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Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preference Based on Race, Gender, or Ethnicity

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Summary

This report provides a broad, but by no means exhaustive, survey of federal statutes and regulations that specifically refer to race, gender, or ethnicity as factors to be considered in the administration of any federal program. Such measures may include, but are not limited to, goals, timetables, set-asides, and quotas, as those terms are generally (however imperfectly) understood. Based on several searches of LEXIS/NEXIS and WESTLAW legal databases, and a variety of search strategies, the compilation seeks to be as comprehensive as possible. With certain noted exceptions, the report collectively describes those statutes, regulations, or executive orders uncovered by our research which appear, in any manner, to prefer or consider race, gender, or ethnicity as affirmative factors in federal employment, in the allocation of federal contracts, or in granting any federal benefit to individuals or institutions. Several laws and regulations directed to “socially and economically disadvantaged” individuals and institutions are included because, as more fully explained by the report, that term has been defined administratively and by statute to presumptively apply to specific racial and ethnic minorities.

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Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preference Based on Race, Gender, or Ethnicity

The purpose of this report is to provide a broad, but by no means exhaustive, survey of federal statutes and regulations that specifically refer to race, gender, or ethnicity as factors to be considered in the administration of any federal program. Such measures may include, but are not limited to, goals, timetables, set-asides, and quotas, as those terms are generally (however imperfectly) understood. Based on several searches of LEXIS/NEXIS and WESTLAW legal databases, and a variety of search strategies, the compilation reflects our effort to be as comprehensive as possible. Given the disparate policy objectives and wording of the various provisions, however, some editorial judgment was called for, and the final product may be viewed as over- or under-inclusive, depending on the reader's perspective. Nonetheless, included are any statute, regulation, or executive order uncovered by our research which appears, in any manner, to prefer or consider race, gender, or ethnicity as affirmative factors in federal employment, in the allocation of federal contracts, or in granting any federal benefit to individuals or institutions. Several laws and regulations directed to "socially and economically disadvantaged" individuals and institutions are included because, as explained *infra*, that term has been defined administratively and by statute to presumptively apply to specific racial and ethnic minorities.

Also, note that certain categories of federal law were purposely not included. First are various federal civil rights statutes, like Title VI of the 1964 Civil Rights Act and related laws, that place nondiscrimination requirements upon recipients of federal financial assistance without mandating racial, ethnic, or gender preferences *per se*. Nor are regulations of the various federal departments or agencies under Title VI included for the similar reason that, although they almost uniformly authorize "affirmative action" by recipients to "overcome the effects of prior discrimination" or otherwise, they do not explicitly define the obligation in terms of "goals" or "set-asides," or other forms of preference for minorities or women.¹ Also beyond the scope of this study are the remedy provisions in federal laws like Title VII of the 1964 Civil Rights Act² or the Fair Housing Act,³ which authorize "affirmative" relief by the courts in discrimination actions, and have been the basis for judicial

¹ See e.g. 15 C.F.R. 15.3(b)(6)(2003)(Department of Agriculture Title VI regulations).

² 42 U.S.C. § 2000e-5(g).

³ 42 U.S.C. § 3613.

preference orders in certain circumstances, but do not explicitly direct the imposition of “timetables, goals, set-asides, and quotas” on their face.

One final category of statutory “preference” excluded from consideration here are federal employment opportunity and other programs operated by the Bureau of Indian Affairs (BIA) for the benefit of American Indians living on or near a reservation. Such programs have been upheld by the Supreme Court under the Constitution based on the Government’s historical trust relationship with the Tribes and the “unique legal status [of] Indians” in matters relating to tribal affairs “on or near” the reservation.⁴ According to the accepted legal view, such “special treatment” is *sui generis* and constitutes neither “racial discrimination” nor “even a ‘racial’ preference.” It is based instead on a “criterion reasonably designed to further the cause of Indian self-government” which “as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”⁵

By way of background, and to facilitate understanding operation of the numerous listed federal laws and regulations, more extensive discussion is devoted at various points of this report to the development of major “affirmative action” programs in federal grant, contract, and employment law.

Federal Grant and Procurement Law

Federal efforts to increase minority and female participation in contracting, federally assisted programs, and employment have been a major aspect of civil rights enforcement for more than three decades. Congress and the Executive Branch have crafted a wide range of federal laws and regulations authorizing, either directly or by judicial or administrative interpretation, race or gender “conscious” strategies in relation to jobs, housing, education, voting rights, and governmental contracting. The historical model for federal laws and regulations establishing minority participation “goals” may be found in Executive Orders which since the early 1960’s have imposed affirmative minority hiring and employment requirements on federally financed construction projects and in connection with other large federal contracts. Presently, Executive Order 11246, as administered by the Office of Federal Contract Compliance Programs (OFCCP), requires that all employers with federal contracts in excess of \$50,000.00 must file written affirmative action plans with the government. These are to include minority and female hiring goals and timetables to which the contractor must commit its “good faith” efforts. Similar affirmative action measures relating to federal government employment were enacted as part of the Equal Employment Opportunity Act Amendment of 1972⁶ and the 1978 Civil Service Reform Act.⁷

Morton v. Mancari, 417 U.S. 535, 548 (1973).

⁵ Id. at 554.

⁶ 42 U.S.C. § 2000e-16(b).

⁷ 5 U.S.C. § 7201.

Affirmative action for minority entrepreneurs soon became a focus of efforts by the Small Business Administration (SBA) and other federal agencies to assist “socially and economically disadvantaged” small businesses under a variety of federal programs. Increasingly, an “affirmative action” model, in the form of participation “goals” or “set-asides” for members of racial or ethnic minorities, and businesses owned or controlled by these or other “disadvantaged” persons, found legislative expression in a wide range of federal programs.

The Small Business Act, as amended, provides the statutory prototype for a host of federal programs to increase minority and female participation as contractors or subcontractors on federally funded projects. First, the “Minority Small Business and Capital Ownership Development,” or § 8(a) program authorizes the Small Business Administration (SBA) to enter into all kinds of construction, supply, and service contracts with other federal departments and agencies. The SBA acts as a prime contractor and then “subcontracts” the performance of these contracts to small business concerns owned and controlled by “socially and economically disadvantaged” individuals, Indian Tribes or Hawaiian Native Organizations.⁸

Applicants for § 8(a) certification must demonstrate “socially disadvantaged” status or that they “have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities.”⁹ The Small Business Administration “presumes,” absent contrary evidence, that small businesses owned and operated by members of certain groups — including Blacks, Hispanics, Native Americans, and Asian Pacific Americans — are socially disadvantaged.¹⁰ Any individual not a member of one of these groups must prove “social disadvantage” by a “preponderance” of evidence in order to qualify for § 8(a) certification. The § 8(a) applicant must, in addition, show that “economic disadvantage” has diminished its capital and credit opportunities, thereby limiting its ability to compete with other firms in the open market.¹¹

The “Minority Small Business Subcontracting Program” authorized by § 8(d) of the Small Business Act codified the presumption of disadvantaged status for minority group members that applied by SBA regulation under the § 8(a) program.¹² Prime contractors on major federal contracts are obliged by § 8(d) to maximize minority participation and to negotiate a “subcontracting plan” with the procuring agency which includes “percentage goals” for utilization of small socially

⁸15 U.S.C. § 637(a).

⁹15 U.S.C. § 637(a)(5).

¹⁰13 CFR § 124.105(b).

¹¹ The statute, 15 U.S.C. § 637(a)(6)(A), defines economic disadvantage in terms of:

socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market.

¹²15 U.S.C. § 637(d). *See also* 13 CFR § 124.106.

and economically disadvantaged firms (SDBs). To implement this policy, a clause required for inclusion in each such prime contract states that “[t]he contractors shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to § 8(a). . .” Accordingly, SBA has discretion in designating a firm or individual as socially and economically disadvantaged for purposes of both the § 8(a) and § 8(d) programs in conformity with specified criteria.¹³

These obligations, first codified in 1978 as an amendment to the SBA, were augmented a decade later by the Business Opportunity Development Reform Act of 1988.¹⁴ Congress there directed the President to set annual, government-wide procurement goals of at least 20% for small businesses and 5% for disadvantaged businesses, as defined by the SBA. Simultaneously, federal agencies were required to continue to adopt their own goals, compatible with the government-wide goals, in an effort to create “maximum practicable opportunity” for small disadvantaged businesses to sell their goods and services to the government. The goals may be waived where not practicable due to unavailability of disadvantaged business enterprises (DBEs) in the relevant area and other factors.¹⁵ While the statutory definition of DBE includes a racial component, in terms of presumptive eligibility, it is not restricted to racial minorities but also includes persons subjected to “ethnic prejudice or cultural bias.”¹⁶ It also excludes businesses owned or controlled by persons who, regardless of race, are “not truly socially and/or economically disadvantaged.”¹⁷ Federal Acquisition Act amendments adopted in 1994 amended the 5% minority procurement goal, and the minority subcontracting requirements in § 8(d), to specifically include “small business concerns owned and controlled by women” in addition to “socially and economically disadvantaged individuals.”¹⁸

In addition, Congress has frequently adopted “set-asides” or other forms of statutory preference for “socially and economically disadvantaged” firms and individuals, following the definitions of the Small Business Act, or by designating minority groups and women as part of specific grant or contract authorization programs. Thus, targeted funding, in various forms, and minority or disadvantaged business set-asides or preferences have been included in major authorization or appropriation measures for agriculture, communications, defense, education, public

¹³ 15 U.S.C. § 637(d). Criteria set forth in the regulations permit an administrative determination of socially disadvantaged status to be predicated on “clear and convincing evidence” that an applicant has “personally suffered” disadvantage of a “chronic and substantial” nature as the result of any of a variety of causes, including “long term residence in an environment isolated from the mainstream of American society,” with a negative impact “on his or her entry into the business world.” 13 C.F.R. § 124.105(c).

¹⁴ P.L. 100-656, § 502, 102 Stat. 3887, codified at 15 U.S.C. § 644(g)(1).

¹⁵ *See e.g.* 49 C.F.R. §§ 23.64(e), 23.65 (setting forth waiver criteria for the Department of Transportation).

¹⁶ 15 U.S.C. § 637(a)(5).

¹⁷ *See* 49 C.F.R. Pt. 23, Subpt. D, App. C.

¹⁸ P.L. 103-355, 108 Stat. 3243, 3374, § 7106 (1994).

works, transportation, foreign relations, energy and water development, banking, scientific research and space exploration, and other purposes. Other federal laws appear to authorize some consideration of race or gender to enhance the participation of minorities and women in federal programs or employment but without directly mandating preferential goals or set-asides.

The following statutes, regulations, and executive orders governing federal contracts and grant programs are, to the extent possible, grouped according to agency and subject matter.

Federal Acquisitions Regulations — General

Section 7102 of P.L. 103-355 (1994): The Federal Acquisition Streamlining Act permits federal agency heads to adopt restricted competition and a 10% “price evaluation preference” in favor of “socially and economically disadvantaged individuals” to achieve government-wide and agency contracting goal requirements.

48 C.F.R. § 19.201 (2003): FAR “socioeconomic program” regulations state general policy that SDB and women-owned business concerns “must have maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance. . . . The SDB procurement mechanisms are a price evaluation adjustment for SDB concerns (see Subpart 19111), an evaluation factor or subfactor for participation of SDB concerns (see 19.1202), and monetary subcontracting incentive clauses for SDB concerns (see 19.1203).” See also *id.* at § 19.304 (Disadvantaged business status).

48 C.F.R. § 19.704 (a)(1)(2003): FAR requirement that “[s]eparate percentage goals for using . . . small disadvantaged business [and] women-owned small business concerns as subcontractors” be included in small disadvantaged business subcontracting plans.

48 C.F.R. § 19.705-4 (2003): In evaluating the adequacy of SDB subcontracting plans by bidders on federal prime contracts, contracting officers must “evaluate the offeror’s past performance in awarding subcontracts for the same or similar products or services to . . . small disadvantaged business [and] and small women-owned business concerns.” See also § 19.705-1 (monetary incentives for exceeding goals).

48 C.F.R. § 19-708 (c)(2) (2003): FAR subcontracting assistance program states that “[v]arious approaches may be used in the development of small and small disadvantaged business concerns subcontracting incentives. They can take many forms, from a fully qualified schedule of payments based on actual subcontract achievement to an award fee approach employing subjective evaluation criteria . . . The incentive should not reward the contractor for results other than those that are attributable to the contractor’s efforts under the incentive subcontracting program.”

48 C.F.R. § 19.1101-1103 (2003): Sets forth procedures for applying a “price evaluation adjustment for small disadvantaged business concerns,” the effect of which is to increase by a percentage factor to be determined by the Department of

Commerce of bids by non-disadvantaged firms competing for federal acquisition contracts.

48 C.F.R. §§ 52.219-8, 52.219-9 (2003): Prescribe clauses for inclusion in federal prime and subcontracts which require, inter alia, “[g]oal, expressed in terms of percentages of total planned subcontracting dollars, for the use of . . . small disadvantaged business [and] women-owned small business concerns as subcontractors.”

Agriculture

7 U.S.C.S. § 2279: “The Secretary of Agriculture shall carry out an outreach and technical assistance program to encourage and assist socially disadvantaged farmers and ranchers in owning and operating farms and ranches” and participating in agricultural programs.” Socially disadvantaged is “a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities” (§ 2279(e)).

7 U.S.C.S. § 3154(c): The Secretary of Agriculture is authorized “to set aside a portion of funds” appropriated for certain research on the production and marketing of alcohols and industrial hydrocarbons for grants to colleges and universities to achieve “the objective of full participation of minority groups.”

7 U.S.C.S. § 3241(a): The Secretary is authorized to make grants to “Hispanic-serving institutions for the purpose of promoting and strengthening the ability of Hispanic-serving institutions to carry out education, applied research, and related community development programs.”

42 U.S.C.S. § 3020e-1: Assistant Secretary of Agriculture is authorized to award grants to entities that establish pension counseling and information outreach programs for “women, minorities, older individuals residing in rural areas and low income retirees.”

7 C.F.R. § 225.17 (2004): Food service management companies participating in the Summer Food Service Program must submit with appropriate state agency a registration which is to include “a statement as to whether the organization is a minority business enterprise” managed and controlled by “Blacks, Hispanics, American Indians, Alaskan Natives, Oriental and Aleuts. . .”

7 C.F.R. § 246.13(g) (2004): Financial management system maintained by state agencies participating in Special Supplemental Food Program for Women, Infants and Children are “encouraged” to use minority- and women-owned banks.

7 C.F.R. § 272.4(b)(2004): Bilingual program information and certification, and interpreters must be provided in certain low income areas with specified percentages of non-English speaking minority households under Food Stamp and Food Distribution Program.

7 C.F.R. § 1775.22 (2004): Recipients of certain rural utilities service grants for technical assistance and training are “encouraged to use minority banks (a bank

which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.”

7 C.F.R. § 1940.968(k)(3)(2004): States participating in certain rural economic development programs are “encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.”

7 C.F.R. § 1942.17(p)(3)(iii) (2004): Applicants for certain FmHA community facilities loans are “encouraged to use minority banks (a bank which is owned by at least 50 percent minority group members) for the deposit and disbursement of funds.”

7 C.F.R. § 1944.526(a)(2)(i)(D) (2004): Preapplication process for Technical and Supervisory Assistance Grant program considers in determining applicant’s eligibility “the estimated number of low income and low income minority families the applicant will assist in obtaining affordable adequate housing.”

7 C.F.R. § 1944.671(b) (2004): Equal Opportunity and outreach requirements applicable to FmHA Housing Preservation Grants program state that “[a]s a measure of compliance, the percentage of the individuals served by the HPG grantee should be in proportion to the percentages of the population of the service area by race/national origin.”

7 C.F.R. §§ 3015.13, 3016.21(h) (2004): “Consistent with the national goal of expanding opportunities for minority business enterprises, recipients and subrecipients” of federal financial assistance administered by the Department of Agriculture “are encouraged to use minority and women-owned banks. Upon request, awarding agencies will furnish a listing of minority and women-owned banks to recipients.”

7 C.F.R. 3015 APPENDIX A (2004): OMB Circular A-128 (Audits of State and Local Governments). “19. Small and Minority Audit Firms. Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this circular.”

7 C.F.R. §§ 3403.1, 3403.2 (2004): USDA regulation implementing small business innovation grants program has as one of its goals to “foster and encourage the participation of socially and economically disadvantaged small business concerns and women owned small business concerns.” For this purpose, minority groups specifically covered include “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, or Subcontinent Asian Americans,” or any others designated by the SBA pursuant to § 8(a).

48 C.F.R. § 419.201 (2003): States USDA policy to provide “small, disadvantaged, minority, and women-owned businesses” with a “fair portion” of opportunities to contract and subcontract. Specifically, agency coordinators shall “identify” and “solicit[]” such businesses, set annually “aggressive minority and women-owned business goals,” and require written plans of contractors “for the

utilization of small and small disadvantaged businesses as subcontractors.” Id. at § 419.201-71.

48 C.F.R. § 422.804-2 (2003): Affirmative action program provision relating to the Department of Agriculture which states that “each contracting office awarding nonexempt construction contracts maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction.”

Banking

12 U.S.C.S. § 1441a(r-w): Provides for various incentives, including “preference points” on proposals and minority capital assistance programs, to preserve and expand bank ownership by minorities and women; authorizes establishment of Resolution Trust Corporation guidelines to achieve parity in distribution of RTC contracts, and “reasonable goals” for subcontracting, to minority and women-owned businesses and firms; and provides a “[m]inority preference in acquisition of institutions in predominantly minority neighborhoods.”¹⁹

12 U.S.C.S. § 1823(f)(12): Authorizes Federal Deposit Insurance Corporation (FDIC) approval of minority-controlled bank acquisitions by minority-controlled holding companies without regard to asset size.

12 U.S.C.S. § 1833e: The Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Housing Finance Board, the Oversight Board of the Resolution Trust Corporation shall each prescribe regulations “to establish and oversee a minority outreach program within each such agency to ensure inclusion ... of minorities and women.”

12 U.S.C.S. § 2219c: Requires that “all institutions of the Farm Credit System with more than 20 employees shall establish and maintain an affirmative action program plan that applies the affirmative action standards otherwise applied to contractors of the Federal Government.”

12 U.S.C.S. § 2907: Any donation or sale on favorable terms of bank branch in minority neighborhood to minority or women-owned depository institution shall be a factor in determining the seller or donor institution’s compliance with the Community Reinvestment Act.

12 U.S.C.S. § 4520: The Federal National Mortgage Association and Federal Home Loan Mortgage Corporation shall establish a minority outreach program to ensure the inclusion of minorities and women in their contractual transactions.

12 C.F.R. § 4.63 (2003): Establishes Contracting Outreach Program for the Office of Comptroller of the Currency to “ensure that minority and women-owned

¹⁹ As amended by §3(a) of the Resolution Trust Completion Act, P.L. 103-204, 107 Stat. 2369, 2375 (1993).

businesses have the opportunity to participate, to the maximum extent possible, in contracts awarded by the OCC.” “Minority means any African American, Native American. . . , Hispanic American, Asian-Pacific American, or Subcontinent-Asian American.” *Id.* at § 462(b).

12 C.F.R. Part 361, §§ 361.2, 361.6 (2004): Federal Deposit Insurance Corporation “Minority and Women Outreach Program” states “policy of the FDIC that minorities and women, businesses owned by them have the maximum practicable opportunity to participate in [FDIC] contracts” and requires each contracting office to make quarterly submissions including “at a minimum, statistical information on contract awards and solicitations by designated demographic categories.” For this purpose “minority means Black Americans, Native Americans, Hispanic Americans, Asian Pacific Americans, or other group designated by SBA. See 13 C.F.R. § 124.103 (2004).

12 C.F.R. §§ 517.5, 517.7 (2004): The Minority, Women, and Individuals with Disabilities Outreach Program of the Office of Thrift Supervision (OTS) defines “[o]utreach activities” to include “identification and registration of minority-, women-owned (small and large) businesses” and “[m]onitoring proposed purchases to assure that OTS contracting staff understand and actively promote the outreach program.” Contract award guidelines state that “[t]he OTS Outreach Program Advocate shall work to facilitate the maximum participation of minority and women-owned. . . businesses. . . in the OTS procurement of goods and services.”

Commerce

15 U.S.C.S. § 278g-5: “The Director of the National Institute of Standards and Technology may work with industry, trade associations, professional societies, and others to raise awareness in the United States, including awareness by businesses that are majority owned by women, minorities, or both, of enterprise integration activities in the United States and abroad, including by the convening of conferences”.

15 U.S.C.S. § 7404: “The Director of the National Science Foundation shall establish a program to award grants to institutions (including minority serving institutions) of higher education to establish or improve undergraduate and master’s degree programs in computer and network security, to increase the number of students, including the number of students from groups historically underrepresented in these fields...”

Executive Order 11625 (1971): Directs the Secretary of Commerce “[w]ith the participation of other Federal departments and agencies. . . [t]o develop comprehensive plans and specific program goals for the minority enterprise program; establish regular performance monitoring and reporting systems to assure that goals are being achieved; and evaluate the impact of Federal support in achieving the objectives established by the order.” *See also* Executive Order 12138 (Women-owned Business Enterprise Program).

Executive Order 13339 (2004): Directs the Secretary of Commerce to establish a Commission on Asian Americans and Pacific Islanders to develop, monitor, and coordinate executive branch efforts to improve economic and community

development of Asian American and Pacific Islander businesses. The Commission terminates in 2006, unless renewed by the President.

15 C.F.R. § 24.21(h) (2004): Grantees and subgrantees of certain grants and cooperative agreements to state and local government “are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members).”

15 C.F.R. § 917.11(d) (2004): A “factor considered” in the approval of proposals under the Sea Grant Matched Funding Program “will be the potential of the proposed program to stimulate interest in marine related careers among those individuals; for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest.”

15 C.F.R. § 2301.5 (2004): The National Telecommunications and Information Administration of the Department of Commerce, in administering the Public Telecommunications Facilities Program, “will give special consideration to applications that foster ownership and control of, operation of, and participation in public telecommunication entities by minorities and women.” *See also id.* at § 2301.17(b)(6).

48 C.F.R. § 1319.7003(a) (2003): Directs contracting officers of the Commerce Department to “provide assistance to prime contractors to identify potential women-owned small businesses. Such assistance is intended to aid prime contractors in placing a fair proportion of subcontracts with women-owned businesses.”

Communications

47 U.S.C.S. § 309(i)(3)(A): “The [Federal Communications] Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection. . .used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.” For this purpose, “minority group” includes “Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.” *Id* at § 309(i)(4)(A).

47 U.S.C.S. § 309(j)(4)(D): In radio licensing proceedings, the Federal Communications Commission is directed to prescribe regulations to “ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services, and, for such purposes, consider the use of tax certificates, bidding preferences, and other procedures.”

47 U.S.C.S. § 396(a)(6): The Corporation for Public Broadcasting is directed to “encourage the development of programming ...that addresses the needs of unserved and underserved audiences, particularly children and minorities.”

47 C.F.R. § 76.977(a),(b),(e) (2003): Minority and educational programming used in lieu of deregulated commercial leased access capacity. “A cable operator required by this section to designate channel capacity for commercial use pursuant to 47 U.S.C. 532 may use any such channel capacity for the provision of programming from a qualified minority programming source. . .whether or not such source is affiliated with cable operator.” “Qualified minority programming source” means a source “that devotes substantially all of its programming to coverage of minority viewpoints, or to programming directed at members of minority groups, and which is over 50 percent minority-owned.” “Minority” includes “Blacks, Hispanics, American Indians, Alaskan Natives, Asians, and Pacific Islanders.”

68 F.C.C. 2d 381, 411-412 (1978). FCC policy awards a quality enhancement credit for minority ownership and participation in station management in the comparative licensing process. When faced with mutually exclusive applications for the same broadcast channel, the FCC initiates a proceeding to compare the merits of the competing applicants based on specific factors including diversification of control of mass media communications, full time participation in station management by owners, proposed program service, past broadcast record, efficient use of frequency, and character of the applicant. Under the FCC’s preference policy, ownership and active participation in station management by members of a minority group are considered a plus to be weighed in with the other comparative factors.

68 F.C.C. 2d 983 (1978): FCC “Distress Sale” Policy. Under this policy, existing licensees in jeopardy of having their licenses revoked or whose licenses have been designated for a renewal hearing are given the option of selling the license to a minority-owned or controlled firm for up to seventy-five percent of fair market value. The minority-assignee must meet the basic qualifications necessary to hold a license under FCC regulations and must be approved by the FCC before the transfer is consummated.

Defense

10 U.S.C.S. § 2191: The Secretary shall take appropriate action to encourage applications for the National Defense Science and Engineering Graduate Fellowships from persons who are member of groups (minority groups, women, and disabled persons) which historically have been underrepresented in science and technology fields.

10 U.S.C. S. § 2193: The Secretary shall give priority to awarding grants for higher education in science and mathematics “in a manner likely to stimulate the interest of women and members of minority groups in pursuing scientific and engineering careers. The Secretary may consider the financial need of applicants in making awards...”

10 U.S.C.S. § 2194: Defense laboratories shall ensure priority consideration to historically Black colleges and universities and other minority institutions in entering into education partnership agreements.

10 U.S.C.S. § 2196(j)(8): Selection criteria for manufacturing engineering grant program established by the Secretary of Defense require proposal by applicant “to

achieve a significant level of participation by women, members of minority groups, and individuals with disabilities through active recruitment of students from among such persons.”

10 U.S.C.S. § 2323: Establishes a goal of awarding five percent of the total value of Department of Defense, Coast Guard, and the National Aeronautics and Space Administration contracts and subcontracts to socially and economically disadvantaged individuals, historically black colleges and universities, and minority institutions which includes Hispanic-serving institutions. This section is applicable to the Department of Defense during fiscal years 1987 through 2006. This section is applicable to the Coast Guard and the National Aeronautics and Scientific Administration during fiscal years 1995 through 2006.

10 U.S.C.S. § 2904(b)(2): The Strategic Environmental Research and Development Program Scientific Advisory Board shall consist of “persons who are eminent in the fields of basic sciences, engineering, ocean and environmental sciences, education, research management, international and security affairs, health physics, health sciences, or social sciences with due regard given to the equitable representation of scientists and engineers who are women or who represent a minority group.”

50 U.S.C.A. § 403: Requires the Director of Central Intelligence to carry out and report to Congress on a three year pilot project to test and evaluate alternative, innovative methods to promote equality of intelligence community employment opportunities for women, minorities, and individuals with diverse ethnic and cultural backgrounds, skills, language proficiency, and expertise.

P.L. 108-106, 117 Stat. 1234, § 2217 (2003): “Requires activities carried out by the U.S. with respect to civilian governance of Afghanistan and Iraq to include advice from women’s organizations, increase access of financial resources and assistance to women, and military and police force training to women.

32 C.F.R. § 33.21(h) (2003): Department of Defense (DOD) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” DOD grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. § 205.207(d)(iv) (2003): States that “[f]or acquisition being considered for historically black college and university and minority institution set-aside,” the proposed contract “is being considered as a 100 percent set-aside for historically black colleges and universities (HBCUs) and minority institutions (MIs), as defined by the clause at §252.226-7000 of the Defense Acquisition Regulation Supplement.”

48 C.F.R. Part 219, § 219.000 (2003): DOD regulation implements “goal” in 10 U.S.C. 2323 to “[a]ward five percent of contract and subcontract dollars to small disadvantaged business (SDB) concerns, historically black colleges and universities (HBCUs), and minority institutions (MIs).” Specific requirements include data collection and reporting (§ 219.202-5); eligibility criteria for program participation (§ 219.703); subcontracting plan goals for SDB concerns and institutions (§

219.704); reviewing the subcontracting plan (§ 219.705-4); solicitation provisions and contract clauses (§ 219.708); and price evaluation adjustments for small disadvantaged business concerns as determined by the Commerce Department (§ 19.1101). See also 48 C.F.R. § 19.1202 (evaluation factors or subfactors for participation of SDB concerns); § 19.2003 (monetary incentives for subcontracting with SDB concerns); and § 252.219-7004 (small business and small disadvantaged business subcontracting plan on DOD contracts).

48 C.F.R. 236.602-1: “In considering equitable distribution of work among firms . . . include historically black colleges and universities and minority institutions; firms that have not had prior DOD contracts; and small disadvantaged business concerns and joint ventures with small disadvantaged business participants if . . . the acquisition is one in which use of a price evaluation adjustment is currently authorized.”

48 C.F.R. Chapter 2 APPENDIX I (2003): Pilot Mentor-Protege Program is to “provide incentives to major DOD contractors, performing under at least one active approved subcontracting plan negotiated with DOD or other Federal agencies, to assist small disadvantaged businesses (SDBs) in enhancing their capabilities to satisfy DOD and other contract and subcontract requirements.”

Education

20 U.S.C.S. § 1063b: Authorizes Education grants to specified postgraduate institutions “determined by the Secretary [of Education] to be making substantial contributions to the legal, medical, dental, veterinary, or other graduate education opportunities in mathematics, engineering, or the physical or natural sciences for Black Americans.”

20 U.S.C.S. §§ 1070a-12; 1070a-13; 1070a-14; 1070-15; 1070-16: Authorizes Education grants under the Federal Trio Programs for various educational programs and services provided to individuals who are “underrepresented, disadvantaged, and/or students of limited English proficiency.”

20 U.S.C.S. § 3916: Fifteen percent of National Science Foundation funds available for science and engineering education is to be allocated to faculty exchange and other programs involving higher educational institutions with “an enrollment which includes a substantial percentage of students who are members of a minority group, or who are economically or educationally disadvantaged and institutions which demonstrate a commitment to meet the special educational needs of students who are members of a minority group or are economically or educationally disadvantaged.”

20 U.S.C.S. § 5205(d): No less than 10 percent of Eisenhower Exchange Fellowship Program funds “shall be available only for participation by individuals who are representative of United States minority populations.”

20 U.S.C.S. § 6301: The No Child Left Behind Act’s goal is to meet “the educational needs of low-achieving children in our Nation’s highest poverty schools, limited English proficient children, migratory children, children with disabilities,

Indian children, neglected or delinquent children, and young children in need of reading assistance; and closing the gaps between minority and nonminority students, and between disadvantaged children and their more advantaged peers.

20 U.S.C.S. §6623(a)(4): Subgrants may be awarded to local educational agencies that develop and implement “initiatives to promote retention of highly qualified teachers and principals, particularly within elementary schools and secondary schools with a high percentage of low-achieving students, including programs that provide . . . financial incentives, to principals who have a record of improving the academic achievement of all students, but particularly students from racial and ethnic minority groups, and students with disabilities.”

20 U.S.C.S §6662(c)(10): The Secretary is authorized to award grants to partnership ((§ 6661(b)(1)) activities of the engineering, mathematics, science department of an institution of higher education and a high-need elementary and secondary school which include “training mathematics and science teachers and developing programs to encourage young women and other underrepresented individuals in mathematics and science careers to pursue post secondary degrees in majors leading to such careers.”

20 U.S.C.S. § 9105(b)(3): The President of the Museum and Library Services Board shall in making appointments to the Board “give due regard to equitable representation of women, minorities, and persons with disabilities who are involved with museums and libraries.”

20 U.S.C.S. § 9579: Authorizes the Director of the Institute for Education Sciences to establish fellowships in “institutions of higher education (which may include . . . historically Black colleges and universities and other institutions of higher education with large numbers of minority students) that support graduate and postdoctoral study on site at the Institute or at the institution of higher education. . . . The Director shall ensure that women and minorities are actively recruited for participation.”

42 U.S.C.S. § 1862d: At least 12 percent of amounts appropriated for the Academic Research Facilities Modernization Program shall be reserved for historically Black colleges and universities and other institutions which enroll a substantial percentage of Black American, Hispanic American, or Native American students.

34 C.F.R. § 84(h) (2003): Department of Education (ED) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” ED grantees and subgrantees to use minority-owned banks.

34 C.F.R. § 461.33(a)(2)(ii) (2003): “[P]articular emphasis” placed on training “minority” adult educators as one aspect of adult education demonstration grant program.

34 C.F.R. Part 607, § 607.3(b)(3) (2003): An institution of higher education is eligible to receive a grant under the Strengthening Institutions Program even if it

does not satisfy certain other generally applicable state authorization or accreditation requirements if it “substantially increases the higher education opportunities for low-income students who are also educationally disadvantaged, underrepresented in postsecondary education, or minority students.”

34 C.F.R. Parts 608, 609 (2003): “The Strengthening Historically Black Colleges and Universities Program [HBCU] provides grants to Historically Black Colleges and Universities to assist these institutions in establishing and strengthening their physical plants, academic resources and student services so that they may continue to participate in fulfilling the goal of equality of educational opportunity.” (§ 608.1).

34 C.F.R. § 637.1 (2003): “The Minority Science Improvement Program is designed to effect long-range improvement in science education at predominantly minority institutions and to increase the flow of underrepresented ethnic minorities, particularly minority women, into scientific careers.”

Energy

42 U.S.C.S. § 7141(e): The Secretary of Energy “may provide financial assistance in the form of loans to any minority business enterprise under such rules as he shall prescribe to assist such enterprises in participating fully in research, development, demonstration, and contract activities of the Department to the extent he considers appropriate.”

42 U.S.C.S. § 13556: Provides that “[t]o the extent practicable, the head of each agency shall provide that the obligation of not less than 10 percent of the total combined amounts obligated for contracts and subcontracts by each agency” under the Energy Policy Act of 1992 “shall be expended with” socially and economically disadvantaged individuals or women, historically Black colleges or universities, or college and universities with more than 20 percent Hispanic or Native American enrollment.

10 C.F.R. § 600.7(a) (2004): “DOE encourages the participation in financial assistance awards of small businesses, including those owned by socially and economically disadvantaged individuals and women, of historically black colleges, and of colleges and universities with substantial minority enrollments.”

10 C.F.R. Part 800 (2004): Sets forth DOE policies and procedures for the award and administration of loans to minority business enterprises. “The loans are to defray a percentage of the costs of obtaining DOE contracts and other agreements, including procurements, cooperative agreements, grants, loans, and loan guarantees. . .” Id. at § 800.001. “Minority” refers to “[a]n individual who is a citizen of the United States and who is a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut, or is a Spanish speaking individual of Spanish descent. . .” Id. at § 800.3.

10 C.F.R. § 1040.101(b)(1),(2) (2004): Under DOE regulations prohibiting discrimination in federally assisted programs, the agency is to select recipients for compliance reviews based, among other factors, on “[t]he relative disparity between the percentage of minorities, women, or handicapped persons, in the relevant labor

market, and the percentage of minorities, women, or handicapped persons, employed by the recipient” or “in the population receiving program benefits.”

Environment

P.L. 101-549, 104 Stat. 2399, 2708 (1990): “In providing for any research relating to requirements of the amendments made by the Clean Air Act Amendments of 1990 which uses funds of the Environmental Protection Agency [EPA], the Administrator of the [EPA] shall, to the extent practicable, require that not less than 10 percent of total Federal funding for such research will be made available to disadvantaged business concerns,” defined to mean any concern with 51% of the stock owned by “Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women or Disabled Americans.”

40 C.F.R. § 1.25(d) 2003): EPA Office of Small and Disadvantaged Business Utilization “develops and implements a program to provide maximum utilization of women-owned business enterprises in all aspects of EPA contract work . . .” and “develops programs to stimulate and improve involvement of small and minority business enterprises.”

40 C.F.R. § 35.936-7 (2003): Grantees of EPA state and local assistance grants “shall make positive efforts to use small business and minority owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds.” See also 40 C.F.R. Part 35 APPENDIX C-1 (14.)(consulting engineering agreement).

40 C.F.R. § 35.3145(d) (2003): State Water Pollution Control Revolving Fund requirement “for the participation of minority and women owned businesses (MBE/WBEs) will apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the [regional administrator] will negotiate an overall ‘fair share’ objective with the State for MBE\WBE participation on these SRF funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals.” See also 40 C.F.R. § 35.4066(g) (1994)(grants for technical assistance).

40 C.F.R. § 35.6580 (2003): Recipients under Cooperative Agreements and Superfund State Contracts for Superfund Response Actions must “award a fair share of contracts to small, minority, and women’s businesses,” as defined by “fair share objectives” negotiated with the EPA for cooperative agreements entered each year.

General Services Administration

41 C.F.R. §§ 105-71.121(h) (2003): General Services Administration (GSA) Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” recipients to use minority-owned and women-owned banks.

41 C.F.R. § 105-72.504(b) (2003): All recipients of GSA grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for “positive efforts. . .to utilize small businesses, minority-owned businesses, and women’s business enterprises, whenever possible” and to ensure that such businesses “are utilized to the fullest extent practicable.”

48 C.F.R. § 552.219-9 (2003): Small business subcontracting plan prescribed for General Service Administration contracts requires “[g]oals, expressed in terms of percentages of total planned subcontracting dollars” for the use of small disadvantaged and women-owned business concerns as subcontractors.

Health and Human Services

42 U.S.C.S. § 3027(20): State plans for grant program on aging “shall provide assurances that special efforts will be made to provide technical assistance to minority providers of services.”

42 C.F.R. § 52c.2 (2003): Minority Biomedical Research Support Program makes grants to higher educational institutions with 50 percent or other “significant proportion” of ethnic minority enrollment.

42 C.F.R. § 62.57(h) (2003): Among factors considered in making certain State loan repayment grants to State applicants is “[t]he extent to which special consideration will be extended to medically underserved areas with large minority populations.”

42 C.F.R. § 64a.105(d)(2) (2003): “Preferred service” for purposes of obligated service requirement for mental health traineeships includes service in any public or private nonprofit entity serving 50 percent or more specified racial or ethnic minorities.

45 C.F.R. §§ 74.22(j), 92.21(h), 602.21(h) (2003): Department of Health and Human Services (HHS) general administration requirements “encourage” grantees and subgrantees to use minority banks at least 50% owned by minority group members. Similar provisions may be found at 45 C.F.R. §§ 1050.13, 1157.21, 1174.21, 1183.21, and 1234.21.

48 C.F.R. § 319.705-4(d)(i)(ii) (2003): HHS small disadvantaged business subcontracting regulation require contracting officer to insure that “[s]ubcontracting goals for small and small disadvantaged business concerns are specifically set forth in each contract or modification over the statutory thresholds. . .” See also §§ 319.705-6, 319.706.

Housing and Urban Development

24 C.F.R. § 84.22(j) (2002): All recipients of Department of Housing and Urban Development (HUD) grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations “shall be encouraged to use

women-owned and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members).” Same provisions apply to use of lump-sum grants under this program, 24 C.F.R. § 84.82(c)(2), a related HUD state and local grant and cooperative agreement program, 24 C.F.R. § 85.21(h), and comprehensive planning assistance grants at 24 C.F.R. § 600.410(k)(2).

24 C.F.R. § 84.44(b) (2002): All recipients of HUD grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for “positive efforts . . . to utilize small businesses, minority-owned businesses, and women’s business enterprises, whenever possible” and to ensure that such businesses “are utilized to the fullest extent practicable.” Same provisions apply to procurement standards used by recipients for the procurement of supplies, equipment, real property and other services with federal funds. 24 C.F.R. § 84.84(e)(2)(i).

24 C.F.R. § 92.351 (2002): HUD affordable housing program requires all participating jurisdictions “to establish and oversee a minority outreach program” insuring “maximum” possible inclusion of women and minorities, and firms or entities owned by them, in contracts for procurement of property or services.

48 C.F.R. § 2426.101 (2003): States the policy of the Department of Housing and Urban Development “to foster and promote Minority Business Enterprise (MBE) participation in its procurement program, to the extent permitted by law and consistent with its primary mission.” For this purpose, “minority” includes members of any group designated as “socially disadvantaged” by the SBA under the § 8(a). *See also* 48 C.F.R. § 2452.219-70 (Small Business and Small Disadvantaged Business Subcontracting Plan to include percentage goals).

Interior

16 U.S.C.S. § 1445c: The Secretary of the Department of Interior shall establish and administer through the National Ocean Service the Dr. Nancy Foster Scholarship Program to provide graduate education scholarships in oceanography, marine biology or maritime archeology particularly to women and members of minority groups.

16 U.S.C.S. § 461, 117 Stat. 2874, P.L. 108-192 (2003): Authorizes the Secretary to enter into agreements with public or private entities to provide public education of African-American heritage in the Shaw area of the District of Columbia, restore the Carter G. Woodson property, and use for administration purposes.

25 C.F.R. § 276.3(c) (2003): Uniform administrative requirements for grants by the Bureau of Indian Affairs “encourage” grantees to use minority banks.

43 C.F.R §§ 12.61(h), 12.922(j) (2003): Department of Interior Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” grantees and subgrantees to use minority banks at least 50% owned by minority group members.

43 C.F.R. § 12.944(b) (2003): Department of Interior procurement requirements provide that “[p]ositive efforts shall be made by recipients [of federal procurement

awards] to use small businesses, minority-owned firms, and women’s business enterprises, whenever possible,” including “contracting with consortiums [of such entities] when a contract is too large for one of these firms to handle individually.”

43 C.F.R. § 27.6 (2003): Affirmative action plan requirements for recipient of financial assistance from the Department of Interior include “specific goals and specific timetables to which its efforts will be directed, to correct all deficiencies and thus to increase materially the participation of minorities and women in all aspects of its operation.”

43 C.F.R. § 34.8 (2003): Grantees or contractors engaged on the Alaska Natural Gas Pipeline must establish “overall goals and timetables for the employment of minorities and women and the utilization of [enterprises owned by them as contractors] in the construction and operation” of the pipeline project.

48 C.F.R. § 1419.901 (2003): Department of Interior socioeconomic program regulations state that “[a]nnual goals for contract awards to women-owned businesses shall be established as prescribed in 1419.202-70.”

Justice

P.L. 108-238 (2004): Directs the Attorney General to make a grant to the Great Blacks in Wax Museum, Inc. to be used only for carrying out programs relating to civil rights and juvenile justice.

31 U.S.C. § 6701(f): Not less than 10 percent of the amount paid from the Local Government Fiscal Assistance Fund created by the Violent Crime Control Act shall be expended on contracts or subcontracts with socially and economically disadvantaged and women-owned small businesses, historically Black colleges and universities, and higher educational institutions with more than 20 percent Hispanic or Native-American student enrollment.

28 C.F.R. § 0.18a(b) (2003): Provides that Director of the Office of Small and Disadvantaged Business Utilization within the Department of Justice shall “[e]stablish Department goals for the participation by small businesses, including small businesses owned and controlled by socially and economically disadvantaged individuals, in Department procurement contracts.”

28 C.F.R. § 42.206 (c)(1) (2003): Recipients of Criminal Justice Improvement Act funds shall be selected for post-award compliance reviews in part on the basis of “[t]he relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient.”

28 C.F.R. § 66.21(h) (2003): Uniform requirements by the Justice Department for administration of state and local grants and cooperative agreements “encourage” grantees and subgrantees to use minority banks at least 50 percent owned by minority groups.

Labor

20 C.F.R. § 627.430(g) (2003): Recipients and subrecipients of Job Training Partnership Act funds are “encouraged to use minority-owned banks (a bank which is owned at least 50 percent by minority group members).”

20 C.F.R. § 653.111 (a), (b)(3) (2003): State agencies participating in the administration of Services for Migrant and Seasonal Farmworkers, under the United States Employment Service, are to develop affirmative action plans which contain “a comparison between the characteristics of the staff and the workforce and determine if the composition of the local office staff(s) is representative of the racial and ethnic characteristics of the workforce in the local office service area(s).” “On a statewide basis, staff representative of the racial and ethnic characteristics in the workforce shall be distributed in substantially the same proportion among (1) all ‘job groups’ . . .and (2) all offices in the plan(s).”

29 C.F.R. §§ 89.52(d), 89.72(d), 95.22(j), 97.21(h), 1470.21(h) (2002): Administrative requirements for Department of Labor (DOL) Project Grants to State and Local Governments, higher educational institutions, and other programs, “encourage” grantees to use minority banks.

29 C.F.R. § 95.44(b) (2002): All recipients of DOL grants and agreements awarded to institutions of higher education, hospitals, and other non-profit organizations are to establish written procurement procedures to provide for “positive efforts. . .to utilize small businesses, minority-owned businesses, and women’s business enterprises, whenever possible” and to ensure that such businesses “are utilized to the fullest extent practicable.”

48 C.F.R. Part 2919, § 1919.202-70 (2004): Small disadvantaged business program regulations of the Department of Labor require “Heads of Contracting Activities [to] develop annual goals for each category of small business and small disadvantaged business utilization programs, which shall include projected acquisition awards to small businesses, minority businesses, 8(a) concerns, women-owned businesses, and HBCU.”

National Aeronautics and Space Administration

42 U.S.C.S. § 2473b: NASA Administrator is required to annually establish a goal of at least eight percent of the total value of prime and subcontracts awarded in support of authorized programs to be made to small disadvantaged businesses or “organizations owned or controlled by socially and economically disadvantaged individuals,” as defined by § 8(a) of the Small Business Act, “including Historically Black Colleges and Universities and minority educational institutions. . .”

48 C.F.R. § 1819.705-470 (2003): Authorizes “[a]cquisition specific subcontracting goals” for small disadvantaged and women-owned business concerns, among other specified categories of small business entity.

48 C.F.R. § 1819.7000 (2003): NASA Administrator must insure that “[a]t least 8% of Federal funding for prime and subcontracts awarded in support of authorized programs, including the space station by the time operational status is obtained, be made available to small disadvantaged business concerns, Historically Black Colleges and Universities, minority institutions, and women-owned small business concerns.” See also, *id.* at § 1852.219-76 (prescribed clause for NASA contracts incorporating 8 percent goal for “small business concerns or other organizations owned or controlled by socially and economically disadvantaged individuals (including women), Historically Black Colleges and Universities, and minority educational institutions”).

Small Business

Executive Order 13170 (2000): “All agencies within the executive branch with procurement authority are required to take necessary steps, as permitted by law, to increase contracting between the Federal Government and Small Disadvantaged Business Program and Minority Business Enterprises.

41 U.S.C.S. § 417a: “Each Federal agency shall report to the Office of Federal Procurement Policy the number of qualified HUBZone small business concerns owned by, the number of small businesses owned and controlled by women and the number of small business concerns owned and controlled by socially and economically disadvantaged businesses, by gender, that are first time recipients of contracts from such agency.” See also 15 U.S.C.S. 694(c)(SBA indemnification of surety against loss on bond issued to socially and economically disadvantaged or women-owned small business concern).

13 C.F.R. § 124.103(b): Groups presumed to be “socially disadvantaged” for purposes SDB certification and SBA’s § 8(a) program: “Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives, or Nepal)” and members of other groups as designated the SBA from time to time.

13 C.F.R. § 115.31(2) (2004): The Small Business Administration (SBA) Surety Bond Guarantee program indemnifies sureties for 90 percent of losses incurred on certain bonds “issued on behalf of a small concern owned and controlled by socially and economically disadvantaged individuals,” including “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and other minorities or any other individual found to be disadvantaged by SBA. . .”

13 C.F.R. § 124.1001(b) (2004): “Only small firms that are owned or controlled by socially and economically disadvantaged individuals are eligible to participate in

Federal SDB price evaluation adjustment, evaluation factor or subfactor, monetary subcontracting incentive, or set-aside programs, or SBA's section 8(d) subcontracting program." See also *id.* at § 124.1015 ("What is the effect of receiving an SDB certification?").

13 C.F.R. 125.2 (d)(2)(i) (2004): SBA's "contract bundling" regulation requires that all federal agencies "[s]tructure procurement requirements to facilitate competition by and among . . . small business concerns owned and controlled by . . . socially and economically disadvantaged individuals and small business concerns owned and controlled by women."

13 C.F.R. § 143.21(h) (2004): Grantees and subgrantees under SBA program of grants and cooperative agreements with state and local governments are "encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members)."

State Department and Foreign Affairs

22 U.S.C.S. § 2665a: "Priority consideration" for Foreign Service fellowships is given to the faculty of institutions of higher learning who teach in programs in international affairs which serve significant numbers of students who are from cultural and ethnic groups which are underrepresented in the Foreign Service."

22 U.S.C.S. § 4823: "The Secretary of State shall actively recruit women and member of minority groups" for special agent positions.

22 U.S.C.S. § 4852(d): Not less than 10 percent of the amount appropriated for diplomatic construction or designed projects each fiscal year shall be allocated to the extent practicable for contracts with American minority contractors.

22 U.S.C.S. § 4864(e): Not less than 10 percent of the amount of funds obligated for local guard contracts for Foreign Service buildings shall be allocated to the extent practicable for contracts with minority small business contractors.

22 U.S.C.S. § 4901(e): The Secretary shall actively recruit women and members of minority groups to receive fellowships for temporary service at United States missions abroad.

P.L. 103-306, 108 Stat. 1608, 1646 § 555 (1994): Provides for a 10 percent set-aside of the aggregate amount of certain appropriations to the Agency for International Development — the Development Assistance Fund, Population, Development Assistance, and the Development Fund for Africa — for socially and economically disadvantaged U.S. businesses and private voluntary organizations, historically black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollment.

Government procurement agreements. The United States has entered into procurement obligations under the North American Free Trade Agreement (NAFTA) (Chapter Ten) and the Uruguay Round Agreement on Government Procurement under which the United States agrees, among other things, to accord national

treatment to products, services, and suppliers of other parties with respect to government contracts entered into by named agencies above certain threshold amounts. In both the NAFTA and the Uruguay Round Agreement (as well as in earlier trade agreements), the United States has taken a reservation stating that agreement obligations will not apply to set asides on behalf of small and minority businesses (NAFTA, Chapter 10, Annex 1001.2b, General Notes, Schedule of the United States, Note 1; Uruguay Round Agreement on Government Procurement, Annex of the United States, General Note 1).

22 C.F.R. § 145.44(b) (2004): All recipients of Department of State grants and cooperative agreements awarded to institutions of higher education and other non-profit organizations are to establish written procurement procedures to provide for “positive efforts. . .to utilize small businesses, minority-owned businesses, and women’s business enterprises, whenever possible” and to ensure that such businesses “are utilized to the fullest extent practicable.” Same provisions apply pursuant to uniform administrative requirements prescribed by 22 C.F.R. 518.44(b) (2004).

48 C.F.R. § 652.219-70 (2003): Clause in Department of State contracts requiring disadvantaged and minority subcontracting goals. See also 48 C.F.R. §§ 619.201(b), 619.708-70.

48 C.F.R. § 706.302-71 (2003): Agency for International Development (AID) requirement that “[e]xcept to the extent otherwise determined by the Administrator, not less than ten percent of amounts made available for development assistance and for assistance for famine recovery and development in Africa shall be used only for activities of disadvantaged enterprises.” “Disadvantaged enterprise” means concerns owned and controlled by “socially and economically disadvantaged individuals,” as defined by FAR (48 C.F.R. § 19001(b)) to be members of designated racial and ethnic minority groups, “Historically Black Colleges and Universities,” and “colleges and universities having a student body in which more than 40 percent of the students are Hispanic American.” 48 C.F.R. § 726.7002.

48 C.F.R. Part 719 (2003): Socioeconomic Program policies of AID state that “[w]here practicable and desirable, small business and minority goals will be established” for procuring activities (id. at § 719.270(e)); and mandates that the AID Office of Small Disadvantaged Business develop “a plan of operation designed to increase the share of contracts awarded to small business concerns, including small minority business enterprises” (id. at § 719.271-2(6)). Disadvantaged enterprises include socially and economically disadvantaged concern, historically black colleges and universities, and higher educational institutions with more than 40 percent Hispanic student enrollments (id. at §§ 726.7002, 752.226-1,2).

Transportation

Transportation Equity Act for the 21st Century (TEA-21), P.L. 105-178, § 1101(b), 112 Stat. 107 (1998). The U.S. Department of Transportation (DOT) established a minority and women’s business enterprise (DBE) program for its highway, airport, and transit programs by regulation in 1980. The Surface Transportation Assistance Act of 1982 contained the first statutory DBE provision for federal highway and transit programs, requiring that at least 10 percent of the

funds provided by the act be expended with small businesses owned and controlled by socially and economically disadvantaged individuals, unless the Secretary of Transportation determined otherwise. Nonminority women were not included as socially and economically disadvantaged individuals. The Surface Transportation and Relocation Assistance Act of 1987 continued and expanded the program to include nonminority women, thereby allowing states to use contracts with minority and women-owned businesses to meet their DBE goals. The Intermodal Surface Transportation Efficiency Act of 1991 and, most recently, §1101(b) of TEA-21 reauthorized the program, continuing the combined 10 percent provision for participation by minority-owned and nonminority women-owned DBEs.

49 U.S.C.S. § 47107(e)(1): Requires federally aided airport operators to insure “to the maximum extent practicable” that at least 10% of contracts for consumer services to the public be placed with “small business concerns owned and controlled by a socially and economically disadvantaged individual. . .” The statute incorporates the Small Business Act definition of that term “except that women are presumed to be socially and economically disadvantaged.” (49 U.S.C.A. § 47113(a)(2)).

49 C.F.R. Part 26 (2003). In 1999, DOT substantially revised its regulations for DBE participation in federally assisted contracting administered by the department. Stricter eligibility requirements included a personal net worth cap of \$750,000 on owners of disadvantaged firms (§ 26.67(a)(2)), and the program’s goal-setting process was overhauled to place greater emphasis on race-neutral measures (e.g. outreach and technical assistance) to achieve a “level playing field” — that is, the level of DBE participation that would be expected in the absence of discrimination (§ 26.1). States and transit authorities, which formerly had to justify goals lower than the statutory 10 percent,” now are required to base their DBE goals on demonstrable evidence of the relative number of “ready, willing, and able” DBEs available in local markets as compared to other qualified business entities (§ 26.45 (b)). Such evidence may be drawn from DBE directories and Census Bureau data, bidders lists, disparity studies, or the goal of another recipient (§ 26.45 (c)). The overall goal must then be adjusted to account for other factors affecting DBEs, such as capacity to perform work on DOT-assisted contracts (§ 26.45(d)). States and transit authorities must meet the maximum feasible portion of their overall DBE goals using race-neutral measures not focused exclusively upon DBEs (§ 26.51). While quotas are prohibited and set-asides are allowed only in the most extreme cases of discrimination (§ 26.43), states and transit authorities must use contract goals and other race conscious means to meet any otherwise unattainable portion of their overall goals. But a recipient will not be punished for failure to attain its overall goal provided that it can demonstrate “good faith efforts” (§ 26.53). Recipients are required to submit their overall DBE participation goals, including the methodology used to set goals and the projected use of race-neutral and race-conscious measure, to DOT for approval on an annual basis.

14 C.F.R. § 152.409 (2004): Grantees under federal Airport Aid Program must develop affirmative action plan comparing separately the percentage of minorities and women in various categories of the employer’s workforce with the demographic makeup of the contiguous counties and implement “goals and timetables designed

to eliminate obstacles to equal opportunities for women and minorities in recruitment and hiring.”

49 C.F.R. § 23.95 *et seq.* (2003): Minority business enterprise participation standards under § 511(A)(17) of the Airport and Airway Improvement Act of 1982 provide that sponsors of airport improvement projects “shall establish an overall goal for the participation of DBE’s” as concessionaires and “[t]o the extent practicable, shall seek to obtain DBE participation in all types of concession activities.” “Where not prohibited by state or local law and determined. . .to be necessary to meet DBE goals, procedures to implement DBE set-asides shall be established. The DBE plan shall specify the concessions to be set-aside.” (§ 23.95(c)). The term “disadvantaged business” means a small business concern owned and controlled by “socially and economically disadvantaged individuals,” as defined in SBA regulations to include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Subcontinent Asian Americans, and women. There is a “rebuttable presumption” that member of these groups are socially and economically disadvantaged. 49 C.F.R. §§ 23.89, 23.62.

49 C.F.R. § 265.13 (2003): Federal Railroad Administration regulations barring discrimination in federally assisted programs require “where there are deficiencies based on past practices, and with respect to future plans for hiring and promoting employees or awarding contracts, the development of specific goals and timetables for the prompt achievement and maintenance of full opportunities for minority persons and MBEs with respect to programs, projects and activities subject to this subpart.”

Veterans Affairs

38 U.S.C.S. § 7303: Authorizes the Veteran’s Administration to provide grants to medical research programs that conduct and support clinical research of women and minorities who are veterans. “The Secretary ... shall foster and encourage the initiation and expansion of research relating to the health of veterans who are women.”

38 C.F.R. § 43.21(h) (2003): Department of Veterans Affairs Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” grantees and subgrantees to use minority banks at least 50% owned by minority group members.

48 C.F.R. § 819.202-5(c) (2003): Department of Veterans Affairs regulations require “all acquisition activities [to] submit information and procurement preference goals” for “minority direct business awards,” “women-owned business awards,” and “[s]ubcontracts to be awarded to small disadvantaged business concerns.”

Other

36 C.F.R. Part 906 (2003): Affirmative action policy and procedures, including goals and timetables for women and minorities, “to assure full minority participation

in activities and benefits that result from implementation of the Pennsylvania Avenue Plan — 1974.”

36 C.F.R. § 1207.21(h) (2003): National Archives and Records Administration Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” grantees and subgrantees to use minority banks at least 50% owned by minority group members.

44 C.F.R §§ 13.21(h) (2003): Federal Emergency Management Agency Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments “encourage” grantees and subgrantees to use minority banks at least 50% owned by minority group members.

Equal Employment Opportunity Laws

The evolution of federal law and policy regarding affirmative action in employment may be traced to a series of executive orders dating to the 1960’s which prohibit discrimination and require affirmative action by contractors with the federal government. The Office of Federal Contract Compliance Programs, an arm of the U.S. Department of Labor, currently enforces the E.O. 11246, as amended, by means of a regulatory program requiring larger federal contractors, those with procurement or construction contracts in excess of \$50,000, to make a “good faith effort” to attain “goals and timetables” to remedy underutilization of minorities and women. Another early Executive Order, No. 11478, was a precursor to the 1964 Civil Rights Act and mandates affirmative action hiring and employment policies by all federal executive departments and agencies.

Public and private employers with 15 or more employees are also subject to a comprehensive code of equal employment opportunity regulation under Title VII of the 1964 Civil Rights Act.²⁰ Except as may be imposed by court order to remedy “egregious” violations of the law, or by consent decree to settle pending claims, however, there is no general statutory obligation on employers to adopt affirmative action measures. The EEOC has issued guidelines to protect employers and unions from charges of “reverse discrimination” when they voluntarily take action to correct the effects of past discrimination.²¹ Federal departments and agencies, by contrast, are required to periodically formulate affirmative action plans for their employees and a “minority recruitment program” to eliminate minority “underrepresentation” in specific federal job categories.

Section 717 of 1972 Amendments to Title VII of the 1964 Civil Rights Act empowers the Equal Employment Opportunity Commission to enforce nondiscrimination policy in federal employment by “necessary and appropriate”

²⁰ 42 U.S.C. 2000e et seq.

²¹ 29 C.F.R. Part 1608 (the guidelines state the EEOC’s position that when employers voluntarily undertake in good faith to remedy past discrimination by race- or gender-conscious affirmative action means, the agency will not find them liable for reverse discrimination).

rules, regulations, and orders and through “appropriate remedies, including reinstatement or hiring of employees, with or without backpay.”²² Each federal department and agency, in turn, is required to prepare annually a “national and regional equal employment opportunity plan” for submission to the EEOC as part of “an affirmative program of equal employment opportunity for all . . . employees and applicants for employment.”²³

Section 717 was reinforced in 1978 when Congress enacted major federal civil service reforms including a mandate for immediate development of a “minority recruitment program” designed to eliminate “underrepresentation” of minority groups in specific federal job categories.²⁴ The EEOC and Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan “must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured.”²⁵

In addition, the following statutes and regulations relate to employment policies of the federal government or under federal grant and assistance programs:

5 U.S.C.S. §§ 4107, 5379: An agency’s selection of employees for reimbursement or repayment of educational loans or training shall be “consistent with the merit principles set forth in § 2301 and take into consideration the need to maintain a balanced workforce in which women and members of racial and ethnic minority groups are appropriately represented in Government service.”

5 U.S.C.S. § 4313(5): Performance appraisal in the Senior Executive Services to take account of individuals’ “meeting affirmative action goals, achievement of equal employment opportunity requirements, and compliance with merit principles. . . .”

5 U.S.C.S. § 7201: Establishes a “Minority Recruitment Program” for the Executive Branch and directs each Executive agency, “to the maximum extent possible,” to “conduct a continuing program for the recruitment of members of minorities for positions in the agency. . . in a manner designed to eliminate underrepresentation of minorities in the various categories of civil service employment within the Federal service, with special efforts directed at recruiting in minority communities, in educational institutions, and from other sources from which minorities can be recruited.”

22 U.S.C.S. § 4141: Establishes the Foreign Service Internship Program “to promote the Foreign Service as a viable and rewarding career opportunity for qualified individuals who reflect the cultural and ethnic diversity of the United States. . . .”

²² 42 U.S.C. § 2000e-16(b).

²³ 42 U.S.C. § 2000e-16(b)(1).

²⁴ 5 U.S.C. § 7201.

²⁵ 5 C.F.R. § 720.205(b).

42 U.S.C.S. § 282(h): The Secretary of HHS, and the National Institutes of Health, “shall, in conducting and supporting programs for research, research training, recruitment, and other activities, provide for an increase in the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities) in the fields of biomedical and behavioral research.”

45 U.S.C.S. §§ 797b, 1004: First right to hire of certain previously separated or furloughed railroad employees subject to exceptions for vacancies covered by “(1) an affirmative action plan, or a hiring plan designed to eliminate discrimination, that is required by Federal or State statute, regulation, or Executive order, or by the order of a Federal court or agency, or (2) a permissible voluntary affirmative action plan.”

Executive Order 11246: Prohibits employment discrimination because of race, color, religion, sex, or national origin by nonexempt federal government contractors and requires inclusion of an affirmative action clause in all covered federal contracts for procurement of goods and services. Pursuant to Labor Department regulations, larger federal contractors are required to adopt goals and timetables to correct “underutilization” of minorities and women. See 41 C.F.R. Part 60 (discussed *infra*).

Executive Order 11478: States the policy of the United States government “to provide equal opportunity in Federal employment for all persons, to prohibit discrimination because of race, color, religion, sex, national origin, handicap, or age, and to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive agency and department.”

Executive Order 13116 (2000): Requires Federal agencies to examine services and prepare a plan “to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency.” (See also Executive Order 50123)

Executive Order 13171 (2000): The head of each executive department and agency shall establish and maintain a program for the recruitment and career development of Hispanics in Federal employment.

Federal Regulations

5 C.F.R. Parts 720, 720 APP. (2003): Affirmative Employment Programs of the Office of Personnel Management and Guidelines for Development of A “Minority Recruitment Program” to Implement 5 U.S.C. § 7201.

14 C.F.R. § 152.407, .409, .411 (2003): All grantees, sponsors, or planning agencies, with 50 or more aviation employees who participate in projects which receive federal airport aid funds are required to maintain “affirmative action” plans containing “goal and timetables” derived from “[a] comparison. . .of the percent of minorities and women in the employer’s present aviation workforce. . .with the percent of minorities and women. . .in the total workforce” in the SMSA or surrounding area.

23 C.F.R. § 230.111 (2003): On-the-job training program rules for federally assisted highway construction projects provide that “[t]he Washington Headquarters shall establish and publish annually suggested minimum training goals. . .based on the Federal-aid apportioned amounts and the minority population. A State will have achieved its goal if the total number of training slot. . .equals or exceeds the State’s suggested minimum annual goal.”

23 C.F.R. Part 230 APP. A (2003): State Highway Agency Equal Employment Opportunity Programs. Affirmative action plans are to set “specific, measurable, attainable hiring and promotion goals, with target dates, in each area of underutilization” of women and minorities.

28 C.F.R. 42.206 (2003): Recipients of federal financial assistance administered by the Justice Department are selected for post-award compliance reviews, in part, on the basis of “[t]he relative disparity between the percentage of minorities, or women, in the relevant labor market, and the percentage of minorities, or women, employed by the recipient. . .” See also *id.* at § 42.303 (Evaluation of employment opportunities); § 42.304 (Written equal employment opportunity program).

29 C.F.R. §§ 30.3-30.8 (2003): Affirmative action requirements of the Department of Labor (DOL) for registered state apprenticeship programs include “goals and timetable for women and minorities.” “Compliance with these requirements shall be determined by whether the sponsor has met its goals within its timetables, or failing that, whether it had made good faith efforts to meet its goals and timetables.”

32 C.F.R. Part 191, § 191.5(a)(6) (2002): DOD Civilian Equal Employment Opportunity Program establishes affirmative action guidelines and procedures for all DOD components and directs the Assistant Secretary of Defense to “[e]nsure that realistic goals that provide for significant continuing increases in the percentages of minorities, women, and people with disabilities in entry, middle, and higher grade positions in all organizations and occupations are set and accomplished until the overall DOD objective is met and sustained.”

34 C.F.R. Part 100 APPENDIX B, VIII C. (2003): Department of Education guidelines for eliminating discrimination in vocational education programs provide that “[w]henver the Office for Civil Rights finds that in light of the representation of protected groups in the relevant labor market there is a significant underrepresentation or overrepresentation of protected group persons on the staff of a vocational education school or program, it will presume that the disproportion results from unlawful discrimination. This presumption can be overcome by proof that qualified persons of the particular race, color, national origin or sex, or that qualified handicapped persons are not in fact available in the relevant labor market.”

40 C.F.R. Part 8 (1994): Environmental Protection Agency (EPA) equal employment opportunity and affirmative action compliance requirements issued pursuant to E.O. 11246 as applied to EPA contracts and EPA assisted construction contracts.

41 C.F.R. Part 60 (1994): Sets forth the body of administrative rules issued by the Office of Federal Contract Compliance Programs within the Department of Labor to enforce the affirmative action requirements of E.O. 11246 on federal procurement and construction contractors. All contractors and subcontractors with federal contracts in excess of \$10,000 are prohibited by the Executive Order from discriminating and required to take affirmative action in the employer of minority groups and women. Federal contractors and subcontractors with 50 or more employees and government contracts of \$50,000 or more must develop written affirmative action compliance programs for each of their facilities. OFCCP rules direct these larger contractors to conduct a “utilization analysis” of all major job classifications and explain any underutilization of minorities and women by job category when compared with the availability of qualified members of these groups in the relevant labor area. Based on this analysis, the contractor’s affirmative action plan must set forth appropriate goals and timetables to which the contractor must direct its “good faith efforts” to correct deficiencies. In addition, OFCCP has established nationwide hiring goals of 6.9 percent for women in construction, and regional and local goals for minorities in construction, which are set out in an appendix to the agency’s affirmative action in construction regulations. 41 C.F.R. 60-4.

48 C.F.R. 22.804 (2003): Affirmative action program under Federal Acquisition Regulations requires written affirmative action plans of federal nonconstruction prime and subcontractors with 50 or more employees that comply with DOL regulations to assure equal opportunity in employment to minorities and women.

48 C.F.R. 52.222-23, 52.222-27 (2003): Prescribes clause for inclusion in federal contracts that requires “[g]oals for minority and female participation, expressed in percentage terms for the Contractor’s aggregate workforce in each trade on all construction work in the covered area” and “to make a good faith effort to achieve each goal under the plan in each trade in which it has employees.”

48 C.F.R. 922.804-2 (2003): Department of Energy regulations implementing the affirmative action plan requirements of E.O. 11246.