DEPARTMENT OF REGULATORY AGENCIES

Civil Rights Commission

STATE OF COLORADO CIVIL RIGHTS COMMISSION RULES AND REGULATIONS

3 CCR 708-1

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

RULES OF PRACTICE AND PROCEDURE

Rule 10.1 - General Statement of Purpose.

The general purpose of the Rules and Regulations of the Colorado Civil Rights Commission is to implement Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended.

Rule 10.2 - Definitions.

(A) "Administrative Law Judge" (ALJ) means an administrative law judge appointed by the commission through the division of administrative hearings of the Department of Administration or appointed by the Governor at the request of the commission as defined in § 24-34-305(1)(d)(I), C.R.S. (1988), as amended.

(B) "Chair" means the elected head of the Colorado Civil Rights Commission or, in his or her absence or inability to serve, the acting head.

(C) "Commission" means the Colorado Civil Rights Commission, created by § 24-34-303, C.R.S. (1988), as amended, with all the power defined in § 24-34-305, C.R.S. (1988), as amended.

(D) "Commissioner" means a duly appointed member of the commission.

(E) "Commission's Counsel" means the attorneys at law who present a case in support of a complaint before an administrative law judge or represent the commission and division in the furtherance of statutory authority.

(F) "Counsel" means the attorneys at law licensed to practice law in Colorado representing the parties, attorneys from other jurisdictions admitted to practice law before state agencies pursuant to Rule 221.1, C.R.C.P. and law students admitted to appear in court pursuant to Rule 226, C.R.C.P.

(G) "Director" means the head of the Colorado Civil Rights Division, or member of the staff delegated authority by the director to investigate allegations of discrimination, to determine whether probable cause exists, to conciliate charges and to report to the commission in accordance with § 24-34-306, C.R.S. (1988), as amended.

(H) "Discriminatory or Unfair Practice" means one or more acts, practices, commissions or omissions prohibited by laws administered by the division and the commission.

(I) "Division" means the Colorado Civil Rights Division, created by § 24-34-302, C.R.S. (1988), as amended.

(J) "Investigation" means the systematic inquiry into the allegation of the charge by the division and its staff. Investigation activities shall include, but are not limited to, collecting and analyzing statistical data and other documentary evidence; visiting respondent's place of business, public accommodation or housing; interviewing witnesses; reviewing relevant records; issuing

questionnaires upon the respondent concerning the alleged discriminatory act; issuing subpoenas in cases involving employment or housing charges;and the holding of informal fact-finding meetings with the parties.

(K) "Law" means any or all of the laws administered by the Colorado Civil Rights Division, including Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended, to be cited as § 24-34-301 to 707, C.R.S. (1988), as amended.

(L) "Mail" means first class mail.

(M) "Party" or "parties" means the complainant, charging party or the respondent.

(N) "Petitioner" means the party who applies to the appropriate court for judicial review or enforcement of final agency action or a party seeking declaratory relief under Rule 10.10 of these rules.

(O) "Staff" means the director and all persons employed to carry out the functions and duties of the division.

Rule 10.3 - Notice and Entry of Appearance.

Whenever these rules require notice to be furnished to any party, either by personal delivery or by mail, such notice also shall be furnished to the party's counsel, if any entry of appearance has been made before the commission.

Whenever a party files any pleadings, motions, or briefs with the commission, that party shall send a copy to all other parties and their counsel by mail before any action will be taken by the commission, a commissioner, the director, or the administrative law judge.

Rule 10.4 - Charges.

(A) Who May File.

Any person, directly or by an attorney at law, or, in like manner, the commission, a commissioner or the attorney general may file a charge in accordance with § 24-34-306(1), 24-34-404, 24-34-504(1) or 24-34-505, C.R.S. (1988), as amended.

Housing charges may be filed as designated above but may also be filed by an aggrieved person with the assistance of a representative authorized by such aggrieved person, including any organization.

(B) Form.

Charges shall be in writing and in duplicate, and shall be signed and verified by the charging party.

(C) Contents.

Charges shall contain the following:

(1) The full name and mailing address of the party or parties charging a discriminatory or unfair practice.

(2) The full name and mailing address of the party or parties alleged to have committed the discriminatory or unfair practice.

(3) A short and plain statement of the facts, including particulars which give rise to the alleged

violation and which set forth the alleged unfair housing practice; or discriminatory or unfair employment practice; or discrimination in places of public accommodation, amusement and resort, and in advertising.

(4) The date or dates the alleged discriminatory or unfair practice occurred or, if the discriminatory or unfair practice charged is of a continuing nature, the date of said practice shall be any date from the date it is alleged to have begun until the date the charge is signed and, unless otherwise indicated, to and beyond the date the charge is signed.

(D) Exception.

Under the provisions of § 24-34-602 and 705, C.R.S. (1988), as amended, civil or criminal proceedings instituted by a party claiming to be aggrieved by discrimination in a place of public accommodation or by discriminatory advertising shall be a bar to proceedings before the Colorado Civil Rights Commission and Colorado Civil Rights Division.

(E) Place of Filing.

Charges shall be filed with the commission at offices of the Colorado Civil Rights Division or at other offices of local, state or Federal government designated by the commission to accept written charges of discrimination. A list of these offices with current addresses and telephone numbers shall be available from any of the Civil Rights Division offices.

(F) Time Limits on Filing.

(1) Charges of unfair or discriminatory practices shall be filed within the time limits listed below, in accordance with the law.

(2) Any charge filed pursuant to §§ 24-34-403, 504, 604 and 706, C.R.S. (1988), as amended, shall be barred if not filed within the time limits set forth therein.

(3) The charge shall be deemed filed as of the date of receipt at an office designated by the commission.

(G) Manner of Filing.

(1) Charges shall be filed either by personal delivery or mail, addressed to the commission at any office designated in Rule 10.4(E). Staff members shall be available to assist in the drafting and filing of charges at the division's offices.

(2) Upon receipt of the charge and prior to any action by the commission, the division shall personally deliver or mail a copy of the charge and notice with certificate of mailing to the charging party and to the respondent. The notice shall acknowledge the filing of the charge and contain an advisement to the parties of the time limits applicable to charge processing and of the procedural rights and obligations of parties as set out in §§ 24-34-504 and §§ 24-34-505.6, C.R.S. (1988), as amended.

(H) Amendments.

(1) Charging parties and the commission, a commissioner or the attorney general shall have the right to reasonably amend charges.

(2) Amendments shall be filed in the same manner as provided for the filing of the original charge in Rules 10.4(B) and 10.4(C).

(3) Amendments to the charge may include, but are not limited to: amendments to cure technical defects or omissions, including failure to sign or verify a charge, to clarify or amplify the allegations therein, or to join additional or substitute parties. Such amendments and amendments alleging additional acts which constitute unlawful, unfair or discriminatory practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received.

(4) Amendments shall be personally delivered or mailed to the respondent in the same manner as the original charge, as provided in Rule 10.4(G)(2).

(I) Withdrawal.

The director may allow charging parties, the commission, a commissioner or the attorney general to withdraw a charge or its amendments prior to the time a complaint has been issued by the commission. Thereafter, withdrawal of charges and of complaints may only be made with the approval of the commission.

(J) Additional and New Charges.

Charging parties, the commission, a commissioner or the attorney general may file new or additional charges alleging discriminatory or unfair acts which have happened since the date of the original or amended charges. Such new or additional charges shall be filed pursuant to procedures set forth in this Rule 10.4.

Rule 10.5 - Investigation, Dismissal and Conciliation.

(A) Expedited Resolution.

Before the director conducts an in-depth investigation, the charging party and the respondent may be invited to meet with division staff in an attempt to resolve the charge and to discuss the charge.

(B) Discovery.

The director may use discovery procedures as provided in the Colorado Rules of Civil Procedure during the investigation of a charge.

(C) Subpoenas.

The director shall exercise the subpoena power as provided by law in the investigation of a charge and shall have the authority to sign and issue a subpoena requiring:

(1) the attendance and testimony of witnesses either informally or under oath;

(2) the production of evidence including, but not limited to, books, papers, records, correspondence or documents, including those stored on electronic media, in the possession or under the control of the person subpoenaed, and;

(3) access to evidence for the purposes of examination and the right to copy.

(D) Dismissal.

If the director determines based either upon the face of the charge or upon the information gathered during the investigation that probable cause for crediting the allegations of a charge does not exist, the director shall dismiss the charge and notify the charging party in writing by

either personal delivery or mail at the charging party's last known address, together with a notice of the charging party's right to appeal the dismissal to the commission as provided by § 24-34-306(2)(b), C.R.S. (1988), as amended, and Rule 10.6. A copy of such notice shall be delivered or mailed to the respondent named in the charge.

(E) Conference, Conciliation and Persuasion.

(1) If for whatever reason the charging party fails or refuses to sign a proposed conciliation agreement which the director has accepted on behalf of the division, the charging party has the right to appeal the director's action to the commission as provided in Rule 10.6. A written notice of the director's action and report shall be mailed to all parties at their last known address no later than five days prior to the date the report is made to the commission.

(2) If conciliation fails and the commission issues a written notice and complaint, the notice and complaint shall be delivered or mailed to the respondent at the last known address. If the notice is not served within 270 days after the filing of the charge, plus any extensions permitted as provided in § 24-34-306(11), C.R.S. (1988), as amended, the jurisdiction of the commission over the complaint shall cease, and the charging party may seek relief authorized in the law.

(F) Disclosure.

Without the written consent of all the parties, the commission, the director and the staff shall not disclose the filing of a charge, the information gathered during the investigation, or the efforts to eliminate such discrimination or unfair practice by conference, conciliation or persuasion unless the disclosure is made in connection with the conduct of the investigation, in connection with the filing of a petition seeking appropriate injunctive relief against the respondent under § 24-34-507, C.R.S. (1988), as amended, or at a public hearing. Nothing in this paragraph shall be construed to prevent the commission, the director or the staff from disclosing final action on a charge, including the reasons for dismissing the charge and terms of a conciliation agreement, or the contents of an order issued after hearing.

(G) Evidence Examination.

Any of the parties or their counsel may examine any evidence contained in the investigative file of the charge, excluding documents or information made confidential by law. Evidence does not include commission or division staff work products or documents excluded by attorney-client privilege.

(H) Notice of Right to Sue.

(1) Issuance prior to 180 days

(a) If the charging party/complainant makes a written request for a notice of right to sue prior to the expiration of 180 days following the filing of the charge, the commission, a commissioner, or the administrative law judge shall grant the request, based upon a determination that the investigation of the charge will not be completed within 180 days. The decision to issue a notice of right to sue will be decided on a case-by-case basis, taking into account the workload of the division and the priority assigned to the charge. Factors which may be considered in the determination include, but are not limited to, whether the director has asserted that the investigation of the charge is not likely to be completed within 180 days, whether the division has prepared documents to dismiss a charge that is untimely, and/or whether a concurrent request for a

notice of right to sue has been made to the appropriate federal agency.

(b) If a determination is made to issue the notice of right to sue prior to the expiration of 180 days from the date of filing the charge, the commission, a commissioner, or the administrative law judge will direct that the notice, with a written certification to that effect, be issued through the division.

(c) The commission, a commissioner, or the administrative law judge may not grant the request for notice of right to sue prior to expiration of the 180 days from the date of filing the charge, if the director asserts that the investigation is nearing completion or will be completed within 180 days of filing, and the charging party/complainant will be so informed.

(2) Issuance after 180 days:

(a) If the charging party/complainant makes a written request for a notice of right to sue after the expiration of 180 days following the filing of the charge, the director may summarily grant the request provided that the commission has not caused to be served a written notice and complaint pursuant to § 24-34-306(4), C.R.S. (1988), as amended.

(b) The notice of right to sue may be issued at any time by the director prior to the expiration of 270 days, but not before 180 days, after the filing of the charge, with any extension of time granted pursuant to § 24-34-306(11), C.R.S. (1988), as amended, and shall include, but is not limited to, those circumstances in which the director has found that probable cause does or does not exist or where the director and/or commission has dismissed a charge pursuant to § 24-34-306(2)(b), C.R.S. (1988), as amended.

(3) General:

(a) Issuance of a notice of right to sue at any time shall cause jurisdiction of the commission to cease and shall constitute final agency action and exhaustion of administrative remedies and proceedings pursuant to Part 3 of Article 34 of Title 24, C.R.S. (1988), as amended.

(b) The other provisions of this Rule 10.5(H) notwithstanding, the filing of a charge and/or issuance of a notice of right to sue is not a prerequisite to the bringing of a civil action is housing cases pursuant to § 24-34-505.6, C.R.S. (1988), as amended.

(c) Issuance of a notice of right to sue at any time shall terminate further processing of any charge by the division.

(4) Contents of notice of right to sue:

(a) All requests for issuance of a notice of a right to sue shall be in writing and signed by the charging party/complainant.

(b) The notice of right to sue shall contain:

1) authorization to the charging party/complainant to bring a civil action in district court;

2) the division director's and/or the commission's determination, decision or dismissal, as appropriate.

Rule 10.6 - Appeal of the Director's Decision.

(A) Appeal.

(1) The charging party may appeal to the commission any final decision made by the director, including dismissal, administrative closure or termination to a Federal agency. The appeal shall be in writing and filed at a division office within 10 days after the date of mailing of the director's decision. A commissioner, the commission, or at its designation, the director, may grant the charging party an extension for good cause if such application for extension is requested verbally or in writing within the 10 days allowed for filing an appeal. Any verbal request must be confirmed in writing.

Such appeal shall contain a specific statement of the grounds upon which the appeal is sought. If no appeal of the director's decision is filed within 10 days of the date of mailing of the notice of decision or within any extended period, such decision shall constitute final agency action.

(2) The commission shall, upon receipt of an appeal of any final decision of the director, mail a copy to the respondent at the address listed in the original charge or in the appeal, if different, and to counsel, along with a notice which states that the procedures as prescribed by these rules for handling the appeal shall apply. The respondent may, within 10 calendar days after the date the commission mails the appeal to the respondent, file a written statement in opposition to such appeal. The commission may grant the respondent an extension for good cause if such application for extension if filed within the 10 days allowed for filing a statement in opposition to the appeal.

(B) Commission's Action on Appeal.

(1) The commission may take the following action on appeal: it may reverse the director's decision and take appropriate action; it may remand the charge to the director for further investigation and appropriate action; or it may uphold the director's decision.

(2) If the appeal is denied, the charging party and any other parties who, prior to such appeal, have been served with pleadings, notices or other documents concerning the proceedings before the commission shall be so notified in writing by mail at their last known addresses.

(3) The charging party may request the opportunity to appear in person and to supply other evidence, if any, in support of the appeal. The respondent may likewise request the opportunity to appear and to supply evidence. The commission may grant or deny such requests.

Rule 10.7 - Rule for the Determination of Good Cause for Extensions of Time During the 270-Day Investigative Period of § 24-34-306(11), C.R.S. (1988), as Amended.

(A) Authority and Purpose.

Pursuant to its rulemaking authority, § 24-34-305(1)(a), C.R.S. (1988), as amended, and in order to set forth procedures for the orderly transaction of business, to assist the gathering of information for the consideration of the ultimate decision-maker, the Colorado Civil Rights Commission adopts this rule. Unless otherwise specified by law, this procedural rule is not intended to be jurisdictional, but is designed to facilitate the investigation of a charge within the time period limitations of § 24-34-306(11), C.R.S. (1988), as amended.

(B) Procedure.

(1) Whenever a party to a charge filed with the Colorado Civil Rights Commission wishes to request an extension of time pursuant to § 24-34-306(11), C.R.S. (1988), as amended, such request shall be made to the commission, a commissioner or the administrative law judge.

(2) Extensions of time shall not exceed a total of 90 days to all charging parties and 90 days to all respondents or a total period of 180 days.

(3) Written notice of the approval or disapproval of an extension request shall be provided to all parties by the Colorado Civil Rights Commission pursuant to Rule 10.3.

(C) Standards for Granting Extensions.

In determining whether good cause has been shown for approving a motion for extension of time, the commission, a commissioner, or administrative law judge shall consider all relevant factors including but not limited to whether the failure to grant an extension would jeopardize the rights of any party, whether there have been administrative delays which would adversely affect the rights of any party, whether there are other factors outside the control of any party which caused delays in the administrative process and whether the rights of any party would be unduly prejudiced by the granting of an extension.

Rule 10.8 - General Rules Governing Hearing Procedures.

(A) Basis and Purpose of the Rules. §§ 24-4-103(4), 24-34-305(1)(a), C.R.S. (1988), as Amended

These procedures are adopted for the orderly transaction of business and are intended to set forth procedures to assist gathering information for the consideration of the ultimate decision-maker. Unless otherwise specified by law, these procedural rules are not intended to be jurisdictional. These procedural rules are intended to facilitate the preparation of a case so that the hearing may be conducted within the speedy hearing provisions of § 24-34-306(11), C.R.S. (1988), as amended.

(B) Issuance of Complaint and Notice of Hearing.

(1) Notice of hearing and complaint:

After the director reports to the commission that efforts to conciliate a charge have failed, the commission, if it so determines, shall issue and mail a written notice and complaint requiring the respondent to answer the charges at a formal hearing before an administrative law judge. Such hearing shall be commenced within 120 days after the service of the written notice and complaint, unless an extension of time is granted in accordance with § 24-34-306(11), C.R.S. (1988), as amended, and Rule 10.8(B)(2) of these rules. Such notice and complaint, which also shall be mailed to the complainant, shall state the time, place and nature of the hearing. The date for commencement of the hearing set forth in the notice and complaint shall be the Monday prior to the end of the 120-day time period, except in housing cases wherein injunctive relief is sought pursuant to § 24-34-507, C.R.S. (1988), as amended, the date of commencement of the hearing may be adjusted to any time within the 120-day period. In all cases, if the Monday is a legal State holiday, then the date for commencement of the hearing shall be the Tuesday prior to the end of the 120-day time period.

The notice shall state the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted. Such notice shall advise the respondent of the right to appear at the hearing, either in person or by counsel, as defined in Rule 10.8 to answer the complaint and to submit testimony. Such notice also shall inform the

respondent that a written, verified answer to the complaint may be filed at the Civil Rights Division office, with a copy to the administrative law judge at the division of administrative hearings in Denver, prior to the hearing date. All notices shall advise the respondent that failure to answer a complaint at a hearing may result in the entry of default.

(2) Extension of time:

The administrative law judge may grant an extension of any time period prescribed in § 24-34-306(11), C.R.S. (1988), as amended, to any party for good cause. The total period of extensions during the 270-day period (100-day period for housing cases with any extensions by the director) and 120-day period shall not exceed 90 days to all complainants and 90 days to all respondents. If the period allowed for extensions of time by § 24-34-306(11), C.R.S. (1988), as amended, has been granted to the complainant (charging party) and/or the respondent for a total of 180 days to all parties during the investigation period, then no further extensions of time may be granted.

(3) Contents of answers:

Answers shall contain the respondent's full legal name; form of doing business, *e.g.*, corporation or partnership; mailing address; and if represented by counsel, the full name and post office address of counsel; a general or specific denial of each allegation controverted by the respondent or a statement that the respondent is without knowledge or information sufficient to form a belief as to the truth of allegation, which statement shall be deemed a denial.

(4) Amendment:

The commission or the complainant shall have the power to reasonably and fairly amend any complaint. The respondent shall have the right to reasonably and fairly amend the answer.

(C) Motions and Affidavits Alleging Bias of the Commission, Commissioner, or the Division.

If a party moves to disqualify the commission on any basis specified in the State Administrative Procedure Act, the issues of the commission disqualification shall be held in abeyance until the case is before the commission for review. Any motion or affidavit directed at dismissal of the complaint or disqualification of the division or its staff due to bias is an improper motion which shall be denied. However, nothing in this rule is intended to preclude a challenge to the credibility of a witness due to bias.

(D) Filing and Service of Papers.

After the complaint is noticed for hearing, the original of all papers required to be served upon a party or person under Rule 10.3 and Rule 10.2(M) shall be filed with the commission through the division either before service or within a reasonable time thereafter. When the case has been assigned to an administrative law judge, a duplicate shall be filed with the administrative law judge at the division of administrative hearings. Whenever service is required under these rules or otherwise a copy shall be served on the complainant whether or not such party has successfully intervened. Interrogatories, requests for documents, requests for admission, and answers and responses to these, shall not be filed unless on special order of the administrative law judge or unless they are needed for use in a motion hearing or hearing.

All pleadings filed after the commencement of a case shall bear the proper case number. The caption thereof shall properly show their nature and on whose behalf the pleading is filed.

No pleading or exhibit belonging in the files of the division shall be taken from the office or custody of the division except on order of the administrative law judge.

Unless otherwise ordered by the administrative law judge, depositions which have been filed with the division may be opened for examination by a party or counsel. Upon the conclusion of the examination, the depositions shall be resealed.

(E) Discovery, Informal Discovery Conference and Discovery Plans and Orders.

In order to facilitate the preparation for hearing with due regard to the time limitation under § 24-34-306(11), C.R.S. (1988), as amended, the administrative law judge shall establish a discovery cut off date not later than 40 days prior to the date set for hearing. The only exception to this discovery cut off date will be permitted under the procedures established under Rule 10.8(B) governing commencement of hearing. The following discovery procedures shall be followed:

(1) Informal discovery conference:

Subject to sanctions under Rule 37, C.R.C.P., all counsel and all parties shall schedule and attend an informal discovery conference among themselves. This conference shall be held no later than 30 days following the issuance of the notice of complaint at which time the following items shall be considered:

(a) The scope of discovery necessary in the case, including alternatives to formal discovery procedures.

(b) An expedited timetable for discovery by the parties with due regard to the time limitation under § 24-34-306(11), C.R.S. (1988), as amended.

(c) Exchange of proposed witness and exhibit lists.

Within 10 days following the informal discovery conference a joint or separate discovery plan shall be filed with the administrative law judge. (The parties shall state whether any continuance of the scheduled hearing date is anticipated at that time.)

(2) If a joint discovery plan is filed, the administrative law judge shall set a discovery cut off date not later than 40 days prior to the date set for hearing.

(3) If separate discovery plans are filed, the parties shall have five days from the date of filing of the separate discovery plan within which to object to the opposing party's discovery plan. Unless the objection sets forth the legal basis the objection shall be waived.

Within five days of receipt of an objection the opposing parties shall file their legal position against the objection and the administrative law judge shall forthwith rule on the issue without hearing unless ordered by the administrative law judge. If a discovery hearing is conducted, the administrative law judge will take all action feasible to avoid any need for future motions to compel and requests for sanctions. The administrative law judge shall establish an expedited timetable for discovery by the parties with due regard to the time limitation under § 24-34-306(11), C.R.S. (1988), as amended, and shall set a discovery cut off date not later than 40 days prior to the date set for hearing.

(4) The discovery plan(s) or order will be the basis for the rulings on later motions concerning discovery.

(5) This discovery Rule 10.8(E) does not prevent informal modifications of the discovery plan(s) agreed upon by the parties.

(6) This discovery Rule 10.8(E) does not prevent discovery by the parties prior to the formulation of discovery plans nor entry of a discovery order.

(7) Extensions may only be granted for good cause, and in doing so the administrative law judge shall assess a fair portion of any extension of time under § 24-34-306(11), C.R.S. (1988), as amended, in accordance with Rule 10.7(H) governing continuances and Rule 10.8(B)(2) governing extensions of time.

(8) Except for excusable neglect, upon failure of a party to timely comply with this discovery Rule 10.8(E), the administrative law judge shall impose sanctions under Rule 37. C.R.C.P., up to and including entry of default judgment.

(F) Determination of Motions.

(1) All motions involving contested issues of law shall be supported by a recitation of legal authority either incorporated into the motion or set forth in a separate memorandum brief. Except for motions made under Rule 12, C.R.C.P., if the moving party chooses to submit a brief rather than incorporating the recitation of legal authority into the motion, the brief shall be filed with the motion. The moving party under Rule 12, C.R.C.P., shall file such brief within 15 days of filing of the motion. Copies of the brief shall be served on all other parties. The responding party shall be allowed 15 days in which to file a responsive brief.

(2) If facts not appearing of record may be considered in disposition of the motion, a party may file affidavits with the motion in accordance with Rules 6(d) and 56, Colo. R. Civ. P. Copies of such affidavits and any documentary evidence used in connection with the motion shall be served on all other parties.

(3) If the moving party fails to incorporate legal authority into the motion and fails to file a separate brief with the motion, the administrative law judge may deem the motion abandoned and may enter an order denying the motion. Failure of a respondent party to file a memorandum brief shall not be considered a confession of the motion.

(4) If possible, motions shall be determined promptly upon the written motion and briefs submitted. However, the administrative law judge may order oral argument or an evidentiary hearing. If the request for oral argument or an evidentiary hearing is requested in a motion, memorandum brief or within 15 days of receipt of an opposing memorandum brief, oral argument may be allowed by the administrative law judge at his or her discretion. Any motion requiring immediate disposition shall be called to the attention of a division clerk by the attorney filing such motion.

(5) Whenever the administrative law judge enters an order denying or granting a motion without a hearing, all parties shall be forthwith notified by the administrative law judge of such order. If the administrative law judge desires or authorizes oral argument or an evidentiary hearing, all parties shall be so notified by the administrative law judge. After notification, it shall be the responsibility of the moving party to have the motion set for oral argument or hearing. A notice to set oral argument or hearing shall be filed within 15 days of notification that oral argument or hearing is required or authorized.

(6) If any of the parties fails to appear at the oral argument or hearing, without prior showing of good cause for non-appearance, the administrative law judge may proceed to hear and rule on the motion.

(7) If a frivolous motion is filed or if frivolous opposition to a motion is interposed, the administrative law judge may assess reasonable attorney's fees against the party or attorney filing such motion or interposing such opposition.

(8) Apportionment of extensions of time under § 24-34-306(11), C.R.S. (1988), as amended, shall be made in compliance with Rule 10.7(H) governing continuance.

(G) Setting Motions.

All hearings on motions shall be set by either the division of administrative hearings or the Coiorado Civil Rights Division under the direction of a administrative law judge or commissioner as the case may be, upon notice. If a party desires to set a motion for hearing by telephone the notice shall so state. The original notice must be on file with the division before the date of setting, set forth in the notice. The party seeking the setting must then obtain the telephone setting from a division clerk, must confirm the date by telephone with all other parties and must file with the clerk and serve on all parties a notice of the date and time of setting.

(H) Continuance.

Continuances shall be granted only for good cause shown. No stipulation for continuance shall be effective until approved by the administrative law judge. Continuances may only be granted in accordance with any days left on extensions of time not previously granted to the parties pursuant to § 24-34-306(11), C.R.S. (1988), as amended. When a stipulated continuance requires an extension of time under § 24-34-306(11), C.R.S. (1988), as amended, the administrative law judge shall not grant the continuance unless the parties have also agreed to the apportionment of the extension of time between them. Counsel and parties should not assume that, because they are in agreement, the administrative law judge will grant a continuance. Continuances are to be discouraged.

Even though a party may not expressly request a continuance, under Rule 37, C.R.C.P., an administrative law judge shall assess a fair portion of any extension of time under § 24-34-306(11), C.R.S. (1988), as amended, to any party who, through motions or discovery procedures, causes a delay in the proceedings. An election to employ Rule 33(c), C.R.C.P., is an example where the administrative law judge must exercise discretion in assessing any continuances.

(I) Informal prehearing conference.

(1) Subject to sanctions under Rule 37, C.R.C.P., all counsel and all parties shall schedule and attend a prehearing conference among themselves. This conference shall be held no later than the 30 days prior to the date set for hearing, at which time the following items shall be considered:

(a) Preparation of a joint hearing data certificate in lieu of separate hearing data certificate.

(b) Cooperation with respect to the preparation of separate hearing data certificates.

(c) Matters which can be presented at hearing by stipulation or agreed statement.

(d) Final list of lay and expert witnesses reasonably expected to be called to testify at the hearing.

(e) Exchange or review of all exhibits to be offered at hearing and damages.

(f) Agreement as to the admissibility of exhibits.

(2) At this conference counsel shall undertake the following:

(a) A list of all exhibits to be introduced at hearing shall be exchanged. Each exhibit listed

shall be marked or given a designation for identification. (Letters for complainant; numbers for respondent; names to be added if multiple complainants or respondents.) The authenticity and genuineness of each exhibit is admitted unless specifically objected to in writing 15 days prior to hearing.

(b) A copy of all bills, statements and written exhibits which do not exceed two pages in length shall be furnished to opposing counsel.

(c) All exhibits shall be made available for inspection.

(d) Counsel and parties shall supply opposing counsel and parties with a list of all items claimed as damages.

(e) All expert reports of any examining or treating expert who may be called to testify at the hearing of the case shall be supplied opposing counsel by the party calling him or her as a witness. Any expert reports which reasonably could not have been obtained 30 days prior to hearing shall be handled by stipulation or order of the administrative law judge.

(3) A joint hearing data certificate shall set forth under the captions the matters on which the parties are agreed and those upon which there is a difference of position or contention. The certificate shall be filed no later than 20 days prior to hearing.

(4) If the parties are unable to agree upon a joint hearing data certificate they shall file separate certificates no later than 20 days prior to hearing.

(5) Each party shall be required to certify in the hearing data certificate that this rule has been complied with fully.

(J) Formal Prehearing Conference

If separate hearing data certificates are filed, the administrative law judge shall, no later than ten days prior to hearing, issue a prehearing order or may hold a prehearing conference pursuant to Rule 16, C.R.C.P., which shall be scheduled in accordance with Rule 10.8(G), governing setting motions. At the conclusion of the conference the administrative law judge shall issue a prehearing order no later than 10 days prior to the hearing.

Rule 10.9 - Hearing.

(A) Appearance

(1) The case in support of the complaint shall be presented at the hearing by the commission's counsel.

(2) At the discretion of the administrative law judge, complainant shall be permitted to intervene either in person or by counsel to present oral testimony or other evidence and to examine and cross-examine witnesses.

(3) Respondent may appear at hearings either in person or by counsel. If respondent is not in default, as defined in Rule 10.8(B), or by leave of the commission, he or she may present oral testimony and other evidence and examine and cross-examine witnesses.

(B) Commencement of Hearing

The hearing shall commence within 120 days of the notice and complaint or such later time as

extended under § 24-34-306(11), C.R.S. (1988), as amended.

If the prehearing order or hearing data certificate indicates that discovery cannot in good faith be completed within the time period, the administrative law judge may commence the hearing to take available evidence and adjourn it to a later date after additional discovery can be completed.

If a party presents a motion for summary judgment the presentation of the motion with supporting evidence may constitute the commencement of the hearing.

(C) Conduct of Hearing

(1) To the extent not inconsistent with the law, the procedures set forth in the State Administrative Procedure Act shall apply to the conduct of the hearing.

(2) The hearing shall be conducted by one or more administrative law judges.

(3) Hearings shall be held at the place specified in the notice of hearing and due regard shall be exercised for the convenience of the parties and witnesses.

(4) The administrative law judge may continue hearings from day to day or adjourn them to a later date or to a different place either by announcement at hearings or by appropriate notice to all parties.

(5) Motions made during hearings and objections concerning the conduct of hearings, including objections to the introduction of evidence, shall be stated orally and shall be included in the record.

(6) The administrative law judge may exclude from the hearing room or from further participation in the proceedings any person who engages in improper conduct.

(7) Upon the motion of any party or upon the motion of the administrative law judge, all witnesses may be excluded from the hearing room, except for the parties themselves.

(8) All hearings shall be public.

(D) Evidence

(1) The commission shall not be bound by strict rules of evidence prevailing in courts. The right of cross examination shall be preserved, and such rules and requirements of proof shall conform to the extent practical with those in civil non-jury cases in the district courts.

(2) The administrative law judge shall have full authority to control the proceedings, to admit or exclude testimony or other offers of evidence; and to rule upon all motions and objections and shall have all powers set forth in the State Administrative Procedure Act.

(3) All oral testimony shall be given under oath or affirmation and a record of the proceedings shall be made.

(4) The administrative law judge may permit the parties or their counsel to present oral arguments at the hearing and to file briefs within such time as the administrative law judge shall determine considering the convenience of the parties.

(E) Stipulations.

(1) Written stipulation of fact may be introduced into evidence if signed by the parties or by

counsel. Oral stipulations may be made in the record of hearing.

(2) The commission expects the parties to stipulate evidence to the fullest extent possible.

(F) Determinations.

(1) If more than one administrative law judge is designated to hear the complaint, a presiding officer shall be elected by majority vote of the administrative law judges present, and such presiding officer shall have authority to decide on all rulings.

(2) All determinations at the hearing shall be by majority vote of the administrative law judges.

(G) Transcript.

(1) The administrative law judge shall cause the proceedings to be recorded by a reporter or by an electronic recording device. If an electronic recording device is used, all parties shall be notified and given the opportunity to provide a reporter at the hearing at their own expense.

(2) The transcript of the record of the proceedings shall consist of a complaint, as amended; notice of hearing; an answer to the complaint, as amended; transcript of testimony; exhibits, depositions, orders; stipulations, pleadings; and such other documents as may properly become a part of the record.

Rule 10.10 - Declaratory Orders.

(A) Basis and purpose. These rules are adopted pursuant to § 24-4-105(11), C.R.S. (1988), as amended, in order to provide for a procedure for entertaining requests for declaratory orders to terminate controversies or to remove uncertainties with regard to the applicability of statutory provisions or rules or orders of the Civil Rights Commission to persons defined in the rules.

(B) Any person may petition the commission for a declaratory order to terminate controversies or to remove uncertainties as to the applicability to the petitioner of any statutory provision or of any rule or order of the commission.

(C) The commission will determine, in its discretion and without notice to petitioner, whether to rule upon any such petition. If the commission determines that it will not rule upon such a petition, the commission shall promptly notify the petitioner of its action and state the reasons for such action.

(D) In determining whether to rule upon a petition filed pursuant to this rule, the commission will consider the following matters, among others:

(1) Whether a ruling on the petition will terminate a controversy or remove uncertainties as to the applicability to petitioner of any statutory provision or rule or order of the commission.

(2) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the commission or a court involving one or more of the petitioners.

(3) Whether the petition involves any subject, question or issue which is the subject of a formal or informal matter or investigation currently pending before the commission or a court but not involving any petitioner.

(4) Whether the petition seeks a ruling on a moot or hypothetical question or will result in an advisory ruling or opinion.

(5) Whether the petitioner has some other adequate legal remedy, other than an action for declaratory relief pursuant to Rule 57, C.R.C.P., which will terminate the controversy or remove any uncertainty as to the applicability to the petitioner of the statute, rule or order in question.

(E) Any petition filed pursuant to this rule shall set forth the following:

(1) The name and address of the petitioner.

(2) The statute, rule or order to which the petition relates.

(3) A concise statement of all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner.

(F) If the commission determines that it will rule on the petition, the following procedures shall apply:

(1) The commission may rule upon the petition based solely upon the facts presented in the petition. In such a case:

(a) Any ruling of the commission will apply only to the extent of the facts presented in the petition and any amendment to the petition.

(b) The commission may order the petitioner to file a written brief, memorandum or statement of position.

(c) The commission may set the petition, upon due notice to petitioner, for a non-evidentiary hearing.

(d) The commission may dispose of the petition on the sole basis of the matters set forth in the petition.

(e) The commission may request the petitioner to submit additional facts, in writing. In such event, such additional facts will be considered as an amendment to the petition.

(f) The commission may take administrative notice of facts pursuant to the State Administrative Procedure Act [§ 24-4-105(8), C.R.S. (1988), as amended], and may utilize its experience, technical competence and specialized knowledge in the disposition of the petition.

(g) If the commission rules upon the petition without a hearing, it shall promptly notify the petitioner of its decision.

(2) The commission may, in its discretion, set the petition for hearing under § 24-4-105, C.R.S. (1988), as amended, upon due notice to petitioner, for the purpose of obtaining additional facts or information or to determine the truth of any facts set forth in the petition or to hear oral argument on the petition. The notice to the petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the commission intends to inquire. For the purpose of such a hearing, to the extent necessary, the petitioner shall have the burden of proving all of the facts stated in the petition, all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the petitioner and any other facts the petitioner desires the commission to consider.

(G) The parties to any proceeding pursuant to this rule shall be the commission and the petitioner. Any other person may seek leave of the commission to intervene in such a proceeding, and leave to intervene will be granted at the sole discretion of the commission. A petition to intervene shall set forth the same matters as required by Rule 10.10(E) of this rule. Any reference to a "petitioner" in this rule also refers to any person who has been granted leave to intervene by the commission.

(H) Any declaratory order or other order disposing of a petition pursuant to this rule shall constitute final agency action subject to judicial review pursuant to § 24-4-106, C.R.S. (1988), as amended.

Rule 10.11 - Subpoenas, Notices to Produce Documents and Witness Fees.

(A) Issuance.

The administrative law judge may issue subpoenas and notices to produce documents.

(B) Cost of Service, Witness Fees and Mileage.

The cost of service, witness fees and mileage shall be borne by the commission or the party at whose insistence subpoenas and notices to produce are issued. Such fees paid shall be the same as provided a witness in the district courts of the State.

Rule 10.12 - Administrative Law Judge's Initial Decision.

The administrative law judge shall issue an initial decision within 30 days after the conclusion of the hearing, unless an application for extension of time is granted by the commission or a commissioner. Such initial decisions shall be rendered in accordance with § 24-4-105, C.R.S. (1988), as amended, except that the decision shall include a statement of the reasons why the findings of fact lead to the conclusions. In the absence of an appeal of the initial decision with 30 days of service, pursuant to Rule 10.13, the initial decision shall become the final order of the commission.

Rule 10.13 - Appeals of the Administrative Law Judge's Decision.

(A) Filing Exceptions.

Any party who seeks to appeal the initial decision of the hearing officer shall file exceptions with the commission at the division's Denver office within 30 days after service of the initial decision upon the parties, in accordance with § 24-4-105, C.R.S. (1988), as amended.

(B) Designation of Record.

Under § 24-4-105(15)(a), C.R.S. (1988), as amended, an appealing party is required to "file with the agency, within twenty days following such decision, a designation of the relevant parts of the record ... and of the parts of the transcript of the proceedings which shall be prepared, and advance the cost therefor. A copy of this designation shall be served on all parties. Within ten days thereafter, any other party or the agency may also file a designation of additional parts of the transcript of the pro-ceedings which is to be included, and advance the cost therefor."

(C) All papers and documents of any kind which are directed to the commission on appeal shall be filed with an original and nine copies.

(D) The commission's final order shall be made a part of a certified transcript of the record of the proceedings, and the entire record shall be filed at the division's Denver office and shall be available for examination by the parties during regular business hours.

Rule 10.14 - Interpretation.

(A) Construction of rules. These rules shall be liberally construed to expedite the action of the commission and the division and to effectuate the purposes of the law.

(B) Application to the law. These rules are not intended to set forth a complete procedure, but rather to supplement and clarify the law. These rules are not designed to be jurisdictional and where not otherwise inconsistent with law, any of these rules may be modified in exceptional cases to meet emergencies or avoid substantial injustice or great hardship.

GENERAL PROVISIONS

Rule 20.1

Every employer, employment agency, labor organization, and place of public accommodation, amusement and resort shall post and maintain at its establishment a notice furnished by the commission which contains the provisions of Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended. The commission will not charge for the notices.

(A) With respect to employers and employment agencies, such notices must be posted conspicuously in easily accessible and well-lighted places customarily frequented by employees and applicants for employment, and at or near each location where employees' services are performed.

(B) With respect to labor organizations, such notices must be posted conspicuously in easily accessible and well-lighted places customarily frequented by members and applicants for membership.

(C) With respect to places of public accommodation, amusement and resort, such notices must be posted conspicuously in easily accessible and well-lighted places customarily frequented by people seeking accommodation, amusement, recreation, or other services offered to the general public.

Rule 20.2

Pursuant to § 24-34-501, C.R.S. (1988), et seq., as amended, real estate brokers or agents, home builders, home mortgage lenders and all other persons who transfer, rent, or finance real estate shall obtain one or more printed non-discrimination notices from the commission and post the notices in all places where real estate transfers, rentals and loans are executed. The commission will not charge for the notices. The notices shall be posted and maintained in conspicuous, well-lighted and easily accessible places ordinarily frequented by prospective buyers, renters, borrowers, and the general public.

Rule 20.3

No employer, employment agency, or labor organization as defined in § 24-34-401, C.R.S. (1988), as amended, shall suggest or require that applicants submit their photographs prior to their employment or placement, unless the requirement is based upon a bona fide occupational qualification.

Rule 20.4

No person shall post or permit to be posted in any place of public accommodation any sign which states or implies the following:

WE RESERVE THE RIGHT TO REFUSE SERVICE TO ANYONE.

Rule 20.5 - Preservation of Records.

(A) Retention of Records During Processing of Charge or Complaint.

In situations where a charge or complaint of discrimination is filed pursuant to Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended, all relevant records shall be kept until final disposition. Relevant records include personnel or employment records relating to the charging party or complainant and to all employees holding similar positions to the one the charging party or complainant held or sought, as well as application forms or test papers of all candidates for the positions, registration records, offers, leases, contracts, correspondence, business records, etc. Final disposition of the charge or complaint occurs when the statutory time periods for all appeals have expired.

(B) The failure to comply with this regulation shall create a rebuttable presumption, either by the commission, or the hearing examiner, that the records contained information adverse to the interests of the party.

HOUSING DISCRIMINATION

Rule 30.0

(A) Whereas the state law [the provisions of Part 5 of Article 34 of Title 24, C.R.S. (1988), as amended] concerning housing practices are substantially equivalent to Federal law concerning fair housing as set forth in the Fair Housing Act.

(B) Whenever possible, the interpretation of Part 5 of Article 34 of Title 24, C.R.S. (1988), as amended, shall follow the interpretations established in Federal housing regulations adopted to implement the Fair Housing Act and in the Federal case law and such interpretations shall be given weight and found to be persuasive in any administrative proceedings.

AGE DISCRIMINATION RULES

Rule 40.1 - Statement of Basis and Purpose.

These rules are adopted by the Colorado Civil Rights Commission pursuant to the authority contained in § 24-34-305(1)(a), C.R.S. (1988), as amended, and in order to implement and ensure compliance with Senate Bill 23, enacted during the 1985-86 legislative session, which for the first time prohibits age discrimination in employment in the State of Colorado. Senate Bill 23 is published at 1986 Colo. Sess. Laws 930-933.

These rules express the Colorado Civil Rights Commission's interpretation of Senate Bill 23 and indicate factors which the commission will take into consideration in determining whether or not there has been a violation of the law. The rules are designed to serve as a set of standards, to provide guidance, and to remove uncertainty and confusion as to whether employment policies concerning age conform to the basic purpose of elimination of discrimination in employment or are unlawful.

Rule 40.2 - Definitions.

(A) “Age” means a chronological age of at least 40 years, but less than 70 years.

(B) “Employee,” “employer,” “employment agency,” and “labor organization” shall have the meanings set forth in § 24-34-401, C.R.S. (1988), as amended. References in these rules to “employer(s)” include employment agencies and labor organizations for purposes of the application of these principles.

Rule 40.3 - Employment Violations.

(A) It is an unlawful employment practice to utilize employment and help wanted notices or advertisements containing terms and phrases which use the age of the applicant as a qualifying

factor including but not limited to, “age 25 to 35,” “young,” “recent college student.” “recent college graduate,” “age 40 to 50,” and “retired person.” To request that job applicants state their age or date of birth is not, in itself, a violation but because it may tend to deter older applicants, the request will be closely scrutinized.

(B) It is an unlawful employment practice to discriminate by giving preference because of age between individuals within the protected age group. Employment decisions affecting individuals within the protected age group must be based upon factors other than age.

Rule 40.4 - Exceptions.

(A) The exception for “bona fide seniority systems” or “bona fide employee benefit plans” of § 24-34-402(4)(b), C.R.S. (1988), as amended, will be narrowly construed. A bona fide seniority system must use length of service as the primary criterion, must not give those with longer service lesser rights, and must have been communicated to the affected employee(s). It is unlawful for a seniority system or employee benefit plan to require or permit the involuntary retirement of an employee within the protected age group on account of age except as provided in § 24-34-402(4)(c), C.R.S (1988), as amended. Nothing in § 24-34-402((4)(b), C.R.S (1988), as amended, prohibits use of a bona fide seniority system or bona fide benefit plan which permits individuals to elect, at their own option, early retirement at a specified age. It is not unlawful for a plan to require early retirement for reasons other than age.

(B) It is not an unlawful employment practice to compel the retirement of an employee who is between the ages of 65 and 70 years of age who, for the two-year period immediately before retirement, is employed as a bona fide executive or in a high policy-making position. Provided that:

(1) The “annual retirement benefit” to which covered employees must be entitled is the sum of amounts payable during each one-year period from the date on which such benefits first became receivable. The retirement benefit must equal, in the aggregate, at least $44,000 annually.

(2) For purposes of determining compliance, an “immediate non-forfeitable annual retirement benefit” means that the payment of plan benefits must occur not later than 60 days after the effective date of the retirement unless the employee elects to receive those benefits outside of the 60-day period.

(3) An annual retirement is deemed to be forfeitable if it is subject to provisions which could cause the cessation of payments or reduction of benefits to less than $44,000 in any one-year period such as engaging in litigation against the former employer or obtaining employment with a competitor. As of the effective date of retirement there must be a reasonable expectation that the annual retirement plan will meet its obligations. However, an annual retirement benefit will not be deemed forfeitable merely because it is not guaranteed against the possibility of bankruptcy.

CREED AND RELIGIOUS DISCRIMINATION RULES (GUIDELINES)

Rule 50.1 - Definition

Creed and religion are defined as a religious, moral or ethical belief which is sincerely held and includes all aspects of religious observance and practice.

Rule 50.2 - Statement of Purpose

(A) The rules in this part have been adopted to contribute to the implementation of nondiscriminatory personnel policies with respect to an employee's creed or religion, as required by Part 4 of Article

34 of Title 24, C.R.S.

(B) The rules in this part are designed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their policies concerning an employee's creed or religion conform with the basic purposes of the elimination of discrimination in employment as defined by the law.

Rule 50.3 - Observance of Sabbath and Other Religious Holidays.

(A) Several charges and complaints filed with the commission have raised the question whether it is discrimination on account of creed to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week as the Sabbath or who observe certain special religious holidays during the year, and, as a consequence, do not work on such days.

(B) The commission believes that the duty not to discriminate on the grounds of creed, required by the law, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees, where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

(C) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of creed, the employer must demonstrate that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

(D) The commission will review each charge and complainant on an individual basis in an effort to seek an equitable application of these rules to the variety of situations which arise due to the varied creeds of the people of Colorado.

RULES PROHIBITING DISCRIMINATION ON ACCOUNT OF MENTAL AND PHYSICAL DISABILITY

Rule 60.1 - General Provisions.

(A) General Statement of Purpose:

The purpose of the rules prohibiting discrimination on account of physical and mental disability is to ensure compliance with the provisions of Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended (the law), as the provisions relate to persons who may be discriminated against on account of physical or mental disability in employment, housing, public accommodations and advertising. The rules express the Colorado Civil Rights Commission's interpretation of the law and indicate factors which the commission will take into consideration in determining whether or not there has been a violation of the law.

(B) Whereas the State law [the pertinent provisions of Parts 3 through 8 of Article 34 of Title 24, C.R.S. (1988), as amended], concerning handicap and/or disability is substantially equivalent to Federal law, as set forth in the Americans with Disabilities Act of 1990 and the Fair Housing Act concerning disability.

(C) Whenever possible, the interpretation of state law [the provisions of Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended] concerning disability shall follow the interpretations established in Federal regulations adopted to implement the Americans with Disabilities Act and the Fair Housing Act and in the Federal case law interpreting the Americans with Disabilities Act and the Fair Housing Act, and such interpretations shall be given weight and found to be

persuasive in any administrative proceedings.

(D) Definitions:

(1) “Handicap” or “Disability” means, with respect to a person, a physical or mental impairment which substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment. The word “disability” can be substituted for the word “handicap”. No change in definition or substance is intended nor should be attributed to this change in phraseology.

(a) “Physical impairment” means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems including, but not limited to: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine.

(b) “Mental impairment” means 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, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, and emotional illness.

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

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

(e) “Is regarded as having such an impairment” means (1) Has a physical or mental impairment that does not substantially limit one or more major life activities but that is treated by another person as constituting such a limitation; (2) Has a physical or mental impairment that substantially limits one or more major life activities only as a result of the attitudes of others toward such impairment; or (3) Has none of the impairments defined as a physical or mental impairment in paragraphs a and b, above, but is treated by another person as having such an impairment.

(f) “Substantially limits” means unable to perform a major life activity that the average person in the general population can perform or is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) “Facility” means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(3) “Auxiliary aids” means devices or aids used by persons having a disability to overcome their disability, such as, but not limited to, readers, interpreters, dog guides, breathing equipment, wheel chairs, walkers, orthopedic appliances.

(E) Determination of Additional Expense.

(1) In determining the applicability of § 24-34-305(2), C.R.S. (1988), as amended, the commission shall consider (1) the extent to which the employer demonstrates that compliance with the law would require alteration, modification, or purchase of any building, structure, or equipment, or would require additional expense which would not otherwise be incurred and (2) the extent to which the employer demonstrates the unavailability of alternatives not requiring additional expense.

(2) Although persons subject to Parts 3, 4, 6 and 7 of Article 34 of Title 24, C.R.S. (1988), as amended, are not required to incur any additional expense under § 24-34-305(2), C.R.S. (1988), as amended, such persons are not prohibited from undertaking such expense in order to overcome the effects of conditions that resulted in limited participation by qualified disabled individuals in the person's operation or activity.

Rule 60.2 - Employment.

(A) Discrimination prohibited: no qualified disabled person shall, on account of disability, be subjected to discrimination in employment as prohibited by § 24-34-401, C.R.S. (1988), as amended, with respect to employment.

(B) “Qualified disabled person” means a person with a disability who, with reasonable accommodation, can perform the essential functions of the job in question.

(C) Reasonable Accommodation.

(1) A person subject to Part 4 of Article 34 of Title 24, C.R.S. (1988), as amended, shall make reasonable accommodation to the known physical limitations of an otherwise qualified disabled applicant or employee unless the person can demonstrate the accommodation would impose an undue hardship or that it would require any additional expense that would not otherwise be incurred.

(2) Reasonable accommodation may include:

(a) making facilities used by employees readily accessible to and useable by physically disabled persons, and

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

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

(a) the overall size of the employer's operation with respect to number of employees, number and type of facilities, and size of budget;

(b) the type of the employer's operation, including the composition and structure of the employer's work force; and

(c) the nature, cost, and funding for the accommodation needed, including, but not limited to, such sources as the Colorado state division of vocational rehabilitation, the personal resources of the person with the disability, and private organizations which provide financial support and auxiliary aids.

(D) Employment Criteria.

(1) An employer may not make use of any employment test or other selection criterion that screens out or tends to screen out persons with disabilities:

(a) unless the test score of other selection criterion, as used by the employee is shown to be job-related for the position in question, or

(b) if alternative job-related tests or criteria that screen out or tend to screen out fewer persons with disabilities are available.

(2) An employer shall select and administer tests concerning employment to ensure that, when administered to an applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other fact the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual or speaking skills (except where those skills are the factors that the test purports to measure).

(E) Employment Inquiries.

(1) Except as provided in paragraphs (2) and (3) of this section, an employer may not conduct a pre-employment medical examination, may not make pre-employment inquiries as to whether the applicant is a disabled person, and may not inquire about the nature or severity of a physical disability. An employer may, however, make pre-employment inquiries into an applicant's ability to perform job-related functions.

(2) When an employer has taken remedial action to correct the effects of past discrimination or when an employer is taking affirmative action, the employer may invite applicants for employment to indicate whether and to what extent they are physically disabled provided that:

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

(b) the employer states clearly that the information is being requested on a voluntary basis, that it will be confidential as provided in paragraph (4) of this section, that the refusal to provide it will not subject the applicant or employee to any adverse treatment, and that such information will be used only in accordance with remedial and affirmative action.

(3) Nothing in this section shall prohibit an employer from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that:

(a) all entering employees are subjected to such an examination regardless of disability, and

(b) the results of such an examination are used only in accordance with the requirements of these rules and regulations.

(4) Information obtained in accordance with this section shall be collected and maintained on separate forms that shall be accorded the same confidentiality as medical records, except that:

(a) supervisors and managers may be informed regarding restrictions on the work or duties of persons with disabilities and regarding necessary accommodations;

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

(c) Colorado Civil Rights Division staff investigating compliance with rules shall be provided the information upon request.

Rule 60.3 - Housing.

(A) Discrimination Prohibited.

No person with a disability shall, on account of disability, be subjected to discrimination in housing as prohibited by § 24-34-501, C.R.S. (1988), et seq., as amended.

(B) A refusal or denial of equal terms, conditions, or privileges of housing, or sale, assignment, transfer, rental, sublease, or financing of housing because of the use by the person with the disability of any auxiliary aid shall constitute a refusal or denial because of disability and constitute a violation of this part 5.

Rule 60.4 - Public Accommodation.

(A) Discrimination Prohibited.

No person with a disability shall, on account of disability, be subjected to discrimination in any public accommodation as prohibited by §§ 24-34-601, and 701, C.R.S. (1988), et seq., as amended.

(B) Subject to provisions of Rule 60.1(C), in regard to the determination of additional expense, a refusal or denial of a public accommodation or advertisement indicating a limitation, denial, or refusal, expressed or implied of a public accommodation because the person who has the disability uses an auxiliary aid shall constitute a refusal, denial or limitation because of disability and be considered a violation of Parts 6 and 7 of Article 34 of Title 24, C.R.S. (1988), as amended.

(C) Subject to provisions of Rule 60.1(C), in regard to the determination additional expense, a person subject to Parts 6 and 7 of Article 34 of Title 24, C.R.S. (1988), as amended, shall operate their public accommodation so that it, when viewed in its entirety, is readily accessible to disabled persons. This paragraph does not require such person to make each of its existing facilities or every part of a facility accessible to persons with disabilities.

NATIONAL ORIGIN DISCRIMINATION RULES

Rule 70.1

The commission is aware of the widespread practices of discrimination on the basis of national origin, and intends to apply the full force of law to eliminate such discrimination. The bona fide occupational qualification exception as it pertains to national origin cases shall be strictly construed.

Rule 70.2

The law, Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended, is intended to eliminate covert as well as overt practices of discrimination, and the commission will, therefore, examine with particular concern cases where persons within the jurisdiction of the commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations. Examples of

cases of this character which have come to the attention of the commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed; denial of equal opportunity to persons married to or associated with persons of a specific national origin; denial of equal opportunity because of attendance at schools or churches commonly utilized by persons of a given national origin; denial of equal opportunity because their name or that of their spouse reflects a certain national origin; and denial of equal opportunity to persons who as a class of person tend to fall outside national norms for height and weight where such height and weight specifications are not necessary for the performance of the work involved.

Rule 70.3

The law protects all persons, including non-citizens, against discrimination on the basis of race, creed, color, sex, national origin, ancestry, physical or mental disability, marital status and age in employment. Persons also are protected on the basis of marital status, religion and familial status in housing, and marital status in public accommodations and advertising.

Rule 70.4

Discrimination in employment on the basis of citizenship against a lawfully immigrated alien residing in, and with the legal right to work in, the United States is a violation of the law when it has the purpose or effect of discriminating against persons of a particular national origin.

SEX DISCRIMINATION RULES

Rule 80.1 - Statement of Purpose.

(A) The guidelines in this section have been adopted to contribute to the implementation of non-discriminatory personnel policies of employers, unions, and employment agencies with respect to the sex of their employees, members, and job applicants as required by the Colorado Anti-Discrimination Act, Parts 3 through 7 of Article 34 of Title 24, C.R.S. (1988), as amended, hereinafter referred to as “the Act”.

(B) The guidelines in this part are designed to serve as a workable set of standards for employers, unions, and employment agencies in determining whether their policies concerning the sex of their employees, members and job applicants conform with the basic purpose of the elimination of discrimination in employment as defined by the Act. Section 24-34-305(1)(a), C.R.S. (1988), as amended, entitled “Powers and Duties of Commission,” authorizes the commission to “adopt, publish, amend and rescind” regulations consistent with and for the enforcement of the Act not to discriminate because of disability, race, creed, color, sex, age, national origin or ancestry.

Rule 80.2 - Sex as a Bona Fide Occupational Qualification.

(A) The commission believes that the bona fide occupational qualification exceptions as to sex should be interpreted narrowly. Labels - “Men's jobs” and “Women's jobs” - tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(a) The refusal to hire a woman because of her sex, based on assumptions of the comparative employment characteristics of women in general, for example: The assumption that the turnover rate among women is higher than among men.

(b) The refusal to hire an individual based on stereotyped characterizations of the sexes.

Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(c) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers.

(d) The fact that the employer may have to provide separate facilities for a person of the opposite sex will not justify discrimination under the bona fide occupational qualification, unless the expense would be clearly unreasonable.

(B) The employer must not make any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment.

(C) In the area of employment contributions for insurance, pensions, welfare programs and other similar "fringe benefits," the employer will not be considered to have violated these guidelines if his contributions are the same for men and women.

(1) "Fringe benefits" as used herein include medical, hospital, accident, life insurance and retirement benefits; profit sharing and bonus plans; leave and other terms, conditions, and privileges of employment.

(2) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(3) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of the household" or "principal wage earner" in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principal wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act.

(4) It shall be an unlawful practice for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits to the husbands of female employees which are not made available for female employees. An example of such an unlawful employment practice is the situation in which wives of male employees receive maternity benefits while female employees receive no such benefits.

(5) It shall be unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages on the basis of sex, or which differentiates in benefits on the basis of sex.

Rule 80.3 - Separate Lines of Progression and Seniority Systems.

(A) It is an unlawful employment practice to classify a job as "male" or "female" or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee, unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

(1) A female is prohibited from applying for a job labeled "male" or for a job in a "male" line of progression; and vice versa.

(2) A male scheduled for layoff is prohibited from displacing a less senior female on a “female” seniority list; and vice versa.

(B) A seniority system or line of progression which distinguishes between “light” and “heavy” jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex could reasonably be expected to perform.

Rule 80.4 - Discrimination Against Married Women.

(A) The commission has determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by the Colorado Anti-Discrimination Act, as re-enacted. It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex. This rule also applies to unmarried women who happen to be mothers, for example; in many instances, women who have small children in the home are denied employment. Such discrimination usually takes place at the initial employer's screening process through the asking of such questions as “How old are your children?, How many children do you have?, What are your plans for providing care for you children?, etc.”

(B) An employed woman should not have her employment terminated when she marries a man who works for the same business or institution by which she is employed. At the same time, a woman should not be denied employment by an employer due to rules against nepotism if she is otherwise qualified to perform the required work.

Rule 80.5 - Pre-Employment Inquiries as to Sex.

(A) Pre-employment inquiry may ask “Male, Female or Mr., Mrs., Miss,” provided that the inquiry is made in good faith for a non-discriminatory purpose. Any pre-empioyment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

Rule 80.6 - Pension and Retirement Plans.

(A) A difference in optional or compulsory retirement ages based on sex violates the Colorado Anti-Discrimination Act, as re-enacted.

(B) Other differences based on sex, such as differences in benefits for survivors, will be decided by the commission by the issuance of commission decisions in cases raising such issues.

Rule 80.7 - Discriminatory Wages.

(A) The employer's wages and wage schedules must not be related to or based on the sex of the employees.

NOTE: The more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort, and responsibility and are performed under similar working conditions.

(B) The employer may not discriminatorily restrict one sex to certain job classifications. In such a situation, the employer must take steps to make jobs available to all qualified employees in all classifications without regard to sex. (Example: An electrical manufacturing company may have a production division with three functional units; one, assembly - all female; another, wiring - all

males; and a third, circuit boards, also all male. The highest wage attainable in the assembly unit is considerably iess than that in the circuit board and wiring units. In such a case the employer must take steps to provide qualified female employees opportunity for placement in job openings in the other two units.)

Rule 80.8 - Pregnancy and Childbirth.

(A) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is prima facie discrimination.

(B) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom, are for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(C) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination is discriminatory if it has a disparate impact on employees of one sex and is not justified by business necessity.

Rule 80.9 - Affirmative Action.

(A) The employer shall take affirmative action to recruit women to apply for those jobs where they have been previously excluded. Such affirmative action may include but is not limited to notifying employment referral agencies that women are welcome to apply for all positions, recruiting at women's colleges, and the use of advertising which is not classified by sex.

Rule 80.10 - Job Opportunities Advertising.

(A) It is a violation of the Colorado Anti-Discrimination Act, as re-enacted. for a help wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such columns headed “Male” or “Female,” will be considered as an expression of preference, limitation, specification, or discrimination based on sex.

Rule 80.11 - Sexual Harassment.

(A) Harassment which results in discrimination in employment, housing, public accommodations or advertising on the basis of sex is a violation of the Act. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Harassment by persons subject to the Act or by their subordinates is a violation of the Act when, for example, (1) submission to such conduct is made either explicitly or implicitly a requirement of employment, housing, public accommodations or advertising, or, (2) the individual's response to such conduct is used as the basis for decisions which deny to such individual rights protected by the Act.

(B) In determining whether alleged conduct constitutes sexual harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(C) The commission encourages all persons subject to the Act to take steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under the Act, and developing methods to sensitize all concerned.

SEXUAL ORIENTATION DISCRIMINATION RULES

Rule 81.1 – Statement of Purpose

Repealed Effective 08/29/2008.

Rule 81.2 – Sexual Orientation

(A) The term "sexual orientation" as defined in §24-34-401(7.5), C.R.S. means a person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof.

(B) The term "transgender status" is an umbrella term that describes an individual whose gender identity or gender expression is different from that traditionally associated with that individual's assigned sex at birth.

Rule 81.3 - Separate Lines of Progression and Seniority Systems

It is an unlawful employment practice to classify any job according to sexual orientation or to maintain separate lines of progression or separate seniority lists based on sexual orientation where this would adversely affect any employee.

Rule 81.5 - Pre-Employment Inquiries

Any pre-employment inquiry in connection with prospective employment that expresses directly or indirectly any limitation, specification or discrimination as to sexual orientation shall be unlawful.

Rule 81.7 - Discriminatory Wages

The employer's wages and wage schedules must not be related to or based on the sexual orientation of the employees.

Rule 81.10 - Job Opportunities Advertising

It is a violation of the Colorado Employment Practices Act, as re-enacted, for a help wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sexual orientation unless sexual orientation is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sexual orientation, will be considered as an expression of preference, limitation, specification, or discrimination based on sexual orientation.

Rule 81.12 - Dress Code

If an employer has a reasonable gender-specific dress code, employers should permit employees to comply with the dress code provisions in an appropriate manner that is consistent with their gender identity. If a dress code is enforced it must be applied consistently to all employees.

WORK PLACE HARASSMENT

Rule 85.0

(A) It shall be a discriminatory or unfair employment practice for an employer, employment agency, labor organization, or its agents or supervisory employees, to harass, with or without loss of income or other tangible employment action, a person during the course of employment because of disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. Harassment occurs if an intimidating, hostile or offensive working environment is created based upon an individual's disability, race, creed, color, sex, sexual orientation, religion, age, national origin, or ancestry. An objectionable environment exists if a reasonable person would find the workplace hostile or abusive and the victim in fact perceived the workplace to be offensive. Harassment is not an illegal act unless a complaint is filed with the appropriate authority at the complainant's workplace and such authority fails to initiate a reasonable investigation of a complaint and take prompt remedial action if appropriate. For the purpose of this rule, "filed" means that a complaint is reported either verbally or in writing to the appropriate authority.

(B) In determining whether alleged conduct constitutes illegal harassment, the commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the offensive conduct and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(C) With respect to conduct between coworkers, an employer is responsible for acts of harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate remedial action.

(D) An employer may also be responsible for the acts of non-employees with respect to workplace harassment of employees where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate remedial action. In reviewing these cases the commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(E)In the event of alleged workplace harassment a defending employer may raise an affirmative defense to liability to a victimized employee. Such defense is that: (1) the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and (2) the victimized employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. This affirmative defense may be established by: a demonstration that the employer had promulgated an anti-harassment policy providing for a complaint procedure which was disseminated in the workplace prior to the occurrence of the offensive conduct and that the employee failed to report the offensive conduct to the appropriate authority in compliance with that complaint procedure. When the alleged violator is a supervisor of the employee, or is the actual employer, the employee is required to file a report with a person with management responsibilities with the employer. The affirmative defense may also be established in the absence of a formal policy if the employer demonstrates that when informed about the conduct it took reasonable steps to investigate and take prompt remedial action concerning the offensive behavior.

(F)Employers are encouraged to take all steps necessary to prevent workplace harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment and developing methods to sensitize all concerned.

(G) This rule 85 also applies to harassment based on retaliation for engaging in a protected activity, pursuant to Section 24-34-402(1)(e), C.R.S.

EMPLOYMENT TESTING RULES

Rule 90.0

The Colorado Civil Rights Commission (CCRC) adopts as its own rules the 1978 Federal Uniform Guidelines on Employee Selection Procedures in order to provide persons covered by Colorado and Federal law with one set of selection standards. Wherever these guidelines refer to Federal law, as in "Rule 90.2. Scope — A. Application of guidelines," the guidelines as adopted by the CCRC must be read to apply to, conform with and interpret Parts 3 and 4 of Article 34 of Title 24, C.R.S., as repealed and re-enacted by the State legislature in 1979.

(UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES GENERAL PRINCIPLES)

Rule 90.1 - Statement of Purpose.

(A) Need for uniformity - Issuing agencies. The Federal government's need for a uniform set of principles on the question of the use of tests and other selection procedures has long been recognized. The Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor, and the Department of Justice jointly have adopted these uniform guidelines to meet that need, and to apply the same principles to the Federal government as are applied to other employers.

(B) Purpose of guidelines. These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, the licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles.

(C) Relation to prior guidelines. These guidelines are based upon and supersede previously issued guidelines on employee selection procedures. These guidelines have been built upon court decisions, the previously issued guidelines of the agencies, and the practical experience of the guidelines of the agencies, as well as the standards of the psychological profession. These guidelines are intended to be consistent with existing law.

Rule 90.2 - Scope.

(A) Application of guidelines. These guidelines will be applied by the Equal Employment Opportunity Commission in the enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter "Title VII"); by the Department of Labor and the contract compliance agencies until the transfer of authority contemplated by the President's Reorganization Plan No. 1 of 1978, in the administration and enforcement of Executive Order 11246, as amended by Executive Order 11375 (hereinafter "Executive Order 11246"); by the Civil Service Commission and other Federal agencies subject to Section 717 of Title VII; by the Civil Service Commission in exercising its responsibilities toward State and local governments under § 208(b)(1) of the Intergovernmental Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

(B) Employment decisions. These guidelines apply to tests and other selection procedures which are used as a basis for any employment decision. Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as

selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.

(C) Selection procedures. These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently under-utilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element, of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures. Similarly, these guidelines do not pertain to the question of the lawfulness of a seniority system within the meaning of Section 703(h), Executive Order 11246 or other provisions of Federal law or regulation, except to the extent that such systems utilize selection procedures to determine qualifications or abilities to perform the job. Nothing in these guidelines is intended or should be interpreted as discouraging the use of a selections procedure for the purpose of determining qualifications or for the purpose of selection on the basis of relative qualifications, if the selection procedure had been validated in accord with these guidelines for each such purpose for which it is to be used.

(D) Limitations. These guidelines apply only to persons subject to Title VII, Executive Order 11246, or other equal employment opportunity requirements of Federal law. These guidelines do not apply to responsibilities under the Age Discrimination in Employment Act of 1967, as amended, not to discriminate on the basis of age, or under Sections 501, 503, and 504 of the Rehabilitation Act of 1973, not to discriminate on the basis of disability.

(E) Indian preference not affected. These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation.

Rule 90.3 - Discrimination defined: Relationship Between Use of Selection Procedures and Discrimination.

(A) Procedures having adverse impact constitutes discrimination unless justified. The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of Rule 90.6, below, are satisfied.

(B) Consideration of suitable alternative selection procedures. Where two or more selection procedures are available which serve the user's legitimate interest in efficient and trustworthy workmanship, and which are substantially equally valid for a given purpose, the user should use the procedure which has been demonstrated to have the lesser adverse impact. Accordingly, whenever a validity study is called for by these guidelines, the user should include, as a part of the validity study, an investigation of suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. If a user has made a reasonable effort to become aware of such alternative procedures and validity has been demonstrated in accord with these guidelines, the use of the test or other selection procedure may continue until such time as it should reasonably be reviewed for currency. Whenever the user is shown an alternative selection procedure with evidence of less adverse impact and substantial evidence of validity for the same job in similar circumstances, the user should investigate it to determine the appropriateness of using or validating it in accord with these guidelines. This subsection is not intended to preclude the combination of procedures into a significantly more valid procedure, if the use of such a combination has been shown to be in compliance with the guidelines.

Rule 90.4 - Information on Impact.

(A) Records concerning impact. Each user should maintain and have available for inspection records or other information which will disclose the impact which its test and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in Rule 90.4(B), below, in order to determine compliance with these guidelines. Where there are large numbers of applicants and procedures are administered frequently, such information may be retained on a sample basis, provided that the sample is appropriate in terms of the applicant population and adequate in size.

(B) Applicable race, sex, and ethnic groups for recordkeeping. The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South America, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO-1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See Rule 90.4(E), below.

(C) Evaluation of selection rates. The “bottom line.” If the information called for by Rules 90.4(A) and (B), above, shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multi-part selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedures (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) above, the Federal enforcement agencies may request a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual component.

(D) Adverse impact and the “four-fifths rule.” A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms, or where a user's actions have discouraged applicants disproportionately on grounds of race, sex or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact, but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same

manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an under-utilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

(E) Consideration of user's equal employment opportunity posture. In carrying out their obligations, the Federal enforcement agencies will consider the general posture of the user with respect to equal employment opportunity for the job or group of jobs in question. Where a user has adopted an affirmative action program, the Federal enforcement agencies will consider the provisions of that program including the goals and timetables which the user has adopted and the progress which the user has made in carrying out that program and in meeting the goals and timetables. While such affirmative action programs may in design and execution be race, color, sex, or ethnic conscious, selection procedures under such programs should be based upon the ability or relative ability to do the work.

Rule 90.5 - General Standards for Validity Studies.

(A) Acceptable types of validity studies. For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, in accordance with standards set forth in the technical standards of these guidelines, Rule 90.14, below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

(B) Criterion-related, content, and construct validity. Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See Rule 90.14(B), below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See Rule 90.14(C), below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See Rule 90.14(D), below.

(C) Guidelines are consistent with professional standards. The provisions of these guidelines relating to validation of selection procedure are intended to be consistent with generally accepted professional standards for evaluating standardized tests and other selection procedures, such as those described in the Standards for Educational and Psychological Tests prepared by a joint committee of the American Psychological Association, the American Educational Research Association, and the National Council on Measurement in Education (American Psychological Association, Washington, D.C., 1974) (hereinafter “A.P.A. Standards”), and standard textbooks and journals in the field of personnel selection.

(D) Need for documentation of validity. For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in Rule 90.15, below.

(E) Accuracy and standardization. Validity studies should be carried out under conditions which assure insofar as possible the adequacy and accuracy of the research and the report. Selection procedures should be administered and scored under standardized conditions.

(F) Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period. In general, users should avoid making employment decisions on the basis of measures of

knowledges, skills, or abilities which are normally learned in a brief orientation period and which have an adverse impact.

(G) Method of use of selection procedures. The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass-fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see Rule 90.5(H), below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See Rules 90.3(B), 90.14(B)(5) and (6), and 90.14(C)(8) and (9).

(H) Cutoff scores. Where cutoff scores are used, they should normally be set so as to be reasonable and consistent with normal expectations of acceptable proficiency within the work force. Where applicants are ranked on the basis of properly validated selection procedures and those applicants scoring below a higher cutoff score than appropriate in light of such expectations have little or no chance of being selected for employment, the higher cutoff score may be appropriate, but the degree of adverse impact should be considered.

(I) Use of selection procedures for higher level jobs. If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A “reasonable period of time” will vary for different jobs and employment situations, but will seldom be more than five years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate:

(1) if the majority of those remaining employed do not progress to the higher level job;

(2) if there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or

(3) if the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

(J) Interim use of selection procedures. Users may continue the use of a selection procedure which is not, at the moment, fully supported by the required evidence of validity, provided: (1) the use has available substantial evidence of validity, and (2) the use has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a study is not technically feasible, see Rule 90.6(B). If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

(K) Review of validity studies for currency. Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review, as provided in Rule 90.3(B), above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

Rule 90.6 - Use of Selection Procedures Which Have Not Been Validated.

(A) Use of alternate selection procedures to eliminate adverse impact. A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See Rule 90.13, below. Such alternative procedures should eliminate the adverse impact on the total selection process, should be lawful and should be as job related as possible.

(B) Where validity studies cannot or need not be performed. There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact, as set forth below:

(1) Where informal or unscored procedures are used. When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure to one which is a formal, scored or quantified measure or combination of measures and then validate the procedure in accord with these guidelines, or otherwise justify continued use of the procedure in accord with Federal law.

(2) Where formal and scored procedures are used. When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed, if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these guidelines, the user should either modify the procedure to eliminate adverse impact, or otherwise justify continued use of the procedure in accord with Federal law.

Rule 90.7 - Use of Other Validity Studies.

(A) Validity studies not conducted by the user. Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see Rule 90.5(C), above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

(B) Use of criterion-related validity evidence from other sources. Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) Validity evidence. Evidence from the available studies meeting the standards of Rule 90.14(B), below, clearly demonstrates that the selection procedure is valid;

(2) Job similarity. The incumbents in the user's job, and the incumbents in the job or group of jobs on which the validity study conducted, perform substantially the same major work behaviors. as shown by appropriate job analyses, both on the job or group of jobs on which the validity study was performed, and on the job for which the selection procedure is to be used; and

(3) Fairness evidence. The studies include a study of test fairness for each race, sex. and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy (1) and (2), above, but do not contain an investigation of test fairness, and it is not technically feasible

for the borrowing user to conduct an internal study of test fairness, the borrowing user may utilize the study until studies conducted elsewhere meeting the requirements of these guidelines show test unfairness, or until such time as it becomes technically feasible to conduct an internal study of test fairness and the results of that study can be acted upon. Users obtaining selection procedures from publishers should consider, as one factor in the decision to purchase a particular selection procedure, the availability of evidence concerning test fairness.

(C) Validity evidence from multi-unit study. If validity evidence from a study covering more than one unit within an organization satisfies the requirements of Rule 90.14(B), below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

(D) Other significant variables. If there are variable in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with Rule 90.6, above.

Rule 90.8 - Cooperative Studies.

(A) Encouragement of cooperative studies. The agencies issuing these guidelines encourage employers, labor organizations, and employment agencies to cooperate in research, development, search for lawful alternatives, and validity studies in order to achieve procedures which are consistent with these guidelines.

(B) Standards for use of cooperative studies. If validity evidence from a cooperative study satisfies the requirements of Rule 90.14, below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

Rule 90.9 - No Assumption of Validity.

(A) Unacceptable substitutes for evidence of validity. Under no circumstances will the general reputation of a test or other selection procedures, its author or its publisher, or casual reports of its validity, be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on a procedure's name or descriptive labels; all forms of promotional literature; data bearing on the frequency of a procedure's usage; testimonial statements and credentials of sellers, users, or consultants; and other non-empirical or anecdotal accounts of selection practices or selection outcomes.

(B) Encouragement of professional supervision. Professional supervision of selection activities is encouraged, but is not a substitute for documented evidence of validity. The enforcement agencies will take into account the fact that a thorough job analysis was conducted and that careful development and use of a selection procedure in accordance with professional standards enhance the probability that the selection procedure is valid for the job.

Rule 90.10 - Employment Agencies and Employment Services.

(A) Where selection procedures are devised by agency. An employment agency, including private employment agencies and State employment agencies, which agrees to a request by an employer or labor organization to devise and utilize a selection procedure, should follow the standards in these guidelines for determining adverse impact. If adverse impact exists, the agency should comply with these guidelines. An employment agency is not relieved of its obligation herein because the user did not request such validation or has requested the use of some lesser standard of validation than is provided in these guidelines. The use of an employment agency does not relieve an employer, labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity or its obligations as a

user under these guidelines.

(B) Where selection procedures are devised elsewhere. Where an employment agency or service is requested to administer a selection procedure which has been devised elsewhere and to make referrals pursuant to the results. the employment agency or service should maintain and have available evidence of the impact of the selection and referral procedures which it administers. If adverse impact results, the agency or service should comply with these guidelines. If the agency or services seeks to comply with these guidelines by reliance upon validity studies to other data in the possession of the employer, it should obtain and have available such information.

Rule 90.11 - Disparate Treatment.

The principles of disparate or unequal treatment must be distinguished from the concepts of validation. A selection procedure -- even though validated against job performance in accordance with these guidelines — cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group where other employees, applicants have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group where other employees, applicants, or members have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to qualify under less stringent selection procedures previously followed, unless the user demonstrates that the increased standards are required by business necessity. This section does not prohibit a user who has not previously followed merit standards from adopting merit standards which are in compliance with these guidelines; nor does it preclude a user who has previously used invalid or unvalidated selection procedures from developing and using procedures which are in accord with these guidelines.

Rule 90.12 - Re-Testing of Applicants.

Users should provide a reasonable opportunity for re-testing and reconsideration. Where examinations are administered periodically with public notice, such reasonable opportunity exists, unless persons who have previously been tested are precluded from re-testing. The user may, however, take reasonable steps to preserve the security of its procedures.

Rule 90.13 - Affirmative Action.

(A) Affirmative action obligations. The use of selection procedures which have been validated pursuant to these guidelines does not relieve users of any obligations they may have to undertake affirmative action to assure equal employment opportunity. Nothing in these guidelines is intended to preclude the use of lawful selection procedures which assist in remedying the effects of prior discriminatory practices, or the achievement of affirmative action objectives.

(B) Encouragement of voluntary affirmative action programs. These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and re-affirm for all governmental employers the Equal Employment Opportunity Coordinating Council's “Policy Statement on Affirmative Action Programs for State and Local Government Agencies” (41 FR 38814, September 13, 1976).

Rule 90.14 - Technical Standards for Validity Studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See Rules 90.6 and 90.7, above.

(A) Validity studies should be based upon a review of information about the job. Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in Rule 90.14(B)(3), below, with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

(B) Technical standards for criterion-related validity studies:

(1) Technical feasibility. Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in Rule 90.16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) Analysis of the job. There should be a review of job information to determine measures of work behavior(s) or performance that are relevant to the job or group of jobs in question. These measures or criteria are relevant to the extent that they represent critical or important job duties, work behavior or work outcomes as developed from the review of job information. The possibility of bias should be considered both in selection of the criterion measures and their application. In view of the possibility of bias in subjective evaluations, supervisory rating techniques and instructions to raters should be carefully developed. All criterion measures and the methods for gathering data need to be examined for freedom from factors which would unfairly alter scores of members of any group. The relevance of criteria and their freedom from bias are of particular concern when there are significant differences in measures of job performance for different groups.

(3) Criterion measures. Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include, but are not limited to, production rate tardiness, absenteeism, and length of service. A standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown, either through a comparison of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include, but are not limited to, instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) Representativeness of the sample. Whether the study is predictive or concurrent, the sample subjects should, insofar as feasible, be representative of the candidates normally

available in the relevant labor market for the job or group of jobs in question, and should, insofar as feasible, include the races, sexes, and ethnic groups normally available in the relevant labor market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job.

Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) Statistical relationships. The degree of relationship between selection procedure scores and criterion measures should be examined and computed, using professionally acceptable statistical procedures. Generally, a selection procedure is considered related to the criterion, for the purposes of these guidelines, when the relationship between performance on the procedure and performance on the criterion measure is statistically significant at the 0.05 level of significance, which means that it is sufficiently high as to have a probability of no more than one (1) in twenty (20) to have occurred by chance. Absence of a statistically significant relationship between a selection procedure and job performance should not necessarily discourage other investigations of the validity of that selection procedure.

(6) Operational use of selection procedures. Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors remain the same, the greater the magnitude of the relationship (e.g., correlation coefficient) between performance on a selection procedure and one or more criteria of performance on the job, and the greater the importance and number of aspects of job performance covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) Overstatement of validity findings. Users should avoid reliance upon techniques which tend to overestimate validity findings as a result of capitalization on chance unless an appropriate safeguard is taken. Reliance upon a few selection procedures or criteria of successful job performance when many selection procedures or criteria of performance have been studied, or the use of optimal statistical weights for selection procedures computed in one sample, are techniques which tend to inflate validity estimates as a result of change. Use of a large sample is one safeguard: cross-validation is another.

(8) Fairness. This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a job

class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

(a) Unfairness defined. When members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in scores are not reflected in differences in a measure of job performance, use of the selection procedure may unfairly deny opportunities to members of the group that obtains the lower scores.

(b) Investigation of fairness. Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in Rule 90.4, above, and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

(c) General considerations in fairness investigations. Users conducting a study of fairness should review the A.P.A. Standards regarding investigation of possible bias in testing. An investigation of fairness of a selection procedure depends on both evidence of validity and the manner in which the selection procedure is to be used in a particular employment context. Fairness of a selection procedure cannot necessarily be specified in advance without investigating these factors. Investigation of fairness of a selection procedure in samples where the range of scores on selection procedures or criterion measures is severely restricted for any subgroup sample (as compared to other subgroup samples) may produce misleading evidence of unfairness. That factor should accordingly be taken into account in conducting such studies and before reliance is placed on the results.

(d) When unfairness is shown. If unfairness is demonstrated through a showing that members of a particular group perform better or poorer on the job than their scores on the selection procedure should indicate through comparison with how members of other groups perform, the user may either revise or replace the selection instrument in accordance with these guidelines, or may continue to use the selection instrument operationally with appropriate revisions in its use to assure compatibility between the probability of successful job performance and the probability of being selected.

(e) Technical feasibility of fairness studies. In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see Rule 90.16, below), an investigation of fairness requires the following:

1) An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.

2) The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study

and their effects identified.

(f) Continued use of selection procedures when fairness studies not feasible. If a study of fairness should otherwise be performed, but is not technically feasible, a selection procedure may be used which has otherwise met the validity standards of these guidelines, unless the technical infeasibility resulted from discriminatory employment practices which are demonstrated by facts other than past failure to conform with requirements for validation of selection procedures. However, when it becomes technically feasible for the user to perform a study of fairness and such a study is otherwise called for, the user should conduct the study of fairness.

(C) Technical standards for content validity studies.

(1) Appropriateness of content validity studies. Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in Rule 90.14(C)(4), below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content of strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, common sense, judgment, leadership, and spatial ability. Content validity is also not an appropriate strategy when the selection procedure involves knowledges, skills, or abilities which an employee will be expected to learn on the job.

(2) Job analysis for content validity. There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job.

(3) Development of selection procedures. A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by the user, or by other users or by a test publisher.

(4) Standards for demonstrating content validity. To demonstrate the content validity of a selection procedure, a user should show that the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job. In the case of a selection procedure measuring a knowledge, skill, or ability, the knowledge, skill, or ability being measured should be operationally defined. In the case of a selection procedure measuring a knowledge, the knowledge being measured should be operationally defined as that body of learned information which is used in and is a necessary prerequisite for observable aspects of work behavior of the job. In the case of skills or abilities, the skill or ability being measured should be operationally defined in terms of observable aspects of work behavior of the job. For any selection procedure

measuring a knowledge, skill, or ability the user should show that (a) the selection procedure measures and is a representative sample of that knowledge, skill or ability; and (b) that knowledge, skill, or ability is used in and is a necessary prerequisite to performance of critical or important work behavior(s). In addition, to be content valid, a selection procedure measuring a skill or ability should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis of showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) Relibility. The reliability of selection procedures justified on the basis of content validity should be a matter of concern to the user Whenever it is feasible, appropriate statistical estimates should be made of the reliability of the selection procedure.

(6) Prior training or experience. A requirement for or evaluation of specific prior training or experience based on content validity, including a specification of level or amount of training or experience, should be justified on the basis of the relationship between the content of the training or experience and the content of the job for which the training or experience is to be required or evaluated. The critical consideration is the resemblance between the specific behaviors, products, knowledges, skills, or abilities in the experience or training as a whole and the job as a whole.

(7) Content validity of training success. Where a measure of success in a training program is used as a selection procedure and the content of a training program is justified on the basis of content validity, the use should be justified on the relationship between the content of the training program and the content of the job.

(8) Operational use. A selection procedure which is supported on the basis of content validity may be used for a job if it represents a critical work behavior (i.e., a behavior which is necessary for performance of the job) or work behaviors which constitute most of the important parts of the job.

(9) Ranking based on content validity studies. If a user can show, by a job analysis or otherwise, that a higher score on a content valid selection procedure is likely to result in better job performance; the results may be used to rank persons who score above minimum levels. Where a selection procedure supported solely or primarily by content validity is used to rank job candidates, the selection procedure should measure those aspects of performance which differentiate among levels of job performance.

(D) Technical Standards for construct validity studies.

(1) Appropriateness of construct validity studies. Construct validity is a more complex strategy than either criterion-related or content validity. Construct validation is a relatively new and developing procedure in the employment field, and there is at present a lack of substantial literature extending the concept to employment practices. The user should be aware that the effort to obtain sufficient empirical support for construct validity is both an extensive and arduous effort involving a series of research studies, which include criterion related validity studies and which may include content validity studies. Users choosing to justify use of a selection procedure by this strategy should therefore take particular care to assure that the validity study meets the standards set forth below.

(2) Job analysis for construct validity studies. There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance on the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work behaviors in the job or jobs in question. Each construct should be named and defined, so as to distinguish it from other constructs. If a group of jobs is being studied the jobs should have in common one or more critical or important work behaviors at a comparable level of complexity.

(3) Relationship to the job. A selection procedure should then be identified or developed which measures the construct identified in accord with Rule 90.14(D)(2), above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of Rule 90.14(B), above.

(4) Use of construct validity study without new criterion related evidence.

(a) Standards for use. Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfied Rule 90.14(B), above, only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in Rule 90.7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies Rules 90.14(B)(2) and (3), above, for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studies, the Federal enforcement agencies will expect, at a minimum, additional empirical research evidence meeting the standards of Rule 90.14(B)(2) and (3) above for the additional jobs or groups of jobs.

(b) Determination of common work behaviors. In determining whether two or more jobs have one or more work behavior(s) in common, the user should compare the observed work behavior(s) in each of the jobs and should compare the observed work product(s) in each of the jobs. If neither the observed work behavior(s) in each of the jobs nor the observed work product(s) in each of the jobs are the same, the Federal enforcement agencies will presume that the work behavior(s) in each job are different. If the work behaviors are not observable, then evidence of similarity of work products and any other relevant research evidence will be considered in determining whether the work behavior(s) in the two jobs are the same.

Rule 90.15 - Documentation of Impact and Validity Evidence.

(A) Required information. Users of selection procedures other than those users complying with Rule 90.15(A)(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) Simplified recordkeeping for users with less than 100 employees. In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other required to file EEO-1, et seq., reports, such users may satisfy the requirements of this Rule 90.15 if they maintain and have available records showing, for each year:

(a) The number of persons hired, promoted, and terminated for each job, by sex, and where appropriate by race and national origin;

(b) The number of applicants for hire and promotion by sex and where appropriate by race and national origin; and

(c) The selection procedures utilized (either standardized or not standardized).

These records should be maintained for each race or national origin group (see Rule 90.4, above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see section above), if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence or validity for that procedure [see Rules 90.7(A) and (8)].

(2) Information on impact.

(a) Collection of information on impact. Users of selection procedures other than those complying with Rule 90.15(A)(1), above, should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by Rule 90.4(B), above. Adverse impact determinations should be made at least annually for each such group which constitutes at least two percent (2%) of the labor force in the relevant labor area or two percent (2%) of the applicable work force. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual components except in circumstances set forth in Rule 90.15(A)(2)(b), below. If the determination of adverse impact is made using a procedure other than the “four-fifths rule,” as defined in the first sentence of Rule 90.4(D), above, a justification, consistent with Rule 90.4(D), above, for the procedure used to determine adverse impact should be available.

(b) When adverse impact has been eliminated in the total selection procedures. Whenever the total selection procedures for a particular job has had an adverse impact, as defined in Rule 90.4, above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two years after the adverse impact has been eliminated.

(c) When data insufficient to determine impact. Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in Rule 90.15(A)(2)(a), above, until the information is sufficient to determine that the overall selection process does not have an

adverse impact as defined in Rule 90.4. above, or until the job has changed substantially.

(3) Documentation of validity evidence.

(a) Types of evidence. Where a total selection process has an adverse impact (see Rule 90.4, above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

1) Documentation evidence showing content validity of the selection procedure (see Rule 90.15(C), below).

2) Documentation evidence showing criterion-related validity of the selection procedure (see Rule 90.15(B), below).

3) Documentation evidence showing construct validity of the selection procedure (see Rule 90.15(D), below).

4) Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see Rule 90.15(E), below).

5) Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

(b) Form of report. This evidence should be compiled in a reasonably complete and organized manner to permit direct evaluation of the validity of the selection procedure. Previously written employer or consultant reports of validity, or reports describing validity, or reports describing validity studies completed before the issuance of these guidelines are acceptable if they are complete in regard to the commentation requirements contained in this section, or if they satisfied requirements of guidelines which were in effect when the validity study was completed. If they are not complete, the required additional documentation should be appended. If necessary information is not available the report of the validity study may still be used as documentation, but its adequacy will be evaluated in terms of compliance with the requirements of these guidelines.

(c) Completeness. In the event that evidence of validity is reviewed by an enforcement agency, the validation reports completed after the effective date of these guidelines are expected to contain the information set forth below. Evidence denoted by use of the word “(Essential)” is considered critical. If information denoted essential is not included, the report will be considered incomplete unless the user affirmatively demonstrates either its unavailability due to circumstances beyond the user's control or special circumstances of the user's study which make the information irrelevant. Evidence not so denoted is desirable but its absence will not be a basis for considering a report incomplete. The user should maintain and have available the information called for under the heading “Source Data” in Rule 90.15(B)(11) and 15(D)(11). While it is a necessary part of the study, it need not be submitted with the report. All statistical results should be organized and presented in tabular or graphic form to the extent feasible.

(B) Criterion-related validity studies. Reports of criterion related validity for a selection procedure should include the following information:

(1) User(s), location(s), and date(s) of study. Dates and location(s) of the job analysis or review of job information, the date(s) and location(s) of the administration of the selection procedures and collection of criterion data, and the time between collection of data on selection procedures and criterion measures should be provided (Essential). If the study was conducted at several locations, the address of each location, including city and state, should be shown.

(2) Problem and setting. An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cut-off scores, if any, should be provided.

(3) Job analysis or review of job information. A description of the procedures used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis [see Rule 90.14(B)(3)], the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required, a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping [see Rule 90.14(B)(1)] should be provided (Essential).

(4) Job titles and codes. It is desirable to provide the user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from U.S. Employment Service's Dictionary of Occupational Titles.

(5) Criterion measures. The bases for the selection of the criterion measures should be provided, together with references to the evidence considered in making the selection of criterion measures (Essential). A full description of all criteria on which data were collected and means by which they were observed, recorded, evaluated, and quantified, should be provided (Essential). If rating techniques are used as criterion measures, the appraisal form(s) and instructions to the rater(s) should be included as part of the validation evidence, or should be explicitly described and available (Essential). All steps taken to insure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described (Essential).

(6) Sample description. A description of how the research sample was identified and selected should be included (Essential). The race, sex, and ethnic composition of the sample, including those groups set forth in Rule 90.4(A), above, should be described (Essential). This description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

(7) Description of selection procedures. Any measure, combination of measures, or procedure studied should be completely and explicitly described or attached (Essential). If commercially available selection procedures are studied, they should be described by title, form, and publisher (Essential). Reports of reliability estimates and how they were established are desirable.

(8) Techniques and results. Methods used in analyzing data should be described (Essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard

deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (Essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (Essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, they need not be reported separately. Statements regarding the statistical significance of results should be made (Essential). Any statistical adjustments, such as for less than perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (Essential). Where the statistical technique categorizes continuous data, such as bi-serial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (Essential). Studies of test fairness should be included where called for by the requirements of Rule 90.14(B)(8) (Essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (Essential). Where revisions have been made in a selection procedure to assure compatibility between successful job performance and the probability of being selected, the studies underlying such revisions should be included (Essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (Essential).

(9) Alternative procedures investigated. The selection procedures investigated and available evidence of their impact should be identified (Essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (Essential).

(10) Use and applications. The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (Essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (Essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (Essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (Essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (Essential).

(11) Source data. Each user should maintain records showing all pertinent information about individual sample members and raters where they are used, in studies involving the validation of selection procedures. These records should be made available upon request of a compliance agency. In the case of individual sample members these data should include scores on the selection procedure(s), scores on criterion measures, age, sex, race, or ethnic group status, and experience on the specific job on which the validation study was conducted, and may also include such things as education, training, and prior job experience, but should not include names and social security numbers. Records should be maintained which show the ratings given to each sample member by each rater.

(12) Contact person. The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (Essential).

(13) Accuracy and completeness. The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(C) Content validity studies. Reports of content validity for a selection procedure should include the following information.

(1) User(s), location(s) and date(s) of study. Dates and location(s) of the job analysis should be shown (Essential).

(2) Problem and setting. An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) Job analysis - Content of the job. A description of the method used to analyze the job should be provided (Essential). The work behavior(s), the associated tasks, and, if the behavior results in a work product, the work products should be completely described (Essential). Measures of criticality and/or importance of the work behavior(s), and the method of determining these measures, should be provided (Essential). Where the job analysis also identified the knowledges, skills and abilities used in work behavior(s), an operational definition for each knowledge in terms of a body of learned information and for each skill and ability in terms of observable behaviors and outcomes, and the relationship between each knowledge, skill, or ability and each work behavior, as well as the method used to determine this relationship, should be provided (Essential). The work situation should be described, including the setting in which work behavior(s) are performed, and where appropriate, the manner in which knowledges, skills, or abilities are used, and the complexity and difficulty of the knowledge, skill, or ability as used in the work behavior(s).

(4) Selection procedure and its content. Selection procedures, including those constructed by or for the user, specific training requirements, composite of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described (Essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (Essential).

(5) Relationship between the selection procedure and the job. The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (Essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (Essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided for the manner, setting, and the level of complexity of the selection procedure with those of the work situation (Essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the specd with which duties must be performed on the job, should be explained. Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations) estimates of reliability should be reported for all selection procedures if available. Such reports should be made for relevant race, sex, and ethnic subgroups, at least on a statistically reliable sample basis.

(6) Alternative procedures investigated. The alternative selection procedures investigated and available evidence of their impact should be identified (Essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings, should be fully described (Essential).

(7) Users and applications. The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described

(Essential). This description should include the rationale for choosing the evidence for operational use, and the evidence of the validity and utility of the procedures as it is to be used (Essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (Essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) Contact person. The name, mailing address, and telephone number of the person who may be contacted for further information about the validity study should be provided (Essential).

(9) Accuracy and completeness. The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(D) Construct validity studies. Reports of construct validity for a selection procedure should include the following information:

(1) User(s), location(s), and date(s) of study. Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (Essential).

(2) Problem and setting. An explicit definition of the purpose(s) of the study and the circumstances in which the study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) Construct definition. A clear definition of the construct(s) which are believed to underlie successful performance of the critical or important work behavior(s) should be provided (Essential). This definition should include the levels of construct performance relevant to the job(s) for which the selection procedures is to be used (Essential). There should be a summary of the position of the construct in the psychological literature, or in the absence of such a position, a description of the way in which the definition and measurement of the construct was developed and the psychological theory underlying it (Essential). Any quantitative data which identify or define the job constructs, such as factor analyses, should be provided (Essential).

(4) Job analysis. A description of the method used to analyze the job should be provided (Essential). A complete description of the work behavior(s) and, to the extent appropriate, work outcomes and measures of their criticality and/or importance should be provided (Essential). The report should also describe the basis on which the behavior(s) or outcomes were determined to be important, such as their level of difficulty, their frequency of performance, the consequences of error or other appropriate factors (Essential). Where jobs are grouped or compared for the purpose of generalizing validity evidence, the work behavior(s) and work product(s) for each of the jobs should be described, and conclusions concerning the similarity of the jobs in terms of observable work behaviors or work products should be made (Essential).

(5) Job titles and codes. It is desirable to provide the selection procedure user's job title(s) for the job(s) in question and the corresponding job title(s) and code(s) from the United States Employment Service's dictionary of occupational titles.

(6) Selection procedure. The selection procedure used as a measure of the construct should be completely and explicitly described or attached (Essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (Essential). The research evidence of the relationship between the selection procedure

and the construct, such as factor structure, should be included (Essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (Essential). Whenever feasible, these measures should be provided separately for each relevant race, sex and ethnic group.

(7) Relationship to job performance. The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (Essential). Documentation of the criterion-related study(ies) should satisfy the provisions of Rule 90.15(B), above, or Rule 90.15(E)(1), below, except for studies conducted prior to the effective date of these guidelines (Essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs in the same should be fully described (Essential).

(8) Alternative procedures investigated. The alternative selection procedures investigated and available evidence of their impact should be identified (Essential). The scope, method, and findings of the investigation, and the conclusions reached in light of the findings should be fully described (Essential).

(9) Uses and applications. The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (Essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (Essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (Essential). If weights are assigned to different parts of the selection procedure, these weights and the validity of the weighted composite should be reported (Essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (Essential).

(10) Accuracy and completeness. The report should describe the steps taken to assure the accuracy and completeness of the collection, analysis, and report of data and results.

(11) Source data. Each user should maintain records showing all pertinent information relating to its study of construct validity.

(12) Contact person. The name, mailing address, and telephone number of the individual who may be contacted for further information about the validity study should be provided (Essential).

(E) Evidence of validity from other studies. When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this Rule 90.15 above. In addition, the following evidence should be supplied:

(1) Evidence from criterion-related validity studies.

(a) Job information. A description of the important job behavior(s) of the user's job and the basis on which the behaviors were determined to be important should be provided (Essential). A full description of the basis for determining that these important work behaviors are the same as those of the job in the original study (or studies) should be provided (Essential).

(b) Relevance of criteria. A full description of the basis on which the criteria used in the original studies are determined to be relevant for the user should be provided (Essential).

(c) Other variables. The similarity of important applicant pool or sample characteristics reported in the original studies to those of the user should be described (Essential). A description of the comparison between the race, sex and ethnic composition of the user's relevant labor market and the sample in the original validity studies should be provided (Essential).

(d) Use of the selection procedure. A full description should be provided showing that the use to be made of the selection procedure is consistent with the findings of the original validity studies (Essential).

(e) Bibliography. A bibliography of reports of validity of the selection procedure for the job or jobs in question should be provided (Essential). Where any of the studies included an investigation of test fairness, the results of this investigation should be provided (Essential). Copies of reports published in journals that are not commonly available should be described in detail or attached (Essential). Where a user is relying upon unpublished studies, a reasonable effort should be made to obtain these studies. If these unpublished studies are the sole source of validity evidence they should be described in detail or attached (Essential). If these studies are not available, the name and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (Essential).

1) Evidence from content validity studies. See Rules 90.14(C)(3) and 90.15(C), above.

2) Evidence from construct validity studies. See Rules 90.14(D)(2) and 15(D), above.

(f) Evidence of validity from cooperative studies. Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of Rules 90.7, 90.8 and 90.15(E) should be provided (Essential).

(g) Selection for higher level job. If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this Rule 90.15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

(h) Interim use of selection procedures. If a selection procedure is being used on an interim basis because the procedure is not fully supported by the required evidence of validity, the user should maintain and have available (1) substantial evidence of validity for the procedure, and (2) a report showing the date on which the study to gather the additional evidence commenced, the estimated completion date of the study, and a description of the data to be collected (Essential).

Rule 90.16 - Definitions

The following definitions shall apply throughout these guidelines:

(A) Ability: A present competence to perform an observable behavior or a behavior which results in an observable product.

(B) Adverse impact. A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See Rule 90.4 of these guidelines.

(C) Compliance with these guidelines. Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see Rule 90.4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See Rule 90.6(B), above.

(D) Content validity. Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See Rules 90.5(B) and 90.14(C).

(E) Construct validity. Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See Rules 90.5(B) and 90.14(D).

(F) Criterion-related validity. Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See Rules 90.5(B) and 90.14(B).

(G) Employer. Any employer subject to the provisions of the Civil Rights Act of 1964, as amended, including State or local governments and any Federal agency subject to the provisions of Section 717 of the Civil Rights Act of 1964, as amended, and any Federal contractor or subcontractor or federally assisted construction contractor or subcontractor covered by Executive Order 11246, as amended.

(H) Employment agency. Any employment agency subject to the provisions of the Civil Rights Act of 1964, as amended.

(I) Enforcement action. For the purposes of Rule 90.4(A), proceeding by a Federal enforcement agency such as a lawsuit or an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under Title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

(J) Enforcement agency. Any agency of the executive branch of the Federal Government which adopts these guidelines for purposes of enforcement of the equal employment opportunity laws or which has responsibility for securing compliance with them.

(K) Job analysis. A detailed statement of work behaviors and other information relevant to the job.

(L) Job description. A general statement of job duties and responsibilities.

(M) Knowledge. A body of information applied directly to the performance of a function.

(N) Labor organization. Any labor organization subject to the provisions of the Civil Rights Act of 1964, as

amended, and any committee subject thereto controlling apprenticeship or other training.

(O) Observable. Able to be seen, heard, or otherwise perceived by a person other than the person performing the action.

(P) Race, sex, or ethnic group. Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

(Q) Selection procedure. Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

(R) Selection rate. The proportion of applicants or candidates who are hired, promoted, or otherwise selected.

(S) Should. The term “should“ as used in these guidelines is intended to connote action which is necessary to achieve compliance with the guidelines, while recognizing that there are circumstances where alternative courses of action are open to users.

(T) Skill. A present, observable competence to perform a learned psychomotor act.

(U) Technical feasibility. The existence of conditions permitting the conduct of meaningful criterion-related validity studies. These conditions include: (1) An adequate sample of persons available for the study to achieve findings of statistical significance; (2) having or being able to obtain a sufficient range of scores on the selection procedure and job performance measures to produce validity results which can be expected to be representative of the results if the ranges normally expected are utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See Rule 90.14(B)(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See Rule 90.14(B)(8).

(V) Unfairness of selection procedure. A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences in measures of job performance. See Rule 90.14(B)(7).

(W) User. Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

(X) Validated in accord with these guidelines or properly validated. A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by Rule 90.3(B), and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

(Y) Work behavior. An activity performed to achieve the objectives of the job. Work behaviors involve observable (physical) components and unobservable (mental) components. A work behavior consists of the performance of one or more tasks. Knowledges, skills, and abilities are not behaviors, although they may be applied in work behaviors.

Editor's Notes

History

Rules 50.1; 50.2; 85.0; and New Rules 81.1; 81.2; 81.3; 81.5; 81.7; 81.10; 81.12 eff. 10/30/2007.

Emer. Rule 81.1 Eff. 5/29/2008; expired 08/29/2008.