

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Parts 60–1, 60–250, and 60–741****RIN 1215–AB28, 1215–AB27, 1215–AB23****Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Compliance Evaluations in All OFCCP Programs****AGENCY:** Office of Federal Contract Compliance Programs, Employment Standards Administration, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: This proposal would revise certain regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended (Section 503 or the Act). Section 503 requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The current regulations implementing Section 503 authorize OFCCP to conduct compliance reviews to determine whether a contractor is complying with its affirmative action and nondiscrimination obligations. Today's proposal would revise the Section 503 regulations to expressly authorize OFCCP to use additional investigative procedures to determine a contractor's compliance with Section 503. In this regard, today's proposal would conform the regulations implementing Section 503 to the compliance evaluation procedures contained in the regulations implementing Executive Order 11246, as amended, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), respectively.

In addition, today's proposal would revise the compliance check procedure found in the current regulations implementing Executive Order 11246 and the affirmative action provisions of VEVRAA by eliminating the on-site visit requirement. The compliance check is one of the four compliance evaluation methods currently used by OFCCP to determine a contractor's compliance with Executive Order 11246 and the affirmative action provisions of VEVRAA.

DATES: To be assured of consideration, comments must be in writing and must be received on or before December 11, 2000.

ADDRESSES: Comments should be sent to James I. Melvin, Director, Division of

Policy, Planning and Program Development, OFCCP, Room C–3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693–1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Receipts of FAX transmittals will not be acknowledged; however the sender may request confirmation that a submission has been received by calling (202) 693–0102 (voice), (202) 693–1308 (TTY).

FOR FURTHER INFORMATION CONTACT:

James I. Melvin, Director, Division of Policy, Planning and Program Development, OFCCP, Room C–3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Telephone (202) 693–0102 (voice), (202) 693–1308 (TTY). Copies of this proposed rule, including copies in alternative formats, may be obtained by calling (202) 693–0102 (voice), or (202) 693–1308 (TTY). The alternate formats available are large print, electronic file on computer disk, and audiotape. The proposed rule also is available on the Internet at <http://www.dol.gov/dol/esa>.

SUPPLEMENTARY INFORMATION:**Background**

Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503 or the Act), requires parties holding a nonexempt Government contract or subcontract in excess of \$10,000 to take affirmative action to employ and advance in employment qualified individuals with disabilities. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces Section 503 through implementing regulations codified at 41 CFR Part 60–741. OFCCP published a substantial revision of its Section 503 regulations on May 1, 1996 (61 FR 19336). Since that time, OFCCP has revised its regulations implementing Executive Order 11246, as amended, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, as amended (VEVRAA). Among the revisions made to both sets of regulations was the introduction of a variety of alternative means of assessing contractors' compliance with their nondiscrimination and affirmative action obligations.

Before amendment, the primary method for evaluating compliance in the Executive Order and VEVRAA enforcement programs was the

“compliance review.” Both the scope and content of a compliance review under Executive Order 11246 were prescribed by regulation. Compliance reviews were to be a comprehensive evaluation of a contractor's employment practices and were to consist of a desk audit, an on-site review and, if necessary, an off-site analysis. The recent amendments to the Executive Order and VEVRAA implementing regulations were designed to provide the agency greater flexibility in the manner in which it evaluates compliance by authorizing the agency to utilize a wider range of methods for evaluating compliance. Specifically, in addition to the full compliance review, three abbreviated methods for evaluating a contractor's compliance are included in the Executive Order 11246 and VEVRAA regulations: off-site review of records, compliance check, and focused review.

This proposal to revise certain provisions of the Section 503 regulations is precipitated by the new methods for evaluating contractor compliance introduced in the Executive Order 11246 and VEVRAA regulations. Under the current regulations implementing Section 503 the compliance review remains the primary method for evaluating compliance. The current regulations at 41 CFR 60–741.60 prescribe the scope of compliance reviews, but unlike the prior Executive Order regulations, do not prescribe the content of a review. For example, under the current regulations, OFCCP may complete the Section 503 compliance review without making an on-site visit to the contractor's establishment, if the agency can make a determination about compliance based upon a review and analysis of the documentation submitted by the contractor in response to the scheduling letter. Likewise, if an on-site visit is required in order to evaluate a particular contractor's compliance with the requirements of Section 503, OFCCP has the authority, under the current regulations, to limit its on-site investigation to one or two issues.

Today's proposal would supplement the comprehensive compliance review with a variety of different means for assessing a contractor's compliance with Section 503 and its implementing regulations. The rule we propose today would formally adopt the compliance evaluation approach and expressly authorize off-site reviews of records, compliance checks, and focused reviews under Section 503. Today's proposal also would replace the term “compliance review” with “compliance

evaluation,” as appropriate, in certain sections of the regulations.

The proposed revisions to 41 CFR Part 60–741 are necessary to harmonize the procedures used when enforcing Section 503, the Executive Order, and VEVRAA. OFCCP believes that adopting the compliance evaluation approach for determining compliance with Section 503 and its implementing regulations would further improve efficiency and permit the agency to better target its resources. Today’s proposal would ensure that the agency could use parallel procedures to simultaneously evaluate contractor compliance under all three laws. At the same time, today’s proposal would give OFCCP leeway to develop and pursue enforcement initiatives that focus on contractor compliance with the requirements of Section 503 and its implementing regulations. For example, the rule we propose today would allow OFCCP to conduct compliance checks solely for the purpose of examining whether contractors have developed and implemented the affirmative action programs required under the regulations in 41 CFR Part 60–741.

Today’s proposal also would revise the definition of “compliance check” used in the Executive Order and VEVRAA regulations by removing the requirement that OFCCP visit a contractor’s establishment during a compliance check. This change would allow OFCCP greater flexibility when using the compliance check method to assess a contractor’s compliance status. With this change, OFCCP could permit a contractor to satisfy the requirements of the compliance check by supplying the required records and supporting information to an OFCCP office or other designated site. Although the proposal would change how the agency intends to implement the compliance check, it would not expand the scope of the examination contemplated under the compliance check procedure. Lastly, today’s proposal corrects a drafting oversight by adding the term and definition of “compliance evaluation” to the definition section of the VEVRAA regulations at 41 CFR 60–250.2. The definition proposed is consistent with the definition in OFCCP’s Executive Order 11246 regulations and with the definition we today propose to add to the Section 503 regulations.

Section-by-Section Analysis

Section 60–741.2 Definitions

A definition of the term “compliance evaluation” is being added to the definition section of the regulations implementing Section 503 of the

Rehabilitation Act of 1973. The proposed definition is consistent with the definition included in the regulations implementing Executive Order 11246 at 41 CFR 60–1.3. Under the new definition a compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor’s or subcontractor’s compliance with one or more of the requirements of Section 503 of the Rehabilitation Act of 1973.

Section 60–741.44 Required Contents of Affirmative Action Programs

These paragraphs are unchanged from the existing § 60–741.44, except that the term “compliance review” has been replaced with the new term “compliance evaluation” in § 60–741.44(a)(2).

Section 60–741.60 Compliance Evaluations

We propose to revise existing paragraph (a) of § 60–741.60, which now addresses compliance reviews.

In the current regulations, paragraph (a) describes the purpose of a compliance review, provides that the review will consist of a comprehensive analysis of all relevant nondiscrimination and affirmative action practices, and provides that, where necessary, recommendations for appropriate sanctions will be made. The proposal expressly authorizes OFCCP’s use of additional methods to evaluate a contractor’s compliance with its Section 503 obligations. Consistent with the regulations implementing Executive Order 11246 and the affirmative action provisions of VEVRAA, the proposal specifies that the compliance evaluation methods available to OFCCP, other than the full compliance review, include an off-site review of records, a compliance check and a focused review. The activities that are contemplated under each of the four evaluation methods are described in proposed paragraph (a).

Proposed paragraph (a)(1), as does existing paragraph (a), states that a compliance review is a comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of affirmative actions efforts undertaken by the contractor. Proposed paragraph (a)(2) describes the off-site review of records. An off-site review of records is composed of an analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor’s personnel policies and employment actions that may be relevant to a determination of

whether the contractor has complied with the requirements of Section 503 of the Rehabilitation Act of 1973 and its implementing regulations. A compliance check is described in proposed paragraph (a)(3) as a determination of whether data and other information previously submitted by the contractor are complete and accurate; whether the contractor has maintained records consistent with § 60–741.80 and/or whether the contractor has developed an affirmative action program consistent with § 60–741.40. Proposed paragraph (a)(4) states that a focused review is an on-site review restricted to one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices.

Section 60–741.62 Conciliation Agreements and Letters of Commitment

These paragraphs are unchanged from the existing § 60–741.62, except that at § 60–741.62 the term “compliance review” is replaced with the new term “compliance evaluation.”

Section 60–741.65 Enforcement Proceedings

These paragraphs are unchanged from the existing § 60–741.65, except that the term “compliance review” is replaced with the new term “compliance evaluation” at § 60–741.65(a)(1).

Section 60–741.68 Reinstatement of Eligible Contractors

These paragraphs are unchanged from the existing § 60–741.68, except that the term “compliance review” is replaced with the new term “compliance evaluation” at § 60–741.68(a).

Section 60–741.69 Intimidation and Interference

These paragraphs are unchanged from the existing § 60–741.69, except that the term “compliance review” is replaced with the new term “compliance evaluation” at § 60–741.69(a)(2).

Section 60–741.80 Recordkeeping

These paragraphs are unchanged from the existing § 60–741.80, except that the term “compliance review” is replaced with the new term “compliance evaluation.”

Section 60–741.81 Access to Records

The paragraph is unchanged from the existing § 60–741.81, except that the term “compliance review” is replaced with the new term “compliance evaluation.”

Sections 60–1.20 and 60–250.60 Compliance Evaluations

As discussed in the above preamble, the regulations currently authorize OFCCP to conduct compliance evaluations to determine contractor compliance with the requirements under Executive Order 11246 and the affirmative action provisions of VEVRAA. The current regulations at 41 CFR 60–1.20(a)(3) and 60–250.60(a)(3) describe a compliance check as “a visit to the [contractor’s] establishment” to ascertain whether data and other information previously submitted is accurate and complete; whether the contractor has maintained records consistent with the record retention requirements in §§ 60–1.12 and 60–250.80; and whether the contractor has developed affirmative action programs consistent with the regulations. The agency has found that, in many instances, the assessments made with a compliance check procedure can be made without making an on-site visit. Accordingly, the proposal would revise the regulations at 41 CFR 60–1.20(a)(3) and 60–250.60(a)(3) by removing the requirement that OFCCP visit a contractor’s establishments when the “compliance check” procedure is used to assess compliance. The proposed revision to the compliance check procedure is designed to improve agency efficiency, but OFCCP believes that contractors also would find it more efficient and less burdensome if the regulations did not require that a compliance check involve an on-site visit. Under this revision the contractor will be required to provide OFCCP access to the requested documents, but at the contractor’s option the documents may be provided either on-site or off-site. While the proposal would change how the agency intends to implement the compliance check, it would not expand the scope of the examination contemplated under the compliance check procedure.

Section 60–250.2 Definitions

A definition of the term “compliance evaluation” is being added to the definition section of the regulations implementing VEVRAA. The definition being added is consistent with the definition in OFCCP’s Executive Order 11246 regulations. Under the new definition, a compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor’s compliance with one or more of the requirements of VEVRAA.

Regulatory Procedures

Executive Order 12866

The Department is issuing this proposed rule in conformance with Executive Order 12866. The rule has been determined not to be significant for purposes of Executive Order 12866 and therefore need not be reviewed by OMB. This rule 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 substantially change the existing obligations of Federal contractors to apply a policy of nondiscrimination and affirmative action. Furthermore, this proposed rule does not substantially change the enforcement techniques currently employed by OFCCP to ensure federal contractor compliance with their nondiscrimination and affirmative action obligations.

Regulatory Flexibility Act

This proposed rule does not substantively change existing obligations for Federal contractors; it would only specify the procedures the agency may use to evaluate a Federal contractor’s compliance with existing requirements. Accordingly, 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

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12875, the proposed rule, if promulgated, will not include any federal mandates that may result in increased expenditures by state, local, and tribal governments, or increased expenditures by the private sector, of \$100,000,000 or more in any one year.

Paperwork Reduction Act

Today’s proposal would have a negligible impact, if any, on the information collection requirements currently approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). Information collection requirements for compliance evaluations are currently approved under OMB control number 1215–0072. The currently approved inventory includes a burden estimate for compliance checks, which is based on

the assumption that it takes the average contractor approximately four-tenths of an hour to find and make available the documents requested during a compliance check. The proposal to revise the compliance check procedure by removing the on-site visit requirement would mean that, during some compliance checks, contractors would be asked to provide documents to OFCCP rather than make them available for an OFCCP compliance officer to review on-site. OFCCP believes that, for some contractors, this may take more time than it would to make them available on-site, but, for others, it may take less time. Accordingly, OFCCP estimates that the proposed revision to the compliance check procedure will not result in a net change in the burden hours associated with compliance checks. OFCCP will submit for approval to OMB the information collection provisions of this rule as necessary. OFCCP invites comments on the information collection provisions of this rule.

Executive Order 13132 (Federalism)

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

List of Subjects

41 CFR Part 60–1

Administrative practice and procedure, Equal employment opportunity, Government contracts, Reporting and recordkeeping requirements.

41 CFR Part 60–250

Administrative practice and procedure, Equal employment opportunity, Government contracts, Individuals with disabilities, Reporting and recordkeeping requirements, Veterans.

41 CFR Part 60–741

Administrative practice and procedure, Equal employment opportunity, Government contracts, Individuals with disabilities, Reporting and recordkeeping requirements.

Signed at Washington, D.C., this 2d day of October, 2000.

Alexis M. Herman,
Secretary of Labor.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, for the reasons set forth in the Preamble, we propose to amend Title 41 of the Code of Federal Regulations, chapter 60, Parts 60–1, 60–250 and 60–741, under authorities cited as set forth below:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

1. The authority citation for part 60–1 continues to read as follows:

Authority: Sec. 201, E.O. 11246 (30 FR 12319), as amended by E.O. 11375 (32 FR 14303) and E.O. 12086 (43 FR 46501).

2. In § 60–1.20 paragraph (a)(3) is revised to read as follows:

§ 60–1.20 Compliance evaluations.

(a) * * *

(3) *Compliance check.* A determination of whether data and other information previously submitted by the contractor is complete and accurate; whether the contractor has maintained records consistent with § 60–1.12; and/or whether the contractor has developed an AAP consistent with § 60–1.40; or

* * * * *

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

3. The authority citation for part 60–250 continues to read as follows:

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

4. In § 60–250.2 paragraph (v) is added to read as follows:

§ 60–250.2 Definitions.

* * * * *

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

5. In § 60–250.60 paragraph (a)(3) is revised to read as follows:

§ 60–250.60 Compliance evaluations.

(a) * * *

(3) *Compliance check.* A determination of whether data and other information previously submitted by the contractor is complete and accurate; whether the contractor has maintained records consistent with § 60–250.80; and/or whether the contractor has developed an AAP consistent with § 60–250.40; or

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PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES

6. The authority citation for part 60–741 continues to read as follows:

Authority: 29 U.S.C. 706 and 793; and E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841.)

7. § 60–741.2 is amended by adding a new paragraph (z) to read as follows:

§ 60–741.2 Definitions.

* * * * *

(z) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of Section 503 of the Rehabilitation Act of 1973.

8. In § 60–741.44 paragraph (a)(2) is revised to read as follows:

§ 60–741.44 Required contents of affirmative action programs.

* * * * *

(a) * * *

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) or any other Federal, State or local law requiring equal opportunity for disabled persons;

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9. In § 60–741.60 the section heading and paragraph (a) are revised to read as follows:

§ 60–741.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations 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. A compliance evaluation may consist of any one or

any combination of the following investigative procedures:

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

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices;

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

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

(2) *Off-site review of records.* An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of Section 503 of the Rehabilitation Act of 1973 and regulations;

(3) *Compliance check.* A determination of whether data and other information previously submitted by the contractor is complete and accurate; whether the contractor has maintained records consistent with § 60–741.80; and/or whether the contractor has developed an affirmative action program consistent with § 60–741.40; or

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

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10. In § 60-741.62, the first sentence of paragraph (a) is revised to read as follows:

§ 60-741.62 Conciliation agreements and letters of commitment.

(a) If a compliance evaluation, complaint investigation or other review by OFCCP finds a material violation of the Act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. * * *

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11. In § 60-741.65, the first sentence of paragraph (a)(1) is revised to read as follows:

§ 60-741.65 Enforcement proceedings.

(a) *General.* (1) If a compliance evaluation, complaint investigation or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of

enforcement proceedings to enjoin the violations, to seek appropriate relief, to impose appropriate sanctions, or any combination of these outcomes. * * *

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12. In § 60-741.68, the fourth sentence of paragraph (a) is revised to read as follows:

§ 60-741.68 Reinstatement of ineligible contractors.

(a) * * * Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. * * *

* * * * *

13. In § 60-741.69, paragraph (a)(2) is revised to read as follows:

§ 60-741.69 Intimidation and interference.

(a) * * *

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

* * * * *

14. In § 60-741.80, the last two sentences of paragraph (a) are revised to read as follows:

§ 60-741.80 Recordkeeping.

(a) * * * Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been

initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term "personnel records relevant to the complaint, compliance evaluation or action" would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

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15. In § 60-741.81, the first sentence is revised to read as follows:

§ 60-741.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books 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. * * *

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