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Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes; Final Rule

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1215–AB45

Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes

AGENCY: Office of Federal Contract Compliance Programs, Employment Standards Administration, DOL.

ACTION: Final rule.

SUMMARY: Office of Federal Contract Compliance Programs (OFCCP) regulations require covered federal contractors and subcontractors to collect information about the gender, race and ethnicity of each ''applicant'' for employment. The final rule published today modifies OFCCP applicant recordkeeping requirements to address challenges presented by the use of the Internet and electronic data technologies in contractors' recruiting and hiring processes. The final rule is intended to address recordkeeping requirements regarding ''Internet Applicants'' under all OFCCP recordkeeping and data collection requirements.

EFFECTIVE DATE: These regulations are effective February 6, 2006.

FOR FURTHER INFORMATION CONTACT: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693–0102 (voice) or (202) 693–1337 (TTY). Copies of this final rule, including copies in alternative formats, may be obtained by calling OFCCP at (202) 693–0102 (voice) or (202) 693–1337 (TDD/TTY). The alternate formats available are large print, electronic file on computer disk and audiotape. This document also is available on the Internet at *http://www.dol.gov/esa*.

SUPPLEMENTARY INFORMATION:

I. Introduction

OFCCP requires covered federal contractors to obtain gender, race, and ethnicity data on employees and, where possible, on applicants. See 41 CFR 60–1.12(c). OFCCP requires this data collection activity for several purposes relating to contractors' administration of nondiscrimination and affirmative action requirements and OFCCP's role in monitoring compliance with OFCPP requirements. See 65 FR 68023 (November 13, 2000); 65 FR 26091 (May 4, 2000). For example, contractors use gender, race, and ethnicity data in the ''job group analysis'' portion of their AAPs (41 CFR 60–2.12) and OFCCP uses the data to decide which contractor establishments to review and, among those reviewed, when to conduct an on-site investigation. Contractors must supply this information to OFCCP upon request. *See* 41 CFR 60–1.12(c)(2).

II. Rulemaking History

The Uniform Guidelines on Employee Selection Procedures (UGESP) were issued in 1978 by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the predecessor of the Office of Personnel Management (''UGESP agencies''). UGESP requires employers to keep certain kinds of information and details methods for validating tests and selection procedures that are found to have a disparate impact.

The Department of Labor is a signatory to UGESP, which is codified in OFCCP regulations at 41 CFR part 60–3. Section 60–1.12, OFCCP's Executive Order 11246 record retention rule, was amended on November 13, 2000, to require contractors to be able to identify, where possible, the gender, race, and ethnicity of each applicant for employment. OFCCP promulgated this regulatory requirement to govern OFCCP compliance monitoring and enforcement (e.g., to allow OFCCP to verify EEO data), consistent with the UGESP. Prior to these amendments, OFCCP regulations did not expressly require contractors to maintain, or submit to OFCCP, information about the gender, race, and ethnicity of applicants and employees. *See* 65 FR 26091 (NPRM May 4, 2000); 65 FR 68023, 68042 (Final Rule Nov. 13, 2000). The pertinent provisions of the November 13, 2000 final rule were codified in OFCCP regulations at 41 CFR 60–1.12(c).

In 2000, the Office of Management and Budget instructed the Equal Employment Opportunity Commission to consult with the other UGESP agencies to address the ''issue of how use of the Internet by employers to fill jobs affects employer recordkeeping obligations'' under UGESP. *See* Notice of OMB Action, OMB No. 3046–0017 (July 31, 2000). In particular, the Office of Management and Budget instructed the agencies to ''evaluate the need for changes to the Questions and Answers accompanying the Uniform Guidelines necessitated by the growth of the Internet as a job search mechanism.'' *Id.*

On March 4, 2004, the UGESP agencies issued a Notice in the **Federal Register** seeking comments under the Paperwork Reduction Act about the burdens and utility of interpretive guidance intended to clarify how UGESP applies in the context of the Internet and related electronic data technologies. 69 FR 10152 (March 4, 2004). The preamble to the new interpretive guidance discussed the need for clarification of UGESP obligations in the context of the Internet and related electronic data technologies. *See* 69 FR 10154–155. The UGESP agencies expressly contemplated that ''[e]ach agency may provide further information, as appropriate, through the issuance of additional guidance or regulations that will allow each agency to carry out its specific enforcement responsibilities.'' 69 FR 10153.

On March 29, 2004, OFCCP published a Notice of Proposed Rulemaking proposing amendments to OFCCP regulations governing applicant recordkeeping requirements. 69 FR 16446, 16449 (March 29, 2004). OFCCP determined that additional regulations were required to clarify OFCCP applicant recordkeeping requirements in light of OFCCP's unique use of applicant data for compliance monitoring and other enforcement purposes.

In the proposed rule, OFCCP proposed to amend OFCCP regulations at 41 CFR 60–1.3 to add a definition of ''Internet Applicant.'' 69 FR 16449. The proposed definition of ''Internet Applicant'' involved four criteria: (1) The job seeker has submitted an expression of interest in employment through the Internet or related electronic data technologies; (2) the employer considers the job seeker for employment in a particular open position; (3) the job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and, (4) the job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual. 69 FR 16449. Under the proposed rule, ''advertised, basic qualifications'' were qualifications that the employer advertises to potential applicants that they must possess in order to be considered for the position. 69 FR 16449. The proposed definition further provided that ''advertised, basic qualifications'' must be noncomparative, objective, and job-related. 69 FR 16449–450.

The proposed rule also would amend 41 CFR 60–1.12(a) to require contractors to retain records of all expressions of interest through the Internet or related electronic technologies. 69 FR 16450.

Lastly, the proposed rule would amend 41 CFR 60–1.12(c)(1)(ii) to incorporate the new category of ''Internet Applicant,'' as defined in the proposed amendment to section 60–1.3 and to distinguish between ''applicants,'' i.e., expressions of interest in employment that are not submitted through the Internet and related electronic technologies, and ''Internet Applicants.'' 69 FR 16450.

OFCCP received 46 comments from 45 entities: four individuals, nine interest groups, an academic organization, the Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, seventeen employers who are covered contractors within OFCCP's jurisdiction, three trade associations, one law firm that represents contractors, and nine consultants that represent contractors.

The commenters offered a diverse array of views on the proposed rule. Almost all of the comments focused on four general areas: (1) The relationship between the proposed rule and the UGESP Additional Questions and Answers; (2) the specific criteria of the proposed ''Internet Applicant'' definition, especially the part of the definition involving ''advertised, basic qualifications;'' (3) the recordkeeping requirements of the proposed rule; and (4) the treatment of ''traditional'' expressions of interest, i.e., those made through means other than the Internet or related electronic data technologies.

Several commenters also addressed significant issues related to OFCCP compliance monitoring and enforcement activities under the proposed rule, including OFCCP's use of labor force statistics and the effective date of the final rule.

III. Summary and Explanation of the Final Rule

The final rule, for the most part, adopts the text that was proposed in the March 29, 2004 NPRM. However, in response to the public comments, OFCCP has modified the proposed text in certain respects. The discussion which follows identifies the significant comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed rule.

Discussion of Comments and Revisions

Comments Regarding the Relationship Between the Proposed UGESP Additional Questions and Answers and the OFCCP Proposed Rule

Many of the commenters expressed concern about the relationship between OFCCP's proposed rule and the Proposed UGESP Additional Questions and Answers. Most of these commenters argued that the proposals are not sufficiently coordinated, which could create confusion among employers, and could lead to inconsistent or even conflicting obligations.[1] Many of these commenters, such as Society for Human Resources Management (SHRM), ORC Worldwide (ORC), National Association of Manufacturers (NAM), and National Industry Liaison Group (NILG), pointed out that this perceived lack of coordination could lead to inadequate compliance with either of the rules and enormous recordkeeping burdens for employers. The Equal Employment Advisory Council (EEAC) believed that the OFCCP proposal conflicts in several important respects with the proposed UGESP Additional Questions and Answers. Gaucher Associates believed that the OFCCP proposal conflicts with OFCCP's prior informal interpretation of UGESP.

These commenters recommended an array of differing solutions for this coordination problem. Most of the commenters preferred that the UGESP agencies more explicitly adopt the ''basic qualifications'' component of the OFCCP applicant definition.[2] Several commenters argued against the OFCCP proposed rule altogether and asserted a preference for the UGESP proposal.[3]

OFCCP agrees with the commenters that coordination between this final rule and the proposed UGESP Additional Questions and Answers is desirable. While the Department believes that the NPRM was consistent with the proposed UGESP Additional Questions and Answers, the Department will work with the other UGESP agencies to coordinate the final UGESP Additional Questions and Answers to ensure that contractors do not face inconsistent applicant recordkeeping obligations.

Morgan, Lewis & Bockius LLP asked how OFCCP interprets procedures for evaluating Internet Applicant recordkeeping obligations under section 60–1.12 and UGESP. To make clear OFCCP's interpretation of procedures regarding Internet Applicant recordkeeping under both rules, OFCCP has added a new regulatory provision, section 60–1.12(d), to the final rule. The new provision, captioned ''Adverse impact evaluations,'' explains that when evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under Part 60–3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants and the impact of employment tests. As discussed below, OFCCP does not deem employment tests to be basic qualifications under the final rule and contractors must continue to collect and maintain records related to the impact of employment tests that are used as employee selection procedures, without regard to whether the tests were administered to Internet Applicants. However, OFCCP's compliance evaluations will not be limited to an evaluation of those records produced by the contractor. During compliance evaluations OFCCP will continue to look broadly at all aspects of a contractor's compliance with its obligations to refrain from discrimination in recruitment, hiring, and other employment practices, including the possible adverse impact of screens for basic qualifications.

As a technical matter, today's rule redesignates the former section 60–1.12(d), *Failure to preserve records,* as section 60–1.12(e), and removes former section 60–1.12(e), Applicability. The latter section was contained in the regulations merely to indicate the Office of Management and Budget's approval under the Paperwork Reduction Act of a previously published recordkeeping requirement. 62 FR 66971 (Dec. 22,

[1] *See, e.g.,* Blount International, Inc., Computer Associates International, Inc., Glenn Barlett Consulting Services, LLC, L–3 Communications, Maly Consulting LLC, Motorola Corp., Society for Human Resource Management, Southwest Airlines Co., ORC Worldwide, National Association of Manufacturers, National Industry Liaison Group, Morgan, Lewis & Bockius LLP, Thomas Houston Associates, Inc., TOC Management Services, Nancy J. Purvis, Sentari Technologies, Inc., Society for Industrial and Organizational Psychology, Louisiana Pacific Corp., and Premier Health Partners.

[2] *See, e.g.,* American Bankers Association, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Computer Associates International, Inc., L–3 Communications, ORC Worldwide, Motorola, Inc., National Association of Manufacturers, National Industry Liaison Group, Morgan, Lewis & Bockius LLP, Sentari Technologies, Inc., Siemens USA, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., TOC Management Services, Louisiana Pacific Corp., and Premier Health Partners.

[3] *See, e.g.,* Blount International, Inc., The Leadership Conference on Civil Rights, the National Women's Law Center, and the Lawyers' Committee for Civil Rights Under Law.

1997). Accordingly, it is no longer necessary.

General Comments on OFCCP's Proposed Definition of ''Internet Applicant''

Most commenters provided comments specific to one or more of the parts and subparts of OFCCP's proposed definition of ''Internet Applicant.'' OFCCP discusses below these comments in relation to each specific part or subpart of the proposed ''Internet Applicant'' definition to which they apply.

However, several commenters, including EEAC, NILG and Glenn Barlett Consulting Services, Inc. (GBCS), expressed general concern that OFCCP's proposed definition is too precise and prescriptive, in light of the variety of recruiting and selection practices that employers utilize. These commenters requested that OFCCP adopt more general guidelines that afford employers significant discretion in determining whether an individual qualifies as an ''applicant'' under the employer's own recruiting and selection systems. For example, GBCS argued that employers should be permitted to determine any point in the selection process in which race, ethnicity, and gender data would be collected. GBCS noted, ''[m]any contractors currently solicit race, ethnicity, and gender at the interview stage.''

OFCCP disagrees with commenters that suggested that general guidelines are preferable to clear rules. OFCCP believes that general guidelines would not provide clear guidance on compliance requirements or ensure adequate protections for employees and applicants. As many commenters have pointed out, over the years, there has been significant controversy between OFCCP and the contractor community as to whether a particular applicant recordkeeping practice satisfies OFCCP requirements. This controversy was fueled by the lack of clear rules about applicant recordkeeping requirements, and, in particular, clear rules about applicant recordkeeping requirements in the context of the Internet and related electronic technologies. Without clear rules, OFCCP cannot secure general compliance with the requirements, either through compliance assistance or compliance monitoring.

Northern California and Silicon Valley Industry Liaison Group requested that OFCCP expressly state in the final rule that the regulatory definition of ''Internet Applicant'' provides a minimum requirement for contractors, but also permits contractors to voluntarily implement a more expansive definition of ''applicant'' for OFCCP recordkeeping purposes.

OFCCP is well aware that contractors utilize a variety of recruitment and selection practices. Nothing in the final rule alters contractors' discretion to determine their own recruitment and selection practices and procedures. Rather, the final rule simply requires contractors to maintain sufficient records to allow both the employer and OFCCP to monitor the contractor's selection practices for potential discrimination. OFCCP disagrees with the recommendation that contractors be afforded ultimate discretion to determine recordkeeping requirements. OFCCP prescribes recordkeeping standards in order to enforce E.O. 11246, which prohibits employment discrimination on the basis of race, color, national origin, religion, and sex. OFCCP regulations implementing E.O. 11246 require contractors to self audit their own selection practices to ensure nondiscrimination. *See* 41 CFR 60–2.17, 60–3.4. OFCCP could not enforce E.O. 11246 effectively to ensure nondiscrimination if contractors are themselves the ultimate arbiters of whether sufficient records are available for OFCCP compliance monitoring activities. Nor, in OFCCP's judgment, could contractors adequately self audit their own selection practices without adequate applicant recordkeeping. Thus, the final rule establishes minimum standards for applicant recordkeeping in the context of the Internet and related electronic technologies. Contractors, however, may voluntarily adopt recordkeeping practices that are broader than those mandated by the final rule.

Comments on OFCCP's Proposed Definition of ''Internet Applicant''

Part 1: ''Submits an expression of interest in employment through the Internet or related electronic data technologies;''

In the proposed rule, ''Internet Applicant'' was defined as any individual who satisfied four criteria. OFCCP has retained the four criteria in the final rule. The first criterion of the proposed definition required that the individual ''[s]ubmits an expression of interest in employment through the Internet or electronic data technologies.'' The preamble to the proposed rule made clear that this provision applied only to expressions of interest in employment through the Internet or related electronic data technologies and that the existing standards would apply to expressions of interest through traditional means.

OFCCP solicited comments on this subject in the preamble of the proposed rule:

> The new interpretive guidelines promulgated by the UGESP agencies apply only to the Internet and related technologies. Because OFCCP relies on applicant data to determine whether to conduct an on-site audit of a contractor's workplace, OFCCP is concerned that the data allow for meaningful analysis. The proposed rule creates differing standards for data collection for traditional applicants versus Internet Applicants for the same job. Accordingly, if an employer's recruitment processes for a particular job involve both electronic data technologies, such as the Internet, and traditional want ads and mailed, paper submissions, the proposed rule would treat these submissions differently for that particular job. We are unsure whether this dual standard will provide OFCCP with meaningful contractor data to assess in determining whether to commit agency resources into an investigation of a contractor's employment practices. Therefore, OFCCP expressly solicits comments on this issue.

69 FR 16447 (March 29, 2004). OFCCP received many comments regarding whether the standard for ''Internet Applicant'' should be applied to individuals who submit an expression of interest through a means other than the Internet or related electronic data technologies. Many of the commenters addressed this subject and virtually all argued that the definition of applicant should not depend on the means by which an expression of interest comes into the employer's possession.[4] Most of these commenters asserted that the differing definitions of applicant would cause confusion and impose significant burdens on employers who would have to maintain two different recordkeeping systems.[5] Several of the commenters,

[4] *See, e.g.*, American Bankers Association, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Computer Associates International, Inc., Glenn Barlett Consulting Services, HR Analytical Services, Kairos Services, Inc., Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, L–3 Communications, Lorillard, Inc., Maly Consulting LLC, Morgan, Lewis & Bockius LLP, Motorola Corp., ORC Worldwide, National Women's Law Center, National Industry Liaison Group, Northern California and Silicon Valley Industry Liaison Group, Siemens USA, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., TOC Management Services, and U.S. Chamber of Commerce. As discussed below, several of these commenters, including Lawyers' Committee for Civil Rights Under Law, Leadership Conference on Civil Rights, and National Women's Law Center, disagreed with the proposed rule's reference to ''basic qualifications'' in defining ''Internet Applicant.''

[5] *See, e.g.*, American Bankers Association, Computer Associates International, Inc., Gaucher Associates, HR Analytical Services, L–3 Communications, ORC Worldwide, Morgan, Lewis

including HR Analytical Services, L–3 Communications, and the U.S. Chamber of Commerce, noted that the applicant data employers would obtain under the proposed rule would not provide for meaningful analysis of recruitment and hiring practices. Several commenters, such as Siemens USA (Siemens), Gaucher Associates, and SHRM, also asserted that a dual standard may create an incentive for employers not to consider expressions of interest through traditional means, such as mailing a paper resume, which would work to the disadvantage of persons who do not have ready access to the Internet.

In response to the comments, OFCCP added a related provision in the final rule which eliminates the proposed rule's dual standard for Internet versus traditional applicants, but only as to positions for which the contractor considers expressions of interest through both the Internet and traditional means. To make this rule clearer, the final rule adds three examples that explain this new provision. In the first example, the contractor solicits potential applicants for a position that is posted on its Web site. The contractor's Web site encourages potential applicants to complete an on-line profile to express an interest in the position. The contractor's Web site also advises potential applicants that they can mail a hard-copy resume with a cover letter that identifies the position for which they would like to be considered. In this example the contractor considers individuals expressing interest in a position using on-line profiles, an Internet technology, and mailed hard-copy resumes, a traditional method of application. Since the contractor considers expressions of interest through both on-line profiles and mailed hard-copy resumes, the Internet Applicant rule applies to both types of expressions of interest. In the second example, the contractor posts an opening for a position on its Web site and encourages potential applicants to complete an on-line profile. The contractor also receives a large number of unsolicited hard-copy resumes in the mail each year. The contractor scans the hard-copy resumes into an internal database that also includes all the on-line profiles that individuals have completed for various jobs. The contractor uses this internal database to find potential applicants for a position posted on the contractor's Web site. In this example, the Internet Applicant rule applies to both the on-line profiles and the unsolicited paper resumes. In the third example, the contractor does not consider potential applicants using Internet or related technologies, and, therefore, the Internet Applicant rule does not apply.

OFCCP agrees with the commenters that the bifurcated standard contained in the proposed rule would not have provided useful data where the contractor considers both types of expressions of interest for a particular position. Indeed, this bifurcated standard would result in essentially two applicant data pools—one describing individuals who possess the basic qualifications and another describing some individuals who do not possess those basic qualifications—depending on the manner in which the employer obtained the expression of interest. Because the pools are composed differently, OFCCP could not draw meaningful conclusions from analysis of the combined pool. OFCCP also shares the concerns regarding the complexity of such a framework and the corresponding difficulty in achieving substantial compliance through compliance assistance and compliance monitoring. Thus, in the final rule, OFCCP eliminated the differing standards for data collection for traditional applicants versus Internet Applicants for the same job when the employer considers both types of applicants. Under the final rule, where the Internet Applicant standard applies to a particular position, a particular expression of interest that does not qualify as an ''Internet Applicant'' for that position (*e.g.*, because the individual did not possess the basic qualifications for the position), will not qualify as an ''applicant'' for that position, as the term ''applicant'' is used in OFCCP regulations at 41 CFR 60–1.12(c). Further, pursuant to section 60–1.12(d), where the Part 60–1 Internet Applicant standard applies to a particular position, OFCCP will only require those records under Part 60–3 (other than those related to job seekers screened by a test used as a selection procedure) that relate to job seekers that are Internet Applicants as defined in 41 CFR 60–1.3. OFCCP modified the text of section 60–1.12(c)(1)(ii) in the final rule to make clear that either the ''applicant'' standard or the ''Internet Applicant'' standard would apply for a particular position, but not both. In the final rule, section 60–1.12(c) requires contractors to maintain records that identify ''where possible, the gender, race, and ethnicity of each applicant or ''Internet Applicant'' as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.''

However, OFCCP does not believe that these problems and concerns are present to the same extent, if at all, where the contractor considers *only* traditional expressions of interest for a particular position. In such a situation, a single standard is used to determine who is an applicant. For example, a manufacturer that hires for assembly line positions and considers only individuals who fill out and submit a hard copy application form has a single data pool—no member of which are Internet Applicants. This contractor can solicit race, ethnicity, and gender information through a voluntary self-identification form provided with the application form. In this example, the applicant pool consists of those individuals who completed and submitted an application form, applying a single, traditional standard for who is an applicant.

OFCCP received several other comments about this part of the proposed rule. The Leadership Conference on Civil Rights (LCCR) requested that OFCCP ''make clear that there are multiple ways for a potential applicant to submit an expression of interest in a particular position.'' LCCR's concern was that an employer might refuse to consider the expressions of interest of individuals who do not follow the employer's desired process for making such expressions of interest. LCCR also was concerned that employers might make *ad hoc* exceptions to their standard process for accepting expressions of interest. LCCR argued that ''any guidance that is developed should make clear that individuals who reasonably believe, based on the information they received from the employer, that they have applied for a particular position should be considered applicants for that position and recorded a (sic) such.''

OFCCP has addressed these comments fully in the section that discusses the second criterion for the ''Internet Applicant'' definition. OFCCP agrees that contractors should not be permitted to selectively determine who will be considered for employment based on the qualifications information contained on an expression of interest. OFCCP has added an explicit definition of ''considers the individual for employment in a particular position.'' Under the final rule at subsection (3) of the definition of Internet Applicant, '' 'considers the individual for employment in a particular position,' means that the contractor assesses the substantive information provided in the

& Bockius LLP, Motorola Corp., Nancy J. Purvis, National Women's Law Center, Society for Human Resource Management, Society for Industrial and Organizational Psychology, Southwest Airlines Co., Thomas Houston Associates, Inc., and U.S. Chamber of Commerce.

expression of interest with respect to any qualifications involved with a particular position.'' This definition forecloses the possibility that a contractor could evaluate an individual's qualifications for a particular position without thereby having ''considered'' the individual.

At the same time, OFCCP does not provide a blanket requirement that contractors must consider any and all expressions of interest they receive, regardless of the manner or nature of the expression of interest. OFCCP makes this clear in the final rule (subsection (3) of the Internet Applicant definition) through the definition of ''considers the individual for employment in a particular position,'' which further provides that ''[a] contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position.'' Under the final rule, it is the contractor's actual practice with respect to a particular expression of interest that determines whether the contractor has ''considered'' that expression of interest and similar expressions of interest. For example, if the contractor's policy is to accept expressions of interest only through its Web site, but its actual practice is to also review faxed resumes and scan those it is interested in into its database, the contractor's actual practice is to consider faxed resumes as well as expressions of interest received through its Web site. This is consistent with OFCCP's longstanding policy to permit contractor's to dispose of unsolicited resumes if the contractor has a consistently applied policy of not considering unsolicited resumes.

OFCCP investigates whether a contractor has such a protocol by reviewing the contractor's hiring procedures and policies and by reviewing the contractor's hiring practices to determine whether those procedures and policies were consistently and uniformly followed.

Several other commenters, including EEAC, Louisiana Pacific Corp., and Premier Health Partners, criticized the proposed rule for not including a requirement that the individual make an expression of interest in accordance with the employer's standard procedures for submitting applications.

Several commenters, including EEAC, ORC, SHRM, and the Society for Industrial and Organizational Psychology (SIOP), requested that this part of the proposed definition expressly require that the expression of interest must be an expression for a particular position. Otherwise, these commenters argued, any expression of interest might qualify an individual as an applicant for any position, which would impose significant burdens on contractors if the potential applicant pool is voluminous. ORC offered the example of an employer that searches Monster.com and finds over 20,000 resumes of individuals who satisfy the basic qualifications for a particular position. ORC argued that all 20,000 of these individuals would be applicants under OFCCP's proposed definition, unless the definition is somehow limited to those individuals who express an interest in the particular position for which the contractor is considering the individual. SIOP argued that contractors will face significant recordkeeping burdens if expressions of interest are not limited to those for a particular position because the proposed rule would require contractors to retain all expressions of interest, regardless of whether the individual qualifies as an Internet Applicant.

OFCCP agrees that the proposed data collection and recordkeeping requirements would be unreasonable in the example ORC offered. To address these situations, the agency has modified or clarified several provisions of the proposed rule. Specifically, OFCCP expressly states in the final rule (subsection (3) of the definition of ''Internet Applicant'') that ''[i]f there are a large number of expressions of interest, the contractor does not 'consider the individual for employment in a particular position' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.'' Data management techniques are not ''appropriate'' under subsection (3) if they are not facially neutral or if they produce disparate impact based on race, gender, or ethnicity in the expressions of interest to be considered. Further, OFCCP modified the fourth part (subsection (1)(iv)) of the proposed definition of ''Internet Applicant'' to require that ''[t]he individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.''

OFCCP also added a related provision (subsection (5) of the definition of ''Internet Applicant'') to clarify that, ''a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.'' Data management techniques are not ''appropriate'' under subsection (5) if they are not facially neutral or if they produce adverse impact based on race, gender, or ethnicity in the job seekers that will be contacted by the contractor to discern interest in the job. Finally, in the final rule (§ 60–1.12(a)), OFCCP clarified that, when a contractor uses a third-party resume database, the contractor must retain the electronic resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor, not all the resumes contained in the third-party resume database, along with records identifying job seekers contacted regarding their interest in a particular position, a record of the position for which each search of the database was made, the substantive search criteria used, and the date of the search.

Returning to ORC's example in light of these modifications, the contractor may reduce the burden from applicant

recordkeeping obligations by determining which of the 20,000 individuals from Monster.com to contact through random sampling or an absolute numerical technique.[6] The contractor could also limit burdens from recordkeeping obligations by determining which of the 20,000 individuals are interested in the position through the individuals' stated preferences as to type or location of work, or salary requirements. The contractor would be required to retain only the resumes of job seekers who met the basic qualifications for the particular position and who were considered by the contractor, not 20,000 resumes or all the resumes in the Monster.com database.

Several commenters, including Gaucher Associates and Siemens USA (Siemens), argued that the term ''Internet and related electronic data technologies'' is vague and requested that OFCCP clarify the meaning of this term in the final rule. OFCCP will not provide a precise definition of this term in recognition of rapid changes in technology in this area. However, OFCCP does intend this term to include the types of technologies referenced in the preamble to the proposed UGESP Additional Questions and Answers as follows:

> Internet-related technologies and applications that are widely used in recruitment and selection today include:
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> E-mail: Electronic mail allows for communication of large amounts of information to many sources with remarkable ease. Recruiters, employers, and job seekers use e-mail lists to share information about potential job matches. Recruiters send e-mails to lists of potential job seekers. These lists are obtained through various sources of information, such as trade or professional lists and employer Web site directories. Employers publish job announcements through e-mail to potential job seekers identified through similar means. Job seekers identify large lists of companies to receive electronic resumes through e-mail. E-mail allows all of these users to send the same information to one recipient or many, with little additional effort or cost.
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> Resume databases: These are databases of personal profiles, usually in resume format. Employers, professional recruiters, and other third parties maintain resume databases. Some third-party resume databases include millions of resumes, each of which remains active for a limited period of time. Database information can be searched using various criteria to match job seekers to potential jobs in which they may be interested.
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> Job Banks: The converse of the resume database are databases of jobs. Job seekers search these databases based on certain criteria to identify jobs for which they may have some level of interest. Job seekers may easily express interest in a large number of jobs with very little effort by using a job bank database. Third-party providers, such as America's Job Bank, may maintain job banks or companies may maintain their own job bank through their Web sites.
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> Electronic Scanning Technology: This software scans resumes and individual profiles contained in a database to identify individuals with certain credentials.
>
> Applicant Tracking Systems/Applicant Service Providers: Applicant tracking systems began primarily to help alleviate employers' frustration with the large number of applications and resumes received in response to job postings. They also serve the wider purpose of allowing employers to collect and retrieve data on a large number of job seekers in an efficient manner. Whether in the form of custom-made software or an Internet service, the system receives and evaluates electronic applications and resumes on behalf of employers. For example, an employer could have the group of job seeker profiles from a third party provider's system searched, as well of those received on its own corporate Web site entered into one tracking system. The system would then pull a certain number of profiles that meet the employer-designated criteria (usually a particular skill set) and forward those profiles to the employer for consideration.
>
> Applicant Screeners: Applicant screeners include vendors that focus on skill tests and other vendors that focus on how to evaluate general skills. Executive recruiting sites emphasize matching job seekers with jobs using information about the individual's skills, interests, and personality.
>
> 69 FR 10155 (March 4, 2004).

Part 2: ''The employer considers the individual for employment in a particular open position;''

In the proposed rule, the second criterion of the ''Internet Applicant'' definition required that ''[t]he employer considers the individual for employment in a particular open position.'' Subsection (1)(ii). OFCCP made one change to this text in the final rule; the word ''open'' was deleted. The deletion was made to avoid confusion about whether the second criterion is met if an individual is considered for a position that may by open in the future, but is not currently open. Under subsection (1)(ii) it will be sufficient for a contractor to consider an individual for employment in a particular position.

In response to comments received from the LCCR, EEAC and others discussed above, OFCCP added a related provision at subsection (3) of the definition of Internet Applicant in the final rule:

> For purposes of paragraph (1)(ii) of this definition, ''considers the individual for employment in a particular position,'' means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not ''consider the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

Subsection (3) explains that a contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures established by the contractor, or not submitted with respect to a particular position. However, the protocol must be uniformly and consistently applied to similarly situated job seekers. As previously mentioned, it is the contractor's actual practice that determines whether the contractor ''considered'' the expression of interest. If a contractor's policy is to accept expressions of interest only through its Web site, but its actual practice is to review faxed resumes as well and to scan those it is interested in into its resume database, then the contractor ''considers'' faxed resumes as well as expressions of interest received through its Web site.

Subsection (3) also provides that if there are a large number of expressions of interest the contractor may use data management techniques to reduce the number of expressions of interest that must be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest. Data management techniques used to reduce the number of expressions of interest to be considered must be facially neutral in terms of race, ethnicity, gender or other protected factors. Data management techniques that produce adverse impact based on race, gender or ethnicity in the expressions of interest that will be considered by the contractor would not be appropriate.

[6] Under a random sampling technique, the employer considers only a small subset of resumes drawn randomly from the 20,000 resumes; many spreadsheets and database software packages offer random sampling functions. Under an absolute numerical limit, the employer reviews only a predesignated number of resumes, such as the first 100 resumes.

Several commenters, including Maly Consulting LLC, ORC, Siemens, and the SIOP, commented generally that the term ''considers'' is ambiguous and requested that OFCCP clarify its meaning. ORC argued that ''considers'' should include the determination of whether an individual meets the basic qualifications for the position.

Siemens was concerned that the term ''considers'' could be interpreted to preclude contractors from searching an internal resume database using successively more precise qualification searches to narrow the pool of potential applicants to a manageable number. Siemens argued that the term ''considers'' should be interpreted to permit contractors to use database searches to narrow a large pool of potential applicants down to a manageable number for individual evaluation. Siemens also recommended that ''considers'' be restricted to the stage in which ''the recruiter or hiring manager evaluates an actual applicant against the employer's requirements and makes a judgment as to which individuals should continue in the process.'' Similarly, SIOP argued that the term ''considers'' should not include searching an external resume database or ''querying an internal database of recruit profiles.''

The U.S. Chamber of Commerce (the Chamber) recommended that the term ''considers'' be interpreted to permit an employer to count as ''applicants'' for OFCCP purposes only ''those individuals best qualified to fill its positions.'' The Chamber argued that this interpretation of ''considers'' is necessary to permit employers to manage large volumes of expressions of interest while retaining their prerogative to select only the best qualified candidates. The Chamber offered an example of how its recommended interpretation of ''considers'' might be applied: ''Hospital A'' has an opening for an emergency room nurse position and advertises that it is seeking registered nurses with hospital experience; Hospital A obtains fifty expressions of interest that meet the advertised, basic qualifications of registered nurse with hospital experience; Hospital A lacks the time or resources to ''consider'' all 50 of these expressions of interest, so it assesses which of the 50 expressions of interest indicate emergency room nursing experience, and finds that 20 of the 50 expressions of interest indicate such experience; Hospital A then looks at 10 out of these 20 expressions of interest with emergency room nursing experience, determines that they are ''good candidates for the job,'' and submits those ten candidates for ''consideration.'' Thus, under the Chamber's recommended interpretation, Hospital A has ''considered'' only the ten individuals whose expressions of interest indicate they are ''good candidates for the job.''

OFCCP agrees with the commenters who recommended that the agency provide clear rules on applicant recordkeeping requirements. It is the agency's intent to provide clear rules for applicant recordkeeping that will allow OFCCP to enforce these requirements and that will provide contractors with meaningful guidance on how to comply with them. Therefore, OFCCP has included an express definition of ''considers the individual for employment in a particular position'' in subsection (3) of the definition of ''Internet Applicant'' in the final rule. Under this definition, ''considers'' involves an assessment of the job seeker's qualifications against any qualifications of a particular position, including a determination of whether a job seeker meets the basic qualifications for the position.

With respect to Siemens' concern about searching a resume database, nothing in the definition of Internet Applicant precludes a contractor from engaging in multiple searches of a resume database, so long as each of the search criteria fall within the definition of ''basic qualifications.'' Moreover, a contractor need not search for all of the qualifications that constitute the ''basic qualifications'' for a particular position. If the contractor chooses not to search for all of the ''basic qualifications'' of the position, then it will collect race and gender information from a broader pool than that framed by search criteria that included all of the ''basic qualifications'' for the position. The final rule provides minimum standards for applicant recordkeeping. It does not prohibit contractors from voluntarily collecting race, ethnicity or gender information from potential applicants, nor does E.O. 11246 preclude contractors from voluntarily obtaining this information from potential applicants, as long as such information is used only for purposes of the contractor's affirmative action and nondiscrimination programs.

However, OFCCP disagrees with Siemens, SIOP and the Chamber with respect to their proposals essentially to eliminate the conditions on ''basic qualifications'' (*i.e.,* that basic qualifications must be noncomparative, objective, and ''relevant to performance of the particular position * * *'') from the proposed definition of Internet Applicant. OFCCP would not have sufficient records to evaluate contractors' recruiting and hiring practices under E.O. 11246 if contractors collected race and gender information in accordance with the recommendations of these commenters. Under these recommendations, OFCCP would be unable to assess a significant portion of a contractor's recruiting and hiring practices, including the impact of basic qualifications [7] and the comparative assessment of candidates. In the Chamber's example, only 10 individuals would be Internet Applicants under their proposal, while 50 would be under the final rule. Under some of these recommendations, OFCCP would be able to assess only the final stages of the contractor's hiring process, leaving open whether there was discrimination at any of the prior stages in the hiring or recruiting processes. Further, many of the recommendations were far too vague to provide a clear rule that OFCCP could enforce or that contractors could apply to their particular recruiting and hiring procedures.

In addition to the comments from LCCR discussed above, LCCR and the National Women's Law Center (NWLC) also expressed concern that the proposed rule leaves to the employer's discretion whom to ''consider'' for a particular position and argued that OFCCP should require employers to ''consider'' all individuals who are similarly situated with respect to the manner of making their expressions of interest. LCCR also noted concern that an employer might make exceptions to its internal procedures: ''[a] misguided employer could decide that he/she only wanted to ''consider'' applicants with certain credentials, or from a particular community, regardless of their actual qualifications for a job.''

As noted above, OFCCP agrees that, for purposes of defining applicant recordkeeping requirements, contractors should not be permitted to selectively determine who will be considered for employment based on the qualification information contained on an expression of interest. Otherwise, OFCCP would not have sufficient information to assess contractors' hiring practices for potential discrimination. As discussed above, OFCCP has addressed this concern through an explicit definition of ''considers the individual for employment in a particular position'' under which contractors do not have

[7] By contrast, under the final rule, OFCCP can assess the impact of ''basic qualifications'' by comparing the demographics of the pool of ''Internet Applicants'' with statistics on the qualified labor force. See discussion under ''Basic Qualifications,'' below.

discretion to assess information about a potential applicant's credentials against any qualification of a particular position without thereby having ''considered'' the potential applicant.

In addition, the final rule (at § 60–1.12(a)) requires contractors to retain records of qualifications used in the hiring process and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a position, including records such as on-line resumes or internal resume databases and records identifying job seekers contacted regarding their interest in a particular position. The rule also specifies that with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. In addition, with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. These records are to be maintained regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3. Existing recordkeeping requirements (under § 60–1.7 and 1.12) and OFCCP's investigative rights (under § 60–1.20) enable OFCCP to determine whether a qualification actually was used for a particular position. The recordkeeping requirements embodied in the final rule combined with the existing OFCCP recordkeeping requirements will ensure that OFCCP has adequate information to assess whether employers are selectively ''considering'' only certain candidates or imposing qualification standards that do not meet the definition of ''basic qualifications'' under the final rule.

Part 3: ''The individual's expression of interest indicates the individual possesses the advertised, basic qualifications for the position;''

In the proposed rule, the third criterion of the ''Internet Applicant'' definition required that ''[t]he individual's expression of interest indicates that the individual possesses the advertised, basic qualifications for the position.'' 69 FR 16446, 16447 (March 29, 2004). The proposed rule defined ''advertised, basic qualifications'' as ''qualifications that the employer advertises (*e.g.*, posts a description of the job and necessary qualifications on its Web site) to potential applicants that they must possess in order to be considered for the position and that meet all of the following three conditions * * *.'' *Id.* at 16449.

A. ''Advertised, basic qualifications''

1. ''Advertised''

Several commenters argued that the ''advertised'' component of the proposed definition of Internet Applicant conflicts with the way employers recruit for employees in many instances. EEAC argued that many employers use ''broadcast recruitment,'' under which the employer permits job seekers to submit a resume or register an expression of interest ''in being considered for a range of positions, a broad category of positions, or in some cases simply any position for which the employer might currently or at some time in the future consider the individual to be a good candidate.'' Siemens asserted that the proposed requirement that the basic qualifications be advertised could place ''undue emphasis on the drafting of the initial announcement of the vacancy and qualifications.'' Siemens argued that employers cannot know in advance whether an advertised qualification will produce too few or too many candidates who meet the basic qualifications, and recommended that the final rule afford contractors flexibility to be able to ensure an adequate, but manageable applicant pool. SIOP provided comments similar to both EEAC and Siemens. HR Analytical Services noted that employers may at times truncate qualifications listed in an advertisement or job posting to save cost or space. ORC, SHRM, and Thomas Houston Associates, Inc. argued that many job seekers submit expressions of interest without ever viewing an advertisement for a specific position. Most of these commenters suggested that OFCCP revise the proposed definition of Internet Applicant to include qualifications that are ''advertised or established.''

OFCCP acknowledges that in certain circumstances a contractor may not have an opportunity because of emergent business conditions to advertise a position before hiring a new employee. To address this issue, the final rule provides an alternative for qualifications that are not advertised. The final rule provides that if the contractor does not advertise for the position, the contractor may use ''an alternative device to find individuals for consideration (for example, through an external resume database),'' and establish the qualification criteria by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that position. Contractors must retain records of these established qualifications in accordance with section 60–1.12(a).

In response to the comments, OFCCP modified this part in the final rule by eliminating the word ''advertised.'' Thus, subsection (1)(iii) of the definition of ''Internet Applicant'' in the final rule provides, ''[t]he individual's expression of interest indicates the individual possesses the basic qualifications for the position. * * *''

2. ''Basic Qualifications''

Many commenters expressed general approval of the ''basic qualifications'' component of the proposed rule.[8] Several commenters approved generally of the concept of ''basic qualifications,'' but requested modifications of the proposed rule. For example, several commenters, such as HR Analytical Services, SHRM, and Thomas Houston Associates, Inc., argued that the term ''basic qualifications'' would cause confusion because it is not a term that is commonly used by employers, job seekers, or recruiters. These commenters recommended that the term ''minimum qualifications'' be used instead of ''basic qualifications,'' and argued that employers, job seekers, and recruiters already understand and use the term ''minimum qualifications.''

SHRM and HR Analytical Services also expressed concern that the word ''basic'' in the term ''basic qualifications'' somehow could be interpreted as a substantive limit on the types of qualifications that could qualify under the definition, over and above the substantive limits contained in the proposed definition of ''basic qualifications,'' *i.e.*, that they are noncomparative, objective, and job related. SHRM and SIOP recommended that OFCCP provide more guidance on what qualifications are ''basic'' in the final rule.

OFCCP disagrees with these commenters that a term other than ''basic qualifications'' is desirable for purposes of the final rule. OFCCP believes that borrowing a term from common usage would cause more confusion, not less. The term ''basic qualifications'' is carefully defined in

[8] *See* note 4, above.

the final rule to satisfy OFCCP compliance monitoring purposes. Under this definition, any qualification that is noncomparative, objective, and ''relevant to performance of the particular position and enabl[ing] the contractor to accomplish business-related goals'' may be a ''basic qualification.'' However, employment tests used as employee selection procedures, including on-line tests, are not considered basic qualifications under the final rule. Contractors are required to retain records about the gender, race and ethnicity of employment test takers who take an employment test used to screen them for employment, regardless of whether test takers are Internet Applicants under section 60–1.3. For example, if 100 job seekers take an employment test, but the contractor only considers test results for the 50 who meet the basic qualifications for the job, demographic information must be solicited only for the 50 job seekers screened by test results because the test was used as a selection procedure only for those individuals. By contrast, if the contractor used the test results from 100 test takers to narrow the pool to 50 job seekers whose basic qualifications are considered, the test is used as a selection procedure and demographic information from all test takers must be solicited.

The term ''basic'' is not intended to provide any substantive limit on the type or range of qualifications that could meet this definition. Rather than offer examples of qualifications that meet the definition of ''basic qualifications'' for particular jobs—which would require OFCCP to describe the actual duties and responsibilities corresponding to the job titles referenced in such examples—OFCCP provides additional discussion of the components (*i.e.*, noncomparative, objective, and ''relevant to performance of the particular position * * *'') of the definition in response to comments under separate headings below.

A job seeker must meet all of a contractor's basic qualifications in order to be an Internet Applicant under today's rule. For example, a contractor initially searches an external job database with 50,000 job seekers for 3 basic qualifications for a bi-lingual emergency room nursing supervisor job (a 4-year nursing degree, state certification as an RN, and fluency in English and Spanish). The initial screen for the first three basic qualifications narrows the pool to 10,000. The contractor then adds a fourth basic qualification, 3 years of emergency room nursing experience, and narrows the pool to 1,000. Finally, the contractor adds a fifth basic qualification, 2 years of supervisory experience, which results in a pool of 75 job seekers. Under this final rule, only the 75 job seekers meeting all five basic qualifications would be Internet Applicants, assuming other prongs of the definition were met.

Several other commenters asserted that OFCCP's proposal was unclear about whether screening for criteria other than qualifications would be deemed ''basic qualifications'' under the definition of Internet Applicant. For example, Morgan Lewis & Bockius LLP asked whether job seekers' salary requirements used to define the applicant pool would be deemed ''basic qualifications.'' SIOP questioned whether ''willingness to work in a specific geographic location,'' ''willingness to travel a certain percentage of time,'' and ''willingness to work certain days or shifts'' would qualify as ''basic qualifications.'' Several commenters, such as NAM and Maly Consulting LLC, asked whether contractors' use of random sampling or specific numerical limits (*e.g.*, first 30 reviewed out of 10,000) to manage large volumes of expressions of interest would be deemed ''basic qualifications.''

OFCCP recognizes that contractors may gauge a job seeker's willingness to work in the particular position through information the individual has provided about salary requirements and willingness to work in certain types of positions or certain geographic areas, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. OFCCP also recognizes that contractors may need to use additional data management techniques (such as random sampling or numerical limits) to develop a reasonable applicant pool out of a large volume of job seekers who possess the basic qualifications for the particular position. OFCCP does not view use of such information or techniques to determine who is interested in a particular position to be consideration of ''basic qualifications,'' provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications. OFCCP addressed these comments in the final rule by modifying the fourth part of the Internet Applicant definition to require that ''[t]he individual at no point in the contractor's selection process * * * removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.'' The final rule includes a provision (subsection (5) of the definition of ''Internet Applicant'') under which ''a contractor may determine that an individual has removed himself or herself from further consideration * * * based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contactor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.'' In addition, as discussed above with regard to Part 2 of the Internet Applicant definition (subsection (1)(ii)), OFCCP added a definition of ''considers the individual for employment in a particular position,'' which also addresses these issues.

In response to the comments, OFCCP modified subsection (4) of the definition of ''Internet Applicant'' by defining ''basic qualifications'' as: ''qualifications (i)(A) that the contractor advertises (*e.g.*, posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or (B) for which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position, if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (*e.g.*, through an external resume database), and (ii) that meet all of the following three conditions * * *'' In the final rule, OFCCP retained most of the text of the proposed rule with respect to the ''three conditions'' referenced in the definition of ''basic qualifications.'' Thus, the final rule provides:

(A) The qualifications must be noncomparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, ''a Bachelor's degree in Accounting'' is objective, while ''a technical degree from a good school'' is not. A basic qualification is objective if a third-party, with the contactor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

Several commenters opposed the use of ''basic qualifications'' in defining ''Internet Applicant'' for purposes of OFCCP recordkeeping requirements. The Leadership Conference on Civil Rights, the National Women's Law Center, and the Lawyers' Committee for Civil Rights Under Law generally offered three arguments against the use of ''basic qualifications'' as a way to determine applicant recordkeeping obligations: (1) Established nondiscrimination legal standards do not require an individual to be qualified for a job in order to be an applicant for the job; (2) employers could use the ''basic qualifications'' to manipulate the composition of the applicant pool, exclude qualified individuals, and mask discrimination; and (3) the purpose of applicant recordkeeping is to ensure that the qualifications standards employers use, including ''basic qualifications,'' do not discriminate against individuals on the basis of race, ethnicity or sex. In sum, these commenters essentially were concerned that OFCCP would not be able to find and remedy particular cases of hiring discrimination under the proposed rule.

OFCCP disagrees with the three arguments presented by these commenters. As to the commenters' first argument, OFCCP is proposing a definition of applicant for the limited purposes of OFCCP recordkeeping and data collection requirements pursuant to Executive Order 11246. Accordingly, OFCCP is not purporting to define who is an applicant for any purposes which would affect the substantive interests of any individual, such as for purposes of litigation of employment discrimination claims under any federal, state, or local antidiscrimination statute. Moreover, OFCCP is not aware of any case in which a court relied on OFCCP's recordkeeping definitions for purposes of determining liability or remedy under Title VII or any other federal, state or local antidiscrimination statute. OFCCP itself may not rely on recordkeeping definitions to frame the appropriate analysis for liability or remedy purposes when alleging a violation of the nondiscrimination requirements of Executive Order 11246 (as opposed to recordkeeping requirements).

As to the commenters' second argument, contractors will not be able to manipulate basic qualifications in order to effectuate discrimination, because the final rule provides adequate safeguards against this problem. First, the final rule requires a contractor to retain all the expressions of interest it considered, even those of individuals who are not Internet Applicants.[9] OFCCP will have access to these records during a compliance evaluation and will review them as appropriate to determine if discrimination exists. Second, OFCCP has carefully defined ''basic qualifications'' in the final rule, requiring that they be noncomparative, objective, and ''relevant to the performance of the particular position and enabl[ing] the contractor to accomplish business-related goals.'' Under the final rule, a contractor must retain records of all such basic qualifications used to develop a pool of Internet Applicants. Again, OFCCP will have access to these records during a compliance evaluation.

Finally, OFCCP will rely on Census and other labor market data to assess contractors' hiring practices for potential discrimination and will carefully review the basic qualifications themselves. The Supreme Court of the United States has authorized the use of comparisons between actual hiring rates and population or labor force statistics to prove hiring discrimination. *See Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 339 n.20 (1977) (population statistics); *Hazelwood Sch. Dist.* v. *United States,* 433 U.S. 299, 307 n.12 (1977) (labor force statistics). As noted in the preamble of the proposed rule, hiring discrimination cases frequently rely on population and labor force statistics. *See, e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430 n.6, 431 (1971) (relying on Census data about the general population to find that a high school degree requirement had a disparate impact on African-Americans); *Dothard* v. *Rawlinson,* 433 U.S. 321, 329–330 (1977) (''The application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.''); *E.E.O.C.* v. *Joint Apprenticeship Comm. of Joint Industrial Bd. of Elec. Indus.,* 186 F.3d 110, 119 (2d Cir. 1999) (general population and qualified labor market data ''often form the initial basis of a disparate impact claim * * *''). OFCCP also will directly review whether the qualifications appear to be relevant to the position at issue and whether they are of a type that have been subject to disparate impact litigation, such as requirements as to height and weight, arrest records, and high school degree or GED. *See, e.g.*, 41 CFR 60–3.4(C) (requiring users to evaluate individual components of hiring process ''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'').

As to the commenters' third argument against ''basic qualifications''—that OFCCP will miss particular cases of disparate impact discrimination—OFCCP disagrees that the proposed applicant recordkeeping standards will make OFCCP less effective at finding and remedying hiring discrimination. Indeed, OFCCP has determined that applicant data under the proposed definition of Internet Applicant will make the agency much more effective at finding and remedying hiring discrimination across the range of cases. OFCCP's rationale can be appreciated only through an understanding of how the agency uses applicant data. OFCCP's use of applicant data is broader than determining whether a particular contractor has engaged in hiring discrimination. The distinction in uses of applicant data reflects OFCCP's historical mission of focusing on systemic workplace discrimination. In *Reynolds Metal Co.* v. *Rumsfeld,* 564 F.2d 663, 668 (4th Cir. 1977), the court described OFCCP's mission and contrasted it with the EEOC's:

> Both agencies are charged with the responsibility of eliminating employment discrimination, but their specific missions differ. The compliance office monitors government contractors to determine whether they are meeting their commitments as equal opportunity employers. It gives priority to the eradication of systemic discrimination rather than to the investigation and resolution of complaints about isolated instances of discrimination.

In keeping with its unique mission, OFCCP uses applicant data broadly to deter all contractors under its jurisdiction from engaging in systemic hiring discrimination, either in the form of disparate impact or disparate treatment discrimination. OFCCP deters contractors in two ways: (1) By monitoring all contractors through a tiered-review approach that effectively targets contractors who have engaged in hiring discrimination; and (2) by effectively investigating contractors who have engaged in systemic hiring discrimination and obtaining significant financial awards (along with instatement obligations) to remedy such discrimination.

[9] With the exception of expressions of interest from external resume databases, where the massive volume of resumes makes such a requirement impracticable. As noted below, as of January, 2005, Monster.com reported that it had over 41 million resumes in its database.

OFCCP primarily uses applicant data with respect to the first part of the two-part deterrence model. OFCCP uses the data to target OFCCP investigations at workplaces in which hiring discrimination is likely to exist. OFCCP initially selects a contractors establishment for a compliance evaluation based, in part, on a statistical analysis of workforce demographic data the contractor submits on annual EEO–1 reports. Once OFCCP selects a contractor's establishment for a compliance evaluation, OFCCP sends the contractor a ''scheduling letter'' that asks the contractor to submit data on, among other things, applicants and hires for a specified period. After receiving the contractor's data, OFCCP analyzes the ratio of applicants and hires, and, based on this analysis, determines whether to investigate the contractor's hiring practices. This initial analysis of applicant and hire data is a part of the compliance evaluation process known as the ''desk audit.'' OFCCP considers desk audit results when determining whether to conduct an on-site investigation, and the scope of any such on-site investigation. OFCCP typically conducts many more desk audits than on-site reviews, and uses the desk audit analysis to allocate agency investigation resources toward workplaces where the likelihood of a discrimination problem is highest.

Thus, inclusion of basic qualifications in the definition of Internet Applicant under section 60–1.3 furthers OFCCP's goal of targeting for in-depth reviews contractor's that are potentially the worst offenders. If, during the desk audit, OFCCP were to target contractors for more in-depth review based on Internet applicant data that includes job seekers not meeting basic qualifications, OFCCP would select contractors that rejected a high proportion of job seekers because they were not even minimally qualified for the job. The result would be that OFCCP would waste finite resources by focusing its on-site reviews on contractors that were not the worst offenders. Under the OFCCP approach, targeting will be based on a contractor's rejection rate of qualified applicants, a better predictor of worst offenders. In determining who are potentially the worst offenders for more in-depth reviews, OFCCP will also analyze whether the contractor potentially discriminated in hiring by comparing the demographic characteristics of the applicants hired to the demographic characteristics of the qualified labor market. During an in-depth review, OFCCP will be able to analyze the contractor's use of basic qualifications by comparing the demographic characteristics of Internet applicants meeting basic qualifications with labor market data. Consequently, including basic qualifications in the definition of Internet Applicant furthers OFCCP's goal of focusing investigative resources on potentially the worst offenders, while preserving OFCCP's ability to efficiently and effectively review a contractor's hiring practices for discrimination.

In addition to the fact that such data would not permit meaningful analysis to guide OFCCP resource allocation decisions, some practical limits must be placed on collecting race, ethnicity, and gender information in this context because of the massive numbers of resumes in these databases. Otherwise, the applicant recordkeeping burdens would be excessive. Several commenters proposed various alternative definitions for ''basic qualifications'' that appeared to be attempts to address these practical problems. For example, Gaucher Associates contended that contractors could use sampling techniques to obtain race, ethnicity and gender data where there are large numbers of applicants. In limited circumstances contractors may use appropriate sampling techniques to collect information required by these regulations (See 41 CFR 60–3.4.A). However, sampling is not always appropriate. For example, a random sample that includes many individuals in a large resume database who have no interest in, nor basic qualifications for, a particular position would provide far less useful information than labor force statistics that are tailored for the position and geographic location.

One commenter, ChevronTexaco Federal Credit Union (CTFCU), argued that the proposed rule would impose undue burdens on small contractors where a significant number of individuals who meet the basic qualifications submit an expression of interest.

CTFCU contended that small contractors cannot afford automated applicant tracking systems and they cannot manually consider all individuals who meet the basic qualifications. CTFCU recommended that OFCCP apply the proposed ''Internet Applicant'' definition and associated obligations only to ''employees showing underutilization of women and/or minorities,'' based on workforce demographic data from EEO–1 reports.

OFCCP believes that data management techniques such as random sampling or absolute numerical limits, discussed above, will enable small contractors to comply with applicant recordkeeping requirements without undue burden. OFCCP does not agree that CTFCU's recommendation would necessarily help small businesses because the burden involved with this proposal depends entirely on the amount of ''underutilization.'' Nor would this proposal provide records that OFCCP requires to enforce E.O. 11246 for job categories in which there was no ''underutilization.'' As OFCCP understands this proposal, contractors would not be required to collect race, ethnicity or gender information about *any* individuals considered for positions in job categories that are not ''underutilized.'' However, the fact that a broad occupational category, such as an AAP job group or EEO–1 job category, is ''utilized'' does not necessarily imply that there is not a discrimination problem in the recruiting or hiring process for the jobs that make up those occupational categories.

3. ''Non-comparative''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''non-comparative.'' The proposed rule provided examples of qualifications that would and would not qualify as ''non-comparative'': ''a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.'' OFCCP retained this provision in the final rule.

The Chamber argued that ''[e]stablished caselaw permits employers to set job qualifications 'as high as [they] like [],' based on current business needs, and permits employers to craft selection procedures that enable them to identify the best-qualified candidates for the job.'' Based on this argument, the Chamber asserted that the ''noncomparative'' component of the proposed rule should not be interpreted ''to imply that a candidate becomes an ''applicant'' simply because he or she possesses the 'basic' qualifications for the position.''

OFCCP disagrees with the Chamber's comments. OFCCP's proposed definition of Internet Applicant determines contractors' recordkeeping obligations, it does not impose substantive limits on the qualifications a contractor may use to select employees. Under the interpretation suggested by the Chamber, OFCCP would not have sufficient records or information to evaluate whether a contractor's hiring practices were discriminatory. In particular, OFCCP

would not be in a position to evaluate a contractor's comparative assessment of applicants' qualifications. Therefore, OFCCP retained in the final rule the requirement that ''basic qualifications'' must be noncomparative.

4. ''Objective''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''objective'' and not depend on the employer's subjective judgment. OFCCP used the term ''third party'' in the proposed rule to describe how to determine whether a qualification is objective: ''One way to tell an advertised, basic qualification is objective is that a third-party, unfamiliar with the employer's operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment.''

ORC expressed concern that the term ''third party'' is ambiguous and that OFCCP's proposed definition does not provide meaningful guidance about whether a qualification is ''objective.'' Similarly, Nancy J. Purvis argued that the reference to ''third parties'' would not work in ''situations where only someone with sufficient technical knowledge (of the company, of the industry, of the job, etc.) will be able to evaluate whether or not an applicant meets the basic requirements.''

OFCCP agrees with these commenters that, as described in the proposed rule, the term ''objective'' left unanswered whether the referenced ''third-party'' has the necessary technical expertise to understand whether a candidate possesses a technical qualification. It is not OFCCP's intent to preclude technical qualifications from being ''basic qualifications.'' Accordingly, OFCCP modified the second sentence of subsection (4)(b) to provide that a basic qualification is objective if a third party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

5. ''Job related''

In the proposed rule, OFCCP provided that ''basic qualifications'' must be ''job-related.'' The proposed rule defined ''job-related'' as ''relevant to performance of the job at hand and enabl[ing] the employer to accomplish business-related goals.'' In response to the comments, OFCCP eliminated the term ''job-related'' and replaced it with the phrase, ''relevant to the performance of the particular position and enabl[ing] the contractor to accomplish business-related goals'' at subsection (4)(c) of the definition of ''Internet Applicant''.

The Lawyers' Committee for Civil Rights Under Law and the Leadership Conference on Civil Rights (LCCR) criticized the requirement in the proposed rule that ''basic qualifications'' must be ''job related.'' They noted that the Civil Rights Act of 1991 provides a defense to disparate impact claims if the criteria having the disparate impact can be shown to be ''job related for the position in question'' and ''consistent with business necessity.'' [10] These commenters argued that OFCCP's proposed rule leaves out the requirement that the basic qualifications must be ''consistent with business necessity.'' LCCR further argued that ''the explanation of what is meant by 'job-related' seems to understate what the law requires by suggesting that any 'relevant' job criteria is sufficient to satisfy the legal standard.''

OFCCP agrees with these commenters that use of the term ''job-related'' in the proposed definition of ''Internet Applicant'' could cause confusion because the term is also used in the Civil Rights Act of 1991. Indeed, there is uncertainty as to the meaning of ''job related'' under the Civil Rights Act of 1991.[11] Therefore, OFCCP has eliminated the term in the final rule and replaced it with the phrase, ''relevant to performance of the particular position and enabl[ing] the contractor to accomplish business-related goals.''

OFCCP disagrees with the commenters' suggestion that the ''business necessity'' standard should be incorporated into the definition of ''basic qualifications.'' OFCCP does not intend to limit the qualifications that could be ''basic qualifications'' only to those which meet the ''business necessity'' standard. That standard is applicable as a *defense* where a disparate impact has already been proven. By including the ''relevant to performance of the particular position * * *'' standard in the final rule as a limitation on qualifications that could qualify as ''basic qualifications,'' OFCCP intends to provide a reasonable limit on the nature of the qualifications used only to define recordkeeping obligations. OFCCP does not intend to define recordkeeping obligations through a presumption that every putative ''basic qualification'' involves a disparate impact. Of course, once it is established that a criterion caused a disparate impact, the contractor has the burden of justifying that the criterion is job related and consistent with business necessity.

Part 4: ''The individual does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.''

In the proposed rule, the fourth part of the ''Internet Applicant'' definition provided that ''[t]he individual does not indicate that he or she is no longer interested in employment in the position for which the employer considered the individual.''

Several commenters, including EEAC, Morgan, Lewis & Bockius LLP, and the Chamber, argued against the negative phrasing of this part of the proposed definition of ''Internet Applicant'' because it implies that an individual is presumed to be interested in a particular position even before the employer contacts the individual. These commenters expressed concern that an individual who does not respond to an employer's inquiry would automatically qualify as an Internet Applicant because the individual has not indicated ''that he or she is no longer interested in the position.''

OFCCP does not believe that the negative phrasing of this part of the proposed rule implies—and OFCCP does not intend for the language to imply—a presumption that every individual who otherwise meets the

[10] The Lawyers' Committee for Civil Rights Under Law joined in LCCR's comments. However, the Lawyers' Committee did not expressly reference the Civil Rights Act of 1991 in its comments, but referred only to ''established legal precedent.'' We understand the Lawyers' Committee to be referencing the Civil Rights Act of 1991 with respect to the standard for defense of a disparate impact claim.

[11] The Civil Rights Act of 1991 does not define the terms ''job related'' or ''business necessity.'' Nor have the federal courts of appeals agreed upon any single explanation of these terms. *Compare Bew* v. *City of Chicago*, 252 F.3d 891, 894 (7th Cir. 2001) (finding that the Civil Rights Act of 1991 adopted the *Griggs* standard and noting that ''Griggs does not distinguish business necessity and job relatedness as two separate standards. It states that: 'The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.' To satisfy the standard, an employment test must 'bear a demonstrable relationship to successful performance of the jobs for which it was used.'" (citations omitted)), with *Ass'n of Mexican-American Educators* v. *State of California*, 231 F.3d 572, 585 (9th Cir. 2000) (en banc) (explaining that a 'job related' test measures ''skills, knowledge or ability required for successful performance of the job''), with *Lanning* v. *Southeastern Pa. Transp. Auth.*, 181 F.3d 478, 489 (3d Cir. 1999) (''Our conclusion that the Act incorporates this standard is further supported by the business necessity language adopted by the Act. Congress chose the terms 'job related for the position in question' and 'consistent with business necessity.' Judicial application of a standard focusing solely on whether the qualities measured by an entry level exam bear some relationship to the job in question would impermissibly write out the business necessity prong of the Act's chosen standard.'').

definition of Internet Applicant is deemed by OFCCP to be automatically interested in the particular position, even before the contractor contacts the individual. Subsection (5) explains that a contractor may conclude that an individual has removed himself or herself from the selection process or has otherwise indicated lack of interest in the position based on the individual's express statement or on the individual's passive demonstration of disinterest. For example, if an individual declines a contractor's invitation for a job interview, he or she has removed himself or herself from the selection process. If the individual declines a job offer he or she has expressly shown disinterest in the job. If an individual repeatedly fails to respond to a contractor's telephone inquiries or emails asking about his or her interest in a job, the individual has passively shown disinterest in the job. In addition to determining an individual's abandonment of interest through an express or passive negative response to the contractor's inquiry as to whether the individual is interested in the position, a contractor may also presume a lack of continuing interest based on a review of the expression of interest. Statements pertaining to the individual's interest in the specific position or type of position at issue, the location of work, and his or her salary requirements may provide the basis for determining the individual is no longer interested in the position, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If the potential applicant withdraws from further consideration after the point at which the individual already has qualified as an ''Internet Applicant'' under this final rule, the employer must retain any race, ethnicity, or gender information which the individual already provided, as well as the individual's expression of interest.

In response to the comments, which expressed concern with the clarity of the proposed rule, OFCCP has slightly modified this part (subsection (1)(iv)) in the final rule to read: ''(iv) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.'' OFCCP also explained in subsection (5) of the definition of ''Internet Applicant'' in the final rule that a contractor may determine whether an individual has removed himself or herself from consideration based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. Subsection (5) further explains that if a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

Comments on OFCCP's Proposed Revisions To Record Retention Requirements Section 60–1.12(a): Record Retention

In the proposed rule, OFCCP added to existing recordkeeping requirements a provision which would require contractors to maintain ''any and all employment submissions through the Internet or related electronic technologies, such as on-line resumes or resume databases (regardless of whether an individual qualifies as an Internet Applicant under 41 CFR 60–1.3).''

Many commenters expressed concern that the proposed record retention requirements would impose significant burdens on contractors, due to the massive volume of expressions of interest.[12] TOC Management Services (TOC) contended that the proposed rule would require employers to maintain all unsolicited expressions of interest, even those that were never considered by the employer. TOC asserted that this proposed requirement runs contrary to OFCCP's longstanding practice of allowing an employer to dispose of unsolicited expressions of interest if the employer adheres to a general policy of not considering them. The Chamber argued that the proposed recordkeeping provision ''would require employers to search all the computer and paper files of each of its employees to identify any expressions of interest that were sent to someone in the company but were never routed through the appropriate channels to those responsible for recruitment and hiring.'' Kairos Services, Inc. suggested that contractors should be required only to maintain records on individuals who qualify as ''Internet Applicants'' under the proposed rule.

In response to the comments, OFCCP modified section 60–1.12(a) of the final rule to require contractors to maintain any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases and records identifying job seekers contacted regarding their interest in a particular position. In addition, for internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. Also, for external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of any job seekers who met the basic qualifications for the particular position who are considered by the contractor. These records must be maintained regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3.

OFCCP agrees that the proposed rule could present unwarranted recordkeeping burdens if the contractor receives a large number of expressions of interest. Therefore, OFCCP modified this provision in the final rule to clarify that contractors must maintain ''expressions of interest through the Internet or related electronic data technologies *as to which the contractor considered the individual for a particular position* * * *'' [emphasis added]. ''Considers the individual for employment in a particular position'' (as defined in subsection 3 of the definition of ''Internet Applicant'') means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not

[12] *See, e.g.*, Chairman of the U.S. House of Representatives Committee on Education and the Workforce's Subcommittee on Employer-Employee Relations, Kairos Services, Inc., Louisiana Pacific Corp., ORC Worldwide, Morgan, Lewis & Bockius LLP, National Association of Manufacturers, and U.S. Chamber of Commerce.

submitted with respect to a particular position.

If there are a large number of expressions of interest to be considered, the contractor does not ''consider'' the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

Under section 60–1.12(a), contractors avoid significant burdens even if there are large numbers of expressions of interest, because contractors are not required to retain records regarding individuals who were never considered for a particular position. However, OFCCP disagrees with the suggestion that contractors be required to maintain only expressions of interest of individuals who qualify as ''Internet Applicants.'' Part of the reason that OFCCP requires contractors to maintain such records is to ensure that they are actually complying with the definition of ''Internet Applicant.'' OFCCP could not verify the contractor's compliance with the ''Internet Applicant'' definition if the agency did not have access to records of individuals whom the contractor contends did not meet that definition.

Several commenters, including NAM, Siemens, and TOC, were also concerned that the proposed rule would require contractors to maintain a ''snapshot'' of the resume database for each search. These commenters suggested that OFCCP require employers to retain any resume databases, specific search terms used in each search, and the date of each search.

OFCCP agrees with these commenters and believes that their recommended approach avoids recordkeeping burdens and affords OFCCP adequate records to ensure compliance. Therefore, OFCCP added a provision to section 60–1.12(a) of the final rule which requires contractors to maintain the following information from internal resume databases: ''A record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search * * *.''

Maly Consulting LLC was concerned that the proposed rule would require contractors to download and retain all resumes on a third-party resume database, whenever the contractor searched the database for potential applicants. OFCCP agrees that it would be unreasonable to require an employer to maintain a copy of every record on a third-party resume database. For example, Monster.com reported that as of January, 2005, it had over 41 million resumes in its resume database. Therefore, in the context of a third-party resume database, the final rule requires contractors to retain resumes only of job seekers who met the basic qualifications for the particular position who are considered by the contractor, and records identifying job seekers contacted regarding their interest in a particular position, along with a record of the position for which each search of the database was made, the substantive search criteria used, and the date of the search.

Section 60–1.12(c)(1)(ii): ''Where possible, the gender, race, and ethnicity of each applicant (i.e., submissions that are not through the Internet and related electronic technologies) and Internet Applicant as defined in 41 CFR 60–1.3.''

In the proposed rule, OFCCP added the term ''Internet Applicant'' into an existing provision of OFCCP regulations which requires contractors to identify ''where possible, the gender, race, and ethnicity of each applicant.'' As discussed under Part 1 of the definition of Internet Applicant above, OFCCP modified this provision in the final rule to eliminate dual standards when the contractor accepts or considers expressions of interest submitted through either the Internet or traditional means for a particular position. Thus, under the final rule, the contractor must identify, ''where possible, the gender, race, and ethnicity of each applicant or Internet Applicant as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.''

Obligation To Solicit Race, Ethnicity and Gender Data

Northern California and Silicon Valley Industry Liaison Group (NCILG) argued that neither UGESP nor existing OFCCP regulations required contractors to solicit or obtain race, ethnicity, and gender data and that OFCCP misinterpreted UGESP and existing OFCCP regulations by asserting such a requirement in the preamble of the proposed rule. NCILG further contended that UGESP and OFCCP's existing regulations required only that contractors ''maintain'' race, ethnicity, and gender data, but there was no affirmative obligation to obtain or solicit such data. NCILG and Affirmative Action Partners, Inc. objected to any requirement that contractors solicit race, ethnicity, or gender information from applicants.

OFCCP disagrees with these commenters. OFCCP historically has taken the position that contractors have some obligation to collect race, ethnicity, and gender information from applicants. OFCCP intends to make clear that, under the final rule, contractors are required to solicit race, ethnicity, and gender information from ''applicants'' or ''Internet Applicants,'' whichever is applicable to the particular position. OFCCP intends this to be a mandate, not an option, because OFCCP requires this information to enforce E.O. 11246, as discussed throughout this preamble.

SHRM argued that requiring employers to collect race, ethnicity, and gender data from all Internet Applicants would impose significant burdens on employers. OFCCP disagrees that the final rule imposes significant burdens on contractors compared with existing recordkeeping requirements. The final rule draws an appropriate balance between, on the one hand, the need of OFCCP and the contractor for certain information and records to enforce and comply with E.O. 11246, and, on the other hand, the practical realities of Internet recruiting.

Several commenters, including GBCS, NILG, and SIOP, expressed concern that the OFCCP proposal does not clearly identify the point in the employment process at which contractors are required to collect race, ethnicity and gender data. Under the final rule, contractors are required to solicit race, ethnicity, and gender data from all individuals who meet the definition of Internet Applicant. OFCCP does not mandate a specific time or point in the employment process that contractors must solicit this information, so long as the information is solicited from all Internet Applicants.

Methods for Complying With the Rule

Several commenters, including NILG, Thomas Houston Associates, Inc., and SHRM, expressed concern that the OFCCP proposal does not provide clear guidance on permissible methods for collecting race, ethnicity, and gender data. NCILG requested that OFCCP ''reaffirm'' that contractors have no obligation to somehow obtain race, ethnicity or gender data from individuals who refuse to voluntarily disclose such information in response to the contractor's solicitation. GBCS questioned whether contractors would be required to make a visual observation of individuals who refuse to voluntarily disclose race, ethnicity or gender information on a written solicitation

form. Nancy J. Purvis argued that contractors should be permitted to continue to use visual observation as a means of identifying the race, ethnicity and gender of applicants. SHRM recommended that employers be permitted to gather race, ethnicity, and gender data through either visual observation or self-identification. Affirmative Action Partners, Inc. (AAPI) offered several problems with collecting and maintaining race, ethnicity, and gender data on job applicants. In particular, AAPI noted that it does not promote EEO compliance to allow hiring managers to have access to candidates' race, ethnicity, or gender.

OFCCP agrees with these commenters that further clarification of these issues would promote compliance with applicant recordkeeping requirements. OFCCP recently issued a Policy Directive on this subject. *See* ADM 04–1, ''Contractor Data Tracking Responsibilities,'' which is available on OFCCP's Web site at *http://www.dol.gov/esa/regs/compliance/ofccp/directives/dir265.htm*. The Directive was prompted by the Office of Management and Budget's (OMB) 1997 Revision to the Standards for the Classification of Federal Data on Race and Ethnicity (62 FR 58782) and its Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity (2000). The OMB Standards and Provisional Guidance emphasize self-reporting or self-identification as the preferred method for collecting data on race and ethnicity. In situations where self-reporting is not practicable or feasible, observer information may be used to identify race and ethnicity. Prior to the 1997 Standards, the position of the Federal Government was that the preferred method of collecting race and ethnic data was visual observation and that self-reporting was not encouraged.

OFCCP issued the Directive on Contractor Data Tracking Responsibilities to make OFCCP's policy on collection of demographic information on applicants consistent with OMB's 1997 Standards. The Directive is applicable to collection of race, ethnic and gender information about applicants under all of OFCCP's regulations, including 41 CFR 60–1.12(c) and 41 CFR Part 60–3. The Directive encourages contractors to use tear off sheets, post cards, or short forms to request demographic information from applicants. These methods can be adapted to electronic formats for recordkeeping regarding Internet Applicants. For example, some contractors have developed ''electronic tear off sheets'' for use with electronic applications that separate reported demographic information to be maintained for record keeping from electronic applications reviewed by employers. Other contractors have sent e-mails to individuals submitting electronic applications, requesting additional information necessary to process the application, including demographic information. The contractor's invitation to an applicant to self-identify his or her race, ethnicity or gender is always to state that the provision of such information is voluntary. Visual observation may be used when the applicant appears in person and declines to self-identify his or her race, ethnicity or gender.

Use of Labor Force Statistics and Census Data

In the NPRM, OFCCP noted that it will ''compare the proportion of women and minorities in the contractor's relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. If there is a significant difference between these figures, OFCCP will investigate further as to whether the contractor's recruitment and hiring practices conform with E.O. 11246 standards.''

Several commenters, including EEAC, ORC, and the Chamber, expressed concern about OFCCP's proposed use of labor force statistics and Census data under the proposed rule. ORC, Gaucher Associates, and the Chamber argued that Census and workforce data may not provide a valid basis for assessing contractors' recruitment or hiring practices because these data do not reflect current labor market conditions or because the Census occupational categories are too general to provide accurate workforce data for specific jobs. ORC recommended that OFCCP should rely on each contractor's own availability statistics as a basis for assessing the contractor's recruitment and hiring practices.

OFCCP disagrees with these commenters that appropriate Census and other labor market data are not reliable benchmarks for assessing contractors' recruitment and hiring practices. As noted above, courts frequently approve of this type of data in recruitment and hiring discrimination cases under Title VII. OFCCP intends to use such data during compliance reviews to determine whether basic qualifications have an adverse impact on the basis of race, ethnicity, or gender. OFCCP does not agree that it should rely exclusively on availability data compiled by contractors, although OFCCP will generally consider such data. OFCCP must ensure that such data is accurate for compliance monitoring and enforcement purposes.

The NCILG urged OFCCP to rescind the requirement that contractors conduct adverse impact analyses of their hiring practices. OFCCP believes such self-analyses are important steps for achieving and maintaining an equal opportunity workplace. Furthermore, the final rule relates to recordkeeping and solicitation of demographic information under section 60–1.12. Accordingly, this final rule would not be the appropriate vehicle for amending UGESP, even if the agency were inclined to do so. A commenter raised concerns about how OFCCP will interpret procedures regarding Internet Applicant recordkeeping under both section 1.12 and UGESP. OFCCP has addressed these concerns by adding a new regulatory provision, section 60–1.12(d), to the final rule, as discussed above.

ORC requested that OFCCP clarify what ''significant difference'' means and recommended that it be defined as two standard deviations or more. OFCCP agrees that the minimum standard for what is statistically significant is generally accepted to be two standard deviations, although the agency may allocate its investigative resources by focusing on larger statistical disparities or other factors, such as the size of the potential affected class.

Effective Date

Several commenters, such as EEAC and NILG, requested that contractors be afforded sufficient time to implement the new applicant recordkeeping standards to be promulgated in the final rule. These commenters noted that contractors will have to make significant changes in technology and personnel practices in order to implement the new requirements. For example, NILG asserted that ''[f]or some companies, this will involve an extensive process of clarifying need, requesting information from possible vendors, seeking proposals from vendors, allowing a period for vendor evaluation, selection and subsequent company customization, implementation and system testing.''

OFCCP agrees with these commenters that contractors should be afforded sufficient time to implement the recordkeeping requirements of the final rule. Therefore, OFCCP has established an effective date of one-hundred twenty days after the date of the publication of the final rule in the **Federal Register**.

Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. As noted in the preamble to the NPRM, this rule constitutes a ''significant regulatory action'' within the meaning of Executive Order 12866 (although not an economically significant regulatory action under the Order). As such, this rule is subject to review by the Office of Management and Budget (''OMB''). However, the Department has determined that this rule will not have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department has concluded that this final rule is not ''economically significant'' as defined in section 3(f)(1) of EO 12866. As a result, the cost-benefit analysis called for under section 6(a)(3)(C) of the Executive Order is not required.

Congressional Review Act

This regulation is not a major rule for purposes of the Congressional Review Act.

Executive Order 13132 (Federalism)

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

Regulatory Flexibility Act

As explained in the Proposed Rule, this final rule will not change, but instead will help to clarify, existing obligations for Federal contractors. Consequently, under the RFA, as amended, 5 U.S.C. 605(b), it is certified that this rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act

This final rule does not include any Federal mandate that may result in increased expenditures by state, local and tribal governments, or by the private sector, of $100,000,000 or more in any one year.

Paperwork Reduction Act

This final rule does not introduce any new information collection requirements. It simply clarifies existing requirements already approved by the Office of Management and Budget under the Paperwork Reduction Act of 1995. The information collection requirements for 41 CFR Part 60–1 are approved under OMB control numbers 1215–0072 (Supply and Service) and 1215–0163 (Construction).

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this final rule does not impose substantial direct compliance costs on Indian tribal governments.

Executive Order 12988 (Civil Justice Reform)

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The final rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

List of Subjects in 41 CFR Part 60–1

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

Signed at Washington, DC, this 3rd day of October, 2005.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

■ Accordingly, part 60–1 of Title 41 of the Code of Federal Regulations is amended as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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

Authority: Section 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 399, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258.

■ 2. In § 60–1.3, a new definition is added below ''government contract'' and above ''minority group'' to read as follows:

§ 60–1.3 Definitions.

* * * * *

Internet Applicant. (1) Internet Applicant means any individual as to whom the following four criteria are satisfied:

(i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

(ii) The contractor considers the individual for employment in a particular position;

(iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and,

(iv) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

(2) For purposes of paragraph (1)(i) of this definition, ''submits an expression of interest in employment through the Internet or related electronic data technologies,'' includes all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection processes for that particular position.

(i) Example A: Contractor A posts on its web site an opening for a Mechanical Engineer position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. The web site also advises potential applicants that they can send a hard copy resume to the HR Manager with a cover letter identifying the position for which they would like to be considered. Because Contractor A considers both Internet and traditional expressions of interest for the Mechanical Engineer position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to Contractor A meet this part of the definition of Internet Applicant for this position.

(ii) Example B: Contractor B posts on its web site an opening for the Accountant II position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. Contractor B also receives a large number of unsolicited paper resumes in the mail each year. Contractor B scans these paper resumes into an internal resume database that also includes all the on-line profiles that individuals completed for various jobs (including possibly for the Accountant II position) throughout the year. To find potential applicants for the

Accountant II position, Contractor B searches the internal resume database for individuals who have the basic qualifications for the Accountant II position. Because Contractor B considers both Internet and traditional expressions of interest for the Accountant II position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to the employer meet this part of the definition of Internet Applicant for this position.

(iii) Example C: Contractor C advertises for Mechanics in a local newspaper and instructs interested candidates to mail their resumes to the employer's address. Walk-in applications also are permitted. Contractor C considers only paper resumes and application forms for the Mechanic position, therefore no individual meets this part of the definition of an Internet Applicant for this position.

(3) For purposes of paragraph (1)(ii) of this definition, ''considers the individual for employment in a particular position,'' means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not ''consider the individual for employment in a particular position'' by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

(4) For purposes of paragraph (1)(iii) of this definition, ''basic qualifications'' means qualifications—

(i)(A) That the contractor advertises (e.g., posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or

(B) For which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., through an external resume database), and

(ii) That meet all of the following three conditions:

(A) The qualifications must be noncomparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, ''a Bachelor's degree in Accounting'' is objective, while ''a technical degree from a good school'' is not. A basic qualification is objective if a third-party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

(5) For purposes of paragraph (1)(iv) of this definition, a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

* * * * *

■ 3. In § 60–1.12:
■ A. The third sentence in paragraph (a) is revised;
■ B. Paragraph (c)(1)(ii) is revised;
■ C. Paragraph (e) is removed;
■ D. Paragraph (d) is redesignated as paragraph (e); and
■ E. A new paragraph (d) is added.

The revisions and addition read as follows:

§ 60–1.12 Record retention.

(a) *General requirements.* * * * Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted regarding their interest in a particular position (for purposes of recordkeeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; for purposes of recordkeeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor), regardless of whether the individual qualifies as an Internet Applicant under 41 CFR 60–1.3, tests and test results, and interview notes. * * *

* * * * *

(c) * * *

(1) * * *

(ii) Where possible, the gender, race, and ethnicity of each applicant or Internet Applicant as defined in 41 CFR 60–1.3, whichever is applicable to the particular position.

* * * * *

(d) *Adverse impact evaluations.* When evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under part 60–3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants, as defined in 41 CFR 60–1.3, and those records relating to the analyses of the impact of employment tests that are used as employee selection procedures, without regard to whether the tests were administered to Internet Applicants, as defined in 41 CFR 60–1.3.

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