(2) Has missing fastener.
(E) Draft key or key retainer:
(1) Inoperative;
(2) Missing.
(F) Follower plate missing or broken.
215.129 Defective cushioning device unless effectively immobilized.
(A) Broken.
(B) Inoperative.
(C) Missing parts.
215.203 Operating a restricted car, except under conditions approved by FRA.

Stenciling

215.301 Failure to stencil car number and built date on freight car as required.
215.303 Failure to stencil restricted car as required.
215.305 Failure to stencil maintenance-of-way equipment as required.

Issued in Washington, D.C. on December 21, 1979.

John M. Sullivan,
Administrator.

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[Docket No. RSGM-1, Notice No. 3]

49 CFR Part 223

Safety Glazing Standards—Locomotives, Passenger Cars and Cabooses

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Adoption of final rule.

SUMMARY: New Part 223 establishes minimum safety requirements for glazing materials in the windows of locomotives, passenger cars and cabooses. This Part requires that all newly built and most existing railroad equipment have improved safety glazing materials installed in order to reduce the risk of death or serious injury resulting from flying objects, including bullets.

DATES: This regulation is effective on January 31, 1980.

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SUPPLEMENTARY INFORMATION:

On October 16, 1978, FRA published a notice of proposed rulemaking (NPRM) proposing to add a new Part 229 to establish minimum safety requirements for glazing materials that are to be installed on the windows of locomotives, passenger cars and cabooses (43 FR 47579). The purpose of the proposed regulation was to reduce the risk of death or serious injury for railroad crew members and railroad passengers from flying objects. This NPRM was also issued in response to a joint petition from the Association of American Railroads (AAR) and the Railway Labor Executive Association (RLEA).

Commenters Views

FRA solicited written comments and views on the proposed regulation and held a public hearing on November 29, 1978, to obtain oral comments on the proposal. Written comments were received from sixteen interested parties and oral presentations were made by eight parties at the public hearing. The commenters generally expressed support for the proposed rule but expressed some concern over specific provisions of the NPRM. However, two commenters did express doubt about the need for a regulation on glazing materials. One of these commenters noted the poor financial condition of the railroad industry and indicated that the magnitude of the safety problem was not sufficient to warrant a Federal rule that would necessitate large capital expenditures by the railroad industry. The other commenter expressed doubt that all railroads were experiencing a sufficiently high level of vandalism to warrant issuance of a Federal regulation and suggested that FRA should exclude from the coverage of the regulation railroads that do not have a safety problem in this area.

After reviewing the available data, FRA believes that a Federal regulation is needed to protect railroad crew members and railroad passengers. Although precise safety data is not available on this issue, the existing statistical information confirms the view of the AAR and the RLEA that a significant safety hazard exists and appears to be growing. For example, FRA data on accidents or incidents involving persons struck by thrown or otherwise propelled objects shows that some 246 people were injured in 1977 and that figure increased to 291 people in the year 1978. Additionally, data from the National Railroad Passenger Corporation (Amtrak) indicates that the FRA accident report statistics, which reflect only those instances in which a person is injured sufficiently to require at least first-aid treatment, understate the magnitude of the problem. For example, in calendar year 1978, Amtrak trains were subjected to in excess of one thousand stoning and nearly one hundred shooting incidents that did not result in accident reports being filed with the FRA. In view of these circumstances, FRA concludes that a significant safety hazard does exist which would be diminished by the installation of improved glazing materials. Accordingly, FRA is proceeding with the adoption of this regulation.

The concern expressed by the other commenter, that a railroad without a high incidence of vandalism should not be forced to comply with this regulation, can be resolved on a case by case basis through the issuance of a waiver of compliance. FRA is empowered to issue such waivers when the facts indicate that a waiver of compliance is consistent with the goal of improving rail safety and is in the public interest. FRA already has established waiver procedures in its Rules of Practice. (49 CFR Part 211.)

The remaining commenters expressed support for the proposed rule but voiced concern over specific provisions contained in the NPRM. These comments and resulting changes are discussed under the appropriate section heading in this preamble.

In adopting a final rule on glazing materials, FRA has decided to place these provisions in Part 223 rather than Part 229 as proposed in the NPRM. This decision reflects FRA's recently issued proposal to amend the Locomotive Inspection Rules and to place the amended provisions in Part 229. Additionally, FRA consolidated two proposed provisions (proposed Sections 229.7 and 229.9) into a single section which resulted in the renumbering of subsequent sections. Consequently, the following discussion is identified by reference to the final rule followed by the proposed section number in parenthesis.

Section 223.3 (Proposed Section 229.3). In the proposed regulation, FRA structured the provisions of Section 229.5(a) and Section 229.13 to permit some locomotives to continue in service without the prescribed retrofit, provided these units were not used as a lead or controlling locomotive. The language of these provisions was also drafted in such a way that a railroad could permit a vandal damaged unit to continue in service until the prescribed retrofit by assuring that such a unit was not the lead unit or the controlling unit occupied by the crew.

FRA believes that the concept contained in the proposed rule is valid but that the wording of the proposed rule could easily be misunderstood. Consequently, FRA decided to change the final rule to more clearly express

FRA's intent. This is being accomplished by providing a clear statement of how a railroad may exclude such locomotives from the applicability of this regulation. Additionally, FRA has added a provision that will require the identification of such units.

FRA has accomplished this change by revising the proposed regulation to include a new subsection (Section 223.3(b)(4)) to exclude from the applicability of this part units that are identified as a "designated locomotive". Additionally, FRA has added a definition of the concept of a designated unit which clearly details the steps that are needed to place a locomotive in this category.

Additionally, one commenter questioned whether the language contained in proposed Section 229.3(b)(3) was intended to exclude privately owned passenger cars. The commenter noted that approximately fifty passenger cars are owned by individuals, clubs and historical societies and that these cars range in age from 25 to 65 years. Given their vintage and limited use, the commenter urged that these cars should be considered historical or antiquated equipment and excluded from the glazing regulations but noted that the cars are not always operated in trains consisting exclusively of similar equipment.

It was not FRA's intent to include such cars within the scope of this regulation. FRA is revising the proposed language of this section to reflect that intent.

Section 223.5 (Proposed Section 229.5). In keeping with changes being made to § 223.3, FRA is altering the proposed language for this section. The first change involves the language contained in proposed § 229.5(a). In the final rule, § 223.5(a) contains a simple definition of what constitutes a "locomotive". The second change involves the addition of what constitutes a locomotive in "designated service" in § 233.5(m). Under this new definition, a locomotive that is operated under the specified operational limitations, may continue in service without installing the prescribed glazing materials. Since such units may not be occupied by operating or deadheading crews and must be stenciled to alert people to this fact, FRA believes that the necessary degree of employee safety will be achieved.

Several commenters also raised issues that relate to the definitions contained in proposed section 229.5. The first concerns the language used to define what constitutes a "yard locomotive." They noted that some locomotives, generally characterized as "switch locomotives", are used almost exclusively to perform switching functions within a yard. They suggested that the definition be drafted to permit such units to be considered as "yard locomotives" even though the units are occasionally used to perform industrial switching or transfer movements beyond the confines of a yard. This suggestion was echoed by another commenter who also asked that FRA define more precisely the concept of what constitutes a single yard for the purpose of this regulation.

FRA's intent was to permit locomotives that are operated exclusively within the confines of a yard to continue in service without a retrofit of the prescribed glazing materials. Available data indicates that the risk exposure for crew members from thrown objects or bullets is significantly lower when they are operating in a yard. Consequently, FRA proposed a narrow operational definition to identify and exclude these locomotive units. This definitional approach was chosen since it reflected the utilization of a locomotive rather than design characteristics of the unit. Utilization is the primary factor of concern to FRA in these circumstances. Broadening the scope of this provision, either by use of a design characteristic or by allowing these locomotives to occasionally operate beyond the yard, would expose crew members to greater risk of injury. Therefore, FRA has not accepted this suggestion. FRA is responding to the commenter's request for a better definition of what constitutes a single yard by revising this definition in order to reflect more fully FRA's intent and to resolve the perceived ambiguity problem that prompted this request. FRA believes that individual local practices of referring to portions of a given facility by a particular designation is the concern that prompted the request. This situation is illustrated most clearly in large hump yard facilities where distinct portions of the facility are given individual designations, such as the receiving yard, the classification yard, or some unique local name for easy reference purposes. FRA's intent is to treat a locomotive that stays within the confines of a particular yard facility as being a "yard locomotive" for the purposes of this regulation even though that unit may operate in various portions of a given facility. Consequently, FRA is revising the definition to include the phrase "single yard area." In providing this revised definition, FRA recognizes that only a few locomotives are utilized exclusively within a single yard area and that consequently the vast majority of locomotives used for yard service will require the installation of the prescribed glazing materials.

A number of commenters expressed concern over the absence of any provision concerning the manner in which glazing materials are to be installed. These commenters expressed a belief that the performance of the glazing materials could be affected by the manner of installation. FRA is aware of some limited data that supports the argument that this regulation should not be totally silent on the issue of how glazing materials are to be installed in the affected equipment. Since FRA's intent is to provide minimum safety standards in this area and because of the wide variances in equipment design, FRA is addressing this problem in a limited manner. Consequently, FRA is requiring that improved glazing materials be installed in such a manner that the occupants of any unit will not be injured in the event the glazing materials are impacted. This will assure that the total glazing installation will provide the same level of protection that glazing materials alone were intended to provide. This is being accomplished by revising the definition of what constitutes "certified glazing" in subsection (k).

The final comments regarding this section involved the concept of the "emergency opening window," defined in subsection (l), that is required to be installed in passenger cars. Some commenters suggested that FRA expand on its proposal and provide greater detail concerning the number of window exits, their location and method of identification. Other commenters inquired about the use of certain types of windows to meet this definition.

FRA's intent, in including a provision for emergency windows, was to assure that the use of improved glazing materials would not indirectly reduce passenger safety by making emergency egress more difficult in an accident or derailment situation. As FRA noted in the preamble to the NPRM, the known wide range of variables present in the existing fleet or passenger cars does not make it appropriate, in FRA's judgement, to provide additional, more specific requirements for these windows. The commenters, although urging greater FRA action, have provided neither data nor a conceptual framework that would permit FRA to adopt their suggestion. Consequently, FRA has not changed the proposed language.

The absence of any analogous emergency window provisions for locomotives and cabooses was also

noted by the commenters. FRA did not include such a provision in the proposed regulation because the limited number of people in these units and the number of available exits indicate that sufficient emergency egress capability is already provided. Accordingly, no additional Federal regulatory action is necessary. Moreover, many of the windows in these units are designed so that they slide open. This design feature permits easy egress in a crisis situation. FRA agrees, as urged by one commenter, that similarly designed windows in older passenger cars should be considered to be emergency opening windows.

Section 223.7 (Proposed §§ 229.7 and 229.9). FRA is providing a new caption for this section and is combining in this single section the provisions that were contained in proposed sections 229.7 and 229.9 concerning the liability for civil penalty for violation of this regulation and the procedure for obtaining a waiver of compliance with this regulation. This change is merely organizational in nature and reflects comparable sections in other FRA rules that are being revised.

Section 223.9 (Proposed § 229.11). Several commenters expressed concern over the proposed compliance date for newly built or rebuilt locomotives contained in proposed § 229.11. These commenters indicated that, if they decided to alter the existing methods for mounting glazing materials in locomotives, additional time would be necessary to accomplish this task and to produce the needed materials for use on the new units. This concern appears to have been intensified by the reservation that these commenters expressed about the stringency of the performance level for side glazing locations.

FRA believes that a six month lead time for compliance for newly built and rebuilt locomotives is appropriate and can be accomplished with reasonable effort. Additionally, FRA is revising the proposed performance level for materials used in side-facing glazing locations. This revision, which is discussed in greater detail below, should serve to make it easier to meet the proposed compliance date. Therefore, FRA has retained this proposal without change.

Section 223.11 (Proposed § 229.13). One commenter expressed concern over the wording contained in proposed § 229.13 that would require immediate retrofitting of a unit in the event that a locomotive window is broken or damaged. The commenter noted that this provision could cause severe compliance problems because of the need to remove equipment from service as soon as the damage occurred and urged that a period of ninety days be allowed for completion of this work. FRA agrees that the immediate action provision could produce unnecessary service disruptions and inconvenience to the public and is revising this provision to permit a railroad to continue the vandal damaged unit in service for a period not to exceed forty-eight hours. At the end of that period, the locomotive must either be removed from service until the required retrofit is accomplished or the unit must be placed in "designated service". The revised provision will allow a railroad to more effectively deal with the various operational problems that could be encountered under the terms of the proposed section and still provides for the requisite degree of crew safety.

Section 223.13 (Proposed § 229.15). A commenter expressed concern over the wording contained in proposed § 229.15 that would require immediate retrofitting of a caboose in the event that a window is broken or damaged. The commenter noted that compliance with this provision in situations such as branch line operations could cause unnecessary service disruptions. FRA agrees that the proposed language is unduly restrictive and is revising this provision to require that the work be accomplished within 30 days after the breakage occurs. FRA believes that this time frame is appropriate in light of the normal maintenance cycles for this equipment and the degree of hazard involved.

Section 223.15 (Proposed § 229.17). FRA did not receive any comments directly addressing the language contained in proposed § 229.17. FRA is adopting the proposed language without change.

Section 223.17 (Proposed § 229.21). The language of this section has basically remained unchanged from the wording that was contained in proposed § 229.21. The wording changed in adopting this final rule reflects the changed Part number and now includes passenger cars within its scope.

In adopting the final rule FRA is not including the restrictions on interim use contained in proposed § 229.21. All of the commenters who addressed the proposed interim use provision for equipped locomotives voiced opposition to this concept. Among the points raised by these commenters was the fact that compliance with this proposal could result in a reduction in operational safety in instances when circumstances require that a locomotive be equipped with cab signal devices, automatic train stop devices or snowplows. FRA agrees that the safety benefits derived in these instances outweigh those gained by adherence to the proposed language of this section. Consequently, FRA is deleting this provision from the final rule. FRA would urge railroads to adhere to the concept contained in the proposed rule unless there are other safety factors that would be compromised by such adherence.

Appendix A

FRA received a considerable volume of comments with regard to the language of this proposed provision which contains both the performance criteria and the testing methodology for the glazing materials. The initial point made by the commenters was the belief that FRA was being unduly restrictive by limiting the certification process to glazing manufacturers. The commenter offering this opinion believes that any party should be permitted to do the necessary testing and certification to achieve compliance.

FRA proposed that manufacturers do the requisite testing and certification because this group appears to be the most qualified and directly affected party. In structuring the regulation in this manner, FRA has not totally precluded other parties from providing certification based on appropriate testing. However, if a party other than a manufacturer desires to provide the required certification, a waiver of this requirement will be necessary. FRA believes that the individualized review process employed in waiver proceedings, is necessary to assure that the quality of the testing will be sufficient to insure the protection of railroad crew members and railroads passengers.

Another commenter raised a question about the requirement that a railroad obtain a written certification that the glazing material it is installing meets the requirements of this regulation. The commenter was concerned that the language could be interpreted to mean that a written certification must be obtained for each piece of material being installed.

FRA's intent is that a railroad install only those types of glazing materials which meet the requirements of this regulation. To assure that only the prescribed materials are being utilized, FRA believes that it is necessary for a railroad to determine that a particular product which has been selected does qualify for installation. However, it is not necessary that such a determination be made and documented for each piece of glazing material. A determination by the railroad that the given brand or product line distributed by a manufacturer has been tested and has qualified will be sufficient.

FRA agrees that the language of this section does not clearly describe the necessary steps that must be followed and is revising the language to more effectively state the procedures involved. In the revised language, a manufacturer who supplies glazing materials that are intended for use in a locomotive, passenger car or caboose can certify that a given type, brand or product line has been successfully tested in accordance with this appendix. This certification would be sufficient to allow a railroad to install such material in any quantity it desired. If a railroad elected to use different product types from one manufacturer or opted to use the product lines of several manufacturers, it would only be necessary to determine that each type, brand or product line selected was in fact certified by its manufacturer. FRA is not detailing the mechanism by which a railroad should or can assure itself that the manufacturer does certify its particular product. However, FRA is revising the identification markings to be imprinted on each individual unit of glazing material so that it will be possible to ascertain the type of material being installed.

The revised identification procedures are now detailed in subsection (c) of this appendix and require that each individual piece being installed contain a marking to indicate that the material qualifies as either Type I or Type II glazing and that the material was manufactured by a given producer. Additionally, FRA is requiring that the identification marking contain sufficient data so that the type, brand or product line of the manufacturer to which this unit of material belongs can be identified.

Several commenters raised questions about the method proposed by FRA for marking or identifying glazing materials that comply with this regulation. FRA's proposal for the use of a blue circle or blue square was deemed impractical because of the current practice of providing large sheets of material that are subsequently cut into smaller units prior to installation and because the color selected will fade rapidly and become indistinquishable. These commenters noted that many users of the same type of glazing materials which will meet FRA's concepts employ "hot stamping" or imprinting techniques to identify the materials and urged that FRA permit use of these techniques.

FRA's intent was to ensure that the glazing materials are readily identifiable. It now appears that the proposed language is unduly restrictive in accomplishing this goal. Consequently, FRA is deleting the reference to blue circles or blue squares. Additionally, FRA is rewording this provision to provide that material that qualifies as either Type I or Type II glazing must be permanently marked so that it is readily identifiable. However, the exact method of marking the material has not been specified. This will permit manufacturers and installers to convey the necessary information in whatever reasonable fashion is desired. In this way, the use of the "hot stamping" technique or other identification methods can be employed by the affected parties.

It should also be noted that FRA is revising this provision to clearly state that the identification marking must be done in such a manner that the required information is clearly visible once the material has been installed.

The next issue raised by the commenters addressed various aspects of the testing methodology proposed by FRA. Several commenters expressed the belief that FRA should require independent third party observation or verification of the actual test procedures for each product. Although no rationale was provided, FRA assumes that the commenters have some reservations about relying on the quality of manufacturer testing. This concern is also apparently the basis for the suggestion that periodic retesting should be required by FRA.

Adoption of the suggestions that independent third party verification and periodic retesting be required, would improve the quality control assurance levels. However, FRA does not believe that the facts warrant imposition of these additional requirements. FRA's intent is to provide minimum standards and to impose limited testing requirements to assure that materials meet those standards. FRA believes that the proposed requirements and the traditional economic forces of the marketplace will be sufficient to achieve the desired goal for improved safety and that adoption of these suggestions would constitute unnecessary overregulation in this instance.

The commenters urged many revisions in the testing procedures proposed by FRA and institution of additional testing parameters. Standardization of the size of the material and the mounting of the material; change in location for the witness plate; utilization of equivalency impacts; and expansion of the test regime to measure the effects of temperature, humidity, transmissivity and durability were suggested as areas for revision.

FRA believes that these suggested revisions are not appropriate and that additional testing requirements are not needed. FRA did not propose standardized test sizes or mountings because of the wide range of sizes and mountings that currently exist for the equipment that is already in service in the railroad industry. FRA believes that the latitude provided by the proposed regulation is necessary in light of these variables. Although product comparability data may suffer from the absence of the recommended standardization, FRA believes that such data is not essential from the standpoint of this regulation. For similar reasons FRA did not include the additional testing requirements suggested by the commenters. The suggested additions are not essential for evaluating the safety performance of these glazing materials, although they may be useful from the standpoint of the manufacturer or the purchaser of the materials. Accordingly, FRA does not agree that such tests should be required by Federal regulation. The remaining suggestion that FRA permit the use of equivalency impact testing as an alternative to the proposed bullet or cinder block impacts presents a slightly different issue. FRA selected these proposed tests because they are representative of the actual environment in which the materials will be utilized and because FRA perceived a difference of opinion in the technical community over the question of whether true equivalency can be obtained by substituting different test methodologies from those proposed. FRA is prepared to respond favorably to any party who can demonstrate that a substitute test program will provide a truly equivalent test to that being prescribed by FRA. Accordingly, FRA is retaining the proposed procedures.

The commenters addressed the provision relating to the "witness plate" that is used to detect material separation from the sheet of glazing that could impact a person adjacent to the installed window. FRA proposed that this witness plate be installed within six inches of the material being tested. The commenters suggested that FRA permit the witness plate to be located at a distance of up to eighteen inches from the test material. Additionally, one commenter suggested a change in the material specified for use as a witness plate. FRA believes that the six inch distance requirement is necessary since there are many instances in which people will be at this distance from the window when an impact occurs. Injuries, particularly injuries to eyes, are likely to occur if particles of material are dislodged on impact. Consequently, FRA believes that a six inch rather than an

eighteen inch distance between the witness plate and the test material is more appropriate. FRA is revising the technical description for the witness plate material as suggested, by providing for a more easily obtainable type of aluminum.

The final issue raised by the commenters with respect to the testing provisions involves the performance level proposed by FRA for glazing materials used in side facing glazing locations. All of the commenters urged that FRA consider reducing the force levels that were proposed for the cinder block portion of the test procedure. They expressed the belief that it was very unlikely that objects with the mass of a cinder block could strike a side window at the rate of velocity contemplated by FRA. The concern over this issue was intensified by the commenters' belief that compliance with the proposed cinder block test procedure would require that large numbers of frames and ancillary supporting mechanisms be modified and that this would have an adverse impact on the proposed retrofit schedule.

FRA agrees that the proposed cinder block impact speed criterion for side facing glazing location is too stringent. Review of available data suggests that the rate of velocity for the cinder block impact can be reduced without significantly reducing safety. Consequently, FRA is revising this portion of the side window impact testing to require that the material be subjected to an impact when the cinder block is moving at a minimum of 12 feet per second velocity. This impact velocity was selected on the basis of available data on the relative impact energy that glazing can be expected to experience from hand thrown objects. It should be noted, however, that FRA is not altering the proposed bullet impact provisions for testing materials intended for use in side window locations.

Economic Impact

FRA has determined that adoption of this final rule does not constitute a significant regulatory proposal. Therefore, a regulatory analysis under Executive Order 12044 is not required (E. O. 12044, 43 FR 12661, March 24, 1978).

However, FRA did prepare a Regulatory Evaluation of the proposed regulation and has revised that evaluation in light of the comments received and the changes made in the final rule. The resulting cost analysis and cost benefit analysis, prepared in accordance with the DOT's policies for evaluation of regulatory impacts (Regulatory Policies and Procedures, 44 FR 11034, February 26, 1979), have been placed in the public docket for this proceeding.

Environmental Impact

On March 16, 1979, the FRA published (44 FR 16062) revised procedures for insuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, executive orders, and DOT Order 5610.113. FRA reviewed the criteria established in those procedures and determined that adoption of this final rule does not constitute a major FRA action which requires an environmental assessment.

In consideration of the foregoing, Title 49 of the Code of Federal Regulations is amended by the addition of a new Part 223 set forth below:

PART 223—SAFETY GLAZING STANDARDS—LOCOMOTIVES, PASSENGER CARS AND CABOOSES

Subpart A—General

Sec.
223.1 Scope.
223.3 Application.
223.5 Definitions.
223.7 Responsibility.

Subpart B—Specific Requirements

223.9 Requirements for new or rebuilt equipment.
223.11 Requirements for existing locomotives.
223.13 Requirements for existing cabooses.
223.15 Requirements for existing passenger cars.
223.17 Identification of equipped locomotives, passenger cars and cabooses.
Appendix A—Certification of Glazing Materials.

Authority: Sec. 202, 84 Stat. 971 (45 U.S.C. 431); sec. 1.49(n) of Title 49 of the Code of Federal Regulations.

Subpart A—General

§ 223.1 Scope.

This part provides minimum requirements for glazing materials in order to protect railroad employees and railroad passengers from injury as a result of objects striking the windows of locomotives, caboose and passenger cars.

§ 223.3 Application.

(a) This part applies to railroads that operate rolling equipment on standard gauge track that is a part of the general railroad system of transportation.

(b) This part does not apply to—

(1) Locomotives, cabooses, and passenger cars that operate only on track inside an installation that is not part of the general railroad system of transportation;

(2) A rapid transit railroad that operates only on track used exclusively for short haul rapid transit passenger service in a metropolitan or suburban area; and

(3) Locomotives, passenger cars and cabooses that are historical or antiquated equipment and are used only for excursion, educational, recreational purposes or private transportation purposes.

(4) Locomotives that are used exclusively in designated service as defined in § 223.5(m).

§ 223.5 Definitions.

As used in this part—

(a) "Locomotive" means a self-propelled unit of equipment designed primarily for moving other equipment. It does not include self-propelled passenger cars.

(b) "Caboose" means a car in a freight train intended to provide transportation for crew members.

(c) "Passenger Car" means a unit of rolling equipment intended to provide transportation for members of the general public and includes self-propelled cars designed to carry baggage, mail, express and passengers.

(d) "Yard" is a system of auxiliary tracks used exclusively for the classification of passenger or freight cars according to commodity or destination; assembling of cars for train movement; storage of cars; or repair of equipment.

(e) "Yard Locomotive" means a locomotive that is operated only to perform switching functions within a single yard area.

(f) "Yard Caboose" means a caboose that is used exclusively in a single yard area.

(g) "Rebuilt Locomotive, Caboose or Passenger Car" means a locomotive, caboose or passenger car that has undergone overhaul which has been identified by the railroad as a capital expense under Interstate Commerce Commission accounting standards.

(h) "Windshield" means the combination of individual units of glazing material of the locomotive, passenger car, or caboose that are positioned in an end facing glazing location.

(i) "End Facing Glazing Location" means any location where a line perpendicular to the plane of the glazing material makes a horizontal angle of 50 degrees or less with the centerline of the locomotive, caboose or passenger car. Any location which, due to curvature of the glazing material, can meet the criteria for either a front facing location

or a side facing location shall be considered a front facing location.

(j) "Side Facing Glazing Location" means any location where a line perpendicular to the plane of the glazing material makes an angle of more than 50 degrees with the centerline of the locomotive, caboose or passenger car.

(k) "Certified Glazing" means a glazing material that has been certified by the manufacturer as having met the testing requirements set forth in Appendix A of this part and that has been installed in such a manner that it will perform its intended function.

(l) "Emergency Opening Window" means that segment of a side facing glazing location which has been designed to permit rapid and easy removal during a crisis situation.

(m) "Designated Service" means exclusive operation of a locomotive under the following conditions;

(1) The locomotive is not used as an independent unit or the controlling unit is a consist of locomotives except when moving for the purpose of servicing or repair within a single yard area;

(2) The locomotive is not occupied by operating or deadhead crews outside a single yard area; and

(3) The locomotive is stenciled "Designated Service—DO NOT OCCUPY".

§ 223.7 Responsibility.

(a) A railroad that fails to comply with any requirement of this part with respect to any locomotive, passenger car or caboose which it operates is subject to a civil penalty as provided in Appendix B of this part. Each day of violation constitutes a separate offense.

(b) A railroad may petition the Federal Railroad Administrator for exemption from any or all requirements prescribed in this part. Each petition shall be filed in accordance with Part 211 of this chapter.

Subpart B—Specific Requirements

§ 223.9 Requirement for new or rebuilt equipment.

(a) Locomotives, including yard locomotives, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows.

(b) Cabooses, including yard cabooses, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows.

(c) Passenger cars, including self-propelled passenger cars, built or rebuilt after June 30, 1980, must be equipped with certified glazing in all windows and at least four emergency opening windows.

§ 223.11 Requirement for existing locomotives.

(a) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Locomotives, other than yard locomotives, built or rebuilt prior to July 1, 1980, which are equipped in all side facing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the sidefacing glazing location except to replace sidefacing glazing material that is broken or damaged.

(c) Except for yard locomotives and locomotives equipped as described in paragraphs (a) and (b), locomotives built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all windows after June 30, 1983.

(d) Each locomotive subject to the provisions of paragraph (c) of this section, which, as a result of an act of vandalism has a window that is broken or damaged so that the window fails to permit good visibility,

(1) Shall be placed in Designated Service within 48 hours of the time of breakage or damage or

(2) Shall be removed from service until equipped with certified glazing in the following manner:

(i) If the broken or damaged window is a part of the windshield, all of the forward and rearward end facing glazing locations must be replaced with certified glazing.

(ii) If the broken or damaged window is a part of the sidefacing window, all of the sidefacing glazing locations must be replaced with certified glazing.

§ 223.13 Requirements for existing cabooses.

(a) Cabooses, other than yard cabooses, built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Cabooses, other than yard cabooses, built or rebuilt prior to July 1, 1980, which are equipped in all side facing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing in the sidefacing glazing locations except to replace sidefacing glazing material that is broken or damaged.

(c) Except for yard cabooses and cabooses equipped as described in paragraphs (a) and (b), cabooses built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all windows after June 30, 1983.

(d) Each caboose subject to the provision of paragraph (c) of this section, which, as a result of an act of vandalism, has a window that is broken or damaged so that the window fails to permit good visibility shall be equipped with certified glazing in the following manner:

(1) If the broken window is a part of the windshield, all of the forward and rearward end facing glazing locations must be replaced with certified glazing within 30 days of the date of breakage or damage.

(2) If the broken window is a part of the sidefacing window, all of the sidefacing glazing locations must be replaced with certified glazing within 30 days of the date of breakage.

§ 223.15 Requirements for existing passenger cars.

(a) Passenger cars built or rebuilt prior to July 1, 1980, which are equipped in the forward and rearward end facing glazing locations of the windshield with a glazing material that meets the criteria for either portion of the impact testing required for a Type I test under the provisions of Appendix A of this part will not require the installation of certified glazing in the windshield location except to replace windshield glazing material that is broken or damaged.

(b) Passenger cars built or rebuilt prior to July 1, 1980, which are equipped in the sidefacing glazing locations with a glazing material that meets the criteria for either portion of the impact testing required for a Type II test under the provisions of Appendix A of this part, will not require the installation of certified glazing except to replace sidefacing glazing material that is broken or damaged.

(c) Except for passenger cars described in paragraphs (a) and (b),

passenger cars built or rebuilt prior to July 1, 1980, shall be equipped with certified glazing in all windows and a minimum of four emergency windows after June 30, 1983.

(d) Each passenger car subject to the provisions of paragraph (c) of this section which as a result of an act of vandalism, has a window that is broken or damaged so that the window fails to permit good visibility shall be equipped with certified glazing in the following manner:

(1) When the broken window is a part of the windshield, all of the forward and rearward end facing glazing locations shall be replaced with certified glazing within 30 days of breakage.

(2) When the broken window is a part of the sidefacing window, the glazing in that individual sidefacing glazing location shall be replaced with certified glazing within 30 days of the date of breakage.

§ 223.17 Identification of Equipped Locomotives, Passenger Cars and Cabooses.

Each locomotive, passenger car and caboose that is fully equipped with certified glazing shall be stenciled on an interior wall as follows: "Fully equipped FRA Part 223 glazing" or similar words conveying that meaning in letters at least 1 inch high.

Appendix A—Certification of Glazing Material

As provided in this part, certified glazing materials installed in locomotives, passenger cars, or cabooses must be certified by the glazing manufacturer in accordance with the following procedures:

a. General Requirements

(1) Each manufacturer that provides glazing materials, intended by the manufacturer for use in achieving compliance with the requirements of this part, shall certify that each type of glazing material being supplied for this purpose has been succcessfully tested in accordance with this appendix and that test verification data is available to a railroad or to FRA upon request.

(2) The test verification data shall contain all pertinent original data logs and documentation that the selection of material samples, test set-ups, test measuring devices, and test procedures were performed by qualified personnel using recognized and acceptable practices and in accordance with this appendix.

b. Testing Requirements

(1) The material to be tested (Target Material) shall be a full scale sample of the largest dimension intended to be produced and installed.

(2) The Target Material shall be representative of production material and shall be selected on a documented random choice basis.

(3) The Target Material shall be securely and rigidly attached in a fixture so that the fixture's own characteristics will not induce test errors.

(4) The Target Material so selected and attached shall constitute a Test Specimen.

(5) The Test Specimen will then be equipped with a Witness Plate that shall be mounted parallel to and at a distance of six inches in back of the Target Material. The Witness Plate shall have at least an area which will cover the full map of the Target Material.

(6) The Witness Plate shall be an unbacked sheet of maximum 0.006 inch, alloy 1100 temper O, aluminum stretched within the perimeter of a suitable frame to provide a taut surface.

(7) The Test Specimen will be positioned so that the defined projectile impacts it at an angle of 90 degrees to the Test Specimen surface.

(8) The point of impact of the defined projectile will be within a radius of 3" of the centroid of the Target Material.

(9) Velocity screens or other suitable velocity measuring devices will be positioned so as to measure the impact velocity of the defined projectile within a 10% accuracy tolerance, with test modifications made to guarantee that the stipulated minimum velocity requirements are met.

(10) The Test Specimen for glazing material that is intended for use in end facing glazing locations shall be subjected to a Type I test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimensions of 8 inches by 8 inches by 16 inches nominally impacts at the corner of the block at a minimum of 44 feet per second velocity. The cinder block must be of composition referenced in American Society for Testing and Materials (ASTM) Specification C33L or ASTM C90.

(11) The Test Specimen for glazing material that is intended for use only in side facing glazing locations shall be subjected to a Type II test regimen consisting of the following tests:

(i) Ballistic Impact in which a standard 22 caliber long rifle lead bullet of 40 grains in weight impacts at a minimum of 960 feet per second velocity.

(ii) Large Object Impact in which a cinder block of 24 lbs minimum weight with dimensions of 8 inches by 8 inches by 16 inches nominally impacts at the corner of the block at a minimum of 12 feet per second velocity. The cinder block must be of the composition referenced in ASTM C33L or ASTM C90.

(12) Three different test specimens must be subjected to the ballistic impact portion of these tests.

(13) Two different test specimens must be subjected to the large object impact portion of these tests.

(14) A material so tested must perform so that:

(i) there shall be no penetration of the back surfaces (side closest to Witness Plate) of the Target Material by the projectile. Partial penetration of the impact (front) surface of the Target Material does not constitute a failure; and

(ii) there shall be no penetration of particles from the back side of the Target Material through the back side of the prescribed Witness Plate.

(15) Test specimens must consecutively pass the required number of tests at the required minimum velocities. Individual tests resulting in failures at greater than the required minimum velocities may be repeated but a failure of an individual test at less than the minimum velocity shall result in termination of the total test and failure of the material.

(16) After successful completion of the prescribed set of required consecutive tests, a manufacturer may certify in writing that a particular glazing material meets the requirements of these standards.

c. Material Identification

(1) Each individual unit of glazing material shall be permanently marked, prior to installation, to indicate that this type of material has been successfully tested as set forth in this appendix and that marking shall be done in such a manner that it is clearly visible after the material has been installed.

(2) Each individual unit of a glazing material that has successfully passed the Type I testing regimen shall be marked to indicate:

(i) "FRA Type I" material;

(ii) the manufacturer of the material;

(iii) the type or brand identification of the material.

(3) Each individual unit of a glazing material that has successfully passed the Type II testing regimen shall be marked to indicate:

(i) "FRA Type II" material;

(ii) the manufacturer of the material;

(iii) the type or brand identification of the material.

Authority: Sec. 202, 84 Stat. 971 (45 U.S.C. 431); Sec. 1.49(n) of the regulations of the Office of the Secretary of Transportation, 49 CFR 1.49(n).

Issued in Washington, D.C. on December 19, 1979.

John M. Sullivan,
Administrator.

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Part III

Department of the Treasury

Office of Revenue Sharing

Revenue Sharing Regulations

DEPARTMENT OF TREASURY

Office of Revenue Sharing

31 CFR Part 51

Revenue Sharing Regulations

AGENCY: Office of Revenue Sharing, Treasury Department.

ACTION: Proposed rule.

SUMMARY: This proposed rule contains: (1) a new set of proposed regulations implementing the prohibition against discrimination on the basis of handicapped status, as provided in section 504 of the Rehabilitation Act of 1973 (section 51.55). The proposed regulation is required pursuant to Executive Order 11914 "Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs." Comments are requested concerning the preparation of a regulatory analysis, (2) proposed age discrimination regulations under the Age Discrimination Act of 1975. The proposed age discrimination regulations are required pursuant to the Age Discrimination Act of 1975 and the HEW Government-wide Age Discrimination Regulations. A regulatory analysis has been determined to be unnecessary; and (3) revisions to existing regulations which make technical and procedural changes. The revisions are primarily for clarification and to conform certain regulations to existing operating procedures. A regulatory analysis has been determined to be unnecessary.

DATES: Written comments must be received on or before February 29, 1980.

ADDRESSES: Send comments to: Director, Office of Revenue Sharing ("ORS"), cc: Treasury Department, Washington, D.C. 20226. Taped copies of Subpart E are available upon request.

FOR FURTHER INFORMATION CONTACT: Arnold Intrater, Chief Counsel for Revenue Sharing or Jacqueline L. Jackson, a staff attorney at 202-634-5182.

SUPPLEMENTARY INFORMATION:

Background

On October 10, 1976, the State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94-488) were enacted to amend the State and Local Fiscal Assistance Act of 1972 (Pub. L. 92-512) which established the General Revenue Sharing program. The amendments were effective January 1, 1977 and necessitated the complete revision of the revenue sharing regulations (31 CFR, part 51). The regulations were published in final form to be effective October 1, 1977 (except for subpart E). Subpart E of the regulations was published in interim form, has not been issued in final form. Further, specific regulations concerning handicapped discrimination and age discrimination have yet to be issued. It was also determined that a complete review of all regulations would be useful prior to publishing a final rule with respect to subpart E. Accordingly, the proposed rule sets forth the complete 31 CFR part 51.

The regulations are divided into seven subparts. Subpart A, "General Information," contains definitions and other provisions applicable to all subparts (unless otherwise stated). Subpart B, "Assurance, Reports, Public Participation and Public Hearings," sets forth the assurance, reporting and public hearing requirements placed upon State and local governments which receive revenue sharing funds. Subpart C, "Computation and Adjustment of Entitlement Funds," sets forth the technical provisions concerning the data and formulae used for payment of entitlement funds. Subpart D, "Prohibitions and Restrictions on Use of Funds," sets forth the restrictions and prohibitions on the use of revenue sharing funds other than the prohibitions against discrimination. Subpart E, "Nondiscrimination by State and Local Governments Receiving Entitlement Funds," sets forth the prohibitions against discrimination by recipient governments, the exceptions thereto and the procedures to be used to achieve compliance. Subpart F, "Fiscal Procedures and Auditing" sets forth the auditing requirements and fiscal procedures concerning expenditure of revenue sharing funds. Finally, Subpart G, "Proceedings for Reduction in Entitlement, Withholding, Suspension, or Repayment of Funds," sets forth the procedures for administrative hearings to redress violations of the provisions of the Revenue Sharing Act and regulations. The following is a section-by-section analysis of the major proposed amendments to the regulations contained in 31 CFR, part 51.

Subpart A—General Information

Section 51.0 Scope and application of regulations. On April 14, 1978, the Office of Revenue Sharing (ORS) published an administrative ruling concerning § 51.0(b) "savings clause," (Administrative Ruling 79-1, March 29, 1979). Confusion had arisen as to what regulations governed administrative complaints filed with the ORS prior to the 1976 amendments. Complaints filed prior to the 1976 amendments and violations occurring and ending prior to the amendments were to be handled under regulations then in effect. The procedures in effect after January 1, 1977 cover complaints filed on or after January 1, 1977 and violations continuing thereafter. Because of the passage of time, few if any complaints concerning pre-1977 violations remain unresolved today. Any that might exist are likely to be of an ongoing nature. Accordingly, the Director proposes to amend § 51.0(b) to provide that all pending pre-1977 administrative proceedings will be resolved under current procedures.

51.2 Definitions. A new § 51.2(h) is proposed to add a definition of the term "funded." This definition was contained in Subpart E, but has been determined to have general applicability to all provisions of this part.

The proposed definition of "lobbying" § 51.2(m) would eliminate the reference to § 51.44 and place the definition in its proper place.

The definitions of "Generally accepted auditing standards and Independent public accountant," have been placed in a new definition section contained in Subpart F. Accordingly, the remaining definitions are redesignated.

The proposed definition of "program and activity" § 51.2(l) has been added from Subpart E because it was determined to have general applicability to all provisions of this part. The definition, presently contained in § 51.51(c) of the regulations was amended on April 2, 1979 (4 CFR 19191) to conform it with the definition contained in regulations implementing the Crime Control and Safe Streets Act of 1968 (42 USC 3701 *et seq.*). The non-discrimination provisions under that Act are substantially similar to those under the Revenue Sharing Act. The regulation (28 CFR 42 202(g)) defined program or activity in a manner which we determined to be appropriate. The proposed rule contains that definition further clarified to encompass secondary recipients.

Proposed § 51(n) would add a new definition of secondary recipient. Presently there is no definition of secondary recipient. Section 51.4 merely states that the secondary recipient shall comply with the restrictions and prohibitions contained in the Act but fails to define the term. We proposed to define a secondary recipient as any entity which receives entitlement funds by grant, contract or other arrangement for the purpose of providing a service the recipient government would otherwise provide or for the purpose of providing such entity with general financial assistance.

The definition includes other governments, private nonprofit

organizations and profit-making businesses which receive revenue sharing funds and use them in a manner which impacts on the citizens of the primary recipient government. The definition specifically excludes the procurement of goods. It does not exclude construction contractors. The construction contractor, however, is a hybrid situation between the purchase of an object (a building or a road) and the provision of a service the government would otherwise provide. Since the construction contractor can be compared to the department of public works of a recipient government, it was determined that the contractor should be included as a secondary recipient.

Section 51.3 Procedure for effecting compliance. This section has been completely revised to provide general guidance concerning compliance procedures and to eliminate the confusing reference to Subpart E. Since the provisions of this section apply to violations of Subparts B, D and F, the provisions must be broad enough to encompass violations in operating procedures. Section 125 of the Act requires the Secretary to promulgate regulations establishing reasonable and specific time limits for the conduct of an investigation and issuance of a finding and for the conduct of compliance audits and reviews. It is the position of the ORS that only section 125(2) requiring reasonable and specific time limits for the conduct of audits and reviews (including investigations of allegations) relating to possible violations of the provisions of the Act, applies to violations other than subpart E. Accordingly, the issuance of a finding is not required within 90 days from receipt of a complaint or other information. This proposed rule is designed to provide required guidance without eliminating the flexibility needed to achieve compliance with varying violations of the Act.

Proposed § 51.3(e) clarifies the procedure for delay of payment where a recipient government fails to comply with the reporting or assurance requirements of the Act. The reporting requirement referred to includes the submission of reports requested by the Director to determine compliance with the provisions of the Act. Entitlement funds constructively waived are not returned to a recipient government, but become a part of the entitlement of the next highest level of government.

Section 51.4 Transfer of funds to secondary recipients. This section is proposed to clarify the application of the prohibitions and restrictions, contained in the Act and regulations, to secondary recipients.

Section 51.5 Time periods. Proposed § 51.5(a) would clarify that the time period for an event will not begin to run until the appropriate party receives notice of the event. For example, a recipient government is given ten days to request an administrative hearing or suffer the suspension of entitlement funds. The ten-day period begins not with the issuance of the determination by the Director, but with the receipt of notice of the determination by the recipient government.

Proposed § 51.5(b) provides that time periods of ten days or less refer to working days not including weekends. Time periods of ten days or more refer to calendar days including weekends.

Section 51.6 Effect of State or local law. The proposed rule adds a new section 51.6 "effect of State or local law" which provides that any conflicting State or local law, that substantially impedes compliance by a recipient government with the provisions of the Act or regulations, will not be a valid defense for failure to comply with the provisions of the Act. This section applies to all restrictions and prohibitions including the audit requirements and nondiscrimination prohibitions.

Section 51.7 Applicability of other Federal laws. A new § 51.7 is proposed which would state that general laws relating to Federal assistance programs are not applicable unless specifically provided in the Revenue Sharing Act. It has always been the position of the ORS that only the Acts specifically mentioned within the Revenue Sharing Act are applicable to the revenue sharing program. This position has support in case law. In *Carolina Action v. Simon,* (552 F. 2d. 295, (1975)) the Court held that the National Environmental Policy Act (42 U.S.C. sections 4321 *et seq.)* was not applicable to revenue sharing. In the latest case, *Goolsby v. Blumenthal* (590 F. 2d. 1369 (1979)), the Court held that the Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. sections 460 *et seq.)* was not applicable to revenue sharing.

The proposed section also provides that the criminal code of the United States is applicable to criminal offenses relating to the expenditure of revenue sharing funds.

Subpart B—Assurances, Reports, Public Participation and Public Hearings

Section 51.10 Definitions. The definitions of budget and budget summary are revised for clarification. The definitions of entitlement funds and recipient governments are eliminated as redundant because they are included in § 51.2 of Subpart A.

Section 51.11 Reports to the Director, assurances procedures for effecting compliance. Proposed § 51.11(c) would amend the current provision to achieve greater clarity. The section would distinguish between the procedures for effecting compliance for public hearing violations and the procedures for effecting compliance for reporting and assurance violations.

Section 51.13 Proposed use hearing. Section 51.13 is proposed to be amended to clarify that a waiver of the proposed use hearing must be requested by the recipient government and the request must be accompanied by a cost estimate of the unavoidable expenses. Further, the waiver must be approved by the Director prior to the appropriation of revenue sharing funds by the recipient government.

Section 51.14 Budget hearing. Proposed § 51.14(b) revises the provision for an alternative procedure for a budget hearing to eliminate the requirement that the recipient government submit a written assurance prior to the use of the alternative procedure. The State or local public hearing procedure may be used automatically and compliance with those procedures need only be proved when questioned pursuant to a compliance review or a complaint.

Proposed § 51.14(e), "Waiver of newspaper publication, alternative forms," would clarify the requirements for the waiver of newspaper publication. Those requirements are the same as the requirements for the waiver of the proposed use hearing and publication requirements.

Section 51.15 Amendments or modification to enacted budget. The proposed rule amends this section to clarify what constitutes a major change. To be a major change, the modification to the budget must be both 25% of the total budget and involve at least $1,000.

Section 51.18 Legal notice rules not applicable. The proposed rule amends this section to provide that newspaper publication required with respect to public hearings and the use report may be in the form of a newspaper advertisement or article. The publication must however include all of the required information.

Subpart C—Computation and Adjustment of Entitlement Funds

Section 51.20 Data. Section 51.20(c) is proposed to be amended to clarify the special rule concerning intergovernmental transfers for less than one-year entitlement periods.

Section 51.21 Data affected by a major disaster. The proposed rule would amend § 51.21(c), "Eligibility requirements," to clarify that at the end of the 60-month period the data used for the initial allocation of revenue sharing funds will also be used for the final allocation of these funds. A new § 51.21(g) is proposed to provide that the post-disaster data factor will be used for the first entitlement period after the end of the 60-month period.

Section 51.25 Waiver of entitlement, nondelivery of checks; insufficient data. Proposed § 51.25(b) "Constructive waiver," would clarify that a recipient government will be constructively waived for failure to comply with the reporting and assurance requirements of the Act and regulations. The reporting requirement includes submission of reports upon request of the Director or her designate to determine compliance with the provision of Subparts B, E or F.

Section 51.27 State to maintain transfers to local governments. The proposed rule would amend this section to remove all reference to pre-January 1, 1977 rules because they are obsolete. Proposed § 51.27(e), "Adjustment where new taxing powers are conferred," would also clarify the effect upon the States of conferring new taxing powers upon local governments.

Current § 51.27(e), "Report by Governor," would be amended by proposed § 51.27(g) "Computation by the ORS". The new section would reflect the current operating procedure of obtaining data concerning maintenance of effort from the Bureau of the Census.

Section 51.30 Adjustment of maximum and minimum per capita entitlement. Proposed § 51.30(b)(4) would add a definition of the "50 percent rule" derived from section 108(b)(6)(c) of the Act. That rule provides that no unit of local government may receive a revenue sharing payment which is more than 50 percent larger than that government's adjusted taxes and intergovernmental transfers received by it (other than revenue sharing funds).

Section 51.32 Population of Indian Tribes and Alaskan Native Villages. The proposed rule would add a new § 51.32 to define the population of Indian tribes and Alaskan native villages for revenue sharing purposes as the resident population of the tribe or village as of July 1, 1977, as determined by the Bureau of Indian Affairs.

Subpart D—Prohibitions and Restrictions on Use of Funds

Section 51.40 Matching funds. With the 1976 amendments, the prohibition against the use of revenue sharing funds for matching purposes, was repealed. Since a recipient government has 24 months in which to use, obligate or appropriate revenue sharing funds, revenue sharing funds received in the last quarter of 1976 may not have been spent until after 1978. Accordingly, the current regulations maintain the restrictions concerning matching with the proviso that they do not apply to revenue sharing funds received after January 1, 1977. Since all pre-1977 funds are likely to have been spent, the proposed rule would eliminate the provision and merely state that revenue sharing funds may be used for matching purposes after January 1, 1977.

Section 51.41 Permissible expenditures for units of local government. The 1976 amendments also eliminated the priority expenditure restrictions for local governments. For the same reason as stated above, the proposed rule would eliminate the current provision and would state that revenue sharing funds may be used by local governments for any purpose permissible under State or local law.

Section 51.43 Restriction on expenditures by Indian tribes and Alaskan native villages. The proposed rule would amend paragraph (b) to clarify that entitlement payments to Indian tribes and Alaskan native villages are to be spent for the benefit of the members of the tribe or village even where that tribe or village extends into two or more county areas. A new proposed paragraph (c) is added to make it clear that an Indian tribe or Alaskan native village, which expends its revenue sharing funds for the benefit of its members, will not be found in noncompliance with the nondiscrimination prohibitions of Subpart E.

Section 51.44 Lobbying. The proposed rule would amend this section to eliminate the definition of lobbying and place it in § 51.2, the definitions section.

Section 51.45 Use of entitlement funds for debt retirement. The proposed rule would amend this section to clarify the current rule that the restrictions on use of entitlement funds for debt retirement have been eliminated, except that the proceeds of indebtedness must have been spent in compliance with the provisions of Subparts D and E.

Subpart E—Nondiscrimination by State and Local Governments Receiving Entitlement Funds

Section 51.51 Definitions. The proposed rule would amend this section to add definitions of the terms "Attorney General," "complaint," "Determination," "noncompliance," and "notification of noncompliance." The section would amend the definitions of "compliance review," "finding," "funded," (which were recently deleted as stated with respect to § 51.2), "holding," "investigation" and "program or activity" to provide greater clarity. The definitions of age discrimination, handicapped status discrimination and religious discrimination are eliminated because they are unnecessary.

Section 51.52 Discrimination prohibited. The proposed rule would amend § 51.52(a) to provide greater clarity and to identify the effective date of the Age Discrimination Act of 1975, and therefore the prohibition against age discrimination under the Revenue Sharing Act. This section would also amend the reference to religious discrimination to reflect the exclusion of religious discrimination from coverage under Title VI of the Civil Rights Act of 1964.

Section 51.52(b) is proposed to be reorganized for greater clarity. The types of discrimination (e.g., discrimination in employment or the provision of services is clearly identified in the first sentence of each subsection). It is to be particularly emphasized that discrimination on the basis of handicapped status is prohibited not only in employment, but also in the provision of services and with respect to the accessibility of facilities. The proposed rule also reflects that discrimination on the basis of age applies only to the provision of services. Section 304(c)(1) of the Age Discrimination Act of 1975 specifically exempts employment discrimination on the basis of age from its coverage and therefore from coverage under the Revenue Sharing Act. Section 122 of the Revenue Sharing Act provides that age discrimination under the Age Discrimination Act of 1975 is prohibited. Discrimination on the basis of religion, due to the exclusions and exemptions contained in the Civil Rights Act of 1964 and the Civil Rights Act of 1968, does not apply to the provision of services and is limited in its application to employment. The proposed regulation reflects these exemptions.

A new §51.52(b)(1) is proposed to reflect the "effects test" of *Lau v. Nichols*, 414 U.S. 563, 94 S. Ct. 786, 39 L. Bd. 2d J (1974), the leading case in the area of discrimination in the provision of services.

A new § 51.52(b)(5) is proposed to prohibit a recipient government from retaliating against or intimidating a complaint or other individual assisting the ORS in its investigation. A new § 51.52(b)(6) is proposed to prohibit the use of an unvalidated height or weight

requirement or other selection device, which has an adverse impact on a protected class.

Interim § 51.52(b)(5) was deleted in response to comment that it confused the difference between voluntary affirmative action and required remedial action. The section was further deemed unnecessary because both affirmative action and remedial action are fully covered in later sections.

Section 51.53 Employment discrimination. Section 51.53(a), "Employment practices," is proposed to provide a more extensive statement of the employment practices covered by this subpart.

Section 51.53(b), "Employee selection procedures," was amended in interim form on September 11, 1978 (43 FR 40223). The amended regulation adopted the Uniform Guidelines on Employee Selection Procedures as adopted by the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor and the Department of Justice on August 25, 1978 (43 FR 38290). The proposed rule would continue the adoption of the guidelines.

Proposed § 51.53(c) "Recruitment practices of recipient governments," proposes to require affirmative action in recruitment procedures where racial, ethnic or sex groups have been denied employment opportunities or are underutilized in a job classification.

Proposed § 51.53(d) "Pre-employment inquiries," would caution a recipient government to review its pre-employment application forms and other inquiries to be sure that the questions asked are not designed to elicit information which could be used to foster prohibited discrimination.

Current § 51.53(d) "Self-evaluation," is proposed to be redesignated § 51.53(e) and retitled "Self-review." As proposed, the section would clarify that recipient governments should review their employment policies and correct any procedures or policies which have the effect of denying equal employment opportunities. Current § 51.53(e) is deleted as redundant since it will be covered by proposed § 51.61.

Section 51.54, "Discrimination on the basis of sex," is proposed to be retitled "Employment discrimination on the basis of sex." The proposed rule further amends this section to delete the current provisions and adopt the EEOC guidelines. The same approach is proposed for §§ 51.57 and 51.58, discrimination on the bases of national origin and religion, respectively. When the regulations are published in final form, copies of all EEOC guidelines adopted by the ORS will be published as appendices.

Section 51.55 Discrimination With Respect To a Qualified Handicapped Individual. The 1976 amendments added discrimination on the basis of handicapped status, as provided in section 504 of the Rehabilitation Act of 1973, as amended to the classes of persons protected by the Act. Executive Order 11914 entitled, "Nondiscrimination With Respect to the Handicapped In Federally Assisted Programs," and the HEW Guidelines implementing the Executive Order (43 FR 2132, January 13, 1978), required Federal agencies with section 504 responsibility to issue proposed regulations within 90 days of the effective date of the Guidelines. The ORS published its proposed regulations on April 14, 1978 (43 FR 15735).

Seventeen comments were received on the proposed rule. These comments will be discussed below as part of the section-by-section analysis of the revisions to the proposed rule. The regulations are republished in proposed form because of the extensive changes made to the initial proposed rule.

Several comments were received, primarily recipient government or their associations, which expressed concern about the cost of complying with the requirements of the proposed rule. Small recipient governments particularly are concerned about the financial burden of compliance. The comments further suggested that the mood across the country, expressed by the passage of "Proposition 13" in California and the New Jersey "cap law", requires local governments to restrict spending and should be taken into account in the implementation of the prohibition against discrimination on the basis of handicap. The Director is sympathetic to the cost of implementation of section 504. Executive Order 11914, however, limits the ability of the ORS to make any amendments to the substantive prohibitions to reduce the cost of implementation. Sections 1 and 2 of the Executive Order require that in matters of substance, ORS regulations must be consistent with the HEW guidelines for determining what are discriminatory practices.

Further, recipient governments are reminded that emphasis is to be placed on reasonableness. Only qualified handicapped individuals are protected from discrimination. A qualified handicapped individual is defined as one who can be employed or otherwise benefit from a program or activity with reasonable accommodation. Any action which would create an undue hardship on a recipient government (on the basis of cost or otherwise) would not be reasonable and therefore, is not required. Further, in the area of accessibility of facilities, which is fully discussed below, the proposed regulation places emphasis upon making programs and activities accessible, requiring restructuring of the facilities themselves only as a last resort. Accordingly, the cost of compliance will not be as great as expected by some recipient governments.

It should also be understood that there are competing interests involved, in that handicap discrimination (like racial and sex discrimination, fifteen or twenty years ago) is so far-reaching and pervasive that decisive steps must be taken in order to bring the handicapped into the mainstream of society. The goal of eliminating handicap discrimination has been determined by the Congress to be worth the cost of implementing the remedies. Concern for the burden placed upon small recipient governments is, however, expressed in several sections of the regulation which exempt recipient governments that employ fifteen or fewer full or part-time employees from certain administrative requirements. Further, weakening of the requirements would conflict with the Federal policy of vigorous enforcement of section 504.

Several comments were received, which suggested that the ORS provide additional funds to recipient governments to implement section 504. The ORS does not have statutory authority to provide additional funding for implementation of section 504. Entitlement payments of recipient governments are determined by a strict statutory formula and the program is funded accordingly. Even if additional revenue sharing funds were allocated for enforcement of this section, there is no guarantee that the funds would be spent for the purpose. Nor can a recipient government be required to spend its revenue sharing funds for a particular purpose as under categorical grant programs. Recipient governments may spend their revenue sharing funds for any purpose which is permissible under State or local law so long as that does not conflict with Federal law.

Several comments were received, which suggested that because revenue sharing funds support so many different kinds of programs and activities, the revenue sharing regulations should contain specific provisions proscribing specific recipient government policies and procedures with regard to handicapped status discrimination, particularly in the areas of education, housing, transportation and public safety. HEW, as lead agency, has acted

through the review process to ensure that other Federal agencies issue regulations consistent with its own. Accordingly, it is not anticipated that revenue sharing regulations will conflict with those published by the departments or agencies with primary responsibility for the areas of education, housing, transportation and public safety. The Director will await the publication of all regulations in these areas before resolving the issue of whether or not to incorporate those regulations. Other options might be to develop revenue sharing regulations in these areas or to provide specific guidance through some other means, such as interpretive rulings. The problem is particularly serious in the area of transportation where the potential costs are so great. The Director again wishes to emphasize the fact that the ORS Office provides financial assistance directly to governments which may use funds for any and all purposes which are permissible under local law. For this reason, the regulations should probably be as general as possible.

Several comments were received, which addressed the issue of the jurisdiction of the ORS based on funding. The nondiscrimination prohibition applies to all programs and activities of recipients of revenue sharing funds unless they can prove by clear and convincing evidence that the programs or activities in question were not funded in whole or in part with revenue sharing funds, as provided in section 122(a)(2) of the Act. Some comments were received, which suggested that the exception causes section 504 to apply only to programs and activities directly funded with revenue sharing funds. The questions of funding and jurisdiction are complex and currently under review in their application to the whole of subpart E, Nondiscrimination. Clearly, however, the issue of funding is one in which the burden of proof is placed upon the recipient government.

The Supreme Court recently handed down the decision in *Southeastern Community College v. Davis* (47 LW 4689, June 12, 1979). The Court held that the College was not required to substantially lower its standards for participation in its nursing school in order to admit an individual with a severe hearing disability. HEW has concluded that no changes need be made to its HEW regulations because of *Davis*, which upheld HEW's interpretation of section 504. Since the Guidelines for other Federal agencies and the ORS regulations are based upon the HEW regulations, the Director has determined, after communicating with HEW, that the *Davis'* case requires no change in the proposed ORS handicap discrimination regulations.

Section 51.55(a) Definitions. Several comments were received, which suggested changes to various provisions of the definition of "handicapped individual." (Section 51.55(a)(1)) The ORS does not have the authority to amend the definition of a "handicapped individual." Section 85.4 of the HEW guidelines requires each agency to issue regulations, which define appropriate terms, consistent with the definitions and standards for determining who are handicapped persons contained in the Guidelines. Accordingly, the definitions of "handicapped individual" and "qualified handicapped individual", contained in the proposed rule, are identical to those in the Guidelines. No change has been made in this proposed ORS regulation.

The 1978 amendments to section 504 altered the definition of handicapped person with respect to drug addicts and alcoholics (Pub. L. 95-602, section 122). Since the amendment was consistent with HEW interpretations, no amendment to the proposed rule was needed.

Section 51.55(a)(6) Qualified handicapped individual. One comment was received, which pointed out that HEW had deleted the word "otherwise" from its definition of "qualified handicapped individual" because it made the provision ambiquous and that the ORS should do the same in the interest of consistency. The Director agrees and the proposed rule is therefore amended throughout to delete the word "otherwise."

The question arose within the Department of the Treasury as to why reasonable accommodation was not applied to discrimination against a qualified handicapped individual in the provision of services. After consultation with HEW, the Director decided that it should be made clear that a stronger standard than reasonable accommodation applies to discrimination in the provision of services than to discrimination in employment. A *qualified* handicapped individual cannot be deprived of a service or benefit solely because of the cost involved. Some method of providing the service must be found. With respect to employment, however, cost can be a factor in refusing to accomodate an applicant or employee. The limitation on accommodation of a handicapped individual with respect to the provision of services comes from the definition of "qualified handicapped individual." Only those handicapped individuals who meet the essential eligibility requirements of the program or activity are "qualified" and must be accommodated.

Section 51.55(b) General prohibitions with respect to discrimination against a qualified handicapped individual. Several comments were received, which objected to the cross-reference between § 51.55 and §§ 51.52(b) and 51.53(b) of the revenue sharing regulations as being ambiguous and needing clarification as to what does and does not apply to discrimination against a qualified handicapped individual. The Director agrees with these comments and proposes to amend § 51.55(b)(1) to eliminate the reference to § 51.53, "Employment discrimination", because that provision applies only to employment discrimination on the basis of race, color, national origin, sex or religion, and not on the basis of handicapped status. The section would further be amended to delete the confusing reference to a cross-reference between §§ 51.52(b) and 51.55, but make it clear that the general prohibitions described in § 51.52(b) (except §§ 51.52(b)(1) (ii), (iii) and (v)) also apply to discrimination against a qualified handicapped individual.

Proposed § 51.55(b)(1)(i) would be amended to clarify that even though it is permissible to maintain separate programs and activities for the handicapped, qualified handicapped individuals cannot be excluded from participation in programs and activities that are open to the general public. If, however, the cost of accommodating a handicapped individual is too great and a permissible separate program exists, then the individual can be limited to the separate program.

Proposed § 51.55(b)(1)(ii) would be amended in response to comment that the phrase "least segregated setting appropriate" does not sufficiently emphasize the need for handicapped persons to be integrated into society. The provision now refers to the "most integrated setting appropriate."

Section 51.55(b)(1)(iii) is proposed to be amended to refer to applicants, employees and beneficiaries as well as to the general public. Several comments were received, which expressed concern that recipient governments, particularly the smaller ones, would have difficulty communicating to persons of impaired vision as is required in § 51.55(b)(1)(iii). The requirement is not expected to work any great hardship on recipient governments. A number of methods can be employed to make communications available to the public. For example, a notification of public hearings might also be advertised over radio and

television through public service announcements.

A new § 51.55(b)(1)(iv) is added to the proposed regulation to make it clear to recipient governments that the public hearings required under section 12 of the Act and § 51.13 and § 51.14 of the regulations must be accessible to the handicapped. New § 51.55(b)(1)(v), (vi), (vii), (viii), (ix) and (x) are added to the proposed regulation in order to provide more consistency with HEW Guidelines. Sections 85.51(b)(1)(iii), (iv), (v) and (vii) and (b)(3), of the Guidelines and § 84.52(d) of the HEW regulations, provide the basis for those subsections. New § 51.55(b)(1)(v) is added to the proposed rule to require recipient governments to provide auxiliary aids to the visually, speech and hearing impaired to allow them to benefit equally from a program or activity. Examples of such auxiliary aids are brailled and typed material, interpreters and similar devices and services. A new § 51.55(b)(1)(ix) is added in order to clarify the fact that a recipient government may not fund discriminatory activities through contractual arrangements. A new § 51.55(b)(1)(x) is added to emphasize that a recipient government's zoning authority cannot be used to discriminate against the handicapped.

One comment was received, which suggested that § 51.55(b)(3) be eliminated because emphasis should be placed on the provision of equal services. The Director agrees with the position of HEW on this point that *equivalent*, as opposed to *identical*, services must be required, thereby providing equal opportunity to achieve the same result. Emphasis should be placed upon meeting the individual needs of handicapped persons to the same extent that the individual needs of nonhandicapped persons are met. The proposed subsection, therefore, remains the same. A new § 51.55(b)(4) emphasizes that the enforcement procedures contained in Subpart E shall be used to redress violations of the provisions of this section.

Section 51.55(c) Self-evaluation. Several comments were received, which objected to the time period allowed for self-evaluations under § 51.55(c) of the regulation. Those comments from recipient governments suggested that the time period be lengthened or indeed that the requirement was not necessary. Section 85.5(b)(2) of the HEW guidelines provides that each agency shall include a requirement for self-evaluation. The first proposed rule was based primarily on § 84.6(c) of the HEW regulations, except that the time for completion was set at two years instead of one. Several comments were suggested that the two-year time period was too long. They pointed out that HEW recipients were required to do self-evaluations within one year commencing June 3, 1977, the effective date of the HEW regulations, and further that in many cases the HEW and the ORS requirements would overlap. Departments of a recipient government which have already undertaken the self-evaluation could aid the recipient government in completing the overall self-evaluation required by the ORS. Accordingly, the time period for completing self-evaluations in the new proposed rule is reduced to one year.

One comment was received, which questioned whether the references to number of employees in § 51.55(c)(2) and § 51.55(k) of the proposed rule referred to full-time or part-time employees and suggested that the subsections should not be applicable to recipient governments with only part-time employees. Upon consulting with HEW, it was determined that the references to the number of employees in the Guidelines include both full-time and part-time employees. In the interests of minimizing the burden on small recipient governments, however, the Director proposed to adopt the concept of full-time equivalent employees. This means that two part-time employees would be counted as one full-time employee in order to determine if a recipient government employs fifteen or more persons. References to the number of employees throughout the proposed rule are specifically to full-time equivalent employees.

Section 51.55(d) Designation of responsible employee and adoption of grievance procedures, Section 51.55(e) notice. Several comments were received, which suggested that the proposed rule should have included requirements for designation of a responsible employee, establishment of grievance procedures and notification to employees and the public that the prohibition against discrimination on the basis of handicap exists. The Director agrees with the comments that these provisions should be added to the proposed regulation. Accordingly, § 51.55(d) "Designation of responsible employee and adoption of grievance procedure", and § 51.55(e) "Notice" are added to the new proposed rule. The new provisions are based upon §§ 84.7 and 84.8 of the HEW regulations.

Section 51.55(f) Administrative requirements for small recipient governments. Several comments were received, which suggested that no exceptions to any of the requirements should be allowed for small recipient governments because the same level of commitment should be required of all recipients of revenue sharing funds regardless of size. The Director realizes the difficulty of balancing the real concerns of small recipient governments over the burden of compliance in this relatively new area, with the goal of eliminating discrimination against the handicapped wherever it exists. While small governments should not be allowed to discriminate against the handicapped, merely because of their size, certain administrative requirements would be unduly burdensome on small recipient governments because of their lack of a workforce to undertake the implementation. A new § 51.55(f) has been added to the new proposed rule, however, to remind small recipient governments that the exceptions are not designed to authorize them to provide services and benefits in a discriminatory manner.

Section 51.55(g) Employment discrimination. Section 51.55(e) "Employment discrimination" is redesignated § 51.55(g). Reference to § 51.53 in the opening paragraph of proposed § 51.55(e) (of the original proposed rule) is proposed to be deleted. Section 51.55(e)(1) on "Reasonable accommodation" is deleted because it is redundant. A new § 51.55(g)(1)(i) states the basic prohibition against employment discrimination on the basis of handicapped status. Proposed § 51.55(e)(3), concerning preemployment inquiries, is deleted and becomes a new § 51.55(j) to be discussed below. Proposed § 51.55(e)(4) is redesignated § 51.55(g)(1)(i). Proposed § 51.55(e)(5) is redesignated § 51.55(g)(1)(iii).

A new § 51.55(g)(1)(iv), is added to the proposed rule in response to comment that the original proposed rule did not apply the prohibition to a number of important employment practices or conditions; the new paragraph is based upon § 84.11(b) of the HEW regulations. A new § 51.55(g)(2) is added to the proposed rule to provide that a recipient government is not excused from compliance because of inconsistent provisions in a collective bargaining agreement; it is based upon § 84.11(c) of the HEW regulations. Similarly, a new § 51.55(g)(3) is added to the proposed rule to prohibit a refusal to hire a handicapped individual because employment opportunities in the occupation are more limited; it is based upon § 84.10(b) of the HEW regulations.

Section 51.55(h) Reasonable accommodation. Section 51.55(f), of the original proposed rule "Reasonable accommodation," is redesignated § 51.55(h). Several comments were received, which suggested that the provision concerning reasonable accommodation needed further elaboration and was unduly burdensome to recipient governments. The Director does not agree with the reasoning behind the comments because the concept of reasonable accommodation is not one in which every consideration can be anticipated and provided for by regulations. The determination as to what is reasonable with respect to a particular recipient government or a particular handicapped status, must be made on a case-by-case basis. Where the Director determines that more specific guidance is needed, however, such guidance will be given in the form of administrative or interpretive rulings. A new § 51.55(h)(4) is added to the proposed rule in response to comment that the regulation should prohibit denial of an employment opportunity to a qualified handicapped individual because of the need to make reasonable accommodation.

Section 51.55(i) Employment criteria. Several comments were received, which suggested that the section concerning employment criteria in the original proposed rule, § 51.55(e)(2), did not provide sufficient elaboration and should be more consistent with the comparable HEW provisions. Further, it has become clear to the Director that additional guidance is needed concerning the use of an employment criterion which excludes an entire class of handicapped individuals from consideration for a particular job or job classification. Some exclusionary standards are obviously needed. However, many recipient governments have created employment criteria which bar entire classes of handicapped individuals from consideration for certain jobs, even though individual members may be qualified to perform the essential functions of the job with reasonable accommodation.

In general, the absolute exclusion of a class of handicapped individuals from consideration for employment, without making an individual determination of the competency of a particular applicant, will be considered evidence of discrimination. A recipient government has the burden of proving that no member of a class of handicapped individuals can be qualified for the job in question in order to sustain such an absolute exclusion.

One example of an employment criterion used by many recipient governments is a policy which requires that to be considered for the position of police officer an individual must have vision, correctible to 20/20. Since it is clear that at least some people without such vision can perform police duties satisfactorily, an applicant must be afforded the opportunity to prove that he or she could still shoot accurately and perform the other essential functions of the job of a police officer without 20/20 vision. As another example, many recipient governments have established policies that no epileptics may be considered for appointment as police officers. The use of such a policy to exclude from consideration all applicants with a history of epilepsy (even if an individual has not had a seizure since childhood) is discriminatory because it does not take into account those persons who have their epilepsy under control.

A number of recent cases support the position that the establishment of employment criteria that unnecessarily exclude an entire class is discriminatory. See, *e.g., Connecticut Institute for the Blind* v. *Commission on Human Rights,* 18 FEP Cases 42, (Sup. Ct. Sept. 5, 1978) in which the Connecticut Supreme Court invalidated a requirement that all teacher's aides must have normal vision; *Davis* v. *Bucher,* 17 FEP 918, C.A. No. 77-932, (E.D. Pa. 1978) in which the Court held that the City discriminated against the plaintiff on the basis of handicap by its refusal to hire any former drug abusers; *Duran* v. *City of Tampa, Florida,* 430 F. Supp. 75 (M.D. Fla. 1977) in which it was held discriminatory for the City to have a policy excluding all persons with a history of epilepsy from employment as police officers (see also *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974); *Gurmankin* v. *Costango,* 411 F. Supp. 982 (E.D. Pa. 1976); *Marsh* v. *Pickens,* Civil Action No. 77 M. 1041 (D. Col., August 1, 1978).

An application of a policy of automatic exclusion also indicates that recipient governments have not attempted to determine if reasonable accommodation would enable a handicapped individual to perform the job in question. Reasonable accommodation of an epileptic individual to qualify him or her for the position of police officer, might require the recipient government to hire the handicapped individual as a "desk officer." The intent of the regulation is to require the recipient government to make a reasonable effort at job restructuring to eliminate those duties of a police officer for which an epiliptic is truly not qualified, while creating a meaningful full-time or part-time job. A recipient government has the burden of proving that an effort to make reasonable accommodation to the handicap of an individual would cause it undue hardship.

The proposed rule is, therefore, amended to provide in subparagraph (1) that a recipient government may not use a selection criterion or policy to exclude a handicapped individual or class of individuals, unless the criterion or policy is shown to be directly related to the essential functions of the position in question and less exclusionary plans. This is an issue which must be studied further before any changes can be made and comments are specifically requested for its resolution.

Section 51.55(j) Employment inquiries. Several comments were received, which suggested that the section concerning preemployment inquiries in the proposed rule, § 51.55(e)(3), did not provide sufficient elaboration and should be more in line with § 84.14 of the HEW regulations. The Director agrees with these comments, and therefore adds a new § 51.55(j) "Preemployment inquiries." One comment expressed concern that the prohibition against preemployment inquiries would cause an increase in the cost of workman's compensation and disability insurance plans. This is a problem which must be studied further before any changes can be made. Comments containing specific recommendations for resolution of this problem are requested.

Section 51.55(k) Program accessibility. Proposed § 51.55(g) concerning program accessibility is redesignated § 51.55(k). The general prohibition against conducting programs and activities unaccessible to the handicapped is designated § 51.55(k)(1). The greatest number of comments were received concerning the accessibility provisions of the original proposed rule. The comments from representatives of recipient governments expressed particular concern that upon the effective date of the regulations, recipient governments would be required to make major structural changes to all of their facilities. The regulations in no way require such wholesale renovation of public facilities. Section 122 of the Revenue Sharing Act does not require that every facility owned or used by a recipient government be accessible to the handicapped, unless that facility is constructed with revenue sharing funds after January 1, 1977. The emphasis has

always been placed upon program accessibility. Those facilities constructed before January 1, 1977, as well as constructed before January 1, 1977, as well as construction projects commenced before that time, need only be made accessible if the programs and activities conducted therein are not accessible and cannot be made accessible in any other way.

Accessibility, however, can be achieved in many ways which do not require modification of the structure of the facility. For example, a public hearing held in a building not accessible to the handicapped can be made accessible by moving it to another building. Where a building does not have an elevator, inaccessible programs and activities conducted on other floors could be moved to the first floor. A new § 51.55(k)(2)(ii) entitled "Methods", sets forth other examples of methods to make programs and activities accessible without structural changes to facilities.

Proposed § 51.55(i)), "Exception for small recipient governments", is redesignated § 51.55(k)(3). This subsection is a part of the continuing effort to take into account the burden of compliance on small recipient governments. Several comments were received, which objected that the exception for small recipient governments was not drawn narrowly enough and should apply only to certain types of services provided by small recipient governments. That approach is not feasible because the financial assistance provided by the Office of Revenue Sharing is open-ended in nature in that it is given directly to governments, not specific programs. Further, the recipients of revenue sharing funds are general purpose governments, except for the separate law enforcement officers of the State of Louisiana, Indian tribes and Alaskan native villages, all of which provide certain minimum services. The Director, therefore, declines to accept this comment. The comments also suggested that the regulation should specifically provide that the cost of providing the service would not be born by the handicapped individual. The Director agrees with these comments and § 51.55(k)(3) is proposed to be amended to provide that the handicapped individual may be referred to other providers of the servide at no additional cost to the handicapped individual.

A new § 51.55(k)(4), "Time periods," is proposed in response to comment that time limits should be set within which recipient governments must make their programs and activities accessible. Paragraph 51.55(k)(4)(i) is based upon § 84.22(d) of the HEW regulations and provides that a recipient government shall comply with this section within 60 days from the effective date of the regulations unless structural changes are required, in which case three years are allowed. Paragraph (k)(4)(ii) was added because the time limits for transportation systems set forth by the Department of Transportation will be different from those for facilities in general. HEW has determined that the problems with making transportation systems accessible are sufficiently serious to justify the extended time period.

Several comments were received, which objected to the fact that the proposed rule did not require the development of a transition plan in situations where structural changes are required. The Director agrees that such a plan should be required. A new § 51.55(k)(5) is therefore proposed to require a recipient government to develop a transition plan within one year from the effective date of the regulation, and sets forth the steps to be taken to complete the necessary changes. A time period of one year is set to correspond with the time period for the self-evaluation (§ 51.55(c)) which can be undertaken at the same time.

A new § 51.55(k)(6), is proposed to require recipient governments to notify the general public of the availability and location of particular services and activities which are accessible to the handicapped.

Proposed § 51.55(j) of the original proposed rule, "New construction", has been redesignated § 51.55(k)(7) and amended by deleting the definition of commencement of a construction project which is now provided in a separate subsection discussed below.

Proposed § 51.55(k), "Alterations," is redesignated § 51.55(k)(8).

One comment suggested that the accessibility requirements should also apply to facilities newly leased with revenue sharing funds after January 1, 1977. The Director agrees that new leases should be covered. It seems clear, however, that to add such a requirement to leases of long standing, which will soon be due for renewal, would be unfair. A new § 51.55(k)(9), is therefore proposed, which provides that facilities newly leased after the effective date of this section, shall be classified as new facilities and are subject to the same accessibility requirements as those facilities owned by recipient governments.

Several comments were received, which objected that the proposed rule did not reference any standards which recipient governments should follow to make new facilities accessible. The Director agrees that recipient governments need the additional guidance provided by the American National Standards Institute (ANSI). A new § 51.55(k)(10) is proposed, which provides that the design, construction or alteration of facilities in compliance with the ANSI standards, will satisfy the requirements of this section.

When the Revenue Sharing Act was amended to include discrimination against the handicapped, Congress also provided an exception for construction projects, which commenced prior to January 1, 1977. One comment suggested that this exception exempts all facilities, the construction of which was begun or completed before January 1, 1977. The Director believes that this is too broad a view of the exception. The emphasis must again be placed on program accessibility. The exception exempts "construction projects" commenced or completed before January 1, 1977, but only if the programs and activities conducted in the facilities are determined not to have been funded with revenue sharing funds or are otherwise accessible. The exception only exempts "construction projects" funded with revenue sharing funds, which are commenced or completed prior to January 1, 1977. Programs and activities funded with revenue sharing funds, however, must still be accessible to the handicapped as provided in this section. A new § 51.55(k)(11), is proposed to explain the application of the exception. New § 51.55(k)(12) is proposed to establish the date on which a construction project is deemed to be commenced, that date is the date when the recipient government obligated itself by contract for the physical construction of the project.

Section 51.56 Discrimination on the Basis of Age. The 1976 amendments added the prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 (Pub. L. 95–488).

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The definition of Federal financial assistance specifically includes revenue sharing. The Act also contains certain exceptions that permit, under limited circumstances, continued use of age distinctions or factors other than age that may have a disproportionate effect on the basis of age. The Age Discrimination Act requires HEW, as lead agency, to issue government-wide regulations, which each Federal agency with age discrimination responsibility

would use as a basis for the development of agency specific regulations.

HEW published final government-wide regulations on June 12, 1979 (45 CFR part 90, 44 FR 33708). The Age Discrimination act and the HEW government-wide regulations require the ORS to publish proposed and then final agency-specific regulations consistent with the government-wide regulations. This proposed rule is the first step in that process.

HEW government-wide regulations (45 CFR Part 90)

The government-wide regulations define certain terms and set standards for determining what is age discrimination under the Age Discrimination Act of 1975, and sets forth exceptions to the general prohibitions, all of which other Federal agencies must include in their agency-specific regulations. The Director may not use different definitions and standards than those in the government-wide regulations. Therefore, the Director asks that comments be directed solely to the new material in the ORS' agency-specific regulations. ORS will only respond to comments on the procedural requirements established by the final, government-wide regulations. The ORS' proposed age discrimination regulation is based upon Subparts A and B of the HEW government-wide regulations, which are repeated as appendix C to the proposed rule.

Procedural Provisions of Age Discrimination Act and HEW Government-Wide Regulations

When the age discrimination prohibition was added to the prohibitions contained in section 122 of the Revenue Sharing Act by the 1976 amendments, the intent of Congress was to make the substantive prohibition enforceable under the procedures set forth in sections 122, 124 and 125 of the Revenue Sharing Act, as amended, rather than procedures set forth in the Age Discrimination Act of 1975. The Revenue Sharing Amendments were passed one year after the Age Discrimination act of 1975. Since both Acts make age discrimination a prohibited practice by recipients of revenue sharing funds, the latter Act should obviously govern where conflict exists regarding procedures. Moreover, it is clear that the Revenue Sharing Act's procedures apply to all other forms of discrimination prohibited by section 122(a), and there is no basis for treating the age discrimination prohibition differently.

The same argument applies to the government-wide regulations issued by HEW to implement the Age Discrimination Act. The enforcement procedures set forth in Subpart D of the HEW government-wide age discrimination regulations are not applicable where revenue sharing funds are involved because the Revenue Sharing regulations have their own enforcement provisions against discriminatory conduct (31 CFR part 51, Subpart E). Substantive provisions of the HEW age discrimination regulations are of course applicable and binding upon the ORS and are the basis of the proposed rule. However, compliance with those provisions is supposed to be achieved under the enforcement provisions of the Revenue Sharing Act and regulations. In the interest of clarity, the regulations are being published as a whole, placing the age and handicapped regulations in the proper context. Except as otherwise provided in section 51.56, those procedures set forth in section 51.52 *et. seq.* will govern.

Specifically, provisions of Subpart D of the HEW government-wide regulations conflict in a number of areas with those contained in Subpart E of the revenue sharing regulations currently in effect and as contained in this proposed rule. Subpart E provides an enforcement mechanism for all bases of discrimination (not only age). As discussed later, revenue sharing regulations provide for complaint processing, compliance reviews, submission of required reports, remedial and affirmative action and exhaustion of administrative remedies prior to right of private action. The Revenue Sharing Act provides no authority however, for provisions for alternate funds disbursal or participation in the mediation process, discussed below. Further, the period for exhaustion of administrative remedies is 90 days, as opposed to 180 days under the Age Discrimination Act and regulations. Where the Director determined that provisions contained in the HEW government-wide regulation but not contained in Subpart E were compatible with the provisions of the Revenue Sharing Act and regulations, those provisions were added to the proposed rule. The proposed rule, therefore, provides for the conduct of a self-evaluation. Proposed § 51.52(b), which contains general prohibitions against discrimination would add a prohibition against intimidation or retaliation (§ 51.52(b)(5)) and currently provides for remedial and affirmative action by recipient government (proposed § 51.52(b)(7) and (b)(8) and § 51.61).

Mediation Process

The major inconsistency between the revenue sharing and HEW government-wide regulations is the provision in the latter for the mediation process. The revenue Sharing Act and regulations require the Director to investigate and issue a finding within 90 days after receipt of a complaint alleging discrimination prohibited by the Act. A mediation process allowing 60 days of mediation before the ORS begins its procedures would make it impossible for the ORS to meet the 90-day requirement of the Act.

At the same time, however, we agree that mediation would be a reasonable and efficient method of resolving many age discrimination complaints before they enter the formal compliance process. The Director, therefore, proposes that the mediation process be offered on a voluntary basis i.e., the complainant may agree to submit the age discrimination complaint to the mediation process before the formal ORS process begins. The time limitations contained in the Revenue Sharing Act and regulations were provided by Congress for the benefit of the complainant. It, therefore, appears reasonable to give complainants the option of selecting mediation and thereby delaying the ORS process or not. The Director would strongly recommend to complainants that they opt for mediation because of the likelihood that potential complaints would be resolved in a quicker and less adversary manner.

The ORS formal administrative process will not be deemed to begin until a complaint submitted to mediation has been returned to the ORS unresolved. Prior to being returned to the ORS, the allegations will be designated a claim as opposed to a complaint. If the complainant agrees to mediation, a claim would only become a complaint for revenue sharing purposes, after mediation failed and FMCS had notified ORS. The Director specifically requests comments upon the question of ORS use of a voluntary mediation process, particularly from potential complainants.

Discussion of Important Requirements and Examples

HEW, as part of the preamble on its proposed agency specific regulations, sets out important requirements and examples of their application to HEW recipients. Since departments and agencies of recipient governments are frequently recipients of HEW funds that section is also helpful to Revenue Sharing recipient governments.

Accordingly, the discussion is attached as appendix C.

Effective date

It is the position of HEW that the effective date of the age discrimination prohibition begins with the effective date of the final HEW government-wide regulations, July 1, 1979. The ORS proposed age discrimination regulations are, therefore, drafted with July 1, 1979, as the effective date. Until final revenue sharing age discrimination regulations are issued, complaints received after that date will be processed pursuant to the government-wide regulations with respect to the substantive prohibitions, but pursuant to the existing procedures under Subpart E of the revenue sharing regulations. Complainants should state in their complaints whether they wish to use the mediation option. The exhaustion of administrative remedies under section 124 of the Revenue Sharing Act, will occur within 90 days after the filing of the complaint by the complainant after July 1, 1979.

Section 51.59 Assurances required; compliance information and reports. On July 24, 1978 (43 FR 31927) § 51.59(a), was amended in interim form to eliminate the requirement that the copy of a holding to be submitted to the Director be certified. This amendment remains in the proposed rule. Proposed § 51.59(b), "Constructive waiver of entitlement payment," applies the constructive waiver process to failure by recipient governments to submit assurances they will comply with the provisions of Subpart E. This section parallels proposed § 51.3(e), which establishes the same procedure for enforcing the assurance requirement with respect to provisions other than Subpart E. Proposed § 51.6(c), "Constructive waiver," adds the same provision with respect to the submission by recipient governments of compliance information and reports.

Section 51.61 Compliance reviews and affirmative action. The proposed rule is completely revised to provide more specificity concerning what a compliance review will consist of. The regulation is modeled after that of the Law Enforcement Assistance Administration of the Department of Justice (28 CFR 42.206) to enforce the Crime Control and Safe Streets Act of 1976.

Proposed § 51.61(b) "Affirmative action" would remove the reference to the guidelines of the Equal Employment Opportunity Coordinating Council, which no longer exists. The Equal Employment Opportunity Commission has recently published Affirmative Action Guidelines, which supersede those of the Coordinating Council. Accordingly, the Director proposes to include these guidelines as an appendix to provide additional guidance.

Section 51.62 Administrative complaints and investigations. Proposed § 51.62(b) "Investigations" amends the interim regulation to clarify that the ORS will investigate administrative complaints, which allege a discriminatory practice which, if true, would violate the Act. Information, other than complaints, either generated within or outside of the ORS may also be the source of an investigation. The proposed rule also provides that the Director may defer to the Attorney General in appropriate cases. The subsection, in conjunction with § 51.69(c), serves as the basis for a cooperative agreement with the Department of Justice. The proposed rule also provides that the scope of an investigation is not limited to the complaint or other information on which it is based, but may be expanded to include other matters.

Section 51.64 Notification of noncompliance. Proposed §§ 51.64 and 51.65 combine interim §§ 51.62, 51.65, 51.67 and 51.68 and generally reorganize the provisions describing the procedures for effecting compliance.

Proposed § 51.64(a) provides that after an investigation or receipt of a determination of a State administrative agency, the Director shall make a finding that it is more likely than not that the recipient government has failed to comply with the provisions of this subpart if warranted. The Director shall within ten days of making a finding, issue a notice of noncompliance to the recipient government and inform the government that it has 30 days to enter into compliance, provide evidence to demonstrate compliance, or prove by clear and convincing evidence that revenue sharing funds were not used to fund the particular program or activity, or else a determination of noncompliance will be issued.

Proposed § 51.64(b) provides that within 10 days after receipt of a holding, the Director shall notify the recipient government of the holding and that the holding is conclusive on the issue of discrimination. The notice of noncompliance shall further inform the recipient government that it has 30 days to enter a compliance agreement or prove lack of funding by clear and convincing evidence, or else a determination of noncompliance will be issued.

Proposed § 51.64(b)(2) provides that where the remedial order issued on which the holding is stayed by a court, the stay will not affect action by the Director unless the ORS is specifically included in the stay.

Section 51.65 Determination of noncompliance. This section covers the action to be taken by the Director if the recipient government fails to enter into compliance after receipt of notification of noncompliance. Once a determination of noncompliance is issued, the recipient government has ten days to enter a compliance agreement, prove by clear and convincing evidence that the program or activity complained of was not funded with revenue sharing funds or request a hearing. If the recipient government does not take any of these actions within the 10-day period, the payment of revenue sharing funds to that government will be suspended until a compliance agreement is concluded. Section 51.65(b)(3) provides that administrative action based upon a holding will be discontinued if that holding is reversed by an administrative tribunal.

Sections 51.66, 51.68(c), 51.69, and 51.72 concerning administrative hearing procedures have been placed in appropriate sections of Subpart G.

Section 51.66 Compliance agreement. Proposed § 51.66(a) sets forth the requirements for compliance agreements where the ORS is not directly a party.

Proposed § 51.66(b) provides that in the case of a holding, the remedial order issued pursuant to the holding, if any, will be the basis of a compliance agreement. If there is no remedial order, a compliance agreement will still be concluded and modified if necessary when the remedial order is issued.

Proposed § 51.66(c) sets forth the requirements for a compliance agreement between the Director and a recipient government. It must be in writing and signed by the Director and the chief executive officer. The agreement may, however, consist of a series of documents.

Proposed § 51.66(d) provides that if the Director believes that a recipient government has violated the provisions of the agreement, the Director may issue a determination of noncomplance based upon the alleged violation of agreement. A subsequent administrative hearing would be limited to the issue of whether the recipient government complied with the agreement.

Section 51.67 Resumption of suspended entitlement payments. This section remains unchanged except that the word "may" is replaced with "shall" since the Director has no discretion to continue to withhold revenue sharing funds if one of the events described occurs.

Section 51.69 Agreements between agencies. The proposed rule would amend this section to describe with greater specificity what a cooperative agreement with a Federal or State agency may include.

Section 51.70 Jurisdiction over property. The proposed rule would amend this section to reflect the fact that jurisdiction over property is not restricted to specific programs and activities. ORS jurisdiction over a recipient government was amended by the 1976 amendments to section 122 of the Act to cover all property unless the government proves by clear and convincing evidence that revenue sharing funds were not spent for the particular property or in the program or activity concerned.

Interim § 51.74 "Authority of the Attorney General of the United States" is deleted from the proposed rule. The subsection restated section 122(g) of the Act, which does not contain any matter to be regulated by the ORS.

Coordination with the Equal Employment Opportunity Commission Pursuant to Executive Order 12067

Consistent with the underlying purpose of Executive Order 12067, the ORS submitted Subpart E of the proposed regulation to EEOC for review. The following item has been recommended for inclusion in the proposed regulations and will be addressed in the final regulations (other changes have already been incorporated in the proposed regulation):

Prefindings. In order to promote early compliance in a case disclosing evidence of noncompliance, the ORS has established an informal procedure in which a prefinding letter is issued. The prefinding letter is issued prior to the notice of noncompliance. The letter presents the information relevant to the alleged noncompliance and provides the recipient government with an opportunity to present preliminary evidence refuting the prefinding letter's indications and noncompliance. The procedure is not statutory and used at the discretion of the manager of the Civil Rights Division. The issuance of a prefinding letter has, therefore, not been included in the regulation as a formal step in the ORS enforcement process.

The EEOC recommends that the prefinding process be described in the appropriate sections of Subpart E. Consideration will be given to additional comments on this matter.

Subpart F—Fiscal Procedures and Auditing

This subpart is reorganized to take the definitions contained in final §§ 51.101 "Auditing and evaluations," and 51.2, general definitions, and create a new definition § 51.100. Sections 51.100(a) and (b) would add the only new definitions. The definitions of "compliance" and "financial audit" reflect the current operating procedure of dividing the single independent audit requirement into two separate audits, a financial audit of all of a recipient government's funds and a compliance audit to determine that revenue sharing funds were spent in compliance with the provisions of the Act. The provisions of the Act referred to include the nondiscrimination provisions of Section 122; public participation requirements of Section 121, the prohibition against the use of revenue sharing funds for lobbying purposes and the requirements in section 123(a) that revenue sharing funds be spent in accordance with State and local law.

Section 123(c) of the Act requires and "independent audit of [a recipient government's] financial statements conducted for the purpose of determining compliance [with the Act] in accordance with generally accepted auditing standards not less often than once every three years." For the sake of convenience, this audit is being performed separately as a financial audit and a compliance audit. The proposed rule merely reflects this current operating practice.

Section 51.101 Procedures applicable to the use of funds. The proposed rule would make only one minor change to this section. Proposed § 51.101(c) would specify that State and local laws and procedures must be followed in the expenditure of revenue sharing funds except where they conflict with Federal law which of course includes the provisions of the Revenue Sharing Act.

Section 51.102 Auditing and evaluations. Section 51.102(a) of the proposed rule would include a reference to the separation of the single audit requirement into a financial audit and a compliance audit, as discussed above. Proposed § 51.102(b) would eliminate the requirement that a recipient government submit a written assurance in order to elect to follow State or local law. The section would also add a new subsection to clarify that a compliance audit is still required if a recipient government elects to follow State or local law in the performance of an audit.

Proposed § 51.102(c) would make it clear that where a recipient government is required by State or local law to conduct an audit, though exempted from the requirement by the Act, that audit must be performed. As stated above, § 51.101(c) requires the expenditure of revenue sharing funds in accordance with the laws and procedures applicable to the expenditure of a recipient governments own funds unless that State or local law conflicts with Federal law. Additional requirements which go beyond the requirements of the Revenue Sharing Act would not be considered conflicting. As stated in Section 123(c) of the Act, the performance of a locally required audit will be considered compliance with the Revenue Sharing Act. The audit performed pursuant to this subsection need not be submitted to the ORS, but shall be made available upon request by the Director.

Proposed § 51.102(d) would provide that a recipient government using the series of audits approach may perform the compliance audit for any one of the three fiscal years.

Section 51.103 Waiver of audit requirement where financial accounts are unauditable. The proposed rule would amend this section to eliminate the requirements that the request for the waiver be submitted before March 31, 1978.

Section 51.107 Scope of audits. The proposed rule would amend this section to clarify that the scope of audits include all of the financial statements for each separate fund. The section would further add the *Statements on Auditing Standards* as an additional guide for the type of audit to be conducted. Section 51.107(c) would clarify what the financial statement consists of.

Subpart G—Proceedings for Reduction in Entitlement, Withholding, Suspension, or Repayment of Funds

This subpart has been revised to differentiate between the requirements for administrative hearings concerning violations of subpart E and those concerning subparts B, D, and F. Section 122 of the Revenue Sharing Act sets forth the hearing procedures for nondiscrimination violations. Section 123(b) sets forth the hearing procedures for violations of the provisions of the Act other than section 122. The current subpart G does not make it clear where the two procedures are the same and where they differ. In the interest of consistency, the administrative hearing procedures contained in current subpart E are added to proposed subpart G. Unless otherwise specified the procedures described in this subpart apply to both types of hearings.

Section 51.202 Reasonable notice and opportunity for hearing. Proposed § 51.202 states that provisions for repayment, withholding, or reduction in revenue sharing payments apply to violations of the provisions of subparts

B, D, and F, while provisions for suspension or termination of the payment of revenue sharing funds apply to violation of the provisions of subpart E.

Section 51.203 Opportunity for compliance. Proposed § 51.203 is amended to reference the provisions pursuant to which a recipient government will be given the opportunity to enter into compliance prior to the initiation of an administrative hearing.

Section 51.204 Institution of an administrative hearing. The proposed rule provides for the institution of an administrative hearing. A hearing instituted under the provisions of subpart E differs from the hearing instituted under other provisions because it is instituted by the Director only after the request of the recipient government and is required under section 122(b)(3)(A) to be instituted within 30 days of receipt of the request by the Director.

Section 51.205 Complaint for administrative hearing; Section 51.206 Service of complaint and other papers. The proposed rule would amend these sections to point out the shortened time frames under which complaints and answers for hearings under subpart E must be filed pursuant to section 122(b)(3)(A). Section 51.205 provides that for hearings under subpart E the complaint must require that the answer be filed within 10 days of receipt of the complaint by the recipient government. Section 51.206 requires that for hearings under subpart E the complaint must be served upon the recipient government within seven days of receipt of the request for a hearing from the recipient government.

Section 51.211 Administrative hearings. This section would set forth the procedures under which an administrative hearing is conducted. Proposed Section 51.211(b) is based upon current Sections 51.66 and 51.68 of subpart E.

Section 51.214 Depositions. The proposed rule would amend this section to provide for the taking of depositions in a shorter time period for hearings under the provisions of subpart E. The summary hearing pursuant to proposed § 51.211 must commence within 30 days of the request for an administrative hearing by the recipient government.

Section 51.217 Preliminary finding (for hearings under subpart E). Proposed § 51.217 sets forth the provisions currently contained in § 51.66 of the interim regulations concerning actions to be taken by the Director after a summary hearing under the provisions of subpart E.

Section 51.218 Initial decision of the administrative law judge. The proposed rule would amend this section to clarify the contents of the decision of the administrative law judge. The administrative law judge's decision is not to include the remedy for noncompliance. The decision merely sets forth the findings of fact and conclusions of law and whether the recipient government has failed to comply with the provisions of the Act.

Section 51.221 Procedure or review of decision of administrative law judge. The proposed rule removes the restriction in current § 51.221(b) that the Director appeal only in absence of appeal by respondent. Proposed § 51.221(b) would add a new provision to state that the Secretary of the Treasury may review the decision of the administrative law judge absent appeal by either party. Current § 51.222 is proposed to be added to this section as a new § 51.221(c). The subsection would provide that the Secretary's decision is the final agency decision.

Section 51.222 Effect of absence of appeal or review of initial decision of administrative law judge. The proposed rule would add a new section to clearly state that the initial decision of the administrative law judge becomes the final agency decision if not appealed by either party or reviewed by the Secretary.

Section 51.223 Effect of order of repayment, withholding of funds or suspension of funds. The proposed rule would describe the remedial orders which may be issued by the administrative law judge after an administrative hearing. Paragraphs (e) and (d) are currently contained in § 51.69 (b) and (c) of the interim regulation.

Section 51.225 Judicial review. The proposed rule would amend this section to provide that the Director may cross-appeal issues decided adversely to the ORS unless those issues were ruled upon directly by the Secretary.

Written Comments solicited

The Director solicits comments on the complete set of revenue sharing regulations or any of its individual parts. Comments on age and handicap regulations will be particularly useful and are specifically requested.

Regulatory Analysis

Section 3 of Executive Order 12044, *Improving Government Regulations*, requires a regulatory analysis for "significant regulations which may have major economic consequences for the general economy, for individual industries, geographic regions or levels of governments." The Treasury Department has determined (pursuant paragraph 13 of the Treasury Department implementation of the Executive Order, 43 FR 52120) that the overall revisions of the regulations, being primarily technical and procedural will not have an impact on the public of $100 million or more and therefore will not require a regulatory analysis. With respect to § 51.56, "Discrimination on the basis of age," the Treasury Department has determined the economic consequences flow directly from the Age Discrimination Act and the Revenue Sharing Act and the cost of implementation will not have an impact on the community of $100 million or more. Accordingly, Treasury has concluded that a regulatory analysis is not required for age discrimination.

With respect to § 51.55, discrimination with respect to an otherwise qualified handicapped individual, this regulation was in the process of active preparation before May 22, 1978, and the provisions of Executive Order 12044 "Improving Government Regulations" and the Treasury Department implementation thereof are not technically applicable. Because of the potential costs, however, a regulatory analysis may still be prepared. The issue is still under review within the Department and the Director has decided to request comments concerning the need for such an analysis. The analysis prepared by the Departments of HEW and Transportation are likely to have general applicability to the costs to recipients of revenue sharing funds because they fund many of the same kinds of programs. As with age discrimination, the economic consequences flow directly from the statute, in this case Executive Order 11914, "Nondiscrimination On The Basis of Handicap In Federally Assisted Programs." Accordingly, the Director preliminarily takes the position that a regulatory analysis need not be prepared.

Authority

This proposed rule is issued under the authority of the State and Local Fiscal Assistance Act of 1972 (Pub. L. 92-512), as amended by the State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94-488), the Age Discrimination Act of 1975, as amended, and section 504 of the Rehabilitation Act of 1973, as amended (Pub. L. 93-112) and Treasury Department Order No. 224, dated January 26, 1973 (38 FR 3342) as amended, by Treasury Department Order No. 242 (Revision No. 1) dated May 17, 1977.

31 CFR Part 51, is therefore proposed to be revised in the manner set forth below:

Kent Peterson,

Acting Director, Office of Revenue Sharing.

Roger C. Altman,

Assistant Secretary (Domestic Finance).

December 21, 1979.

PART 51—FINANCIAL ASSISTANCE TO STATE AND LOCAL GOVERNMENTS

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Authority: State and Local Assistance Act of 1972, Pub. L. 92–512), as amended by the State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94–488), the Age Discrimination Act of 1975, as amended, and section 504 of the Rehabilitation Act of 1973, as amended (Pub. L. 93–112) and Treasury Department Order No. 224, dated January 26, 1978 (38 FR 3342) as amended by Treasury Department Order No. 242 (Revision No. 1) dated May 17, 1977.

Subpart A—General Information

§ 51.0 Scope and application of regulations.

(a) *In general.* The rules and regulations in this subpart are prescribed for carrying into effect the State and Local Fiscal Assistance Act of 1972 (Pub. L. 92–512) applicable to entitlement periods beginning January 1, 1973 and the State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94–488) applicable to entitlement periods beginning January 1, 1977. Subpart A of this part sets forth general information and definitions of terms used in this part. Subpart B of this part prescribes the reporting, public hearing and publication requirements under this part. Subpart C of this part contains rules regarding the computation, allocation and adjustment of entitlements. Subpart D of this part prescribes prohibitions and restrictions on the use of funds. Subpart E of this part contains the nondiscrimination provisions applicable to programs funded by recipient governments which receive revenue sharing funds. Subpart F of this part prescribes fiscal procedures and auditing requirements. Subpart G of this part contains rules relating to procedure and practice requirements where a recipient government has failed to comply with any provision of this part.

(b) *Effect on pending cases.* The procedural provisions of the State and Local Fiscal Assistance Amendments of 1976 (Pub. L. 94–488) and regulations promulgated thereunder shall apply to all pending administrative proceedings,

including cases commenced by complaints filed prior to January 1, 1977.

§ 51.1 Establishment of Office of Revenue Sharing.

There is established in the Office of the Secretary of the Treasury the Office of Revenue Sharing. The office shall be headed by a Director who shall be appointed by the Secretary of the Treasury. The Director shall perform the functions, exercise the powers and carry out the duties vested in the Secretary of the Treasury by the State and Local Fiscal Assistance Act of 1972, Title I, Public Law 92-512 as amended by the State and Local Fiscal Assistance Amendments of 1976, Public Law 94-488. A reference to the individuals in the feminine or masculine gender shall not be construed to exclude either gender.

§ 51.2 Definitions.

As used in this part (except where the context clearly indicates otherwise, or where the term is otherwise defined elsewhere in this part) the following definitions shall apply:

(a) "Act" means the State and Local Fiscal Assistance Act of 1972, Title I of Public Law 92-512, approved October 20, 1972 as amended by the State and Local Fiscal Assistance Amendments of 1976, Public Law 94-488, approved October 13, 1976. (31 U.S.C. 1221, *et seq.*, as amended).

(b) "Chief executive officer" of a unit of local government means the elected official, or the legally designated official, who has the primary responsibility for the conduct of that unit's governmental affairs. Examples of the "chief executive officer" of a unit of local government may be: The elected mayor of a municipality, the elected county executive of a county, the chairman of a county commission or board in a county that has no elected county executive, the township supervisor, trustee, first selectman, chairman, city manager, or such other official as may be designated pursuant to law by the duly elected governing body of the unit of local government; or the chairman, governor, chief or president (as the case may be) of an Indian tribe or Alaskan native village.

(c) "Department" means the Department of the Treasury.

(d) "Director" means the Director of the Office of Revenue Sharing.

(e) "Entitlement" means the amount of payment to which a State government or unit of local government is entitled as determined by the Director pursuant to an allocation formula contained in the Act and as established by regulations under this part.

(f) "Entitlement funds" means the amount of funds paid or payable to a State government or unit of local government for the entitlement period.

(g) "Entitlement period" means one of the following periods of time:

(1) The 6-month period beginning January 1, 1973, and ending June 30, 1973.

(2) The fiscal year beginning July 1, 1973, and ending June 30, 1974.

(3) The fiscal year beginning July 1, 1974, and ending June 30, 1975.

(4) The fiscal year beginning July 1, 1975, and ending June 30, 1976.

(5) The 6-month period beginning July 1, 1976, and ending December 31, 1976.

(6) Entitlement Period Eight is the 9-month period beginninng January 1, 1977, and ending September 30, 1977.

(7) Entitlement Period Nine is the fiscal year beginning October 1, 1977, and ending September 30, 1978.

(8) Entitlement Period Ten is the fiscal year beginning October 1, 1978, and ending September 30, 1979.

(9) Entitlement Period Eleven is the fiscal year beginning October 1, 1979, and ending September 30, 1980.

(h) "Funded" means funds have been or are being made available for expenditure in or substantially benefited a program or activity of the recipient government or a secondary recipient.

(i) "Governor" means the Governor of any of the 50 States or the Mayor of the District of Columbia.

(j) "Indian tribes and Alaskan native villages" means those Indian tribes and Alaskan native villages which have a recognized governing body and which perform substantial governmental functions. Certification to the Director by the Secretary of the Interior (or by the Governor of a State in the case of a State affiliated tribe) that an Indian tribe or an Alaskan native village has a recognized governing body and performs substantial governmental functions, shall constitute prima facie evidence of that fact.

(k) "Lobbying" means the personal solicitation or exercise of personal influence upon members of a legislative body by representatives of the recipient government for the purpose of influencing pending or proposed legislation regarding the provisions of the Act.

(l) "Program or activity" means the operations of the agency or organizational unit of a recipient government or the operations or organizational unit of a secondary recipient (examples include but are not limited to a police department, department of corrections, health department, or a division of a public or private corporation).

(m) "Recipient government" means a State government or unit of local government as defined in this section, Indian tribe, Alaskan Native Village, or the office of the separate law enforcement officer for any parish in the State of Louisiana other than the Parish of Orleans which directly receives entitlement funds.

(n) "Secondary recipient" means: (1) any State government, unit of local government, any political subdivision of any State or local government, any public or private agency, institution, organization or other entity which receives entitlement funds, in whole or in part, from a recipient government either:

(i) by a contract or other arrangement pursuant to which such other entity shall conduct, deliver or otherwise participate or assist in the conduct or delivery of a program or activity of the recipient government, including construction projects or;

(ii) by a grant or other arrangement with the recipient government intended to provide financial assistance to such other entity under a program or activity.

(2) "Secondary recipient" shall not include any other private or governmental entity from which a recipient government only acquires real or personal property (e.g. supplies, equipment and materials) by such means as purchasing, renting, leasing, or bartering. Secondary recipient also shall not include persons who are the ultimate beneficiaries of a recipient goverment's programs or activities.

(o) "Secretary" means the secretary of the Treasury.

(p) "State government" means the government of any of the 50 States or the District of Columbia.

(q) "Unit of local government" means the government of a county, municipality, or township, which is a unit of general government and which shall be determined on the basis of the same principles as used by the Bureau of the Census for general statistical purposes. The term "unit of local government" shall also include the recognized governing body of an Indian tribe or Alaskan native village which performs substantial governmental functions. The District of Columbia, in addition to being treated as a State, shall also be treated as a county area which has no units of local government (other than itself) within its geographic area.

§ 51.3 Procedures for effecting compliance for violations of provisions other than subpart E.

(a) *Investigations.* (1) Within 180 days of receipt of an administrative

complaint, audit report or other information relating to possible violation of the provisions of this part (other than subpart E), the Director shall complete an investigation and issue a finding.

(2) The scope of the investigation is not necessarily limited to the administrative complaint or other information but may be expanded to include any matters under the Act either discovered during the investigation or reasonably flowing from said administrative complaint or other information.

(b) *Compliance review or audit.* The Director may periodically conduct audits or reviews of compliance with the provisions of the Act (other than subpart E) which shall be completed within 180 days after initiation.

(c) *Finding by the Director.* After the completion of an investigation, compliance review or audit, the Director shall issue a finding as to whether the recipient government has complied with the provisions of the Act. After the issuance of a finding, the Director shall provide the appropriate notice(s) of noncompliance and make appropriate efforts to secure compliance.

(d) *Opportunity for hearing.* If a recipient government fails to enter into compliance after receipt of appropriate notice(s) of noncompliance, the Director shall initiate an administrative hearing pursuant to the provisions of subpart G of this part.

(e) *Constructive waiver of entitlement payments.* The failure of a recipient government to comply with the assurance and reporting requirements of subpart A, which include response to specific requests for information concerning possible violations of the Act, shall result in the determination that one or more of the entitlement payments to the recipient government for a particular entitlement period is constructively waived pursuant to § 51.25(b) of this part. The constructive waiver shall not be subject to the procedure for effecting compliance set forth in paragraph (a) of this section.

§ 51.4 Transfer of entitlement funds to secondary recipients.

Any prohibitions, restrictions and requirements set forth in subparts D, E, and F of this part that are applicable to a recipient government's use and expenditure of entitlement funds are also applicable to the expenditure of entitlement funds transferred to a secondary recipient by the primary recipient government. Any failure by a secondary recipient to comply with any provision of subparts D, E, and F shall constitute noncompliance with such subparts by the primary recipient government and the Director shall effect compliance by taking appropriate enforcement action against the recipient government.

§ 51.5 Time periods.

(a) *Effect on notice.* Time periods that begin with the date of an event, such as the making of a determination by the Director or a request for a wiaver by a recipient government, shall begin with the date of the receipt of notice of the event.

(b) *Time periods of ten (10) days or less.* References to time periods of ten (10) days or less shall be to working days unless otherwise specified. References to time periods of more than ten (10) days shall be to calendar days unless otherwise specified.

§ 51.6 Effect of State or local law.

Any State or local law, ordinance or regulation that substantially impedes compliance by a recipient government with the provisions of this part, shall be inoperative to the extent necessary to achieve such compliance or remedy.

§ 51.7 Applicability of other Federal laws.

Except as otherwise provided in the Act or this part, entitlement funds are not subject to Federal civil laws applicable only to Federally assisted programs or to Federal grants, loans or contracts. The Criminal Code of the United States (title 18, U.S.C.) shall be applicable to all criminal offenses relating to the expenditure, accounting or reporting of entitlement funds by a recipient government receiving such funds under the Act or this part.

Subpart B—Assurances, Reports, Public Participation and Public Hearings

§ 51.10 Definitions.

As used in this subpart (except where the context clearly indicates otherwise) the following definitions shall apply:

(a) "Budget" means a plan for the overall allocation of funds, including entitlement funds, by a recipient government to various purposes during a specified fiscal period in accordance with its State or local law and procedure. A recipient government that does not formally adopt or enact such a plan, shall be deemed to have adopted or enacted a budget for purposes of this subpart when it has adopted or enacted a resolution, ordinance, or appropriation act, or taken other action dedicating, setting aside, or otherwise designating entitlement funds for a particular purpose or use.

(b) "Budget summary" means categories of expenditures for entitlement funds and general funds classified by major function and activity in accordance with the recipient government's State or local laws and procedures. Where there is no State or local law or procedure prescribing the expenditure classifications, the recipient government shall use the classifications of the Bureau of the Census.

(c) "Enacted" means, in the budget context, the act of final adoption, ratification, confirmation or other action with respect to an approved budget that makes the budget the official expenditure authorization of the recipient government. Where a State board or agency has statutory authority to review or approve the budget of a unit of local government, enacted means the final action of the unit of local government.

(d) "Fiscal year" means the 12-month period or other fiscal period on the basis of which the recipient government operates.

(e) "Executive authority" means the chief executive officer or other elected or appointed officials of the recipient government whose statutory responsibility is to assemble budget data and prepare the budget document for presentation to the legislative body for enactment or approval.

(f) "Legislative body" means the elected official or officials of the recipient government who have the primary legal responsibility for enacting the budget.

(g) "Presented" means, in the budget context, the submission of a proposed budget to the legislative body having primary legal responsibility for enacting the budget of a recipient government.

(h) "Public hearing" means an open public meeting called by a recipient government to provide all citizens with an opportunity to offer written and oral comments regarding the subject to be discussed. A public hearing required under this subpart may be held concurrently with other meetings held by the recipient government for public purposes (such as town meetings, budget sessions and other regular meetings), provided that the recipient government complies with the public notice requirements of this subpart.

(i) "Publication" means giving notice or advising the public, and making information known to the citizens of the recipient government.

(j) "Use report" means a report required by the Director from each recipient government showing the amounts and purposes for which entitlement funds have been used.

§ 51.11 Reports to the Director; assurances; procedure for effecting compliance.

(a) *In general.* The Director may require each recipient government to submit such annual and interim reports as may be necessary to provide a basis for evaluation and review of compliance with, and effectiveness of, the provisions of the Act and regulations of this part.

(b) *Requisite assurances for receipt of entitlement funds.* In order to qualify for entitlement funds for an entitlement period, the chief executive officer of each recipient government, when requested by the Director, shall file a Statement of Assurances on a form to be provided. The Statement of Assurances will state the recipient government's intention to comply with specified requirements, prohibitions and restrictions of the Act and of Subparts D, E, and F of this part, with respect to the use of entitlement funds. The Director will afford the Governor of each State an opportunity for review and comment to the Office of Revenue Sharing on the adequacy of the assurance by units of local government, other than Indian Tribes and Alaskan native villages, located in his State.

(c) *Procedure for effecting compliance.* (1) If a recipient government fails to comply with the public participation requirement of this subpart, the Director shall apply the procedures for effecting compliance set forth in § 51.3 of subpart A and hearing procedures of subpart G of this part.

(2) The failure of the recipient government to comply with the assurance and reporting requirements of this part shall result in the implementation of the pertinent constructive waiver provisions of § 51.25(b) of subpart C of this part.

§ 51.12 Use reports.

(a) *In general.* Each recipient government shall submit a report to the Director (or to the Bureau of the Census or other agency that the Director may designate) setting forth the amounts and purposes for which entitlement funds have been appropriated, spent or obligated during its fiscal year. Such report shall also show the relationship of the entitlement funds to the relevant functional items in the recipient government's budget and shall identify differences between actual use of entitlement funds and the use of such funds as planned in the enacted budget. The report shall be filed on the form prescribed and approved by the Director and shall be submitted within the requested time period. Failure to file the report as prescribed by the Director may jeopardize future entitlement payments pursuant to § 51.3(c) of this part.

(b) *Public inspection.* A copy of the use report and documentation necessary to support it shall be made available for public inspection. Within 10 days after the use report is filed, this information shall be placed at the principal office of the recipient government for public inspection during normal business hours. Where feasible, local public libraries and other public buildings should be used also. If the recipient government has no principal office, the report and supporting documentation shall be made available for public inspection at a public place or places within the political boundaries of the recipient government to satisfy the requirements of this paragraph.

(c) *Notice of availability of use reports.* The recipient government shall publish notice which indicates that the actual use report is available for public inspection. Such notice shall be published within 10 days of the filing of the report with the Director (or other designated agency) and specify the location(s) and hours during which the report and its supporting documentation are available to the public. Publication of the notice shall be made in a newspaper of general circulation serving the recipient government's geographic area. Where newspaper publication is impractical and infeasible, alternative methods of publication shall be used as provided in § 51.13(c)(2) of this subpart.

(d) *Submission of use reports to Governor.* The Director (or such agency as the Director may designate) shall furnish the reports required under paragraph (a) of this section, except those reports relating to Indian tribes and Alaskan native villages, to the Governor of the State in which a recipient government is located, in the manner and form prescribed by the Director.

§ 51.13 Proposed use hearing.

(a) *In general.* Each recipient government which expends entitlement funds in any fiscal year pursuant to a budget enacted on or after January 1, 1977, shall have at least one public hearing on the possible uses of such funds. At the public hearing, citizens of the recipient government shall have the opportunity to provide the executive authority written or oral comments and suggestions respecting the possible uses of entitlement funds. The public hearing shall be conducted not less than seven calendar days before the budget is presented to the legislative body.

(b) *Public notice.* Notice of the public hearing shall be published in at least one newspaper of general circulation serving the recipient government's geographic area, no later than 10 days prior to the scheduled date of the hearing. Such notice shall include the date, place, and time of the public hearing, the amount of unappropriated entitlement funds in the recipient government's revenue sharing trust fund, and the amount of entitlement funds which the recipient government expects to receive during its fiscal year. In addition, the notice shall specify that citizens attending the public hearing shall have the right to provide written and oral comments and suggestions respecting possible uses of entitlement funds.

(c) *Waiver of proposed use hearing and notice requirements; alternative method of publication.* (1) The Director, upon written application by the chief executive officer of a recipient government, may grant a waiver of the proposed use hearing requirements for one or more entitlement periods, if it can be determined from the facts submitted that the unavoidable expenses associated with holding the public hearing would exceed fifteen (15) percent of the recipient government's entitlement. A cost estimate of the unavoidable expenses must accompany the waiver application. For purposes of this paragraph, "unavoidable expenses" are those incurred in holding the public hearing, such as space, furniture and equipment rentals, overtime compensation, and similar direct costs including the costs of publication of the public notice. The waiver must be requested and approved before the proposed appropriation of entitlement funds occurs.

(2) The newspaper publication requirements for the notice of the proposed use hearing may be waived by the Director upon written application by the chief executive officer of the recipient government. The application shall indicate the circumstances making newspaper publication impractical or infeasible, and provide for an alternative method of notification which informs citizens of the recipient government of the date, place, time, and subject of the public hearing. The waiver must be requested and approved before the proposed appropriation of entitlement funds occurs.

§ 51.14 Budget hearing.

(a) *Budget hearing procedure.* Each recipient government which expends entitlement funds in any fiscal year pursuant to a budget enacted on or after January 1, 1977 shall have at least one public hearing on the government's proposed uses of entitlement funds in relation to its entire budget. The budget

hearing shall be conducted by the legislative body, or the appropriate committee thereof, prior to enactment of the budget. For those recipient governments which have a bicameral legislature, the hearing shall be held before the appropriate committee in each house of the legislature, or before an appropriate joint committee on both houses of the legislature. All citizens of the recipient government shall have a reasonable opportunity to provide written and oral comments, and to ask questions concerning the entire budget and the relationship of entitlement funds to the entire budget. The budget hearing required by this paragraph shall be held at a date, place, and time that permits and encourages public attendance and participation by all citizens.

(b) *Alternative procedures for budget hearing.* A recipient government may use an alternative budget hearing process without obtaining prior approval from the Director if:

(1) The recipient government, pursuant to State or local law, governing the expenditure of its own revenues, is required to have a budget process which includes a public hearing; and that public hearing provides all citizens the opportunity to provide oral and written comments and ask questions concerning the proposed use of all funds, including the use of entitlement funds and their relationship to the entire budget; and

(2) Documentation that the recipient government's alternative budget hearing procedures comply with State or local law shall be made available for public inspection during normal business hours at the principal office of the recipient government and submitted to the Director upon request.

(3) The use of alternative budget hearing procedures for complying with the public hearing requirements of this section does not exempt a recipient government from complying with the public notice requirements of this section relating to the budget hearing.

(c) *Public notice and inspection.* (1) Notice of the budget hearing shall be published in a newspaper of general circulation serving the recipient government's geographic area no later than 10 days prior to the scheduled date of the hearing. Such notice shall specify the date, place, and time of the public hearing, and that citizens attending the hearing have the right to provide written and oral comments and ask questions concerning the entire budget and the relationship of entitlement funds to the entire budget. The notice shall state how, in the context of its proposed budget, the recipient government intends to use its entitlement funds, and shall require a budget summary of its entire proposed budget. In addition, the notice shall advise when and where the above information, together with a copy of the entire proposed budget, shall be made available for public inspection.

(2) At least 10 days prior to the budget hearing a recipient government shall make available for public inspection during normal business hours, at the principal office of such government, a statement of the government's proposed uses of entitlement funds in the context of its proposed budget, a summary of its entire proposed budget, and a copy of its entire proposed budget. If a recipient government has no principal office then making the above materials available at a public place within the political boundaries of the recipient government shall satisfy the requirements of this paragraph. Where feasible, local public libraries and other public buildings should be used for the purpose of providing additional places for public inspection of these materials.

(d) *Modification of time limitation for public notice and inspection.* Whenever State or local law provides for a specified time period within which a recipient government is required to publish notice of a budget hearing or to permit public inspection of its proposed budget for a specified time period, the recipient government shall comply with the time period for publication or public inspection required by its State or local law, provided that it is not less than three (3) working days.

(e) *Waiver of newspaper publication; alternative forms.* (1) The newspaper publication requirement governing notice of the budget hearing and the summary of the proposed budget may be waived by the Director upon receipt of a written request by the chief executive officer of the recipient government. The request shall include a cost estimate verified by a newspaper, which shows the cost of publication will exceed fifteen (15) percent of the amount of entitlement funds included in the proposed budget. In addition, the request shall propose an alternative method of publication which provides the citizens of the jurisdiction with adequate notice of the budget hearing and the opportunity to review the budget summary.

(2) When newspaper publication of the notice of the budget hearing and the budget summary is impractical or infeasible, the Director may waive the newspaper publication requirement upon receipt of a written request by the chief executive officer of the recipient government. The request shall indicate the circumstances which make publication in a newspaper impractical or infeasible and shall propose an alternative method of publication. The waiver must be requested and approved before the proposed appropriation of entitlement funds occurs.

(f) *Summary of enacted budget.* Within 30 days after enactment of a budget as provided by State or local law, a summary of the enacted budget showing the intended uses of entitlement funds and information necessary to support the information and data in the summary shall be made available for public inspection during normal business hours at the principal office of the recipient government. If a recipient government has no principal office, the summary of the enacted budget and the enacted budget document shall be made available for public inspection at a public place within the political boundaries of the recipient government to satisfy the requirements of this paragraph. Where feasible, local public libraries and other public buildings should be used for the purpose of providing additional places at which the public may inspect the budget summary and the enacted budget.

(g) *Published notice of availability of summary of enacted budget.* Public notice shall be published in a newspaper of general circulation serving the geographic area of the recipient government within 30 days after enactment of the budget. The notice shall state where and when the summary of the enacted budget is available for public inspection. Where newspaper publication is impractical or infeasible alternative methods of publication shall be used as provided in § 51.13(c)(2).

§ 51.15 Amendments or modification to enacted budget.

Where applicable State or local law exists which governs amendments or modification of existing budgets, and requires public notice, at least one public hearing, and the availability of the amendments or modifications for public inspection, the recipient government shall comply with the State or local law. In the absence of applicable State or local law, the provisions of § 51.14 of this subpart shall apply to any amendment, modification or revision of an enacted budget when a major change is proposed. For the purposes of this section, a major change is any change in the enacted budget which, on a cumulative basis, affects the use of 25 percent and a minimum of $1,000 of the entitlement funds as originally enacted in the budget of the recipient government.

§ 51.16 Participation by senior citizens.

In conducting any hearing or proceeding required under this subpart or under its own budget processes, a recipient government shall endeavor to provide senior citizens and organizations representing the interests of senior citizens with an opportunity to be heard and present their views regarding the use of entitlement funds prior to final allocation of such funds.

§ 51.17 Notification of news media.

At the same time that any public report, notice of hearing or budget information is required to be published in a newspaper under this subpart, each recipient government shall advise the news media, including minority, bilingual and foreign language news media, serving its geographic area and shall provide copies of such reports, notice, or budget information to the news media on request.

§ 51.18 Legal notice rules not applicable.

Whenever any section of this subpart requires the newspaper publication of a report, public notice, budget summary, or any other required information, the recipient government may publish the required information in a newspaper of general circulation serving its geographic area without regard to State or local statutory requirements for the publication of legal notices. Prominently displayed advertisements or news articles may be used to provide newspaper notice required by this subpart. Such article or advertisement must contain all of the required information.

§ 51.19 Reports to the Bureau of the Census.

It shall be the obligation of each recipient government to comply promptly with requests by the Bureau of the Census (or by the Director) for data, information and reports relevant to the determination of entitlement allocations or use of entitlement funds. Failure of any recipient government to comply may place in jeopardy its receipt of entitlement funds.

Subpart C—Computation and Adjustment of Entitlement Funds

§ 51.20 Data.

(a) *In general.* The data used in determination of allocations and adjustments thereto payable under this part will be the latest and most complete data supplied by the Bureau of the Census, the Bureau of Indian Affairs, the Bureau of Economic Analysis and the Internal Revenue Service which are available prior to the allocations for one entitlement period unless, in the judgment of the Director, the data provided by those agencies are not current enough or are not comprehensive enough to provide for equitable allocations.

(b) *Computation and payment of entitlements.* (1) Allocations will not be made to any unit of local government if the available data is so inadequate as to frustrate the purpose of the Act. Such units of local government will receive an entitlement and payment when current and sufficient data become available as necessary to permit an equitable allocation.

(2) Payment to units of local government for which the Director has not received an address confirmation will be delayed until proper information is available to the Director.

(3) Where the Director determines that the data provided by the agencies listed in paragraph (a) of this section are not current enough, or are not comprehensive enough, or are otherwise inadequate to provide for equitable allocations the Director may authorize the use of other data, including estimates. The Director's determination shall be final and such other additional data and estimates as are used, including the sources, shall be publicized by notice in the **Federal Register.**

(4) *Currency of tax collection.* Only that tax collection data, which is received in the most recent reporting year available from the appropriate agencies prior to the allocation for an entitlement period, shall be used in the determination of entitlements for that entitlement period.

(c) *Special rule for less than one year entitlement periods.* For entitlement periods which encompass less than one year, the adjusted taxes and intergovernmental transfers of any unit of local government for the entire reporting year will be used. The limitation that the amount allocated to a recipient government shall not exceed 50% of the sum of the recipient government's adjusted taxes and intergovernmental transfers of revenues shall be reduced proportionately for entitlement periods which are less than one year.

(d) *Units of local government located in more than one county area.* In cases where a unit of local government is located in more than one county in one or more States, each part of such unit in each county is treated for allocation purposes as a separate unit of government, and the adjusted taxes, and intergovernmental transfers of such parts are estimated on the basis of the ratio which the population of that part bears to the entire population of the local government.

§ 51.21 Data affected by major disaster.

(a) *In general.* Any change in data otherwise eligible for use in determining the entitlement of a recipient government after April 1, 1974, shall be disregarded for a period of 60 months if that change:

(1) Resulted from a major disaster as determined by the President under section 301 of the Disaster Relief Act of 1974 (Pub. L. 93–288) and

(2) Results in a data factor which is less beneficial to the recipient government than the pre-disaster data factor for purposes of the revenue sharing allocation process.

(b) *Less beneficial data factor.* For the purposes of this section, a pre-disaster data factor is defined as a data factor of record for the final revenue sharing allocation which was calculated for a time period immediately preceding the data factor time period in which the disaster occurred and, therefore, could not have been affected by the disaster.

(c) *Eligibility requirements.* To be eligible for the data stabilization benefit of paragraph (a) of this section, a recipient government shall:

(1) Be located within a State designated by the President as a major disaster area, and

(2) Be located within a geographical subdivision of the State as certified to the Office of Revenue Sharing as a major disaster area by the Administrator of the Disaster Assistance Administration of the Department of Housing and Urban Development.

Further, each recipient government within the specific geographic area so designated will be notified, pursuant to the data improvement program, provided for in section 51.29, of each of its data factors developed subsequent to the major disaster designation, which are less beneficial than the pre-disaster data factors. The chief executive officer of the recipient government must verify that the data was adversely affected by the major disaster. In addition, the Director may require that the verifications be accompanied by substantiating documentation evidencing a causal relationship between the major disaster and the less favorable value of the current revenue sharing data factor of record. The Director, upon being satisfied that all of the requirements of this section have been met with respect to any post-disaster data factor, shall refrain from using the post-disaster data factor in the allocation process, of an entitlement period, and shall continue to use the pre-

disaster data factor in the allocation process for each entitlement period that begins during the 60-month period after the President's designation of the specific major disaster area unless:

(i) A data factor for a current entitlement period is more beneficial than the pre-disaster data factor, or

(ii) A post-disaster data factor of an entitlement period is not verified by the chief executive officer as having been adversely affected by the major disaster.

(d) *Multiple disasters.* Recipient governments may be in areas designated by the President as specific major disaster areas as the result of two or more disasters. Recipient governments in such areas will also be provided their appropriate pre-disaster data for verification. The 60-month period for which more beneficial pre-disaster data may be used for a government shall be determined by the most recent designation by the President of a specific major disaster area containing that government.

(e) *Effect on later entitlement periods of failure to verify.* A recipient government which does not verify that an adverse data change is caused by a disaster in an entitlement period when it was afforded an opportunity to make the verification does not lose the opportunity to verify in a later entitlement period that a disaster has affected the data factor for that later entitlement period.

(f) *Per capita income data.* Increases in per capita income data subsequent to disasters for governments in designated disaster areas will not be considered adverse data changes resulting from a disaster for purposes of section 145 of the Act.

(g) *60-month period.* The post-disaster data factor shall be used for the first entitlement period beginning after the end of the 60 months referred to in § 51.21(a).

§ 51.22 Adjusted taxes.

(a) *In general.* Tax revenues are compulsory contributions to a unit of local government exacted for public purposes, as such contributions are determined by the Bureau of the Census for general statistical purposes. The term "adjusted taxes" means the tax revenues adjusted by excluding an amount equal to that portion of the compulsory contributions which is properly allocable to school operations, debt service on school indebtedness, school capital outlays, and other educational purposes.

(b) *Procedure for exclusion of tax revenues for education.* The tax revenues exacted by a unit of local government shall be adjusted to exclude any such tax revenues used for financing education in a manner consistent with the following provisions:

(1) Where a unit of local government finances education from a specific fund and lists tax revenues to the fund or levies a separate tax for purposes of education, this amount will constitute the tax revenues for education.

(2) If tax revenues for purposes of education are not separately identifiable because education is financed by expenditure or transferring of moneys from a general fund (or similarly named fund) to a school fund or funds, then the ratio of tax revenues (as defined in paragraph (a) of this section) to the total revenues in the fund shall be calculated, and that ratio multiplied by the expenditure or transfer of non-dedicated moneys from the fund to the school fund shall be equated with the tax revenues properly allocable to expenses for education. The phrase "total revenues in the fund" means cash and securities on hand in the general fund (or similarly named fund) at the beginning of the fiscal year, plus all non-dedicated revenues to the fund (other than trust or agency revenues) less cash and securities on hand at the end of the fiscal year. Trust and agency funds are those held specifically for individuals or governments for which no discretion can be exercised as to the amounts to be paid to the recipient.

(3) If any instance where neither paragraph (b)(1) nor (2) of this section permits determination of school taxes, then any procedure deemed equitable by the Director shall be utilized to ascertain adjusted taxes.

(c) *Validity of adjusted tax data.* Allocation of funds under the Act will be based on data reported by States and units of local government to the Bureau of the Census and shall be in accordance with definitions established by the Bureau. No unit of government shall report to the Department of the Treasury or the Bureau of the Census in a manner which attempts to circumvent or frustrate the intent of this section.

§ 51.23 Date for determination of allocation.

(a) *In general.* Pursuant to the provisions of § 51.20(a) and (b)(3), the determination of the data definitions upon which the allocations and entitlements for an entitlement period are to be calculated shall be made no later than the day immediately preceding the beginning of the entitlement period. Any change in the computation of local tax effort to credit county sales taxes to units of local government pursuant to section 109(e)(2)(B) of the Act (the "Memphis Rule") will be considered to be a change in a data definition and will not be given effect for any entitlement periods for which there are final data definitions. The final date upon which initial allocations for an entitlement period are calculated for payment purposes shall be determined by the Director as soon as practicable and shall be publicized by notice in the **Federal Register.**

(b) *Time limitation and minimum adjustment.* If it is established to the satisfaction of the Director by factual evidence and documentation that the data used in the computation of an allocation is erroneous, an adjustment will be made. No adjustment shall be made unless such evidence and documentation of erroneous data is provided the Director for determination within one year of the end of the entitlement period with respect to which the payment is made. No adjustment of any kind, which is less than $200, shall be made to an entitlement if in the judgment of the Director such adjustment will be burdensome, expensive, or otherwise impracticable.

(c) *Adjusted taxes and intergovernmental transfers.* The date for determining the amount of adjusted taxes and intergovernmental transfers of a unit of local government will be the fiscal year that can be uniformly assembled for all units of local government prior to the beginning of the affected entitlement period.

§ 51.24 Boundary changes, governmental reorganization, etc.

(a) *In general.* A boundary change, governmental reorganization, or change in State statutes or constitution, relevant to the computation of entitlement of a unit of local government under the Act, which occurs during an entitlement period shall, not result in a change to the entitlement of that government until the next entitlement period. However, payment(s) tendered to such government for the entitlement period may be redistributed pursuant to the provisions of paragraphs (b) and (c) of this section.

(b) *New units of local government.* A unit of local government which came into existence during an entitlement period shall first be eligible for an entitlement allocation for the next entitlement period. However, if such unit is a successor government, it shall be eligible to receive the entitlement payment of the unit or units of local government to which it succeeded in accordance with the conditions of the succession.

(c) *Dissolution of units of local government.* A unit of local government which dissolved, was absorbed or ceased to exist as such during an

entitlement period is eligible to receive an entitlement payment for that entitlement period; *provided* that such unit of local government is in the process of winding up its governmental affairs or a successor unit of local government has the legal capacity to accept and use such entitlement funds. Entitlement payments which are returned to the Director because of the cessation of existence of a unit of local government shall be placed in the State and Local Government Fiscal Assistance Trust Fund until such times as they can be redistributed according to the conditions under which the unit of local government ceased to exist.

(d) *Limitations on adjustment for annexations.* (1) Annexations by units of local government having a population of less than 5,000 on April 1, 1970, shall not affect the entitlement of any unit of local government for an entitlement period unless the Director determines that adjustments pursuant to such annexations would be equitable and would not be unnecessarily burdensome, expensive, or otherwise impracticable.

(2) Annexations of areas with a population of less than 250, or less than 5 percent of the population of the gaining government, shall not affect the entitlement of any unit of local government unless the Director determines that adjustments pursuant to such annexations would be equitable and would not be unnecessarily burdensome, expensive, or otherwise impracticable.

(e) *Certification.* Units of local government affected by a boundary change, governmental reorganization, or change in State statutes or constitution shall, before receiving an entitlement adjustment or payment redistribution pursuant to this section, obtain State certification that the change was accomplished in accordance with State law. The certifying official shall be designated by the Governor, and the certification shall be submitted to the Bureau of the Census.

§ 51.25 Waiver of entitlement; nondelivery of checks; insufficient data.

(a) *Waiver.* Any unit of local government or Indian tribe or Alaskan native village may waive its entitlement for any entitlement period; provided that the chief executive officer with the consent of the governing body of the government notifies the Director that the entitlement payments for a past, current, or next beginning entitlement period, or any combination thereof, are being waived. A waiver of entitlement for the next beginning entitlement period will only be given effect if the waiver notice is received during the 6-month period immediately preceding that entitlement period. In the event that an entitlement payment is returned or a notice of waiver is executed which is not in accordance with this procedure, the chief executive officer will be notified by the Director and, unless the attempted waiver is rescinded within 30 days of the notice, it shall be given effect. However, in no event will a notice of waiver be given effect for an entitlement period which is subsequent to the next beginning entitlement period. The entitlement waived, and any adjustments resulting from recalculation of earlier entitlements, shall be added to and shall become a part of the entitlement of the next highest unit of government eligible to receive entitlement funds in that State in which the unit of local government, Indian tribe or Alaskan native village waiving entitlement is located. A waiver of entitlement by a unit of local government, Indian tribe or Alaskan native village shall be deemed irrevocable 30 days prior to the first payment for the entitlement period to which it relates.

(b) *Constructive waiver.* Any recipient government which has not waived and is otherwise eligible to receive entitlement payments and which has failed to provide reports or assurances required pursuant to Subparts B, E or F, is subject to a determination of having constructively waived its entitlement funds for one or more of the entitlement payments of that entitlement period. Prior to such a determination, the Director shall, in two separate notices of not less than 30 days each, notify nonresponsive recipient governments of their noncompliance and that their entitlement payment(s) for the affected entitlement period(s) are being temporarily withheld pursuant to § 51.3(c). If compliance is not achieved by the end of each affected entitlement period, the Director shall make a determination that the payments to the nonresponsive recipient governments are continued to be constructively waived. Entitlement funds constructively waived will be redistributed pursuant to the provisions of paragraph (a) of this section.

(c) *Nondelivery.* Entitlement funds for any entitlement period which are returned to the Department of the Treasury as being nondeliverable because of incorrect address information, or which are unclaimed for any reason, shall be placed in the State and Local Government Fiscal Assistance Trust Fund until such time as payment can be made.

(d) *Insufficient data.* Entitlement funds for any entitlement period which are withheld from payment because of insufficient data upon which to compute the entitlement, or for which payment cannot be made for nay other reason, shall remain in the State and Local Government Fiscal Assistance Trust Fund until such time as payment can be made.

§ 51.26 Reservation of funds and adjustment of entitlement.

(a) *Reservation of entitlement funds.* In order to make subsequent adjustments to an entitlement payment under this part which may be necessitated because of insufficient or erroneous data, or for any other reason, the Director shall reserve in the State and Local Government Fiscal Assistance Trust Fund such percentage, not to exceed 0.5 percent, of the total entitlement funds for any State government and all units of local government within the State for any entitlement period as in her judgment shall be necessary to insure that there will be sufficient funds available so that all recipient governments will receive their full entitlements. The reserve shall be known as the State Obligated Adjustment Reserve and amounts remaining in that reserve will accumulate until the liabilities of the Trust Fund to the recipient governments in that State are discharged or sufficiently diminished to permit an allocation.

(b) *Adjustments to entitlement payments.* (1) Adjustments to the entitlement of a recipient government during the current entitlement period will ordinarily be effected through alteration to entitlement payments for the next entitlement period, unless there is a downward adjustment which is so substantial as to make payment alterations impracticable or impossible. In such case, the Director may demand that the remaining entitlement funds by the recipient government in excess of its entitlement be immediately repaid to the Trust Fund of the Department.

(2) For entitlement periods which begin after December 31, 1976, any adjustments to increase or decrease entitlement payments of a recipient government for a particular entitlement period shall be made only if demand therefor has been made by the recipient government, or the Director, prior to the expiration of one year from the end of the entitlement period for which the adjustment is claimed.

(3) For entitlement periods which begin after December 31, 1976, any adjustments to increase or decrease entitlement payments of a recipient

government for a particular entitlement period shall be made through the State Obligated Adjustment Reserve.

(4) Adjustments made to decrease payments to a recipient government for an entitlement period ending before January 1, 1977 shall be withheld from the Obligated Adjustment Reserve established under § 51.26(a) of this part. (38 F.R. 18668)

§ 51.27 State to maintain transfers to local governments.

(a) *General rule for entitlement periods commencing on or after January 1, 1977.* The entitlement of any State government for any entitlement period beginning on or after January 1, 1977 shall be reduced by the amount (if any) by which—

(1) One-half of the aggregate amounts transferred by the State government out of its own sources during the 24-month period ending the last day of the last fiscal year for which the Bureau of the Census has relevant data, on the first day of such entitlement period, to all units of local government in such State is less than:

(2) One-half the similar aggregate amount for the 24-month period ending the day before the 24-month period described in paragraph (1) above.

For purposes of paragraph (a)(1) of this section, the amount of any reduction in the entitlement of a State government under this section for any entitlement period shall, for subsequent entitlement periods, be treated as an amount transferred by the State government in such State. The phrase "own sources" means all sources of State revenue (including debt proceeds and State's revenue sharing entitlement funds) but excluding intergovernmental revenues received from the Federal government.

(b) *Measurement of maintenance of effort.* The following formula will be applied by the Director to establish the base year intergovernmental transfers to units of local government from the State's own sources and to generally monitor the level of effort in accordance with the maintenance provisions of paragraph (a) of this section during future entitlement periods:

(1) It shall be assumed that the ratio of a State's own source intergovernmental transfers to units of local government to that State's total intergovernmental transfers to units of local government is equal to the ratio of that State's own source revenues to its total revenues. Thus, for a State in which such formula may be applied, its base year own source intergovernmental transfers to units of local government shall be assumed to equal its total intergovernmental transfers to units of local government in the base year multiplied by its own source revenue in the base year divided by its total revenues in the base year.

(2) In a State in which the formula is applied, the State's own source intergovernmental transfers to units of local government in a future entitlement period shall be assumed to equal the average of—

(i) The State's total intergovernmental transfers to units of local government during that period (or that State's fiscal year ending on or immediately prior to the end of such period) multiplied by its own source revenue in that period (or such fiscal year) divided by its total revenues in that period (or such fiscal year) and

(ii) The State's total intergovernmental transfers to units of local government during the preceding entitlement period (or that State's fiscal year ending on or immediately prior to the end of such period) multiplied by its own source revenue in that period (or such fiscal year) divided by its total revenues in that period (or such fiscal year).

(3) Therefore, in a State in which the formula is applied, maintenance (for a given entitlement period) of intergovernmental transfer effort to units of local government will be measured by the difference between that State's average aggregate intergovernmental transfers to units of local government (over the appropriate periods) as calculated by employing the method described in paragraph (b)(2) of this section and that State's own source intergovernmental transfers to units of local government in the base period as calculated by employing the method described in paragraph (b)(1) of this section.

(4) If the application of this formula during any entitlement period indicates that a State government has not maintained its intergovernmental transfer effort, i.e., should a State's intergovernmental transfers to units of local government, for a particular period, be less than transfers calculated for the base period, the difference (as defined in paragraph (b)(3) of this section) shall constitute the future indicated reduction in that State's entitlement unless such State can document to the Director that the fact or amount of nonmaintenance, as determined by application of the formula, is inaccurate.

(c) *Alternative procedure.* If the Director determines that the application of the formula set forth in paragraph (a) of this section in a particular case provides an inaccurate or unfair measurement of transfer effort, then any formula, procedure, or method deemed equitable by the Director may be utilized to measure such transfer effort for the purpose of implementing the maintenance provision.

(d) *Adjustment where State assumes responsibility for category of expenditures.* If the State government establishes to the satisfaction of the Director that since June 30, 1972, it has assumed responsibility for a category of expenditures which (before July 1, 1972) was the responsibility of local governments located in such State, then the aggregate amount taken into account under paragraph (a)(2) of this section shall be reduced to the extent that increased State government spending (out of its own sources) for such category has replaced corresponding amounts, which for the period used for the purposes of this paragraph, it transferred to units of local government.

(e) *Adjustment where new taxing powers are conferred upon local governments.* If a State establishes to the satisfaction of the Director that since June 30, 1972, one or more units of local government within such State have had conferred upon them new taxing authority, then, the aggregate amount taken into account under paragraph (a)(2) shall be reduced to the extent of the larger of—

(1) An amount equal to the amount of the taxes collected by reason of the exercise of such new taxing authority by such local governments, or

(2) An amount equal to the amount of the loss of revenue to the State by reason of such new taxing authority being conferred on such local governments. No amount shall be taken into consideration under paragraph (e)(1) of this section if such new taxing authority is an increase in the authorized rate of tax under a previously authorized kind of tax, unless the State is determined by the Director to have decreased a related State tax.

(f) *Adjustment where Federal government assumes responsibility for category of expenditures.* If in an entilement period beginning on or after January 1, 1977, a State government establishes to the satisfaction of the Director that the Federal government has assumed responsibility for a category of expenditures for which such State government transferred amounts, during all or a part of the period utilized for purposes of paragraph (a)(1) of this section, which (but for this paragraph) would be included in the aggregate amount taken into account under paragraph (a)(2), the aggregate amount shall be reduced to the extent that increased Federal government spending has replaced corresponding amounts

which such State government had transferred to units of local government.

(g) *Computation by the Office of Revenue Sharing.* The Director shall make the computation required for the determination of maintenance of effort, based on data furnished by the Bureau of the Census. The Bureau of the Census shall provide to the Office of Revenue Sharing the following data pertaining to a State's transfer of funds to units of local government for the State's appropriate fiscal year:

(1) The State's own source funds.

(2) The State's total funds.

(3) The State's own source transfers to units of local government.

(4) The State's total transfers to units of local government.

(h) *Reduction in entitlement.* If the Director has reason to believe that paragraph (a) of this section require a reduction in the entitlement of any State government for any entitlement period, the Director shall give reasonable notice and opportunity for hearing to the State. If, after a hearing it is determined that a reduction is required, the Director shall determine the amount of the reduction, the Director shall determine the amount of the reduction, notify the Governor of the affected State of the determinations and withhold from subsequent payments to such State government under this part an amount equal to the reduction.

(i) *Transfer to general fund.* An amount equal to the reduction in the entitlement of any State government which results from the application of this section (after any judicial review) shall be transferred from the Secretary's Trust Fund to the general fund of the Treasury on the day on which such reduction becomes final.

§ 51.28 Optional formula.

(a) *In general.* A State government may by law provide for the allocation of entitlement funds among the county areas, or among units of local government (other than county governments, Indian tribes, and Alaskan native villages):

(1) On the basis of the population multiplied by the general tax effort factors of such areas or units of local government; or

(2) On the basis of the population multipulied by the relative income factors of such areas or units of local government; or

(3) On the basis of a combination of those two factors. Any State which provides by law for such a variation in the allocation formula provided by subsections 108(a) or 108(b)(2) and (3) of the Act, shall notify the Director of the new law no later than 90 days before the beginning of the first entitlement period to which it is to apply. Any such law shall:

(i) Provide for allocating 100 percent of the aggregate to be allocated under subsections 108(a) or 108(b)(2) and (3) of the Act;

(ii) Apply uniformly throughout the State; and

(iii) Apply during the period beginning on the first day of the first entitlement period to which it applies and ending on Septmeber 30, 1980.

(b) *Single legislation required.* If a State government alters its county area allocation formula or its local government allocation formula, or both, such alteration may be made only once and is required to be made in the same legislative enactment.

(c) *Certification required.* Paragraph (a) of this section shall apply within a State only if the Director certifies that the State law complies with the requirements of the paragraph. The Director shall not certify any such law with respect to which she receives notification later than 30 days prior to the initial entitlement period during which it is to apply.

§ 51.29 Adjustment of data factors.

The data factors and data definitions used in computing entitlements under the Act for any entitlement period will be made available to each State government and unit of local government as soon as practicable. Each such government will be given a reasonable opportunity to question those data factors by providing factual documentation demonstrating evidence of error no later than one year from the end of the entitlement period for which the data are applicable. If the Director determines that any data factors used were erroneous, necessary adjustments will be made.

§ 51.30 Adjustment of maximum and minimum per capita entitlement; 100 percent criterion.

(a) *County area maximum and minimum per capita entitlement.* (1) *In general.* Pursuant to section 108(b)(6) of the Act, the per capita amount allocated to any county area shall be not less than 20 percent, nor more than 145 percent, of two-thirds of the amount allocated to the State under section 106 of the Act, divided by the population of that State.

(2) *One hundred forty-five percent rule.* If a county area allocation is greater than the 145-percent limit, its allocation shall be reduced to the 145-percent level and the resulting surplus shall be shared proportionately by all remaining unconstrained county areas.

(3) *Twenty-percent rule.* If, after the application of paragraph (a)(2) of this section, a county area allocation is less than the 20-percent limit, its allocation shall be increased to the 20-percent level and the resulting deficit shall be shared proportionately by all remaining unconstrained county areas.

(b) *Local government (other than a county government).* (1) *In general.* Except as provided below, the per capita amount allocated to any unit of local government (other than a county government) shall be not less than 20-percent, nor more than 145-percent, of two-thirds of the amount allocated to the State under section 106 of the Act, divided by the population of that State.

(2) *One hundred forty-five percent rule.* If a unit of local government is allocated an amount greater than the 145-percent limit, its allocation shall be reduced to that level.

(3) *Twenty-percent rule.* If a unit of local government is allocated, an amount less than the 20-percent limit, its allocation shall be increased to the lower of the 20-percent limit or 50 percent of the sum of that unit's adjusted taxes and transfers.

(4) *50-percent rule.* If a unit of local government is allocated an amount greater than 50 percent of the sum of that government's adjusted taxes and intergovernmental transfers received by it (other than entitlement funds), its allocation shall be reduced to that level.

(c) *One hundred-percent criterion.* If the amounts allocated to recipient governments of a State do not total 100 percent of the amount allocated to that State, the amount to be allocated to county areas shall be adjusted appropriately, and the allocation process shall be repeated until the amounts allocated to recipient governments of a State total 100 percent of the amount allocated to that State.

§ 51.31 Separate law enforcement officers.

(a) *Entitlement of separate law enforcement officers.* (1) The office of the separate law enforcement officer within any parish area in the State of Louisiana, other than the parish of East Baton Rouge, shall be entitled to recieve for each entitlement period beginning on or after January 1, 1977, 15 percent of the entitlement of the government of the Parish government.

(2) The office of the separate law enforcement officer within the area of the government of the parish of East Baton Rouge, shall be entitled to receive for each entitlement period, beginning on or after January 1, 1977, 7.5 percent of the entitlements of the governments of Baton Rouge, Baker and Zachary, Louisiana for each such entitlement period.

(b) *Reduction of entitlement of parish government.* (1) The governments of each parish (other than Baton Rouge, Baker and Zachary, Louisiana) shall receive for an entitlement period entitlements reduced by one-half of the amount due the separate law enforcement officer for such parish.

(2) The governments of Baton Rouge, Baker and Zachary, Louisiana shall receive, for an entitlement period, entitlements reduced by an amount equal to 3.75 percent of such government's normal entitlement.

(c) *Reduction of entitlement of State government.* The State government of Louisiana shall receive for an entitlement period an entitlement reduced by the same amount as the entitlement of the parishes (including Baton Rouge, Baker and Zachary).

(d) *Entitlement of the Parish of Orleans.* The provisions of paragraph (a), (b), and (c) of this section shall not apply to the entitlements of the Parish of Orleans. The Parish of New Orleans shall be entitled to receive for each entitlement period beginning after December 31, 1976 an additional amount equal to 7.5 percent of the amount it is otherwise entitled to receive.

§ 51.32 Population of Indian tribes and Alaskan native villages.

(a) *In general.* The population of an Indian tribe or Alaskan native village is the resident population as of July 1, 1977, as determined by the Bureau of Indian Affairs.

(b) *Indian tribes.* For Indian tribes, the resident population is the number of Indians living within the boundaries of the tribal reservation, plus the number of Indians living on trust land (including public domain allotments) adjacent to the reservation and pertaining to the tribe. The adjacent trust land may be tribally owned or individually owned. Resident non-Indian members of families with an Indian head or spouse are also included in the population estimate.

(c) *Alaskan native villages.* For Alaskan native villages, the resident population is the number of Indians, Aleuts and Eskimos living within the boundaries of the village. Resident non-Alaskan native members of families with an Alaskan native head or spouse are also included in the population estimate.

Subpart D—Prohibitions and Restrictions on Use of Funds

§ 51.40 Matching funds.

The prohibition against the use of entitlement funds for matching purposes has been repealed. After January 1, 1977, a recipient government may expend its entitlement funds for this purpose without restriction.

§ 51.41 Permissible expenditures for units of local government.

The priority expenditure restrictions on the use of entitlement funds by units of local government have been repealed. After January 1, 1977, a recipient government may expend its entitlement funds for any purpose permissible under State or local law.

§ 51.42 Wage rate and labor standards.

(a) *Construction laborers and mechanics.* A recipient government shall require that all laborers and mechanics employed by contractors or subcontractors in the performance of work on any construction, renovation or repair project costing in excess of $2,000 and of which 25% or more of the cost is paid out of its entitlement funds:

(1) Will be paid at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis–Bacon Act, as amended (40 U.S.C. 276a—276a–5); and

(2) Will be covered by labor standards specified by the Secretary of Labor pursuant to 29 CFR parts 1, 3, 5, and 7.

(b) *Wage rates.* In projects to which the Davis-Bacon Act standards are applicable, the recipient government must ascertain the U.S. Department of Labor's wage rate determination for each intended project and insure that such wage rates are incorporated in the contract specifications. Wage rate determinations may be obtained by filing a Standard Form 308 with the Employment Standards Administration of the applicable regional Office of the U.S. Department of Labor at least 30 days before the invitation for bids, or in the case of construction covered by general wage rate determination, the appropriate rate may be obtained from the **Federal Register.**

(c) *Government Employees.* A recipient government which employs individuals whose wages are paid in whole or in part from entitlement funds must pay wages which are not lower than the prevailing rates of pay for persons employed in similar public occupations by the same employer. However, this subsection shall apply with respect to employees in any category only if 25% or more of the wages of all employees of the recipient government in such category are paid from the trust fund established by it under § 51.100(a) of this part.

§ 51.43 Restriction on expenditures by Indian tribes and Alaskan native villages.

(a) *In general.* Indian tribes and Alaskan native villages as defined in § 51.2(b) of this part, are required to expend entitlement funds for the benefit of members of the tribe or village residing in the county area from which the allocation of entitlement funds was originally made.

(b) *Extension into two or more county areas.* Indian tribes and Alaskan native villages which extend into two or more county areas may expend their entitlement funds for the benefit of members of the tribe or village in any or all of those county areas provided members of the tribe or village are not excluded from these benefits solely on the basis of their residence in a particular county area.

(c) *Effect of Subpart E.* Expenditures which are made in accordance with paragraphs (a) and (b) of this section will not constitute a failure to comply with the requirements of Subpart E of this part.

§ 51.44 Lobbying.

(a) *In general.* Entitlement funds may not be used by any State or unit of local government for the purpose of lobbying (as defined in § 51.2(k) of this part) concerning the provisions of the Act.

(b) *Activities prohibited.* Prohibited lobbying activities include, but are not limited, to the following:

(1) Personal solicitation of individual members of a legislative body to influence legislation regarding the General Revenue Sharing Program by personal interview, letter, financial contributions, and other means.

(2) Employment of a lobbyist to engage in proscribed activities.

(c) *Activities permitted.* Without violation of this section, a recipient government may:

(1) Use revenue sharing funds to pay dues to national or State organizations.

(2) Use revenue sharing funds to attempt to influence public opinion or to convey opinions and judgments to the public regarding provisions of the Act, by publication, distribution of books, pamphlets and other writings.

§ 51.45 Use of entitlement funds for debt retirement.

Where the actual expenditures of the proceeds of indebtedness were made after January 1, 1977, the repayment of the indebtedess with entitlement funds is permissible, provided that the expenditures from the proceeds of the indebtedness were made in compliance with the restrictions and prohibitions set forth in Subparts D and E of this part.

Subpart E—Nondiscrimination by States and Local Governments Receiving Entitlement Funds

§ 51.50 Purpose.

The purpose of this subpart is to effectuate section 122 of the Act which provides that no person in the United States shall, on the grounds of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a recipient government. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to a qualified handicapped individual, as provided in section 504 of the Rehabilitation Act of 1973, or any prohibition against discrimination on the basis of religion (as modified by the exemptions and exclusions contained in the Civil Rights of 1964, as amended or the Civil Rights Act of 1968), shall also apply to any such program or activity.

§ 51.51 Definitions.

Unless the context provides otherwise, as used in this subpart, the term:

(a) "Attorney General" means the Attorney General, the Assistant Attorney General for Civil Rights or a designate.

(b) "Complaint" means an allegation submitted in writing to the ORS which sets forth the nature of the discrimination alleged and the specific facts upon which the allegation is based. The complaint may be filed by an individual or organization which believes that a recipient government has or is committing discrimination prohibited by the provisions of this subpart.

(c) "Compliance review" means a review of a recipient government's employment practices, facilities, or delivery of services for the purpose of ascertaining compliance with the provisions of this subpart.

(d) "Determination" means the decision made and issued by the Director after a recipient government has demonstrated compliance, or failed to enter into compliance, following receipt of a notice of noncompliance after a finding or a holding. The determination is to the effect that a recipient government is in compliance or in noncompliance with the provisions of this subpart.

(e) "Facility" includes all or any part of structures, equipment, or other real or personal property or interests therein.

(f) "Finding" means the decision made and issued by the Director after the completion of an investigation of alleged noncompliance by a recipient government with the provisions of this subpart or after a compliance review. The finding states that a recipient government is more likely than not to have violated a provision of this subpart.

(g) "Funded" means funds have been or are being made available for expenditure in, or substantially benefited, a program or activity of the recipient government or a secondary recipient.

(h) "Holding" means any finding of fact or conclusion of law by a Federal court, a State court, or a Federal administrative law judge (after notice and opportunity for a hearing), which has been litigated, pertains to a recipient government and is to the effect that there has been exclusion, denial, or discrimination on the grounds of race, color, national origin, sex, age, handicapped status or religion prohibited under section 122 of the Act. The holding is conclusive as to the issue of discrimination.

(i) "Investigation" means fact-finding efforts made after receiving an allegation that a recipient government has failed to comply with the provisions of this subpart, or other information relating to possible violation of the provisions of the Act.

(j) "Noncompliance" means the failure of a recipient government to comply with the provisions of this subpart.

(k) "Notification of noncompliance" means the notification given to a recipient government after issuance of a finding or receipt of a holding.

(l) "Program or activity" means the operations of the agency or organizational unit of a recipient government or the operations or organizational unit of a secondary recipient (examples include, but are not limited to a police department, department of corrections, health department, or a division of a public or private corporation).

§ 51.52 Discrimination prohibited.

(a) *In general.* No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity of a recipient government. Also prohibited is discrimination:

(1) On the basis of age under the Age Discrimination Act of 1975, effective July 1, 1979 (hereinafter referred to as discrimination on the basis of age);

(2) With respect to a qualified handicapped individual, as provided in section 504 of the Rehabilitation Act of 1973, as amended, (hereinafter referred to as discrimination on the basis of handicapped status), or

(3) On the basis of religion, as modified by exemptions and exclusions contained in the Civil Rights Act of 1964, as amended or the Civil Rights Act of 1968, (hereinafter referred to as discrimination on the basis of religion).

(b) *Specific discriminatory actions prohibited.* (1) Except as otherwise provided in § 51.55(c)(1) and other sections in this subpart with respect to services, a recipient government shall not on the ground of race, color, national origin, sex, handicapped status or age:

(i) Deny any service or other benefit provided.

(ii) Provide any service or other benefit, which is not equal to, or is provided in a different form, than that provided to others.

(iii) Subject any person to segregated or separate treatment in any facility or in any matter or process related to receipt of any service or benefit.

(iv) Restrict in any way the enjoyment of any advantage or privilege enjoyed by others receiving any service or benefit.

(v) Treat an individual differently from others in determining whether the individual satisfies any admission, enrollment, eligibility, membership, or other requirement or condition which individuals must meet in order to be provided any service or other benefit.

(vi) Determine the types of services, or other benefits or facilities which will be provided or the class of individuals to whom, or the situation in which, such services or other benefits or facilities will be provided by utilizing criteria or methods of administration which have the effect of:

(A) Subjecting individuals to discrimination;

(B) Perpetuating the results of past discrimination; or

(C) Defeating or substantially impairing the accomplishment of the objectives of the programs or activities with respect to individuals of a particular race, color, national origin, and sex, handicapped status or age.

(2) With respect to planning and advisory boards, a recipient government shall not on the ground of race, color, national origin, sex, handicapped status, or religion, deny any person an equal opportunity to participate as an appointed member of planning or advisory bodies in connection with the disposition of entitlement funds.

(3) With respect to employment, a recipient government shall not utilize criteria or methods of administration that have the effect of:

(i) Subjecting individuals to discrimination on the basis of race,

color, national origin, sex, handicapped status, or religion in any program or activity.

(ii) Perpetuating the results of past discriminatory practices.

(iii) Defeating or substantially impairing the accomplishment of the objectives of the program or activities with respect to individuals of a particular race, color, national origin, sex, age, handicapped status, or religion.

(4) With respect to facilities, a recipient government shall not on the grounds of race, color, national origin, sex, age, or handicapped status, except as provided in § 51.55 and other sections of this subpart, make selections of site or location of facilities which have the effect of:

(i) Excluding individuals from such facilities.

(ii) Denying the individuals the benefits of such facilities.

(iii) Subjecting individuals using the facilities to discrimination.

(5) A recipient government shall not intimidate, threaten, coerce, or in any way retaliate against any person who files a complaint against the government alleging a violation of the provisions of this subpart, or who assists the ORS in an investigation, or any other proceedings under this subpart.

(6) A recipient government shall not use any selection device, including, but not limited to, a minimum height or weight requirement or physical agility test which operates to disproportionately exclude members of a protected class, is a violation of this subpart, unless it is validated pursuant to the Uniform Guidelines on Employee Selection Procedures.

(7) The enumeration of specific forms of prohibited discrimination in this paragraph does not limit the generality of the prohibition in paragraph (a) of this section and should not be considered all inclusive.

(c) *Exemptions.* The provisions of paragraphs (a) and (b) concerning prohibited discrimination shall not apply:

(1) Where a recipient government demonstrates by clear and convincing evidence that a program or activity, with respect to which discrimination is alleged, is not funded in whole or in part with entitlement funds.

(2) To construction projects commenced prior to January 1, 1977, with respect to discrimination on the basis of handicapped status, except as provided in Section 51.55(k)(11). A construction project shall be deemed to have commenced when the recipient government has obligated itself by contract for the physical construction of the project or of any substantial portion of the project.

§ 51.53 Employment discrimination.

(a) *Employment practices.* In general a recipient government shall not discriminate on the grounds of race, color, national origin, sex or religion in the following specific activities:

(1) Recruitment, advertising, and the processing of applications for employment;

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

(3) Setting rates of pay or any other form of compensation and changes in compensation;

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

(5) Granting leaves of absence, sick leave, or other leave;

(6) Providing fringe benefits available by virtue of employment, whether or not administered by the recipient government;

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

(8) Employer sponsored activities, including social recreational programs; and

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

(b) *Uniform guidelines on employee selection procedures.* The Equal Employment Opportunity Commission (EEOC), the Office of Personnel Management, the Department of Justice, the Department of Labor and the Department of Treasury, in carrying out their responsibilities in ensuring compliance with Federal equal employment opportunity law, have adopted Uniform Guidelines on Employee Selection Procedures to assist in establishing and maintaining equal employment opportunities. These regulations are in 29 CFR Part 1607; 5 CFR 300.103(c); 990–1 (Book 3) of the Federal Personnel Manual; 28 CFR 50.14, and 41 CFR 60.3. These Guidelines, among other things, recognize the unlawfulness of the use of any employee selection procedures (including tests and minimum education levels) which disqualify a disproportionate number of persons on grounds of race, color, religion, sex or national origin (not handicapped status or age) and which have not been validated or otherwise justified in accordance with Federal law. Recipient governments shall use selection procedures that comply with the provisions of the guidelines, which are attached as appendix A to this subpart.

(c) *Recruitment practices of recipient governments.* Recipient governments are encouraged to analyze their recruitment practices to determine whether they are making information about job opportunities equally available to minority groups and women. Where racial, ethnic or sex groups are being or have been denied employment opportunities, or are underutilized in a job classification or classifications, recruiting procedures designed to attract members of racial, ethnic or sex groups that have been denied employment opportunities shall be required to comply with these regulations.

(d) *Pre-employment inquiries.* Except in those limited instances where religion, sex or national origin are bona fide occupational qualifications (B.F.O.Q.) reasonably necessary for the performance or qualification for a particular job, a recipient shall not inquire of an applicant for employment concerning the applicant's race, color, national origin, sex, or religion. A recipient government should review its employment practices to insure that such information is not elicited from applicants for employment either directly, or by such indirect means as photographs, place of birth, citizenship (if used as a pretext for prohibited discrimination), organizational membership or activities, and arrest records.

(e) *Self-review.* Recipient governments should conduct continuing reviews of their programs or activities to determine if employee selection or promotional policies (or lack thereof) directly or indirectly have the effect of denying equal employment opportunity on the basis of race, color, national origin, sex or religion.

§ 51.54 Employment discrimination on the basis of sex.

The EEOC has adopted guidelines on employment discrimination on the basis of sex (29 CFR Part 1604). These guidelines provide practical assistance to enable recipient governments to bring themselves into compliance with Federal law. Recipient governments shall comply with the provisions of these Guidelines, which are adopted by the ORS and are attached as appendix B to this subpart.

§ 51.55 Discrimination with respect to a qualified handicapped individual.

(a) *Definitions.* As used in this section the phrase:

(1) "Handicapped individual" means any person who has a physical or

mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(2) "Physical or mental impairment" means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychlogical disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, concer, heart disease, diabetes, mental retardation, emotional illness, drug addiction and alcoholism.

(3) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) "Has a record of such an impairment" means has a history of, or has been incorrectly classified as having, a mental or physical impairment that substantially limits one or more major life activities.

(5) "Is regarded as having an impairment" means (i) has a physical or mental impairment that does not substantially limit major life activities, but is treated by a recipient government as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) has none of the impairments defined in paragraph (a) (1) of this section but is treated by a recipient government as having such impairment.

(6) *Qualified handicapped individual.* "Qualified handicapped individual" means (i) with respect to employment, a handicapped individual who, with reasonable accommodation, can perform the essential functions of the job in question; and (ii) with respect to services, a handicapped individual who meets the essential eligibility requirements for the receipt of such services.

(b) *General prohibitions with respect to discrimination against a qualified handicapped individual.* (1) Those general prohibitions described in § 51.52(b) of this subpart, also apply to discrimination against a handicapped individual, with the exception of §§ 51.52(b)(1)(ii), (iii) and (v). In addition, a recipient government shall:

(i) Not exclude a qualified handicapped individual from participation in programs or activities open to the general public, regardless of the availability of permissibly separate or different programs or activities designed especially for the handicapped;

(ii) Administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped individuals;

(iii) Take appropriate steps to ensure that communications with applicants, employees, beneficiaries, and the general public are available to persons with impaired vision or hearing;

(iv) Take the appropriate steps to assure that the public hearings required under §§ 51.13 and 51.14 of this part are accessible to qualified handicapped individuals and that notice of such hearings is made available to individuals with impaired vision and hearing;

(v) Provide appropriate auxiliary aids to individuals with impaired sensory, manual or speaking skills, where necessary to prevent a qualified handicapped individual from being denied the benefits of, excluded from participation in or subjected to discrimination under a program or activity;

(vi) Not provide a qualified handicapped individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(vii) Not provide a different or separate aid, benefit, or service to qualified handicapped individuals or to any class of qualified handicapped individuals than is provided to others unless such action is necessary to provide qualifed handicapped individuals with aid, benefits, or services that are as effective as those provided to others;

(viii) Not aid or perpetuate discrimination against a qualifed handicapped individual by providing entitlement funds to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient government's program;

(ix) A recipient government may not, directly or through contractual or other arrangements, utilize criteria or methods of administration that:

(A) Have the effect of subjecting qualified handicapped individuals to discrimination on the basis of their handicaps;

(B) Have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient government's program with respect to handicapped individuals; or

(C) Perpetuate the discrimination of a secondary recipient if both recipients are subject to common administrative control or are agencies of the same larger recipient government;

(x) Not use its zoning authority in a manner that will have the effect of subjecting qualified handicapped individuals to discrimination on the basis of handicap;

(2) The exclusion of nonhandicapped individuals from the benefits of a program limited by Federal statute or executive order to handicapped individuals, or the exclusion of a specific class of handicapped individuals from a program limited by Federal statute or executive order to a different class of handicapped individuals, is not prohibited by this section.

(3) For purposes of this section, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped individuals. They must, however, afford qualified handicapped individuals equal opportunity to obtain the identical result, or achievement in the most integrated setting appropriate to the individual's needs.

(4) The enforcement provisions contained in this subpart are applicable to violations of the provisions of this section.

(c) *Self-evaluation.* (1) A recipient government shall, within one year of the effective date of this section:

(i) Evaluate with the assistance of interested individuals, including handicapped individuals or organizations representing handicapped individuals, its current policies and practices and their effects that do not or may not meet the requirements of this section;

(ii) Modify, after consultation with interested individuals, including handicapped individuals or organizations representing handicapped individuals, any policies and practices that do not meet the requirements of this section; and

(iii) Take appropriate remedial steps, after consultation with interested individuals, including handicapped individuals or organizations representing handicapped individuals, to eliminate the effects of any discrimination that resulted from

adherence to these discriminatory policies and practices.

(2) A recipient government that employs the equivalent of fifteen employees on a full-time basis shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested individuals consulted, (ii) a description of policies and practices examined and problems identified, and (iii) a description of modifications made and remedial steps taken.

(d) *Designation of responsible employee and adoption of grievance procedures.* (1) *Designation of responsible employee.* A recipient government that employs the equivalent of fifteen or more employees on a full-time basis shall designate at least one person to coordinate its efforts to comply with this section.

(2) *Adoption of grievance procedures.* A recipient government that employs the equivalent of fifteen or more employees on a full-time basis shall adopt a grievance procedure that incorporates appropriate due process standards and that provides for the prompt and equitable resolution of complaints alleging any action prohibited by this section. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

(e) *Notice.* (1) A recipient government that employs the equivalent of fifteen or more employees on a full-time basis shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient government, that it does not discriminate on the basis of handicapped status in violation of section 122 and this section. The notification shall state, where appropriate, that the recipient government does not discriminate on the basis of handicapped status in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 51.55(e). A recipient government shall make the initial notification required by this paragraph within 90 days of the effective date of this section. Methods of initial and continuing notification may include the use of public service radio and television announcements, the posting of notices, publication in newspapers and magazines, placement of notices in recipient governments' publications, and distribution of memoranda or other written and taped communications.

(2) If a recipient government publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, or the general public, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient government may meet the requirements of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(f) *Administrative requirements for small recipient governments.* The Director may require any recipient government which employs the equivalent of fifteen or fewer full-time employees, to comply with §§ 51.55 (d), (e) and (f), in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient government to provide benefits or services.

(g) *Employment discrimination against a qualified handicapped individual.* (1) A recipient government shall:

(i) Not discriminate against a qualified handicapped individual in employment in any program or activity.

(ii) Not participate in a contractural or other relationship that has the effect of subjecting a qualified handicapped applicant or employee to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient government, and with organizations providing training and apprenticeship programs.

(iii) Take appropriate steps to ensure that communications with its applicants and employees are available to persons with impaired vision and hearing.

(iv) Not discriminate against a qualified handicapped individual in the following specific activities:

(A) Recruitment, advertising, and the processing of applications for employment;

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

(C) Setting 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 senority lists;

(E) Granting leaves of absence, sick leave, or any other leave;

(F) Providing fringe benefits available by virtue of employment, whether or not administered by the recipient government;

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

(H) Employer sponsored activities, including social or recreational programs; and

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

(2) A recipient government's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is party.

(3) A recipient government's obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped individuals than for nonhandicapped individuals.

(h) *Reasonable accommodation.* (1) A recipient government shall make reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee unless the recipient government can demonstrate that the accommodation would impose an undue hardship on a operation of its program.

(2) Reasonable accommodation may include:

(i) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(ii) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(3) In determining, pursuant to paragraph (h)(1) of this section, whether an accommodation would impose an undue hardship on the operation of a recipient government's program, factors to be considered include:

(i) The overall size of the recipient government's operations with respect to number of employees, number and type of facilities, and size of budget;

(ii) The composition and structure of the specific program or activity and the structure of the work force required; and

(iii) The nature and cost of the accommodation needed.

(4) A recipient government may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

(i) *Employment criteria and policies.* (1) A recipient government may not use any employment test, selection criterion or policy, that excludes or tends to exclude from consideration for employment a handicapped individual or any class of handicapped individuals unless:

(i) The test, selection criterion or policy as used by the recipient, is shown to be directly related to the essential functions of the position in question, and

(ii) Alternative tests, criteria or policies that do not exclude or tend to exclude as many handicapped individuals are shown to be not available.

(2) A recipient government shall select and administer tests concerning employment so as to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test is intended to measure).

(3) If a recipient government has established a test, selection criterion or policy that explicitly or implicitly excludes or tends to exclude a class of handicapped individuals from a particular job, and cannot establish that the class as a whole is unqualified to perform the job, the recipient government shall individually evaluate each such individual who applies for the job to determine whether he or she can perform the essential functions of the job in question despite the handicap. As part of the determination, the recipient government shall also decide whether such applicant can be made qualified to perform the essential functions of the job in question through reasonable accommodation without undue hardship, as provided in § 51.55(i) of the part.

(j) *Preemployment inquiries.* (1) Except as provided in paragraphs (j) (2) and (3) of this section, a recipient government may not conduct a preemployment medical examination or make preemployment inquiry of an applicant as to whether the applicant is a handicapped individual or as to the nature of the severity of a handicap. A recipient government may, however, make preemployment inquiry into an applicant's ability to perform the essential functions of the job.

(2) When a recipient government is taking remedial action to correct the effects of past discrimination, when a recipient government is taking voluntary action to overcome the effects of conditions that resulted in limited participation in a program or activity, or when a recipient government is taking affirmative action, the recipient government may invite applicants for employment to indicate whether and to what extent they are handicapped, provided that:

(i) The recipient government states clearly on any written questionnaire used for this purpose or makes clear orally, if no written questionnaire is used, that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(ii) The recipient government states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (j)(4) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this section.

(3) Nothing in this section shall prohibit a recipient government from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: (i) all entering employees are subjected to such an examination regardless of handicap, and (ii) the results of such an examination are used only in accordance with the requirements of this section.

(4) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms and shall be accorded confidentiality as used for medical records, except that:

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

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

(iii) Government officials investigating compliance with the Act shall be provided relevant information upon request.

(k) *Program accessibility.* (1) *Discrimination prohibited.* No qualified handicapped individual shall, because a recipient government's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity of a recipient government, which government receives entitlement funds.

(2) *Existing facilities.* (i) *Program accessibility.* A recipient government shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped individuals. Where structural changes are necessary to make programs or activities in existing facilities accessible, such changes shall be made as soon as practicable, but in no event later than three years after the effective date of this regulation.

(ii) *Methods.* A recipient government may comply with the requirements of paragraph (j)(1) of this section through such means as redesign of equipment, reassignemnt of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of paragraph (j)(7) of this section, or any other methods that result in making its programs or activities accessible to handicapped individuals. A recipient government is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (j)(1) of this section. In choosing among available methods for meeting the requirements of paragraph (j)(1) of this sectin, a recipient government shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(3) *Exception for small recipient governments.* If a recipient government which employs the equivalent of fifteen or fewer employers on a full-time basis determines, after consultation with a handicapped individual seeking a health, welfare or social service, that there is no method of complying with paragraph (k)(1) of this section other than making a significant alteration in its existing facilities, that government may, as an alternative, refer the handicapped individual to other providers of those services that are

accessible at no additional cost to the handicapped individual. Examples of other providers of those services are States and larger recipient governments.

(4) *Time periods.* (i) *General.* Except as otherwise provided in paragraph (j)(4)(ii) of this section, where structural changes are not required, a recipient government shall comply with the requirements of paragraph (j)(1) of this section within sixty days of the effective date of § 51.55. Where structural changes in facilities are necessary, such changes shall be made as expeditiously as possible, but in any event within three years of the effective date of this section.

(ii) *Transportation systems.* With respect to transportation systems, a recipient government shall comply with the time periods prescribed in regulations issued by the Department of Transportation (44 F.R. 31443) where structural changes in facilities are necessary.

(5) *Transition plan.* In the event that structural changes to facilities are necessary to comply with the requirments of paragraph (j)(1) of this section, a recipient government shall develop, within one year of the effective date of this section, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested individuals, including handicapped individuals or organizations representing handicapped individuals. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(i) Identify physical obstacles in the recipient government's facilities that limit the accessibility of its program or activity to handicapped individuals;

(ii) Describe in detail the methods that will be used to made the facilities accessible;

(iii) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period for the transition is longer than one year, identify steps that will be taken during each year of the transition period; and

(iv) Indicate the person responsible for implementation of the plan.

(6) *Notice.* The recipient government shall adopt and implement procedures to require that interested individuals, including individuals with impaired vision or hearing, can obtain information as to the existence and location of particular services, activities, and facilities that are accessible to and useable by handicapped individuals.

(7) *New construction.* Facilities financed with entitlement funds, the construction of which commenced on or after January 1, 1977, shall be designed and constructed so as to be readily accessible to and useable by handicapped individuals.

(8) *Alterations.* Alterations to existing facilities, which alterations are funded with entitlement funds and commenced on or after January 1, 1977, shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and useable by handicapped individuals.

(9) *Leased facilities.* Facilities newly leased by a recipient government after the effective date of this section, shall be classified as new facilities. Those facilities are subject to the same accessibility requirements as facilities constructed by recipient governments and are required to be made accessible in accordance with the provisions of this section.

(10) *American National Standards Institute Accessibility Standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A 117.1–1961 (R1971),* which is incorporated by reference in this subpart, shall constitute compliance with paragraphs (j)(1) and (2) of this section. A recipient government may use other standards or methods, if the government establishes that equivalent or better access to the facility or part of the facility is thereby provided.

(11) *Exception for construction projects commenced prior to January 1, 1977.* The provisions of this subsection do not apply to buildings or construction projects, including those funded with revenue sharing funds and commenced or completed prior to January 1, 1977, unless it is determined that programs or activities funded in whole or in part with revenue sharing funds are conducted within or make use of such facilities, in which case, those programs and activities must be readily accessible to and usable by handicapped individuals as described in paragraphs (j)(2) (i) and (ii) of this section.

(12) *"Commencement of construction" defined.* A construction project shall be deemed to have commenced when the recipient government has obligated itself by contract for the physical construction of the project or any substantial portion of the project.

*Copies obtainable from American National Standard Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

§ 51.56 Discrimination on the basis of age.

(a) *Purpose.* This regulation sets forth the prohibition against discrimination on the basis of age in programs or activities of recipient governments as required by the Age Discrimination Act of 1975. Recipient governments may, however, continue to use certain age distinctions and factors other than age which meet the requirements set forth in this section.

(b) *Definitions.* (1) "Age Discrimination Act" means the Age Discrimination Act of 1975, as amended, (42 U.S.C. 6101, Title III of Pub. L. 94–135).

(2) "Action" means any act, activity, policy rule, standard or method of administration.

(3) "Age" means how old a person is or the number of elapsed years from the date of a person's birth.

(4) "Age distinction" means any action using age or an age-related term.

(5) "Age-related term" means a word or words which necessarily implies a particular age or range of ages (for example, "children," "adult," "older persons," but not "student").

(6) "Claim" means a written statement, alleging discrimination on the basis of age by a recipient government, that is referred to mediation.

(7) "FMCS" means the Federal Mediation and Conciliation Service.

(8) "Mediation" means the process by which an impartial mediator through the FMCS attempts to resolve a claim of discrimination on the basis of age, on which a complaint is based.

(c) *Discrimination prohibited.* (1) *General rule.* Those general prohibitions described in § 51.52 of this subpart also apply to discrimination on the basis of age, except that § 51.52(b)(3) containing general prohibitions against employment discrimination shall not apply.

(2) *Specific rules.* A recipient government may not, in any program or activity, use age distinctions or take any other actions, which have the effect of causing age discrimination prohibited under section 51.52 (other than § 51.52(b)(3)).

(3) *Employment discrimination not covered.* The prohibitions contained in this section shall not apply to the employment practices of recipient governments or their secondary recipients.

(d) *Exceptions to the rules against age discrimination.* (1) *Definitions.* For purposes of this subsection, the terms "normal operation" and "statutory objective" shall have the following meaning:

(i) "Normal operation" means the operation of a program or activity

without significant changes that would impair its ability to meet its objectives.

(ii) "Statutory objective" means any purpose of a program or activity expressly stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected general purpose legislative body.

(2) *Normal operation or statutory objective of any program or activity.* A recipient government is permitted to take action, otherwise prohibited by paragraphs (c) (1) and (2) of this section, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, thereby, complying with the following four-part test:

(i) Age is used as a measure or approximation of one or more non-age characteristic; and

(ii) The other non-age characteristic(s) are measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(iii) The other non-age characteristic(s) can be reasonably measured or approximated by the use of age; and

(iv) The other non-age characteristic(s) are impractical to measure directly on an individual basis.

(3) *Reasonable factors other than age.* A recipient government may take an action otherwise prohibited by sections (c) (1) and (2) of this section, which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages, provided that the other factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(4) *Affirmative action.* If a recipient government or a secondary recipient operates a program or activity which serves the elderly or children in addition to persons of other ages, and provides special benefits to the elderly or to children, the provision of these benefits shall be presumed to be voluntary affirmative action, permissible under this section, provided that it does not have the effect of excluding otherwise eligible persons from participation in the program.

(5) *Age distinction contained in Federal, State, or local statute or ordinance.* The provisions of this section shall not apply to an age distinction contained in that part of a Federal, State or local statute or ordinance adopted by an elected general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(e) *Burden of proof.* The burden of proving that an age distinction or other action falls within the exceptions outlined in §§ 51.56(d) (2), (3) and (4) is on the recipient government.

(f) *Self-evaluation.* (1) A recipient government employing the equivalent of 15 or more full-time employees shall complete a one-time written self-evaluation of its compliance under the Act within 18 months of the effective date of this section.

(2) In its self-evaluation, the recipient government shall identify all age distinctions it uses, and justify age distinctions it imposes on programs or activities.

(3) A recipient government shall take corrective action whenever a self-evaluation indicates noncompliance with these regulations.

(4) Each recipient government shall make the self-evaluation available on request to the Director and to the public for a period of three years following its completion.

(g) *Enforcement generally.* Except as otherwise provided in this section, the enforcement provisions contained in this subpart shall be used to effectuate compliance with the provisions of this section.

(h) *Mediation alternative.* (1) Any individual who believes that anyone has been subjected to discrimination on the basis of age may file an administrative complaint with the Director as provided in § 51.61(a) of this subpart. However, such individual may, as an alternative, elect to have the claim(s) of discrimination on which the complaint is based referred by the Director for mediation by the Federal Mediation and Conciliation Service (EMCS).

(2) Within 5 days of receipt of a claim of age discrimination, the Director shall notify the claimant of the alternative of mediation and request the claimant to notify the ORS whether mediation of the claim of age discrimination is elected.

(3) If mediation is elected, the claimant shall personally or by representative notify the Director of the ORS in writing of such election. The notice shall set forth the facts upon which the claim of age discrimination by a recipient government is based. The Director shall refer the claim to FMCS within 5 days of receipt of the notification of the election of mediation, provided that she has determined that the claim is within the jurisdiction of this section and contains all information necessary for referral to FMCS.

(4) The Director shall advise the chief executive officer of the recipient government of any referral to the FMCS. Both the individual filing the claim and the recipient government against whom discrimination is alleged shall participate in the mediation process to the extent necessary to reach an agreement or make an informed judgment that an agreement is not possible. There must be at least one meeting with the mediator before the Director will accept a judgment that an agreement is not possible. However, the recipient government and the claimant need not meet with the mediator at the same time.

(5) If the claimant and the recipient government reach an agreement, the mediator shall prepare a written statement of the agreement for the signature of the claimant and the chief executive officer of the recipient government. The mediator shall send a signed copy of the agreement to the Director. The Director will take no further action on the claim, unless she is notified that the agreement has been breached, in which case the claim will be treated as a complaint pursuant to section 51.61 of this subpart.

(6) The mediation process shall be limited to a maximum of 60 days after the claimant notifies the Director of the election of the mediation process. Mediation ends if:

(i) 60 days elapse from the time the Director receives notice from the claimant;

(ii) Prior to the end of that 60-day period, an agreement is reached; or

(iii) Prior to the end of the 60-day period, the mediator determines that an agreement cannot be reached.

(7) The mediator shall return unresolved claims to the Director, who shall upon receipt, consider such unresolved claims to be administrative complaints to be processed in accordance with the procedures set forth in § 51.61(a) of this subpart.

(8) The mediator shall protect the confidentiality of all information obtained in the course of the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained in the course of the mediation process without prior approval of the head of the FMCS.

(9) Age discrimination claims which also allege other bases of discrimination, such as sex or race, will, at the election of the complainant, be mediated. All bases or allegations of discrimination will be submitted to mediation. If the mediation process fails,

the entire claim will be processed as a complaint under § 51.61 of this subpart.

§ 51.57 Discrimination on the basis of national origin.

The EEOC has adopted Guidelines on discrimination on the basis of national origin (29 CFR part 1606). These Guidelines provide practical assistance to enable recipient governments to bring themselves into compliance with Federal law. Recipient governments shall comply with the provisions of these Guidelines, which are adopted by the ORS and are attached as appendix D to this subpart.

§ 51.58 Discrimination on the basis of religion.

(a) *In general.* Any prohibition against discrimination on the basis of religion, or any exclusion or exemption from such discrimination, as provided in the Civil Rights Act of 1964 or title VIII of the Act of April 1968 (hereafter referred to as the Civil Rights Act of 1968), shall apply to any program or activity of a recipient government which receives entitlement funds under the Act.

(b) *EEOC Guidelines.* The EEOC has adopted Guidelines on discrimination on the basis of religion (29 CFR part 1605). These Guidelines provide practical assistance to enable recipient governments to bring themselves into compliance with Federal law. Recipient governments shall comply with the provisions of these Guidelines, which are adopted by the ORS and are attached as appendix E to this subpart.

§ 51.59 Assurances required.

(a) *General.* In order to qualify for any payment of entitlement funds for any entitlement period, each Governor of a State or each chief executive officer of a unit of local government shall, prior to the beginning of each entitlement period, execute to the satisfaction of the Director an assurance that all programs and activities of a recipient government will be conducted in compliance with the requirements of this subpart. The chief executive officer is also required to assure that in the event a Federal or State court or Federal administrative law judge makes a holding as defined in § 51.51(j) of this subpart against the recipient government, such recipient government will forward a copy of the holding to the Director within 10 days of receipts by the recipient governments. Assurances required under this paragraph shall be in such form and detail as prescribed by the Director.

(b) *Constructive waiver of entitlement.* The failure of a recipient government to execute or fulfill the assurance requirements of this subpart, shall result in the determination that one or more of the entitlement payments to the recipient government for a particular entitlement period is constructively waived pursuant to § 51.25(b) of this part. The constructive waiver shall not be subject to the procedures for effecting compliance set forth in this subpart.

§ 51.60 Compliance information and reports.

(a) *Access to sources of information.* Each recipient government shall permit access by authorized representatives of the ORS and the Department of Justice during normal business hours to such of its facilities, books, records, accounts, personnel, and other sources on information as may be relevant to a determination of whether the receipient government is complying with this subpart. Where any information required of a recipient government is in the exclusive possession of any other agency, institution, or person, and such agency, institution, or person fails or refuses to furnish this information to the ORS or its authorized representatives, the responsibility for providing such information shall remain with the recipient government.

(b) *Compliance reports.* Each recipient government shall keep such records and submit on request of the Director timely, complete and accurate compliance reports at such times, in such form, and containing such information, as the Director may determine to be necessary or useful to ascertain whether the recipient government has complied or is complying with the requirements of the subpart. Recipient governments shall make available on request of ORS officials, racial, ethnic, male/female, and national origin data showing the extent to which minorities and females will be beneficiaries of entitlement funds. The recipient government shall also make available on request similar data concerning age distinctions and handicapped status In the case of any program under which a primary recipient government extends or will extend entitlement funds to any secondary recipient, such secondary recipient shall submit such compliance reports to the primary recipient as may be necessary or useful to enable the primary recipient to carry out its obligations as a recipient government under this subpart. Each recipient government shall identify, on request of the ORS, any State or local agency which has been legally authorized to monitor its civil rights compliance activities.

(c) *Constructive Waiver of entitlement.* The failure of a recipient government to submit reports requested to determine compliance with the provisions of this subpart, shall result on the determination that one or more of the entitlement payments to the recipient government for a particular entitlement is constructively waived pursuant to § 51.25(b) of this part. The constructive waiver shall not be subject to the procedure for effecting compliance set forth in this subpart.

§ 51.61 Compliance reviews and affirmative action.

(a) *Compliance Reviews.* (1) The Director may periodically conduct compliance reviews of selected recipient governments.

(2) In any such reviews the Director shall seek to select for review those recipient governments which appear to have the most serious equal employment opportunity problems, or the greatest disparity in the delivery of services to the majority and minority, or male and female members of the communities they serve. Selection for review shall be made on the basis of any of the following:

(i) The relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient government;

(ii) The percentage of women and minorities in the population receiving benefits from a program or activity.

(iii) The number and nature of discrimination complaints filed against a recipient with ORS or other Federal agencies;

(iv) The scope of the problems revealed by any investigation of allegations of noncompliance against a recipient government;

(v) The amount of entitlement funds provided to the recipient government.

(3) Within 90 days after selection of a recipient government for review, the Director shall inform the recipient government that it has been selected and will initiate the review. The review will ordinarily be initiated by a letter requesting data pertinent to the review and advising the recipient government of:

(i) The practice(s) to be reviewed;

(ii) The programs or activities affected by the review;

(iii) The opportunity to make, at any time prior to the receipt of the Director's findings, a documentary submission responding to the Director, explaining, validating, or otherwise addressing the practices under review; and

(iv) The schedule under which the review will be conducted and a finding made.

(4) Within 180 days after the initiation of the review, the Director shall advise

the recipient, the chief executive officer(s) of the appropriate recipient government of:

(i) The preliminary finding;

(ii) Where appropriate, a recommendation for compliance; and

(5) If, within 30 days, the Director's recommendations for compliance are not met, or voluntary compliance is not secured, the matter will be forwarded to her for a finding. If the Director makes a finding of noncompliance, she shall institute administrative proceedings pursuant to § 51.64, *et seq.* and subpart G of this part.

(b) *Affirmative action.* The EEOC has adopted Guidelines for affirmative action (29 CFR part 16—). These Guidelines clarify the kinds of voluntary actions that are appropriate under Federal law and are attached as appendix F to this subpart.

§ 51.62 Administrative complaints and investigations.

(a) *Administrative complaints.* Any person who believes anyone has been subjected to discrimination prohibited by this subpart, may personally or by a representative file with the Director of the ORS (Treasury Department, Washington, D.C. 20226) a written statement setting forth the nature of the discrimination alleged and the facts upon which the allegation is based.

(b) *Investigations.* (1) The Director shall advise the chief executive officer of the recipient government of any administrative complaint received pursuant to paragraph (a) within 30 days of the receipt of such complaint.

(2) The ORS will investigate administrative complaints described in paragraph (a). Information contained within the files of the ORS or other information which suggests discrimination prohibited by this subpart may be part of an ongoing or future investigation.

(3) Such investigations may be made with the assistance of the complainant(s) or of the recipient government.

(4) In appropriate cases the Director may defer to the Attorney General as provided for in an agreement with the Department of Justice.

(5) The scope of such investigations shall not be limited to the administrative complaint or other information but may be expanded to include any matters under the Act either discovered during the investigation or reasonably flowing from said administrative complaint or other information.

(6) The Director shall, if warranted, make a finding within (90) ninety days of receipt of an administrative complaint or State administrative agency determination.

(7) To the maximum extent feasible, the Director will make use of the agreements between agencies as provided for in § 51.69 of this subpart in order to facilitate compliance under the provisions of this section.

§ 51.63 Notification to the complainant.

Upon written request, the complainant shall be advised of the status of the investigation or other proceeding undertaken in response to the complaint. Within 10 days after the Director issues a finding, or determination or receives the decision of an administrative law judge, the Director shall notify the complainant or the complainant's counsel.

§ 51.64 Notification of noncompliance.

(a) *Notification of noncompliance after a finding by the Director.* (1) Within 10 days of completion of the investigation of a complaint, determination of a State administrative agency or other information, the Director shall, if warranted, make a finding and issue a notice of noncompliance in writing to the chief executive officer of the recipient government (and in the case of a unit of local government, also the Governor of the State in which the recipient government is located).

(2) The notice shall be to the effect that it is more likely than not that the recipient government has failed to comply with the provisions of this subpart. The notice shall further state that unless, within 30 days after receipt of this notice, a recipient government enters into a compliance agreement with the Director or presents additional evidence that demonstrates compliance or that proves by clear and convincing evidence that the program or activity complained of was not funded with entitlement funds, the Director shall issue a determination that the recipient government has failed to comply with the provisions of this subpart.

(b) *Notification of noncompliance by the Director after receipt of a holding.* (1) Within 10 days of receipt of a holding, the Director shall issue a notice of noncompliance to the chief executive officer of the recipient government in writing (and in the case of a unit of local government, to the Governor of the State in which the recipient government is located).

(2) The notice shall state that the ORS is required to adopt the holding as conclusive on the issue of discrimination and that the recipient government is in noncompliance with the provisions of this subpart. The notice shall further state that the Director may expand the issues beyond those contained in the holding. The notice shall state that unless within 30 days after receipt of this notice the recipient government enters into a compliance agreement or presents evidence which proves by clear and convincing evidence that the program or activity complained of was not funded with entitlement funds, the Director will issue a determination that the recipient government has failed to comply with the provisions of this subpart.

(3) Where the remedial order issued by the Court or administrative law judge, on which the holding is based, is stayed pending further proceedings, the stay will not affect action by the Director unless the ORS is specifically included in the stay.

§ 51.65 Determination of noncompliance.

(a) *Determination by the Director after a finding of discrimination.* (1) If a recipient government fails to demonstrate compliance, prove by clear and convincing evidence that the program or activity complained of was not funded with entitlement funding or enter into a compliance agreement within 30 days after receipt of a notice of noncompliance, the Director shall, if warranted, make a determination of non-compliance and notify the chief executive officer of the recipient government thereof (and in the case of a unit of local government, the Governor of the State in which the recipient government is located shall also be notified).

(2) Once a determination of noncompliance is received, a recipient government shall have 10 days in which to enter into a compliance agreement or request an administrative hearing. If a recipient government fails to take either action within the 10-day period, the Director shall immediately suspend the further payment of entitlement funds to such recipient government, which shall remain suspended until the recipient government enters into a compliance agreement.

(b) *Determination of the Director after notice of a holding.* (1) If a recipient government fails to prove by clear and convincing evidence that the program or activity complained of was not funded with entitlement funds, or enter into a compliance agreement within 30 days after receipt of notification of noncompliance based on a holding, the Director shall make a determination of noncompliance based upon the holding. Where the Director makes a determination of noncompliance based upon a holding she shall notify the chief executive officer of the receipient

government (and in the case of a unit of local government, the Governor of the State in which the recipient government is located shall also be notified).

(2) The notification of the determination shall adopt, the holding of the Federal or State Court or Federal administrative law judge as conclusive on the issue of discrimination and give the recipient government 10 days from receipt of the notification of the determination to enter into a compliance agreement or request an administrative hearing. The sole issue at the administrative hearing shall be whether the program or activity complained of was funded by entitlement funds. If the recipient government fails to take either action within the 10 day period, the Director shall immediately suspend the further payment of entitlement funds to such government.

(3) If the holding on which the determination is based is reversed by a appellate tribunal, or by agency review in the case of the holding of a Federal administrative law judge, the Director shall discontinue the administrative action begun as a result of the holding. Any suspension of entitlement funds resulting from the determination shall also be discontinued and those funds paid to the recipient government as quickly as possible.

51.66 Compliance agreements.

(a) *In matters where the ORS was not a party to the proceeding.* For purposes of this subpart a compliance agreement includes an agreement in writing between the Federal or State agency or official responsible for prosecuting the claim (including the Attorney General of the United States) and the chief executive officer of the recipient government against whom the noncompliance with this subpart is alleged. Such compliance agreement may take the form of a consent decree to be entered in the proceedings before a court of record or to be entered by a Federal administrative law judge having jurisdiction over the proceedings. Counsel of record representing the chief executive officer of the recipient government may initiate or negotiate the compliance agreement on behalf of the chief executive officer of the recipient government. However, in each case the Director shall, through her counsel or representative, indicate her approval or rejection of the compliance agreement. The Director may reject the compliance agreement if, in her judgment she determines that the agreement has not adequately remedied the discrimination.

(b) *In matters involving a holding.* Where the Director acts on the basis of a holding, the remedial order of the Court or Federal administrative law judge shall constitute the basis of the compliance agreement to be entered into with the Director; *provided,* however, that the lack of a remedial order does not affect the requirement that a recipient govnerment enter into a compliance agreement with the Director within the time limits set forth in section 122(b) of the Act and §§ 51.64, 51.65 and 51.66(c) of this subpart. Any agreement entered into prior to issuance of such remedial order may be appropriately modified when the order is entered.

(c) *In matters between the Director and a recipient government.* In those instances where a compliance agreement is negotiated by the Director and the chief executive officer of the recipient government, the agreement shall be one document or a series of documents containing the following:

(1) A statement of all matters that constitute the failure of the recipient government to comply with the requirements of this subpart;

(2) The terms and conditions with the recipient government has agreed to comply in order to achieve compliance with the requirements of this subpart. Such terms and conditions may include the payment of restitution to persons injured by the failure of the recipient government to comply with any provisions of this subpart; and

(3) The signatures of the Director and the chief executive officer of the recipient government concerned.

(d) *Effect of violation of compliance agreement.* (1) If the recipient government fails to comply with the obligations stipulated in this agreement, the Director may issue a new determination of noncompliance under Section 122(b)(2) of the Revenue Sharing Act.

(2) The recipient government within ten (10) days after receipt of the determination of noncompliance, shall either come into compliance with the provisions of the compliance agreement or request an administrative hearing. At such hearing, the issues shall be limited to whether or not the recipient government has acted in compliance with this agreement.

(e) *Notification to complainants of compliance agreement.* Within 15 days after the execution of a compliance agreement (or, in the case of an agreement executed under paragraph (a) of this section, upon the approval of the Director if later than 15 days) the Director shall submit a copy of such agreement to the complainant or complainants who initiated the complaint against the recipient government. The submission of a copy of the compliance agreement to counsel of record (if any) for the complainants shall meet the requirements of this paragraph.

§ 51.67 Resumption of suspended entitlement payment.

The payment of entitlement payments to a recipient government for which such payment has been suspended shall be resumed when:

(a) The recipient government enters into a compliance agreement with the Director and the Director ascertains to her satisfaction that the recipient government will comply with the provisions in this subpart.

(b) Subsequent to a hearing on the merits in a case where the Director has invoked a preliminary suspension of entitlement funds, the administrative law judge holds that the recipient government is in compliance with the provisions of this subpart; or

(c) The recipient government complies fully with the order of a court or a Federal administrative law judge if the order covers all matters raised by the Director in the original notice of noncompliance to the recipient government; or

(d) After a rehearing or similar adjudicative proceedings a court or an administrative law judge which originally held that the recipient government had failed to comply with the provisions of this subpart, subsequently holds that the recipient government did not so fail to comply; or

(e) An appellate court reverses the findings of discrimination by a lower court or administrative law judge upon the basis of which the Director suspended the payment of entitlement funds.

§ 51.68 Exhaustion of administrative remedies.

For purposes of bringing a private civil action pursuant to section 124 of the Act a complainant shall be deemed to have exhausted the administrative remedies upon the expiration of 90 days from the date the administrative complaint was mailed to the director, or with an agency with which the Director has an agreement under § 51.69 of this subpart where the Director or such agency:

(a) Issues a determination that the recipient government against whom the

complaint was filed is in compliance with the provisions of this subpart, or

(b) Fails to make a determination on such complaint.

§ 51.69 Agreements between agencies.

(a) *Purpose of cooperative agreements.* The Director shall endeavor to enter into cooperative agreements with officials of other departments and agencies of the Federal government, or officials of State agencies (which have concurrent jurisdiction) to effectuate the purposes of this subpart, including the achievement of effective coordination within the executive branch in the implementation of Title VI and Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000d, 2000e), the Civil Rights Act of 1968, the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

(b) *Content of cooperative agreements.* The agreements between the Director and other agencies or officials shall describe the cooperative efforts to be undertaken, which may include, but need not be limited to:

(1) Sharing of resources during investigations and compliance reviews (either by having joint investigations or having one agency do an investigation for both);

(2) Cooperation during compliance activities including the issuance of findings or determinations, (including the adopting of other agency's findings or determinations where practical);

(3) Cooperation during administrative hearings including joint participation and sharing of resources.

(4) Deferral of agency action where one agency has begun compliance activities on the same complaint or set of circumstances and provision for resumption of action where the agency deferred to does not act in a timely manner;

(5) Sharing of information, including data, records and investigative and other files, computer printouts, lists and status reports on complaints received;

(6) Identification of liaison personnel and the establishment of periodic meetings to discuss common substantive and procedural problems;

(7) Protecting the confidentiality of information shared;

(8) Providing for notification of formal administrative actions instituted against jointly covered recipients and of the results of such actions, particularly those that may be classified as holdings;

(9) The establishment of lead agencies (in those areas in which lead agencies have not already been designated by statute or executive order) so that the designated lead agency will provide policy guidance in the area where two of more agencies share concurrent jurisdiction.

§ 51.70 Jurisdiction over property.

(a) *In general.* The Director shall have jurisdiction over any recipient government for purposes of this subpart for as long as that recipient government retains ownership or possession of any real or personal property or any interest therein, which was purchased in whole or in part with entitlement funds. Further, if such property is transferred to a secondary recipient or other party, the Director will retain jurisdiction over the recipient government for purposes of this subpart for as long as the property is used to provide benefits similar to those which were provided by the property before the transfer.

(b) *Definitions.* For the purposes of this section:

(1) Real property includes land, structures upon land and fixtures attached to land, and buildings or structures which cannot be removed without damage to the fixtures, buildings or structures.

(2) Personal property includes, at the least, non-expandable tangible property having a useful life of more than one year and an acquisition cost of $1,000 or more per unit of property.

(3) The transfer of property means the passage of the property to a secondary recipient, or to any other person firm or agency.

(c) *Use of property to provide similar benefits.* For the purposes of this section the clause in paragraph (a) of this section "so long as the property is used to provide benefits similar to those provided by the property before the transfer" means the primary use or function of the property and not the specific or particular use of the property in the program or activity for which originally acquired.

(d) *Record keeping requirements.* Recipient governments shall maintain a separate record of real property and of tangible personal property having a value in excess of $1,000. Such records shall set forth the date of purchase, date of disposal or transfer and the transferee of the property. Upon outright sale, discard, or trade of such property the provisions of this section shall no longer be applicable.

Appendix A

(From the **Federal Register** of Friday, August 25, 1978.)

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Title 5—Administrative Personnel

CHAPTER I—CIVIL SERVICE COMMISSION

PART 300—EMPLOYMENT (GENERAL)

Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE

PART 50—STATEMENTS OF POLICY

Title 41—Public Contracts and Property Management

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

PART 60-3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

Adoption of Employee Selection Procedures

AGENCIES: Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice and Department of Labor.

ACTION: Adoption of uniform guidelines on employee selection procedures as final rules by four agencies.

SUMMARY: This document sets forth the uniform guidelines on employee selection procedures adopted by the Equal Employment Opportunity Commission, Civil Service Commission, Department of Justice, and the Department of Labor. At present two different sets of guidelines exist. The guidelines are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice), 29 CFR Part 1607 (Equal Employment Opportunity Commission), and 41 CFR Part 60-3 (Department of Labor) elsewhere in this issue.

EFFECTIVE DATE: September 25, 1978.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

An Overview of the 1978 Uniform Guidelines on Employee Selection Procedures

I. Background

One problem that confronted the Congress which adopted the Civil Rights Act of 1964 involved the effect of written preemployment tests on equal employment opportunity. The use of these test scores frequently denied employment to minorities in many cases without evidence that the tests were related to success on the job. Yet employers wished to continue to use such tests as practical tools to assist in the selection of qualified employees. Congress sought to strike a balance which would proscribe discrimination, but otherwise permit the use of tests in the selection of employees. Thus, in title VII, Congress authorized the use of "any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate * * *".[1]

At first, some employers contended that, under this section, they could use any test which had been developed by a professional so long as they did not intend to exclude minorities, even if such exclusion was the consequence of the use of the test. In 1966, the Equal Employment Opportunity Commission (EEOC) adopted guidelines to advise employers and other users what the law and good industrial psychology practice required.[2] The Department of Labor adopted the same approach in 1968 with respect to tests used by Federal contractors under Executive Order 11246 in a more detailed regulation. The Government's view was that the employer's intent was irrelevant. If tests or other practices had an adverse impact on protected groups, they were unlawful unless they could be justified. To justify a test which screened out a higher proportion of minorities, the employer would have to show that it fairly measured or predicted performance on the job. Otherwise, it would not be considered to be "professionally developed."

In succeeding years, the EEOC and the Department of Labor provided more extensive guidance which elaborated upon these principles and expanded the guidelines to emphasize all selection procedures. In 1971 in *Griggs* v. *Duke Power Co.*,[3] the Supreme Court announced the principle that employer practices which had an adverse impact on minorities and were not justified by business necessity constituted illegal discrimination under title VII. Congress confirmed this interpretation in the 1972 amendments to title VII. The elaboration of these principles by courts and agencies continued into the mid-1970's,[4] but differences between the EEOC and the other agencies (Justice, Labor, and Civil Service Commission) produced two different sets of guidelines by the end of 1976.

With the advent of the Carter administration in 1977, efforts were intensified to produce a unified government position. The following document represents the result of that effort. This introduction is intended to assist those not familiar with these matters to understand the basic approach of the uniform guidelines. While the guidelines are complex and technical, they are based upon the principles which have been consistently upheld by the courts, the Congress, and the agencies.

The following discussion will cite the sections of the Guidelines which embody these principles.

II. Adverse Impact

The fundamental principle underlying the guidelines is that employer policies or practices which have an adverse impact on employment opportunities of any race, sex, or ethnic group are illegal under title VII and the Executive order unless justified by business necessity.[5] A selection procedure which has no adverse impact generally does not violate title VII or the Executive order.[6] This means that an employer may usually avoid the application of the guidelines by use of procedures which have no adverse impact.[7] If adverse impact exists, it must be justified on grounds of business necessity. Normally, this means by validation which demonstrates the relation between the selection procedure and performance on the job.

The guidelines adopt a "rule of thumb" as a practical means of determining adverse impact for use in enforcement proceedings. This rule is known as the "⅘ths" or "80 percent" rule.[8] It is not a legal definition of discrimination, rather it is a practical device to keep the attention of enforcement agencies on serious discrepancies in hire or promotion rates or other employment decisions. To determine whether a selection procedure violates the "⅘ths rule", an employer compares its hiring rates for different groups.[9] But this rule of thumb cannot be applied automatically. An employer who has conducted an extensive recruiting campaign may have a larger than normal pool of applicants, and the "⅘ths rule" might unfairly expose it to enforcement proceedings.[10] On the other hand, an employer's reputation may have discouraged or "chilled" applicants of particular groups from applying because they believed application would be futile. The application of the "⅘ths" rule in that situation would allow an employer to evade scrutiny because of its own discrimination.[11]

III. Is Adverse Impact To Be Measured by the Overall Process?

In recent years some employers have eliminated the overall adverse impact of a selection procedure and employed sufficient numbers of minorities or women to meet this "⅘th's rule of thumb". However, they might continue use of a component which does have an adverse impact. For example, an employer might insist on a minimum passing score on a written test which is not job related and which has an adverse impact on minorities.[12] However, the employer might compensate for this adverse impact by hiring a sufficient proportion of minorities who do meet its standards, so that its overall hiring is on a par with or higher than the applicant flow. Employers have argued that as long as their "bottom line" shows no overall adverse impact, there is no violation at all, regardless of the operation of a particular component of the process.

Employee representatives have argued that rights under equal employment opportunity laws are individual, and the fact that an employer has hired some minorities does not justify discrimination against other minorities. Therefore, they argue that adverse impact is to be determined by examination of each component of the selection procedure, regardless of the "bottom line." This question has not been answered definitively by the courts. There are decisions pointing in both directions.

These guidelines do not address the underlying question of law. They discuss only the exercise of prosecutorial discretion by the Government agencies themselves.[13] The agencies have decided that, generally, their resources to combat discrimination should be used against those respondents whose practices have restricted or excluded the opportunities of minorities and women. If an employer is appropriately including all groups in the workforce, it is not sensible to spend Government time and effort on such a case, when there are so many employers whose practices do have adverse effects which should be challenged. For this reason, the guidelines provide that, in considering whether to take enforcement action, the Government will take into account the general posture of the employer concerning equal employment opportunity, including its affirmative action plan and results achieved under the plan.[14] There are some circumstances where the government may intervene even though the "bottom line" has been satisfied. They include the case where a component of a selection procedure restricts promotional opportunities of minorities or women who were discriminatorily assigned to jobs, and where a component, such as a height requirement, has been declared unlawful in other situations.[15]

What of the individual who is denied the job because of a particular component in a procedure which otherwise meets the "bottom line" standard? The individual retains the right to proceed through the appropriate agencies, and into Federal court.[16]

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[1] Section 703(h), 42 U.S.C. 2000e(2)(h).

[2] See 35 U.S.L.W. 2137 (1966).

[3] 401 U.S. 424 (1971).

[4] See, *e.g.*, *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975).

[5] *Griggs*, note 3, supra; uniform guidelines on employee selection procedures (1978), section 3A, (hereinafter cited by section number only).

[6] *Furnco* v. *Waters*, 98 S.Ct. 2943 (1978).

[7] Section 6.

[8] Section 4D.

[9] Section 16R (definition of selection rate).

[10] Section 4D (special recruiting programs).

[11] *Ibid* (user's actions have discouraged applicants).

[12] See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

[13] Section 4C.

[14] Section 4E.

[15] Section 4C.

[16] The processing of individual cases is excluded from the operation of the bottom line concept by the definition of "enforcement action," section 16I. Under section 4C, where adverse impact has existed, the employer must keep records of the effect of each component for 2 years after the adverse effect has dissipated.

IV. Where Adverse Impact Exists: The Basic Options

Once an employer has established that there is adverse impact, what steps are required by the guidelines? As previously noted, the employer can modify or eliminate the procedure which produces the adverse impact, thus taking the selection procedure from the coverage of these guidelines. If the employer does not do that, then it must justify the use of the procedure on grounds of "business necessity." [17] This normally means that it must show a clear relation between performance on the selection procedure and performance on the job. In the language of industrial psychology, the employer must validate the selection procedure. Thus the bulk of the guidelines consist of the Government's interpretation of standards for validation.

V. Validation: Consideration of Alternatives

The concept of validation as used in personnel psychology involves the establishment of the relationship between a test instrument or other selection procedure and performance on the job. Federal equal employment opportunity law has added a requirement to the process of validation. In conducting a validation study, the employer should consider available alternatives which will achieve its legitimate business purpose with lesser adverse impact.[18] The employer cannot concentrate solely on establishing the validity of the instrument or procedure which it has been using in the past.

This same principle of using the alternative with lesser adverse impact is applicable to the manner in which an employer uses a valid selection procedure.[19] The guidelines assume that there are at least three ways in which an employer can use scores on a selection procedure: (1) To screen out of consideration those who are not likely to be able to perform the job successfully; (2) to group applicants in accordance with the likelihood of their successful performance on the job, and (3) to rank applicants, selecting those with the highest scores for employment.[20]

The setting of a "cutoff score" to determine who will be screened out may have an adverse impact. If so, an employer is required to justify the initial cutoff score by reference to its need for a trustworthy and efficient work force.[21] Similarly, use of results for grouping or for rank ordering is likely to have a greater adverse effect than use of scores solely to screen out unqualified candidates. If the employer chooses to use a rank order method, the evidence of validity must be sufficient to justify that method of use.[22]

VI. Testing for Higher Level Jobs

Normally, employers test for the job for which people are hired. However, there are situations where the first job is temporary or transient, and the workers who remain are promoted to work which involves more complex activities. The guidelines restrict testing for higher level jobs to users who promote a majority of the employees who remain with them to the higher level job within a reasonable period of time.[23]

VII. How Is Validation To Be Conducted

Validation has become highly technical and complex, and yet is constantly changing as a set of concepts in industrial psychology. What follows here is a simple introduction to a highly complex field. There are three concepts which can be used to validate a selection procedure. These concepts reflect different approaches to investigating the job relatedness of selection procedures and may be interrelated in practice. They are (1) criterion-related validity,[24] (2) content validity,[25] and (3) construct validity.[26] In criterion-related validity, a selection procedure is justified by a statistical relationship between scores on the test or other selection procedure and measures of job performance. In content validity, a selection procedure is justified by showing that it representatively samples significant parts of the job, such as a typing test for a typist. Construct validity involves identifying the psychological trait (the construct) which underlies successful performance on the job and then devising a selection procedure to measure the presence and degree of the construct. An example would be a test of "leadership ability."

The guidelines contain technical standards and documentation requirements for the application of each of the three approaches.[27] One of the problems which the guidelines attempt to meet is the "borderline" between "content validity" and "construct validity." The extreme cases are easy to understand. A secretary, for example, may have to type. Many jobs require the separation of important matters which must be handled immediately from those which can be handled routinely. For the typing function, a typing test is appropriate. It is justifiable on the basis of content validity because it is a sample of an important or critical part of the job. The second function can be viewed as involving a capability to exercise selective judgment in light of the surrounding circumstances, a mental process which is difficult to sample.

In addressing this situation, the guidelines attempt to make it practical to validate the typing test by a content strategy,[28] but do not allow the validation of a test measuring a construct such as "judgment" by a content validity strategy.

The bulk of the guidelines deals with questions such as those discussed in the above paragraphs. Not all such questions can be answered simply, nor can all problems be addressed in the single document. Once the guidelines are issued, they will have to be interpreted in light of changing factual, legal, and professional circumstances.

VIII. Simplification of Reporting and Recordkeeping Requirements

The reporting and recordkeeping provisions which appeared in the December 30 draft which was published for comment have been carefully reviewed in light of comments received and President Carter's direction to limit paperwork burdens on those regulated by Government to the minimum necessary for effective regulation. As a result of this review, two major changes have been made in the documentation requirements of the guidelines:

(1) A new section 15A(1) provides a simplified recordkeeping option for employers with fewer than 100 employees;

(2) Determinations of the adverse impact of selection procedures need not be made for groups which constitute less than 2 percent of the relevant labor force.

Also, the draft has been changed to make clear that users can assess adverse impact on an annual basis rather than on a continuing basis.

Analysis of comments. The uniform guidelines published today are based upon the proposition that the Federal Government should speak to the public and to those whom it regulates with one voice on this important subject; and that the Federal Government ought to impose upon itself obligations for equal employment opportunity which are at least as demanding as those it seeks to impose on others. These guidelines state a uniform Federal position on this subject, and are intended to protect the rights created by title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, as amended, and other provisions of Federal law. The uniform guidelines are also intended to represent "professionally acceptable methods" of the psychological profession for demonstrating whether a selection procedure validly predicts or measures performance for a particular job. *Albemarle Paper Co.* v. *Moody*, 442 U.S. 405, 425. They are also intended to be consistent with the decisions of the Supreme Court and authoritative decisions of other appellate courts.

Although the development of these guidelines preceded the issuance by President Jimmy Carter of Executive Order 12044 designed to improve the regulatory process, the spirit of his Executive order was followed in their development. Initial agreement among the Federal agencies was reached early in the fall of 1977, and the months from October 1977 until today have been spent in extensive consultation with civil rights groups whose clientele are protected by these guidelines; employers, labor unions, and State and local governments whose employment practices are affected by these guidelines; State and

[17] A few practices may be used without validation even if they have adverse impact. See, *e.g.*, *McDonnell Douglas* v. *Green*, 411 U.S. 792 (1973) and section 6B.

[18] *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971).

[19] Sections 3B; 5G.

[20] *Ibid.*

[21] See sections 3B; 5H. See also sections 14B(6) (criterion-related validity); 14C(9) (content validity); 14D(1) (construct validity).

[22] Sections 5G, 14B(6); 14C(9); 14D(1).

[23] Section 5I.

[24] Sections 5B, (General Standards); 14B (Technical Standards); 15B (Documentation); 16F (Definition).

[25] Sections 5B (General Standards); 14C (Technical Standards); 15C (Documentation); 16D (Definition).

[26] Sections 5B (General Standards); 14D (Technical Standards); 15D (Documentation); 16E (Definition).

[27] Technical standards are in section 14; documentation requirements are in section 15.

[28] Section 14C.

local government antidiscrimination agencies who share with the Federal Government enforcement responsibility for discriminatory practices; and appropriate members of the general public. For example, an earlier draft of these guidelines was circulated informally for comment on October 28, 1977, pursuant to OMB Circular A-85. Many comments were received from representatives of State and local governments, psychologists, private employers, and civil rights groups. Those comments were taken into account in the draft of these guidelines which was published for comment December 30, 1977, 42 FR 66542.

More than 200 organizations and individuals submitted written comments on the December 30, 1977, draft. These comments were from representatives of private industry, public employers, labor organizations, civil rights groups, the American Psychological Association and components thereof, and many individual employers, psychologists, and personnel specialists. On March 3, 1978, notice was given of a public hearing and meeting to be held on April 10, 1978, 43 FR 9131. After preliminary review of the comments, the agencies identified four issues of particular interest, and invited testimony particularly on those issues, 43 FR 11812 (March 21, 1978). In the same notice the agencies published questions and answers on four issues of concern to the commenters. The questions and answers were designed to clarify the intent of the December 30, 1977, draft, so as to provide a sharper focus for the testimony at the hearing.

At a full day of testimony on April 10, 1978, representatives of private industry, State and local governments, labor organizations, and civil rights groups, as well as psychologists, personnel specialists, and others testified at the public hearing and meeting. The written comments, testimony, and views expressed in subsequent informal consultations have been carefully considered by the four agencies. We set forth below a summary of the comments, and the major issues raised in the comments and testimony, and attempt to explain how we have resolved those issues.

The statement submitted by the American Psychological Association (A.P.A.) stated that "these guidelines represent a major step forward and with careful interpretation can provide a sound basis for concerned professional work." Most of the A.P.A. comments were directed to clarification and interpretation of the present language of the proposal. However, the A.P.A. recommended substantive change in the construct validity section and in the definition of work behavior.

Similarly, the Division of Industrial and Organizational Psychology (division 14) of the A.P.A. described the technical standards of the guidelines as "superior" in terms of congruence with professional standards to "most previous orders and guidelines but numerous troublesome aspects remain." Division 14 had substantial concerns with a number of the provisions of the general principles of the draft.

Civil rights groups generally found the uniform guidelines far superior to the FEA guidelines, and many urged their adoption, with modifications concerning ranking and documentation. Others raised concerns about the "bottom line" concept and other provisions of the guidelines.

The Ad Hoc Group on Employee Selection Procedures representing many employers in private industry supported the concept of uniform guidelines, but had a number of problems with particular provisions, some of which are described below. The American Society for Personnel Administration (ASPA) and the International Personnel Management Association, which represents State and local governments, generally took the same position as the ad hoc group. Major industrial unions found that the draft guidelines were superior to the FEA guidelines, but they perceived them to be inferior to the EEOC guidelines. They challenged particularly the bottom line concept and the construct validity section.

The building trade unions urged an exclusion of apprenticeship programs from coverage of the guidelines. The American Council on Education found them inappropriate for employment decisions concerning faculty at institutions of higher education. Other particular concerns were articulated by organizations representing the handicapped, licensing and certifying agencies, and college placement offices.

General Principles

1. *Relationship between validation and elimination of adverse impact, and affirmative action.* Federal equal employment opportunity law generally does not require evidence of validity for a selection procedure if there is no adverse impact; e.g., *Griggs* v. *Duke Power Co.*, 401 U.S. 424. Therefore, a user has the choice of complying either by providing evidence of validity (or otherwise justifying use in accord with Federal law), or by eliminating the adverse impact. These options have always been present under Federal law, 29 CFR 1607.3; 41 CFR 60-3.3(a); and the Federal Executive Agency Guidelines, 41 FR 51734 (November 23, 1976). The December 30 draft guidelines, however, clarified the nature of the two options open to users.

Psychologists expressed concern that the December 30 draft of section 6A encouraged the use of invalid procedures as long as there is no adverse impact. Employers added the concern that the section might encourage the use of illegal procedures not having an adverse impact against the groups who have historically suffered discrimination (minorities, women), even if they have an adverse impact on a different group (whites, males).

Section 6A was not so intended, and we have revised it to clarify the fact that illegal acts purporting to be affirmative action are not the goal of the agencies or of the guidelines; and that any employee selection procedure must be lawful and should be as job related as possible. The delineation of examples of alternative procedures was eliminated to avoid the implication that particular procedures are either prescribed or are necessarily appropriate. The basic thrust of section 6A, that elimination of adverse impact is an alternative to validation, is retained.

The inclusion of excerpts from the 1976 Equal Employment Opportunity Coordinating Council Policy Statement on Affirmative Action in section 13B of the December 30 draft was criticized as not belonging in a set of guidelines for the validation of selection procedures. Section 13 has been revised. The general statement of policy in support of voluntary affirmative action, and the reaffirmation of the policy statement have been retained, but this statement itself is now found in the appendix to the guidelines.

2. *The "bottom line" (section 4C).* The guidelines provide that when the overall selection process does not have an adverse impact the Government will usually not examine the individual components of that process for adverse impact or evidence of validity. The concept is based upon the view that the Federal Government should not generally concern itself with individual components of a selection process, if the overall effect of that process is nonexclusionary. Many commenters criticized the ambiguity caused by the word "generally" in the December 30 draft of section 4C which provided, "the Federal enforcement agencies * * * generally will not take enforcement action based upon adverse impact of any component" of a process that does not have an overall adverse impact. Employer groups stated the position that the "bottom line" should be a rule prohibiting enforcement action by Federal agencies with respect to all or any part of a selection process where the bottom line does not show adverse impact. Civil rights and some labor union representatives expressed the opposing concerns that the concept may be too restrictive, that it may be interpreted as a matter of law, and that it might allow certain discriminatory conditions to go unremedied.

The guidelines have been revised to clarify the intent that the bottom line concept is based upon administrative and prosecutorial discretion. The Federal agencies cannot accept the recommendation that they never inquire into or take enforcement action with respect to any component procedure unless the whole process of which it is a part has an adverse impact. The Federal enforcement agencies believe that enforcement action may be warranted in unusual circumstances, such as those involving other discriminatory practices, or particular selection procedures which have no validity and have a clear adverse impact on a national basis. Other unusual circumstances may warrant a high level agency decision to proceed with enforcement actions although the "bottom line" has been satisfied. At the same time the agencies adhere to the bottom line concept of allocating resources primarily to those users whose overall selection processes have an adverse impact. See overview, above, part III.

3. *Investigation of alternative selection procedures and alternative methods of use (section 3B).* The December 30 draft included an obligation on the user, when conducting a validity study, to investigate alternative procedures and uses, in order to determine whether there are other procedures which are substantially equally valid, but which have less adverse impact. The American Psychological Association stated:

"We would concur with the drafters of the guidelines that it is appropriate in the

determination of a selection strategy to consider carefully a variety of possible procedures and to think carefully about the question of adverse impact with respect to each of these procedures. Nevertheless, we feel it appropriate to note that a rigid enforcement of these sections, particularly for smaller employers, would impose a substantial and expensive burden on these employers."

Since a reasonable consideration of alternatives is consistent with the underlying principle of minimizing adverse impact consistent with business needs, the provision is retained.

Private employer representatives challenged earlier drafts of these guidelines as being inconsistent with the decision of the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405. No such inconsistency was intended. Accordingly, the first sentence of section 3B was revised to paraphrase the opinion in the *Albemarle* decision, so as to make it clear that section 3B is in accord with the principles of the *Albemarle* decision.

Section 3B was further revised to clarify the intent of the guidelines that the obligation to investigate alternative procedures is a part of conducting a validity study, so that alternative procedures should be evaluated in light of validity studies meeting professional standards, and that section 3B does not impose an obligation to search for alternatives if the user is not required to conduct a validity study.

Just as, under section 3B of the guidelines, a user should investigate alternative selection procedures as a part of choosing and validating a procedure, so should the user investigate alternative uses of the selection device chosen to find the use most appropriate to his needs. The validity study should address the question of what method of use (screening, grouping, or rank ordering) is appropriate for a procedure based on the kind and strength of the validity evidence shown, and the degree of adverse impact of the different uses.

4. *Establishment of cutoff scores and rank ordering.* Some commenters from civil rights groups believed that the December 30 draft guidelines did not provide sufficient guidance as to when it was permissible to use a selection procedure on a ranking basis rather than on a pass-fail basis. They also objected to section 5G in terms of setting cutoff scores. Other comments noted a lack of clarity as to how the determination of a cutoff score or the use of a procedure for ranking candidates relates to adverse impact.

As we have noted, users are not required to validate procedures which do not have an adverse impact. However, if one way of using a procedure (e.g., for ranking) results in greater adverse impact than another way (e.g., pass/fail), the procedure must be validated for that use. Similarly, cutoff scores which result in adverse impact should be justified. If the use of a validated procedure for ranking results in greater adverse impact than its use as a screening device, the evidence of validity and utility must be sufficient to warrant use of the procedures as a ranking device.

A new section 5G has been added to clarify these concepts. Section 5H (formerly section 5G) addresses the choice of a cutoff score when a procedure is to be used for ranking.

5. *Scope: Requests for exemptions for certain classes of users.* Some employer groups and labor organizations (e.g., academic institutions, large public employers, apprenticeship councils) argued that they should be exempted from all or some of the provisions of these guidelines because of their special needs. The intent of Congress as expressed in Federal equal employment opportunity law is to apply the same standards to all users, public and private.

These guidelines apply the same principles and standards to all employers. On the other hand, the nature of the procedures which will actually meet those principles and standards may be different for different employers, and the guidelines recognize that fact. Accordingly, the guidelines are applicable to all employers and other users who are covered by Federal equal employment opportunity law.

Organizations of handicapped persons objected to excluding from the scope of these guidelines the enforcement of laws prohibiting discrimination on the basis of handicap, in particular the Rehabilitation Act of 1973, sections 501, 503, and 504. While this issue has not been addressed in the guidelines, nothing precludes the adoption of the principles set forth in these guidelines for other appropriate situations.

Licensing and certification boards raised the question of the applicability of the guidelines to their licensing and certification functions. The guidelines make it clear that licensing and certification are covered "to the extent" that licensing and certification may be covered by Federal equal employment opportunity law.

Voluntary certification boards, where certification is not required by law, are not users as defined in section 16 with respect to their certifying functions and therefore are not subject to these guidelines. If an employer relies upon such certification in making employment decisions, the employer is the user and must be prepared to justify, under Federal law, that reliance as it would any other selection procedure.

6. *The "Four-Fifths Rule of Thumb" (section 4D).* Some representatives of employers and some professionals suggest that the basic test for adverse impact should be a test of statistical significance, rather than the four-fifths rule. Some civil rights groups, on the other hand, still regard the four-fifths rule as permitting some unlawful discrimination.

The Federal agencies believe that neither of these positions is correct. The great majority of employers do not hire, promote, or assign enough employees for most jobs to warrant primary reliance upon statistical significance. Many decisions in day-to-day life are made on the basis of information which does not have the justification of a test of statistical significance. Courts have found adverse impact without a showing of statistical significance. *Griggs* v. *Duke Power Co.*, supra; *Vulcan Society of New York* v. *CSC of N.Y.*, 490 F. 2d 387, 393 (2d Cir. 1973); *Kirkland* v. *New York St. Dept. of Corr. Serv.*, 520 F. 2d 420, 425 (2d Cir. 1975).

Accordingly, the undersigned believe that while the four-fifths rule does not define discrimination and does not apply in all cases, it is appropriate as a rule of thumb in identifying adverse impact.

Technical Standards

7. *Criterion-related validity (section 14B).* This section of the guidelines found general support among the commenters from the psychological profession and, except for the provisions concerning test fairness (sometimes mistakenly equated with differential prediction or differential validity), generated relatively little comment.

The provisions of the guidelines concerning criterion-related validity studies call for studies of fairness of selection procedures where technically feasible.

Section 14B(8). Some psychologists and employer groups objected that the concept of test fairness or unfairness has been discredited by professionals and pointed out that the term is commonly misused. We recognize that there is serious debate on the question of test fairness; however, it is accepted professionally that fairness should be examined where feasible. The A.P.A. standards for educational and psychological tests, for example, direct users to explore the question of fairness on finding a difference in group performances (section E9, pp. 43–44). Similarly the concept of test fairness is one which is closely related to the basic thrust of Federal equal employment opportunity law; and that concept was endorsed by the Supreme Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405.

Accordingly, we have retained in the guidelines the obligation upon users to investigate test fairness where it is technically feasible to do so.

8. *Content validity.* The Division of Industrial and Organizational Psychology of A.P.A. correctly perceived that the provisions of the draft guidelines concerning content validity, with their emphasis on observable work behaviors or work products, were "greatly concerned with minimizing the inferential leap between test and performance." That division expressed the view that the draft guidelines neglected situations where a knowledge, skill or ability is necessary to an outcome but where the work behavior cannot be replicated in a test. They recommended that the section be revised.

We believe that the emphasis on observable work behaviors or observable work products is appropriate; and that in order to show content validity, the gap between the test and performance on the job should be a small one. We recognize, however, that content validity may be appropriate to support a test which measures a knowledge, skill, or ability which is a necessary prerequisite to the performance of the job, even though the test might not be close enough to the work behavior to be considered a work sample, and the guidelines have been revised appropriately. On the other hand, tests of mental processes which are not directly observable and which may be difficult to determine on the basis of observable work behaviors or work products should not be supported by content validity.

Thus, the Principles for the Validation and Use of Personnel Selection procedures (Division of Industrial and Organizational

Psychology, American Psychological Association, 1975, p. 10), discuss the use of content validity to support tests of "specific items of knowledge, or specific job skills," but call attention to the inappropriateness of attempting to justify tests for traits or constructs on a content validity basis.

9. *Construct validity (section 14D).* Business groups and professionals expressed concern that the construct validity requirements in the December 30 draft were confusing and technically inaccurate. As section 14D indicates, construct validity is a relatively new procedure in the field of personnel selection and there is not yet substantial guidance in the professional literature as to its use in the area of employment practices. The provisions on construct validity have been revised to meet the concerns expressed by the A.P.A. The construct validity section as revised clarifies what is required by the Federal enforcement agencies at this stage in the development of construct validity. The guidelines leave open the possibility that different evidence of construct validity may be accepted in the future, as new methodologies develop and become incorporated in professional standards and other professional literature.

10. *Documentation (section 15).* Commenters stated that the documentation section did not conform to the technical requirements of the guidelines or was otherwise inadequate. Section 15 has been clarified and two significant changes have been made to minimize the recordkeeping burden. (See overview, part VIII.)

11. *Definitions (section 16).* The definition of work behavior in the December 30, 1977 draft was criticized by the A.P.A. and others as being too vague to provide adequate guidance to those using the guidelines who must identify work behavior as a part of any validation technique. Other comments criticized the absence or inadequacies of other definitions, expecially "adverse impact." Substantial revisions of and additions to this section were therefore made.

Uniform Guidelines on Employee Selection Procedures (1978)

Note.—These guidelines are issued jointly by four agencies. Separate official adoptions follow the guidelines in this part IV as follows: Civil Service Commission, Department of Justice, Equal Employment Opportunity Commission, Department of Labor.

For official citation see section 18 of these guidelines.

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General Principles

Section 1. *Statement of purpose.*—A. *Need for uniformity—Issuing agencies.* The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal Government as are applied to other employers.

B. *Purpose of guidelines.* These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

C. *Relation to prior guidelines.* These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

Sec. 2. *Scope.*—A. *Application of guidelines.* These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor, and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. *Employment decisions.* These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

C. *Selection procedures.* These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selection procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

D. *Limitations.* These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of handicap.

E. *Indian preference not affected.* These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

Sec. 3. *Discrimination defined: Relationship between use of selection procedures and discrimination.*—A. *Procedure having adverse impact constitutes discrimination unless justified.* The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. *Consideration of suitable alternative selection procedures.* Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination

of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

Sec. 4. *Information on impact.*—A. *Records concerning impact.* Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in subparagraph B below in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

B. *Applicable race, sex, and ethnic groups for recordkeeping.* The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. *Evaluation of selection rates. The "bottom line."* If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

D. *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. *Consideration of user's equal employment opportunity posture.* In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program, including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

Sec. 5. *General standards for validity studies.*—A. *Acceptable types of validity studies.* For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

B. *Criterion-related, content, and construct validity.* Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See section 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. *Guidelines are consistent with professional standards.* The provisions of these guidelines relating to validation of selection procedures are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter "A.P.A. Standards") and standard textbooks and journals in the field of personnel selection.

D. *Need for documentation of validity.* For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. *Accuracy and standardization.* Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

F. *Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.* In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

G. *Method of use of selection procedures.* The evidence of both the validity and utility

of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. *Cutoff scores.* Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

I. *Use of selection procedures for higher level jobs.* If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A "reasonable period of time" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) If the majority of those remaining employed do not progress to the higher level job;

(2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. *Interim use of selection procedures.* Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. *Review of validity studies for currency.* Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

Sec. 6. *Use of selection procedures which have not been validated.*—A. *Use of alternate selection procedures to eliminate adverse impact.* A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. *Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below.

(1) *Where informal or unscored procedures are used.* When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) *Where formal and scored procedures are used.* When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact or otherwise justify continued use of the procedure in accord with Federal law.

Sec. 7. *Use of other validity studies.*—A. *Validity studies not conducted by the user.* Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. *Use of criterion-related validity evidence from other sources.* Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) *Validity evidence.* Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) *Job similarity.* The incumbents in the user's job and the incumbents in the job or group of jobs on which the validity study was conducted perform substantially the same major work behaviors, as shown by appropriate job analyses both on the job or group of jobs on which the validity study was performed and on the job for which the selection procedure is to be used; and

(3) *Fairness evidence.* The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2) above but do not contain an investigation of test fairness, and it is not technically feasible for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

C. *Validity evidence from multiunit study.* if validity evidence from a study covering more than one unit within an organization statisfies the requirements of section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. *Other significant variables.* If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

Sec. 8. *Cooperative studies.*—A. *Encouragement of cooperative studies.* The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

B. *Standards for use of cooperative studies.* If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

Sec. 9. *No assumption of validity.*—A. *Unacceptable substitutes for evidence of validity.* Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of it's validity be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other nonempirical or anecdotal accounts of selection practices or selection outcomes.

B. *Encouragement of professional supervision.* Professional supervision of selection activities is encouraged but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

Sec. 10. *Employment agencies and employment services.*—A. *Where selection procedures are devised by agency.* An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to device and utilize a selection procedure should follow the standards in these guidelines for determining adverse impact. If adverse impact exists the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a user under these guidelines.

B. *Where selection procedures are devised elsewhere.* Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results, the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results the agency or service should comply with these guidelines. If the agency or service seeks to comply with these guidelines by reliance upon validity studies or other data in the possession of the employer, it should obtain and have available such information.

Sec. 11. *Disparate treatment.* The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure—even though validated against job performance in accordance with these guidelines—cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

Sec. 12. *Retesting of applicants.* Users should provide a reasonable opportunity for retesting and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from retesting. The user may however take reasonable steps to preserve the security of its procedures.

Sec. 13. *Affirmative action.*—A. *Affirmative action obligations.* The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

B. *Encouragement of voluntary affirmative action programs.* These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17.

Technical Standards

Sec. 14. *Technical standards for validity studies.* The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

A. *Validity studies should be based on review of information about the job.* Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. *Technical standards for criterion-related validity studies.*—(1) *Technical feasibility.* Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) *Analysis of the job.* There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behaviors or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) *Criterion measures.* Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in

training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) *Representativeness of the sample.* Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) *Statistical relationships.* The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) *Operational use of selection procedures.* Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors reman the same, the greater the magnitude of the relationship (e.g., coorelation coefficent) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) *Overstatement of validity findings.* Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of chance. Use of a large sample is one safeguard: cross-validation is another.

(8) *Fairness.* This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) *Unfairness defined.* When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) *Investigation of fairness.* Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) *General considerations in fairness investigations.* Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) *When unfairness is shown.* If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure would indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) *Technical feasibility of fairness studies.* In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

(i) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

(ii) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

(f) *Continued use of selection procedures when fairness studies not feasible.* If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

C. *Technical standards for content validity studies.*—(1) *Appropriateness of content validity studies.* Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) *Job analysis for content validity.* There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) *Development of selection procedures.* A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) *Standards for demonstrating content validity.* To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill, or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) *Reliability.* The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user. Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) *Prior training or experience.* A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training and the specific behaviors, products, knowledges, skills, or abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) *Content validity of training success.* Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) *Operational use.* A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) *Ranking based on content validity studies.* If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance, the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

D. *Technical standards for construct validity studies.*— (1) *Appropriateness of construct validity studies.* Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) *Job analysis for construct validity studies.* There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) *Relationship to the job.* A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

(4) *Use of construct validity study without new criterion-related evidence.*—(a) *Standards for use.* Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study

pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

(b) *Determination of common work behaviors.* In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

Documentation of Impact and Validity Evidence

Sec. 15. *Documentation of impact and validity evidence.*—A. *Required information.* Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) *Simplified recordkeeping for users with less than 100 employees.* In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO–1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see § 4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) *Information on impact.*—(a) *Collection of information on impact.* Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the "four-fifths rule," as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) *When adverse impact has been eliminated in the total selection process.* Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) *When data insufficient to determine impact.* Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) *Documentation of validity evidence.*—(a) *Types of evidence.* Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

(i) Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).

(ii) Documentation evidence showing content validity of the selection procedure (see section 15C, below).

(iii) Documentation evidence showing construct validity of the selection procedure (see section 15D, below).

(iv) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).

(v) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) *Form of report.* This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the documentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) *Completeness.* In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word "(Essential)" is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading "Source Data" in sections 15B(11) and 15D(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

B. *Criterion-related validity studies.* Reports of criterion-related validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and State, should be shown.

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job anlysis or review of job information.* A description of the procedure used to

analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) *Job titles and codes.* It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) *Criterion measures.* The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (essential).

(6) *Sample description.* A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) *Description of selection procedures.* Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (essential). Reports of reliability estimates and how they were established are desirable.

(8) *Techniques and results.* Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) *Alternative procedures investigated.* The selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(10) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(11) *Source data.* Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(13) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

C. *Content validity studies.* Reports of content validity for a selection procedure should include the following information:

(1) *User(s), location(s) and date(s) of study* Dates and location(s) of the job analysis should be shown (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Job analysis—Content of the job.* A description of the method used to analyze the job should be provided (essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (essential). Measures of criticality and/or importance of the work behavior(s) and the method of determining these measures should be provided (essential). Where the job analysis also identified the knowledges, skills, and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) *Selection procedure and its content.* Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other

procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) *Relationship between the selection procedure and the job.* The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tend- ency (e.g., means) and measures of dispersion (e.g., standard deviations) and estimates of realibility should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (essential).

(7) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) *Contact person.* The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (essential).

(9) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

D. *Construct validity studies.* Reports of construct validity for a selection procedure should include the following information:

(1) *User(s), location(s), and date(s) of study.* Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

(2) *Problem and setting.* An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) *Construct definition.* A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedure is to be used (essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (essential).

(4) *Job analysis.* A description of the method used to analyze the job should be provided (essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (essential). Where jobs are grouped or compared for the purposes of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (essential).

(5) *Job titles and codes.* It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) *Selection procedure.* The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) *Relationship to job performance.* The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) *Alternative procedures investigated.* The alternative selection procedures investigated and available evidence of their impact should be identified (essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (essential).

(9) *Uses and applications.* The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential).

(10) *Accuracy and completeness.* The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) *Source data.* Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) *Contact person.* The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (essential).

E. *Evidence of validity from other studies.* When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) *Evidence from criterion-related validity studies.*—a. *Job information.* A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (essential).

b. *Relevance of criteria.* A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (essential).

c. *Other variables.* The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (essential).

d. *Use of the selection procedure.* A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (essential).

e. *Bibliography.* A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).

(2) *Evidence from content validity studies.* See section 14C(3) and section 15C above.

(3) *Evidence from construct validity studies.* See sections 14D(2) and 15D above.

F. *Evidence of validity from cooperative studies.* Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. *Selection for higher level job.* If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. *Interim use of selection procedures.* If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (essential).

Definitions

Sec. 16. *Definitions.* The following definitions shall apply throughout these guidelines:

A. *Ability.* A present competence to perform an observable behavior or a behavior which results in an observable product.

B. *Adverse impact.* A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. *Compliance with these guidelines.* Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. *Content validity.* Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. *Construct validity.* Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. *Criterion-related validity.* Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. *Employer.* Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontactor covered by Executive Order 11246, as amended.

H. *Employment agency.* Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

I. *Enforcement action.* For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. *Enforcement agency.* Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of the enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

K. *Job analysis.* A detailed statement of work behaviors and other information relevant to the job.

L. *Job description.* A general statement of job duties and responsibilities.

M. *Knowledge.* A body of information applied directly to the performance of a function.

N. *Labor organization.* Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. *Observable.* Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

P. *Race, sex, or ethnic group.* Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. *Selection procedure.* Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

R. *Selection rate.* The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

S. *Should.* The term "should" as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

T. *Skill.* A present, observable competence to perform a learned psychomoter act.

U. *Technical feasibility.* The exist- ence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected were utilized; and (3) having or being able to devise unbiased,

reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. *Unfairness of selection procedure.* A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. *User.* Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. *Validated in accord with these guidelines or properly validated.* A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. *Work behavior.* An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

Appendix

17. *Policy statement on affirmative action* (see section 13B). The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.

The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether precentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the precentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic "conscious," include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking "journeyman" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited

to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,

Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

Michael H. Moskow,

Under Secretary of Labor.

Ethel Bent Walsh,

Acting Chairman, Equal Employment Opportunity Commission.

Robert E. Hampton,

Chairman, Civil Service Commission.

Arthur E. Flemming,

Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.

Done this 26th day of August 1976.

Richard Albrecht,

General Counsel, Department of the Treasury.

Section 18. *Citations.* The official title of these guidelines is "Uniform Guidelines on Employee Selection Procedures (1978)". The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:

"Section ——, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR —— (August 25, 1978)."

The short form citation is:

"Section ——, U.G.E.S.P. (1978); 43 FR —— (August 25, 1978)."

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:

Equal Employment Opportunity Commission
29 CFR Part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR Part 60–3
Department of Justice
28 CFR 50.14
Civil Service Commission
5 CFR 300.103(c)

Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1–18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows: "Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR ——, (August 25, 1978); 29 CFR Part 1607, section 6A."

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

Alan K. Campbell,

Chairman, Civil Service Commission.

Ray Marshall,

Secretary of Labor.

Griffin B. Bell,

Attorney General.

CIVIL SERVICE COMMISSION

Title 5—Administrative Personnel

CHAPTER 1—CIVIL SERVICE COMMISSION

PART 300—EMPLOYMENT (GENERAL)

Uniform Guidelines on Employee Selection Procedures (1978)

The Uniform Guidelines on Employee Selection Procedures (1978) which are printed at the beginning of this part IV in today's **Federal Register** are adopted by the Civil Service Commission, in conjunction with the Equal Employment Opportunity Commission, Department of Justice, and the Department of Labor to establish uniformity in prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 29 CFR parts 1607 (Equal Employment Opportunity Commission), 28 CFR 50.14 (Department of Justice), and 41 CFR 60–3 (Department of Labor) elsewhere in this issue of the **Federal Register.**

By virtue of the authority vested in it by sections 3301, 3302, 7151, 7154, and 7301 of title 5 and section 4763(b) of title 42, United States Code, and Executive Order 10577, 3 CFR 1954–58 comp. page 218 and Executive Order 11478, 3 CFR 1959 comp. 133, and section 717 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e–16), the Civil Service Commission amends title 5, part 300, subpart A, § 300.103(c) of the Code of Federal Regulations to read as follows:

§ 300.103 Basic requirements.

"(c) Equal employment opportunity. An employment practice shall not discriminate on the basis of race, color, religion, sex, age, national origin, partisan political affiliation, or other nonmerit factor. Employee selection procedures shall meet the standards established by the "Uniform Guidelines on Employee Selection Procedures (1978), 43 FR—— (August 25, 1978)."

The Civil Service Commission rescinds the Guidelines on Employee Selection Procedures, 41 FR 51752, Federal Personnel Manual part 900, subpart F and adopts the Uniform Guidelines on Employee Selection Procedures (1978), to be issued as identical supplement appendices to supplements 271–1, Development of Qualification Standards; 271–2, Tests and Other Applicant Appraisal Procedures; 335–1, Evaluation of Employees for Promotion and Internal Placement; and 990–1 (Book III), part 900, subpart F, Administration of Standards for a Merit System of Personnel Administration of the Federal Personnel Manual in order to insure the examining, testing standards, and employment practices are not affected by discrimination on the basis of race, color, religion, sex or national origin.

Effective date: September 25, 1978.

Alan K. Campbell,

Chairman, Civil Service Commission.

DEPARTMENT OF JUSTICE

Title 28—Judicial Administration

CHAPTER 1—DEPARTMENT OF JUSTICE

PART 50—STATEMENTS OF POLICY

Uniform Guidelines on Employee Selection Procedures (1978)

The Uniform Guidelines on Employee Selection Procedures which are provided at the beginning of this part IV in today's **Federal Register** are adopted by the Department of Justice, in conjunction with the Civil Service Commission, Equal Employment Opportunity Commission, and the Department of Labor to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c), (Civil Service Commission) 29 CFR 1607 (Equal Employment Opportunity Commission), and 41 CFR 60–3 (Department of Labor), elsewhere in this issue of the **Federal Register.**

By virtue of the authority vested in me by 28 U.S.C. 509 and 5 U.S.C. 301, Sec. 50.14 of part 50 of chapter 1 of title 28 of the Code of Federal Regulations is amended by substituting the Uniform Guidelines on Employee Selection Procedures (1978) for part I through part IV.

Effective date: September 25, 1978.

Griffin B. Bell,

Attorney General.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1607—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

The Uniform Guidelines on Employee Selection Procedures which are printed at the beginning of this part IV in today's **Federal Register** are adopted by the Equal Employment Opportunity Commission, in conjunction with the Civil Service Commission, Department of Justice, and the Department of Labor to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice) and 41 CFR 60–3 Department of Labor), elsewhere in this issue.

By virtue of the authority vested in it by sections 713 and 709 of title VII of the Civil Rights Act of 1964 (78 Stat. 265), as amended

by the Equal Employment Opportunity Act of 1972 (Pub. L. 92-261), (42 U.S.C. 2000e-12 and 2000e-8), the Equal Employment Opportunity Commission hereby revises part 1607 of chapter XIV of title 29 of the Code of Federal Regulations by rescinding the Guidelines on Employee Selection Procedures (see 35 FR 12333, August 1, 1970; and 41 FR 51984, November 24, 1976) and adopting the Uniform Guidelines on Employee Selection Procedures (1978) as a new part 1607.

Effective date: September 25, 1978.

Eleanor Holmes Norton,
Chair.

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DEPARTMENT OF LABOR

Title 41—Public Contracts and Property Management

CHAPTER 60—OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, DEPARTMENT OF LABOR

PART 60-3—UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES (1978)

The Uniform Guidelines on Employee Selection Procedures which are printed at the beginning of this part IV of today's **Federal Register** are adopted by the Department of Labor, in conjunction with the Civil Service Commission, Department of Justice, and the Equal Employment Opportunity Commission to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. Cross reference documents are published at 5 CFR 300.103(c) (Civil Service Commission), 28 CFR 50.14 (Department of Justice) and 29 CFR 1607 (Equal Employment Opportunity Commission), elsewhere in this issue of the **Federal Register.**

By virtue of the authority of sections 201, 202, 203, 203(a), 205, 206(a), 301, 303(b), and 403(b) of Executive Order 11246, as amended, 30 FR 12319; 32 FR 14303; section 60-1.2 of part 60-1 of 41 CFR chapter 60, and section 715 of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e-14), part 60-3 of chapter 60 of title 41 of the Code of Federal Regulations is revised by rescinding the Guidelines on Employee Selection Procedures (see 41 FR 51744, November 23, 1976) and adopting the Uniform Guidelines on Employee Selection Procedures (1978) as a new part 60-3.

Effective date: September 25, 1978.

Ray Marshall,
Secretary of Labor.

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B. Criterion-Related Validity Studies
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Appendix B

(From the Federal Register of Friday, April 20, 1979.)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1604

Guidelines on Sex Discrimination; Adoption of Final Interpretive Guidelines; Question and Answers

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Amendments to Guidelines on Discrimination Because of Sex, and Addition of Questions and Answers concerning the Pregnancy Discrimination Act, Public Law 95–555, 92 Stat. 2076 (1978).

SUMMARY: On October 31, 1978, President Carter signed into law the Pregnancy Discrimination Act, Pub. L. 95–555, 92 Stat. 2076, as an amendment to Title VII of the Civil Rights Act of 1964, as amended. The act makes clear that discrimination on the basis of pregnancy, childbirth or related medical conditions constitutes unlawful sex discrimination under Title VII. The amendments to the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex bring the Guidelines into conformity with Pub. L. 95–555. The accompanying questions and answers respond to concerns raised by the public about compliance with the Pregnancy Discrimination Act.

EFFECTIVE DATE: April 20, 1979.

FOR FURTHER INFORMATION CONTACT: Peter C. Robertson, Director, Office of Policy Implementation, Room 4002A, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506, (202) 634–7060.

SUPPLEMENTARY INFORMATION: The Pregnancy Discrimination Act makes clear that Title VII of the Civil Rights Act of 1964, as amended, forbids discrimination on the basis of pregnancy, childbirth and related medical conditions. As reflected in the Committee Reports (Senate Report 95–331, 95th Cong., 1st Session (1977) and House of Representatives Report 95–948, 95th Cong. 2d Session (1978)), Congress believed that the Equal Employment Opportunity Commission (EEOC or the Commission), in its Guidelines on Discrimination Because of Sex (29 CFR Part 1604, published at 39 FR 6836, April 5, 1972) had "rightly implemented the Title VII prohibition of sex discrimination in the 1964 act." H.R. 95–948 at p. 2.

Contrary to the EEOC's Guidelines and rulings by eighteen District Courts and all seven Courts of Appeal which faced the issue, in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), the Supreme Court ruled that General Electric's exclusion of pregnancy related disabilities from its comprehensive disability plan did not violate Title VII. The Supreme Court further indicated that it believed that the EEOC Guidelines located at 29 CFR 1604.10(b) incorrectly interpreted the Congressional intent in the statute.

The Pregnancy Discrimination Act reaffirms EEOC's Guidelines with but minor modifications. For that reason, the Commission believed that only slight modifications of its Guidelines were necessary and issued them on an interim basis on March 9, 1979 at 44 FR 13278. Along with these amended Sex Discrimination Guidelines, the Commission published a list of questions and answers concerning the Pregnancy Discrimination Act. These responded to urgent concerns raised by employees, employers, unions and insurers who sought the Commission's guidance in understanding their rights and obligations under the Pregnancy Discrimination Act.

Fringe benefit programs subject to Title VII which existed on October 31, 1978, must be modified in accordance with the Pregnancy Discrimination Act no later than April 29, 1979. It is the Commission's desire, therefore, that all interested parties be made aware of EEOC's view of their rights and obligations in advance of April 29, 1979, so that they may be in compliance by that date. For that reason, the Commission has determined that the amendment to 29 CFR 1604.10 and the questions and answers, which will be appended to 29 CFR Part 1604, are not subject to the requirements of Executive Order 12044. See section 6(b)(6) of Executive Order 12044.

The Commission, however, invited and received comments from the public and affected Federal agencies. The Commission has considered the comments and determined that its Sex Discrimination Guidelines at 29 CFR 1604.10 should be issued in final form as they were published in 44 FR 13278 (March 9, 1979), except that the word "opportunities" has been inserted in Subsection (a) of Section 1604.10 to emphasize that this subsection applies to all employment-related policies or practices, since there was apparent confusion on this point. Also as a result of the comments, the Commission has added several questions and answers which will be of further assistance to those seeking Commission guidance with respect to their rights and obligations under the Pregnancy Discrimination Act, and has amended two of the originally published questions and answers.

Question 21 was amended by changing the second paragraph of the answer to read "non-spouse dependents" instead of "other dependents", to clarify the intent of the answers. Question 30 (now question 34) has been amended to include women who are contemplating an abortion within the prohibition against discrimination on the basis of abortion.

Questions 29 and 30 were added to address many of the concerns which had been raised with respect to "extended benefits" provisions.

Question 18(A) was added in response to questions and comments which pertain to child care leave.

A majority of the comments questioned the appropriateness of the Commission's answer to Question 21 of the questions and answers at 44 FR 13278. Question 21 asked whether an employer has to make available health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees and of the non-spouse dependents of all employees.

The Commission concluded that health insurance benefits for the pregnancy-related conditions of the male employee's spouse must be available to the same extent as health insurance benefits are available to the female employee's spouse. The pregnancy-related conditions of non-spouse dependents, however, would not have to be covered under the health insurance program so long as that practice applied to the non-spouse dependents of male and female employees equally.

The Pregnancy Discrimination Act amends Title VII of the Civil Rights Act of 1964, as amended. To the extent that a specific question is not directly answered by a reading of the Pregnancy Discrimination Act, existing principles of Title VII must be applied to resolve that question. The legislative history of the Pregnancy Discrimination Act states explicitly that existing principles of Title VII law would have to be applied to resolve the question of benefits for dependents. (S. Rep. No. 95–331 at 6.)

The Commission, being responsible for interpreting and implementing Title VII, utilized Title VII principles to arrive at the position reached on the dependent question.

The underlying principle of Title VII is that applicants for employment or employees be treated equally without regard to their race, sex, color, religion, or national origin. This equality of treatment encompasses the receiving of fringe benefits made available in connection with employment. Title VII does not require employers to provide the same coverage for the pregnancy-related medical conditions of spouses of male employees as it provides for the pregnancy-related costs of its female employees. However, if an employer makes available to female employees insurance which covers the costs of all of the medical conditions of their spouses, but provides male employees with insurance coverage for only *some* of the medical

conditions (i.e., all but pregnancy-related expenses) of their spouses, male employees are receiving a less favorable fringe benefit package. This view was explicitly supported in the Senate by Senators Bayh and Cranston, 123 Cong. Rec. S15037, S15058 (daily ed. Sept. 16, 1977), and not specifically opposed.

Absent a state statute to the contrary, it would not be a violation of Title VII if an employer's health insurance policy denied pregnancy benefits for the other dependents of employees (e.g. daughters) so long as the exclusion applied equally to non-spouse dependents of male employees and non-spouse dependents of female employees. Since male and female employees have an equal chance of having pregnant dependent daughters, male and female employees would be equally affected by such an exclusion.

Although costs may increase as a result of providing pregnancy benefits for the spouses of male employees where benefits are made available for the spouses of female employees, the Pregnancy Discrimination Act provides that where costs were apportioned on the date of enactment between employers and employees, any payments or contributions required to comply with the Act may be made by employers and employees in the same proportion, if that apportionment was non-discriminatory.

As a result of the many comments and questions raised on the dependent question, questions 22 and 23 were added to provide additional guidance to interested parties.

With the exception of the addition of questions 18(A), 22, 23, 29, and 30, and the amendments to questions 21 and 30 (now 34); the questions and answers are issued in final form as they were published in 44 FR 13278 (March 9, 1979).

By virtue of the authority vested in it by Section 713 of Title VII of the Civil Rights Act, as amended, 42 U.S.C. 2000–12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby approves as final § 1604.10 and adopts questions and answers concerning the Pregnancy Discrimination Act, Pub. L. 95–555, 92 Stat. 2076 (1978), as an appendix to Part 1604 of Title 29 of the Code of Federal Regulations as set forth below.

Signed at Washington, D.C., this 17th day of April, 1979.

Eleanor H. Norton,

Chair, Equal Employment Opportunity Commission.

1. 29 CFR 1604.10 is amended to read as follows:

§ 1604.10 Employment policies relating to pregnancy and childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment opportunities applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth, or related medical conditions on the same terms and conditions as they are applied to other disabilities. Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer; nothing herein, however, precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d)(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of § 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

2. The following questions and answers, with an introduction, are added to 29 CFR Part 1604 as an appendix:

Questions and Answers on the Pregnancy Discrimination Act, Pub. L. 95–555, 92 Stat. 2076 (1978)

Introduction

On October 31, 1978, President Carter signed into law the *Pregnancy Discrimination Act* (Pub. L. 95–955). The Act is an amendment to Title VII of the Civil Rights Act of 1964 which prohibits, among other things, discrimination in employment on the basis of sex. The *Pregnancy Discrimination Act* makes it clear that "because of sex" or "on the basis of sex", as used in Title VII, includes "because of or on the basis of pregnancy, childbirth or related medical conditions." Therefore, Title VII prohibits discrimination in employment against women affected by pregnancy or related conditions.

The basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion. She usually cannot be forced to go on leave as long as she can still work. If other employees who take disability leave are entitled to get their jobs back when they are able to work again, so are women who have been unable to work because of pregnancy.

In the area of fringe benefits, such as disability benefits, sick leave and health insurance, the same principle applies. A woman unable to work for pregnancy-related reasons is entitled to disability benefits or sick leave on the same basis as employees unable to work for other medical reasons. Also, any health insurance provided must cover expenses for pregnancy-related conditions on the same basis as expenses for other medical conditions. However, health insurance for expenses arising from abortion is not required except where the life of the mother would be endangered if the fetus were carried to term, or where medical complications have arisen from an abortion.

Some questions and answers about the *Pregnancy Discrimination Act* follow. Although the questions and answers often use only the term "employer," the Act—and these questions and answers—apply also to unions and other entities covered by Title VII.

1. Q. What is the effective date of the Pregnancy Discrimination Act?

A. The Act became effective on October 31, 1978, except that with respect to fringe benefit programs in effect on that date, the Act will take effect 180 days thereafter, that is, April 29, 1979.

To the extent that Title VII already required employers to treat persons affected by pregnancy-related conditions the same as persons affected by other medical conditions, the Act does not change employee rights arising prior to October 31, 1978, or April 29, 1979. Most employment practices relating to pregnancy, childbirth and related conditions—whether concerning fringe benefits or other practices—were already controlled by Title VII prior to this Act. For example, Title VII has always prohibited an employer from firing, or refusing to hire or promote, a woman because of pregnancy or related conditions, and from failing to accord a woman on pregnancy-related leave the same seniority retention and accrual accorded those on other disability leaves.

2. Q. If an employer had a sick leave policy in effect on October 31, 1978, by what date must the employer bring its policy into compliance with the Act?

A. With respect to payment of benefits, an employer has until April 29, 1979, to bring into compliance any fringe benefit or insurance program, including a sick leave policy, which was in effect on October 31, 1978. However, any such policy or program created after October 31, 1978, must be in compliance when created.

With respect to all aspects of sick leave policy other than payment of benefits, such as the terms governing retention and accrual of seniority, credit for vacation, and resumption of former job on return from sick leave, equality of treatment was required by Title VII without the Amendment.

3. Q. Must an employer provide benefits for pregnancy-related conditions to an employee

whose pregnancy begins prior to April 29, 1979, and continues beyond that date?

A. As of April 29, 1979, the effective date of the Act's requirements, an employer must provide the same benefits for pregnancy-related conditions as it provides for other conditions, regardless of when the pregnancy began. Thus, disability benefits must be paid for all absences on or after April 29, 1979, resulting from pregnancy-related temporary disabilities to the same extent as they are paid for absences resulting from other temporary disabilities. For example, if an employee gives birth before April 29, 1979, but is still unable to work on or after that date, she is entitled to the same disability benefits available to other employees. Similarily, medical insurance benefits must be paid for pregnancy-related expenses incurred on or after April 29, 1979.

If an employer requires an employee to be employed for a predetermined period prior to being eligible for insurance coverage, the period prior to April 29, 1979, during which a pregnant employee has been employed must be credited toward the eligibility waiting period on the same basis as for any other employee.

As to any programs instituted for the first time after October 31, 1978, coverage for pregnancy-related conditions must be provided in the same manner as for other medical conditions.

4. Q. Would the answer to the preceding question be the same if the employee became pregnant prior to October 31, 1978?

A. Yes.

5. Q. If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

A. An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.

6. Q. What procedures may an employer use to determine whether to place on leave as unable to work a pregnant employee who claims she is able to work or deny leave to a pregnant employee who claims that she is disabled from work?

A. An employer may not single out pregnancy-related conditions for special procedures for determining an employee's ability to work. However, an employer may use any procedure used to determine the ability of all employees to work. For example, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities.

7. Q. Can an employer have a rule which prohibits an employee from returning to work for a predetermined length of time after childbirth?

A. No.

8. Q. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, may her employer require her to remain on leave until after her baby is born?

A. No. An employee must be permitted to work at all times during pregnancy when she is able to perform her job.

9. Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are help open for employees on sick or disability leave for other reasons.

10. Q. May an employer's policy concerning the accrual and crediting of seniority during absences for medical conditions be different for employees affected by pregnancy-related conditions than for other employees?

A. No. An employer's seniority policy must be the same for employees absent for pregnancy-related reasons as for those absent for other medical reasons.

11. Q. For purposes of calculating such matters as vacations and pay increases, may an employer credit time spent on leave for pregnancy-related reasons differently than time spent on leave for other reasons?

A. No. An employer's policy with respect to crediting time for the purpose of calculating such matters as vacations and pay increases cannot treat employees on leave for pregnancy-related reasons less favorably than employees on leave for other reasons. For example, if employees on leave for medical reasons are credited with the time spent on leave when computing entitlement to vacation or pay raises, an employee on leave for pregnancy-related disability is entitled to the same kind of time credit.

12. Q. Must an employer hire a woman who is medically unable, because of a pregnancy-related condition, to perform a necessary function of a job?

A. An employer cannot refuse to hire a woman because of her pregnancy-related condition so long as she is able to perform the major functions necessary to the job. Nor can an employer refuse to hire her because of its preferences against pregnant workers or the preferences of co-workers, clients, or customers.

13. Q. May an employer limit disability benefits for pregnancy-related conditions to married employees?

A. No.

14. Q. If an employer has an all female workforce or job classification, must benefits be provided for pregnancy-related conditions?

A. Yes. If benefits are provided for other conditions, they must also be provided for pregnancy-related conditions.

15. Q. For what length of time must an employee who provides income maintenance benefits for temporary disabilities provide such benefits for pregnancy-related disabilities?

A. Benefits should be provided for as long as the employee is unable to work for medical reasons unless some other limitation is set for all other temporary disabilities, in which case pregnancy-related disabilities should be treated the same as other temporary disabilities.

16. Q. Must an employer who provides benefits for long-term or permanent disabilities provide such bnefits for pregnancy-related conditions?

A. Yes. Benefits for long term or permanent disabilities resulting from pregnancy-related conditions must be provided to the same extent that such benefits are provided for other conditions which result in long term or permanent disability.

17. Q. If an employer provides benefits to employees on leave, such as installment purchase disability insurance, payment of premiums for health, life or other insurance, continued payments into pension, saving or profit sharing plans, must the same benefits be provided for those on leave for pregnancy-related conditions?

A. Yes, the employer must provide the same benefits for those on leave for pregnancy-related conditions as for those on leave for other reasons.

18. Q. Can an employee who is absent due to a pregnancy-related disability be required to exhaust vacation benefits before receiving sick leave pay or disability benefits?

A. No. If employees who are absent because of other disabling causes receive sick leave pay or disability benefits without any requirement that they first exhaust vacation benefits, the employer cannot impose this requirement on an employee absent for a pregnancy-related cause.

18(A). Q. Must an employer grant leave to a female employee for childcare purposes after she is medically able to return to work following leave necessitated by pregnancy, childbirth or related medical conditions?

A. While leave for childcare purposes is not covered by the Pregnancy Discrimination Act, ordinary Title VII principles would require that leave for childcare purposes be granted on the same basis as leave which is granted to employees for other non-medical reasons. For example, if an employer allows its employees to take leave without pay or accrued annual leave for travel or education which is not job related, the same type of leave must be granted to those who wish to remain on leave for infant care, even though they are medically able to return to work.

19. Q. If state law requires an employer to provide disability insurance for a specified period before and after childbirth, does compliance with the state law fulfill the employer's obligation under the Pregnancy Discrimination Act?

A. Not necessarily. It is an employer's obligation to treat employees temporarily disabled by pregnancy in the same manner as employees affected by other temporary

disabilities. Therefore, any restrictions imposed by state law on benefits for pregnancy-related disabilities, but not for other disabilities, do not excuse the employer from treating the individuals in both groups of employees the same. If, for example, a state law requires an employer to pay a maximum of 26 weeks benefits for disabilities other than pregnancy-related ones but only six weeks for pregnancy-related disabilities, the employer must provide benefits for the additional weeks to an employee disabled by pregnancy-related conditions, up to the maximum provided other disabled employees.

20. Q. If a State or local government provides its own employees income maintenance benefits for disabilities, may it provide different benefits for disabilities arising from pregnancy-related conditions than for disabilities arising from other conditions?

A. No. State and local governments, as employers, are subject to the Pregnancy Discrimination Act in the same way as private employers and must bring their employment practices and programs into compliance with the Act, including disability and health insurance programs.

21. Q. Must an employer provide health insurance coverage for the medical expenses of pregnancy-related conditions of the spouses of male employees? Of the dependents of all employees?

A. Where an employer provides no coverage for dependents, the employer is not required to institute such coverage. However, if an employer's insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.

But the insurance does not have to cover the pregnancy-related conditions of non-spouse dependents as long as it excludes the pregnancy-related conditions of such non-spouse dependents of male and female employees equally.

22. Q. Must an employer provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it provides for its female employees?

A. No. It is not necessary to provide the same level of coverage for the pregnancy-related medical conditions of spouses of male employees as for female employees. However, where the employer provides coverage for the medical conditions of the spouses of its employees, then the level of coverage for pregnancy-related medical conditions of the spouses of male employees must be the same as the level of coverage for all other medical conditions of the spouses of female employees. For example, if the employer covers employees for 100 percent of reasonable and customary expenses sustained for a medical condition, but only covers dependent spouses for 50 percent of reasonable and customary expenses for their medical conditions, the pregnancy-related expenses of the male employee's spouse must be covered at the 50 percent level.

23. Q. May an employer offer optional dependent coverage which excludes pregnancy-related medical conditions or offers less coverage for pregnancy-related medical conditions where the total premium for the optional coverage is paid by the employee?

A. No. Pregnancy-related medical conditions must be treated the same as other medical conditions under any health or disability insurance or sick leave plan *available in connection with employment*, regardless of who pays the premiums.

24. Q. Where an employer provides its employees a choice among several health insurance plans, must coverage for pregnancy-related conditions be offered in all of the plans?

A. Yes. Each of the plans must cover pregnancy-related conditions. For example, an employee with a single coverage policy cannot be forced to purchase a more expensive family coverage policy in order to receive coverage for her own pregnancy-related condition.

25. Q. On what basis should an employee be reimbursed for medical expenses arising from pregnancy, childbirth or related conditions?

A. Pregnancy-related expenses should be reimbursed in the same manner as are expenses incurred for other medical conditions. Therefore, whether a plan reimburses the employees on a fixed basis, or a percentage of reasonable and customary charge basis, the same basis should be used for reimbursement of expenses incurred for pregnancy-related conditions. Furthermore, if medical costs for pregnancy-related conditions increase, reevaluation of the reimbursement level should be conducted in the same manner as are cost reevaluations of increases for other medical conditions.

Coverage provided by a health insurance program for other conditions must be provided for pregnancy-related conditions. For example, if a plan provides major medical coverage, pregnancy-related conditions must be so covered. Similarly, if a plan covers the cost of a private room for other conditions, the plan must cover the cost of a private room for pregnancy-related conditions. Finally, where a health insurance plan covers office visits to physicians, pre-natal and post-natal visits must be included in such coverage.

26. Q. May an employer limit payment of costs for pregnancy-related medical conditions to a specified dollar amount set forth in an insurance policy, collective bargaining agreement or other statement of benefits to which an employee is entitled?

A. The amounts payable for the costs incurred for pregnancy-related conditions can be limited only to the same extent as are costs for other conditions. Maximum recoverable dollar amounts may be specified for pregnancy-related conditions if such amounts are similarly specified for other conditions, and so long as the specified amounts in all instances cover the same proportion of actual costs. If, in addition to the scheduled amount for other procedures, additional costs are paid for, either directly or indirectly, by the employer, such additional payments must also be paid for pregnancy-related procedures.

27. Q. May an employer impose a different deductible for payment of costs for pregnancy-related medical conditions than for costs of other medical conditions?

A. No. Neither an additional deductible, an increase in the usual deductible, nor a larger deductible can be imposed for coverage for pregnancy-related medical costs, whether as a condition for inclusion of pregnancy-related costs in the policy or for payment of the costs when incurred. Thus, if pregnancy-related costs are the first incurred under the policy, the employee is required to pay only the same deductible as would otherwise be required had other medical costs been the first incurred. Once this deductible has been paid, no additional deductible can be required for other medical procedures. If the usual deductible has already been paid for other medical procedures, no additional deductible can be required when pregnancy-related costs are later incurred.

28. Q. If a health insurance plan excludes the payment of benefits for any conditions existing at the time the insured's coverage becomes effective (pre-existing condition clause), can benefits be denied for medical costs arising from a pregnancy existing at the time the coverage became effective?

A. Yes. However, such benefits cannot be denied unless the pre-existing condition clause also excludes benefits for other pre-existing conditions in the same way.

29. Q. If an employer's insurance plan provides benefits after the insured's employment has ended (i.e. extended benefits) for costs connected with pregnancy and delivery where conception occurred while the insured was working for the employer, but not for the costs of any other medical condition which began prior to termination of employment, may an employer (a) continue to pay these extended benefits for pregnancy-related medical conditions but not for other medical conditions, or (b) terminate these benefits for pregnancy-related conditions?

A. Where a health insurance plan currently provides extended benefits for other medical conditions on a less favorable basis than for pregnancy-related medical conditions, extended benefits must be provided for other medical conditions on the same basis as for pregnancy-related medical conditions. Therefore, an employer can neither continue to provide less benefits for other medical conditions nor reduce benefits currently paid for pregnancy-related medical conditions.

30. Q. Where an employer's health insurance plan currently requires total disability as a prerequisite for payment of extended benefits for other medical conditions but not for pregnancy-related costs, may the employer now require total disability for payment of benefits for pregnancy-related medical conditions as well?

A. Since extended benefits cannot be reduced in order to come into compliance with the Act, a more stringent prerequisite for payment of extended benefits for pregnancy-related medical conditions, such as a requirement for total disability, cannot be imposed. Thus, in this instance, in order to comply with the Act, the employer must treat other medical conditions as pregnancy-related conditions are treated.

31. Q. Can the added cost of bringing benefit plans into compliance with the Act be

apportioned between the employer and employee?

A. The added cost, if any, can be apportioned between the employer and employee in the same proportion that the cost of the fringe benefit plan was apportioned on October 31, 1978, if that apportionment was nondiscriminatory. If the costs were not apportioned on October 31, 1978, they may not be apportioned in order to come into compliance with the Act. However, in no circumstance may male or female employees be required to pay unequal apportionments on the basis of sex or pregnancy.

32. Q. In order to come into compliance with the Act, may an employer reduce benefits or compensation?

A. In order to come into compliance with the Act, benefits or compensation which an employer was paying on October 31, 1978 cannot be reduced before October 31, 1979 or before the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

Where an employer has not been in compliance with the Act by the times specified in the Act, and attempts to reduce benefits, or compensation, the employer may be required to remedy its practices in accord with ordinary Title VII remedial principles.

33. Q. Can an employer self-insure benefits for pregnancy-related conditions if it does not self-insure benefits for other medical conditions?

A. Yes, so long as the benefits are the same. In measuring whether benefits are the same, factors other than the dollar coverage paid should be considered. Such factors include the range of choice of physicians and hospitals, and the processing and promptness of payment of claims.

34. Q. Can an employer discharge, refuse to hire or otherwise discriminate against a woman because she has had or is contemplating having an abortion?

A. No. An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion.

35. Q. Is an employer required to provide fringe benefits for abortions if fringe benefits are provided for other medical conditions?

A. All fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions, must be provided for abortions. Health insurance, however, need be provided for abortions only where the life of the woman would be endangered if the fetus were carried to term or where medical complications arise from an abortion.

36. Q. If complications arise during the course of an abortion, as for instance excessive hemorraging, must an employer's health insurance plan cover the additional cost due to the complications of the abortion?

A. Yes. The plan is required to pay those additional costs attributable to the complications of the abortion. However, the employer is not required to pay for the abortion itself, except where the life of the mother would be endangered if the fetus were carried to term.

37. Q. May an employer elect to provide insurance coverage for abortions?

A. Yes. The Act specifically provides that an employer is not precluded from providing benefits for abortions whether directly or through a collective bargaining agreement, but if an employer decides to cover the costs of abortion, the employer must do so in the same manner and to the same degree as it covers other medical conditions.

Appendix C

From the **Federal Register** of Tuesday, June 12, 1979.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

45 CFR Part 90

Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance

AGENCY: Department of Health, Education, and Welfare.

ACTION: Final rule.

SUMMARY: These regulations implement the provisions of the Age Discrimination Act of 1975, as amended (Act). They are general regulations designed to guide the development of agency specific regulations by each Federal agency which administers programs of Federal financial assistance. The Age Discrimination Act prohibits discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also contains certain exceptions which permit, under limited circumstances, continued use of age distinctions or factors other than age which may have a disproportionate effect on the basis of age. These regulations discuss what is age discrimination under the Act, the circumstances under which the statutory exceptions may be invoked, the responsibilities of Federal agencies and recipients to enforce the Act, and the procedures for investigation, conciliation, and enforcement. Each Federal agency which administers programs of Federal financial assistance must issue age discrimination regulations which conform to these general regulations.

EFFECTIVE DATE: July 1, 1979.

FOR FURTHER INFORMATION CONTACT: Bayla F. White, Director Age Discrimination Task Force, Room 711-E, Hubert Humphrey Building, 200 Independence Avenue, S.W., Washington, D.C. 20201, (202) 245-6284.

SUPPLEMENTARY INFORMATION:

Background

In November 1975, Congress enacted the Age Discrimination Act (42 U.S.C. 6101, *et seq.)* as part of the Amendments to the Older Americans Act (P.L. 94-135). At that time, the express purpose of the Act was to prohibit unreasonable discrimination based on age in programs and activities receiving Federal financial assistance, including the State and Local Fiscal Assistance Act of 1972. The Act also permitted federally assisted programs and activities, and recipients of Federal funds, to continue to use: (1) some age distinctions, and (2) "reasonable factors other than age." The Act applied to persons of all ages.

Prior to the enactment of any regulations, the Act required the Commission on Civil Rights to conduct a study of age discrimination in federally funded programs and activities. The Commission transmitted its study to the President and the Congress on January 10, 1978. The Commission published the second part of its study in January 1979. The Act also required each affected Federal agency to respond to the Commission's findings and recommendations.

After the receipt of the report of the Commission on Civil Rights and the Federal agency responses to that report, the Congress considered amendments to the Age Discrimination Act of 1975. In October 1978, Congress amended the Act (P.L. 95-478). Congress struck the word "unreasonable" from the statement of purpose clause, so that the purpose of the Act is to prohibit discrimination based on age in programs and activities receiving Federal financial assistance. However, the Congress retained the exceptions to the prohibition against age discrimination. Thus, the Act still permits the use of: (1) some age distinctions, and (2) "reasonable factors other than age." The Act continues to apply to persons of all ages.

According to the language of the Act, the prohibition against age discrimination will become effective when regulations are issued to enforce the Act. The Act requires the Secretary of HEW to publish proposed and then final general regulations HEW issued proposed general regulations on December 1, 1978. These regulations are the final general regulations required by the Act. They set standards for other Federal agencies to follow in the development of agency specific regulations. The Act also requires each agency which provides Federal financial assistance to issue proposed and then final specific regulations. All agency specific regulations must conform to these general regulations and must be approved by the Secretary of HEW.

Rulemaking History

The Department of Health, Education, and Welfare has been vitally concerned about the need for public participation in the development of these regulations because of the substantial impact the Age Discrimination Act will have on the operation of federally assisted programs.

As the first step of its obligation to issue general regulations, HEW published in the **Federal Register** (43 FR 8756) a Notice of Intent To Issue Age Discrimination Regulations (NOI) on March 2, 1978. The NOI briefly identified some of the major issues addressed later in the regulatory process. Persons wishing additional information on the age discrimination regulations were asked to write to HEW. Over 600 individuals and organizations responded to the NOI. These names were incorporated into a mailing list for distribution of materials developed during the rulemaking process.

Since these general regulations apply to all Federal departments and agencies which administer programs of Federal financial assistance, HEW created an Interagency Age Discrimination Task Force to coordinate the development of the regulations. The Interagency Task Force consists of at least one representative from every department or agency which ultimately must issue its own

age discrimination regulations, as well as observers, from other interested Federal agencies. The Interagency Task Force met five (5) times during the development of the age discrimination regulations to consider both substantive and procedural matters. Consultations were also held with individual Federal agencies. The Interagency Task Force will continue to function during the development of agency specific regulations.

The Notice of Proposed Rulemaking (NPRM) was published in the **Federal Register** (p. 56428–56446) on December 1, 1978. The NPRM contained a discussion of the major issues and a section-by-section analysis of the proposed regulations as well as the text of the proposed rules. At certain key places in the proposed rules, HEW presented options for public consideration and comment. Publication of the proposed rules inaugurated a 90-day public comment period.

HEW distributed more than 16,000 copies of the proposed rules. Copies were mailed to every member of Congress, every State governor, the head of every Federal agency which provides Federal financial assistance, adminstrators of federally assisted programs, recipients of Federal funds at the State and local levels, interested individuals and groups. Special efforts were made to distribute copies of the NPRM to groups representing the interests of the elderly and of children and youth.

In January and early February, the Department held public hearings in Washington, D.C., and in each of HEW's 10 Regions in order to obtain public comment on the proposed rules. A total of 170 witnesses made presentations at those hearings. In addition, 246 letters were received containing comments, criticisms and suggestions on nearly every section of the proposed rules. Comments made at the public hearings and in writing have come from individuals, from State and local governmental units, from providers of federally supported services, from public officials at the Federal, State and local levels, and a large number have come from groups representing the interests of the elderly. The comments and verbatim transcripts from the eleven hearings have been analyzed and used in the development of these final regulations. A summary of the comments received and the responses to those comments follow the text of these regulations.

Although the final government-wide regulations have been significantly affected by the comments received, the implementation of the Age Discrimination Act is a continuing process which provides several opportunities for public participation. Each agency providing Federal financial assistance must now issue its own proposed and then final, specific age discrimination regulations. The issuance of proposed agency regulations 90 days after these general regulations are published will provide another opportunity for the public to participate in the shaping of age discrimination policies. The actual impact of the Age Discrimination Act and the problems which recipients of Federal financial assistance may encounter in implementing these general age discrimination regulations will be examined after 30 months time. Similarly, each agency will examine and publish for comment its own assessment of the effectiveness of its age discrimination regulations after they have been in effect for 30 months.

HEW will amend and revise the government-wide regulations as need and experience dictate.

Overview of the Regulations

The following paragraphs summarize the text of the final regulations. The last section of the preamble contains a discussion of the resolution of certain major issues which were raised in the NPRM and an explanation of key parts of the text of the final regulations.

Subpart A—General

The four sections in Subpart A explain the purpose of the Age Discrimination Act (§ 90.1), the purpose of the general age discrimination regulations (§ 90.2), the programs and activities covered by the Act (§ 90.3) and the meaning of important terms used in the regulations (§ 90.4).

The Age Discrimination Act is designed to prohibit discrimination on the basis of age in programs or activities which receive Federal financial assistance. The Act also contains certain exceptions which permit age distinctions and factors other than age to continue in use under certain circumstances (§ 90.1). The Act applies to persons of all ages.

The Act generally covers all programs and activities which receive Federal financial assistance. However, the Act does not apply to any age distinction "established under authority of any law" which provides benefits or establishes criteria for participation on the basis of age or in age related terms. Thus, age distinctions which are "established under authority of any law" may continue in use. These regulations (§ 90.3) define the phrase "any law" to mean Federal statutes, State statutes or local statutes adopted by elected, general purpose legislative bodies.

The Act also excludes from its coverage most employment practices, except for programs funded under the public service employment titles of the Comprehensive Employment and Training Act (CETA). These regulations do cover any program or activity which is both a program of Federal financial assistance and provides employment such as the College Work Study Program (42 U.S.C. 2751, *et seq.*) and the Work Incentive Program (42 U.S.C. 630, *et seq.*). The Age Discrimination in Employment Act (ADEA) which is administered by the Department of Labor, [Equal Employment Opportunity Commission (EEOC) after July 1, 1979], continues to be the Federal statute that prohibits employment discrimination for persons between the ages of 40 and 70. Individuals in this age range who experience employment discrimination, other than in CETA public service employment programs, must look to the ADEA for relief, not to the Age Discrimination Act.

Section 90.4 defines important terms used throughout these regulations.

Subpart B—What Is Age Discrimination?

This subpart sets out the rules against age discrimination and the conditions under which the statutory exceptions apply.

No person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance (§ 90.12(a)). This general rule is limited by the exceptions which are contained in section 304 of the Act and which are explained in §§ 90.14 and 90.15 of these regulations. The specific prohibited actions, are patterned after the regulations issued under Title VI of the Civil Rights Act of 1964 (45 CFR Part 80). As a general rule, separate or different treatment which denies or limits service from or participation in a program receiving Federal financial assistance will be prohibited by these regulations.

The Act contains several exceptions which limit the general prohibition against age discrimination. Section 304(b)(1) of the Act permits the use of age distinctions which are necessary to the normal operation or to the achievement of a statutory objective. It also permits actions which are based on reasonable factors other than age. The regulations provide definitions for two terms which are essential to an understanding of those exceptions: "normal operation" and "statutory objective" (§ 90.13). "Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives. "Statutory objective" is defined to mean any purpose which is explicity stated in a Federal statute, State statute or local statute or ordinance.

The regulations establish a four part test, all parts of which must be met for an explicit age distinction to satisfy one of the statutory exceptions and to continue in use in a Federally assisted program (§ 90.14). This four part test will be used to scrutinize age distinctions which are imposed in the administration of Federally assisted programs, but which are not explicitly authorized by a Federal, State or local statute.

Recipients of Federal funds are also permitted to take an action otherwise prohibited by the Act, if the action is based on "reasonable factors other than age." In that event, the action may be taken even though it has a disproportionate effect on persons of different ages. However, according to the regulations (§ 90.15), the factor other than age must bear a direct and substantial relationship to the program's normal operation or to the achievement of a statutory objective.

The regulations place on the recipient the burden of proving that an age distinction or a factor other than age qualifies for an exception (§ 90.16).

Subpart C—What Are the Responsibilities of the Federal Agencies?

This subpart contains four sections which explain the responsibilities that Federal agencies have to implement the ADA.

Each agency which extends Federal financial assistance must issue proposed and then final regulations to enforce the Act

(§ 90.31). The agency specific regulations must be consistent with these government-wide regulations and must be approved by the Secretary of HEW. The final agency specific regulation must contain an appendix listing all age distinctions which appear in Federal statutes and regulations which affect the agency's programs of Federal financial assistance. The appendix is the first step of a process set in motion by these regulations to inform the public of those age distinctions used in Federal Program administration. The appendix will *not* constitute agency approval or disapproval of the age distinctions contained in its regulations.

As a second step in this public information process, each Federal agency must review the age distinctions it imposes on its recipients by regulation or by administrative action to determine whether these age distinctions are permissible under the Act (§ 90.32). This review must be completed within 12 months after publication of the agency final regulations and must be published for public comment in the **Federal Register**. The report must indicate which age distinctions meet the requirements of the Act and will be continued and which will be eliminated. The report must identify age distinctions not in regulations which meet the requirements of the Act and which will subsequently be incorporated into regulations. Beginning with the effective date of an agency's specific regulations, no new age distinction may be imposed, unless it is adopted by regulation using the notice and comment procedures of the Administrative Procedure Act (5 U.S.C. 553). Beginning one year from the publication of an agency's specific regulations, no existing age distinction may be continued unless it has already been adopted by regulation or is adopted by regulation using the notice and comment procedures of the Administrative Procedure Act (5 U.S.C. 553).

The next two sections of the regulations (§§ 90.33 and 90.34) reflect HEW's goal of reducing administrative burden on recipients while still ensuring compliance with the Act. To avoid or minimize conflicting actions by different Federal agencies which deal with the same recipient, the Secretary of HEW may designate "lead agencies" to coordinate compliance and enforcement activities in those instances where two or more agencies provide assistance to the same recipient (§ 90.33). Interagency cooperation may extend to all compliance and enforcement activities *except* for the actual termination of funds and the notification to Congress of that termination.

The Act requires each agency to report annually to the Congress, through HEW, on its compliance and enforcement activities. The final regulations adopt a targeted approach to data collection and analysis, which will maximize the opportunity to measure and analyze actual progress in complying with the Act and, at the same time, minimize the burden of unnecessary data collection on recipients (§ 90.34).

The targeted approach to data collection builds on the analysis of existing data about compliance, such as complaint data and information from compliance reviews. The regulations also provide for agencies to collect data which are directly relevant to particular patterns or practices of discrimination revealed by complaints, compliance reviews or other compliance activities. This targeted approach gives each agency the authority to tailor its own data collection to the characteristics of its programs, rather than establishing specific reporting requirements for every federally assisted program.

Subpart D—Investigation, Conciliation and Enforcement Procedures

This subpart of the regulations is divided into 10 sections dealing with various aspects of the compliance and enforcement process.

Each agency is required to establish procedures for compliance, investigation, conciliation and enforcement (§ 90.41). A recipient has primary responsibility to ensure that its programs and activities are in compliance with the Act and must take necessary steps to eliminate any violations. An agency has responsibility to attempt to secure recipient compliance with the Act by voluntary means. An agency must enforce the Act when a recipient fails to eliminate violations of the Act (§ 90.42).

Each agency is required to provide written notice to each recipient of the recipient's obligations under the Act, to provide technical assistance to recipients where necessary and to make available educational materials explaining the rights and obligations of beneficiaries and recipients (§ 90.43(a)).

Moreover, each Federal agency must direct its recipients which employ the equivalent of 15 or more persons on a full-time basis to prepare a written self-evaluation (§ 90.43(b)). A recipient's self-evaluation will focus on age distinctions which are imposed directly by the recipient and not on any factors other than age. Each recipient must justify the continued use of any distinction as sanctioned under these regulations. A recipient must take corrective and remedial action whenever the self-evaluation indicates a violation of the Act. The recipient self-evaluation must be completed 18 months after the effective date of agency regulations. The self-evaluation must be available to the agency or the public for a period of three years following its completion.

Every agency must establish a procedure for processing complaints of age discrimination (§ 90.43(c)). The complaint handling procedure must include an initial screening by the Federal agency and notice to complainants and recipients of their rights and obligations in the complaint process. All complaints which fall within the coverage of the Act will be referred to a mediation process which will be managed by a single agency designated by the Secretary of HEW. That agency is the Federal Mediation and Conciliation Service (FMCS).

Complainants and recipients are required to participate in the effort to reach a mutually satisfactory mediated settlement of the complaint, although they need not meet with the mediator at the same time. The mediation process may last no more than 60 days from the date the agency first receives the complaint. The mediator will have the authority to terminate the mediation at any time before the end of the 60-day period if the process appears to have broken down. The terms of settlement that are satisfactory to both parties will be reduced to writing and sent to the Federal agency which referred the complaint. The Federal agency will take no further action on a complaint which has been successfully mediated.

If mediation does not succeed, or if a mediated settlement is violated, Federal agencies will engage in informal fact finding and then, if necessary, proceed to formal investigation of the complaint. The formal investigation may result in an administrative hearing before an administrative law judge. A Federal agency may terminate a recipient's Federal funds if the administrative law judge finds that the recipient has violated the Act.

The regulations of each Federal agency must provide that the agency may conduct compliance reviews, preaward reviews and use other similar procedures to determine compliance with the Act. These procedures are *not* dependent on the filing of a complaint of age discrimination (§ 90.44).

To help determine whether a recipient is in compliance with the Act, each Federal agency may require its recipients to make their records reasonably accessible to the agency and to furnish information to the agency (§ 90.45). Recipients are prohibited from acts of retaliation or intimidation against individuals who file age discrimination complaints or who cooperate in any aspect of the enforcement process (§ 90.46).

After a hearing before an administrative law judge, a Federal agency may terminate Federal funds to a recipient found to have violated the Act or regulations implementing the Act. Termination must be limited to the particular recipient which has violated the Act and to the program where the violation has been found. An agency may delay granting new Federal funds to a recipient when termination proceedings have been initiated (§ 90.47).

When Federal funds are terminated, the agency may pay those funds to another qualified recipient which can demonstrate the ability to achieve the goals of the Federal program's authorizing statute and to comply with the Age Discrimination Act (§ 90.48). If a Federal agency or an administrative law judge, finds that a recipient has engaged in age discrimination, the recipient must take remedial action as the agency requires. Even in the absence of a finding of discrimination, recipients may voluntarily take affirmative action to encourage the participation of persons in age groups where participation has been limited in the past. The regulations permit a recipient to provide special benefits to children or the elderly provided that the benefits do not result in the exclusion of persons who are eligible to participate in the recipients' program (§ 90.49).

The Act authorizes a private right of action, when an individual has exhausted administrative remedies. The regulations implement that provision (§ 90.50). Administrative remedies are exhausted when either 180 days have elapsed from the filing of the complaint and the agency has made no finding or the agency issues a finding in favor of the recipient. The complainant may then file a suit in a U.S. district court. The

complainant must indicate at the time the suit is filed, if attorney's fees will be demanded in the event that the complainant is successful. No action can be brought if the same alleged violation by the same defendant is the subject of a pending action in any U.S. court. Complainants who wish to file an action must give 30 days notice to the Attorney General, the Secretary of HEW, the head of the granting agency and the recipient.

Subpart E—Future Review of Age Discrimination Regulations

HEW must review the effectiveness of these general age discrimination regulations 30 months after the regulations take effect (§ 90.61). In addition, each agency must review the effectivess of its own regulations 30 months after they become effective (§ 90.62). These reviews must be published in the **Federal Register** with an opportunity for public comment.

Critical Issues

Comments were submitted on many sections of the proposed regulations and on many different issues raised in the NPRM. These comments and the responses to them are set forth in the appendix which follows the text of the regulations. Some of the comments concerned critical policy issues with respect to the implementation of the Act. These critical issues are discussed in the following paragraphs.

1. *What Ages Does the Act Cover?* Section 303 of the Act prohibits discrimination on the basis of age in federally funded programs or activities. Although the legislative history indicates Congressional concern for the problems of the elderly in particular, the Congress made it clear in its Conference Committee report that the Act is intended to apply to persons of all ages.

When the Act was originally passed in 1975, Congress directed the United States Commission on Civil Rights to conduct a study of age discrimination in federally funded programs, and required each affected Federal agency to respond to the Commission's study. After reviewing the Commission's report and Federal agency responses to it, Congress considered amendments to the Act. Nowhere in the amendment process was there any discussion of limiting or changing the coverage of the Act. It continues to extend protection to persons of all ages.

Various advocacy groups for older persons have suggested that HEW construe these general implementing regulations to protect only the elderly or to provide greater protection for older persons than for other age groups. This construction is not legally supportable in view of the legislative history and the plain language of the Act.

However, the Congress has consistently made clear its support for the concerns of older persons. It is therefore unlikely that Congress intended the Act to call into question the generally accepted special benefits which are provided to older persons in programs that are otherwise available to a wider age range of the population. Public comment on the regulations was almost unanimously supportive of these benefits, which often take the form of special discounts. Similarly, no one has suggested that similar benefits for children should be questioned under the Act.

HEW supports the continuation of special benefits for children and older persons. Therefore, these regulations permit special benefits for the elderly persons and for children that are extended by recipients so long as they do not result in the exclusion from the program of otherwise eligible persons. [§ 90.49(c)].

2. *Does the Act Require Proportional Allocation of Services and Funds by Age?* Commenters also asked whether the Act requires proportional allocation by age of the services and the benefits of federally assisted programs. Some believe that certain groups, especially the elderly, do not get their "fair share" of funds in certain programs or that certain program participation rates among age groups like the elderly are disproportionately low.

These final regulations do not require proportional program participation by age or the proportional allocation of funds by age. Discrimination has not been defined in this way in other non-discrimination regulations. However, disproportionate allocation of funds or program participation may be one of the elements which triggers an examination of whether age discrimination exists in the federally funded program or activity. If further inquiry is necessary, the recipient may show that the disparity in rates of participation, fund allocation, or services has nondiscriminatory causes. Comments on the NPRM suggested that there may be nondiscriminatory reasons which adequately explain the disproportionately low participation of the elderly in some programs.

3. *What Programs or Activities are "Established Under Authority of Any Law"?* The Age Discrimination Act exempts from coverage age distinctions contained in a program or activity "established under authority of any law" which provides benefits on the basis of age or in age related terms. Congress did not expressly indicate anywhere in the legislative history of the Act what it meant by the term "any law." The regulations must, nevertheless, define the phrase "established under authority of any law" in order to determine which age distinctions are exempted by this provision of the Act.

The NPRM presented four options for interpreting the phrase "any law" and asked for comments on those or any other reasonable interpretations. The NPRM cited two overriding issues to be considered in determining the meaning of "any law" (a) whether to include age distinctions contained in regulations; and (b) whether to include age distinctions enacted by State and local legislative bodies.

The narrowest option interpreted "any law" to mean only Federal statutes. The broadest option intepreted "any law" to include Federal, State and local statutes and Federal, State and local regulations. Supporters of defining "any law" to mean only Federal statutes argued that any other interpretation seriously weakens the Act. Congress could not have intended to give discretion to State or local legislative bodies to exempt any age distinction from the coverage of the Act. To do so would be an abdication of Federal responsibility which defeats the purpose of the Act.

Those who argued that "any law" should mean Federal and State statutes argued that the Act should permit the States to use age in exercising their traditional power in such areas as defining the age of majority, controlling access to a driver's license, and regulating compulsory school attendance. On the other hand, extending this exemption to local statutes and ordinances would permit thousands of local jurisdictions to introduce age distinctions into the administration of Federal programs which would fatally weaken the Act.

Supporters of defining "any law" to mean Federal, State and local statutes and ordinances argued that there is no clear basis for limiting the interpretation of "any law" to Federal statutes. Congress rejected an amendment to the Act in 1978 which would have defined "any law" to mean Federal statutes. Furthermore, there is no basis for excluding local statutes and ordinances if State statutes are included in the definition. They argued that no case has been made that age discrimination occurs as a result of age distinctions in State and local statutes and ordinances and that beneficial age distinctions are enacted by State and local legislative bodies.

Defining "any law" to include all regulations had relatively little support. Some suggested defining "any law" to mean Federal statutes and regulations. Supporters of including regulations in the definition argued that regulations have the force and effect of law and should be included in the "any law" exemption. This position has been rejected on the grounds that it would permit administrators of federally funded programs to impose age distinctions which are not authorized by a legislative body. In addition, HEW does not believe that the language "established under authority of any law" necessarily includes regulations having the force and effect of law.

The final regulations define "any law" to mean Federal, State and local statutes and ordinances. The language of the statute, and the general lack of legislative history to justify any narrower interpretation of that language support the conclusion that Federal and State statutes, and statutes or ordinances enacted by general purpose, elected local governments should be exempt from coverage of the Act. This is particularly appropriate in the absence of any clear indication that age discrimination occurs as a result of State and local statutes. This definition of "any law" recognizes the authority of State and general purpose, elected local governments to enact statutes which condition benefits or participation on the basis of age.

Examples: "Established Under Authority of Any Law"

1. *Federal statutes.* The Adult Education Act (20 U.S.C. 1201–1213) is statutorily designed to provide services or instruction below college level for adults. The Act defines adults as individuals who have attained the age of 16. This limitation on participation in adult education programs is

not covered by the Act. The Runaway Youth Program (42 U.S.C. 5701) authorized under the Juvenile Justice & Deliquency Prevention Act, awards grants for the development and/or strengthening of local facilities to address the immediate needs of runaway youth in a manner which is outside of the law enforcement and juvenile justice systems. The terms "runaway youth," "juveniles," and "young people" are used in the statute without further definition. Reasonable definitions of these terms would not be covered by the Act.

2. *State statutes.* Statutes setting age limitations on obtaining a driver's license or fixing age limits for compulsory school attendance are not covered by the Act.

3. *Local statutes or ordinances.* Age limitations on consuming alcoholic beverages or possessing firearms are not covered by the Act as long as these are adopted by an elected general purpose legislative body.

Note.—Any age distinction not exempted from coverage by the "any law" provision, may still qualify for an exception under another provision of the Act or these regulations.

4. *What are the Rules Against Age Discrimination?* Many commenters asked for clarification of the rules against age discrimination contained in § 90.12 of the regulations. Section 90.12 sets forth a general rule against age discrimination which is based on Section 303 of the Act, and then presents specific rules against age discrimination. These rules are limited by the exceptions contained in the Act and these regulations.

The general rule in § 90.12 reflects the language of the Act: except as provided in the Act and these regulations, ". . . no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance." It means that, unless sanctioned by one of the exceptions, recipients of Federal financial assistance may not, either directly or indirectly, do anything to exclude persons from their programs or activities on the basis of age. Nor may recipients do anything not sanctioned by one of the exceptions to deny or limit persons in their efforts to participate in federally funded programs or activities on the basis of their age. For example, a medical school may not exclude persons from admission solely because of their age.

The prohibition against age discrimination does not include an absolute prohibition against separate or different treatment on the basis of age. As a general rule, separate or different treatment which denies or limits services from, or participation in, a program receiving Federal financial assistance would be prohibited by these regulations. On the other hand, these regulations do not automatically invalidate the provision of services through separate or different treatment on the basis of age. Separate or different treatment necessary to normal operations or to the achievement of a statutory objective would qualify for an exception under these regulations.

Section 90.49 of these regulations contains language which affects the rules against discrimination in two important ways: a recipient may voluntarily act to overcome the effects of conditions which, in the past, have limited participation in a federally assisted program on the basis of age; and, a recipient may provide special benefits for children or the elderly if, by so doing, the recipient does not exclude others who are eligible from participating in the federally assisted program. As mentioned earlier, HEW does not believe that Congress meant to disturb the practices of recipients which provide special benefits to children or the elderly. For example, reduced fares for children and for senior citizens on public transportation or on railways or airlines would qualify as a special benefit under § 90.49 of these regulations. The definition of who qualifies as "children" or "elderly" for purposes of receiving a special benefit will be left to the reasonable discretion of the recipients who voluntarily provide the benefit.

5. *What are the Statutory Exceptions to the Rules Against Age Discrimination?* a. *Definitions of Statutory Objective and Normal Operation.* Many commenters questioned the meaning, clarity, and interpretation of the statutory exceptions to the prohibition against age discrimination contained in the proposed rules §§ 90.14 and 90.15.

Two phrases, "normal operations" and "statutory objective" are used in these regulations in interpreting the Act's exceptions for explicit age distinctions (§ 90.14) and for the use of factors other than age (§ 90.15). Critical to an understanding of these statutory exceptions is the definition of "statutory objective" and the definition of "normal operation."

The NPRM stated that statutory objective would mean either: (1) any purpose of a program or activity expressly stated in a statute, or (2) any purpose of a program or activity expressly stated in a statute or reasonably inferred from its provisions or legislative history. Because legislative history is a broad concept and because statutory objectives will be used to justify the use of administratively imposed age distinctions or factors other than age which have a disproportionate effect, HEW believes that the term "statutory objective" should be construed to mean only expressly stated objectives.

The NPRM was silent about whether the term "statutory objective" referred to Federal statutes, or State statutes, or local statutes, or all statutes. HEW believes the definition of "any law" in § 90.3 and the definition of "statutory objective" in § 90.13 should be parallel. Therefore, the final regulations define "statutory objective" to mean "any purpose of a program or activity expressly stated in any Federal statute, State statute or local statute or ordinance adopted by an elected, general purpose legislative body."

The final regulations have not changed the definition of "normal operation." "Normal operation" continues to mean "the operation of a program or activity without significant changes that would impair its ability to meet its objectives." This definition of "normal operation" means that a recipient of Federal funds may not use the statutory exceptions to justify refusing to make changes in program operation because those changes disturb administrative routine or are inconvenient.

b. *The four-part test for determining when an explicit age distinction is necessary to normal program operations or necessary to achieve a statutory objective.* Section 90.14 establishes a four-part test for explicit age distinctions which are claimed to be necessary to the normal operation of a program or activity, or to the achievement of a statutory objective of a program or activity.

The NPRM provided that an action reasonably takes age into account as a factor necessary to the normal operation or the achievement of a statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics (e.g., maturity);

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are difficult, costly, or otherwise impractical to measure directly.

The final regulations retain the four-part test, with some changes. The word "and" has been added after parts (a) and (b) to clarify the intent that an age distinction must meet all four parts in order to qualify for an exception. The reference to "maturity" has been deleted as an example of a characteristic for which age may be an approximation, because commenters felt that the term was too vague and did not illustrate what was meant in the test. The first part of the test in § 90.14 refers to a situation in which a program uses an age distinction as an indicator of some other characteristic, such as susceptibility to disease.

The third change occurs in part (d) of the test. The final regulations no longer contain a reference to cost or difficulty; however, part (d) now requires that the characteristics for which age is an approximation must be impractical to measure directly on an individual basis.

Thus, to qualify for an exception under § 90.14, all four of the following conditions must be met: (a) the age distinction in question must be used as an indicator or measure of some other (non-age) characteristic; (b) the *other* characteristic must be necessary for "normal operation" or for the achievement of a "statutory objective"; (c) the other characteristic must be capable of being reasonably approximated by age; and (d) the other characteristic must be impractical to measure directly on an individual basis.

The test set out in § 90.14 is designed to require careful scrutiny of age distinctions in programs receiving Federal financial assistance. It is not intended to serve as a basis for permitting continued use of age distinctions for the sake of administrative convenience if this results in denial or limitation of services on the basis of age.

HEW encourages recipients to apply age distinctions flexibly; that is, to permit a person, upon a proper showing of the

necessary characteristic to participate in the activity or program even though he or she would otherwise be barred by the age distinction. Other things being equal, an age distinction is more likely to qualify under one of the statutory exceptions if it does not automatically bar all those who do not meet the age requirements.

Examples:* "Necessary to the Normal Operation of the Program"

1. A youth organization receiving Federal financial assistance imposes a maximum age limitation on membership. The organization claims that it has as an objective, the training, education and character development of youth. The use of a maximum age limit *is necessary* to the normal operation of the recipient's program because:

(a) Age is used as a measure of the need for training, education, and character building experiences preparing for the assumption of adult responsibility; and

(b) The need for the service must be measured in order for the youth organization's objective to be met; and

(c) Age is highly related to the need for this service and is thus a reasonable measure of it; and

(d) It is not practical to measure this need on an individual basis (i.e., while some persons over the age limit might benefit from the service and some persons under the age limit might not need it, there is no practical way to identify them on an individual basis).

2. A medical school receiving Federal financial assistance generally does not admit anyone over 35 years of age, even though this results in turning away highly qualified applicants over 35.

The school claims that it has an objective, the teaching of qualified medical students who, upon graduation, will practice as long as possible. The school believes that this objective requires it to select younger applicants over older ones.

The use of such an age distinction *is not necessary* to the normal operation of the recipient's program because it does not meet the requirement of § 90.14(b).

Age of the applicant may be a reasonable measure of a non-age characteristic (longevity of practice). This characteristic may be impractical to measure directly on an individual basis. Nevertheless, achieving a high average longevity of practice for its graduates cannot be considered a program objective for a medical school within the meaning of the Act. The "normal operation" exception is not intended to permit a recipient to use broad notions of efficiency or cost-benefit analysis to justify exclusion from a program on the basis of age. The basic objectives of the medical school involve training competent and qualified medical school graduates. These objectives are not impaired if the average length its graduates practice medicine is lowered by a fraction of a year (or even more) by the admission of qualified applicants over 35 years of age.

*The examples illustrate general situations in which the regulations are applied to hypothetical recipients.

Examples:* "Necessary to the Achievement of a Statutory Objective"

1. Applications for grants for disease control programs under the Public Health Service Act can only be approved if they "(B) contain assurances satisfactory to the Secretary that . . . the applicant will conduct such programs as may by necessary (i) to develop an awareness in those persons in the area served by the applicant who are most susceptible to the disease or conditions . . . of appropriate preventive behavior and measures (including immunization) and diagnostic procedures for such disease, and (ii) to facilitate their access to such measures and procedures," (42 U.S.C. 247b).

Under the test of § 90.14, *it is necessary* to the achievement of this explicit statutory objective to give priority in immunization to age categories most at risk to the disease in question because:

(a) Age is being used as a measure of susceptibility to a disease; and

(b) Susceptibility to disease must be measured for the statutory objective to be met; and

(c) Age is a reasonable measure of susceptibility to the particular disease; and

(d) Susceptibility to the disease is impractical to measure directly on an individual basis.

2. The purpose of the Adult Education Act (20 U.S.C. 1201 *et seq.*) is to provide education that will "enable all adults to continue their education . . . and . . . enable them to become more employable, productive, and responsible citizens." (20 U.S.C. 1201.) The Act defines an adult as "any individual who has attained the age of 16." (20 U.S.C. 1201(a).)

A recipient limits participation in its adult education program to adults under 35 on the grounds that this is necessary to achieve the explicit Adult Education Act objective of increasing employability, productivity, and responsibility.

It *is not necessary* to the achievement of this statutory objective to limit participation to those under 35. This age limitation fails at least two elements of the four-part test set out in § 90.14. Employability, productivity and responsibility need not be measured in order to meet the statutory objective of making adults more employable, productive or responsible because the objective is comparative rather than absolute. The statute only requires an effort to improve these characteristics in an individual, not to maximize the degree of improvement.

These characteristics have no demonstrable correlation with age and cannot be reasonably measured by the use of age (§ 90.14(c)).

Whether or not these characteristics can practically be measured directly on an individual basis need not be considered, since the characteristics do not have to be measured in order to meet the statutory objective.

c. *Use of Reasonable Factors Other than Age.* Section 90.15 of the NPRM set out four options to characterize the relationship between a factor other than age that may have a discriminatory effect and the normal operation of a program or the achievement of a statutory objective. Those four options were rational, direct, substantial, and necessary. Commenters disagreed about what relationship a factor other than age should bear to the normal operation or the statutory objective of a program or activity.

The final regulations require that a factor other than age bear a direct and substantial relationship to the normal operation of the statutory objective of a program or activity. The "rational" option, which was equated in the NPRM with the rational basis test used under the equal protection clause of the Fourteenth Amendment, has been rejected on the grounds that many serious discriminatory effects created by factors other than age would be likely to survive a rational basis level of scrutiny.

The "necessary" option has been rejected because it requires a test which is not sufficiently flexible to deal with the variety of factors other than age and the variation in facts and circumstances that contribute to whether those factors other than age are "reasonable."

The regulations adopt the "direct and substantial" standard because it provides the appropriate flexibility and, at the same time, avoids the weaknesses inherent in the "rational" standard. Use of the "direct and substantial" standard means that use of factors other than age must be carefully examined in light of the individual facts and circumstances surrounding their use. This examination will determine whether use of the factor other than age is a sufficiently effective method of achieving a worthwhile program purpose to justify limiting or denying services or participation to adversely affected persons.

Examples:* "Reasonable Factors Other Than Age"

1. A federally assisted training program uses a physical fitness test as a factor for selecting participants to train for a certain job. The job involves frequent heavy lifting and other demands for physical strength and stamina. Even though older persons might fail the test more frequently than younger persons, the physical fitness test measures a characteristic that is *directly and substantially* related to the job for which persons are being trained and is, therefore, permissible under the Act.

2. The same program referred to in (1) above uses the same physical fitness test to select participants for a training program for clerical work. It claims that persons who pass the test are likely to do better work than those who are unable to pass the test. Even if this were true, the relationship between the requirements of the test and the requirements of the type of job for which training is being offered *is not direct and substantial.* It is so tenuous and limited that it will not justify the test's age discriminatory effect. In this situation, use of the test would violate the Act.

* The examples illustrate general situations in which the regulations are applied to hypothetical recipients.

6. *Cost/Benefit Analysis.* The NPRM raised the issue of whether cost-benefit considerations can justify the use of age distinctions or factors other than age. A majority of commenters expressed support for the NPRM position that a cost-benefit consideration by itself cannot be the sole justification for an exception under § 90.14 and § 90.15. Others, however, opposed any use of cost-benefit analysis in the administration of federally assisted programs.

The use of an explicit age distinction in the operation of a federally assisted program will have to be justified as necessary to the normal operation of the program or to the achievement of a statutory objective. That is, the explicit age distinction will have to meet the four part test of § 90.14 and cannot be disqualified or justified because it reflects a cost-benefit consideration. Use of a factor other than age will have to meet the test established in § 90.15 and cannot be disqualified or justified because it reflects a cost-benefit consideration. The scrutiny afforded age distinctions and factors other than age under these regulations should have the effect of screening out discriminatory cost-benefit considerations.

7. *Relationship Between General and Age-Targeted Programs.* Another major issue in the NPRM concerned similar services provided by both general and age-targeted programs. The question was whether the existence of an age-targeted program in any way relieved a general program of its obligation to serve the age group eligible for the age-targeted program.

Many commenters expressed the view that the general program was not relieved in any way of its obligation to serve everyone regardless of age. They reasoned that: the age targeted program was intended to supplement service for the eligible population, not to replace the services provided by the general program; an age-targeted program recognizes the special or additional needs of an age group, so that any restriction on the availability of services in a general program based solely on the existence of an age-targeted program would be discriminatory; administrators should not be given discretion to limit participation on the basis of age in a general program which Congress created to serve all ages.

Some commenters did say, however, that there are occasions when a general program should be permitted to deny services to an age group which is served elsewhere. They reasoned that the general programs can then focus on those in need who are not being served elsewhere; services offered in a general program should be based on the needs of the community as a whole and should take into account what is offered elsewhere; to require a general program to spread its limited resources to all age groups, regardless of the availability of similar services, would weaken the quality of the services provided. There was no support for the view that the general program's obligation was unconditionally lessened by the existence of the age targeted program.

The final regulations continue the policy expressed in the NPRM that, for a general program, any deviation from a policy of serving all eligible persons regardless of age that results in a denial or limitation of service on the basis of age is only permissible if it meets one of the statutory exceptions under § 90.14 Or § 90.15.

A general program can focus its services by referring persons to existing age targeted programs only if those actions do not result in the denial of services to the individual or in the provision of lesser or different services. However, HEW is persuaded that there are situations when referral to an age targeted program does not result in a denial or limitation of services. For example, a program which serves all ages may be aware of an age targeted program which, because of its specialization, offers better services to that age group. A general program may have a waiting list of applicants while a similar age targeted program has space available. In situations like these, a general program could refer an applicant to the age targeted program provided that it had sufficiently well established relationship with the age targeted program to assure that the person referred actually received the service sought.

8. *Mediation of Age Discrimination Complaints.* The NPRM proposed that complaints of age discrimination be subject to mediation after initial screening by the Federal agency. The NPRM also proposed that participation in mediation be mandatory for both complainant and recipient and that administration of the mediation process be centralized in one government agency, the Federal Mediation and Conciliation Service (FMCS). These provisions of the NPRM have been kept in the final regulations.

While most commenters supported the proposed use of mediation, some commenters questioned the appropriateness of requiring mediation as the first step in resolving an age discrimination complaint. They argued that mediation promotes inappropriate bargaining over civil rights, that mediation may jeopardize the rights of complainants, that not every complaint is suitable for mediation, that mediation introduces a new and different step in the complaint resolution process which will be unnecessarily confusing to complainants and recipients.

HEW continues to believe that the mediation process is an important innovation in resolution of age discrimination complaints. Mediation is an effort to provide faster and more creative resolution of complaints through informal methods of dispute resolution. Attempts to reach a mediated settlement of the complaint must be completed in the first 60 days after the complaint is received. While mediation does represent a new step in the complaint resolution process, the experience in resolving complaints under other civil rights statutes has been that the 60 days set aside for mediation will not significantly delay the enforcement process.

Experience with mediation in other areas indicates that even the most intransigent parties can arrive at a mutually satisfactory resolution of their dispute. Consequently, HEW believes it is desirable to require that mediation be attempted in all complaints. Mediation does not necessarily mean that the two parties to the dispute must meet face to face; each may meet separately with the mediator. Since the mediated settlement must be satisfactory to both parties, neither the complainant nor the recipient is compelled to settle the complaint. Since the cost of the mediator will be paid by the Federal government, the financial burden on complainants and recipients will be minimal. HEW believes that the ADA offers a unique opportunity to try this innovative approach to the resolution of disputes.

These regulations require that the management of the mediation process be centralized in one agency, designated by the Secretary of HEW. The FMCS will be that agency. Commenters critical of this decision questioned the wisdom of introducing a new agency into the civil rights enforcement process. Some suggested that each agency should manage its own mediation process, to permit the use of staff who would be more familiar with the program and problems of the Federal agency receiving the complaint.

HEW believes that the benefits to be realized by centralizing the management of the mediation process are substantial and that the FMCS is the appropriate agency for the job. The use of a single agency to manage the mediation process assures that uniform standards will be used in the recruitment and training of mediators, that the training will be centralized, that consistent procedures will be followed in the mediation, and that there can be a comprehensive and coherent evaluation of the process as part of the 30 month review of the effectiveness of these regulations. While the use of the FMCS does introduce a new agency into civil rights enforcement, one of the key elements in mediation is that both sides have confidence that the mediator is an independent third party. HEW believes that mediation of age discrimination complaints has a better chance to succeed if the mediator is not part of the staff of a Federal agency responsible for enforcing the Age Discrimination Act. The FMCS, which has an established reputation for mediating disputes, will draw on some of its experienced staff and will recruit and train a cadre of community based mediators who will work on age discrimination complaints.

After 30 months, HEW will evaluate the mediation process in accordance with § 90.61 of these regulations. The process will be used, revised or restructured as indicated by the results of that review.

The Department of Health, Education, and Welfare adds Part 90 to Title 45 of the Code of Federal Regulations as set forth below.

Dated: June 5, 1979.

Joseph A. Califano Jr.,

Secretary, Department of Health, Education, and Welfare.

The Department of Health, Education, and Welfare adds Part 90 to Title 45 of the Code of Federal Regulations as set forth below:

PART 90—NONDISCRIMINATION ON THE BASIS OF AGE IN PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

Subpart A—General

Sec.

90.1 What is the purpose of the Age Discrimination Act of 1975?

90.2 What is the purpose of these regulations?
90.3 What programs and activities does the Age Discrimination Act of 1975 cover?
90.4 How are the terms in the regulations defined?

Subpart B—What Is Age Discrimination?

(Standards for Determining Discriminatory Practices)

90.11 Purpose of this Subpart.
90.12 Rules against age discrimination.
90.13 Definitions of "normal operation" and "statutory objective."
90.14 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.
90.15 Exceptions to the rules against age discrimination. Reasonable factors other than age.
90.16 Burden of proof.

Subpart C—What are the Responsibilities of the Federal Agencies?

90.31 Issuance of regulations.
90.32 Review of agency policies and administrative practices.
90.33 Interagency cooperation.
90.34 Agency reports.

Subpart D—Investigation, Conciliation and Enforcement Procedures

90.41 What is the purpose of this Subpart?
90.42 What responsibilities do recipients and agencies have generally to ensure compliance with the Act?
90.43 What specific responsibilities do agencies and recipients have to ensure compliance with the Act?
90.44 Compliance reviews.
90.45 Information requirements.
90.46 Prohibition against intimidation or retaliation.
90.47 What further provisions must an agency make in order to enforce its regulations after an investigation indicates that a violation of the Act has been committed?
90.48 Alternate funds disbursal procedure.
90.49 Remedial and affirmative action by recipients.
90.50 Exhaustion of administrative remedies.

Subpart E—Future Review of Age Discrimination Regulations

90.61 Review of general regulations.
90.62 Review of agency regulations.

Authority: *Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq.*

Subpart A—General

§ 90.1 What is the purpose of the Age Discrimination Act of 1975?

The Age Discrimination Act of 1975, as amended, is designed to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance. The Act also permits federally assisted programs and activities, and recipients of Federal funds, to continue to use certain age distinctions and factors other than age which meet the requirements of the Act and these regulations.

§ 90.2 What is the purpose of these regulations?

(a) The purpose of these regulations is to state general, government-wide rules for the implementation of the Age Discrimination Act of 1975, as amended, and to guide each agency in the preparation of agency-specific age discrimination regulations.

(b) These regulations apply to each Federal agency which provides Federal financial assistance to any program or activity.

§ 90.3 What programs and activities does the Age Discrimination Act of 1975 cover?

(a) The Age Discrimination Act of 1975 applies to any program or activity receiving Federal financial assistance, including programs or activities receiving funds under the State and Local Fiscal Assistance Act of 1972 (31 U.S.C. 1221 *et seq.*).

(b) The Age Discrimination Act of 1975 does not apply to:

(1) An age distinction contained in that part of a Federal, State of local statute or ordinance adopted by an elected, general purpose legislative body which:

(i) Provides any benefits or assistance to persons based on age; or

(ii) Establishes criteria for participation in age-related terms; or

(iii) Describes intended beneficiaries or target groups in age-related terms.

(2) Any employment practice of any employer, employment agency, labor organization, or any labor-management joint apprenticeship training program, except for any program or activity receiving Federal financial assitance for public service employment under the Comprehensive Employment and Training Act of 1974 (CETA), (29 U.S.C. 801 *et seq.*).

§ 90.4 How are the terms in these regulations defined?

As used in these regulations, the term:

"Act" means the Age Discrimination Act of 1975, as amended, (Title III of Public Law 94–135).

"Action" means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

"Age" means how old a person is, or the number of elapsed years form the date of a person's birth.

"Age distinction" means any action using age or an age-related term.

"Age-related term" means a word or words which necessarily imply a particular age or range of ages (for example, "children," "adult," "older persons," but not "student").

"Agency" means a Federal department or agency that is empowered to extend financial assistance.

"Federal financial assistance" means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the agency provides or otherwise makes available assistance in the form of:

(a) Funds;

(b) Services of Federal personnel; or

(c) Real and personal property or any interest in or use of property, including:

(1) Transfers or leases of property for less than fair market value or for reduced consideration; and

(2) Proceeds from a subsequent transfer or lease of property if the Federal share of its fair market value is not returned to the Federal Government.

"Recipient" means any State or its political subdivision, any instrumentality of a State or its political sub-division, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended, directly or through another recipient. Recipient includes any successor, assignee, or transferee, but excludes the ultimate beneficiary of the assistance.

"Secretary" means the Secretary of the Department of Health, Education, and Welfare.

"United States" means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, the Trust Territory of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

Subpart B—What Is Age Discrimination?

Standards for Determining Discriminatory Practices

§ 90.11 Purpose of this subpart.

The purpose of this subpart is to set forth the prohibitions against age discrimination and the exceptions to those prohibitions.

§ 90.12 Rules against age discrimination.

The rules stated in this section are limited by the exceptions contained in sections 90.14, and 90.15 of these regulations.

(a) *General rule:* No person in the United states shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

(b) *Specific rules:* A recipient may not, in any program or activity receiving Federal financial assistance, directly or through contractual, licensing, or other arrangements use age distinctions or take any other actions which have the effect, on the basis of age, of:

(1) excluding individuals from, denying them the benefits of, or subjecting them to discrimination under, a program or activity receiving Federal financial assistance, or

(2) Denying or limiting individuals in their opportunity to participate in any program or activity receiving Federal financial assistance.

(c) The specific forms of age discrimination listed in paragraph (b) of this section do not necessarily constitute a complete list.

§ 90.13 Definitions of "normal operation" and "statutory objective."

For purposes of sections 90.14, and 90.15, the terms "normal operation" and "statutory objective" shall have the following meaning:

(a) "Normal operation" means the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(b) "Statutory objective" means any purpose of a program or activity expressly

stated in any Federal statute, State statute, or local statute or ordinance adopted by an elected, general purpose legislative body.

§ 90.14 Exceptions to the rules against age discrimination. Normal operation or statutory objective of any program or activity.

A recipient is permitted to take an action, otherwise prohibited by section 90.12, if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity. An action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

(a) Age is used as a measure or approximation of one or more other characteristics; and

(b) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity; and

(c) The other characteristic(s) can be reasonably measured or approximated by the use of age; and

(d) The other characteristic(s) are impractical to measure directly on an individual basis.

§ 90.15 Exceptions to the rules against age discrimination. Reasonable factors other than age.

A recipient is permitted to take an action otherwise prohibited by section 90.12 which is based on a factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

§ 90.16 Burden of proof.

The burden of proving that an age distinction or other action falls within the exceptions outlined in sections 90.14 and 90.15 is on the recipient of Federal financial assistance.

Appendix D

PART 1606—GUIDELINES ON DISCRIMINATION BECAUSE OF NATIONAL ORIGIN

§ 1606.1 Guidelines on discrimination because of national origin.

(a) The Commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply to the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

(b) Title VII is intended to eliminate covert as well as the overt practices of discrimination, and the Commission will, therefore, examine with particular concern cases where persons within the jursidiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of cases of this character which have come to the attention of the Commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of membership in lawful organizations identified with or seeking to promote the interests of national groups; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin, and denial of equal opportunity to persons who as a class of persons tend to fall outside national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.

(c) Title VII of the Civil Rights Act of 1964 protects all individuals, both citizen and noncitizens, domiciled or residing in the United States, against discrimination on the basis of race, color, religion, sex, or national origin.

(d) Where discrimination on the basis of citizenship against a lawfully immigrated alien residing in the United States has the purpose or effect of discriminating against persons of a particular national origin, such person may not be discriminated against on the basis of citizenship, except that it is not an unlawful employment practice for an employer pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive Order of the President respecting the particular position or the particular premises in question.

(e) In addition, some states have enacted laws prohibiting the employment of noncitizens. Where such laws have the purpose or effect of discriminating on the basis of national origin, they are in conflict with and are, therefore, superseded by title VII of the Civil Rights Act of 1964, as amended.

(Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12)

Appendix E

(From the **Federal Register** of Friday, September 14, 1979.)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1605

Proposed Guidelines on Discrimination Because of Religion

AGENCY: Equal Employment Opportunity Commission.

ACTION: Proposed Guidelines.

SUMMARY: The Equal Employment Opportunity Commission is proposing a revision of its Guidelines on Discrimination Because of Religion. We are taking this action in response to the public confusion concerning the duty of employers and labor organizations to provide reasonable accommodation for the religious practices of employees or prospective employees. If adopted, these Guidelines will clarify this duty and thereby prevent an employee or prospective employee from being discriminated against and unnecessarily penalized because of his or her religious practices.

DATES: Comments must be received on or before December 13, 1979.

ADDRESSES: Address all comments to: Marie D. Wilson, Executive Officer, Executive Secretariat, Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506.

FOR FURTHER INFORMATION CONTACT: Frederick D. Dorsey, Director, Office of Policy Implementation, Room 4002, EEOC, 2401 E Street NW., Washington, D.C. 20506, (202) 634–7060.

SUPPLEMENTARY INFORMATION: Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended creates an obligation to provide reasonable accommodation for the religious practices of an employee or prospective employee, unless to do so would create an undue hardship. In 1977, the Supreme Court rendered its decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). The Court's interpretation of an undue hardship led to much confusion in the employment sector. It left employers, employees and labor organizations unclear as to the extent of the statutory duty under Title VII to provide reasonable accommodation for the religious practices of an employee or prospective employee. The Commission held public informational hearings on this issue in April and May of 1978 in New York City, Los Angeles and Milwaukee. To allow interested persons an opportunity to participate in all stages of its rulemaking process and in compliance with Executive Order 12044, Improving Government Regulations (43 FR 12661, March 24, 1978), the Commission published its intent to review its current *Guidelines on Discrimination Because of Religion* (44 FR 6200, January 31, 1979). The purpose of this review was to determine if any changes in the Guidelines were needed based on the information obtained from the Commission's informational hearings.

After this information was studied, the Commission considered several alternatives among which were: (1) The Commission could seek new legislation; (2) the Commission could publish the transcript of the hearings and then employers could develop solutions from the information obtained at the hearings; (3) the Commission could rely on its existing Guidelines; (4) the Commission could revise its Guidelines or; (5) the Commission could revise its Guidelines and publish the transcript of the hearings.

The last alternative was selected because the hearings established that many people desired clarification of the Guidelines and that many employers had developed alternative employment practices for accommodating the religious practices of employees and prospective employees which

could be of use generally. A transcript of the hearings will be available for purchase after October 15, 1979.

One issue repeatedly raised during the hearings concerned the use of pre-selection inquiries into an applicant's availability to work during an employer's scheduled hours. Many employers—especially employers who operate on shifts or 7 days a week—ask applicants if they are available to work all of the scheduled working hours even though the applicant would only be working some of those hours. The employer then often excludes any applicants who are not available at all the specified times. This procedure prevents many applicants, who are not available at all times because of their religious practices, from being employed even before the employer determines whether or not it could accommodate the applicant without an undue hardship to its business. The Commission has developed one solution to this problem (at footnote 10) which would enable the employer to determine the majority of hours when all the applicants would be available, while deferring until after the position is offered determination of the times when individuals cannot be available because of religious practices. The Commission asks the public to comment on this solution and to suggest other alternatives.

These Guidelines are a significant regulation under Executive Order 12044. Their purpose is to clarify the Commission's current *Guidelines on Discrimination Because of Religion*. There are no regulatory burdens or recordkeeping requirements necessary for compliance with the Guidelines. The Commission has determined that they would not have a major economic impact on the economy and that a regulatory analysis is not necessary.

In compliance with Executive Order 12067 (43 FR 28967, July 5, 1978), the Commission has consulted during the drafting stage with representatives of the Department of Justice, Department of Labor, Department of Treasury and the Office of Personnel Managment. As a result of this coordination and cooperation, the Commission and the above agencies have developed these proposed Guidelines. At the end of the 90 day comment period, the Commission will continue to consult with these agencies on issues raised through the public comment process. The Commission and these agencies will then issue final Guidelines. Each agency may decide if additional provisions are necessary under its specific statutory authority.

Signed at Washington this 11th day of September 1979.

For the Commission.

Eleanor Holmes Norton.

Chair.

Accordingly, it is proposed to amend 29 CFR Chapter XIV by revising Part 1605 to read as follows:

PART 1605—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION

Sec.

1605.1 "Religious" nature of a practice or belief.

1605.2 Reasonable accommodation without undue hardship as required by section 701(j) of Title VII of the Civil Rights Act of 1964.

Appendix A to § 1605.2 Background information.

Authority: Sec. 713(a), 78 Stat. 265; 42 U.S.C. 2000e–12.

§ 1605.1 "Religious" nature of a practice [1] or belief.

In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in *United States* v. *Seeger*, 380 U.S. 163 (1965) and *Welsh* v. *United States*, 398 U.S. 333 (1970). The Commission has consistently applied this standard in its decisions.[2] The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

§ 1605.2 Reasonable accommodation without undue hardship as required by section 701(j) of title VII of the Civil Rights Act of 1964.[3]

(a) *Purpose of This Section.* This section clarifies the obligation imposed by Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717) to accommodate the religious practices of employees and prospective employees. This section does not address other obligations under Title VII not to discriminate on grounds of religion, nor other provisions of Title VII.[4] The legal principles which have been developed with respect to other aspects of discrimination prohibited by Title VII on the bases of race, color, sex, and national origin also apply to religious discrimination in all circumstances other than where an accommodation is required.

(b) *Duty to Accommodate.* (1) Section 701(j) makes it an unlawful employment practice under § 703(a)(1) for an employer to fail to reasonably accommodate the religious practices and beliefs of an employee or prospective employee, unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.[5] Section 701(j) in conjunction with § 703(c), imposes an obligation on a labor organization to reasonably accommodate the religious practices and beliefs of an employee or prospective employee, unless the labor organization demonstrates that accommodation would result in undue hardship.[6]

(2) After an employee or prospective employee notifies the employer or labor organization of his or her need for a religious accommodation, the employer or labor organization has an obligation to explore all possible methods of reasonable accommodation. A refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each alternative. A mere assumption that many more people, with the same beliefs as the person being accommodated, may also need accommodation is not evidence of undue hardship.

(c) *Alternatives for Accommodating Religious Practices.* (1) Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following subsections are some means of accommodating the conflict between work schedules and religious practices which the Commission believes that employers and labor organizations must explore as part of the obligation to accommodate. These are not intended to be all-inclusive. There are often other alternatives which would reasonably accommodate an individual's religious practices when they conflict with a work schedule. There are also employment practices besides work scheduling which may conflict with religious practices and cause an individual to request an accommodation. See, for example, the Commission's finding number (3) from its Hearings on Religious Discrimination, in Appendix A to § 1605.2. The principles expressed in these guidelines apply as well to such requests for accommodation.

(2) Some alternatives for accommodating an individual's religious practices could, to various degrees, disadvantage the individual in terms of wages, desirability of position, or career opportunities. The obligation to provide equal employment opportunity to the extent possible, irrespective of religious beliefs, requires that employers and labor organizations adopt the alternative which least disadvantages the individual requiring the accommodation.

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[1] The word "practice" as used in these guidelines means "observance and practice, as well as belief", as stated in section 701(j), 42 U.S.C. 2000e(j).

[2] See CD 76–104 (1976), CCH ¶ 6500; CD 71–2620 (1971), CCH ¶ 6283; CD 71–779 (1970), CCH ¶ 6180.

[3] Section 701(j), 42 U.S.C. 2000e(j) states: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

[4] This section is not intended to limit any additional obligations to accommodate religious practices which may exist pursuant to constitutonal, statutory or executive order provisions such as E.O. 11246; neither is it intended to provide guidance for statutes which require accommodation on bases other than religion such as § 503 of the Rehabilitation Act of 1973.

[5] See *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 74 (1977).

[6] Section 1605.2 is primarily directed to obligations of employers or labor organizations, which are the entities covered by Title VII that will most often be required to make an accommodation. However, the principles of § 1605.2 also apply when an accommodation can be required of other entities covered by Title VII, such as an employment agency (§ 703(b)) or a joint labor-management committee controlling apprenticeship or other training or retraining (§ 703(d)). See, for example, § 1605.2(e)(1) "Scheduling of Tests or Other Selection Procedures."

(i) *Voluntary Substitutes.* Reasonable accommodation without undue hardship is possible where a satisfactory voluntary substitute is available. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations do everything possible to facilitate the securing of a satisfactory voluntary substitute. Some means of doing this which would not involve substantial cost are: to publicize policies regarding accommodation and substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

(ii) *Flexible Scheduling.* One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations must explore is the creation of a flexible work schedule. The following list is an example of areas in which flexibility might be introduced: Flexible arrival and departure times; floating or optional holidays; flexible work breaks; use of lunch time in exchange for early departure; staggered work hours; and permitting an employee to make up time lost due to the observance of religious practices.[7]

(iii) *Lateral Transfer and Change of Job Assignments.* When an employee cannot be accommodated either as to his or her entire job or an assignment within the job, employers and labor organizations must consider whether or not it is possible to change the job assignment to give the employee a lateral transfer.

(iv) *Payment of Dues to a Labor Organization.* Some collective bargaining agreements include a provision that each employee must join the labor organization or pay the labor organization a sum equivalent to dues. When an employee's religious practices do not permit compliance with such a provision, the labor organization must accommodate the employee by permitting him or her to donate a sum equivalent to dues to a charitable organization other than one associated with the employee's religion.[8]

(d) *Undue Hardship*— (1) *Cost.* In the *Hardison* decision, the Court indicated that it would be an undue hardship on an employer if it is forced to bear "more than a *de minimis* cost" in order to accommodate an employee's need to be absent from his or her scheduled duty hours. 432 U.S. at 84. Interpretation of "more than a *de minimis* cost" has to be made on a case by case basis with due regard given to the identifiable cost in relation to the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In general, the Commission interprets this phrase as it was used in the *Hardison* decision to mean that costs similar to the regular payment of premium wages of substitutes, which was at issue in *Hardison*, would constitute undue hardship. However, the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation. In most circumstances an employer can also be required to pay administrative costs necessary for providing the accommodation, such as those costs involved in rearranging schedules and recording substitutions for payroll purposes.

(2) *Seniority Rights.* the *Hardison* decision also indicated that it would be undue hardship to require a variance from a seniority system in order to accommodate an employee's religious practices when doing so would deny another employee his or her shift preference guaranteed by that system. 432 U.S. at 80. The Commission believes that arrangements for voluntary substitutes (see paragraph (c)(1) of this section do not interfere with legitimate expectations founded on a seniority system.

(e) *Selection Practices.*— (1) *Scheduling of Tests or Other Selection Procedures*

When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, the user of the test should be aware that the principles enunciated in these guidelines apply and that it has an obligation to accommodate such employee or prospective employee unless undue hardship would result.

(2) *Inquiries Which Determine An Applicant's Availability to Work During An Employer's Scheduled Working Hours.* (i) The duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship. When an employer inquires into an applicant's availability to work during its scheduled working hours prior to making a decision whether to hire the applicant, there is a danger that the employer will deny the position to an applicant requiring an accommodation in order to avoid having to make any effort to accommodate the applicant, even though an accommodation without undue hardship is possible. There is also a danger that many selecting officials will not be able to objectively evaluate an applicant when they know the applicant will require an accommodation, especially when the official is selecting from among similarly qualified applicants. When the need for an accommodation affects a decision to reject an applicant, the applicant will usually be unaware of this fact; even if the applicant suspects that the rejection was based on the need for a religious accommodation, the applicant will find it difficult to prove. Awareness of employer attitudes toward accommodation, and of the difficulty of challenging a rejection because of a need for an accommodation, discourages applicants from applying to employers who make pre-selection inquiries into availability.[9]

(ii) Therefore, because pre-selection inquiries concerning availability have the effect of excluding persons of certain religious beliefs, an employer must justify such inquiries by business necessity. Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to selection must consider procedures which would serve this interest without excluding persons whose religious practices need accommodation.[10]

(iii) The Commission will consider there to be *prima facie* evidence that the need for an accommodation influenced a decision to reject an applicant when: (A) Prior to selection the employer elicits information which would determine an applicant's need for a religious accommodation; (B) this procedure is not justified by business necessity; and (C) the employer rejects a qualified applicant after the employer has determined the applicant's need for an accommodation. The burden is then on the employer to demonstrate that factors other than the need for an accommodation were the reason for rejecting the qualified applicant, or that a reasonable accommodation without undue hardship was not possible.

Appendix A to § 1605.2—Background Information

In 1966, the Commission adopted guidelines on religious discrimination which stated that an employer had an obligation to accommodate the religious practices of its employees or prospective employees unless to do so would create a "serious inconvenience to the conduct of the business". 29 CFR 1605.1(a)(2), 31 FR 8370 (1966).

In 1967 the Commission revised these guidelines to state that an employer had an obligation to reasonably accommodate the religious practices of its employees or prospective employees, unless the employer could prove that to do so would create an "undue hardship". 29 CFR 1605.1(b)(c), 32 FR 10298.

In 1972, Congress amended Title VII to incorporate the obligation to accommodate expressed in the Commission's 1967 Guidelines by adding section 701(j).

In 1977, the United States Supreme Court issued its decision in the case of *Trans World*

[7] On September 29, 1978, Congress enacted such a provision for the accommodation of Federal employees' religious practices. See Public Law 95-390, 5 U.S.C. 5550a "Compensatory Time Off for Religious Observances."

[8] *Intn' Ass'n of Machinist and Aerospace Workers* v. *Anderson*, F. 2d 397 (9th Cir. 1978); *cert denied* ——U.S.——, 47 L.W. 3738 (June 5, 1979).

[9] Evidence of these problems was submitted through oral and written testimony at the Commission's Hearings on Religious Discrimination.

[10] An example of such a procedure is for the employer to initially ask a question such as: "Apart from absences for religious observances will you be available for work at the following times?" Then, after a position is offered, the employer can inquire into the need for a religious accommodation and determine, according to the principles of these Guidelines, whether an accommodation is possible. This type of inquiry would provide an employer with information concerning the overwhelming majority of times when applicants will be available, while deferring until after a position is offered the identification of those times when the usually small number of applicants needing accommodation will not be available.

Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977). *Hardison* was brought under Section 703(a)(1) because it involved facts occurring before the enactment of Section 701(j). The Court applied the Commission's 1967 Guidelines, but indicated that the result would be the same under section 701(j). It stated that Trans World Airlines had made reasonable efforts to accommodate the religious needs of its employee, Hardison. The Court held that to require Trans World Airlines to make further attempts at accommodations—by unilaterally violating a seniority provision of the collective bargaining agreement, paying premium wages on a regular basis to another employee to replace Hardison, or creating a serious shortage of necessary employees in another department in order to replace Hardison—would create an undue hardship on the conduct of Trans World Airlines' business, and would therefore, exceed the duty to accommodate Hardison.

In 1978, the Commission conducted public hearings on religious discrimination in New York City, Milwaukee, and Los Angeles in order to respond to the concerns raised by *Hardison*. Approximately 150 witnesses testified or submitted written statements.[11] The witnesses included employers, employees, representatives of religious and labor organizations and representatives of Federal, State and local governments.

The Commission found from the hearings that:

(1) There is widespread confusion concerning the extent of accommodation under the *Hardison* decision.

(2) The religious practices of some individuals and some groups of individuals are not being accommodated.

(3) Some of those practices which are not being accommodated are:

—Observance of a Sabbath or religious holidays;

—Need for prayer break during working hours;

—Practice of following certain dietary requirements;

—Practice of not working during a mourning period for a deceased relative;

—Prohibition against medical examinations;

—Prohibition against membership in labor and other organizations; and

—Practices concerning dress and other personal grooming habits.

(4) Many of the employers who testified had developed alternative employment practices which accomodate the religious practices of employees and prospective employees and which meet the employer's business needs.

(5) Little evidence was submitted by employers which showed actual attempts to accommodate religious practices with resultant unfavorable consequences to the employer's business. Employers appeared to have substantial anticipatory concerns but no, or very little, actual experience with the problems they theorized would emerge by providing reasonable accommodation for religious practices.

Based on these findings, the Commission is revising its Guidelines to clarify the obligation imposed by Section 701(j) to accommodate the religious practices of employees and prospective employees.

[11] The transcript of the Commission's Hearings on Religious Discrimination can be examined by the public at: The Equal Employment Opportunity Commission, 2401 E Street NW., Washington, D.C. 20506.

This transcript will be published by the Government Printing Office and available for purchase on approximately October 15, 1979.

Appendix F

(From the **Federal Register** of Friday, January 19, 1979.)

Title 29—Labor

CHAPTER XIV—EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1608—AFFIRMATIVE ACTION APPROPRIATE UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Adoption of Interpretative Guidelines

AGENCY: Equal Employment Opportunity Commission.

ACTION: Adoption of final Guidelines on Affirmative Action appropriate under Title VII of the Civil Rights Act of 1964, as amended.

SUMMARY: The Equal Employment Opportunity Commission wishes to encourage voluntary action to eliminate employment discrimination, and hereby publishes its final Guidelines on Affirmative Action. Proposed Guidelines were published on December 28, 1977 (42 FR 64,826) for public comment. The Commission has now analyzed those comments and taken them into consideration in preparing its final Guidelines. The Preamble, below, describes the Commission's purpose for issuing these Guidelines and explains how the issues raised by the comments have been addressed. These Guidelines clarify the kinds of voluntary actions that are appropriate under Federal law. They describe the action the Commission will take when the procedures outlined herein have been followed. By elucidating the standards for voluntary action in these Guidelines, the Commission encourages affirmative action without resort to litigation.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT:

Peter C. Robertson, Director, Office of Policy Implementation, Room 4002A, 2401 E Street, N.W., Washington, D.C. 20506, (202) 254-7669, 634-7060.

SUPPLEMENTARY INFORMATION:

An Overview of the Guidelines on Affirmative Action

The Equal Employment Opportunity Commission ("EEOC", "the Commission") enforces Title VII of the Civil Rights Act of 1964, as amended, ("Title VII," "the Act"), which makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin. The Act requires the Commission to investigate complaints and attempt to correct violations it discovers, informally and through conciliation, or, if necessary, through court action. The Act also authorizes private individuals to bring lawsuits if their complaints are not resolved to their satisfaction or within the statutory time period.

Since the enactment of Title VII of the Civil Rights Act of 1964, many employers, labor organizations, and other persons subject to the Act have altered employment systems to implement the purposes of Title VII by improving employment opportunities for previously excluded groups. Because of what Congress has called the "complex and pervasive" nature of systemic discrimination against minorities and women (see H.R. Rep. No. 92-238, 92nd Cong., 2nd Sess. 8 (1972)), these voluntary efforts often involve significant changes in employment relationships. Some of these actions have been challenged under Title VII, as conflicting with statutory language requiring that employment decisions not be based on race, color, religion, sex, or national origin considerations. Accordingly, the Commission believes it is important to announce the legal principles which govern voluntary affirmative action under Title VII and other employment discrimination laws, so that persons subject to the Act have appropriate guidance. These Guidelines constitute the Commission's interpretation of Title VII, harmonizing the need to eliminate and prevent discrimination and to correct the effects of prior discrimination with the need to protect all individuals from discrimination on the basis of race, color, religion, sex, or national origin.

Requests for guidance have been received by the Commission from persons subject to Title VII concerning the relationship between affirmative action and so-called "reverse discrimination." There is no separate concept under Title VII of "reverse discrimination." Discrimination against all individuals because of race, color, religion, sex, or national origin is illegal under Title VII. *McDonald* v. *Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976).

To clarify the relationship between affirmative action and a countervailing claim of discrimination, a new section 1608.1 of these Guidelines sets forth the historical and legislative foundation for the Commission's interpretation of Title VII. Section 1608.1(b) explains that Congress enacted Title VII in order to overcome the effects of past and present employment practices which are part of a larger pattern of restriction, exclusion, discrimination, segregation and inferior treatment of minorities and women in many areas of life. Congress sought to accomplish this objective by establishing a national policy against discrimination in employment and encouraging voluntary affirmative action to eliminate barriers to equal employment opportunity. It is the Commission's interpretation that appropriate voluntary affirmative action, or affirmative action pursuant to an administrative or judicial requirement, does not constitute unlawful discrimination in violation of the Act.

It is essential to the effective implementation of Title VII that those who take appropriate voluntary affirmative action receive adequate protection against claims that their efforts constitute discrimination.

The term affirmative action means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Section 1608.3 of these Guidelines identifies circumstances in which voluntary affirmative action is permissible under Title VII. When such circumstances exist, and a plan or program otherwise complies with these Guidelines, the Commission will find that there is no reasonable cause to believe that the affirmative action plan or program violates Title VII. See § 1608.10(a). In addition, § 1608.10(b) provides that where the plan or program is in writing and was adopted in good faith, in conformity with, and in reliance upon these Guidelines, the Commission will provide the protection authorized under section 713(b)(1) of Title VII to the employer, labor organization, or other person taking the action. See *EEOC* v. *AT&T*, 419 F. Supp. 1022, 1055, n. 34 (E.D.Pa. 1976), *aff'd*, 556 F.2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

On December 28, 1977, at 42 FR 64826 the Commission published proposed "Guidelines on Remedial and/or Affirmative Action" in the **Federal Register** and invited comments from the public. Comments were received from almost 500 individuals and organizations. The paragraphs below summarize the major issues raised by the comments and indicate the way in which the final Guidelines address the concerns raised by the comments.

On December 11, 1978, the Commission voted to approve the Guidelines in final form. Pursuant to Executive Order 12067, the Guidelines were then distributed to all Federal agencies for their review. Comments received in this process are also reflected in the discussion below.

I. Change of Guidelines' Title

The proposed Guidelines were titled "Proposed Guidelines on Affirmative and/or Remedial Action" and the phrase "remedial and/or affirmative action" was utilized throughout the document. A number of comments questioned the difference, if any, between remedial action and affirmative action. The term "remedial" has been dropped because of the possible erroneous implication that a violation of the law was required before affirmative action could be taken.

II. The Commission Will Process Complaints Alleging Discrimination Against Any Aggrieved Person

Many of the comments interpreted the Guidelines as indicating a Commission position that whites or males are entitled to less protection against discrimination than minorities or females, and that the Commission would either ignore complaints filed by whites or males, or process them in a different manner from those filed by females and minorities. The Commission maintains its position, articulated prior to *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), that discrimination on the basis of race, color, religion, sex, or national origin, is prohibited under Title VII, regardless of the individual or class against whom such discrimination is directed. See, e.g., Commission Decision No. 74-31, 7 FEP Cases 1326, 1328, CCH EEOC Decisions, ¶6404, (1973). The Commission will follow the same procedures in processing complaints filed by all individuals, regardless of their race, color, religion, sex, or national origin.

To avoid any ambiguity on these issues, language in the proposed Guidelines suggesting that complaints filed by whites and males would be "dismissed" under certain circumstances has been amended. Proposed paragraph V stated that the Commission would "issue a notice of dismissal of the charge" when an affirmative action program conformed to the Guidelines' requirements. The word "dismissal" is a term of art used by the Commission in its procedural regulations to refer to all determinations other than "reasonable cause." Because its use was misconstrued in many comments, final sections have been amended by substituting the phrase "a determination of no reasonable cause" where such a finding is justified by the facts of the case.

III. Consideration of Race, Color, Religion, Sex, and National Origin in Employment Decisions

Some commentators objected to the draft Guidelines because of their belief that Title VII requires that all employment decisions be made without consideration of race, color, religion, sex, or national origin, regardless of the circumstances. This conclusion does not comport with United States Supreme Court decisions interpreting Title VII, nor with the recent decision in *Regents of the University of California* v. *Bakke*, 98 S. Ct. 2733 (1978) (discussed infra). In the Title VII cases, the Supreme Court has called upon employers "'* * * to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). See also, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Thus, the Supreme Court recognizes that persons subject to Title VII will consider race, sex and national origin in their analyses and evaluations. In addition, the Court has emphasized the concept of conciliation and voluntary action rather than litigation as the primary method of enforcing Title VII. See *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355 (1977). Voluntary action necessarily implies latitude to make a reasonable judgement as to whether action should be taken and the nature of such action.

At the same time, the Commission recognizes that considerations of race, color, religion, sex, and national origin are not permissible in other contexts. For example, in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976), the Court held that the antidiscrimination principle of Title VII could be invoked by white employees as well as minority employees. No question of affirmative action was involved. The Court held that disparate treatment violated Title VII, but specifically stated that its decision did not address any issues relating to affirmative action programs. *McDonald*, *supra*, at 280, n. 8. For the reasons set forth in § 1608.1, the Commission considers that these Guidelines are consistent with the statute, the Congressional intent behind it, and the decisions of the Supreme Court.

IV. Two Different Justifications of Voluntary Action: The Relationship Betweeen Title VII and Executive Order No. 11246, As Amended

A number of comments indicated uncertainty as to the relationship in the proposed Guidelines between the references to Title VII and the references to the Executive Order. These commentators apparently understood the Guidelines to mean that affirmative action required by Executive Order No. 11246, as amended, and its implementing regulations would be lawful under Title VII *only* where the contractor has a reasonable basis for concluding that such action is necessary under Title VII. The structure of the Guidelines has been changed to clarify the Commission's original interpretation that action taken pursuant to, and in conformity with the Executive order, as amended, and its implementing regulations, does not violate Title VII.

The legislative history of the Equal Employment Opportunity Act of 1972 shows that Congress repeatedly rejected limitations on affirmative action under the Executive Order, including the goals and timetables approach that had become by that time a central feature of the implementation of the Order. See, e.g., 118 Cong. Rec. 1385–1386 (1972) (remarks of Sen. Saxbe); 118 Cong. Rec. 1664–1665 (1972) (remarks of Sen. Javits); 118 Cong. Rec. 1676 (1972) (rejecting amendment offered by Sens. Allen and Ervin that would have prohibited requirements for certain types of affirmative action, including the goals approach, under the Executive Order); 118 Cong. Rec. 4918 (1972) (rejecting amendment offered by Sen. Ervin that would have applied section 703(j) of Title VII to the Executive Order).

The Commission concludes that Congress intended to permit the continuation of the Executive Order program which required affirmative action by government contractors. The Congress which acted to allow the Executive Order program to continue would not, in the same measure, invalidate it under Title VII. The statute should be construed to avoid such a contradictory conclusion, especially where such a conclusion would undermine the expressed Congressional purpose of opening employment opportunities to minorities and women who had in the past been denied such opportunities.

In the Equal Employment Opportunity Act of 1972, Congress recognized the contractor's right to rely on affirmative action plans that had been approved under the Executive Order. See section 718 of Title VII. Furthermore, Congress in section 715 established the Equal Employment Opportunity Coordinating Council (composed of the Secretary of Labor, the Chair of the EEOC, the Attorney General, the Chair of the U.S. Civil Service Commission, the Chair of the U.S. Commission on Civil Rights, or their respective delegates) "to minimize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among * * * branches of the Federal

Government responsible for the implementation and enforcement of equal opportunity legislation, orders, and policies." 42 U.S.C. 2000e–14. This coordination responsibility now rests in the Commission by virtue of 5 U.S.C. 901 et seq., as applied by Reorganization Plan No. 1 (1978), which was implemented by Executive Order 12067 (43 FR 28,967, July 30, 1978). In order to achieve the objectives of section 715 and Executive Order No. 12067, the Commission concludes that it must recognize compliance with the requirements of Executive Order No. 11246, as amended, and its implementing regulations, as a defense to a charge that the affirmative action compliance program is discriminatory. The Commission concludes that adherence to an affirmative action compliance program approved by an appropriate official of the Department of Labor or its authorized agencies is lawful under Title VII. This interpretation thus insures that government contractors will not be subject to inconsistent standards by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.

Thus, the Commission recognizes that affirmative action by government contractors may be lawful under Title VII for either of two distinct reasons: (a) Such efforts constitute reasonable action to implement the legislative purposes of Title VII, or (b) the action was taken pursuant to, and in conformity with Executive Order No. 11246, as amended, and its implementing regulations. The Guidelines have been revised to reflect these two independent justifications for affirmative action under Title VII. A separate § 1608.5 governs affirmative action under Executive Order No. 11246, as amended.

The three step analytical process required under § 1608.4,, when action is being justified under Title VII, is not necessary under § 1608.5, when action is being justified as undertaken pursuant to an approved program under Executive Order No. 11246, as amended. The circumstances in which such affirmative action is required under the Executive Order and the nature of such affirmative action are established by the Department of Labor.

V. Appropriate Steps for Taking Voluntary Action

A number of comments suggested that the Guidelines did not clearly define the steps the Commission believes are appropriate in taking voluntary affirmative action. A new § 1608.4 has been added to explain the three step process applicable to action justified under Title VII: reasonable self analysis, reasonable basis for concluding that action is appropriate, and reasonable action to correct that situation. The process set forth in § 1608.4 should be utilized to determine whether the circumstances set forth in § 1608.3 are present. Section 1608.5 covers action pursuant to Executive Order No. 11246, as amended.

VI. Reasonable Self Analysis

Some commentators requested further elaboration on the meaning of the term "self analysis." Section 1608.4(a) has been amended to make it clear that there is no single mandatory method of conducting the self analysis, and to refer to the methodology used by government contractors under Revised Order 4 as a model which employers and others may use in conducting a self analysis. Whatever method is used, the primary objective must be to determine whether the employment practices operate as barriers to equal employment opportunity.

Some commentators suggested that the Guidelines may be subject to abuse unless the self analysis is required to be in writing. The Commission believes that the protection from Title VII liability which may be available under section 713(b)(1) should only be recognized where the affirmative action plan or program has been carefully and consciously developed. Accordingly, the section 713(b)(1) defense will be recognized by the Commission only where the analysis and the affirmative action plan or program are in writing and are adopted in good faith, in conformity with, and in reliance upon these Guidelines. See §§ 1608.4(d) and 1608.10.

However, a respondent who has undertaken the analysis, self-evaluation, and development of an affirmative action plan of the type described in the Guidelines, but has not reduced the analysis and plan to writing, may assert these facts as a defense to a charge of discrimination. The analysis and plan need not be in writing because the Commission does not generally require that employer defenses be based on written documents. However, employers are encouraged to have written documentation since such written evidence would make it easier to establish that an analysis was conducted and that a plan or program exists. See § 1608.4(d)(2).

In response to comments which expressed concern that adoption of a plan or program might constitute an admission of discrimination, § 1608.4(d)(1) makes it clear that it is not necessary to state in writing the conclusion that a Title VII violation exists.

VII. The Guidelines Do Not Approve Inadequate Remedies

A number of commentators were concerned that violators of the Act could use the Guidelines and the section 713(b)(1) defense to shield themselves from liability for the underlying discrimination inadequately addressed by an affirmative action plan or program. The Guidelines do not lend themselves to this interpretation.

The proposed Guidelines stated in paragraph VII that the Guidelines were not intended to provide standards for determining whether voluntary action had fully remedied discrimination. The analysis and plan contemplated by these Guidelines will not establish whether discrimination existed before the plan was adopted. Furthermore, the plan cannot determine whether discrimination might take place subsequent to its adoption. In addition, the judgment as to whether affirmative action is sufficient to eliminate discrimination is a complex one which may take into account circumstances that may not have been included in the analysis which underlies the affirmative action plan. For these reasons the existence of the plan cannot provide the basis for determining whether discrimination existed, or whether the plan itself provided an adequate remedy for such discrimination. Therefore, the Guidelines state that they do not apply to a determination of the adequacy of an affirmative action plan to eliminate discrimination against previously excluded groups. Furthermore, the section 713(b)(1) defense is not involved in a determination of the adequacy of such a plan or program. Section 1608.11(a) is intended to make it clear that employers, labor organizations, or other persons who take affirmative action may still be liable under Title VII if the plan or program does not adequately remedy illegal discrimination.

VIII. No Admission of Discrimination Required

Another group of comments stated that, because the Guidelines do not require an admission or finding of discrimination, the Commission may thereby approve affirmative action which might constitute unlawful discrimination prohibited by Title VII. This interpretation is incorrect.

The proposed Guidelines stated in paragraph II that the lawfulness of affirmative action was not "dependent upon an admission, or a finding, or evidence sufficient to prove" that the person taking such action had actually violated Title VII. After careful analysis and consideration, the Commission is of the opinion that the statement, as amended, appearing in § 1608.4(b), represents an appropriate interpretation of Federal law and policy for the reasons set forth in § 1608.1(c).

These Guidelines provide a sufficient basis to determine whether affirmative action is appropriate. Persons subject to the Act should not, by taking reasonable affirmative action, be exposed to liability under the very Act they are seeking to implement. Similarly, the law should not force the employer or other person to speculate whether an arguable defense to a Title VII charge would be recognized by a court before taking affirmative action. Section 1608.4(b) makes it clear that this reasonable basis exists without regard to arguable defenses to a Title VII action.

IX. The Scope of Appropriate Voluntary Action

Several comments raised questions concerning the appropriate scope of voluntary affirmative action intended by the Guidelines. Some perceive the Commission's use of the words "ratios and other numerical remedies" in proposed Paragraph IV, in addition to the words "goals and timetables", as indicating that the Commission was endorsing "absolute quotas" or "fixed quotas" without regard to qualifications or the circumstances in which they were used. The words "ratios and other numerical remedies" have been omitted from these Guidelines in order to avoid ambiguity and to make it clear that any numerical objective is subject to the availability of sufficient applicants who are qualified by proper, validated standards.

Affirmative Action under these Guidelines must be reasonable and must be related to

the problems disclosed by the self-analysis. A new § 1608.4(c) has been added to make this clear. Affirmative action under these Guidelines may include interim goals or targets. Such interim goals or targets for previously excluded groups may be higher than the percentage of their availability in the workforce so that the long term goal may be met in a reasonable period of time. In order to achieve such interim goals or targets, an employer may consider race, sex, and/or national origin in making selections from among qualified or qualifiable applicants. Courts have ordered actions of this kind in litigated cases and in consent decrees. *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1972), *en banc, cert. denied* (98 S. Ct. 3145 (1978); *U.S.* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

X. Relevance of Certain Court Cases

A number of comments indicated that there were court decisions rendering inappropriate the approach taken by the Commission in these Guidelines. Because the proposed Guidelines were issued for comment prior to the decision of the United States Supreme Court in the case of *Regents of University of California* v. *Bakke*, 98 S. Ct. 2733 (1978), a number of commentators suggested that either the Guidelines were inappropriate in light of the decision of the California Supreme Court in that case, or that the Commission should wait until the U.S. Supreme Court had issued its opinion. As recommended, the Commission awaited the action of the Supreme Court in that case before promulgating these Guidelines. The Commission has reviewed these Guidelines in light of the opinions of the Justices of the Supreme Court in *Bakke*. The Commission concludes that these Guidelines are consistent with the action of the Supreme Court in that case.

In the *Bakke* case the university did not assert reliance on any detailed guidance and procedures for crafting an affirmative action plan. These Guidelines seek to provide such guidance and thereby to establish an appropriate legal foundation for voluntary action under Title VII.

Perhaps the case most frequently cited by the commentators as conflicting with the principles articulated in the proposed Guidelines was a split decision in *Weber* v. *Kaiser Aluminum Corp.*, 563 F.2d 216 (5th Cir. 1977), *cert. granted*, —— U.S. ——. *Weber*, however, was decided prior to *Bakke*, and therefore did not take into account the opinions in that case. In addition, it is fundamentally unfair to expose those subject to Executive Order No. 11246 to risks of liability under Title VII when they act in compliance with government requirements or when they act voluntarily and appropriately to achieve statutory objectives. Furthermore, the clarification provided by these Guidelines is necessary because the *Weber* decision may be interpreted to unduly interfere with the range of affirmative action which Congress intended to permit under Title VII.[1]

The Commission has examined all the decisions brought to its attention in the comments and other recent decisions of the United States Supreme Court and concludes that none of these decisions affect its interpretation of the circumstances in which affirmative action is lawful under Title VII.

By virtue of the authority vested in it by section 713 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–12, 78 Stat. 265, and after due consideration of all comments received, the Equal Employment Opportunity Commission hereby issues as new Part 1608 of Title 29 of the Code of Federal Regulations its "Guidelines on Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964, as Amended" as set forth below.

Signed at Washington, D.C., this 16th day of January 1979.

For the Commission.

Eleanor Holmes Norton,
Chair.

Sec.
1608.1 Statement of purpose.
1608.2 Written interpretation and opinion.
1608.3 Circumstances under which voluntary affirmative action is appropriate.
1608.4 Establishing affirmative action plans.
1608.5 Affirmative action compliance programs under executive order No. 11246, as amended.
1608.6 Affirmative action plans which are part of commission conciliation or settlement agreements.
1608.7 Affirmative action plans or programs under State or local law.
1608.8 Adherence to court order.
1608.9 Reliance on directions of other government agencies.
1608.10 Standard of review.
1608.11 Limitations on the application of these guidelines.
1608.12 Equal employment opportunity plans adopted pursuant to section 717 of title VII.

Authority: Sec. 713 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–12, 78 Stat. 265.

§ 1608.1 Statement of purpose.

(a) *Need for Guidelines.* Since the passage of Title VII in 1964, many employers, labor organizations, and other persons subject to Title VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue. These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to Title VII, or as a result of conciliation efforts under Title VII, action under Executive Order No. 11246, as amended, or under other Federal, state, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious in order to achieve the Congressional purpose of providing equal employment opportunity. Occasionally, these actions have been challenged as inconsistent with Title VII, because they took into account race, sex, or national origin. This is the so-called "reverse discrimination" claim. In such a situation, both the affirmative action undertaken to improve the conditions of minorities and women, and the objection to that action, are based upon the principles of Title VII. Any uncertainty as to the meaning and application of Title VII in such situations threatens the accomplishment of the clear Congressional intent to encourage voluntary affirmative action. The Commission believes that by the enactment of Title VII Congress did not intend to expose those who comply with the Act to charges that they are violating the very statute they are seeking to implement. Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increasing the prospect of Title VII litigation. The Commission believes that it is now necessary to clarify and harmonize the principles of Title VII in order to achieve these Congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of Title VII.

(b) *Purposes of Title VII.* Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.[2] The Legislative Histories of Title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women.[3] The purpose of Executive Order No. 11246, as amended, is similar to the purpose of Title VII. In response to these economic and social conditions, Congress, by passage of Title VII, established a national policy against

[1] The Commission has taken the position that the decision of the Court of Appeals is incorrect and that the affirmative action program there was lawful. The Solicitor General has taken the same position, and the Supreme Court has now granted petitions for a writ of certiorari.

[2] Congress has also addressed these conditions in other laws, including the Equal Pay Act of 1963, Pub. L. 88–38, 77 Stat. 56 (1963), as amended; the other Titles of the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241 (1964), as amended; the Voting Rights Act of 1965, Pub. L. 89–110, 79 Stat. 437 (1965), as amended; the Fair Housing Act of 1968, Pub. L. 90–284, Title VII, 82 Stat. 73, 81 (1968), as amended; the Educational Opportunity Act (Title IX), Pub. L. 92–318, 86 Stat. 373 (1972), as amended; and the Equal Employment Opportunity Act of 972, Pub. L. 92–261, 86 Stat. 103 (1972), as amended.

[3] Equal Pay Act of 1963: S. Rep. No. 176, 88th Cong., 1st Sess., 1–2 (1963). Civil Rights Act of 1964: H.R. Rep. No. 914, pt. 2, 88th Cong., 1st Sess. (1971). Equal Employment Opportunity Act of 1972: H.R. Rep. No. 92–238, 92d Cong., 1st Sess. (1971); S. Rep. No. 92–415, 92d Cong., 1st Sess. (1971). See also, Equal Employment Opportunity Commission, *Equal Employment Opportunity Report—1975, Job Patterns for Women in Private Industry* (1977); Equal Employment Opportunity Commission, *Minorities and Women in State and Local Government—1975* (1977); United States Commission on Civil Rights, *Social Indicators of Equality for Minorities and Women* (1978).

discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, Congress strongly encouraged employers, labor organizations, and other persons subject to Title VII (hereinafter referred to as "persons," see section 701(a) of the Act) to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action. Conference, conciliation, and persuasion were the primary processes adopted by Congress in 1964, and reaffirmed in 1972, to achieve these objectives, with enforcement action through the courts or agencies as a supporting procedure where voluntary action did not take place and conciliation failed. See § 706 of Title VII.

(c) *Interpretation in furtherance of legislative purpose.* The principle of nondiscrimination in employment because of race, color, religion, sex, or national origin, and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII. Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in Title VII.[4] Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity. Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation. Rather, persons subject to Title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of Title VII. Correspondingly, Title VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against Title VII liability which the Commission is authorized to provide under section 713(b)(1).

(d) *Guidelines interpret Title VII and authorize use of Section 713(b)(1).* These Guidelines describe the circumstances in which persons subject to Title VII may take or agree upon action to improve employment opportunities of minorities and women, and describe the kinds of actions they may take which are consistent with Title VII. These Guidelines constitute the Commission's interpretation of Title VII and will be applied in the processing of claims of discrimination which involve voluntary affirmative action plans and programs. In addition, these Guidelines state the circumstances under which the Commission will recognize that a person subject to Title VII is entitled to assert that actions were taken "in good faith, in conformity with, and in reliance upon a written interpretation or opinion of the Commission," including reliance upon the interpretation and opinion contained in these Guidelines, and thereby invoke the protection of section 713(b)(1) of Title VII.

(e) *Review of existing plans recommended.* Only affirmative action plans or programs adopted in good faith, in conformity with, and in reliance upon these Guidelines can receive the full protection of these Guidelines, including the section 713(b)(1) defense. See § 1608.10. Therefore, persons subject to Title VII who have existing affirmative action plans, programs, or agreements are encouraged to review them in light of these Guidelines, to modify them to the extent necessary to comply with these Guidelines, and to readopt or reaffirm them.

§ 1608.2 Written interpretation and opinion.

These Guidelines constitute "a written interpretation and opinion" of the Equal Employment Opportunity Commission as that term is used in section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e–12(b)(1), and section 1601.33 of the Procedural Regulations of the Equal Employment Opportunity Commission (29 CFR 1601.30; 42 FR 55,394 (October 14, 1977)). Section 713(b)(1) provides:

> In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission * * *. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that * * * after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect * * *.

The applicability of these Guidelines is subject to the limitations on use set forth in § 1608.11.

§ 1608.3 Circumstances under which voluntary affirmative action is appropriate.

(a) *Adverse effect.* Title VII prohibits practices, procedures, or policies which have an adverse impact unless they are justified by business necessity. In addition, Title VII proscribes practices which "tend to deprive" persons of equal employment opportunities. Employers, labor organizations and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices.

(b) *Effects of prior discriminatory practices.* Employers, labor organizations, or other persons subject to Title VII may also take affirmative action to correct the effects of prior discriminatory practices. The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.

(c) *Limited labor pool.* Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to Title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:

(1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and expericence necessary to perform the functions of skilled trades, crafts, or professions;

(2) Extensive and focused recruiting activity;

(3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, Uniform Guidelines on Employee Selection Procedures (1978), 43 FR 30,290; 38,297; 38,299 (August 25, 1978));

(4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.

§ 1608.4 Establishing affirmative action plans.

An affirmative action plan or program under this section shall contain three elements: a reasonable self analysis; a reasonable basis for concluding action is appropriate; and reasonable action.

(a) *Reasonable self analysis.* The objective of a self analysis is to determine whether employment practices do, or tend to, exclude, disadvantage, restrict, or result in adverse impact or disparate treatment of previously excluded or restricted groups or leave uncorrected the effects of prior discrimination, and if so, to attempt to determine why. There is no mandatory method of conducting a self analysis. The employer may utilize techniques used in order to comply with Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60–2 (known as Revised Order 4), or related orders issued by the Office of Federal Contract Compliance Programs or its authorized agencies, or may use an analysis similar to that required under other Federal, state, or local laws or regulations prohibiting employment discrimination. In conducting a self analysis, the employer, labor organization, or other person subject to Title VII should be concerned with the effect on its employment practices of circumstances which may be the result of discrimination by other persons or institutions. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

(b) *Reasonable basis.* If the self analysis shows that one or more employment practices: (1) Have or tend to have an adverse effect on employment opportunities

[4] Affirmative action often improves opportunities for all members of the workforce, as where affirmative action includes the posting of notices of job vacancies. Similarly, the integration of previously segregated jobs means that all workers will be provided opportunities to enter jobs previously restricted. See, e.g., *EEOC* v. *AT&T*, 419 F. Supp. 1022 (E.D.Pa. 1976), *aff'd*, 556 F. 2d 167 (3rd Cir. 1977), *cert. denied*, 98 S.Ct. 3145 (1978).

of members of previously excluded groups, or groups whose employment or promotional opportunities have been artificially limited, (2) leave uncorrected the effects of prior discrimination, or (3) result in disparate treatment, the person making the self analysis has a reasonable basis for concluding that action is appropriate. It is not necessary that the self analysis establish a violation of Title VII. This reasonable basis exists without any admission or formal finding that the person has violated Title VII, and without regard to whether there exists arguable defenses to a Title VII action.

(c) *Reasonable action.* The action taken pursuant to an affirmative action plan or program must be reasonable in relation to the problems disclosed by the self analysis. Such reasonable action may include goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees. It may include the adoption of practices which will eliminate the actual or potential adverse impact, disparate treatment, or effect or past discrimination by providing opportunities for members of groups which have been excluded, regardless of whether the persons benefited were themselves the victims of prior policies or procedures which produced the adverse impact or disparate treatment or which perpetuated past discrimination.

(1) *Illustrations of appropriate affirmative action.* Affirmative action plans or programs may include, but are not limited to, those described in the Equal Employment Opportunity Coordinating Council "Policy Statement on Affirmative Action Programs for State and Local Government Agencies," 41 FR 38,814 (September 13, 1976), reaffirmed and extended to all persons subject to Federal equal employment opportunity laws and orders, in the Uniform Guidelines on Employee Selection Procedures (1978) 43 FR 38,290; 38,300 (Aug. 25, 1978). That statement reads, in relevant part:

When an employer has reason to believe that its selection procedures have * * * exclusionary effect * * *, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex or ethnic 'conscious,' include, but are not limited to, the following:

The establishment of a long term goal and short range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

A recruitment program designed to attract qualified members of the group in question;

A systematic effort to organize work and re-design jobs in ways that provide opportunities for persons lacking 'journeyman' level knowledge or skills to enter and, with appropriate training, to progress in a career field;

Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(2) *Standards of reasonable action.* In considering the reasonableness of a particular affirmative action plan or program, the Commission will generally apply the following standards:

(i) The plan should be tailored to solve the problems which were identified in the self analysis, see § 1608.4(a), supra, and to ensure that employment systems operate fairly in the future, while avoiding unnecessary restrictions on opportunities for the workforce as a whole. The race, sex, and national origin conscious provisions of the plan or program should be maintained only so long as is necessary to achieve these objectives.

(ii) Goals and timetables should be reasonably related to such considerations as the effects of past discrimination, the need for prompt elimination of adverse impact or disparate treatment, the availability of basically qualified or qualifiable applicants, and the number of employment opportunities expected to be available.

(d) *Written or unwritten plans or programs*—(1) *Written plans required for 713(b)(1) Protection.* The protection of section 713(b) of Title VII will be accorded by the Commission to a person subject to Title VII only if the self analysis and the affirmative action plan are dated and in writing, and the plan otherwise meets the requirements of Section 713(b)(1). The Commission will not require that there be any written statement concluding that a Title VII violation exists.

(2) *Reasonable cause determinations.* Where an affirmative action plan or program is alleged to violate Title VII, or is asserted as a defense to a charge of discrimination, the Commission will investigate the charge in accordance with its usual procedures and pursuant to the standards set forth in these Guidelines, whether or not the analysis and plan are in writing. However, the absence of a written self analysis and a written affirmative action plan or program may make it more difficult to provide credible evidence that the analysis was conducted, and that action was taken pursuant to a plan or program based on the analysis. Therefore, the Commission recommends that such analyses and plans be in writing.

§ 1608.5 Affirmative action compliance programs under Executive Order No. 11246, as amended.

Under Title VII, affirmative action compliance programs adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, including 41 CFR Part 60–2 (Revised Order 4), will be considered by the Commission in light of the similar purposes of Title VII and the Executive Order, and the Commission's responsibility under Executive Order No. 12067 to avoid potential conflict among Federal equal employment opportunity programs. Accordingly, the Commission will process Title VII complaints involving such affirmative action compliance programs under this section.

(a) *Procedures for review of Affirmative Action Compliance Programs.* If adherence to an affirmative action compliance program adopted pursuant to Executive Order No. 11246, as amended, and its implementing regulations, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine:

(1) Whether the affirmative action compliance program was adopted by a person subject to the Order and pursuant to the Order, and (2) whether adherence to the program was the basis of the complaint or the justification.

(1) *Programs previously approved.* If the Commission makes the determination described in paragraph (a) of this section and also finds that the affirmative action program has been approved by an appropriate official of the Department of Labor or its authorized agencies, or is part of a conciliation or settlement agreement or an order of an administrative agency, whether entered by consent or after contested proceedings brought to enforce Executive Order No. 11246, as amended, the Commission will issue a determination of no reasonable cause.

(2) *Program not previously approved.* If the Commission makes the determination described in paragraph (a), of this section but the program has not been approved by an appropriate official of the Department of Labor or its authorized agencies, the Commission will: (i) Follow the procedure in § 1608.10(a) and review the program, or (ii) refer the plan to the Department of Labor for a determination of whether it is to be approved under Executive Order No. 11246, as amended, and its implementing regulations. If, the Commission finds that the program does conform to these Guidelines, or the Department of Labor approves the affirmative action compliance program, the Commission will issue a determination of no reasonable cause under § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action compliance program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the contractor.

§ 1608.6 Affirmative action plans which are part of Commission conciliation or settlement agreements.

(a) *Procedures for review of plans.* If adherence to a conciliation or settlement agreement executed under Title VII and approved by a responsible official of the EEOC is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action challenged under Title VII, the Commission will investigate to determine: (1) Whether the conciliation agreement or settlement agreement was approved by a responsible official of the EEOC, and (2)

whether adherence to the agreement was the basis for the complaint or justification. If the Commission so finds, it will make a determination of no reasonable cause under § 1608.10(a) and will advise the respondent of its right under section 713(b)(1) of Title VII to rely on the conciliation agreement.

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) of Title VII and of § 1608.10(b), below, may be asserted by the respondent.

§ 1608.7 Affirmative action plans or programs under State or local law.

Affirmative action plans or programs executed by agreement with state or local government agencies, or by order of state or local government agencies, whether entered by consent or after contested proceedings, under statutes or ordinances described in Title VII, will be reviewed by the Commission in light of the similar purposes of Title VII and such statutes and ordinances. Accordingly, the Commission will process Title VII complaints involving such affirmative action plans or programs under this section.

(a) *Procedures for review of plans or programs.* If adherence to an affirmative action plan or program executed pursuant to a state statute or local ordinance described in Title VII is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (1) Whether the affirmative action plan or program was executed by an employer, labor organization, or person subject to the statute or ordinance, (2) whether the agreement was approved by an appropriate official of the state or local government, and (3) whether adherence to the plan or program was the basis of the complaint or justification.

(1) *Previously Approved Plans or Programs.* If the Commission finds the facts described in paragraph (a) of this section, the Commission will, in accordance with the "substantial weight" provisions of section 706 of the Act, find no reasonable cause where appropriate.

(2) *Plans or Programs not previously approved.* If the plan or program has not been approved by an appropriate official of the state or local government, the Commission will follow the procedure of § 1608.10 of these Guidelines. If the Commission finds that the plan or program does conform to these Guidelines, the Commission will make a determination of no reasonable cause as set forth in § 1608.10(a).

(b) *Reliance on these guidelines.* In addition, if the affirmative action plan or program has been adopted in good faith reliance on these Guidelines, the provisions of section 713(b)(1) and § 1608.10(b), below, may be asserted by the respondent.

§ 1608.8 Adherence to court order.

Parties are entitled to rely on orders of courts of competent jurisdiction. If adherence to an Order of a United States District Court or other court of competent jurisdiction, whether entered by consent or after contested litigation, in a case brought to enforce a Federal, state, or local equal employment opportunity law or regulation, is the basis of a complaint filed under Title VII or is alleged to be the justification for an action which is challenged under Title VII, the Commission will investigate to determine: (a) Whether such an Order exists and (b) whether adherence to the affirmative action plan which is part of the Order was the basis of the complaint or justification. If the Commission so finds, it will issue a determination of no reasonable cause. The Commission interprets Title VII to mean that actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII.

§ 1608.9 Reliance on directions of other government agencies.

When a charge challenges an affirmative action plan or program, or when such a plan or program is raised as justification for an employment decision, and when the plan or program was developed pursuant to the requirements of a Federal or state law or regulation which in part seeks to ensure equal employment opportunity, the Commission will process the charge in accordance with § 1608.10(a). Other agencies with equal employment opportunity responsibilities may apply the principles of these Guidelines in the exercise of their authority.

§ 1608.10 Standard of review.

(a) *Affirmative action plans or programs not specifically relying on these guidelines.* If, during the investigation of a charge of discrimination filed with the Commission, a respondent asserts that the action complained of was taken pursuant to an in accordance with a plan or program of the type described in these Guidelines, the Commission will determine whether the assertion is true, and if so, whether such a plan or program conforms to the requirements of these guidelines. If the Commission so finds, it will issue a determination of no reasonable cause and, where appropriate, will state that the determination constitutes a written interpretation or opinion of the Commission under section 713(b)(1). This interpretation may be relied upon by the respondent and asserted as a defense in the event that new charges involving similar facts and circumstances are thereafter filed against the respondent, which are based on actions taken pursuant to the affirmative action plan or program. If the Commission does not so find, it will proceed with the investigation in the usual manner.

(b) *Reliance on these guidelines.* If a respondent asserts that the action taken was pursuant to and in accordance with a plan or program which was adopted or implemented in good faith, in conformity with, and in reliance upon these Guidelines, and the self analysis and plan are in writing, the Commission will determine whether such assertion is true. If the Commission so finds, it will so state in the determination of no reasonable cause and will advise the respondent that:

(1) The Commission has found that the respondent is entitled to the protection of section 713(b)(1) of Title VII; and

(2) That the determination is itself an additional written interpretation or opinion of the Commission pursuant to section 713(b)(1).

§ 1608.11 Limitations on the application of these guidelines.

(a) *No determination of adequacy of plan or program.* These Guidelines are applicable only with respect to the circumstances described in § 1608.1(d), above. They do not apply to, and the section 713(b)(1) defense is not available for the purpose of, determining the adequacy of an affirmative action plan or program to eliminate discrimination. Whether an employer who takes such affirmative action has done enough to remedy such discrimination will remain a question of fact in each case.

(b) *Guidelines inapplicable in absence of affirmative action.* Where an affirmative action plan or program does not exist, or where the plan or program is not the basis of the action complained of, these Guidelines are inapplicable.

(c) *Currency of plan or program.* Under section 713(b)(1), persons may rely on the plan or program only during the time when it is current. Currency is related to such factors as progress in correcting the conditions disclosed by the self analysis. The currency of the plan or program is a question of fact to be determined on a case by case basis. Programs developed under Executive Order No. 11246, as amended, will be deemed current in accordance with Department of Labor regulations at 41 CFR Chapter 60, or successor orders or regulations.

§ 1608.12 Equal employment opportunity plans adopted pursuant to section 717 of Title VII.

If adherence to an Equal Employment Opportunity Plan, adopted pursuant to Section 717 of Title VII, and approved by an appropriate official of the U.S. Civil Service Commission, is the basis of a complaint filed under Title VII, or is alleged to be the justification for an action under Title VII, these Guidelines will apply in a manner similar to that set forth in § 1608.5. The Commission will issue regulations setting forth the procedure for processing such complaints.

PART 1601—PROCEDURAL REGULATIONS

Issuance of Interpretation and Opinion

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: The Commission is today publishing in final form a set of Guidelines on Affirmative Action (44 FR 4422), to encourage voluntary action to eliminate employment discrimination. Section 1601.33 of the Commission's regulations is being amended to reflect a new method, contemplated by these Guidelines, by which the Commission may issue an "interpretation of opinion" of the Commission within the meaning of

Section 713 of Title VII of the Civil Rights Act of 1964, as amended.

EFFECTIVE DATE: February 20, 1979.

FOR FURTHER INFORMATION CONTACT: Peter C. Robertson, Director, Office of Policy Implementation, 2401 E Street, NW., Room 4002A, Washington, D.C. 20506 (202) 254-7639.

SUPPLEMENTARY INFORMATION: The Commission's new Guidelines on Affirmative Action contemplate that in instances where a charge of discrimination has been filed and the Commission finds that the treatment complained of occurred as a result of affirmative action procedures consistent with its Guidelines on Affirmative Action, the Commission will issue a determination of no reasonable cause. This determination may contain language stating that it is "a written interpretation or opinion of the Commission" within the meaning of Section 713(b)(1) of Title VII of the Civil Rights Act of 1964, as amended. The respondent in such a case may rely upon this determination as a defense to any subsequent complaints of discrimination which involve similar facts and circumstances, if the subsequent actions complained of were also taken by the respondent under its affirmative action procedures.

Such language will also appear in no-cause determinations whenever the Commission finds that the action complained of occurred pursuant to an affirmative action plan adopted in good faith compliance with, and reliance upon, the Commission's Guidelines on affirmative Action.

The Commission's procedural regulations are accordingly revised to include this specific type of no-cause finding as a type of "written interpretation or opinion of the Commission."

Signed at Washington, D.C. this 16th day of January 1979.

For the Commission.

Eleanor Holmes Norton,
Chair.

Therefore, 29 CFR 1601.33 is amended to read as follows:

§ 1601.33 Issuance of interpretation or opinion.

Only the following may be relied upon as a "written interpretation or opinion of the Commission" within the meaning of Section 713 of Title VII:

(a) A letter entitled "opinion letter" and signed by the General Counsel on behalf of the Commission, or

(b) Matter published and specifically designated as such in the **Federal Register**, including the Commission's Guidelines on Affirmative Action, or

(c) A Commission determination of no reasonable cause, issued under the circumstances described in § 1608.10 (a) or (b) of the Commission's Guidelines on Affirmative Action 29 CFR Part 1608, when such determination contains a statement that it is a "written interpretation or opinion of the Commission."

Subpart F—Fiscal Procedures and Auditing

§ 51.100 Definitions.

Unless the context requires otherwise, as used in this subpart, the term:

(a) "Compliance audit" means the review of the documentation concerning a recipient government's expenditure of entitlement funds to determine that those funds have been expended in compliance with the provisions of the Act and regulations.

(b) "Financial audit" means examination of the financial statements concerning all funds of a recipient government in accordance with generally accepted auditing standards.

(c) "Generally accepted auditing standards" means those auditing standards pronounced by the American Institute of Certified Public Accountants and incorporated in its *Statements on Auditing Standards*, or those in the financial and compliance element of the *Standards for Audit of Governmental Organizations, Programs, Activities & Functions*, issued in 1972 by the Comptroller General of the United States.

(d) "Independent audit" means an audit conducted by independent public accountants, or by independent qualified accountants or examiners from a State or local agency. An independent public accountant or independent qualified accountant or examiner is one who has no personal interest directly or indirectly in the financial affairs of the government being audited, or in the financial affairs of any of the officers of the government being audited.

(1) In those states in which an audit is required by State law to be made of the State government by a State office or official, such audit shall be considered to meet the requirements of an independent audit provided the principal officer of the State audit agency is not responsible for the maintenance of the accounting records being audited and does not report to the officer responsible for maintenance of such accounting records, and is:

(i) Elected by the citizens of the State;

(ii) Elected or appointed by and reports to the State legislature or a committee thereof; or

(iii) Appointed by the Governor and confirmed by and reports to the legislature or a committee thereof.

(2) In those States in which an audit is made of local governments (or certain categories of local government) by a State office or official, such audit shall be considered to meet the requirements of an independent audit.

(3) Audits of local recipient governments made by a permanent (internal) auditing office or officer employed on a full-time basis shall be considered to meet the requirements of an independent audit provided the principal officer of the audit agency is not responsible for the maintenance of the official accounting records being audited and does not report to the officer responsible for maintenance of official accounting records, and is:

(i) Elected by the citizens of the local recipient governments;

(ii) Reports to the governing body of the local recipient government or a committee thereof; or

(iii) Appointed by the chief executive officer of the local recipient government and reports to the governing body of the local recipient government or a committee thereof.

(4) Audits other than those specified in paragraphs (d)(1), (2) and (3) of this section shall not be considered to be independent audits.

(e) "Independent public accountant" means independent certified public accountants, and licensed public accountants licensed on or before December 31, 1970, certified or licensed by a regulatory authority of a State or other political subdivision of the United States.

§ 51.101 Procedures applicable to the use of funds.

A recipient government which receives entitlement funds under the Act shall: (a) Establish a trust fund and deposit all entitlement funds received and all interest earned thereon in that trust fund. The trust fund may be established on the books and records as a separate set of accounts, or a separate bank account may be established. If the trust fund is established as a separate set of accounts, the fund comprising these accounts shall be classified as a special revenue fund and accounted for accordingly.

(b) Use, obligate, or appropriate entitlement funds within 24 months from the end of the entitlement period to which the entitlement payment is applicable. The use, obligation or appropriation of entitlement funds shall be consistent with State or local law requiring a legislative enactment in ordinance or resolution form. Any interest earned on such funds while in the trust fund shall be used, obligated, or appropriated within 24 months from the end of the entitlement period during which the interest was received or credited. An extension of time in which to act on the funds, or interest accrued, shall be obtained by application to the Director. The application will set forth the facts and circumstances supporting the need for more time and the amount

of additional time requested. The Director may grant such extensions of time which appear necessary or appropriate.

(c) Provide for the expenditure of entitlement funds in accordance with the laws and procedures applicable to the expenditure of its own revenues so long as those laws and procedures do not conflict with Federal law.

(d) Maintain its fiscal accounts in a manner sufficient to: (1) Permit the reports required by the Director to be prepared, and

(2) Permit the tracing of entitlement funds to a level of expenditure adequate to establish that the funds have not been used in violation of the restrictions and prohibitions of this part. Tracing requires that vouchers in support of expenditures funded by the Act shall be identified. Identification can be made in any one of three ways as follows:

(i) Maintain a separate set of fund accounts;

(ii) Maintain a separate bank account; or

(iii) Keep a memorandum record of the voucher numbers and amounts for the expenditures funded by entitlements received under the Act.

The accounting for entitlement funds shall, at a minimum, employ the same fiscal accounting and internal audit procedures as are used with respect to the revenues derived from the recipient government's own sources.

(e) Provide to the Director and to the Comptroller General of the United States, on reasonable notice, access to and the right to examine such books, documents, papers or records as the Director may reasonably require for the purpose of reviewing compliance with the Act and the regulations of this part or, in the case of the Comptroller General, as the Comptroller General may reasonably require for the purpose of reviewing compliance and operations under the Act.

§ 51.102 Auditing and evaluation.

(a) *In general.* Each recipient government which expects to receive entitlement funds for entitlement periods beginning on or after January 1, 1977, shall have an independent audit of its financial statements conducted for the purpose of determining compliance with the provisions of the Act, in accordance with generally accepted auditing standards, not less often than once every three years. Such audit may be separately performed as a financial audit and a compliance audit.

(b) *Election by recipient government.* A recipient government may elect to have the requirements of paragraph (a) of this section not applicable to that government upon filing notice to the Director that the audits are conducted in compliance with State or local law and meet the following requirements:

(1) The financial statements of the recipient governments are audited by independent public accountants as defined in section 51.100(e) of this subpart, or by independent auditors as defined in paragraph (b) of this section; and

(2) The audits of the recipient government are conducted in accordance with generally accepted auditing standards;

(3) The audits of the recipient government will be conducted not less often than every three years; and

(4) A compliance audit, as well as a financial audit, is conducted.

(c) *Inapplicability of audit requirement.* The requirement of paragraph (a) of this section shall not apply where the recipient government's entitlement for any of its fiscal years is less than $25,000. State or local law which requires an audit of such government's financial statements must be complied with in accordance with § 51.101(c) of this subpart, and will constitute compliance with paragraph (a). Such an audit conducted under State or local law need not be submitted to the ORS, but shall be made available upon request by the Director.

(d) *Series of audits.* A series of independent audits may be used as an alternative to the provisions of paragraph (a) if they are conducted in accordance with generally accepted auditing standards, over a period not to exceed three fiscal years, and cover, in the aggregate, all of the accounts of a recipient government. When doing a series of audits a recipient government may perform the compliance audit for any one of the three fiscal years.

§ 51.103 Waiver of audit requirement where financial accounts are unauditable.

The Director may, upon written application of the chief executive officer of the recipient government, waive the provisions of § 51.102 of this subpart for any fiscal period, if in the course of determining compliance with § 51.102, the independent auditor renders an opinion that the financial accounts of such recipient government are not auditable, and the chief executive officer of such recipient government assures the Director that the accounts are not auditable and clearly set forth the arrangements which have been made or taken toward making such financial accounts auditable. The Director shall satisfy herself by investigation or inquiry that the recipient government is achieving substantial progress toward making its financial accounts auditable. A recipient government, which fails to apply to the Director for the waiver based upon the unauditability of its financial accounts shall not be entitled to use the waiver provisions of this section.

§ 51.104 Audits of secondary recipients.

A recipient government shall be responsible for an audit of the entitlement funds transferred to any secondary recipient, where the aggregate of the entitlement funds transferred to such secondary recipient during the fiscal year is $25,000 or more. Such audit shall be conducted pursuant to § 51.102 of this subpart and the *Audit Guide and Standards for Revenue Sharing Recipient* currently applicable published by the Office of Revenue Sharing and available to each recipient government.

§ 51.105 Reliance upon audits under other Federal laws.

The Director may rely upon audits of the financial statements of recipient governments conducted in accordance with other Federal laws, for any fiscal period, provided that such audits substantially satisfy the requirements for audits contained in § 51.102(a) of this part.

§ 51.106 Audit opinions.

(a) *In general.* Opinions made with respect to audits must be rendered as a part of the audit report and shall be in accordance with the opinion in general use for attesting to financial statements, as defined in paragraph 51.100(c). Examples of opinions are set out in the appendix of the *Audit Guide and Standards for Revenue Sharing Recipients* published by the Office of Revenue Sharing and available to each recipient government.

(b) *Nature of opinions.* Audit opinions may be unqualified, qualified, adverse, or a disclaimer of an opinion (provided the accounts are auditable). Audit opinions may be expressed on cash basis statements.

(c) *Expression of unqualified opinions.* The expression of an unqualified opinion shall include the statement that the financial statements are in accordance with generally accepted accounting principles. Generally accepted accounting principles are defined as those pronouncements of the National Committee on Governmental Accounting as set forth in its publication *Governmental Accounting, Auditing and Financial Reporting* published in 1968, or any subsequent revisions thereof.

§ 51.107 Scope of audits.

(a) *In general.* The scope of each audit required under § 51.102(a) of this part shall include all of the financial statements for each separate fund which is defined as a self-balancing group of accounts which the recipient government is required to maintain pursuant to State or local law (as determined by the State Attorney General or the legal counsel of a unit of local government). The audit shall be of the financial and compliance type described in *The Standards for Audit of Governmental Organization, Programs, Activities & Functions* as issued in 1972 by the Comptroller General of the United States, or the financial types prescribed by the American Institute of Certified Public Accountants and incorporated in its *Statements on Auditing Standards* and as described further in the *Audit Guide and Standards for Revenue Sharing Recipients*, currently applicable, and published by the Office of Revenue Sharing. The audit for compliance shall pertain only to entitlement funds of the recipient government received under the Act.

(b) *Verification of fiscal data reported to the Bureau of the Census.* The scope of the audit shall include also a verification of the recipient government's fiscal data as reported by it to the Bureau of the Census.

(c) *Financial statement.* For purposes of this subpart financial statements are those statements which:

(1) Reflect the financial transactions for all funds for a specific period of time, and

(2) Present the financial position as of the end of that fiscal period.

§ 51.108 Retention of audit workpapers.

Audit workpapers and related audit reports shall be retained for three years after the issuance of the audit report, and shall be available upon request to the Director and the Comptroller General or to their representatives.

§ 51.109 Requirement to submit audit reports.

The Director may require the chief executive officer of a recipient government to submit a copy of its audit reports at such times as she may request.

Subpart G—Proceedings for Reduction in Entitlement, Withholding, Suspension, or Repayment of Funds

§ 51.200 Scope of subpart.

The regulations of this subpart govern the procedure and practice requirements involving adjudications where the Act requires reasonable notice and opportunity for a hearing. The adjudications covered in this subpart include administrative hearings concerning violations of all provisions of this part and unless otherwise specified, the procedures described herein apply to all types of hearings.

§ 51.201 Liberal construction.

The regulations in this subpart shall be liberally construed to secure just, expeditious, and efficient determination of the issues presented. The Rules of Civil Procedure for the District Courts of the United States, where applicable, shall be a guide in any situation not provided for or controlled by this subpart, but shall be liberally construed or relaxed when necessary.

§ 51.202 Reasonable notice and opportunity for hearing.

Whenever the Director has reason to believe that a recipient government has failed to comply with any section of the Act or of the provisions of this part, and that repayment, withholding, or reduction in the amount of an entitlement of a recipient government is required for a violation of the provisions of subparts B, D and F, or suspension or termination of the entitlement payments for violations of subpart E, the Director shall give reasonable notice and opportunity of hearing to such government as required by the pertinent procedural provisions of subparts A, E or G prior to the invocation of any sanction under the Act.

§ 51.203 Opportunity for compliance.

(a) *In general.* Except in proceedings involving willfulness or those in which the public interest requires otherwise, an administrative hearing under this part will not be instituted until such facts or conduct which may warrant such action have been called to the attention of the chief executive officer of the recipient government in writing and he has been accorded an opportunity to demonstrate or achieve compliance with the requirements of the Act and the regulations of this part.

(b) *Opportunity for compliance, other than under subpart E.* The opportunity for compliance will be given in accordance with the procedural provisions of § 51.3 for violations of subparts B, D, and F. If the recipient government fails to meet the requirements of the Act and regulations within such reasonable time as specified by the Director in Subpart A, as administrative hearing may be initiated by the Director.

(c) *Opportunity for compliance under subpart E.* For violations of the provisions of subpart E, entitlement funds will be immediately suspended after notification of a determination of noncompliance pursuant to § 51.65, unless a recipient government specifically and timely requests an administrative hearing pursuant to § 51.65. If the recipient government is a unit of local government, a copy of the finding and determination letters shall be transmitted by the Director to the Governor of the State in which the unit of local government is located.

§ 51.204 Institution of administrative hearing.

(a) *Institution of an administrative hearing other than under subpart E.* An administrative hearing to require repayment of funds to the Director, or to withhold funds from subsequent entitlement payments, or to reduce the entitlement of a recipient government for violations of the provisions of subparts B, D, or F, shall be instituted by the Director by a complaint which names the recipient government as the respondent.

(b) *Institution of an administrative hearing under subpart E.* An administrative hearing under subpart E of this part shall be instituted at the request of the recipient government, pursuant to § 51.65 of subpart E within 30 days of receipt of that request by the Director. After the Director receives the request for a hearing she shall file a complaint which names the recipient government as the respondent.

51.205 Complaint for administrative hearing.

Administrative complaints shall include the following: (a) *Charges.* A complaint shall give a plain and concise description of the allegations which constitute the basis for the proceeding. A complaint shall be deemed sufficient if it fairly informs the respondent of the charges against it.

(b) *Demand for answer.* Notification shall be given in the complaint as to the place and time within the recipient government shall file its answer, which time shall be not less than 30 days from the date of service of the complaint. Where the hearing concerns provisions under subpart E the answer shall be required to be filed within 10 days of the date of service of the complaint. The complaint shall also contain notice that a decision by default will be rendered against the recipient government in the event it fails to file its answer as required.

§ 51.206 Service of complaint and other papers.

(a) *Service of complaint.* The complaint or a true copy thereof may be

served upon the recipient government by first-class mail or by certified mail, return receipt requested; or it may be served in any other manner which has been agreed to by the respondent. Where the service is by certified mail, the return Postal Service receipt duly signed on behalf of the respondent shall be proof of service. Where the hearing concerns the provisions of subpart E, the complaint shall be served upon the recipient government within seven days of receipt of the request for a hearing from the recipient government.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served upon a party or upon its attorney of record by first-class mail. Such mailing shall constitute complete service.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with an administrative hearing under this subpart, and the place of filing is not specified in this subpart or by rule or order of the administrative law judge, the paper shall be filed with the Director, Office of Revenue Sharing, Treasury Department, Washington, D.C. 20226. All papers shall be filed in duplicate.

(d) *Motions and requests.* Motions and requests may be filed with the designated administrative law judge, except that an application to extend the time for filing an answer shall be filed with the Director, Office of Revenue Sharing, pursuant to § 51.207(a).

§ 51.207 Answer; referral to administrative law judge.

(a) *Filing.* The recipient government's answer shall be filed in writing within the time specified in the complaint, unless on application the time is extended by the Director. The recipient government's answer shall be filed in duplicate with the Director, Office of Revenue Sharing.

(b) *Contents.* The answer shall contain a statement of facts which constitute the grounds of defense, and it shall specifically admit or deny each allegation set forth in the complaint, except that the recipient government shall not deny a material allegation in the complaint which it knows to be true, nor shall a recipient government state that it is without sufficient information to form a belief when in fact it possesses such information. The recipient government may also state affirmatively special matters of defense.

(c) *Failure to deny or answer allegation in the complaint.* Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proved, and no further evidence in respect of such allegation need be adduced at a hearing.

(d) *Failure to file answer.* Failure to file an answer within the time prescribed in the complaint, except as the time for answer is extended under paragraph (a) of this section, may constitute an admission of the allegations of the complaint and a waiver of hearing, and the administrative law judge may make his findings and decision by default without a hearing or further procedure.

(e) *Reply to answer.* No reply to the recipient government's answer shall be required, and new matter in the answer shall be deemed to be denied, but the Director may file a reply in her discretion and shall file one if the administrative law judge so requests.

(f) *Referral to administrative law judge.* Upon receipt of the answer by the Director, or upon filing a reply if one is deemed necessary, or upon failure of the recipient government to file an answer within the time prescribed in the complaint or as extended under paragraph (a) of this section, the complaint (and answer, if one is filed) shall be referred to the administrative law judge who shall then proceed to set a time and place for hearing and shall serve notice thereof upon the parties at least 15 days in advance of the hearing date.

§ 51.208 Proof; variance; amendment of pleadings.

In the case of a variance between the allegations in a pleading and the evidence adduced in support of the pleading, the administrative law judge may order or authorize amendment of the pleading to conform to the evidence; *provided that,* the party that would otherwise be prejudiced by the amendment is given reasonable opportunity to meet the allegation of the pleading as amended. The administrative law judge shall make findings on any issue presented by the pleadings as so amended.

§ 51.209 Representation.

A recipient government may appear in person through its chief executive officer or it may be represented by counsel or other duly authorized representative. The Director shall be represented by the General Counsel of the Treasury, or a person or persons designated by the General Counsel.

§ 51.210 Administrative law judge; powers.

(a) *Appointment.* An administrative law judge, appointed as provided by section 11 of the Administrative Procedure Act (5 U.S.C. 3105), shall conduct proceedings upon complaints filed under this subpart.

(b) *Powers of administrative law judge.* Among other powers provided by law, the administrative law judge shall have authority, in connection with any proceeding under this subpart, to do the following things:

(1) Administer oaths and affirmations;

(2) Make ruling upon motions and requests. Prior to the close of the hearing no appeal shall be made from any such ruling except, at the discretion of the administrative law judge, in extraordinary circumstances;

(3) Determine the time and place of hearing and regulate its course and conduct. In determining the place of hearing the administrative law judge may take into consideration the requests and convenience of the respondent or its counsel;

(4) Adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written arguments on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform the acts and take the measures necessary or appropriate to promote the efficient conduct of any proceeding; and

(10) Make initial findings and decision.

§ 51.211 Administrative hearings.

(a) *Administrative hearing for violations other than subpart E.* The administrative law judge shall preside at the hearing on a complaint. Testimony of witnesses shall be given under oath or affirmation. the hearing shall be stenographically recorded and transcribed. Hearings will be conducted pursuant to section 7 of the Administrative Procedure Act (5 U.S.C. 556).

(b) *Administrative hearing under subpart E.* A hearing requested by a recipient government under subpart E pursuant to section 51.65 shall commence 30 days after receipt of such request by the Director and shall be before an administrative law judge. Testimony shall be given under oath or affirmation and shall consist of two proceedings as follows:

(1) The first proceeding shall be in the nature of a summary hearing conducted in accordance with the provisions of this

subpart, similar to a judicial hearing on a preliminary injunction. All parties shall have an opportunity to present their respective positions. The administrative law judge shall issue a preliminary finding as to whether the recipient government is likely to prevail, which finding shall be based upon the record developed through this proceeding, and shall be issued within 30 days after commencement of the summary hearing.

(2) The second proceeding, if necessary, shall be a full hearing on the merits conducted in accordance with the provisions of this subpart and shall result in the initial decision of the administrative law judge. The initial decision of the administrative law judge shall be based upon the complete record of all the evidence developed throughout the hearing.

(c) *Failure to appear.* If a recipient government fails to appear at a hearing, after due notice thereof has been served upon it or upon its counsel of record, it shall be deemed to have waived the right to a hearing and the administrative law judge may make her findings and decision against the respondent by default.

(d) *Waiver of hearing.* A recipient government may waive the hearing by informing the adminstrative law judge, in writing, on or before the date set for hearing, that it desires to waive a hearing. In such event the administrative law judge may make her findings and decision based upon the pleadings before her, together with such documentary evidence properly submitted. The decision shall plainly show that the respondent waived hearing.

§ 51.212 Stipulations.

The administrative law judge shall, prior to or at the beginning of a hearing, require the parties to arrive at such stipulations as will eliminate the necessity of taking evidence with respect to allegations of facts concerning which there is no substantial dispute. The administrative law judge shall take similar action, where it appears appropriate, throughout the hearing and shall call and conduct any conferences which she deems advisable with a view to the simplification, clarification, and disposition of any of the issues involved.

§ 51.213 Evidence.

(a) *In general.* Any evidence which would be admissible under the rules of evidence governing proceedings in matters not involving trial by jury in the Courts of the United States, shall be admissible and controlling as far as possible; *provided that* the administrative law judge may relax such rules in any hearing when in her judgment such relaxation would not impair the rights of either party and would more speedily conclude the hearing, or would better serve the ends of justice. Evidence which is irrelevant, immaterial or unduly repetitious shall be excluded by the administrative law judge.

(b) *Depositions.* The deposition of any witness may be taken pursuant to § 51.214 and the deposition may be admitted.

(c) *Proof of documents.* Official documents, records, and papers of a respondent shall be admissible as evidence without the production of the original, provided that such documents, records and papers are evidenced as the original by a copy attested or identified by the chief executive officer of the respondent or the custodian of the document, and contain the seal of the respondent.

(d) *Exhibits.* If any document, record, paper, or other tangible or material thing is introduced in evidence as an exhibit, the administrative law judge may authorize the withdrawal of the exhibit subject to any conditions he deems proper. An original document, paper or record need not be introduced, and a copy duly certified (pursuant to paragraph (c) of this section) shall be deemed sufficient.

(e) *Objections.* Objections to evidence shall be in short form, stating the grounds of objection relied upon, and the record shall not include argument thereon, except as permitted by the administrative law judge. Rulings on such objections shall be a part of the record. No exception to the ruling is necessary to preserve the right of either party to the proceeding.

§ 51.214 Depositions.

(a) *In general.* Depositions for use at a hearing may, with the written approval of the administrative law judge, be taken by either the Director or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories, upon not less than 15 days written notice to the other party, before any officer duly authorized to administer an oath for general purposes, except in proceedings under subpart E in which case depositions may be taken upon not less than 10 days written notice. Such written notice shall state the names of the witnesses and the time and place where the depositions are to be taken. The requirement of written notice may be waived by the parties in writing, or may be modified by the administrative law judge. Depositions may be taken from the persons and at times and places mutually agreed to by the parties.

(b) *Written interrogatories.* When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and copies of any written cross-interrogatories shall be mailed by first class mail or delivered to the opposing party at least 7 calendar days before the date on which such interrogatories or cross interrogatories are scheduled to be answered, unless the parties mutually agree or the administrative law judge rules otherwise. A party upon whose behalf a deposition is taken must file it with the administrative law judge and serve one copy upon the opposing party. Expenses in the reporting of depositions shall be borne by the party at whose request the deposition is taken.

§ 51.215 Stenographic record; oath of reporter; transcript.

(a) *In general.* A stenographic record shall be made of the testimony and proceedings, including stipulations and admissions of fact in all proceedings. A transcript of the proceedings and evidence at a hearing shall be made in all cases.

(b) *Oath of reporter.* The reporter making the stenographic record shall subscribe an oath before the administrative law judge, to be filed in the record of the case, that she will truly and correctly report the oral testimony and proceedings at such hearing and accurately transcribe the same to the best of her ability.

(c) *Transcript.* In cases where the hearing is stenographically reported by a Government contract reporter copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Department of the Treasury, a copy thereof will be supplied to the respondent or its counsel at actual cost of duplication. Copies of exhibits introduced at the hearing or at the taking of deposition will be supplied to the parties upon the payment of a reasonable fee (31 U.S.C. 483(a)).

§ 51.216 Proposed findings and conclusions.

Except in cases where a recipient government has failed to answer the complaint, has failed to appear at the hearing, or has waived the hearing, the

administrative law judge shall, prior to making her preliminary finding under § 51.217 for hearings under subpart E, or her initial decision, give the parties a reasonable opportunity to submit proposed findings and conclusions and any supporting reasons.

§ 51.217 Preliminary finding (for hearings under subpart E).

(a) *Suspension of funding or termination of payment by administrative law judge.* (1) Within 30 days after the commencement of a summary hearing under § 51.211(b)(1) the administrative law judge conducting the hearing shall, on the record of evidence then before her, issue a preliminary finding as to whether the recipient government has failed to comply with the provisions of this part. If the preliminary finding of the administrative law judge is to the effect that the recipient government is not likely to prevail on the issues to which the hearing pertained, the Director shall immediately suspend the further payment of entitlement funds to the recipient government.

(2) Such suspension shall remain in effect until a compliance agreement is entered into by the recipient government and the Director. A preliminary finding by the administrative law judge is not appealable by the recipient government. After the completion of the full hearing on the merits the administrative law judge will make findings and a decision based upon the complete record of the evidence. If the administrative law judge issues a decision that the recipient government has failed to comply with the provisions of this part then the recipient government must enter into a compliance agreement with the Director before the 31st day after the decision. If no compliance agreement is entered into, the Director shall, upon the initial decision and order of the administrative law judge, indefinitely suspend the payment of entitlement funds to the recipient government, continue the suspension invoked under paragraph (a)(1) of this section, or terminate the payment of entitlement funds if ordered to terminate by the administrative law judge.

(b) *Resumption of funding; finding of compliance by administrative law judge.* A determination by the administrative law judge that the recipient government has complied with the provisions of this part, will terminate a suspension of entitlement funds invoked by the Director pursuant to paragraph (a) of this section. In such case the Director shall, as promptly as feasible, pay over to the recipient government all entitlement funds the payment of which were temporarily suspended.

§ 51.218 Initial decision of the administrative law judge.

(a) *In general.* As soon as practicable after the conclusion of a full hearing on the merits under § 51.211(b)(2) and the receipt of any proposed findings and conclusions timely submitted by the parties, but in no event later than 30 days after the conclusion of the hearing, the administrative law judge shall, in accordance with 5 U.S.C. section 557, make his initial decision in the case. The initial decision shall include a statement of the findings of fact and the conclusions reached upon all the material issues of fact, law or discretion presented on the record, as well as the reasons or basis for them. The decision shall not however order any particular remedy for the noncompliance but shall only state whether the recipient government has failed to comply with the provisions of the statute. The nature of the remedy shall be within the discretion of the Director, based upon the findings of fact and conclusions of law of the administrative law judge. The initial decision shall further provide for one of the following orders:

(1) With respect to proceedings under subpart E, that the payment of all future entitlement funds to the recipient government shall be suspended, terminated, or resumed, including all payments previously suspended;

(2) With respect to proceedings other than under subpart E—

(A) That the respondent pay over to the Director an amount equal to the amount of entitlement funds determined to be expended in violation of the Act and the provision of this part;

(B) That the Director withhold from subsequent entitlement payments to the respondent an amount equal to the amount of entitlement funds determined to be expended in violation of the Act and the provisions of this part;

(C) That the entitlement of a recipient government be reduced and the amount of such reduction to be withheld from subsequent entitlement payments.

(3) That the proceedings be dismissed.

(b) *Order of suspension of funding.* An order of suspension of entitlement funds means that such funds will not be paid to the recipient government but will continue to accumulate in the State and Local Government Fiscal Assistance Trust Fund until such time as compliance is achieved by the recipient government.

(c) *Order of termination of funding.* An order to terminate the payment of entitlement funds means that the funds will be returned to the general fund of the Treasury and will not thereafter be available for entitlement payments unless the decision resulting in the termination of funding is reversed by an appellate tribunal.

§ 51.219 Certification and transmittal of record and decision.

After reaching his initial decision, the administrative law judge shall certify the complete record before him and shall immediately forward the certified record, together with a certified copy of his initial decision, to the Director. The administrative law judge shall serve also a copy of the initial decision by certified mail to the chief executive officer of the recipient government or to its attorney of record.

§ 51.220 What constitutes the record.

The transcript of testimony, pleadings and exhibits, all papers and requests filed in the proceeding, together with all findings, decisions and orders, shall constitute the exclusive record in the matter.

§ 51.221 Procedure on review of decision of administrative law judge.

(a) *Appeal to the Secretary.* (1) *By the recipient government.* In all proceedings, within 30 days from the date of the initial decision and order of the administrative law judge, the recipient government may appeal to the Secretary and file its exceptions to the initial decision and reasons for the exceptions. The recipient government shall transmit a copy of its appeal and reasons therefor to the Director of the Office of Revenue Sharing, who may, within 30 days from receipt of the recipient government's appeal, file a reply brief in opposition to the appeal. A copy of the reply brief, if one is filed, shall be tramsmitted to the recipient government or its counsel of record. Upon the filing of an appeal and a reply brief, if any, the Secretary shall make the final agency decision on the record of the administrative law jude.

(2) *By the Director of the Office of Revenue Sharing.* In all proceedings, the Director may, on her own motion, within 45 days after the initial decision, serve on the recipient government by certified mail a notice that the decision will be appealed to the Secretary. Within 30 days from such notice, the Director or her counsel will file with the Secretary her exceptions to the initial decision and her supporting reasons therefor. A copy of the exceptions shall be transmitted to the recipient government or its counsel of record, who, within 30 days after receipt thereof, may file a reply brief thereto with the Secretary and submit a copy to the Director of the Office of Revenue Sharing or her counsel. Upon

the filing of a reply brief, if any, the Secretary will make the final agency decision on the record of the administrative law judge.

(b) *Review by Secretary.* In all proceedings in the absence of appeal by either party, the Secretary may at her own discretion review the initial decision of the administrative law judge. Within 45 days of the initial decision, the Secretary shall serve on the recipient government by certified mail, a notice that she will review the decision. As part of the review the Secretary may request briefs from each party within 30 days of the date of such notice. Upon filing of the briefs the Secretary shall make the final agency decision on the record of the administrative law judge.

(c) *Decision of the Secretary.* On appeal or review of the initial decision of the administrative law judge, the Secretary shall make the final agency decision after review of the record or such portions thereof as may be cited by the parties to permit limiting of the issues. The Secretary may affirm, modify, or revoke the findings and initial decision of the administrative law judge. A copy of the Secretary's decision shall be transmitted immediately to the chief executive officer of the recipient government or its counsel of record.

§ 51.222 Effect of absence of appeal or review of initial decision of administrative law judge.

In the absence of either exceptions by the recipient government or a notice of appeal by the Director or review by the Secretary (where appropriate) within the time periods set forth in paragraphs (a), (b) or (c) of § 51.221, the initial decision of the administrative law judge shall become the final decision of the department.

§ 51.223 Effect of order of repayment, withholding of funds or suspension of funds.

(a) *Order of repayment.* For violations of provisions other than subpart E, if the final order of the administrative law judge or the Secretary against the recipient government is for repayment of funds to the United States pursuant to the Director shall give the recipient government 60 days within which to take corrective action. If the recipient fails to take corrective action within 60 days from receipt of such notice, the amount as determined by the order shall be repaid upon request of the Director. To the exten that the recipient government fails to repay, the Director shall withhold from subsequent entitlement payments to the recipient government an amount equal to the amount not repaid.

(b) *Order of withholding.* For violations of provisions other than subpart E, if the final order of the administrative law judge or the Secretary against the recipient government is for the withholding of future entitlement payments, the amounts as ordered shall be withheld by the Director after notice of the chief executive officer of the recipient government. The notice shall state that if the recipient government fails to take corrective action within 60 days after receipt of the notice, further entitlement payments will be withheld until the Director is satisfied that appropriate corrective action has been taken and there is full compliance with the Act and regulations of this part. In every case in which the recipient government is a unit of local government, a copy of the final order and notice shall be submitted to the Governor of the State in which the recipient government is located.

(c) *Order of suspension.* For violations of the provisions of subpart E, if the final order against the recipient government is for suspension of entitlement funds, (or continued suspension of funds suspended after a preliminary finding of the administrative law judge) the entitlement payment to the recipient government shall be suspended by the Director unitl the recipient government enters into a compliance agreement which satisfies the Director that appropriate corrective action has been taken and there is full compliance with the provisions of subpart E.

(d) *Order of termination.* For violations of the provisions of subpart E, if the order of the administrative law judge against the recipient government is for termination of entitlement funds, the entitlement payment to the recipient government shall be terminated by the Director. The recipient government may resume participation in the program in the future if it enters into a compliance agreement which satisfies the Director that appropriate corrective action has been taken and there is full compliance with the provisions of subpart E. Entitlement funds terminated shall be returned to the general fund of the Department and will not be available to the recipient government unless the order of termination is reversed by an appellate tribunal.

§ 51.224 Publicity of proceedings.

(a) *In general.* A proceeding conducted under this subpart shall be open to the public and to elements of the news media provided that, in the judgment of the administrative law judge, the presence of the media does not detract from the decorum and dignity of the proceeding.

(b) *Availability of record.* The record established in any proceeding conducted under this subpart shall be made available to inspection by the public as provided for in accordance with regulations of the Department of the Treasury pursuant to 31 CFR Part 1.

(c) *Decisions of the administrative law judge.* The statement of findings and the initial decision of the administrative law judge in any proceedings, whether or not on appeal or review, shall be indexed and maintained by the Director and made available for inspection by the public at the public documents room of the Department. If practicable, the statement of findings and the decisions of the administrative law judge shall be published periodically by the Department and offered for sale through the Superintendent of Documents.

§ 51.225 Judicial review.

(a) *In gereral.* Actions taken as a result of administrative hearings pursuant to this subpart shall be subject to judicial review pursuant to section 143 of Subtitle C of the Act.

(b) *Appeal by the respondent.* A respondent may appeal the initial decision of the administrative law judge which has become final, or a final order of the Secretary pursuant to §§ 51.221(c) or 51.222, to the U.S. Court of Appeals, as provided by law.

(c) *Cross-appeal by the Director.* In the event a recipient government appeals, the Director may cross-appeal any issues decided adversely to the ORS by the administrative law judge. Issues decided adversely to the ORS by the Secretary may not be appealed.

(d) *The record.* The Secretary, upon prior notification of the filing of the petition for review, shall have prepared in triplicate, a complete transcript of the record of the proceeding, and shall certify to the correctness of the record. The original record shall then be filed with the Court of Appeals which has jurisdiction.

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