reasonable accommodation contained in the appendix to the EEOC regulations. (The second paragraph of the proposed appendix, however, contains a discussion regarding the contractor's affirmative action duties pursuant to proposed §§ 60–250.42 and 60–250.44(d), which is not paralleled in the EEOC appendix.)

For the sake of brevity, proposed Appendix A condenses and summarizes the most significant portions of the EEOC appendix regarding the reasonable accommodation duty. The relevant portions of the EEOC appendix are those that relate to the failure to make reasonable accommodation (§ 1630.9) and to the definitions for ''reasonable accommodation'' (§ 1630.2(o)) and ''undue hardship''

(§ 1630.2(p)). Additionally, some guidance in the proposed appendix is based on a discussion from the ADA's legislative history that is not incorporated into the EEOC's appendix. The discussion provides some practical examples of methods that may be used to carry out the reasonable accommodation duty (e.g., resources to consult to obtain assistance and specific types of accommodations for particular disabilities). Moreover, the proposed appendix (in the next to last paragraph) provides specific guidance on the issue of providing reasonable accommodation with respect to the employment application process; this discussion is drawn from Appendix C of OFCCP's December 30, 1980, proposed rule (45 FR 86214).

Appendix B—Sample Invitation to Self-Identify

On May 1, 1996, OFCCP published (61 FR 19366) an interim rule amending Appendix A of the current regulations relating to invitations to self-identify. The purpose of the interim rule was to conform the invitation to self-identify requirement under VEVRAA with the requirement contained in the new Section 503 final rule (61 FR 19336).

This appendix is patterned after the VEVRAA interim rule and the Section 503 final rule. However, this proposal also includes in the sample invitation definitions for the terms ''special disabled veteran'' and ''veteran of the Vietnam era.''

Appendix C—Review of Personnel Processes

Proposed Appendix C sets out an example of an appropriate set of procedures that contractors may use to facilitate a review by the contractor and the Government of the contractor's implementation of its duty to evaluate its personnel processes pursuant to proposed § 60–250.44(b). (Section 60–250.44(b) requires the contractor to ensure that its personnel processes provide for careful consideration of the qualifications of applicants and employees who are known to be special disabled veterans or veterans of the Vietnam era for employment opportunities.) This appendix is generally consistent with current Appendix B. However, the proposal drops a provision contained in the current appendix (paragraph 3) that requires, in cases where an applicant or employee who is a special disabled veteran or veteran of the Vietnam era is rejected for an employment opportunity, that the contractor append to the individual's application or personnel form a statement comparing the qualifications of the rejected individual with those of the person selected for the opportunity. OFCCP proposes to omit this requirement because it has not provided sufficient assistance to OFCCP in its enforcement and monitoring efforts under the Act to justify the continued imposition of this fairly significant burden on contractors.

Regulatory Procedures

Executive Order 12866

The Department is issuing this proposed rule in conformance with Executive Order 12866. This proposal has been determined not to be significant for purposes of Executive Order 12866 and therefore need not be reviewed by OMB. This proposal does not meet the criteria of Section 3(f)(1) of Executive Order 12866 and therefore the information enumerated in Section 6(a)(3)(C) of that Order is not required.

This conclusion is based on the fact that this proposed rule does not substantively change the existing obligation of Federal contractors to apply a policy of nondiscrimination and affirmative action in their employment of qualified special disabled veterans and veterans of the Vietnam era. For instance, although the rule generally conforms the existing Section 4212 regulations' nondiscrimination provisions to the Section 503 final rule published by the OFCCP, it does not significantly alter the substance of the existing nondiscrimination provisions.

Regulatory Flexibility Act

The proposed rule, if promulgated in final, will clarify existing requirements for Federal contractors. In view of this fact and because the proposed rule does not substantively change existing obligations for Federal contractors, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Unfunded Mandates Reform

Executive Order 12875—This proposed rule, if promulgated in final, will not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This proposed rule, if promulgated in final, will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more, or increased expenditures by the private sector of $100 million or more.

Paperwork Reduction Act

The proposed rule: extends the current one-year record retention period to two years (for larger contractors) and makes the retention obligation applicable to a broader range of records; requires that, for purposes of confidentiality, medical information obtained regarding the medical condition or history of any applicant or employee be collected and maintained on separate forms and in separate medical files; and requires those contractors who, for affirmative action purposes, choose to invite applicants and employees to identify themselves as special disabled veterans or veterans of the Vietnam era to maintain a separate file on such applicants and employees. The recordkeeping provisions of this proposed rule are consistent with those contained in the Section 503 final rule. Therefore, although the recordkeeping provisions are more expansive than those in the current VEVRAA regulations, they do not result in increased recordkeeping burdens. Information collection under the Section 503 regulations, and under the VEVRAA regulations, is covered by OMB control number 1215–0072.

List of Subjects in 41 CFR Part 60–250

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

Signed at Washington, D.C., this 23rd day of August, 1996.

Robert B. Reich,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, with respect to the rule amending 41 CFR Chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely at 46 FR 42865, the revision of Part 60–250 is proposed to be withdrawn, and in Parts 60–1 and 60–30, all references to Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act are proposed to be withdrawn; and, under authority of 38 U.S.C. 4212, Title 41 of the Code of Federal Regulations, Chapter 60 is proposed to be amended as follows:

Part 60–250 is revised to read as follows:

PART 60–250—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING SPECIAL DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

Subpart A—Preliminary Matters, Equal Opportunity Clause

Subpart B—Discrimination Prohibited

Subpart C—Affirmative Action Program

Subpart D—General Enforcement and Complaint Procedures

Subpart E—Ancillary Matters

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

§ 60–250.1 Purpose, applicability and construction.

(a) *Purpose.* The purpose of the regulations in this part is to set forth the standards for compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212, or VEVRAA), which requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

(b) *Applicability.* This part applies to all Government contracts and subcontracts of $10,000 or more 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 § 60–250.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part.

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

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any state or political subdivision that provides greater or equal protection for the rights of special disabled veterans or veterans of the Vietnam era as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

§ 60–250.2 Definitions.

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

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

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

(d) *Deputy Assistant Secretary* means the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee.

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

(f) *United States*, as used herein, 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.

(g) *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.

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

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

(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) *Person*, as used in paragraphs (i) and (l) 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.

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

(5) *Construction*, as used in paragraphs (i) and (l) 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.

(6) *Personal property,* as used in paragraphs (i) and (l) 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).

(j) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of $10,000 or more.

(k) *Prime contractor* means any person holding a contract of $10,000 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.

(l) *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.

(m) *Subcontractor* means any person holding a subcontract of $10,000 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.

(n)(1) *Special Disabled Veteran means:*

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

(A) Rated at 30 percent or more; or

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

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

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

(o)(1) *Qualified special disabled veteran* means a special disabled veteran who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such veteran holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(2) See § 60–250.3 for exceptions to the definition in paragraph (o)(1) of this section.

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

(1) Served on active duty for a period of more than 180 days, any part of which occurred between August 5, 1964, and May 7, 1975, and was discharged or released therefrom with other than a dishonorable discharge; or

(2) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed between August 5, 1964, and May 7, 1975.

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

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

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

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

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

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

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

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

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

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

(v) The terms of a collective bargaining agreement;

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

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

(r) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant who is a special disabled veteran to be considered for the position such applicant desires; [1] or

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

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

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

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

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

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified special disabled veteran in need of the accommodation.[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.)

(s) *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 (s)(2) of this section.

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

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

(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.

(t) *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.

(u) *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 a special disabled veteran 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.

§ 60–250.3 Exceptions to the definition of ''special disabled veteran'' and ''qualified special disabled veteran.''

(a) *Alcoholics*—(1) *In general.* As used in this part, the terms *special disabled veteran* and *qualified special disabled veteran* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (a)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (a)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to property or the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education and other job-related requirements of such position.

(b) *Contagious disease or infection*—(1) *In general.* The terms *special disabled veteran* and *qualified special disabled veteran* do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) *Duty to provide reasonable accommodation.* Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education and other job-related requirements of such position.

§ 60–250.4 Coverage and waivers.

(a) *General*—(1) *Contracts and subcontracts of $10,000 or more.* Contracts and subcontracts of $10,000 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 $10,000. 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 $10,000 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary in writing within 30 days.

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

§ 60–250.5 Equal opportunity clause.

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

Equal Opportunity for Special Disabled Veterans and Veterans of the Vietnam Era

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era 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; and

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 wherein the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local office of the state employment service system wherein the opening occurs.

3. Listing of employment openings with the employment service 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 the contractor becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the employment service system in each state where it has establishments of the name and location of each hiring location in the state: *Provided,* That this requirement shall not apply to state and local governmental contractors. As long as the contractor is contractually bound to these provisions and has so advised the state system, there is no need to advise the state system of subsequent contracts. The contractor may advise the state 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, and the Virgin Islands.

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

(ii) *Appropriate local office of the state employment service system* means the local office of the Federal-state national system of public employment offices with assigned responsibility for serving the area where the employment opening is to be filled, including the District of Columbia, Guam, the Commonwealth of Puerto Rico, and the Virgin Islands.

(iii) *Executive and top management* means any employee: (a) Whose primary duty consists of the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and (b) who customarily and regularly directs the work of two or more other employees therein; and (c) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and (d) who customarily and regularly exercises discretionary powers; and (e) who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his or her hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in (a) through (d) of this paragraph 6.(iii); *Provided,* that (e) of this paragraph 6.(iii) shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he or she is employed.

(iv) *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 Deputy Assistant Secretary for 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 special disabled veterans or veterans of the Vietnam era. The contractor must ensure that applicants or employees who are special disabled veterans are informed of the contents of the notice (e.g., the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

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 the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended and is committed to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era.

11. The contractor will include the provisions of this clause in every subcontract or purchase order of $10,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 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 Deputy Assistant Secretary for Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

[End of Clause]

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

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

(d) *Inclusion of the equal opportunity clause in the contract.* It is not necessary that the equal opportunity clause be quoted verbatim in the contract. The clause may be made a part of the contract by citation to 41 CFR 60–250.5(a).

(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 Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary, and taking such actions for noncompliance as are set forth in § 60–250.66 as may be ordered by the Secretary or the Deputy Assistant Secretary.

Subpart B—Discrimination Prohibited

§ 60–250.20 Covered employment activities.

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

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

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

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

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

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

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

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

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

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

§ 60–250.21 Prohibitions.

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

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

(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 special disabled veteran or veteran of the Vietnam era. For example, the contractor may not segregate qualified special disabled veterans or veterans of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era; or

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

(e) *Relationship or association with a special disabled veteran or a veteran of the Vietnam era.* 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 special disabled veteran or Vietnam era 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 otherwise qualified applicant or employee who is a 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 otherwise qualified job applicant or employee who is a special disabled veteran based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(3) A qualified special disabled veteran is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified special disabled veteran.

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

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

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

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

§ 60–250.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60–250.2(u) defining *direct threat.*)

§ 60–250.23 Medical examinations and inquiries.

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

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

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

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

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

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

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

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

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

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

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

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

§ 60–250.24 Drugs and alcohol.

(a) *Specific activities permitted*. The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

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

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

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

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

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

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

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

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

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

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

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

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

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

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

Subpart C—Affirmative Action Program

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

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

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

(c) The affirmative action program shall be reviewed and updated annually.

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

§ 60–250.41 Availability of affirmative action program.

The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

§ 60–250.42 Invitation to self-identify.

(a) Except as provided in paragraphs (b) and (c) of this section, the contractor shall, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the Act and wishes to benefit under the affirmative action program.

(b) The contractor may invite special disabled veterans to self-identify prior to making a job offer only when:

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

(2) The invitation is made pursuant to a Federal, state or local law requiring

affirmative action for special disabled veterans.

(c) The contractor may invite veterans of the Vietnam era to self-identify prior to making a job offer only when:

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

(2) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for veterans of the Vietnam era.

(d) The invitation referenced in paragraphs (a) through (c) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitation also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the invitation 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. If an applicant so identifies himself or herself, the contractor should also seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The contractor also may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file on persons who have self-identified and provide that file to OFCCP upon request. This information may be used only in accordance with this part. (An acceptable form for such an invitation is set forth in Appendix B of this part. Because a contractor usually may not seek advice from an applicant regarding placement and accommodation until after a job offer has been extended, the invitation set forth in Appendix B of this part contains instructions regarding modifications to be made if it is used at the pre-offer stage.)

(e) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be special disabled veterans or veterans of the Vietnam era.

(f) Nothing in this section shall relieve the contractor from liability for discrimination under the Act.

§ 60–250.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act, contractors shall not discriminate because of status as a special disabled veteran or veteran of the Vietnam era and shall take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60–250.20.

§ 60–250.44 Required contents of affirmative action programs.

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

(a) *Policy statement.* The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees who are special disabled veterans are informed of the contents of the policy statement (for example, the contractor may have the statement read to a visually disabled individual, or may lower the posted notice so that it may be read by a person in a wheelchair). The policy statement should indicate the chief executive officer's attitude on the subject matter, 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 should 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 special disabled veteran or Vietnam era 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 review, hearing, or any other activity related to the administration of the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) or any other Federal, state or local law requiring equal opportunity for special disabled veterans or veterans of the Vietnam era;

(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 special disabled veterans or veterans of the Vietnam era; 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 special disabled veterans or veterans of the Vietnam era for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a special disabled veteran or a veteran of the Vietnam era is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, that is relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype special disabled veterans and veterans of the Vietnam era 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 of this part 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 special 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 special disabled veterans, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph (c)(2).

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60–250.2(u) defining *direct threat*.)

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

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

(f) *External dissemination of policy, outreach and positive recruitment.* The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraphs (f)(1) through (f)(8) of this section that are reasonably designed to effectively recruit qualified special disabled veterans and veterans of the Vietnam era. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraphs (f)(1) through (f)(8) 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.

(1) The contractor should enlist the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for, qualified special disabled veterans and veterans of the Vietnam era, to fulfill its commitment to provide meaningful employment opportunities to such veterans:

(i) The local Veterans Employment Representative or his or her designee in the state employment service office nearest the contractor's establishment;

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

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

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

(v) Local veterans' groups and veterans' service centers near the contractor's establishment.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant 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. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(3) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are special disabled veterans or veterans of the Vietnam era. 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.

(4) The contractor should establish meaningful contacts with appropriate veterans' service organizations which serve special disabled veterans or veterans of the Vietnam era for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance shall have authority to approve or disapprove the acceptability of affirmative action programs.

(5) Special disabled veterans and veterans of the Vietnam era should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(6) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(7) The contractor should take positive steps to attract qualified special disabled veterans and veterans of the Vietnam era 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 Vietnam era veterans and veterans with disabilities.

(8) The contractor, in making hiring decisions, should consider applicants who are known special disabled veterans or veterans of the Vietnam era for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(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 internal procedures such as those 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 special disabled veterans and veterans of the Vietnam era. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (g)(2) of this section or that its 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. 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 practices are adequate.

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

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

(ii) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified special disabled veterans and veterans of the Vietnam era. The contractor should periodically schedule special meetings with all employees to discuss policy and explain individual employee responsibilities;

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

(iv) 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 attitude;

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

(vi) Meet with union officials and/or employee representatives to inform them of the contractor's policy, and request their cooperation;

(vii) Include articles on accomplishments of special disabled veterans and veterans of the Vietnam era in company publications; and

(viii) When employees are featured in employee handbooks or similar publications for employees, include special 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 special disabled veterans and veterans of the Vietnam era have had the opportunity to participate in all company sponsored educational, training, recreational and social activities; and

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

(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 top 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.

Subpart D—General Enforcement and Complaint Procedures

§ 60–250.60 Compliance reviews.

(a) OFCCP may conduct compliance reviews to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated in accordance with this part during employment. The compliance review shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made.

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

(c) *VETS–100 Report.* During a compliance review, OFCCP will verify whether the contractor has complied with its obligation, pursuant to 41 CFR Part 61–250, to file its annual Veterans' Employment Report (VETS–100 Report) with the Office of the Assistant Secretary for Veterans' Employment and Training (OASVET). If the contractor has failed to file a timely VETS–100 Report, OFCCP will notify OASVET.

§ 60–250.61 Complaint procedures.

(a) *Place and time of filing.* Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint alleging a violation of the Act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown. Complaints may be submitted to the OFCCP, 200 Constitution Avenue, N.W., Washington, D.C. 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) or his or her designee at the local state 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 shall cooperate with the Deputy Assistant Secretary 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 special disabled veteran or veteran of the Vietnam era. Such documentation must include a copy of the veteran's form DD–214, and, where applicable, a copy of the veteran's Benefits Award Letter, or similar Department of Veterans Affairs certification, updated within one year prior to the date the complaint is filed, indicating the veteran's level (by percentage) of disability, and whether the veteran has been determined by the Department of Veterans Affairs to have a serious employment handicap under 38 U.S.C. 3106;

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

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

(2) *Third party complaints.* A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made, and the other information specified in paragraph (b)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such

person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

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

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

(e) *Resolution of matters.* (1) If the complaint investigation finds no violation of the Act or this part, or if the Deputy Assistant Secretary decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60–250.65(a)(1), the complainant and contractor shall be so notified. The Deputy Assistant Secretary, 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary decides to reconsider the determination of a Notification of Results of Investigation, the Deputy Assistant Secretary shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration, to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

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

§ 60–250.62 Conciliation agreements and letters of commitment.

(a) If a compliance review, 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.

(b) The term *conciliation agreement* does not include *letters of commitment*, which are appropriate for resolving minor technical deficiencies.

§ 60–250.63 Violation of conciliation agreements and letters of commitment.

(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.

(d) When OFCCP believes that a letter of commitment has been violated, the matter shall be handled, where appropriate, pursuant to § 60–250.64. The violation may be corrected through a conciliation agreement, or an enforcement proceeding may be initiated.

§ 60–250.64 Show cause notices.

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

§ 60–250.65 Enforcement proceedings.

(a) *General.* (1) If a compliance review, 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 review. 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 Deputy Assistant Secretary may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60–250.5, including appropriate injunctive relief.

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

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

(3) For the purposes of hearings pursuant to this part, references in 41 CFR Part 60–30 to ''Executive Order 11246'' shall mean the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; to ''equal opportunity clause'' shall mean the equal opportunity clause published at 41 CFR 60–250.5; and to ''regulations'' shall mean the regulations contained in this part.

§ 60–250.66 Sanctions and penalties.

(a) *Withholding progress payments.* With the prior approval of the Deputy Assistant Secretary so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the Act or this part.

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

(c) *Debarment.* A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to § 60–250.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years.

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

§ 60–250.67 Notification of agencies.

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

§ 60–250.68 Reinstatement of ineligible contractors.

(a) *Application for reinstatement.* A contractor debarred from further contracts for an indefinite period under the Act may request reinstatement in a letter filed with the Deputy Assistant Secretary 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 Deputy Assistant Secretary 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 Deputy Assistant Secretary may conduct a compliance review of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary 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 Deputy Assistant Secretary's decision. The petition shall be served on the Deputy Assistant Secretary and the Associate Solicitor for Civil Rights and shall include the decision as an appendix. The Deputy Assistant Secretary may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

§ 60–250.69 Intimidation and interference.

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

(1) Filing a complaint;

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

(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 special disabled veterans or veterans of the Vietnam era; 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 Deputy Assistant Secretary against any contractor who violates this obligation.

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

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

Subpart E—Ancillary Matters

§ 60–250.80 Responsibilities of state employment service offices.

(a) Local state employment service offices shall refer qualified special disabled veterans and veterans of the Vietnam era to fill employment openings listed by contractors with such local offices pursuant to the mandatory listing requirements of the equal opportunity clause, and shall give priority to special disabled veterans and veterans of the Vietnam era in making such referrals.

(b) Local state employment service offices shall contact employers to solicit the job orders described in paragraph (a) of this section. The state employment service shall provide OFCCP upon request information pertinent to whether the contractor is in compliance with the mandatory listing requirements of the equal opportunity clause.

§ 60–250.81 Recordkeeping.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of

pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least $150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance review has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance review or action until final disposition of the complaint, compliance review or action. The term *personnel records relevant to the complaint, compliance review 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) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the Act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided,* That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control. (c) The requirements of this section shall apply only to records made or kept on or after [60 days after date of publication of final rule].

§ 60–250.82 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 reviews and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Act or this part. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

§ 60–250.83 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, the Department of Veterans Affairs, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the Act.

§ 60–250.84 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Deputy Assistant Secretary.

§ 60–250.85 Effective date.

This part shall become effective on [60 days after date of publication of final rule], and shall not apply retroactively. Contractors presently holding Government contracts shall update their affirmative action programs as required to comply with the regulations in this part within 120 days after [60 days after date of publication of final rule].

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

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR Part 1630). Although the following discussion is intended to provide an independent ''free-standing'' source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. See § 60–250.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under 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 special disabled veteran who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of an ''otherwise qualified'' special disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60–250.2(o), a special disabled veteran is qualified if he or she satisfies all the skill, experience, education and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the special disabled veteran is qualified with respect to that process. One is ''otherwise qualified'' if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees who are known to be special disabled veterans. As stated in § 60–250.42 (see also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they begin their employment duties, to indicate whether they are covered by the Act and wish to benefit under the contractor's affirmative action program. That section further provides that the contractor should seek the advice of special disabled veterans who ''self-identify'' in this way as to proper placement and appropriate accommodation. Moreover, § 60–250.44(d) provides that if an employee who is a known special disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables a special disabled veteran to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee

who is a special disabled veteran in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the ''best'' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) accommodations in the application process; (2) accommodations that enable employees who are special disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are special disabled veterans to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term ''undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered—those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., the Department of Veterans Affairs or a state vocational rehabilitation agency, or if Federal, state or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the special disabled veteran should 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. Section 60–250.2(r) 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 generally should consult with the special disabled veteran in deciding on the appropriate 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–EEOC (voice), 1–800–800–3302 (TDD)), the Job Accommodation Network (JAN) operated by the President's Committee on Employment of People with Disabilities (1–800–JAN–7234), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a special disabled veteran to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For the visually-impaired such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and braille or large-print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck telephone headsets, mechanical page turners and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by special disabled veterans—including areas used by employees for purposes other than the performance of essential job functions such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60–250.2(r) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified special disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a special disabled veteran is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, i.e., those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor which has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind special disabled veteran with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the special disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit special disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or special disabled veterans with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the special disabled veteran's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider applicants who are known special disabled veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees who are special disabled veterans by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A ''reasonable amount of time'' should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned special disabled veteran at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not special disabled veterans. It should also be noted that the contractor is not required to promote a special disabled veteran as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) Providing information regarding job vacancies in a form accessible to special disabled veterans who are vision or hearing impaired, e.g., by making an announcement available in braille, in large print, or on audio tape, or by responding to job inquiries via TDDs; (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3) appropriately adjusting or modifying employment-related examinations, e.g., extending regular time deadlines, allowing a special disabled veteran who is blind or has a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her ability, to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices; and (4) ensuring a special disabled veteran with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

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

Note: When the invitation to self-identify is being extended prior to an offer of employment, as is permitted in limited circumstances under §§ 60–250.42 (b) and (c), paragraph 2(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

[Sample Invitation to Self-Identify]

1.a. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era. If you are a special disabled veteran or veteran of the Vietnam era and would like to be considered under the affirmative action program, please tell us. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

b. The term ''special disabled veteran'' refers to 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 rated at 30 percent or more, or rated at 10 or 20 percent in the case of a veteran who has been determined by the Department of Veterans Affairs to have a serious employment handicap. The term also refers to a person who was discharged or released from active duty because of a service-connected disability.

c. The term ''veteran of the Vietnam era'' refers to a person who served on active duty for more than 180 days, any part of which occurred between August 5, 1964, and May 7, 1975, and was discharged or released with other than a dishonorable discharge. It also refers to a person who was discharged or released from active duty for a service-connected disability if any part of such active duty was performed between August 5, 1964, and May 7, 1975.

d. If you are a special disabled veteran, this information will assist us in placing you in an appropriate position and in making accommodations for your disability. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

e. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. Information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of special disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by OFCCP or the Americans with Disabilities Act, may be informed. 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.

2. If you are a special disabled veteran or a veteran of the Vietnam era, we would like to include you under the affirmative action program. If you are a special disabled veteran it would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations.

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

The following is a set of procedures which contractors may use to meet the requirements of § 60–250.44(b):

1. The application or personnel form of each known applicant who is a special disabled veteran or veteran of the Vietnam era 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 special disabled veteran or veteran of the Vietnam era should include (i) the identification of each promotion for which the covered veteran was considered, and (ii) the identification of each training program for which the covered veteran was considered.

3. In each case where an employee or applicant who is a special disabled veteran or a veteran of the Vietnam era is rejected for employment, promotion, or training, a statement of the reason should be appended to the personnel file or application form as well as a description of the accommodations considered (for a rejected special disabled veteran). This statement should be available to the applicant or employee concerned upon request.

4. Where applicants or employees who are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place a special disabled veteran on the job, the application form or personnel record should contain a description of that accommodation.

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