Order. Accordingly, no preliminary or final Regulatory Impact Analysis has to be or will be prepared.

2. This rule does not contain a collection of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

3. Section 13(a) of the Export Administration Act of 1979, as amended (50 U.S.C. app. 2412(a)), exempts this rule from all requirements of section 553 of the Administrative Procedure Act (APA) (5 U.S.C. 553), including those requiring publication of a notice of proposed rulemaking, an opportunity for public comment, and a delay in effective date. This rule is also exempt from these APA requirements because it involves a foreign and military affairs function of the United States. Further, no other law requires that a notice of proposed rulemaking and an opportunity for public comment be given for this rule.

4. Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553) or by any other law, under sections 603(a) and 604(a) of the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)) no initial or final Regulatory Flexibility Analysis has to be or will be prepared.

Therefore, this regulation is issued in final form. Although there is no formal comment period, public comments on this regulation are welcome on a continuing basis. Comments should be submitted to John Black, Office of Technology and Policy Analysis, Export Administration, Department of Commerce, P.O. Box 273, Washington, DC 20044.

List of Subjects in 15 CFR Parts 371 and 374

Exports, Reporting and recordkeeping requirements.

Accordingly, Parts 371 and 374 of the Export Administration Regulations are amended as follows:

1. The authority citation for 15 CFR Part 371 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981 and by Pub. L. 99–64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985); Pub. L. 95–223 of December 28, 1977 (50 U.S.C. 1701 *et seq.*); E.O. 12532 of September 9, 1985 (50 FR 36861, September 10, 1985) as affected by notice of September 4, 1986 (51 FR 31925, September 8, 1986); Pub. L. 99–440 of October 2, 1986 (22 U.S.C. 5001 *et seq.*); and E.O. 12571 of October 27, 1986 (51 FR 39505, October 29, 1986).

2. The authority citation for 15 CFR Part 374 continues to read as follows:

Authority: Pub. L. 96–72, 93 Stat. 503 (50 U.S.C. app. 2401 *et seq.*), as amended by Pub. L. 97–145 of December 29, 1981 and by Pub. L. 99–64 of July 12, 1985; E.O. 12525 of July 12, 1985 (50 FR 28757, July 16, 1985).

PART 371—[AMENDED]

3. Section 371.8 is amended by adding "Austria," immediately before the word "Belgium," in paragraph (b) and revising paragraph (a) to read as follows:

§ 371.8 General License G–COM; certain shipments to cooperating countries.

(a) *Scope.* A general license designated G–COM is established, authorizing exports to the COCOM participating countries and Austria, Finland, Singapore, Sweden, and Switzerland, for use or consumption therein, of commodities that the United States may approve for export to controlled countries with only notification to the COCOM governments.

* * * * *

4. Section 371.14 is amended by revising the second sentence in paragraph (b) to read as follows:

§ 371.14 General License GCG; shipments to agencies of cooperating governments.

* * * * *

(b) *Definition of a Cooperating Government Agency.* * * * Cooperating governments are the national governments of the COCOM participating countries and the national governments of Austria, Singapore, Sweden, and Switzerland.

* * * * *

PART 374—[AMENDED]

§ 374.2 [Amended]

5. In § 374.2, paragraph (j) is amended by revising the words "Switzerland or a COCOM country" to read "a COCOM participating country, Austria, or Switzerland,".

Dated: November 25, 1987.

Vincent F. DeCain,

Deputy Assistant Secretary for Export Administration.

[FR Doc. 87–27556 Filed 11–30–87; 8:45 am]

BILLING CODE 3510–DT–M

FEDERAL TRADE COMMISSION

16 CFR Part 6

Enforcement of Nondiscrimination on Basis of Handicap in Federal Trade Commission Programs

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: This regulation requires that the Federal Trade Commission ("the Commission") operate all of its programs and activities to ensure nondiscrimination against qualified individuals with handicaps. It sets forth standards for what constitutes discrimination on the basis of mental or physical handicap, provides a definition for individual with handicaps and qualified individual with handicaps and establishes a complaint mechanism for resolving allegations of discrimination. It is issued under the authority of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in programs or activities conducted by Federal Executive agencies.

EFFECTIVE DATE: February 1, 1988.

FOR FURTHER INFORMATION CONTACT: Jerome A. Tintle, Office of General Counsel, Federal Trade Commission, Washington, DC 20580, [202–326–2463]; TDD (202) 326–2502.

An audio tape of this regulation will be made available to any person with visual impairment upon request. He or she may contact the Office of the Secretary, Federal Trade Commission, Washington, DC 20580 ((202) 326–2515; TDD (202) 326–2502).

SUPPLEMENT INFORMATION:

Background

The purpose of this rule is to provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794), as it applies to programs and activities conducted by the Commission. As amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Section 119, Pub. L. 95–602, 92 Stat. 2982), and the Rehabilitation Act Amendments of 1966 (Pub. L. 99–506, 100 Stat. 1810), section 504 of the Rehabilitation Act of 1973 states that:

> No otherwise qualified individual with handicaps in the United States, . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after*

the date on which such regulation is so submitted to such committees.

(29 U.S.C. 794 (1978 amendment italicized).)

On August 12, 1985, the Commission published for comment a notice of proposed rulemaking (NPRM) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, as it applies to programs and activities conducted by the Commission. 50 FR 32443. The NPRM was modeled after a prototype regulation developed by the Department of Justice (the Department) for the guidance of all Executive agencies. It was also based upon the Department's own proposed regulation (48 FR 55996) and final regulation (28 CFR Part 39). The period for commenting on the NPRM expired on December 10, 1985, with three comments having been filed.

Section 504 requires that regulations that apply to the programs and activities of Federal Executive agencies shall be submitted to the appropriate authorizing committees of Congress and that such regulations may take effect no earlier than the thirtieth day after they have been submitted. The Commission is submitting this regulation to the appropriate committees of Congress pursuant to this requirement. The regulation will become effective on February 1, 1988.

The substantive nondiscrimination obligations of the Commission, as set forth in this rule, are identical, for the most part, to those established by Federal regulations for programs or activities receiving Federal financial assistance. *See* 28 CFR Part 41 (section 504 coordination regulation for federally assisted programs). This general parallelism is in accord with the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, that the Federal Government should have the same section 504 obligations as recipients of Federal financial assistance. 124 Cong. Rec. 13,901 (1978) (remarks of Rep. Jeffords); 124 Cong. Rec. E2668, E2670 (daily ed. May 17, 1978) *id.*; 124 Cong. Rec. 13,897 (remarks of Rep. Brademas); *id.* at 38,552 (remarks of Rep. Sarasin).

There are, however some language differences between this final rule and the Federal government's section 504 regulations for federally assisted programs. These changes are based on the Supreme Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), and the subsequent circuit court decisions interpreting *Davis* and section 504. *See Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis*, 655 F.2d 1272 (D.C. Cir. 1981) (*APTA*); *see also Rhode Island Handicapped Action Committee* v. *Rhode Island Public Transit Authority*, 718 F. 2d 490 (1st Cir. 1983).

Some commenters questioned the use of *Davis* as justification for the inclusion of the new provisions in the federally conducted regulation. They noted that these changes had not been included in the Department of Justice regulation, issued subsequent to the *Davis* decision, implementing section 504 in programs receiving Federal financial assistance. This regulation, however, was issued prior to the D.C. Circuit's decision in *APTA*. In *APTA*, the Department had argued a position similar to that advocated by the commenters. Judge Abner Mikva's decision in *APTA* clearly rejected the Department's position in that case. Other circuit court decisions followed the *APTA* interpretation of *Davis*. Since these decisions, the Department has interpreted its section 504 regulation for federally assisted programs in a manner consistent with the language of this final rule. The Commission believes that judicial interpretation of section 504 compels it to incorporate the new language in its federally conducted regulation.

This interpretation is supported by the decision of the Supreme Court in *Alexander* v. *Choate*, 469 U.S. 287 (1985), where the Court held that the regulations for federally assisted programs did not require a recipient to modify its durational limitation on Medicaid coverage of inpatient hospital care for handicapped persons. Clarifying its *Davis* decision, the Court explained that section 504 requires only "reasonable" modifications, *id.* at 300, and explicitly noted that "[t]he regulations implementing section 504 [for federally assisted programs] are consistent with the view that *reasonable* adjustments in the nature of the benefit offered must at times be made to assure meaningful access." *Id.* at n.21 (emphasis added).

Incorporation of these changes, therefore, makes this regulation implementing section 504 for federally conducted programs consistent with the Federal Government's regulation implementing section 504 for federally assisted programs, as interpreted by the Supreme Court. Many of these federally assisted regulations were issued prior to the interpretations of section 504 in *Davis*, by lower court cases interpreting *Davis*, and by the Supreme Court in *Alexander*; therefore their language does not reflect the interpretation of section 504 provided by the Supreme Court and by the various circuit courts. Of course, these federally assisted regulations must be interpreted to reflect the holdings of the Federal judiciary. Hence the Commission believes that there are no significant differences between this final rule for federally conducted programs and the Federal Government's interpretation of section 504 regulations for federally assisted programs.

This regulation has been reviewed by the Department of Justice under Executive Order 12250 (45 FR 72995), 3 CFR, 1980 Comp., p. 298) and by the Equal Employment Opportunity Commission under Executive Order 12067 (43 FR 28967, 3 CFR, 1978 Comp., p. 206).

Because the Commission is expressly excluded from the coverage of Executive Order 12291 (46 FR 13193, 3 CFR, 1981 Comp., p. 127) and because this regulation is not a major rule within the meaning of the Executive Order, a regulatory impact analysis has not been prepared. The regulation does not have an impact on small entities. It is not, therefore, subject to the Regulatory Flexibility Act (5 U.S.C. 601–612).

Section-by-Section Analysis and Response to Comments

Section 6.101 Purpose

Section 6.101 states the purpose of the rule, which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. The section, as initially published in the **Federal Register**, included an additional sentence stating:

> The Commission intends to comply fully with section 504 insofar as compliance is within the Commission's authority and does not interfere with the Commission's law enforcement responsibilities in a manner not intended by section 504.

One comment questions the Commission's inclusion of this sentence. The comment contends that the Commission has the authority to make alterations or additions to the buildings it occupies and that the sentence fails to provide adequate notice as to how the Commission intends to apply section 504 consistently with its law enforcement obligations. As the Commission explained in the NPRM, the Commission's compliance with section 504 is necessarily limited to such actions as are within its authority, citing as an example the fact that the General Services Administration (GSA) has exclusive authority to make alterations

or additions to the buildings and facilities occupied by the Commission. The Commission disagrees with the view expressed in the comment that the Commission has the authority to make structural changes to the buildings that it occupies. The Commission recognizes its responsibility to identify any structural modifications that are necessary to comply with section 504 and to work closely with GSA to ensure that such changes are made; however, it cannot commit itself by regulation to make such changes on its own. Nevertheless, since the language of the regulation is not necessary to establish this point, the sentence has been deleted as surplusage. Likewise, it is self-evident that the regulation is to be enforced in a manner consistent with the enabling legislation, and there is thus no need for the regulation to state so specifically.

Section 6.102 Application

The regulation applies to all programs or activities conducted by the Commission except those that are conducted outside the United States that do not involve handicapped persons in the United States. Under this section, a federally conducted program or activity is, in simple terms, anything a Federal agency does. Aside from employment, there are two major categories of federally conducted programs or activities covered by this regulation: Those involving general public contact as part of ongoing Commission operations and those directly administered by the Commission for program beneficiaries and participants. Activities in the first category include communication with the public (telephone contacts, office walkins, or interviews) and the public's use of the Commission's facilities. Activities in the second category include programs that provide Federal services or benefits. No comments were received on this section.

Section 6.103 Definitions

"Auxiliary aids." "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and enjoy the benefits of the Commission's programs or activities. The definition provides examples of commonly used auxiliary aids. Although auxiliary aids are required explicitly only by § 6.160(a)(1), they may also be necessary to meet other requirements of the regulation. Comments on the definition of "auxiliary aids" are discussed in connection with § 6.160(a)(1).

"Commission." In order to conform this regulation with other Commission rules and regulations, the Commission has determined to change the word "agency" wherever it appeared in the proposed regulations to the word "Commission." Accordingly, the word "Commission" as used in this regulation means the "Federal Trade Commission."

"Complete complaint." "Complete complaint" is defined to include all the information necessary to enable the Commission to investigate the complaint. The definition is necessary because the 180 day period for the Commission's investigation (*see* § 6.170(g)) begins when the Commission receives a complete complaint.

"Facility." The definition of "facility" is similar to that in the section 504 coordination regulation for federally assisted programs, 28 CFR 41.3(f), except that the term "rolling stock or other conveyances" has been added and the phrase "or interest in such property" has been deleted.

The comments objected to the omission of the phrase "or interest in such property" from the definition of "facility." As explained in the NPRM, the term "facility," as used in this regulation, refers to structures, and does not include intangible property rights. The definition, therefore, has no effect on the scope of coverage of programs, including those conducted in facilities not included in the definition. The phrase has been omitted because the requirement that facilities be accessible would be a logical absurdity if applied to a lease, life estate, mortgage, or other intangible property interest. The regulation applies to all programs and activities conducted by the Commission regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the Commission. The term "facility" is used in §§ 6.149, 6.150, and 6.170(f).

"Individual with handicaps." The definition of "individual with handicaps" is identical to the definition of "handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statute as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

"Qualified individual with handicaps." The definition of "qualified individual with handicaps" is a revised version of the definition of "qualified handicapped person" appearing in the section 504 coordination regulation for federally assisted programs (28 CFR 41.32).

Paragraph (1) of the definition deviates from existing regulations for federally assisted programs because of intervening court decisions. It defines "qualified individual with handicaps" with regard to any program under which a person is required to perform services or to achieve a level of accomplishment. In such programs a qualified individual with handicaps is one who can achieve the purpose of the program without modifications in the program that the agency can demonstrate would result in a fundamental alteration in its nature. This definition is based on the Supreme Court's *Davis* decision.

In *Davis*, the Court ruled that a hearing-impaired applicant to a nursing school was not a "qualified handicapped person" because her hearing impairment would prevent her from participating in the clinical training portion of the program. The Court found that, if the program were modified so as to enable the respondent to participate (by exempting her from the clinical training requirements), "she would not receive even a rough equivalent of the training a nursing program normally gives." *Id.* at 410. It also found that "the purpose of [the] program was to train persons who could serve the nursing profession in all customary ways," *id.* at 413, and that the respondent would be unable, because of her hearing impairment, to perform some functions expected of a registered nurse. It therefore concluded that the school was not required by section 504 to make such modifications that would result in "a fundamental alteration in the nature of the program." *Id.* at 410.

The Commission has incorporated the Court's language in the definition of "qualified individual with handicaps" in order to make clear that such a person must be able to participate in the program offered by the Commission. The Commission is required to make modifications in order to enable an applicant with handicaps to participate, but is not required to offer a program of a fundamentally different nature. The test is whether, with appropriate modifications, the applicant can achieve the purpose of the program offered; not whether the applicant could benefit or obtain results from some other program that the Commission does not offer. Although the revised definition allows exclusion of some individuals with handicaps from some programs, it

requires that an individual with handicaps who is capable of achieving the purpose of the program must be accommodated, provided that the modifications do not fundamentally alter the nature of the program.

The commenters objected to this revised definition for a variety of reasons. They asserted that the Commission incorrectly used *Davis* as the justification for explaining the differences between the federally assisted and the federally conducted regulations even though the Supreme Court expressly upheld the validity of the federally assisted regulations in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984) (*Conrail*). This argument misunderstands the Court's actions in *Conrail*. In that case the Court ruled on a series of issues, the most important of which was under what circumstances section 504 applied to employment discrimination by recipients. The Court did not concern itself either directly or indirectly with the definition of "qualified handicapped person" or whether section 504 included limitations based on "undue financial and administrative burdens."

One comment argued that provision of a sign language interpreter or relocation of a service could be considered a "fundamental alteration" in the nature of a program or activity. The Commission believes that the specific provisions of the regulation on program accessibility and communications clearly establish that, absent some unusual circumstances, such an interpretation would be incorrect.

The commenters asserted that the definition would have the effect of placing on the individual with handicaps the burden of proving that he or she is qualified. The definition, however, makes clear that the Commission has the burden of demonstrating that a proposed modification would constitute a fundamental alteration in the nature of its program or activity. Furthermore, in demonstrating that a modification would result in such an alteration, the Commission must follow the procedures established in §§ 6.150(a)(2) and 6.160(d), which are discussed below, for demonstrating that an action would result in undue financial and administrative burdens. That is, the decision must be made by the Chairman or his or her designee in writing after consideration of all resources available for the program or activity and must be accompanied by an explanation of the reasons for the decision. If the Chairman or his or her designee determines that an action would result in a fundamental alteration, options must be considered that would enable the individual with handicaps to achieve the purpose of the program but would not result in such an alteration.

The commenters argued that the definition of "qualified handicapped person" places individuals with handicaps in a "Catch-22" situation: because only qualified individuals with handicaps are protected by the statute, a determination that a person is not qualified would make enforcement remedies unavailable to that person. This concern is misplaced. If the Commission determined that an individual with handicaps was not "qualified," the person could use the procedures established by § 6.170 to challenge that determination, just as he or she could challenge any other decision by the Commission that he or she believed to be discriminatory.

The commenters asserted that the definition of "qualified handicapped person" confused what should be two separate inquiries: whether a person meets essential eligibility requirements and, if so, whether accommodation is required. They argued that the reference to "fundamental alteration" in the definition focuses attention on accommodations rather than on abilities of an individual with handicaps. The Supreme Court in *Davis*, however, developed its "fundamental alteration" language in a decision that was determining the nature and scope of what constitutes a qualified handicapped person. The Commission continues to believe that the concept of "qualified individual with handicaps" properly encompasses both the notion of "essential eligibility requirements" and the notion of program modifications that might fundamentally alter a program.

The commenters argued that our analysis of *Davis* was inappropriate because *Davis* was decided on the basis of individual facts unique to that case or because *Davis* involved federally assisted and not federally conducted programs. While cases are decided on the basis of specific factual situations, courts, especially the Supreme Court, develop general principles of law for use in analyzing facts. The *Davis* decision was the Supreme Court's first comprehensive view of section 504, a major new civil rights statute. The *Davis* holding, that a person who cannot achieve the purpose of a program without fundamental changes in its nature is not a "qualified handicapped person," is a general principle, a statement by the Court on how it views section 504. It is therefore necessary to reflect it in the Commission's regulation.

For programs or activities that do not fall under the first paragraph, paragraph (2) of the definition adopts the existing definition in the coordination regulation of "qualified handicapped person" with respect to services for programs receiving Federal financial assistance (28 CFR 41.32(b)). Under this part of the definition, a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity.

Paragraph (3) explains that "qualified individual with handicaps" means "qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 6.140. Nothing in this part changes existing regulations applicable to employment.

"Section 504." This definition makes clear that, as used in this regulation, "section 504" applies only to programs or activities conducted by the Commission and not to programs or activities to which it provides Federal financial assistance.

Section 6.110 Self-evaluation

This section requires that the Commission conduct a self-evaluation of its compliance with section 504 within one year of the effective date of this regulation. The self-evaluation requirement is present in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.5(b)(2)). Experience has deomonstrated the self-evaluation process to be a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504.

The final rule uses the same provision adopted by the Department of Justice in its final rule implementing section 504 for its federally conducted programs. 28 CFR 39.110. The Department determined that this regulatory language was appropriate after it had analyzed the Federal Advisory Committee Act (5 U.S.C. app.), Executive Order 12024, and 41 CFR Part 101–6, the regulation of the General Services Administration implementing the Act.

This final rule provides that the Commission shall provide an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and development of transition plans by

submitting comments (both oral and written).

One comment suggested that the Commission's procedures for self-evaluation include (1) an assurance that the effects of a discriminatory policy will be eliminated, (2) a transition plan for compliance, and (3) specific modification requirements including those for persons with impaired vision or hearing. The Commission rejects these suggested additions to the regulations as unnecessary.

Section 6.111 Notice

Section 6.111 requires the Commission to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504 and this regulation. Methods of providing this information include, for example, the publication of information in handbooks, manuals, and pamphlets that are distributed to the public to describe the Commission's programs and activities; the display of informative posters in service centers and other public places; or the broadcast of information by television or radio.

The comments suggested that the regulation specifically require that notice information "effectively" apprise persons of their rights and protection against discrimination and that notification of Commission policy regarding nondiscrimination also be distributed in recruitment materials as well as general information. The Commission has determined that the regulation as proposed amply satisfies the Commission's notice obligations and has determined not to adopt the suggestions.

Section 6.130 General prohibitions against discrimination

Section 6.130 is an adaptation of the corresponding section of the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.51).

Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in § 6.130 establish the general principles for analyzing whether any particular action of the Commission violates this mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the Commission violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found in § 6.130. When there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The Commission may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from its program simply because the person is handicapped. Such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons (*e.g.*, epileptics, hearing-impaired persons, persons with heart ailments) from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for a license to operate a commercial vehicle in interstate commerce; but it may not be permissible to automatically disqualify all those who are blind in just one eye.

In addition, section 504 prohibits more than just the most obvious denials of equal treatment. It is not enough to admit persons in wheelchairs to a program if the facilities in which the program is conducted are inaccessible. Paragraph (b)(1)(iii), therefore, requires that the opportunity to participate or benefit afforded to an individual with handicaps be as effective as that afforded to others. The later sections on program accessibility (§§ 6.149–6.151) and communications (§ 6.160) are specific applications of this principle.

Despite the mandate of paragraph (d) that the Commission administer its programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps, paragraph (b)(1)(iv), in conjunction with paragraph (d), permits the Commission to develop separate or different aids, benefits, or services when necessary to provide individuals with handicaps with an equal opportunity to participate in or benefit from the Commission's programs or activities. Paragraph (b)(1)(iv) requires that different or separate aids, benefits, or services be provided only when necessary to ensure that the aids, benefits, or services are as effective as those provided to others. Even when separate or different aids, benefits, or services would be more effective, paragraph (b)(2) provides that a qualified individual with handicaps still has the right to choose to participate in the program that is not designed to accommodate individuals with handicaps.

Paragraph (b)(1)(v) prohibits the Commission from denying a qualified individual with handicaps the opportunity to participate as a member of a planning or advisory board.

Paragraph (b)(1)(vi) prohibits the Commission from limiting a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving any aid, benefit, or service.

Paragraph (b)(3) prohibits the Commission from utilizing criteria or methods of administration that deny individuals with handicaps access to the Commission's programs or activities. The phrase "criteria or methods of administration" refers to official written Commission policies and to the actual practices of the Commission. This paragraph prohibits both blatantly exclusionary policies or practices and nonessential policies and practices that are neutral on their face, but deny individuals with handicaps an effective opportunity to participate.

Paragraph (b)(4) specifically applies the prohibition enunciated in § 6.130(b)(3) to the process of selecting sites for construction of new facilities or existing facilities to be used by the Commission. Paragraph (b)(4) does not apply to construction of additional buildings at an existing site.

Paragraph (b)(5) prohibits the Commission, in the selection of procurement contractors, from using criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

One comment objected to the proposed regulation's failure to include a paragraph corresponding to one that appears in the regulations for federally assisted programs prohibiting a recipient from providing significant assistance to an agency, organization, or person that discriminates. The inclusion of such a provision in a regulation applying only to federally conducted programs or activities, as opposed to federally assisted programs, clearly seems inappropriate.

Paragraph (c) provides that programs conducted pursuant to Federal statute or Executive order that are designed to benefit only individuals with handicaps or a given class of individuals with handicaps may be limited to those individuals with handicaps.

Paragraph (d), discussed above, provides that the Commission must administer programs and activities in the most integrated setting appropriate

to the needs of qualified individuals with handicaps, *i.e.*, in a setting that enables individuals with handicaps to interact with nonhandicapped persons to the fullest extent possible.

Section 6.140 Employment

Section 6.140 prohibits discrimination on the basis of handicap in employment by the Commission. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner* v. *Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith* v. *United States Postal Service*, 742 F.2d 257, 259–260 (6th Cir. 1984); *Prewitt* v. *United States Postal Service*, 662 F.2d 292, 302–04 (5th Cir. 1981). *Contra McGuiness* v. *United States Postal Service*, 744 F.2d 1318, 1320–21 (7th Cir. 1984); *Boyd* v. *United States Postal Service*, 752 F.2d 410, 413–14 (9th Cir. 1985).

Courts uniformly have held that, in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith*, 742 F.2d at 262; *Prewitt*, 622 F.2d at 304. Accordingly, § 6.140 (Employment) of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the Equal Employment Opportunity Commission (EEOC) at 29 CFR Part 1613. In addition to this section, § 6.170(b) specifies that the Commission will use the existing EEOC procedures to resolve allegations of employment discrimination. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067 (3 CFR, 1978 Comp., p. 206). Under this authority, the EEOC establishes government-wide standards on nondiscrimination in employment on the basis of handicap. While the Commission's regulation could define terms with respect to employment and enumerate what practices are covered and what requirements apply, the Commission has adopted EEOC's recommendation that to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference in these regulations to the government-wide EEOC rules is sufficient. The class of Federal employees and applicants for employment covered by section 504 is identical to or subsumed within that covered by section 501. To apply different or lesser standards to persons alleging violations of section 504 could lead unnecessarily to confusion in the enforcement of the Rehabilitation Act with respect to Federal employment.

Except for editorial changes, the section remains unchanged from the version published in the NPRM.

Section 6.149 Program accessibility: Discrimination prohibited

Section 6.149 states the general nondiscrimination principle underlying the program accessibility requirements of §§ 6.150 and 6.151. No comments were received on this section. Except for editorial changes, it remains unchanged from the version published in the NPRM.

Section 6.150 Program accessibility: Existing facilities

This regulation adopts the program accessibility concept found in the existing section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 6.150 requires that each Commission program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the Commission is not required to make each of its existing facilities accessible (§ 6.150(a)(1)). However, § 6.150, unlike 28 CFR 41.57, places explicit limits on the Commission's obligation to ensure program accessibility (§ 6.150(a)(2)).

Paragraph (a)(2) generally codifies recent case law that defines the scope of the Commission's obligation to ensure program accessibility. This paragraph provides that in meeting the program accessibility requirement the Commission is not required to take any action that would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. A similar limitation is provided in § 6.160(d). This provision is based on the Supreme Court's holding in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), that section 504 does not require program modifications that result in a fundamental alteration in the nature of a program, and on the Court's statement that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412. Since *Davis*, circuit courts have applied this limitation on a showing that only one of the two "undue burdens" would be created as a result of the modification sought to be imposed under section 504. *See e.g.*, *Dopico* v. *Goldschmidt*, 687 F.2d 644 (2d Cir. 1982); *American Public Transit Association* v. *Lewis (APTA)*, 655 F.2d 1272 (D.C. Cir. 1981).

Paragraphs (a)(2) and 6.160(d) are also supported by the Supreme Court's decision in *Alexander* v. *Choate* 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it has an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. *Id.* at 299.

Relying on *Davis*, the Court said that section 504 guarantees qualified handicapped persons "meaningful access to the benefits that the grantee offers", *id.* at 301, and that "*reasonable adjustments* in the nature of the benefit being offered must at times be made to assure meaningful access." *Id.* at n.21 (emphasis added). However, section 504 does not require " 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial' * * * or that would constitute 'fundamental alteration[s] in the nature of a program' ". *Id.* at n.20 (citations omitted).

Alexander supports the position, based on *Davis* and the earlier, lower court decisions, that in some situations, certain accommodations for a handicapped person may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Thus failure to include such an "undue burdens" provision could lead to judicial invalidation of the regulation or reversal of a particular enforcement action taken pursuant to the regulation. This provision is therefore unchanged from the proposed rule.

Some commenters asserted that the holding in *Davis* was that the plaintiff was not a qualified handicapped person and that the subsequent reference to "undue financial and administrative burdens" is mere *dicta*. This view overlooks the interpretations of *Davis* provided by the Federal circuit court cases mentioned above. The *APTA* and *Dopico* decisions make it clear that financial burdens can limit the obligation to comply with section 504. *See also New Mexico Association for Retarded Citizens* v. *New Mexico*, 678 F.2d 847 (10th Cir. 1982). In addition, the Court in *Alexander* held that the

"administrative costs" of subjecting any action affecting Medicaid recipients to a detailed analysis of its effects on handicapped people "would be well beyond the accommodations that are required under *Davis*." 469 U.S. at 308.

One comment included a lengthy analysis opposing the undue burdens defense. This comment was premised on the assumption that the proposed regulation was substantively inconsistent with the regulations for federally assisted programs. This assumption is incorrect. Judicial interpretations have established that neither section 504 nor the regulations for federally assisted programs establish an unlimited obligation to modify programs or activities to accommodate individuals with handicaps.

This comment also argued that *APTA* is no longer good law, in view of the Supreme Court's decision in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984) (*Conrail*), in which the Court said that Congress intended, through the 1978 amendments to the statute, to codify the HEW regulation. Another commenter also argued that *Conrail* prohibits departures from the language of the federally assisted regulation. The *Conrail* decision addressed only the question of employment coverage under the statute and cannot be read to mean that Congress "codified" other parts of the regulation. Furthermore, the undue burdens defense is not inconsistent with the HEW regulation; in fact, the employment provisions of the HEW regulation—those addressed in *Conrail*—do include an "undue hardship" defense. This position is confirmed by the Supreme Court's decision in *Alexander*. There the Court referred to its previous recognition in *Conrail* of the regulation as "an important source of guidance on the meaning of section 504," 469 U.S. at 304, n.24, and at the same time, as discussed above, emphasized that section 504 does not mandate extensive costs and administrative burdens.

The Commission has carefully considered the comments on the process that it should follow in determining whether a program modification would result in undue financial and administrative burdens. We are adopting the proposed rule's procedural requirements for the application of the "fundamental alteration" and "undue financial and administrative burdens" language, and we intend to be guided by six principles in applying those procedures.

First, we explicitly acknowledge that, in most cases, making a Commission program accessible will likely not result in undue burdens. Second, the burden of proving that the accommodation request will result in a fundamental alteration or undue burdens is placed squarely on the Commission, not on the handicapped person. Third, in determining whether financial and administrative burdens are undue, we will consider all Commission resources available for use in the funding and operation of the conducted program. Fourth, the "fundamental alteration"/"undue burdens" decision is to be made by the Chairman or his or her designee and must be accompanied by a written statement of reasons for reaching such a conclusion. Fifth, if a disabled person disagrees with the Commission's finding, he or she can file a complaint under the complaint procedures established by § 6.170. Finally, even if there is a determination that making a program accessible will fundamentally alter the nature of the program, or will result in undue financial and administrative burdens, the Commission must still take action, short of that outer limit, that will open participation in the Commission's program to disabled persons.

The commenters objected to the provision that the "undue burdens" decision would be based on consideration of "all agency resources available for use in the funding and operation of the conducted program," arguing that it should be based on the resources of the agency as a whole. They argued that this formulation was required because all agency resources come from taxpayers' monies and should not be used to support discrimination. We believe that the Commission's entire budget is an inappropriate touchstone for making determinations as to undue financial and administrative burdens. Parts of the Commission's budget may be earmarked for specific purposes and are simply not available for use in making the Commission's programs accessible to disabled persons.

One commenter said that the term "undue hardship" used in regulations for federally assisted programs is more specific and less discriminatory than the term "undue burdens." The term "undue hardship" is a term of art used in connection with employment. The term "undue burdens" is taken from the Supreme Court's opinion in *Davis* and is appropriately included in this regulation.

The commenters argued that section 504 creates an absolute right to access, and that cost cannot limit this right, although it may be a factor in determining time frames for compliance. Section 504 does not create an absolute right to access. The Supreme Court stated in *Davis* that recipients need not undertake modifications to their programs to meet the requirements of section 504 that would result in "undue financial and administrative burdens." This understanding of section 504 and its implementing regulations for federally assisted programs is shared by the lower Federal courts, which have routinely applied the "undue burdens" limitation to accessibility issues. Congress suggested no different interpretation of section 504 when applying it to federally conducted programs. Spreading the cost of compliance over a period of time is, however, one way of avoiding undue financial and administrative burdens, and the Commission will consider that as an option whenever it considers asserting that defense.

Paragraph (b) sets forth a number of means by which program accessibility may be achieved, including redesign of equipment, reassignment of services to accessible buildings, and provision of aides. In choosing among methods, the Commission shall give priority consideration to those that will be consistent with provision of services in the most integrated setting appropriate to the needs of handicapped persons. Structural changes in existing facilities are required only when there is no other feasible way to make the Commission's program accessible. The Commission may comply with the program accessibility requirement by delivering services at alternate accessible sites or making home visits as appropriate.

Paragraphs (c) and (d) establish time periods for complying with the program accessibility requirement. As currently required for federally assisted programs by 28 CFR 41.57(b), the Commission must make any necessary structural changes in facilities as soon as practicable, but in no event later than three years after the effective date of this regulation. Where structural modifications are required, a transition plan shall be developed within six months of the effective date of this regulation. Aside from structural changes, all other necessary steps to achieve compliance shall be taken within sixty days.

Section 6.151 Program accessibility: New construction and alterations

Overlapping coverage exists with respect to new construction and alterations under section 504 and the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). Section 6.151 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or

altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101–19.600 to 101–19.607. This standard was promulgated pursuant to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157). It is appropriate to adopt the existing Architectural Barriers Act standard for section 504 compliance because new and altered buildings subject to this regulation are also subject to the Architectural Barriers Act and because adoption of the standard will avoid duplicative and possibly inconsistent standards.

This regulation does not require that buildings leased after the effective date of the regulation meet the new construction standards of § 6.151 rather than the program accessibility standard for existing facilities in § 6.150. Federal practice under section 504 has always treated newly leased buildings as subject to the existing facility program accessibility standard. Unlike the construction of new buildings where architectural barriers can be avoided at little or no cost, the application of new construction standards to an existing building being leased raises the same prospect of retrofitting buildings as the use of an existing Federal facility, and the Commission believes the same program accessibility standard should apply to both owned and leased existing buildings.

In *Rose* v. *United States Postal Service*, 774 F.2d 1355 (9th Cir. 1985), the Ninth Circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The Commission may provide more specific guidance on section 504 requirements for leased buildings after the litigation is completed.

Section 6.160 Communications

Section 6.160 requires the Commission to take appropriate steps to ensure effective communication with personnel of other Federal entities, applicants, participants, and members of the public. These steps shall include procedures for determining when auxiliary aids are necessary under § 6.160(a)(1) to afford an individual with handicaps an equal opportunity to participate in, and to enjoy the benefits of, the Commission's program or activity. They shall also include an opportunity for individuals with handicaps to request the auxiliary aids of their choice. This expressed choice shall be given primary consideration by the Commission (§ 6.160(a)(1)(ii)). The Commission shall honor the choice unless it can demonstrate that another effective means of communication exists or that use of the means chosen would not be required under § 6.160(d). That paragraph limits the obligation of the Commission to ensure effective communication in accordance with *Davis* and the circuit court opinions interpreting it (*see supra* preamble § 6.150(a)(2)). Unless not required by § 6.160(d), the Commission shall provide auxiliary aids at no cost to the individual with handicaps.

The discussion of § 6.150(a), Program accessibility: Existing facilities, regarding the determination of undue financial and administrative burdens also applies to this section and should be referred to for a complete understanding of the Commission's obligation to comply with § 6.160.

One comment argued that the communications section should require that communications for handicapped people be "equal" to those for nonhandicapped people, not merely "effective." The regulation requires the Commission to provide auxiliary aids to ensure that individuals with handicaps have "an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission." Where the form of communication is different for individuals with handicaps than for nonhandicapped people (*e.g.*, oral instead of written for blind people, sign language instead of speech for deaf people) the effectiveness of the communication is the only appropriate measurement of equality of treatment.

In some circumstances, a notepad and written materials may be sufficient to permit effective communication with a hearing-impaired person. In many circumstances, however, they may not be, particularly when the information being communicated is complex or exchanged for a lengthy period of time (*e.g.*, a meeting) or where the hearing-impaired applicant or participant is not skilled in spoken or written language. In these cases, a sign language interpreter may be appropriate. For vision-impaired persons, effective communication might be achieved by several means, including readers and audio recordings. In general, the Commission intends to inform the public of (1) the communications services it offers to afford individuals with handicaps an equal opportunity to participate in or to benefit from its programs or activities, (2) the opportunity to request a particular mode of communication, and (3) the Commission's preferences regarding auxiliary aids if it can demonstrate that several different modes are effective.

The Commission shall ensure effective communication with vision-impaired and hearing-impaired persons involved in hearings conducted by the Commission. Auxilliary aids must be afforded where necessary to ensure effective communication at the proceedings.

If sign language interpreters are necessary, the Commission may require that it be given reasonable notice prior to the proceeding of the need for an interpreter. Moreover, the Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature. (§ 6.160(a)(1)(ii)). For example, the Commission need not provide eye glasses or hearing aids to applicants or participants in its programs. Similarly the regulation does not require the Commission to provide wheelchairs to persons with mobility impairments.

The comments suggested that the Commission's language in § 6.160(a)(1)(ii), which states that the Commission need not provide individually prescribed devices or readers for personal use or study, be modified to state that such devices are not required for "nonprogram material." This suggestion has not been adopted because it is less clear than the existing formulation, which is intended to distinguish between communications that are necessary to obtain the benefits of the Federal programs and those that are not, and which parallels the requirements of the Federal Government's section 504 regulations for federally assisted programs. For example, a federally operated library would have to ensure effective communication between its librarian and a patron, but not between the patron and a friend who had accompanied him or her to the library.

The comments suggested that the definition of auxiliary aids should include attendant services that may be needed to aid disabled persons to travel to meetings. They also recommended that in some cases attendant services may be an appropriate auxiliary aid to achieve program accessibility. The Commission has not adopted the approach recommended by these comments. To the extent that the services of an attendant are not directly related to a federally conducted program or activity, it would be inappropriate to require them at Federal expense. For example, the services of a sign language interpreter make a

workshop as available to any deaf participant as it is to other participants. The need for services of interpreters arises directly out of the presentation of information in a form that can be understood by hearing persons. However, the Commission views the services of an attendant for a disabled person as generally personal in nature and not directly related to the federally conducted program.

A different conclusion, however, might be reached for Federal employees or other persons traveling for the Commission. Where a disabled person who is unable to travel without an attendant is required to perform official travel, the travel expenses of an attendant, including per diem and transportation expenses, may be paid by the Commission. See 5 U.S.C. 3102(d)(1982).

The Commission has not adopted a suggestion by one commenter that a provision be added to this section requiring the Commission to make efforts to provide captioning on training films and video tapes. Such a provision would limit the Commission's flexibility in selecting other, equally suitable and possibly less expensive, methods for accommodating hearing-impaired persons as the need arises.

We have also declined to follow a commenter's suggestion that a provision be added to this section that would require the Commission to take appropriate steps to provide handicapped persons with information regarding their section 504 rights under the agency's programs or activities. Such a provision would be redundant with the broader and more detailed requirements of § 6.111, previously discussed.

Paragraph (b) requires the Commission to provide information to handicapped persons concerning accessible services, activities, and facilities. Paragraph (c) requires the Commission to provide signs at inaccessible facilities that direct users to locations with information about accessible facilities.

Section 6.170 Compliance procedures

Paragraph (a) specifies that paragraphs (c) through (l) of this section establish the procedures for processing complaints other than employment complaints. Paragraph (b) provides that the Commission will process employment complaints according to procedures established in existing regulations of the EEOC (29 CFR Part 1613) pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

The Commission has amended paragraphs (c) through (k) to take into consideration suggestions made by the commenters and to delegate authority under the section to the Commission's Director of Equal Employment Opportunity ("EEO Director"). Thus,

—Paragraph (c) designates the EEO Director as the official responsible for the implementation and operation of the section.

—Paragraph (d) permits the filing with the EEO Director of a complaint by a person in his individual capacity or as a representative of a class of which he or she is a member or by an authorized representative of such person; it requires that the complaint be filed within 180 days of the alleged act of discrimination unless the EEO Director extends the time period for good cause; and it requires that the complaint be addressed to the EEO Director.

—Paragraph (e) authorizes the EEO Director to determine whether the Commission has jurisdiction over a complaint and, if the EEO Director determines that the Commission does not have jurisdiction over a complaint, he or she shall promptly notify the complainant and make reasonable efforts to refer the complaint to the appropriate entity of the Federal Government.[1]

—Paragraph (f) requires the EEO Director to notify the Architectural and Transportation Barriers Compliance Board upon receipt of a complaint alleging that a building or facility subject to the Architectural Barriers Act was designed, constructed, or altered in a manner that does not provide ready access to and use by handicapped persons.

—Paragraph (g) authorizes the EEO Director to determine whether a complaint is complete, and if he or she determines that a complaint is incomplete, to so notify the complainant, and to dismiss the complaint without prejudice if the complainant fails to complete the complaint within 30 days of the date of the notice.

—Paragraph (h) requires the EEO Director, within 180 days of his or her receipt of a complete complaint, to notify the complainant by letter of the EEO Director's findings of fact and conclusions of law, description of a remedy for each violation found, and notice of the right to appeal.

—Paragraph (i) permits an appeal to the Commission's General Counsel from a determination by the EEO Director under paragraph (h). The paragraph further provides that the appeal must be filed within 90 days of the complainant's receipt of the letter required by paragraph (h) unless the General Counsel extends the time period for good cause, and it specifies what the appeal must contain.

—Paragraph (j) requires the General Counsel to notify the complainant of the results of the appeal within 60 days of the receipt of the appeal unless the General Counsel determines that additional information is needed from the complainant, in which event the 60-day period will begin to run from the date of receipt of the additional information. The paragraph also confers upon the General Counsel discretionary authority to refer the appeal to the Commission for final determination provided that the Commission's final determination is made within the 60-day time period specified by the paragraph.

—Paragraph (k) of the proposed regulation would have authorized the Assistant Attorney General, Civil Rights Division, United States Department of Justice, to grant extensions of time in which to reach a determination on a complaint or appeal. Since this proposed oversight is not required by statute, this regulation authorizes the Chairman to determine such grants of extensions of time.

—Paragraph (l) permits the Commission to delegate its authority for investigating complaints to other Federal agencies. However, the statutory obligation of the Commission to make a final determination of compliance or noncompliance may not be delegated.

One commenter requested the addition of a provision whereby the Commission would award attorneys fee to complainants. Another commenter suggested that the Equal Access to Justice Act (5 U.S.C. 504) might provide for the award of fees. Nothing contained in title V of the Rehabilitation Act provides for the agency award of attorneys fees in administrative proceedings other than those involving Federal employment. Nor does the EAJA and the Commission's implementing regulations at 16 CFR Part 3 provide for such awards in hearings conducted under § 6.170. We have therefore included no attorneys fee provision in the regulations.

We have also declined to follow the suggestion of one commenter that the regulation be clarified to state that the existence of the Commission's internal

[1] One commenter objected to our proposed regulation's limiting the Commission's referral obligation to making "reasonable efforts" to refer a complaint to the appropriate governmental entity. The commenter suggested that the rule be amended to impose an absolute obligation. The Commission declines to adopt this suggestion since some complaints may not be referrable, *e.g.*, a complaint over which no Federal agency has jurisdiction or that lacks sufficient information to enable the Commission to identify the appropriate agency.

compliance procedures does not curtail a complainant's right to seek direct judicial relief or to obtain *de novo* review of Commission action under the section. Those issues are appropriate for the courts to decide.

List of Subjects in 16 CFR Part 6

Blind, Civil rights, Employment, Equal employment opportunity, Federal buildings and facilities, Government employees, Handicapped.

For the reasons set forth in the preamble, Chapter I of Title 16 of the Code of Federal Regulations is amended as follows:

A new Part 6 is added to read as follows:

PART 6—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FEDERAL TRADE COMMISSION

Sec.

6.101 Purpose.
6.102 Application.
6.103 Definitions.
6.104–6.109 [Reserved]
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6.112–6.129 [Reserved]
6.130 General prohibitions against discrimination.
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6.149 Program accessibility: Discrimination prohibited.
6.150 Program accessibility: Existing facilities.
6.151 Program accessibility: New construction and alterations.
6.152–6.159 [Reserved]
6.160 Communications.
6.161–6.169 [Reserved]
6.170 Compliance procedures.
6.171–6.999 [Reserved]

Authority: 29 U.S.C. 794.

§ 6.101 Purpose.

This part effectuates section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 6.102 Application.

This part applies to all programs or activities conducted by the Commission except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 6.103 Definitions.

For purposes of this part, the term—

"Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and to enjoy the benefits of, programs or activities conducted by the Commission. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

"Commission" means the Federal Trade Commission.

"Complete complaint" means a written statement that contains the complainant's name and address and describes the Commission's alleged discriminatory action in sufficient detail to inform the Commission of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

"Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

"Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term "physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

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

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

(4) "Is regarded as having an impairment" means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the Commission as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the Commission as having such an impairment.

"Qualified individual with handicaps" means—

(1) With respect to any Commission program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the Commission can demonstrate would result in a fundamental alteration in its nature; and

(2) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) "Qualified handicapped person" as that term is defined for purposes of employment in 29 CFR 1613.702 (f), which is made applicable to this part by § 6.140.

"Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955) and the Rehabilitation Act

Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 6.104-6.109 [Reserved]

§ 6.110 Self-evaluation.

(a) The Commission shall, by February 1, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the Commission shall proceed to make the necessary modifications.

(b) The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The Commission shall, for at least three years following completion of the self-evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified, and

(2) A description of any modifications made.

§ 6.111 Notice.

The Commission shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the Commission, and make such information available to them in such manner as the Chairman or his or her designee finds necessary to apprise such persons of the protections against discrimination assured to them by section 504 and this regulation.

§§ 6.112-6.129 [Reserved]

§ 6.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

(b)(1) The Commission, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

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

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The Commission may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The Commission may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The Commission may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the Commission; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The Commission, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The Commission shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 6.131-6.139 [Reserved]

§ 6.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the Commission. The definitions, requirements and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in federally conducted programs or activities.

§§ 6.141-6.148 [Reserved]

§ 6.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 6.150, no qualified individuals with handicaps shall, because the Commission's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the Commission.

§ 6.150 Program accessibility: Existing facilities.

(a) *General.* The Commission shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the Commission to make each of its existing facilities accessible to and usable by individuals with handicaps, or

(2) Require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the

proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 6.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or such burdens, but would, nevertheless, ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The Commission may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The Commission is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The Commission, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the Commission shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The Commission shall comply with the obligations established under this section by April 1, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by February 1, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the Commission shall develop, by August 1, 1988, a transition plan setting forth the steps necessary to complete such changes. The Commission shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the Commission's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups with whose assistance the plan was prepared.

§ 6.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the Commission shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 6.152–6.159 [Reserved]

§ 6.160 Communications.

(a) The Commission shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The Commission shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the Commission.

(i) In determining what type of auxiliary aid is necessary, the Commission shall give primary consideration to the requests of the individual with handicaps.

(ii) The Commission need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the Commission communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's), or equally effective telecommunication systems shall be used.

(b) The Commission shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The Commission shall provide signs at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the Commission to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity, or in undue financial and administrative burdens. In those circumstances where Commission personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the Commission has the burden of proving that compliance with § 6.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the Chairman or his or her designee after considering all Commission resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the Commission shall take any other action that would not result in such an alteration or burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 6.161–6.169 [Reserved]

§ 6.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the Commission.

(b) The Commission shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR Part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section is vested in the Director of Equal Employment Opportunity.

(d) (1) A complete complaint under this section may be filed by any person who believes that he or she or any specific class of persons of which he or she is a member has been subjected to discrimination prohibited by this part. The complaint may also be filed by an authorized representative of any such person.

(2) The complaint must be filed within 180 days of the alleged act of discrimination unless the Director of Equal Employment Opportunity extends the time period for good cause.

(3) The complaint must be addressed to the Director of Equal Employment Opportunity, Federal Trade Commission, 6th and Pennsylvania Ave. NW., Washington, DC 20580.

(e) If the Director of Equal Employment Opportunity receives a complaint over which the Commission does not have jurisdiction, he or she shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The Director of Equal Employment Opportunity shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157) is not readily accessible to and usable by individuals with handicaps.

(g) (1) The Director of Equal Employment Opportunity shall accept and investigate a complete complaint that is filed in accordance with paragraph (d) of this section and over which the Commission has jurisdiction.

(2) If the Director of Equal Employment Opportunity receives a complaint that is not complete (see § 6.103), he or she shall, within 30 days thereafter, notify the complainant that additional information is needed. If the complainant fails to complete the complaint within 30 days of the date of the Director's notice, the Director of Equal Employment Opportunity may dismiss the complaint without prejudice.

(h) Within 180 days of the receipt of a complete complaint over which the Commission has jurisdiction, the Director of Equal Employment Opportunity shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal to the Commission's General Counsel.

(i)(1) An appeal under this section must be filed within 90 days of the complainant's receipt of the letter under paragraph (h) of this section unless the General Counsel extends the time period for good cause.

(2) The appeal must be addressed to the General Counsel, Federal Trade Commission, 6th and Pennsylvania Ave. NW., Washington, DC 20580.

(3) The appeal shall specify the questions raised by the appeal and the arguments on the points of fact and law relied upon in support of the position taken on each question; and it shall include copies of the complaint filed under paragraph (d) of this section and the letter by the Director of Equal Employment Opportunity under paragraph (h) of this section as well as any other material relied upon in support of the appeal.

(j) The General Counsel shall notify the complainant of the results of the appeal within 60 days of the receipt of the appeal. If the General Counsel determines that additional information is needed from the complainant, the General Counsel shall have 60 days from the date of receipt of the additional information to make a final determination on the appeal. The General Counsel may submit the appeal to the Commission for final determination provided that any final determination of the appeal is made by the Commission within the 60-day period specified by this paragraph.

(k) The time limits specified by paragraphs (h) and (j) of this section may be extended by the Chairman for good cause.

(l) The Commission may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated.

§§ 6.171–6.999 [Reserved]

(15 U.S.C. 46 (g).)

Emily H. Rock,

Secretary.

[FR Doc. 87–27523 Filed 11–30–87; 8:45 am]

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CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1015

Freedom of Information Act Regulations; Congressional Requests Interim Amendment With Request for Comment

AGENCY: Consumer Product Safety Commission.

ACTION: Interim amendment with request for comment.

SUMMARY: The Commission's Freedom of Information Act regulations direct that records be disclosed to Congress when requested by the chairman of a committee or subcommittee acting pursuant to committee business and having appropriate jurisdiction. To give ranking minority members the same access to Commission information as the chairmen, the Commission is amending this regulatory provision to make it applicable to requests from ranking minority members of such committees and subcommittees.[1]

DATES: Comments on the interim amendment are due no later than December 31, 1987. The amendment will become effective, as an interim measure, on December 1, 1987. As a final amendment, it is proposed to become effective immediately upon its publication in final form.

ADDRESSES: Comments should be submitted to the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Alan Shakin, Assistant General Counsel, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 492–6980.

SUPPLEMENTARY INFORMATION: The Commission's existing Freedom of Information Act (FOIA) regulations contain the following provision: "All records of the Commission shall be disclosed to Congress upon a request made by the chairman of a committee or subcommittee of Congress acting pursuant to committee business and having jurisdiction over [the] matter about which information is requested." 16 CFR 1015.12(a).

This regulatory provision is based on section 6(a)(7) of the Consumer Product Safety Act: "Nothing in this Act shall authorize the withholding of information by the Commission or any officer or

[1] The Commission voted unanimously (3–0) to issue this Federal Register document. Chairman Scanlon has written a statement which is available from the Office of the Secretary.