Monday, October 25
4:30pm-6:00pm

406 - To Hire or Not to Hire, that is the Question: Employment Screening Best Practices

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Session 406

Faculty Biographies

Julienne Bramesco

Julienne Bramesco is the vice president and general counsel for Colonial Parking Inc. in Washington, DC, where she advises the company on all legal matters related to the business of parking cars.

She was formerly associate general counsel for the ACC. She also practiced labor and employment law in the corporate legal departments of Marriott International, and Kaiser Permanente.

Ms. Bramesco has been a speaker at a number of conferences including ACC's CCU and Annual Meeting programs, and The Georgetown University Law Center Corporate Counsel Institute, where is a member of the Advisory Board. She is the author of "Is Green the New Black?" published in the October 2007 ACC Docket, and is also the co-author of "The Firing Line," published in the ACC Docket in September 2005. In her spare time, Ms. Bramesco is a lifetime member of the Girl Scouts USA, and in addition to advising a troop, she has been trained as an adult educator and facilitator and provides training for leaders and advisors. She is also a member of the board of directors of Beth El Hebrew Congregation where she chairs the Inclusion Committee devoted to accommodating members with disabilities, and is vice president of the Yorktown High School Crew Booster Board.

Ms. Bramesco received her bachelor's from the School of Industrial and Labor Relations, Cornell University. She received her JD from Georgetown University Law Center.

Ed Farren

Ed Farren is an assistant general counsel with Capital One. He is a member of the employment law team in the legal department's litigation group. Mr. Farren provides strategic legal counsel and compliance advice across a broad range of US employment law issues. His work includes legal support for complex human resources programs and initiatives.

Before joining Capital One, Mr. Farren practiced law with Hunton & Williams in Richmond, Virginia. There, he specialized in employment law litigation, advice and training. Mr. Farren's practice included significant experience in federal and state courts, as well as expertise in affirmative action planning and managing audits by the OFCCP.

Mr. Farren is a member of the Virginia State Bar, the Richmond Bar Association, WMACCA, and ACC. He is a co-chair of the membership subcommittee of ACC's Employment and Labor Law Committee.

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Mr. Farren earned his JD from Washington & Lee University, graduating magna cum laude, and his BA, with distinction, from the University of Virginia.

Kristina Kerwin

Kristina M. Kerwin is employment law counsel at Accenture LLP. As a member of the North America Employment Law Team, Ms. Kerwin provides counsel to internal human resources and employee relations professionals on a wide range of employee issues including hiring, performance, discipline, leaves of absence, and termination. Ms. Kerwin is involved in the development and application of Accenture human resources policy and claims management, including litigation. Ms. Kerwin also provides advice to Accenture transactional attorneys regarding the provision or acquisition of personnel in connection with Accenture contracts to provide consulting, technology and outsourcing services to clients.

Prior to joining Accenture, Ms. Kerwin was an associate in the labor and employment group at Seyfarth Shaw in Chicago. She also practiced employment law in Texas and California.

Ms. Kerwin received her BS from Texas A&M University and her JD from the University of Texas School of Law. She also received her Masters in Business Administration from the University of Chicago Booth School of Business.

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Three Background Check Favorites:

Criminal

Credit

Fair Credit Reporting Act ("FCRA")

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Criminal Background Checks

At least seven states restrict the use of criminal history in employment decisions:

California
Hawaii
Illinois
Kansas
Minnesota
Massachusetts
Pennsylvania

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Criminal Background Checks

Recent focus by EEOC and Courts on Background Screening Policies and Procedures

- EEOC's New E-RACE Initiative
- Adverse Impact

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Due Diligence for Criminal Checks

Did the applicant actually commit the offense?

- Allow the person a meaningful opportunity to explain the circumstances of the arrest or conviction and make a reasonable effort to determine whether the explanation is credible before eliminating him/her from consideration

What is the nature and gravity of the offense?

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How long ago was the offense?

- DUI 15 years ago
- Retail theft 1 year ago

What is the nature of the job being applied for?

- DUI for a consultant/bus driver
- Theft for cashier/lifeguard

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Credit Checks

Significant recent legislative activity in this area

Four states (WA,HI, OR, IL) restrict use of credit history in employment decisions

- Others pending

Similar federal legislation is also pending (SA 3795 and HR 3149)

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Fair Credit Reporting Act:
Overview and Developments

FCRA Basics:

- Applies to background checks performed by an outside entity (“consumer reporting agency”)
- Notice and consent requirements
- “Consumer report” vs. “consumer investigative report”

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FCRA Basics

- Pre-adverse action disclosure
- Adverse action notice

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FCRA Developments

The growth of litigation related to FCRA

- Failure to disclose
- Failure to secure consent
- Failure to provide adverse action notices

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Managing Selection Programs is Critical

High Level Profile

- Supreme Court decisions in *Ricci* and *Lewis*
- Heightened enforcement scrutiny from EEOC & OFCCP

High Business Stakes

- Keen competition for best talent
- Significant capital investment and trailing costs; possible liabilities

VALIDATION
Maximizes Business Value → Minimizes Legal Risk

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To Test – You and Your Client Must Be Committed

If You Do It, Do It Well

- Believe in it - Apply tests consistently
- It is not cheap - Don't cut corners in development or maintenance
- Get expert support - Outside counsel, reputable vendors & consultants

Be the Solution for Your Client

- Identify must-haves, pulls on business, and best practices/ trends
- Proactively identify the corners vendors cut, and their sales pitches
- Advocate UGESP validation as the metric for Success & Business Value

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Testing & EEO Requirements

If adverse impact

- Title VII & ADA – employer must establish that tests, as applied, are "job-related and consistent with business necessity"
- ADEA – employer must establish that tests, as applied, are based on reasonable factors other than age

ADA accommodations in test administration

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Uniform Guidelines on Employee Selection Procedures

History

- Post *Griggs*, issued in 1978 by EEOC, DOL, DOJ & Civil Service Commission
- These are "guidelines"
- Somewhat outdated, but no momentum to update

Scope

- Tests and ***other selection procedures***
- Framework for adverse impact assessment – 80% rule
- Approaches for ***validation*** of selection practices that impose adverse impact

Practical Applications

- Framework for employer EEO compliance efforts (not ADEA)
- Grounding for OFCCP & EEOC enforcement efforts, but they have "administrative & prosecutorial discretion"
- UGESP, plus professional IO standards inform the "battle of experts" in litigation

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Validation Principles

What is Validity?

- The degree to which evidence and theory support the interpretations of test scores

What is a Validation Study?

- Scientific analysis of the accuracy of inferences from test scores
- Use of appropriate & accepted validation study will demonstrate the job relatedness of a selection procedure & business necessity

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Three Basic Validation Strategies

Content: establishes that content of test is representative of content of job through expert "linkages"
- Classic "work sample" tests and job simulations; Job skills & knowledge tests; Structured interviews

Criterion: statistical proof that test performance predicts job performance (concurrent or predictive)
- Cognitive tests; Biodata tests

Construct: uses criterion strategy linked to constructs (abstract variables such as intelligence, motivation, etc.)
- Esoteric and rarely used

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Validity Transportability

Validity evidence from a specific study may be "transported" to a new job if The source and target jobs are sufficiently similar in job responsibilities and skill requirements

Job Analysis for the new job is critical to ensure that they key characteristics of the two jobs are sufficiently similar

A helpful approach for managing testing program for enterprise with large number of jobs and/or evolving jobs

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Identify the Must Haves – Local Validation

Key for Any Validation - Comprehensive Job Analysis
- Appropriate methodologies
- Adequate sample size
- Shelf life issues

Key Issues for Content Validation
- Test content related to/representative of job content – linkages
- Passing score that selects those who can better perform the job

Key Issues for Criterion-Related Validation
- Selection/harvesting of appropriate job performance criteria & sample size
- Test content development
- Calculation of correlation needed to establish validity
- Setting appropriate cut score
- Consideration of alternatives imposing less adverse impact

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Identify Pulls on Business, Get Buy-In Up Front & Anticipate Pressure Points

Monetary Costs
- Test Development & Validation
- Operations, administration & maintenance

Diversion of Resource Costs
- Manager and incumbent resources time to complete job analysis and performance criterion tasks
- Time for training of administrators, hiring managers and other relevant staff

Pressure for Exceptions to Override Test Failure

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Best Practices and Trends

- *Structured interviews deliver significant value*
- *Cognitive ability deliver significant value, but are lightening rods*
- *Compensatory scoring v. Stand-alone hurdles*
- *Robust consideration of alternatives*
- *Appropriate cut-off scores*
- *Test administration – security, confidentiality of scores, accommodations process*
- *Privileged periodic adverse impact analyses (bottom line and step)*
- *Periodic scheduled Job Analysis maintenance*

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Make Your Client an Informed Customer of Testing Vendors/Consultants

- *Beware the sales pitch – don't believe claims that an off-the-shelf test*
  - Is "validated" or "approved" by EEOC/OFCCP
  - Is "facially valid"
  - Has no adverse impact
  - Guarantees wildly successful results
  - Will be "plug-in-and-play"
- *Understand the difference between marketing materials & validation studies/reports*
- *Common risks with Vendors*
  - Push their own tests to the exclusion of other types of tests
  - May skimp on validation or documentation
  - May persist with a tests even if validation is not strong

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Medical Exams

How do you identify employees who can do the work?

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Laws Governing Medical Exams

- Americans with Disabilities Act
  - 42 USC 12112(d)
- Age Discrimination in Employment Act
- Genetic Information Nondisclosure Act
- State drug testing laws

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ADA Requirements

- Drug tests are not "medical exams"
- Medical exams are not prohibited—but strictly regulated
- Physical fitness tests are not "medical exams"
- Pre-hire vs. Post-offer

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Pre-Hire Inquiries

May not elicit information about disabilities

Ask only can the applicant perform job related functions

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Post-Offer

- *Once an offer is made but before an employee starts to work, an employer may require a medical exam if*
  - All employees are subjected to the exam
  - Information is maintained in separate confidential files

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Information from Employment Medical Exams

- *Restrictions and accommodations may be shared with supervisor*
- *First aid and safety personnel may be informed when appropriate*
- *May not be used to discriminate against the employee*

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Permitted Examinations

- *Voluntary medical exams*
- *Exams part of an employee health programs that are available to the employees, and*
- *Inquiries about ability to perform job related functions are always permitted*

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Demonstrations

- *An employer can ask an applicant to demonstrate how they might perform a job function*
  - But the same demonstration must be asked of all applicants

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Hiring Individuals with Known Disabilities

- *Disability may be apparent or the applicant may disclose*
  - Employer can ask whether the applicant will need an accommodation
    - If the answer is no, no further inquiry permitted

Don't Fear the ADA

- The law was passed to remove barriers
- Possibilities for accommodations are myriad
- Accommodations do not need to be expensive
- Proper performance management will help guard against lawsuits

To Hire or Not To Hire, That is the Question: Employment Screening Best Practices ACC Annual Meeting, October 25, 2010

Supporting Materials Regarding Criminal Background Checks, Credit Checks, and FCRA Developments

Presented by: Kristina M. Kerwin

I. Criminal Background Checks

A. State Law Requirements:

California: Cannot ask applicants about any arrest that did not result in a conviction, and cannot seek the information from any other source. Exceptions: Out on bail pending trial; health care workers in care facilities; supervisory position (children). California Labor Code §432.7

Hawaii: Hawaii state law makes it an unlawful employment practice to discriminate on the basis of an "arrest and court record." Haw. Rev. Stat. Ann. 378-2. The law allows employers to inquire as to an applicant's criminal conviction record from the past ten years, provided that the crime in the record "bears a rational relationship to the duties and responsibilities of the position." Furthermore, this inquiry may take place "only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position." Hawaii also provides an exception similar to that found under Wisconsin law, which allows employers to consider conviction records that are substantially related to the job sought.

Illinois: Cannot use information that has been expunged, sealed, or impounded; and cannot take action based on record of *arrest* (may consider convictions). Illinois Human Rights Act, 775 Ill. Comp. Stat. Ann. 5/2-103.

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Kansas: Kansas law provides that an employer cannot be held liable for decisions based on criminal history information, as long as the information "reasonably bears" on the individual's trustworthiness, or the safety or well-being of the employees or customers. See K.S.A. § 22-4710(f). Under K.S.A. § 21-4619(h), in an application for employment, a person whose arrest records, conviction or diversion of a crime has been expunged may state that such person has never been arrested, convicted or diverted of such crime (with some exceptions for positions pertaining to social and rehabilitative services, the practice of law, firearms, private detective, etc.).

Minnesota: Cannot ask applicants about any arrest not followed by a valid conviction, or any misdemeanor convictions for which no jail sentence can be imposed. *Applies only to public employers and occupations for which a state license is required.* Minn. Stat. Sec. 364 et seq.

Massachusetts: See below

New York: New York also has a statute prohibiting employment discrimination on the basis of criminal convictions. The statute provides two exceptions that allow employers to refuse to hire applicants based on criminal convictions: when "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought" and when "the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." See N.Y. Correct. Law 752 ("No application for any license or employment ... shall be denied by reason of the applicant's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of 'good moral character' when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses ... .").

Pennsylvania: In Pennsylvania, the use of criminal background checks in making hiring decisions is governed by 18 Pa.C.S. Sec. 9125, part of the Criminal History Record Information Act, 18 Pa.C.S. Sec. 9101-9181. Section 9125 permits employers to consider an applicant's felony and misdemeanor convictions - not mere arrests- in connection with hiring decisions. Significantly, however, the convictions may only be considered to the extent they relate to an

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applicants' suitability for the specific job in question. The Act further requires that if an employer's decision not to hire an applicant is based in whole or in part on criminal history record information, then the employer must so notify the applicant in writing. Rejected applicants can sue to challenge the employer's reliance on the background check. If, for example, an employer relies on a conviction unrelated to the job, or if the employer relied on a mere arrest, the Act permits an award of actual and real damages, as well as punitive damages (up to $10,000.00) and attorneys' fees.

Wisconsin: Wisconsin's Fair Employment Act prohibits employment discrimination on the basis of fourteen grounds, which specifically include "arrest record" and "conviction record." Wis. Stat. Ann. 111.31-.395 (West 2002). The Wisconsin statute, however, also contains an exception which provides that employers and licensing agencies may refuse to hire or license an individual, or terminate employment or licensing of an individual, if he or she "has been convicted of any felony, misdemeanor or other offense the circumstances of which *substantially relate to the circumstances of the particular job or licensed activity.*" (emphasis added). Recent cases have used "a liberal interpretation of the substantial relationship exception," which often favors employers. See Thomas M. Hruz, Comment, The Unwisdom of the Wisconsin Fair Employment Act's Ban of Employment Discrimination on the Basis of Conviction Records, 85 Marq. L. Rev. 779, 827 (2002).

New Massachusetts Law Prohibits Employers From Inquiring About Criminal Convictions on “Initial” Applications

On August 6, 2010, Governor Patrick signed into law legislation overhauling the Commonwealth’s Criminal Offender Record Information law (CORI). The new law contains several provisions that will affect employers’ use of the criminal histories of prospective and current employees.

The new law prohibits employers from asking questions on an “initial written application form” about an applicant’s “criminal offender record information,” which includes information about criminal charges, arrests, and incarceration. This provision amends a portion of the Massachusetts Fair Employment Practices Law, M.G.L. Chapter 151B, §4 (9), which bars employers from asking questions of job applicants about arrests that do not result in convictions

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and convictions for certain misdemeanors, but allows questions about felony convictions and about misdemeanor convictions not protected from disclosure. By using the term "initial written application," the new law may allow employers to continue to question applicants about felony and currently unprotected misdemeanor convictions in subsequent parts of the application process such as in-person interviews, but the intent of the amendment is not clear. The new law may also be read to require employers to obtain criminal offender record information only from the newly created Department of Criminal Justice Information Services, which is a department in the executive office that largely replaces the Criminal History Systems Board (CHSB). The law does not address criminal history inquiries conducted by third parties on behalf of a current or prospective employer. Until these ambiguities in the CORI reform law are resolved, employers are advised to exercise caution in asking job applicants about any felony or misdemeanor convictions during the application process, to seek such information from the new Department, and to avoid asking for such information in any event on an "initial written application form."

The only exceptions to the new initial job application requirements expressly provided in the CORI reform law are for (1) positions for which a federal or state law or regulation disqualifies an applicant based on a conviction; or (2) employers who are subject to an obligation under a federal or state law or regulation not to employ persons who have been convicted.

Employers Can Still Consider A Candidate's Criminal History Subject To Conditions

The CORI reform law does not prohibit employers from obtaining a current or prospective employee's criminal history contained in the Commonwealth's Criminal Offender Record Information (CORI) database. However, under the law, an individual's CORI record will no longer include (1) felony convictions that have been closed for more than ten years (i.e., the conviction occurred more than ten years ago or, if the individual was incarcerated, the individual was released more than ten years ago); or (2) misdemeanor convictions that have been closed for more than five years.

Also, the employer's request for a current or prospective employee's CORI record will no longer be invisible to the subject. A current or prospective employee will be able to obtain from the Department of Criminal Justice Information Services a log listing the names of persons who

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requested his or her CORI record, the date of the requests, and the certified purpose of the requests.

Employers in possession of a current or prospective employee's CORI record are still allowed to ask the subject about his or her criminal history and can decide not to hire a candidate or take adverse actions based on that person's criminal history. Before doing either, however, the employer must give the subject a copy of his or her CORI record.

Employers Who Conduct Five or More Criminal Background Investigations Per Year Must Have A Written Policy

Employers who annually conduct five or more criminal background investigations will be required to maintain a written criminal offender record information policy. The policy must provide that the employer will (1) notify an applicant who is the subject of an investigation of the potential of an adverse decision based on the investigation; (2) provide a copy of the policy to the applicant and a copy of the criminal offender record information obtained as part of the investigation; and (3) provide information concerning the process for the applicant to correct his or her criminal record.

Employer's Obligation To Discard CORI Records

The CORI reform law prohibits employers from maintaining a former employee's CORI record for more than seven years from the former employee's last date of employment. Employers are also prohibited from maintaining an unsuccessful candidate's CORI record for more than seven years from the date of the decision not to hire the candidate.

Employer Defenses To Charges Of Negligent Hiring And Failure To Hire

The law also contains some protections for employers related to their use of and reliance on CORI records, provided that the employer made the employment decision within 90 days of receipt of the CORI record and verified the information in the CORI record as set forth in the law's requirements. First, the law shields employers from liability for failure to hire based on erroneous information on a candidate's CORI record. Second, the law provides that employers

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cannot be liable for negligent hiring by reason of relying solely on CORI records and not performing additional criminal history background checks prior to hiring an individual.

B. *Recent focus by EEOC and Courts on Background Screening Policies and Procedures*

EEOC's New E-RACE Initiative

As part of its new Eradicating Racism and Colorism from Employment ("E-RACE") Initiative, the EEOC is in the process of identifying "issues, criteria and barriers" that contribute to race and color discrimination in the workplace. Part of this effort involves collecting data regarding background screening policies and procedures that may disparately impact minority applicants. The EEOC has determined that employer polices or practices of excluding individuals from employment based on their criminal history or credit history may have an adverse impact on Black or Hispanic employees (or other minority populations) because these groups are arrested at a disproportionately higher rate or not given credit advantages as compared to the rest of the population.

The EEOC has recently begun to advance this theory by bringing nationwide pattern and practice lawsuits challenging such screening procedures, and requesting background screening policies and procedures from numerous employers – even in cases unrelated to hiring or promotion. Employers are experiencing an uptick in EEOC requests for nationwide information regarding background screening procedures, presumably because the EEOC is looking to bolster its argument that such employer practices have an adverse impact on minority applicants.

To date there are two reported pattern and practice cases that test this theory:

- *EEOC v. Freeman d/b/a TFC Holdings Co.*, Case No. 09-CV-2573 (D. Md.) (complaint filed on September 30, 2009): Nationwide pattern and practice lawsuit alleging that a Dallas-based convention and corporate events planning company unlawfully discriminates against Black, Hispanic, and male job applicants on a nationwide basis by using credit histories and certain types of criminal arrests or convictions as selection criteria. The EEOC alleges that the

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company's use of credit histories and criminal backgrounds as selection criteria has a "significant disparate impact in Black applicants and that [the company's] use of criminal history information has an adverse impact on Hispanic and male applicants."

- *EEOC v. Peoplemark,* Case No. 08-CV-0907 (W.D. Mich.) (complaint filed Sept. 29, 2008): Nationwide lawsuit under Title VII on behalf of plaintiff and similarly situated African American applicants for employment at Peoplemark. The complaint alleges that the company maintains a policy which denies hiring or employment to any person with a criminal record and that such policy has a disparate impact on African American applicants. Seyfarth has routinely counseled employers about their background screening policies and procedures to comply with state law restrictions and requirements and in light of the EEOC's recent interest in this area.

Employers Should be Wary of Bright Line Policies

Employers are urged to observe some general parameters when considering an applicant's criminal history. The applicant's conviction record must be evaluated on its own merits rather than by applying hard and fast exclusionary rules. Those who are responsible for reviewing the conviction data must understand the nature, qualifications and duties of the position for which the applicant has applied. The employer must carefully consider whether or not the conviction directly bears on the applicant's suitability for that job. Unless the issue is clearly black and white, employers are best advised to consult experienced employment law counsel to discuss making and defending a proper decision.

Documentation is vital. When rejecting an applicant due to background check, the employer should memorialize the perceived link between the conviction and the job. Likewise, if an applicant is rejected for reasons other than the conviction record, document that fact. A contemporaneous annotation may be key to a future defense of an action under state statutes or federal discrimination law.

Employers should not inform applicants of the strength of their candidacy before the criminal background report has been evaluated. If applicants are told they are strong candidates,

but later they are turned down after the background report is received, then even if the conviction record played no part in the decision, the applicant may be much more likely to contend that it did. Avoiding the appearance of impropriety can prevent baseless lawsuits.

There has also been an increase in the number of charges of discrimination being brought in states that have "job relatedness" requirements when employers are making decisions based on criminal convictions. This is most notably occurring in Wisconsin at the Department of Workforce Development and the New York Civil Rights Division.

II. Credit Checks

A. State Law Restrictions

Four states (Washington, Hawaii, Oregon and Illinois) now *require relatedness between the credit history and the position sought* before an employer can use such information in making employment decisions. *See e.g.,* Wash. Rev. Code § 19.182.020 (employers may only secure credit information for employment decisions if such information is substantially related to the job); Hawaii Rev. Stat. § 238-1 (employers can only conduct a credit check if such information has a direct relationship to a "bona fide occupational qualification" and a conditional job offer has been made to the employee). In addition, several more states – such as Connecticut, Missouri, Ohio, New Jersey, Michigan, and Wisconsin – are considering passing similar laws. Further, the EEOC has taken the position that "it seems likely that in most cases credit check policies will be legally problematic" in Title VII cases where adverse impact is shown. Testimony of EEOC Commissioner Ishimaru, Hawaii State Senate Committee On Labor (March 19, 2009).

Oregon: On March 29, 2010, Oregon Governor Kulongoski signed legislation (S.B. 1045) that specifically prohibits employers from using credit history in making hiring, discharge, promotion, and compensation decisions unless the applicant or employee is given advanced written notice and the credit history is substantially related to the position sought. The legislation provides additional exceptions for financial institutions and public safety offices. Although the proposed

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legislation was to be effective July 1, 2010, the Governor declared the legislation effective immediately.

Illinois: On August 10, 2010, Illinois became the fourth state to enact restrictions on an employer's use of credit information in making employment decisions. Illinois's Employee Credit Privacy Act (H.B. 4658) prohibits most employers from using an applicant's or employee's credit history or other credit information as a factor in any employment decision (e.g., hire, discharge, terms of employment). The Act also prohibits employers from inquiring into an applicant's or employee's credit history or obtaining a credit history report from a consumer reporting agency. The Act restricts use of a broad range of credit information regardless of the source of such information; it is not limited solely to information obtained from a consumer reporting agency.

The Act applies to employers of any size, but certain employers are specifically excluded from the Act's coverage. Many governmental employers, as well as banks, savings and loan associations, other financial institutions, debt collectors, insurance companies and surety businesses are specifically excluded from the Act's prohibitions.

The Act also provides limited exceptions that allow employers to use credit information where such information is related to a "bona fide occupational requirement" for a particular position or group of employees. The bona fide occupational qualification applies generally to those positions involving money-handling or other confidential job duties. For instance, employers may use credit information for employees whose duties: require bonding by state or federal law; have unsupervised access to cash or certain assets valued at $2500 or more; have signatory power of $100 or more per transaction; are in a managerial position which involves setting direction or control of the business; or involve access to confidential information, financial information, or trade secrets. The Act includes other limited exceptions and contemplates that future administrative regulations may define additional categories of bona fide occupational requirements permitting exceptions to this Act. Notably, the Act specifically incorporates BFOQ definitions from either the state or federal Departments of Labor.

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Employers may not retaliate or discriminate against a person for exercising rights under the Employee Credit Privacy Act. Employers who violate the Act may be sued and ordered to pay damages including attorneys' fees. Further, the Act does not allow waivers of the Act's rights and invalidates any such waivers that exist.

The effective date of the Act is January 1, 2011. Accordingly, employers who use credit history as part of a background check or other hiring processes should take stock of their policies in light of the shifting tide against use of such information.

Pending Federal Legislation

At the federal level, H.R. 3149 was introduced in the U.S. House of Representatives in July 2009, to amend the Fair Credit Reporting Act. Known as the "Equal Employment for All Act," it seeks to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions. This bill is currently in committee; however passage of laws in Oregon and other states may drive further interest in this bill at the federal level. In addition, independent of this federal legislation, the Equal Employment Opportunity Commission has recently taken particular interest in the use of credit checks in employment decisions.

More recently, Senator Dianne Feinstein of California introduced SA 3795 as an amendment to Fair Credit Reporting Act. She submitted this proposal as part of an amendment to bill S. 3217 "to promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail,' to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices." Similar to the pending HR 3149, Senator Feinstein's bill proposes to restrict an employer from using a "consumer's creditworthiness, credit standing, or credit capacity" in making any employment decision or for the basis of taking any adverse action—regardless of whether a consumer gives an employer consent to use such information. The only exceptions to this prohibition would be for: 1) national security or FDIC clearance; 2) employment with state or

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local government agency which requires the use of this information; 3) employment in a management position with access to customer funds at a financial institution; or 4) as otherwise required by law. Given Senator Feinstein's particular commitment to consumer protection legislation in the past, the introduction of SA 3795 gives added momentum to this hot button topic, and all employers would be wise to monitor this legislation.

III. Fair Credit Reporting Act Overview and Recent Developments

A. An Overview of the FCRA for Employers

Definitions:

Consumer Reporting Agencies

Under the FCRA, a consumer reporting agency or CRA is defined as any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When an employer seeks any written, oral, or other communication (e.g., credit history, criminal records, driving records, etc.) from a CRA about an applicant, employee, or independent contractor for employment purposes, it must comply with the notice requirements identified herein.

Consumer Reports

Under the FCRA there are two types of reports available from CRAs: "consumer reports" and "investigative consumer reports." Consumer reports are defined as written, oral, or other communications by a consumer reporting agency which bear upon a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and which is used (or expected to be used) as a factor in establishing eligibility for employment purposes. This type of report is often obtained by employers (as defined under the FCRA) for pre-employment screening. Investigative consumer reports are reports provided by a CRA which include information on a consumer's character, general reputation, personal characteristics, or mode of living obtained through communications with neighbors, friends, or

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associates of the consumer or acquaintances of the consumer or others (California has a different definition of "investigative consumer report").

In order to comply with the FCRA employers should ensure that any use of investigative and other consumer reports satisfies the FCRA's notice requirements, described below. Specific attention should be directed toward employment applications and other documentation used in the hiring process.

Specific Notice Requirements For Employers Under the FCRA

An Employer's Notice Requirements with Respect to Consumer Reports

The FCRA requires employers using consumer reports for employment purposes to abide by certain notice requirements. Specifically, the FCRA mandates that employers make a clear and conspicuous written disclosure to the applicant or employee that a consumer report may be obtained. This written disclosure must appear on a document separate from an employment application (e.g., the disclosure cannot be incorporated into an employment application), and it must be made *before* the consumer report is obtained or caused to be obtained. In addition to this disclosure, an employer must obtain the written authorization of the applicant or employee *prior* to requesting a consumer report.

A sample disclosure and consent form is provided at the end of this document. A copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" may be found at the Federal Trade Commission's website, http://www.ftc.gov/os/2004/07/040709fcraappxf.pdf.

Moreover, before a CRA can provide a consumer report, the employer must certify to the CRA that it will distribute the required written disclosure and obtain the required written authorization. The employer must also certify that the information being obtained will not be used in violation of any federal or state law or regulation. Lastly, the employer must certify that it will comply with the adverse action requirements set forth in the FCRA, and described below.

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An Employer's Notice Requirements with Respect to Investigative Consumer Reports

The Act requires that an employer disclose to the applicant or employee that an investigative consumer report may be obtained. The employer must give a written disclosure to the consumer not later than three days after the report has been first requested from the CRA.

In addition, the FCRA requires that the disclosure include a summary of consumer rights under the FCRA; and a statement informing the applicant or employee of his/her right to request additional disclosures regarding the nature and the scope of the investigation.

If a request for additional disclosure is made within a reasonable time by the applicant or employee, the employer must make a complete disclosure of the nature and the scope of the investigation that was requested. The disclosure must be in writing and given to the applicant or employee no later than five days after the date on which the request was received or the report was first requested, whichever is later in time. It is also important to note that there are also many state laws that delineate specific requirements relating to investigative consumer reports.

If an employer takes adverse action on an applicant or employee based in whole or *in part* on information in a consumer report, it must comply with certain notice requirements. Under the Act, an adverse action is defined as a denial of employment or any other decision that for employment purposes adversely affects any current or prospective employee (*e.g.*, denial of promotion or failure to hire applicant). If an employer is contemplating taking adverse action as a result of obtaining a consumer report, employers must go through a two-step process. First, before the adverse action is taken, the employer must provide the applicant or employee with (1) a copy of the consumer report obtained from the consumer reporting agency (CRA), and (2) a summary of the consumer's rights under the Act.

Here is a sample pre-adverse action letter:

Dear Applicant,
A decision is currently pending concerning your application for employment at (the above

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employer)(this company). Enclosed for your information is a copy of the consumer report that you authorized in regard to your application for employment, together with a "Summary of Your Rights Under the Fair Credit Reporting Act."

If there is any information that is inaccurate or incomplete, you should contact this office as soon as possible so an employment decision may be completed.

Sincerely yours,

The purpose of this notice is to give an applicant the opportunity to see the report that is being used against them. If the report is inaccurate or incomplete, the applicant then has the opportunity to contact the Consumer Reporting Agency to dispute or explain what is in the report. Otherwise, applicants may be denied employment without ever knowing they were the victims of inaccurate or incomplete data.

As a practical matter, by the time an applicant is the subject of a Consumer Report, an employer has spent time, money and effort in recruiting, and hiring. Therefore, it is in the employer's best interest to give an applicant an opportunity to explain any adverse information before denying a job offer. If there was an error in the public records, giving the applicant the opportunity to explain or correct it could be to the employer's advantage.

Even if there were other reasons in addition to the Consumer Report for not hiring an applicant, these rights still apply. If the intended decision was based in whole or part on the Consumer Report, the applicant has a right to receive the report. In a situation where the employer feels that they would make an adverse decision anyway, regardless of the report, the employer may still want to follow this procedure for maximum legal protection.

After providing these documents, the employer must *wait* before taking the adverse action. The Federal Trade Commission's (FTC) staff informally has approved a five business day waiting period. The appropriate period should be judged based on the particular facts of each case. Although it is somewhat of a legal fiction that employers must act before taking adverse action, the Act is clear that employees and applicants should be given the opportunity to correct or

challenge incorrect information on a consumer report before the employer actually takes adverse action.

Once the adverse action based, at least in part, on the results of the consumer report has been taken, the employer must provide to the applicant or employee the following: (1) notice of the adverse action taken; (2) the name, address, and toll-free telephone number of the CRA that furnished the consumer report; (3) a statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; (4) notice of the consumer's right to obtain a free copy of the consumer report from the CRA within 60 days; and (5) notice of the consumer's right to dispute the accuracy or completeness of any information in the consumer report furnished by the CRA.

The following is a sample letter that contains the necessary statements:

Dear Applicant,

In reference to your application for employment, we regret to inform you that we are unable to further consider you for employment at this time. Our decision, in part, is the result of information obtained through the Consumer Reporting Agency identified below.

The Consumer Reporting Agency did not make the adverse decision, and is unable to explain why the decision was made.

You have the right to obtain within 60 days a free copy of your consumer report from the Consumer Reporting Agency as identified below and from any other consumer reporting agency which complies and maintains files on consumers on a nationwide basis.

You have the right to contact the Consumer Reporting Agency listed below to dispute any information contained in the report that you believe may be inaccurate or incomplete. A copy of your rights under the "Fair Credit Reporting Act" is enclosed, entitled "Summary of Your Rights under the Fair Credit Reporting Act." **(List the Consumer Reporting Agency's name, address and phone number below, including any 800/888 number.)**

An Employer's Liability Under The FCRA

State or federal actions and private lawsuits are available to enforce compliance with the Act. Potential damages include actual damages, compensatory damages, attorneys' fees, and for willful violations, unlimited punitive damages. Any person who knowingly and willfully obtains a consumer report under false pretenses may also face criminal prosecution.

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Recent Litigation Against Employers For Failing To Follow The FCRA And Applicable State Laws

There has recently been an upsurge in litigation involving employer's failing to properly follow the strict requirements of the Fair Credit Reporting Act (FCRA) and applicable state laws. Most notably, employers have been targeted when they: 1) fail to provide proper "disclosure" to applicants or employers that specific background information will be gathered by a third-party in connection with their employment that meets the requirements of the FCRA; 2) fail to obtain proper consent/authorization for such checks; or 3) fail to follow the stringent adverse action procedures. *Compare Vlasek v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 55761 (S.D. Tex. July 22, 2008) (summary judgment granted where former employee claimed employer violated the FCRA by using information obtained in a credit/background check as a basis for firing employee without providing employee with a copy of the report); *Beverly v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 2266 (E.D. Va. Jan. 11, 2008) (summary judgment denied where former employee claimed employer violated the FCRA by using information obtained in a background check as a basis for firing employee without providing employee with a copy of the report).

In addition, litigation is also occurring under California's Investigative Consumer Reporting Agencies Act. California's law provides even greater protection for consumers when an adverse action is taken, creating the likelihood of more litigation in this area. *See Moran v. Murtagh, Miller, Meyer & Nelson, LLP*, 126 Cal. App. 4th 323 (4th Dist. 2005) (explaining that under the revised Investigative Consumer Reporting Agencies Act information in an investigative consumer report must be disclosed to an employee whenever an adverse action was taken and a report regarding a consumer was obtained, even if the employer states the adverse action was not based on the information in the report).

See also, e.g., Molina, et al. v. Roskam Baking Company and Forge Industrial Staffing, Case No. 1:09-CV-475 (Fair Credit Reporting Act class action asserting a pattern and practice of failing to provide reports and notice of summary of rights before taking adverse action); *Ross, et*

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al. v. Cox Auto Trader, Inc., et al., Case No. 2:09-cv-00522-PJG (United States District Court/Eastern District of Wisconsin) (nationwide Fair Credit Reporting Act class action alleging failure to provide reports and summary of rights before taking adverse action)

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FAIR CREDIT REPORTING ACT
DISCLOSURE TO APPLICANTS FOR EMPLOYMENT
AND CONSENT FORM

This form has been provided to you because Accenture may request a Consumer Report and/or an Investigative Consumer Report from a consumer reporting agency. The Company will use any such report(s) solely for employment-related purposes. You should read this form carefully.

Consumer Reports or Investigative Consumer Reports will be obtained from a consumer reporting agency, such as, for example, ___________________ [name of agency] located at ________________ [address of agency]. They can be contacted at_______________ [phone number of agency]. Any such reports may contain information bearing on your character, general reputation, personal characteristics, mode of living and credit standing. The types of information that may be obtained include, but are not limited to: credit reports, social security number, criminal records checks, public court records checks, including civil court records, driving records, educational records, verification of employment positions held, workers compensation records, personal and professional references, licensing, certification, etc. The information contained in these reports may be obtained by ____________ [name of agency] from private or public record sources including sources identified by you in your job application or through interviews or correspondence with your past or present coworkers, neighbors, friends, associates, current or former employers, educational institutions or other acquaintances.

For California residents, under section 1786.22 of the California Civil Code, you may view the file maintained on you by_______________ [name of agency]. You may also obtain a copy of this file, upon submitting proper identification and paying the costs of duplication services, by appearing at _______________'s [agency's] offices in person, during normal business hours and on reasonable notice, or by mail; you may also receive a summary of the file by telephone. ________________ [name of agency] has trained personnel available to explain your file to you, including any coded information. If you appear in person, you may be accompanied by one other person, provided that person furnishes proper identification.

You are being given a copy of the "Summary of Your Rights Under the Fair Credit Reporting Act" prepared pursuant to 15 U.S.C. section 1681(g)(c). You have the right to request additional disclosures of the nature and scope of the investigation and a statement of your rights by contacting______________ [name of agency].

CONSENT

In the process of executing your background check, Accenture personnel may be requested to provide information about you, including your Social Security number, etc., which you provided to Accenture or authorized Accenture to obtain.

Accenture may send your information to a department or office other than the one in which you may have initially been interested in obtaining employment. If Accenture does not employ you, Accenture may nevertheless retain and use this information so as to be able to consider your application later if a

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suitable position becomes available and, if appropriate, refer back to this application if you apply with Accenture again in the future, as well as for more general management and internal research purposes.

I have carefully read and understand this Disclosure and Consent form and, by my signature below, consent to the release of consumer and/or investigative consumer reports, as defined above, to the Company in conjunction with my application for employment. I further understand that any and all information I provided or otherwise disclosed to the Company by me before, during or after my employment, if any, may be utilized for the purpose of obtaining the consumer reports or investigative consumer reports requested by the Company. I understand that if the Company hires me, it may request a consumer report and/or an investigative consumer report about me, as defined above, for employment-related purposes during the course of my employment. I understand that my consent will apply throughout my employment, to the extent permitted by law, unless I revoke or cancel my consent by sending a signed letter or statement to the Company at any time. This Disclosure and Consent form, in original, faxed, photocopied or electronic form, will be valid for any reports that may be requested by the Company.

____
Signature of Applicant

____
Printed Name of Applicant

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OFCCP FAQs on the *Ricci* Case

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FREQUENTLY ASKED QUESTIONS: The *Ricci* Case

1. **I've heard that the Supreme Court has issued an employment discrimination decision called *Ricci v. DeStefano*? What was the case about?**

   In *Ricci v. DeStefano*, 129 S. Ct. 2658 (June 29, 2009), the Supreme Court addressed when an employer may take a race-based action in order to correct a potentially discriminatory employment practice. Specifically, *Ricci* addressed whether the City of New Haven, Connecticut discriminated against a group of white firefighters in violation of Title VII of the Civil Rights Act when the City failed to certify and use the results of a test given to employees vying for promotions within the fire department. The City did not use the test results because they had an unintentional adverse impact on minorities and the City believed it would be liable for discrimination against minorities if the promotions were awarded. The City's decision negatively affected the white candidates, who had expected to be promoted but were not.

   In its decision, the Supreme Court held that the City's action constituted intentional race-based discrimination that was not justified by a valid defense, in violation of Title VII. The Court found that New Haven's desire to avoid or remedy unintentional adverse impact on minority candidates, without more, was not a sufficient justification for its challenged action. Rather, the Court ruled, to justify such a race-based selection decision, an employer was required to demonstrate "a strong basis in evidence" that its challenged employment action was necessary to prevent unintentional disparate impact against minority candidates. The Court held that the City did not demonstrate that it had a strong basis in evidence that it would have been liable for disparate impact discrimination if it had certified the test results.

2. **Does the Supreme Court's decision in the *Ricci* case change how OFCCP will conduct compliance evaluations of contractors' employment practices?**

   No. The *Ricci* decision does not affect how OFCCP examines the use and impact of selection procedures, such as tests. OFCCP will therefore continue to assess whether a contractor's use of its particular selection procedures complies with the Uniform Guidelines on Employee Selection Procedures (UGESP) at 41 CFR Part 60-3, available on-line at http://www.dol.gov/dol/allcfr/Title_41/Part_60-3/toc.htm.

3. **Does the *Ricci* decision change contractors' affirmative action obligations or their obligations regarding the use and validation of tests?**

   No. *Ricci* does not change a contractor's affirmative action obligations under the mandates enforced by OFCCP. Likewise, a contractor's obligation to comply with

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UGESP when using a test as part of its selection process remains the same. If a test has a disparate impact on a particular race, ethnic group or gender, the test must be validated as to the particular job for which it is being used. The contractor must also investigate alternative selection procedures, and must use an alternative procedure if it would result in less adverse impact and would be valid for the job in question.

4. What should contractors do in light of the *Ricci* decision?

To comply with its nondiscrimination obligations, a contractor must examine its tests and other selection procedures to identify whether there are any problem areas in terms of adverse impact on a particular race, ethnic group, or gender, and to prevent prohibited discrimination from occurring. The *Ricci* decision indicates that an employer's failure to conduct an appropriate job analysis, or to validate a test or other selection procedure prior to its implementation, places an employer in a position that may be difficult to defend should the test be found to have an adverse impact after it is used.

On the other hand, contractors that are proactive and subject their tests and selection procedures to validity studies performed in compliance with the technical standards of UGESP prior to implementation will be more likely to avoid problems and successfully defend against any claim of disparate impact. Contractors may also wish to "pre-test" their tests to determine if they would result in adverse impact. The test results would not be made known to candidates or hiring officials, and if adverse impact is revealed, the contractor will have the opportunity to make appropriate adjustments or find a suitable alternative before using the procedure to make actual selections.

5. How will OFCCP address an allegation of discrimination, like that in *Ricci*, based on a company's decision not to use test/selection procedure results because of possible adverse impact?

Although OFCCP might learn of a *Ricci* situation during a compliance review, it is more likely that such an allegation would be raised in the context of a discrimination complaint filed with OFCCP or the EEOC. Under a Memorandum of Understanding regarding complaint processing, OFCCP generally refers individual complaints to the EEOC for investigation and resolution, but retains and processes class complaints. If OFCCP receives a class complaint from applicants or employees who believe that they were discriminated against when a contractor refused to use the results of a selection procedure, OFCCP will investigate the complaint using established complaint procedures. Where the contractor defends its action by asserting that using the selection procedure could result in liability for an unlawful adverse impact based on race, ethnicity, or gender, OFCCP will evaluate whether, as prescribed by *Ricci*, there is a strong basis in evidence for the contractor's claim.

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EEOC Fact Sheet on Employment Tests and Selection Procedures

AND

Transcript of EEOC 5/16/07 Commission Meeting on Testing

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The U.S. Equal Employment Opportunity Commission

Employment Tests and Selection Procedures

Employers often use tests and other selection procedures to screen applicants for hire and employees for promotion. There are many different types of tests and selection procedures, including cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks.

The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.

On May 16, 2007, the EEOC held a public meeting on Employment Testing and Screening. Witnesses addressed legal issues related to the use of employment tests and other selection procedures. (To see the testimony of these witnesses, please see the EEOC's website at http://www.eeoc.gov/abouteeoc/meetings/5-16-07/index.html.)

This fact sheet provides technical assistance on some common issues relating to the federal anti-discrimination laws and the use of tests and other selection procedures in the employment process.

Background

- Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act of 1990 (ADA), and the Age Discrimination in Employment Act of 1967 (ADEA) prohibit the use of discriminatory employment tests and selection procedures.
- There has been an increase in employment testing due in part to post 9-11 security concerns as well as concerns about workplace violence, safety, and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek efficient ways to screen large numbers of online applicants in a non-subjective way.
- The number of discrimination charges raising issues of employment testing, and exclusions based on criminal background checks, credit reports, and other selection procedures, reached a high point in FY 2007 at 304 charges.

Types of Employment Tests and Selection Procedures

Many employers use employment tests and other selection procedures in making employment decisions. Examples of these tools, many of which can be administered online, include the following:

- Cognitive tests assess reasoning, memory, perceptual speed and accuracy, and skills in arithmetic and reading comprehension, as well as knowledge of a particular function or job;
- Physical ability tests measure the physical ability to perform a particular task or the strength of specific muscle groups, as well as strength and stamina in general;
- Sample job tasks (e.g., performance tests, simulations, work samples, and realistic job previews) assess performance and aptitude on particular tasks;

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- Medical inquiries and physical examinations, including psychological tests, assess physical or mental health;
- Personality tests and integrity tests assess the degree to which a person has certain traits or dispositions (e.g., dependability, cooperativeness, safety) or aim to predict the likelihood that a person will engage in certain conduct (e.g., theft, absenteeism);
- Criminal background checks provide information on arrest and conviction history;
- Credit checks provide information on credit and financial history;
- Performance appraisals reflect a supervisor's assessment of an individual's performance; and
- English proficiency tests determine English fluency.

Governing EEO Laws

- Title VII of the Civil Rights Act of 1964
  - Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin.
  - With respect to tests in particular, Title VII permits employment tests as long as they are not "designed, intended or used to discriminate because of race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(h). Title VII also imposes restrictions on how to score tests. Employers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin. *Id.* at §2000e-2(l).
  - Title VII prohibits both "disparate treatment" and "disparate impact" discrimination.
    - Title VII prohibits **intentional** discrimination based on race, color, religion, sex, or national origin. For example, Title VII forbids a covered employer from testing the reading ability of African American applicants or employees but not testing the reading ability of their white counterparts. This is called **"disparate treatment"** discrimination. Disparate treatment cases typically involve the following issues:
      - Were people of a different race, color, religion, sex, or national origin treated differently?
      - Is there any evidence of bias, such as discriminatory statements?
      - What is the employer's reason for the difference in treatment?
      - Does the evidence show that the employer's reason for the difference in treatment is untrue, and that the real reason for the different treatment is race, color, religion, sex, or national origin?
    - Title VII also prohibits employers from using neutral tests or selection procedures that have the **effect** of disproportionately excluding persons based on race, color, religion, sex, or national origin, where the tests or selection procedures are not "job-related and consistent with business necessity." This is called **"disparate impact"** discrimination.

  Disparate impact cases typically involve the following issues:

    - Does the employer use a particular employment practice that has a **disparate impact** on the basis of race, color, religion, sex, or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.

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- If the selection procedure has a disparate impact based on race, color, religion, sex, or national origin, can the employer show that the selection **procedure is job-related and consistent with business necessity**? An employer can meet this standard by showing that it is necessary to the safe and efficient performance of the job. The challenged policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants' or employees' skills, the challenged policy or practice must evaluate an individual's skills as related to the particular job in question.
- If the employer shows that the selection procedure is job-related and consistent with business necessity, can the person challenging the selection procedure demonstrate that there is a **less discriminatory alternative** available? For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

  See 42 U.S.C. § 2000e-2 (k). This method of analysis is consistent with the seminal Supreme Court decision about disparate impact discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

- In 1978, the EEOC adopted the Uniform Guidelines on Employee Selection Procedures or "UGESP" under Title VII. *See* 29 C.F.R. Part 1607.[1] UGESP provided uniform guidance for employers about how to determine if their tests and selection procedures were lawful for purposes of Title VII disparate impact theory.
  - UGESP outlines three different ways employers can show that their employment tests and other selection criteria are job-related and consistent with business necessity. These methods of demonstrating job-relatedness are called "test validation." UGESP provides detailed guidance about each method of test validation.

- Title I of the Americans with Disabilities Act (ADA)
  - Title I of the ADA prohibits private employers and state and local governments from discriminating against qualified individuals with disabilities on the basis of their disabilities.
  - The ADA specifies when an employer may require an applicant or employee to undergo a medical examination, *i.e.*, a procedure or test that seeks information about an individual's physical or mental impairments or health. The ADA also specifies when an employer may make "disability-related inquiries," *i.e.*, inquiries that are likely to elicit information about a disability.
    - When hiring, an employer may not ask questions about disability or require medical examinations until **after** it makes a conditional job offer to the applicant. 42 U.S.C. §12112 (d)(2);
    - After making a job offer (but before the person starts working), an employer may ask disability-related questions and conduct medical examinations as long as it does so for **all individuals entering the same job category**. *Id.* at § 12112(d)(3); and
    - With respect to **employees**, an employer may ask questions about disability or require medical examinations only if doing so is **job-related and consistent with business necessity**. Thus, for example, an employer could request medical information when it has a **reasonable belief**, based on **objective evidence**, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition, or when an employer receives a request for a **reasonable accommodation** and the person's disability and/or need for accommodation is not obvious. *Id.* at § 12112(d)(4).
  - The ADA also makes it unlawful to:
    - Use employment tests that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the test, as used by the

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employer, is shown to be job-related and consistent with business necessity. 42 U.S.C. § 12112(b)(6);

- Fail to select and administer employment tests in the most effective manner to ensure that test results accurately reflect the skills, aptitude or whatever other factor that such test purports to measure, rather than reflecting an applicant's or employee's impairment. *Id.* at § 12112(b)(7); and
- Fail to make reasonable accommodations, including in the administration of tests, to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such accommodation would impose an undue hardship. *Id.* at § 12112(b)(5).

- The Age Discrimination in Employment Act (ADEA)
  - The ADEA prohibits discrimination based on age (40 and over) with respect to any term, condition, or privilege of employment. Under the ADEA, covered employers may not select individuals for hiring, promotion, or reductions in force in a way that unlawfully discriminates on the basis of age.
  - The ADEA prohibits **disparate treatment** discrimination, i.e., intentional discrimination based on age. For example, the ADEA forbids an employer from giving a physical agility test only to applicants over age 50, based on a belief that they are less physically able to perform a particular job, but not testing younger applicants.
  - The ADEA also prohibits employers from using neutral tests or selection procedures that have a **discriminatory impact** on persons based on age (40 or older), unless the challenged employment action is based on a **reasonable factor other than age**. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Thus, if a test or other selection procedure has a disparate impact based on age, the employer must show that the test or device chosen was a reasonable one.

Recent EEOC Litigation and Settlements

A number of recent EEOC enforcement actions illustrating basic EEO principles focus on testing.

- **Title VII and Cognitive Tests**: Less Discriminatory Alternative for Cognitive Test with Disparate Impact. *EEOC v. Ford Motor Co. and United Automobile Workers of America*, involved a court-approved settlement agreement on behalf of a nationwide class of African Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical, and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford's needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure, to be designed by a jointly-selected industrial psychologist, that would predict job success and reduce adverse impact. Additionally, Ford paid $8.55 million in monetary relief.
- **Title VII and Physical Strength Tests**: Strength Test Must Be Job-Related and Consistent with Business Necessity If It Disproportionately Excludes Women. In *EEOC v. Dial Corp.*, women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women. Dial defended the test by noting that it looked like the job and use of the test had resulted in fewer injuries to hired workers. The EEOC established through expert testimony, however, that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On

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appeal, the Eighth Circuit upheld the trial court's finding that Dial's use of the test violated Title VII under the disparate impact theory of discrimination. *See* http://www.eeoc.gov/press/11-20-06.html

- **ADA and Test Accommodation**: Employer Must Provide Reasonable Accommodation on Pre-employment Test for Hourly, Unskilled Manufacturing Jobs. The EEOC settled *EEOC v. Daimler Chrysler Corp.*, a case brought on behalf of applicants with learning disabilities who needed reading accommodations during a pre-employment test given for hourly unskilled manufacturing jobs. The resulting settlement agreement provided monetary relief for 12 identified individuals and the opportunity to take the hiring test with the assistance of a reader. The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotape providing the same information.

Employer Best Practices for Testing and Selection

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.
- For further background on experiences and challenges encountered by employers, employees, and job seekers in testing, see the testimony from the Commission's meeting on testing, located on the EEOC's public web site at: http://www.eeoc.gov/abouteeoc/meetings/5-16-07/index.html.
- For general information on discrimination Title VII, the ADA and the ADEA see EEOC's web site at:
  - http://www.eeoc.gov/abouteeo/overview_practices.html and
  - http://www.eeoc.gov/abouteeo/overview_laws.html

Footnote

[1]The Departments of Labor and Justice and the Office of Personnel Management (then called the Civil Service Commission) issued UGESP along with the EEOC.

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The U.S. Equal Employment Opportunity Commission

Commission Meeting of May 16, 2007

TRANSCRIPT

PRESENT:

NAOMI C. EARP, Chair
LESLIE E. SILVERMAN, Vice Chair
STUART J. ISHIMARU, Commissioner
CHRISTINE M. GRIFFIN, Commissioner

ALSO PRESENT:

PEGGY MASTROIANNI, Associate Legal Counsel
BERNADETTE B. WILSON, Program Analyst

This transcript was typed from a video tape provided by the Equal Employment Opportunity Commission.

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James Robinson, Sr.

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Ken Willner

Cyrus Mehri

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Rae T. Vann

Adam T. Klein

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Shereen Arent

Lawrence Ashe

Fred Alvarez

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James L. Outtz

Kathleen K. Lundquist

Motion to Adjourn

PROCEEDINGS

CHAIR EARP: Now the meeting will come to order. In accordance with the Sunshine Act, today's meeting is open to public observation of the Commission's deliberation and voting. At this time, I'm going to ask Bernadette Wilson to announce any Notation Votes that have taken place since the last Commission meeting. Ms. Wilson?

MS. WILSON: Good morning, Madam Chair, Madam Vice Chair, Commissioners. I'm Bernadette Wilson from the Executive Secretariat. We'd like to remind our audience that questions and comments from the audience are not permitted during the meeting, and we ask that you carry on any conversations outside the meeting room, departing and re-entering as quietly as possible.

Also, please take this opportunity to turn your cell phones off, or to vibrate mode. I would also like to remind the audience that in addition to the elevators, in case of emergency, there are stairways down the hall to the right and left as you exit this room. Additionally, the rest rooms are down the hall to the right.

During the period April 17th, 2007 through May 14th, 2007, the Commission acted on five items by Notation Vote:

Approved litigation on two cases;

Approved an RFP for a full service publication storage and distribution center;

Approved a motion to reconsider the Headquarters Project Management and Relocation Services Contract; and,

Approved the Headquarters Project Management and Relocation Services Contract.

Madam Chair, it's appropriate at this time to have a motion to close a portion of the next Commission meeting in case there are any closed agenda items.

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CHAIR EARP: Thank you, Ms. Wilson. Do I hear a motion?

COMMISSIONER ISHIMARU: So moved.

CHAIR EARP: Is there a second?

VICE CHAIR SILVERMAN: Second.

CHAIR EARP: Any discussion?

COMMISSIONER ISHIMARU: Madam Chair, I'd like to explain my vote, and also to thank Commissioner Griffin for asking for reconsideration of the vote on the relocation services contract, which was the subject of our last meeting. And I wanted to thank you and your staff for providing Commissioner Griffin and I with information that was very helpful in allowing us to cast a vote for the contract. I know at our last meeting, there was a long discussion about the contract and the move, and it was contentious at times. And I was sorry for that, but I was glad we were able to get the information we needed to make the vote. I know that we are going to move, likely, and we do need a contract to deal with those services. I know that you're in control of the move, and I also appreciate that. And I know everyone is anxious to see where we, in fact, may move to. But, again, I want to thank you and Commissioner Griffin for allowing this to happen so we didn't have a premium that we would have been forced to pay on the contract. Thank you, Madam Chair.

CHAIR EARP: Thank you. Can we have a vote on the motion? It has been properly moved and seconded. All in favor?

(Chorus of ayes.)

CHAIR EARP: Opposed? [No Response] The ayes have it. Thank you, Ms. Wilson.

Good morning, again, everyone. Welcome to EEOC's public meeting on employment testing and screening. We are honored today to have nationally recognized organizational psychologists and advocates of employers, as well as employees, who will share their experiences and perspectives on employment testing and screening. We also are honored to host some of EEOC's own litigators, and charging parties, who have experienced legal issues associated with testing and screening criteria. We look forward to learning from your remarks, and to receiving your recommendations about effective ways to focus the Commission's resources in this area.

Contemporary employers commonly use a range of employment tests and other screening tools to make hiring, promotion, termination, or other employment decisions. For example, many employers use basic literacy tests, personality tests, medical and fitness tests, and credit checks are often used as a gauge of employment worthiness.

The goals of today's Commission meeting include the following: to gather information about testing practices which abide by the requirements of EEO law; and to educate about emerging trends in employment testing and screening; to educate about EEO laws prohibiting discrimination in employment testing and recent EEOC and other litigation; to discuss increasingly common employment screens, such as criminal background checks and credit checks, and the discriminatory impact they have, potentially, on people of color; to explain when employment tests are medical examinations subject to the Americans with Disabilities Act's restrictions; and to receive recommendations from the panelists about effective ways to focus the EEOC's resources in this area.

Before we begin - no opening statements? Okay.

COMMISSIONER ISHIMARU: Do you want to make one?

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CHAIR: Commissioner, no? Okay, there being no opening statements from my fellow Commissioners --

COMMISSIONER ISHIMARU: Madam Chair, we were told we'd have a chance to make closing statements at the end.

CHAIR EARP: Absolutely.

COMMISSIONER ISHIMARU: Okay. Very good.

CHAIR EARP: Thank you Commissioners.

One housekeeping note before we begin. I would like to remind everyone that we have a full agenda, and we're on a tight timeline. To afford each panelist their fully allotted time to speak, and to allow the Commissioners to ask questions, I've asked Legal Counsel to make use of our timing lights. Speakers, you know where the lights are, right? The timing light will turn yellow, giving each panelist and Commissioner a one-minute warning. When the light turns red, it means stop, your time has expired. You may finish your thought, but please respect the time limit so that those scheduled later in the meeting are not rushed.

MS. MASTROIANNI: Excuse me, Madam Chair, actually, the yellow light is a two-minute warning.

CHAIR EARP: Okay. You have one minute more.

(Laughter.)

CHAIR EARP: So let's turn to the substance of our meeting. We'll begin with EEOC Staff, Richard Tonowski, our Chief Psychologist from the Office of General Counsel, who will provide more information about employment tests. And also, Carol Miaskoff, the Assistant Legal Counsel. Thank you.

MR. TONOWSKI: Thank you. Good morning, Madam Chair, Madam Vice Chair, Commissioners, and distinguished panelists. This morning, I'm giving you a brief overview on testing threats and promises.

An employment test is any procedure used to make an employment decision. There are the familiar multiple choice tests of job knowledge or basic cognitive ability, such as doing arithmetic, or understanding written instructions. There are also physical ability tests, as simple as moving a box from here to there, or as sophisticated as measuring the strength of specific muscle groups. Beyond assessing strength and endurance, is the issue of pre-employment medical inquiries for both current and potential conditions, both physical and psychological. Background checks are extensively used, and sometimes include examination of credit history. Finally, for the last 20 years, multiple choice personality and integrity tests have become increasingly popular. In all, employment testing is widespread and increasing.

A mature technology of testing promises readily available methods that serve as a check against both traditional forms of discrimination, as well as the workings of unconscious bias. If that is a promise, then the threat comes from institutionalizing technical problems not yet fully addressed, the undermining of Equal Employment Opportunity under the guise of sound selection practice, and the unintended introduction of new problems that will require resolution to safeguard both test takers and test users.

Since the Supreme Court's landmark decisions in the 1970s, which Carol will reference, some notable things, not fully envisioned, have happened to testing.

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Understanding of cognitive ability in jobs and tests to measure it greatly increased. Statistical approaches to summarizing results across many separate studies to reach general conclusions became widely used. The limit to these generalizations remains a matter of contention.

How test scores are reported became hotly debated. Congress made unlawful test score adjustments based on protected class. Some psychologists propose banded rather than discreet scores as a means of promoting both diversity and test utility. Opponents have objected on both technical and legal grounds.

The enactment of the Americans with Disabilities Act, or ADA, restricted medical exams and disability-related inquiries for applicants and employees. There remains the issue of differentiating proper tests of competencies from unlawful medical investigations.

Sometimes promise and threat arrive together. Personality testing has been hailed by some as a means for a more complete, and thus, more valid assessment of potential employees. It may reduce the adverse impact associated with cognitive ability testing used alone. Well, when does legitimate inquiry into an applicant's qualifications become an intrusive search for medical conditions? The Seventh Circuit held in Karraker v. Rent-A-Center, Inc., that the line is crossed when the personality assessment tools and instruments, such as the Minnesota Multiphasic Personality Inventory, or MMPI. The MMPI is widely used for clinical diagnosis, and was originally normed on hospitalized psychiatric patients. However, researchers have combined its questions in new ways to measure a variety of traits, not all of them clinical. Some of its current 567 questions explore whether the individual sees things that others do not, has laughing or crying fits, or was compelled to do things under hypnosis. The Court of Appeals held that the MMPI, by its nature, was a medical examination violating the ADA. An earlier case, Soroka v. Dayton Hudson, Inc, that arose in California, and was ultimately settled, raised similar issues, as well as views of test usage at the individual item level that alarmed psychologists. This is but one instance where science and law intersect, and where the outcome has real consequences to employers and to potential employees.

EEOC is seeing a limited but increasing number of tests in the course of its investigations. Sometimes we are gratified by the care given to both technical and EEO considerations. There are times when superficial work and unsupported conclusions come from consultants who should know better. This kind of work constitutes a threat to job applicants, employers, and all concerned with good selection practice.

On the plaintiff's side, occasionally there are arguments backed by a highly selective reading of the research literature that whatever the employer did was unacceptable simply because the employer might have done something else. This also presents a threat to good selection practice. But first, legal bases from the Office of Legal Counsel.

MS. MIASKOFF: Thank you very much, Rich. Good morning, Madam Chair, Madam Vice Chair, Commissioners, distinguished guests. I am Carol Miaskoff, Assistant Legal Counsel for Coordination. I will give a very short summary of some major legal principles relevant to employment testing to serve as a reference for the presentations that you will hear this morning.

Before starting, however, I would like to recognize Kerry Leibig and Mary Kay Maurin, both Senior Attorney Advisors in the Coordination Division, Office of Legal Counsel. Each of them contributed greatly to the preparations for this meeting, and I appreciate their efforts.

In Title VII of the Civil Rights Act of 1964, Congress expressly allowed professionally developed ability tests, but only if they were not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. In the 1991 amendments to Title VII, Congress added Section 703(k), which added provisions on scoring tests and enshrined some provisions subsequently developed in the case law.

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To go back to that case law, the Supreme Court considered the basic standard from Title VII that permitted non-discriminatory tests for the first time in Griggs v. Duke Power Company, which is the seminal Supreme Court case on employment testing. The facts in Griggs involved a workplace with five operating departments ranging from labor, at the bottom, to laboratory and tests at the top.

In 1965, the company abandoned its policy of restricting African Americans to the labor department. At the same time, however, the company made completion of high school a prerequisite to transfer from the Labor Department to any other department. Also, as of July 2nd, 1965, which coincidentally was the effectiveness date of Title VII, the company announced that to qualify for placement in any but the Labor Department, it would be necessary to receive satisfactory scores on two professionally developed aptitude tests, as well as have a high school diploma.

A vice president for the company testified at trial that these requirements were instituted to generally improve the quality of the workforce. When this case came to the Supreme Court, the Fourth Circuit already had found that whites registered far better on the company's alternative requirements than blacks. The Supreme Court in its decision in Griggs held that the legality of these professionally developed tests turned on whether they were job-related, noting that, "The touchstone is business necessity", the Court also stated that Title VII forbids employers from "giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of business performance."

In Albermarle v. Moody, a 1975 case, the Supreme Court expanded on the standard, emphasizing that the tests must be closely related to the job in question. Subsequently, the EEOC, acting with the Departments, Labor and Justice, and the agency now known as OPM, adopted in 1978 the Uniform Guidelines on Employee Selection Procedures, affectionately known as UGESP.

UGESP was published at a time when lawyers and psychologists were confronting the differences between judicial and scientific approaches to assessing the effects of employment tests. UGESP provided uniform federal guidelines for establishing when employment tests were not discriminatory.

Beyond Title VII, I would like to quickly mention Title I of the Americans with Disabilities Act, and the Age Discrimination in Employment Act. Title I of the ADA regulates when employers who are covered by the law may make disability-related inquiries, or require applicants or employees to undergo a medical exam. Under the ADA, these inquiries and exams are prohibited pre-offer, allowed post offer if everyone entering the same job category gets the test, and regulated during employment.

I will quickly finish here. The ADA also has several provisions that specifically relate to tests. It makes it unlawful to use employment tests that screen out an individual with a disability or class of such individuals unless the test as used by the employer is shown to be job-related and consistent with business necessity, there's that standard again. It's unlawful to fail, to select, or administer employment tests in a way that does not ensure that the tests accurately reflect the skills, aptitude, and whatever factor that's being measured, rather than reflecting an applicant's or employee's impairment. And finally, reasonable accommodation in testing is required.

In conclusion, I want to add that the Age Discrimination in Employment Act also prohibits discrimination based on age, 40 or over, with respect to terms and conditions, and privileges of employment, which include selecting applicants or employees for hiring, promotion, or reductions in force. The ADEA also prohibits disparate impact discrimination, unless the challenged employment action is based on a reasonable factor other than age.

This concludes my short summary. You will now hear from EEOC litigators and charging parties, who will bring these principles to life. Thank you.

CHAIR EARP: Thank you for setting the stage. May we have the first panel? On the first panel

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we have Jean Kamp, Associate Regional Attorney in the Chicago District Office, and she's accompanied by Paula Liles, a Charging Party. Then we'll hear from Jeffrey Stern, Senior Trial Attorney in Cleveland, and he's accompanied by Charging Party, James Robinson, Sr. Thank you. Jean?

MS. KAMP: Thank you, Madam Chair, Madam Vice Chair, Commissioners, ladies and gentlemen. I've been asked to provide testimony to you about the EEOC's litigation against the Dial Corporation, which resulted in a final judgment in favor of the EEOC for about $3.7 million, and the ending of the use of what they called their "Work Tolerance Screen".

The case began with Paula Liles, who's sitting right here, a very brave and very tenacious woman who, among other things, sat through the six-day trial. She had worked at Dial through a temporary agency in their plant in Fort Madison, Iowa, where they make Armor Star Sausage products. She knew, therefore, what the job was like that she was applying for. It was basically an entry level production job, which required carrying rods of sausages, which weighed about 35 pounds, back and forth all day long, putting them up and down on a rack, basically, at various levels ranging from about 35 inches off the ground, to about 65 inches off the ground. It was a very difficult job.

At trial, there was testimony that the ability to do that kind of lifting is very much correlated with gender, that about 90 percent of men are able to do it, and about 10 percent of women are actually able to do this.

Ms. Liles had watched it. She knew that she was able to do the job. She applied for it. She went through a very detailed application procedure that Dial used in selecting people. She was offered the job subject to a pre-employment physical exam. At just this time, unfortunately for Ms. Liles, they instituted this Work Tolerance Screen, and what it was was a strength test. And it looked quite a lot like the job. What you did is you had to pick up a rod with 35 pounds of weights on it off of the table, walk with it about 10 feet to a rack, put it at 35 inches, take it off, walk back to the table, turn around, walk back to the rack again, this time move it to 65 inches, take it off, go back to the table, repeat the cycle for a seven-minute test period.

Paula took the test, and she was, in fact, able to do it. She completed the test, and they had a little scoring sheet on it, and she was marked pass on that scoring sheet, but they did have a comment on it saying "lifting up over her head was difficult because of her height". So she left, I believe, thinking that she was all set, that she passed the test, but the job offer was later withdrawn on the grounds that she had failed it.

The test had been designed by the plant nurse and an occupational therapist at a local hospital. The plant nurse took notes while she watched people taking the test.

Paula failed the test under this definition, and I believe about 16 of the 22 women who took the test at the same time also failed it. Paula filed a charge and the litigation started. Over the next four years, a couple of hundred people, I believe, were actually given this test. Ninety-seven percent of the men passed the test, 38 percent of the women passed the test. As a result, the hiring went from being 50 percent female before the test, to 15 percent after.

We tried the case in August of 2004. At trial, Dial argued content validity, that the test looked like the job, and therefore, was okay. And, also, criterion validity, that because the test was employed to reduce injuries, and that because it did that, it was okay. The problem was that competing experts made it clear that neither one was true. The test, in fact, was a great deal more difficult than the job, which is why women were able to do the job, and had been doing the job before the test, but were not able to pass the test.

I see my time is up. Let me just say the criterion validity was just as bad. In fact, women were no more likely to be injured than men, either before or after the test. And I'll stop at that point.

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CHAIR EARP: Good. Thank you.

MS. LILES: Good morning ladies and gentlemen. First, I would like to thank the people for asking me here.

Pre-employment testing is something that should be taken seriously, and handled very carefully. In my case, I was employed as a temporary at the Dial Corporation, and I wanted a full-time job with them, so I filled out their application, and went through their hiring process.

I received a letter in the mail with a potential start date. The only thing left for me to do was what they called their Work Tolerance Test, something that had never been done before. It was to see how you could physically perform one of their jobs in their plant, this test, but I had no worries. I knew I was a fairly fit person, and I had performed various jobs in the past, and had no complaints. I did their test, and I was told that I had passed.

Then the devastation began. I received another letter in the mail from them saying they did not want my employment due to my height. In an instant, as I was reading this letter, every emotion a person can have went through me. I thought I was going to fall apart.

I went to the proper agency. They took it to the EEOC. They did an investigation, and eventually filed charges on the Dial Corporation on my behalf, and on the behalf of several other women. Every since that day seven years ago, I have been affected by that test in every part of my life. I have felt like I've been on a roller coaster. It was going down, and I was going to go down with it.

The EEOC did win the case. I got my job back with all my back pay, but it didn't stop there. Three months later they fired me, saying once again that I couldn't do the job. The union took it to arbitration, and once again, we won.

In the last seven years, my credit has been ruined, my reputation as a hard worker has been on the line. I've been in and out of therapy, and not to mention how much harder it was being a single parent than it already is. My heart was broken when my daughter graduated in 2006, and she had to pay for her own class ring, her own senior pictures, and even her cap and gown for graduation day. A parent is supposed to be able to reward a child for the biggest accomplishment so far in their life. I couldn't do that with no job. This whole ordeal had quite an impact on me and my family, something I will carry with me for life.

In conclusion, it was a great win for all of us involved, the EEOC, myself, and Jean Kamp, who I will be forever grateful to. She won this case, got me my job back with my back pay which is helping me pick myself back up, and for that I owe her, and everyone involved in winning this case a great big thank you. Thank you.

CHAIR EARP: Thank you. Jeff?

MR. STERN: Thank you, Madam Chair and Commissioners for inviting me to be here today, and talk to you briefly about a case that EEOC brought on behalf of one of our courageous charging parties, James Robinson, Sr., and a nationwide class of African American test-takers seeking apprentice positions, which we got resolved with a settlement agreement, which required changes in employment testing.

Mr. Robinson, and 12 other African American apprentice test-takers, filed discrimination charges against their employer, Ford, against their union, the UAW, and against the Joint Apprentice Program. They alleged that they and blacks, as a class, had been denied acceptance into the Employer's and Union's Joint Apprentice Program due to their race. Two charges were filed in Cleveland concerning a test episode in Walton Hills, Ohio, and 11 charges were filed in the Cincinnati area office

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concerning a test episode in Sharonville, Ohio.

Ford's Apprentice Training Selection Program, the ATSS, was a paper and pencil cognitive test, which applicants needed to pass in order for entry into the Apprenticeship Program. A written cognitive test can assess aptitude for mechanical tasks by measuring verbal, numerical, or spatial reasoning.

The Apprentice Program at Ford was a stepping stone to highly coveted certification as a Skilled Trades Journeyman with increased earnings, increased job security, increased job mobility, as well as prestige.

The Commission's extensive investigation ripened into an EEOC determination that the ATSS had a disparate impact on the charging parties, and on blacks as a class. Only two of 51 African American test-takers passed the test at the 1998 Sharonville test episode, compared with about one-third of the white test-takers who passed that test. Nationwide, about 13,000 Ford employees took the ATSS at more than 40 facilities between February 2000 and June 2003, and about 25 percent of those test-takers nationwide were African Americans.

The EEOC's investigation found that the ATSS was properly validated. The real problem we assessed was Ford's efforts to find a less discriminatory alternative had become inadequate because it had not been updated on expert knowledge which became current by the mid-1990s. In our view, Ford needed to bring itself into compliance with Title VII by considering less discriminatory selection procedures, such as work sampling, or trainability tests. Work sample requires the applicant to perform the task or job in question, trainability is done the same way, except it has a period of instruction for applicants who are not familiar with the job, or the task in question.

EEOC's extensive investigation and intense conciliation under EEOC auspices allowed the parties, Ford, the Union, class members, to resolve the case with a settlement. The settlement was far-reaching, advanced the public interest. Ford agreed to stop using the ATSS test. Ford agreed that an industrial psychologist jointly selected by all the parties would design a new selection system for apprentices. The new process would be designed to both predict job success, and to reduce adverse impact, and to provide feedback to the test-takers so they could appreciate where their strengths and weaknesses would be.

The settlement expanded skilled trades opportunities for African Americans at Ford. Ford agreed to place 279 of the qualified class members on to the apprentice eligibility list, and that was to redress the shortfall the EEOC determined was resulting from the ATSS. Finally, the settlement provided more than $8 million of monetary relief to the nationwide class of approximately 3,420 African American test-takers who were not selected.

It's not enough to validate a discriminatory employment test when it's designed; employers need to review their tests to assure that newer, less discriminatory alternatives are considered. Thank you.

CHAIR EARP: Thank you.

MR. ROBINSON: Good morning, ladies and gentlemen. My name is James Robinson, Sr., and I'm pleased to be here today to tell you about my testing experience.

I'm a 48-year old African American, and I've worked for Ford Motor Company since mid-November of 1996. I was hired as a manufacturing technician at the Sharonville Plant near Cincinnati, Ohio. I am also a UAW Local 863 member. I'm married with two children, a son and a daughter, who I'm always telling that life is full of opportunities, and to take advantage of everything it has to offer, and not to let anyone stop you from being whatever you desire to be.

In January of 1998, I, and hundreds of other Ford employees, took the apprenticeship test to

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qualify for 117 apprenticeship positions available at Ford's Sharonville and Batavia plants. In February of 1998, the UAW and the company wrote me a letter advising that unfortunately my name did not appear among those provided as qualified.

To qualify, you had to score within the top 70 percent of everyone who took the test. The test was easy. It had about 120 questions in four parts. Only those employees who requested their score received them. I had to wait three months to get my score, but I was told I did not fall within the top 70 percent. I was not told which questions were right, or which ones were wrong. To my knowledge, no African American from the Sharonville plant, and only one or two from the Batavia plant were selected as apprentices from the January 1998 test.

Prior to taking the test, some African Americans told me that we would not be put into the apprentice program because blacks were not accepted. This was not the first time this happened. I saw the financial and personal harm that exclusion from the apprenticeship test caused me and my African American co-workers. We each lost about $4 an hour increase that we would have received as apprentices and journeymen.

At first I was angry, outraged, and discouraged. A lot of us felt betrayed that this type of discrimination still exists, but then I realized that we cannot allow anyone to discriminate against us. We had to stand up for what we believe, so I decided in 1998, in October, that we would file charges against Ford and the UAW. We received a determination letter from EEOC that was in our favor. It was determined that the test had a disparate impact on the charging party and on Blacks as a class.

I took the test again in 2003. I am now apprenticing as a Millwright at the Sharonville plant, and expect to earn my journeyman certificate in December of 2008. I am pleased that other qualified African Americans have joined me as an apprentice at Ford as a result of this settlement. I thank you very much for letting me share that with you today.

CHAIR EARP: Thank you. Thank you, Ms. Liles, Mr. Robinson, for your bravery.

Questions and comments from Commissioners? Vice Chair?

VICE CHAIR SILVERMAN: Thank you, Madam Chair. I just wanted to say that I think today's meeting addresses a critical topic and I want to thank all the folks at Legal Counsel for all their hard work in arranging this meeting. And all you have to do is look at the witnesses that you've assembled here to know that you've put a lot of thought and hard work into this meeting, we really do appreciate it. I want to thank Carol and Rich for providing an overview of the key issues. And I also want to thank Jean and Jeff Stern for your presentations. And most importantly, for the work you do, and the work you performed on these cases.

I want to express my sincere appreciation to Ms. Liles, and to Mr. Robinson. It's such a pleasure and an honor to have you here today. We really appreciate your coming forward, and filing your charge with the Commission so that we can know about these issues, and do something about it; and coming here is just icing on the cake for us, so thank you so much.

I just have a couple of questions for Jean. In the Dial case, how many women accepted the job, and do you know - have any idea of how many are still there?

MS. KAMP: Yes. Approximately, I believe it was 16 women of the 53 total group actually accepted the job when it was offered to them after the court's decision in the case, and I believe eight or so are still there, which is consistent with about 50 percent turnover rate with other employees.

VICE CHAIR SILVERMAN: Paula, are you at Dial now?

MS. LILES: No, I'm not. I did go back after the arbitration, and it was very hard for me. I was

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treated very badly, so I didn't want to stay there.

VICE CHAIR SILVERMAN: But you don't regret coming forward and bringing the issue.

MS. LILES: No, I don't. I don't at all.

VICE CHAIR SILVERMAN: Mr. Stern, do you have information on the status of the 279 African American employees hired as a result of the settlement?

MR. STERN: All of the employees were class members, are and were incumbent Ford employees, so it's not a hiring situation.

VICE CHAIR SILVERMAN: Okay.

MR. STERN: It's an apprentice program. Ford actually exceeded the 279 agreed remedial apprenticeships, and there are 282 class members who accepted offers that were made. Most of those individuals are on waiting lists until business conditions allow Ford to have more entrants into the apprentice program. The apprentice program requires about 8,000 hours, if I'm not mistaken, of apprenticeships before an individual be certified as a journey person.

VICE CHAIR SILVERMAN: Mr. Robinson, how did you know to come to the EEOC with your issue, and what was it that finally drove you to us on this process, during this process?

MR. ROBINSON: Well, I knew something wasn't right. Whenever someone offers you a test, and then they refuse to give you your results, they're hiding something, so I wrestled with that thought for a couple of months, and then I realized that that had happened in the past. And that if we were going to change that, somebody had to take the initiative to do that, so I took it upon myself to go around the plant and ask people if they wanted to get involved in trying to fight this thing that Ford had been doing for years. And I managed to get 10 other people to go with me, and that's when we went downtown in October and filed the complaint.

VICE CHAIR SILVERMAN: So you were aware of the EEOC and what you needed to do. It was just a question of deciding in your own heart to do it, and then, of course, the leadership that you took, role in the office.

MR. ROBINSON: Well, I knew there was an Ohio Civil Commission.

VICE CHAIR SILVERMAN: Okay.

MR. ROBINSON: And they told me that I needed to go to the Equal Employment institution. But I'm thankful that you guys were able to assist us in that.

VICE CHAIR SILVERMAN: And we're thankful that you did. Thank you.

CHAIR EARP: Commissioner?

COMMISSIONER ISHIMARU: Thank you, Madam Chair. Mr. Robinson, let me follow up on the Vice Chair's question. When you took the test itself, could you tell at that point that there was something wrong with the test, or was it only after when they wouldn't tell you what your score was that you thought something was fishy?

MR. ROBINSON: Well, as I stated, I heard people saying that the test - actually, they told me I was wasting my time because we wouldn't be put into the program. So when I took the test, I studied for it, and I had been working with my children as far as doing homework, math. And presently, I was

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on a job where I was using numbers, things of that nature, so when I took the test, it was easy. I felt that there was no problem at all.

I took the pretest they had, and I only missed three in the pretest. So I figured if I only missed three in the pretest, I would have no problem with the actual test. But come to find out, I did not qualify. I knew something was wrong because the test that I took, I knew I passed. I figured I didn't have no problem with any of the answers. I completed every part of it, and I think I'm fairly intelligent. And for them to tell me that I didn't qualify out of 117 people was an insult. But then when I looked into this room where they were bringing the people who did qualify, I see nothing but white people. And I just felt that we are not that dumb, excuse my expression, but I know there was some other people who took the test were just as intelligent as I am.

COMMISSIONER ISHIMARU: So you put all the pieces together, and figured out there was a big problem here.

MR. ROBINSON: Yes, I did.

COMMISSIONER ISHIMARU: Okay. Mr. Stern, when we heard about the settlement of the Ford case it made us very excited in my office because it highlights the importance of the less discriminatory alternative. Do you have any recommendations to the Commission on the types of training or resources we could provide our staff nationwide to bring more disparate impact cases involving less discriminatory alternatives? Is there something more we could do?

MR. STERN: Investigation on a testing situation seems to me is very labor-intensive, requires time and patience, requires expert resources from Headquarters. We were very fortunate to have an outstanding expert who was available during the investigation; had to review and make an assessment of the validity studies; then had to review and make an assessment of the state-of-the-art in testing, and determine if less discriminatory alternatives were there. And, finally, had to make an assessment of what the shortfall would be. That was absolutely critical, so we do need continued access to skilled resource expert services.

It may be that for selected industries, one could ask any charging parties who bring charges arising from those locations whether they have been tested either for application or promotion. That may allow us to flag cases that are more appropriate for investigation. I don't think we're going to --I don't think we can just rely on charging parties identifying those issues for us, but I think that's something that could be done without a great deal of expense, or even, necessarily, training, picking out an issue, just ask that question, and follow-up.

COMMISSIONER ISHIMARU: Great. I see my time has expired. I want to thank the panel. I thought it was an excellent presentation, and I join my colleagues in saluting the charging parties for coming forward. It's not easy to do so, and it's not easy to hang in there throughout the whole process, so thank you for coming today. Thank you, Madam Chair.

CHAIR EARP: Thank you.

MR. STERN: Thank you.

CHAIR EARP: Commissioner Griffin?

COMMISSIONER GRIFFIN: I too, want to thank you for coming forward. It's not easy to file a charge, sit through the trial, go the whole distance because we know it literally takes years to get through a process like that. And it's not easy, and it sort of upturns your whole life while you're going through it, and so thanks for doing it because I think, as you said, unless you're willing to come forward and make this change, it changes for no one. So we appreciate your filing the charges and following through.

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I want to say hi to Jean. Jean and I worked for Paul Igasaki when he was the Vice Chair here at the EEOC, so it's great to see you.

Jeff, in the settlement agreement in Mr. Robinson's case, you talked about the new selection process was going to be determined by an agreed upon industrial psychologist. Can you tell us what was developed, and how that's working today?

MR. STERN: The jointly selected expert, who you'll hear I believe in the third panel this morning, recently this past spring has done a pilot study for the proposed new selection instrument. The pilot study was favorable, and hopefully this summer, we will have results from a validation study, so that's the next phase. So we've already done the design of the proposed system. It's now been piloted, and will be subject to a validation study. The report will then be disclosed to both class counsel and the Commission, and we will be able to have input and ask any questions we have concerning the validation study.

COMMISSIONER GRIFFIN: Good. Okay. I know that the test they had was technically validated, but shouldn't the Company and the Union, for that matter, seeing exactly what Mr. Robinson saw when they gathered a group of people together that had passed the test, and lo and behold, they were all white, and that they knew there were African Americans that had taken the test. I mean, shouldn't that have been a clue to somebody that something was wrong?

MR. STERN: Certainly, a substantial adverse impact is a red flag that, in our view, certainly by the mid-90s should have precipitated a stop, look, and listen situation to review the validated procedure for currency, and then looking at less discriminatory alternatives. I think most experts would probably agree that a written cognitive test is, and would be expected to have, a greater adverse impact than many other types of tests.

COMMISSIONER GRIFFIN: Okay. Thank you all very much.

CHAIR EARP: I have one question for both charging parties. Ms. Liles, you said when you returned back to work, it was very difficult for you. We are always concerned about reprisal and retaliation after an employee has filed a charge. Given what you went through, and your understanding of our process, what Jean and her staff could do, is there anything that you think EEOC could have done to make your life better after the litigation?

MS. LILES: It was the actual co-workers that when I went back to work treated me very badly. It wasn't the Company at that time, it was the co-workers. They did not want me there, and why, I don't know. But they did, they treated me very badly when I went back, so I just didn't feel comfortable with spending that much time out of my day every day on the job with people that did not want me around.

CHAIR EARP: I'm very sorry about that. Mr. Robinson, did you experience a similar change in attitude either with co-workers, or the Union, or management?

MR. ROBINSON: Well, as she stated, a lot of the resentment comes from a lot of the co-workers. Most of the Caucasians or whites, they just felt that we were actually given some favor. They didn't want to accept the fact that, in my opinion, Ford was not going to spend that much money for something that they didn't feel was incorrect. Some people stopped speaking to me, people who were friends of mine. Some of them felt that once I got into the program, I was only in there because of me filing the charges, not that I belonged, but I didn't let that bother me none, because I know what I am, and what I'm about. And I know what I'm capable of, so I didn't let that bother me at all.

I found my name on the bathroom wall. We know how that it is. I wish I was dumb, and somebody gave me $9 million, but that doesn't bother me none. I'm where I'm at because I belong there, and I don't let anybody take that away from me.

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CHAIR EARP: Jean, Jeff, at the time, was there any discussion with management about rehabilitating the work environment, or was it a part of the monitoring afterwards? Is there anything at all that we could have done to ensure a little less hostility after the litigation?

MS. KAMP: Actually, one thing we did do in the Dial case is part of the final judgment involved that people like Paula would have Union representation right from the beginning, rather than having to go through a probationary period, which is why she was able to file her grievance, and did, in fact, win that grievance, so we can do things like that. What we can't do, I'm afraid, and what we, unfortunately, always tell people that come to us is we can't make people be nice to you. We can't do it.

CHAIR EARP: Yes.

MR. STERN: Madam Chair, we did include in the settlement, which was hammered out during conciliation, so we had good faith by all parties. The case was not settled after a contested litigation, so it was resolved during the charge process. And that, I think, is a very positive way to proceed. That agreement, among other provisions, has an express non-retaliation agreement, and an extensive monitoring period during the term of the agreement. There was no retaliation issue that we made any determination on, and that was not something that we worked with.

CHAIR EARP: Okay. Well, thank you both, all of you very much.

MR. ROBINSON: Thank you.

MS. LILES: Thank you.

CHAIR EARP: In the interest of making sure we hear from as many stakeholders as possible, we actually have two panels that represent stakeholders and different perspectives. So let me ask Panel 2-A to come forward. Mr. Willner, we'll start with you, and I'll ask each of the panelists to just give your name and who you're with, and then proceed with your remarks.

MR. WILLNER: Thank you, and good morning, Madam Chair, and all the distinguished Commissioners. My name is Ken Willner. I'm with the firm of Paul, Hastings, Janofsky, and Walker, and I've represented employers in EEO issues, including pre-employment testing issues for 20 years. You want to hear everyone's names first, or shall I just proceed?

CHAIR EARP: Just proceed. Thank you.

MR. WILLNER: I did represent Ford Motor Company in the case that has been described this morning. I'd like to talk briefly about testing, in general, and testing litigation also very briefly. And, finally, if time permits, to talk about the Ford case a little bit.

Pre-employment testing is an area or a practice that is, and can be good for an employer, good for public policy, and also good for employees. It's good for employers because when a test is valid, it is scientifically shown to result in the selection of people who are more likely to do well on the job. It's also good for employers, and many employers choose to use testing because it is an objective measure, and employers have not been deaf for the last 15 or 20 years or so when they have been hearing from the EEOC and from other enforcement agencies, and the case law, that the use of subjective criteria is, shall we say, frowned upon. So employers look for objective measures where they can, and tests are nothing, if not objective measures.

Testing can also be good for public policy for the same reason, because it is an objective measure, and it does enable employers to get away from subjective decision-making processes. Testing can also be good for employees, because for the same reasons, it selects people who are going to succeed in their jobs. And, also, it is a way that employers can eliminate favoritism. We've found in our dealings with unions, for example, that unions are not opposed to testing because it's clear why

someone is selected or why they are not. They either passed the test or they did not, and it's not because if someone is related to someone, or something like that. So there are some real benefits to testing.

There are also some downsides. For employers, the downside is that creating and validating a test can be very expensive. It can cost hundreds of thousands of dollars, and it can take years to do. Also, it can be less flexible than other methods of selection, so those are the downsides for employers.

On the public policy side, some tests have adverse impact, and that can be a downside from public policy. However, under Griggs and other authority, where a test is valid, and it actually predicts job performance, that adverse impact is, as a matter of law, not an issue, provided that the test is validated in a proper way, and alternatives are properly considered.

It's also, I think, something worth consideration as to whether even tests which have adverse impact have substantially less adverse impact than other means of selection, such as the subjective decision making processes which are frequently the alternative that's out there.

Testing litigation and enforcement is something that we've heard about before today, and there are a number of issues that come up frequently in litigation. For example, there's a fairly small cadre of counsel, and judges, and experts who are conversant in the subject, and we tend to run into each other over and over again. But getting outside of that group, we find there's a lot of misunderstanding of what the standards are. And the standards themselves, which are the Uniform Guidelines, are not overly helpful in that regard.

(Laughter.)

MR. WILLNER: They're about 30 years old at this point, and in our opinion, in need of some updating to be consistent with the standards that are professionally accepted within the field.

One thing that many employers who are involved in testing perceive is that there is a sometimes knee-jerk reaction by enforcement agencies to testing where there is adverse impact. And that when a validation study has been done, that is viewed as merely something to be overcome in litigation, as opposed to a recognition of the employer's good faith efforts to comply with the law, and to come up with a testing device, which is going to get people who will succeed at the job with a minimum possible adverse impact.

And I think it's important in that connection to bear in mind that where the alternative is subjective decision making, it's not necessarily in the public's interest to drive employers in that direction by proceeding with aggressive enforcement of tests that have been validated, and where there is good professional work that was done. That's not to say there's no reason to pursue the employers that have not validated their tests, or that use them for improper reasons, but there is a perception among employers that any test with adverse impact may be pursued, regardless of whether it's been validated.

With regard to the Robinson case, as Mr. Stern mentioned, that was settled in the conciliation process, and I think this case is a good example of where employers and EEOC's, and employee's interests align, because Ford recognized that its best interest was to have a good test, and a valid test, and a test with a scoring mechanism which was going to get the best people without adverse impact, and so Ford approached EEOC to work out a resolution that was in everyone's interest based upon a new test. And I think that this is a good example of how testing can work to the benefit of everyone. I think that case is one good way in which to accomplish that.

CHAIR EARP: Thank you.

MR. MEHRI: Good morning, Madam Chair and Commissioners. Thank you for having me here

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today. My name is Cyrus Mehri. I'm at the firm of Mehri & Skalet here in Washington, D.C. My firm's had the pleasure to represent Mr. Robinson, who was on the prior panel, and charging parties at Alcoa, and a third company that we're going to announce a settlement on in the next couple of months, that we have had the opportunity to really look at this area of testing and apprenticeship selection. And there's a few highlights I'd like to bring to the Commission's attention.

First, the stakes are very, very high. Mr. Robinson talked about a $4 per hour difference between being in an unskilled position, or the skilled positions of millwrights, electricians, and various other positions. The stakes are very, very high economically.

Secondly, that he did not mention, and I want to underscore that the skilled trades have much greater job security. They're the positions that are the least likely to be downsized, and in the capricious environment that there is right now in big companies with downsizing and so forth, it is a particularly powerful reason why people seek these jobs. But we've found in our various investigations of different companies that people of color have been all but locked out of those positions. And the root of it is not the fact that there's testing, but the kinds of testing that we saw in our investigations.

First of all, one of the recurring themes that we found was that many of these validation studies, which should be done, had excellent people working on the validation studies, but the companies themselves did not update the studies, they were not reasonably current as required by the Uniform Guidelines. They did not even follow the very specific and detailed instructions from the experts working on them. They would validate the studies conditionally, saying okay, we'll go on board with this, but you have to do A, B, and C. And A, B, and C didn't happen. The funding wasn't provided to follow-up. The specific things that needed to be done to keep this test, to make sure it's done properly, was not followed up. I'm just using generalizations from different investigations. I'm not trying to pin it on any particular company.

The failure to look at alternatives, the failure to really look at less discriminatory alternatives, the trainability kind of alternative that Mr. Stern talked about, was often overlooked. Job simulation alternatives were often overlooked. It was almost exclusively hanging onto the paper and pencil test. In one instance, we even saw the Bennett Mechanical Test, which was a focus of the Griggs case, still being used today, which has really caught our attention. So we think that testing can be done, should be done, and there's no problem with it, as long as the companies make the effort to use state-of-the-art tests, and really follow-up on what their experts are asking them to do.

The final point I wanted to say is that I believe that this is an area that the Commission can have a great impact. First of all, the Ford case is a great example. We had, I believe, an enlightened company on the other side that was very proactive when we met with them. On the verge of them trying to institute the test again, they said look, we want to work to solve the problem. EEOC had a great process in terms of conciliation, and Jeff Stern really did an outstanding job. I think it was all combined, it was a great example how we can work together to get really historic result. I mean, I don't think there's ever been 270 positions created in an apprenticeship settlement like this.

But the key for the Commission to be successful is you have to have experts in-house who can study this. It's not as labor-intensive, I think, as it might be for other areas, because really, all you need is the data, and an expert, and you'll be able to flag whether or not there is an issue here that needs to be followed-up on.

Now my written testimony talked about other recommendations that really try to build on Commissioner Silverman's task force on systemic enforcement. The other areas to build on, and Mr. Stern, I think, touched upon this, is early detection by - I would add in the questions that are routinely done on intake, whether or not people have taken a test. It could be for salary positions, doesn't have to be only for hourly workers, but that should be routinely in the Q&A that happens on intake. And then working with the technology provisions that are talked about in that task force report, enhancing that. I think the Commission, with a combination of having in-house experts, and making this a focal point of the intake, making this - improving the technology and communication around the country could have

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a great impact on this.

And then, finally, I think I would use the Ford example as a good model of kind of the strategic alliance between class counsel, like my firm, and our co-counsel, and the Commission. I think combined, we produce great results, and I think we can continue to do that.

CHAIR EARP: Thank you. Rae?

MS. VANN: Good morning, Madam Chair, Madam Vice Chair, Commissioners Ishimaru, Griffin, and colleagues. My name is Rae Vann. I'm General Counsel of the Equal Employment Advisory Council here in Washington, and I am delighted to appear before you this morning to discuss EEAC's perspectives on employment testing, and other selection procedures.

As both my colleagues, Mr. Willner and Mr. Mehri have mentioned, when administered properly, employment testing can be a very important tool that is effective in identifying the most qualified candidates for positions, making sure that the folks, candidates, who apply for positions have the skills and abilities that are needed to perform a particular job.

EEAC commends the Commission's efforts to explore this area. And, again, as my colleagues indicated, there is a need to develop an expertise and some best practices around employment testing and selection procedures. And as my written testimony indicates, we have some specific recommendations in that regard, but I'd like to just cover some background before I get to those recommendations.

As many of you may be aware, EEAC is comprised of over 300 of the nation's largest private sector employers. EEAC member companies are all subject to the Uniform Guidelines, and approximately 80 percent of our membership is comprised of federal government contractors, so EEAC members are very familiar with the requirements of the Uniform Guidelines, and the need to ensure the testing and other selection procedures are properly validated, are job-related, and consistent with business necessity.

They also recognize the risks, obviously, associated with testing procedures that are poorly designed, or improperly administered, including loss of efficiency and productivity, increased administrative costs, as well as exposure to large-scale systemic and class action litigation.

Accordingly, EEAC member companies certainly strive to ensure that employment tests and other selection procedures are administered in a manner that is consistent, fair, and non-discriminatory.

My testimony this morning will focus on why employment tests generally are used, as well as common challenges that employers face relating to employment testing. In addition, I'll offer some recommendations, as I indicated that we believe will advance the Commission's aim of ensuring employment tests are administered fairly, and in a non-discriminatory manner.

Why do employers test? As was mentioned earlier, employers utilize employment tests to evaluate job candidates to determine, based on objective criteria, as Mr. Willner indicated, their suitability for employment. Examples of some tests that are commonly used in the employment context include those that measure language skills, reading comprehension, verbal and/or mathematical reasoning, physical abilities, and personality characteristics.

In addition, as was mentioned earlier, many employers conduct routine background checks as part of their employee selection process in order to avoid making bad hiring decisions that could either harm business operations, or adversely affect employees or customers.

Sometimes these backgrounds checks include or reveal information pertaining to criminal

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conviction records. EEAC members clearly are cognizant of the dangers of relying on criminal background checks where there's no connection to the job that's being performed, or applying blanket rules that categorically exclude from employment those with prior criminal convictions, so they're pretty careful to rely on that information only to the extent that it is relevant to the position for which the candidate has applied, and only in so far as is legally permitted.

As I describe in my written testimony, one EEAC member company reports that whether or not that company will rely on criminal background checks ultimately in excluding a candidate for employment will depend on an assessment of a number of factors, including the number, type and dates of convictions, as well as, again, any applicable state or federal laws that either restrict their ability to rely on this information, or in some instances require that the information be obtained and considered in the employment decision.

What are some of the practical challenges associated with testing? As was mentioned before, testing is coming under increased scrutiny by the enforcement agencies, and EEAC member companies are particularly concerned about doing the right thing, and doing a good job in so far as validating their tests, and so forth.

One particular challenge that our members have reported is dealing with enforcement staff that may not have the level of expertise that's required in order to really investigate and assess the extent to which there might be problems with a test in the way it's administered, or in so far as whether or not it's been validated properly. So that is probably the major challenge that employers have reported to us facing with respect to employment testing. And I'll stop now, as I see that my time has expired.

CHAIR EARP: Thank you. Hi, Adam.

MR. KLEIN: Yes. Hi, Madam Chair and Commissioners. Thank you for having me speak this morning. My discussion will be focused on the use of credit scores and criminal histories in terms of suitability for employment.

The topic itself is, I think, timely. It's clear that the use of credit history or credit score and criminal history is becoming more prevalent in the U.S. workforce. Statistics show that in the retail sector, the use of credit scores, for example, borders around 40 percent, meaning that 40 percent of U.S. retailer employers use credit history, credit score as a factor in determining employment suitability.

The reason for it, it seems, is clear. The use of this information, frankly, is cheap and easy to obtain. That's, frankly, something that is part of our modern society. The use of electronic data has become sort of a commodity that any employer can gain ready access to.

What's interesting about the use of credit history or credit score in this context is that it was never intended for that purpose. The use of credit history or credit score was used to determine suitability for the extension of credit, not for determining employment suitability, and so any of the studies that you see that shows what the default rates are, or what a proper interest rate should be charged to a consumer, has nothing whatsoever to do with employment suitability.

And the problem, of course, is that the use of credit score has adverse impact. In fact, there's a study by Freddie Mac from 2000 that shows there's roughly a 2-1 impact between whites and African Americans in terms of poor credit. So you have criteria being used, credit score, that was never intended for the stated purpose of screening out applicants for employment, and adverse impact of almost 2-1. It also, likely, has adverse impact for disabled applicants and for others.

Just to make the point, there are people who have no credit score. They've not sought a credit card application; have not taken out a loan. They're new to this country, so they have no credit history or credit score, literally has nothing whatsoever to do with suitability of employment. Yet, it's being

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routinely used throughout the work force.

Now there is literally, to my knowledge, no correlation between credit score, credit history, and job performance. There's not been any study, to my knowledge, that demonstrates a good credit score with better performance, or a bad credit score with poor performance. There's simply no science supporting the idea that the use of credit score is a good predictor, or any predictor of job performance, or any other characteristic that has anything to do with the employment arena.

The one articulated defense that we've seen in filing charges and working with EEOC on this issue is the threat of stealing, propensity to steal is the articulated defense, and it generally comes up in the context of sort of the para-dramatic bank teller. A situation where an employee has access to money, and so the theory is that an employee with access to money who has poor credit, perhaps, would think to steal the money to address their own personal circumstance. And I suggest to you that while that may seem plausible, it's simply not validated. There's no evidence, no science to suggest that one's credit has anything at all to do with propensity to steal.

The irony, of course, is that if that person had filed for bankruptcy, it would be unlawful to discriminate based on bankruptcy filing in terms of extending a job offer to that person, but merely having poor credit leads to a different result.

The reality is that we've seen, and what's more pernicious, perhaps, is the use of credit score or credit history as a factor in the determination for employment suitability, meaning that employees or applicants, rather, who seek employment literally don't know that credit score and credit history played a part in the decision by the employer not to extend an offer. The reality is most applicants don't know why they were not selected for employment.

Frankly, it's a common experience for people who apply for a job not to be hired. There's nothing necessarily wrong with that. There's no indicia of discrimination because of that fact alone, and, obviously, they have almost no information about what factors were considered when they sought employment and were denied. And so you have sort of a hidden problem, a very clear pattern of using credit score and credit history for employment suitability, almost no information available to the applicant who was denied employment based on that, either in whole or in part, and literally no science, no causation, no correlation between credit score and credit history, and suitability for employment. Thank you.

CHAIR EARP: Thank you. Vice Chair?

VICE CHAIR SILVERMAN: Wow, there's so many questions I have, and so little time. I want to thank all of you for your testimony, and your written testimony. I can't even --I guess one of the questions I have, there seems to be some disagreement among your written testimony of this panel and other panels about whether or not we need to update the Uniform Guidelines. Could you please just talk briefly to that? I'd like to hear from everybody.

MR. MEHRI: The experts I've talked to feel that the Uniform Guidelines are very well thought out, very well developed, and still very pertinent today. I think, personally, from my point of view, I think it would be risky business to get into that, opening up that can of worms. I think that a lot of effort went into that in 1978. The same issues are applicable today, so I would be very cautious about --

VICE CHAIR SILVERMAN: So you think there's enough within there for us to do our job, and for you to do your job.

MR. MEHRI: Yes.

VICE CHAIR SILVERMAN: Okay. Mr. Willner?

MR. WILLNER: We do have a different perspective than Mr. Mehri on that subject. The Guidelines were prepared almost 30 years ago based upon the state-of-the-art of the science at the time. They refer to other professional principles that are out there, although they don't incorporate them expressly, such as the Society of Industrial Organizational Psychologists, SIOP principles, and some other guidance, as well. In the intervening 29 years, the science relating to selection devices has advanced substantially, and a lot of those advances are reflected in other professional guidelines that the experts who are preparing the selection devices, and who are representing parties in litigation, then are defending them based upon guidance from - SIOP guidance, for example, that isn't necessarily, and in many cases is not consistent with the Uniform Guidelines. And there's a real tension there in the litigation I've been involved with as between what the guidelines say, and what the professional guidance is, and what the science says.

There are some examples that are listed in the paper that I submitted having to do with, for example, synthetic validity, and validity generalization, and other areas of differences between current thinking and past thinking.

VICE CHAIR SILVERMAN: So your view is that the guidelines don't allow enough for the modern advances. What about you, Ms. Vann?

MS. VANN: It is true that the professional standards are more contemporary, if you will, have been updated more regularly; whereas, the Uniform Guidelines have not. Having said that, the Uniform Guidelines provide the fundamentals for conducting adverse impact analyses, and those fundamental legal principles have not changed, so we would urge the Commission not to over-regulate in this area. And perhaps, better utilize its resources on developing best practices, educating folks on how to apply the Uniform Guidelines, and how to work within the confines of both the legal, and the professional standards.

VICE CHAIR SILVERMAN: Providing clearer guidelines about what it is that we think is legal, and what is not?

MS. VANN: Sure. Certainly, interpretive guidance, some --yes, some interpretive guidance, stopping short of actually going in, because I agree with Mr. Mehri, that that task of going in and trying to amend or revise the Uniform Guidelines could very well open up a huge can of worms.

VICE CHAIR SILVERMAN: It seems from the testimony I've heard so far, that even where the tests are validated, then there's a question of whether or not the --how updated that is. How often should an employer be expected to update a validation, or does that depend on --

MR. MEHRI: The Uniform Guidelines have a phrase in there about that they should be reasonably current. The experts I've talked to said that they look at it as no more than five years as reasonably current.

VICE CHAIR SILVERMAN: Mr. Klein, you talked a lot about the credit issue. And it was my understanding that under the Fair Credit Reporting Act, which, of course, we don't enforce, and I'm not trying to shirk our duties in any way here, but people will know when their credit is checked.

MR. KLEIN: Yes.

VICE CHAIR SILVERMAN: Can you talk to us about that?

MR. KLEIN: There's a disclosure requirement with the Fair Credit Reporting Act. There are two problems with it. One, employers don't comply with it, because they don't appreciate that denying employment based on credit comes under that Act. The second is, the disclosure itself is underwhelming. It doesn't provide information that would reasonably lead an applicant to come to the EEOC and think that because of poor credit they were discriminated against because of race or

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disability status. One doesn't flow from the other.

VICE CHAIR SILVERMAN: It does tell them if an employer is following it, though, they would know that their credit was checked.

MR. KLEIN: Yes.

VICE CHAIR SILVERMAN: They may not know that they were turned down because of that.

MR. KLEIN: Right.

VICE CHAIR SILVERMAN: And even if they knew that they were turned down because of it, they may not make that leap, is what you're saying.

MR. KLEIN: That's right. There's no reason for one to think that because of their race, they were the victim of discrimination, when they were denied employment based on their credit. That's information that's not typically within the possession of a typical applicant.

VICE CHAIR SILVERMAN: Okay. I see I'm out of time.

CHAIR EARP: Commissioner Ishimaru?

COMMISSIONER ISHIMARU: Thank you, Madam Chair. I, again, want to follow-up the Vice Chair's question on the mechanics of the credit check. Does the employer have to ask permission from the applicant, or is it noticed that they're going to ask?

MR. KLEIN: They need to ask permission. And typically, the way this happens, and I've gone and sought employment applications from various retailers to see how this works. There's a general employment form, may run pages, and at the bottom right above where you sign it, it says, "you are giving permission to Employer X to do a credit check," so there isn't really any choice. If you would like to seek employment, you have to sign the form. And the form gives you a one-liner. It doesn't explain anything beyond that. And that's essentially how it's done.

COMMISSIONER ISHIMARU: I found your statement, and especially your written statement, to be compelling. And it would strike me that it's almost a per se violation, that the use of credit checks without a validation study, without supporting documentation being used on such a widespread basis, causing a disparate impact, isn't justified. Is there something, or do you have a recommendation for the EEOC as to what we should be doing on this?

MR. KLEIN: I think there are two answers to that question. I do think it's imperative that the EEOC issue guidance on this point. The EEOC years ago issued guidance on the use of criminal conviction or criminal records in terms of employment suitability, and it has an impact. But here, there really isn't any guidance. And to be candid, I'm not sure where the idea of using credit scores for employment suitability determination came from. Where this idea came from is something that employers, perhaps, can answer. And, also, the EEOC should enforce Title VII. It should aggressively pursue charges that are filed, or issue Commissioner's charges where credit is being used.

You know, there's a simple way to find out whether employers are using credit in determining suitability. If you look at the employment applications, they'll give a Fair Credit Reporting disclosure. Well, why would they be asking for that information if they're not using it? It wouldn't be very difficult to figure that out.

VICE CHAIR SILVERMAN: Is that the only disclosure? I'm sorry? Is it the bottom of the application, is that it in complying with the Fair Credit Reporting?

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MR. KLEIN: Well, there's just a requirement that the applicant be told that their credit is being checked, and that they agree to that. And a lot of times, it's on the employment application itself.

COMMISSIONER ISHIMARU: Or there's a separate form. I remember filling out a separate form and just signing, and say go ahead and check.

MR. KLEIN: Right.

COMMISSIONER ISHIMARU: Sure enough happened. Are there alternatives that employers can use? In litigation you've brought, this is quick, it's easy, it's cheap.

MR. KLEIN: Right, quick, easy, and cheap.

COMMISSIONER ISHIMARU: Are there other things employers can do that are similar, quick, easy, and cheap, that would be more helpful to them that you've come up with in your various pieces of litigation?

MR. KLEIN: The short answer is no, but I could see how that could happen. The reality is, what are they asking for, what are they looking for? They're looking for whether there's some characteristic or behavior of the applicant that they feel has some relation to the performance of the job, so propensity to steal is an example. Well, if they have a criminal conviction of theft, that would, seemingly, be more relevant. So the question is, what is it that's causing the poor credit? Was it disability status, was it bankruptcy filing, was it just a lack of credit all together, meaning they're new to this country and have not established credit? What is it that's causing the credit score to go down, or not to be substantial? And I would suggest that I think it would be very difficult for employers to even use that as a criteria for eligibility for employment. Again, it doesn't seemingly have much to do, or anything to do with employment suitability for most jobs in the U.S. workforce.

COMMISSIONER ISHIMARU: Mr. Mehri, in your litigation over the years, how typical is it to come up with an alternative selection device that both reduces adverse impact, and meets the employer's need of needing some sort of selection device that is required for their business?

MR. MEHRI: It's a very achievable goal. You'll have your last panel today, you'll hear from Dr. Lundquist and Dr. Outtz. They'll be able to address that. I've seen them do this work in the past. I've seen other experts do it. It can be done. It's not a pie-in-the-sky thing. It's a very achievable goal, and I think there is a lot of new literature, a lot of new mechanisms that have come up with job simulation approaches, trainability approaches, conscientious - testing for conscientiousness doesn't have adverse impact. There are a lot of good tools that are out there that can be used.

I haven't seen anyone completely jettison the paper and pencil test, but they've supplemented it with many other things that are more job-related, and reduce adverse impact.

COMMISSIONER ISHIMARU: And I would imagine in the cases you've seen, that businesses that may not have the counsel of Mr. Willner, may pull a test off the internet, may get something off the shelf that may not be related to the job in question. How often do you see that happening, where someone pulls a test, and this measures - this was designed for Purpose X, but they're using it for Purpose Y?

MR. MEHRI: We did see that. Like I said, the Bennett Mechanical Test you can actually get that on line. And one of the things that reminds me of, is that sometimes the questions are so available that there's a security issue, as well. And one of the things about having an individualized test is you have less risk that the applicant, or that the workers applying for apprenticeship programs, much less risk that they'll know the questions in advance.

COMMISSIONER ISHIMARU: Okay. Thank you. Madam Chair, I hope, like the Vice Chair, that

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we'll have more time to talk about this at another forum, because this is a fascinating panel, and maybe we can get folks to come back.

CHAIR EARP: It is, I agree. Commissioner Griffin, before I give the floor to you - Mr. Mehri, did I understand you to say that testing for conscientiousness would be a reasonable alternative to some of the tests currently available?

MR. MEHRI: As part of the selection procedure, yes. In other words, there's multiple components to a test, and that kind of testing, I understand from talking to experts, does not have as much adverse impact as other - in fact, doesn't have adverse impact, is my understanding.

CHAIR EARP: Really? That's interesting, because I would think that testing for something like conscientiousness might have a cultural component that would, for some groups, have an adverse impact.

MR. MEHRI: Well, I will defer to Panel III on that.

CHAIR EARP: Okay.

MR. MEHRI: Because I think they can address that, but that's my understanding.

CHAIR EARP: Okay. Good enough. Sorry. Commissioner Griffin.

COMMISSIONER GRIFFIN: Should we wait until Panel III to ask them what that actually is?

(Laughter.)

COMMISSIONER GRIFFIN: There's a couple of us up here going what is it? I've got to wait until then?

MR. MEHRI: I would wait for them.

COMMISSIONER GRIFFIN: Well, I want to thank you all. I want to really thank Adam Klein for bringing up the issue of no credit history, because this is a huge problem for, especially people with disabilities, and I'm sure people that are new to this country. People that are living, and you can't make a living on benefits, but people who are living on Social Security benefits are routinely denied credit, because of their status. And so when they do go to get a job or anything like that, that very fact is a barrier. And, again, you don't know, even though you sign that thing.

I like your idea about going out and collecting applications, and taking a look at them. Are you aware of any court cases where credit checks have actually been upheld as a valid selection criteria?

MR. KLEIN: No. In fact, the truth is there's not been much litigation on this topic, generally. I think it's a relatively new phenomenon. We've filed a number of class charges with EEOC. The EEOC is actively pursuing them. And frankly, the stories are compelling. They make no sense, literally, when you hear the facts, hear the stories of why people were denied employment, you're dumbfounded by the explanation. But having said that, there's not been litigation on this topic, to my knowledge.

COMMISSIONER GRIFFIN: Okay. Mr. Mehri, when you --in your statement you make several suggestions about steps that we can take to identify situations where paper and pencil tests are used to exclude minorities, and other applicants. Are there any specific industries that you think have a problem with the improper use of tests?

MR. MEHRI: Well, some industries don't have paper and pencil tests at all, so I think the

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question is really what industry - I would rephrase the question a little bit in terms of what industries are using them; and, therefore, more likely to have issues come up. The automotive industry, I think the aerospace industry, the telecommunications industry, there are a number of industries which have these kind of tests. And as I was trying to say earlier, I wouldn't say having a test or a selection procedure written form is per se a problem.

COMMISSIONER GRIFFIN: Right.

MR. MEHRI: I think the question is getting the data --

COMMISSIONER GRIFFIN: Having your tests, and then looking at the data.

MR. MEHRI: And having your in-house experts that we're fortunate to have both in Alcoa and Ford, that the EEOC had in-house experts, industrial psychologists, who also had statistical backgrounds, who looked at it. And my concern is, is that whether or not that area within the Commission has been staffed fully, because I understand there's been some turnover there. One person left, I think, on disability, another person retired, so that's my number one recommendation to you, is to go back and visit that area, and make sure you have industrial psychologists, the statistician-type of experts in-house for both what I was talking about, and what Mr. Klein's talking about. Ultimately, you need to have those kind of skill sets within the Commission to effectively enforce this.

COMMISSIONER GRIFFIN: And is it just paper and pencil, or are there other tests that you would say here's an industry using this type of test, and here's another suggestion, look at their data.

MR. MEHRI: The ones that we've looked at have been paper and pencil, but I would --and we've done it mostly for hourly workers, but there are other contexts, and some - in telecommunications industry you can have hourly workers who are trying to go from hourly to management, as the cases I highlighted today were going from unskilled to skilled positions. But they're also contexts of going from hourly to management, is one. I have not seen much of it in the salaried workforce, going from, let's say, one pay grade to another pay grade within salaried. I have not seen that. I have seen it hourly to management, or unskilled to skilled.

COMMISSIONER GRIFFIN: Okay. Thank you. I have like a second left on my yellow light. I've got a minute. Mr. Willner, you talk about updating the guidelines to reflect new research showing that construct validity and associated approaches are now fully developed and useful. What are the associated approaches that you talk about?

MR. WILLNER: For example, there are a variety of different sub-headings, I suppose, but the research since the guidelines have addressed, for example, looking at validity in multiple locations, or multiple instances, and dealing with whether validity has to be location-specific, or necessarily employer-specific, sometimes you have small samples, small populations with one location or one employer, and sometimes you can get a much better view, actually, of validity by looking at a larger sample that might require looking at multiple locations, or multiple employers. You can get a better sense for how valid a test actually is with a larger population. And that's one of the things that could be improved about the guidelines, is their emphasis on local validation. And they give less flexibility in how tests are validated, as compared to what the current professional guidance is.

COMMISSIONER GRIFFIN: Mr. Mehri, do you want to add anything to that?

MR. MEHRI: The issue, at least the way I understood it, that Mr. Willner was talking about, about applicability, or generalization of testing from one location to another is, again, an area where experts have different opinions on. What I've seen is a great deal of caution from experts about unduly generalizing from one context to another, and so the best practice is to actually do it for the location, or for the use it's going to be deployed for in a company.

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COMMISSIONER GRIFFIN: Okay. Thank you all very much.

CHAIR EARP: Ms. Vann, you mentioned regarding arrest and conviction records, the companies that are part of EEAC's awareness of number, type, and date, but does EEAC have a position on the use of credit checks?

MS. VANN: In speaking with many of our member company representatives, it became pretty apparent to me that the practice, the use of credit checks as a screening tool is not a widespread practice among EEAC member companies, for many of the reasons that Mr. Klein discussed. It's very difficult to come up with a job-relatedness argument based simply on a credit check, and I think that has been one of the concerns that's been expressed to us by some member companies, in so far as justifying their hesitancy, or their tendency not to go there. Really, it's a job-relatedness issue, and whether or not you can actually validate that sort of thing.

CHAIR EARP: Mr. Klein, do you find the use of credit checks more prevalent in one industry over another?

MR. KLEIN: It seems to focus on some relationship to financial matters. We have a charge before the Commission now, Lisa Bailey, the charging party, against Harvard University. She was in the on-line development office, she was a temp employee for five months, and they asked her to apply for the position full-time, did a credit check and determined that she was not suitable for the job she had been performing for five months. So that's a typical fact pattern. In fact, any time I have a discussion about this topic, it's usually a question of dealing with money or some aspect of propensity to steal as the articulated reason that credit checks are used. And I don't see how that's been validated. There's been no evidence, to my knowledge, that suggests that it has.

CHAIR EARP: Thank you very much to the panelists.

MR. KLEIN: Thank you.

MR. MEHRI: Thank you.

CHAIR EARP: Before we invite Panel II-A up, we're going to take a 10-minute break.

(Whereupon, a short recess was taken)

CHAIR EARP: We'd like to reconvene, if we can, please. Continuing with the perspective of stakeholders, Panel IIB has been seated. Ms. Arent, we'll start with you, have you introduce yourself and give your remarks.

MS. ARENT: Good morning, Madam Chair, Vice Chair, and Commissioners. I'm honored to have the opportunity to speak to you about the impact of employer testing and screening on people with disabilities. My name is Shereen Arent. I'm the Managing Director of Legal Advocacy at the American Diabetes Association. And though I'll focus on examples concerning diabetes, what I'm saying will be generally applicable to the disability community.

There's two striking differences about how testing and screening impact people with disabilities, compared to what we've been hearing about today. The first is that much of the discrimination that people with disabilities face is explicit. The person is told because of this medical condition, you cannot have this job.

The other thing that's striking is how very few resources are used to justify that explicit discrimination. Rather, people with disabilities are denied employment based on a mish-mash of core science and extraordinarily brief, if any, assessment of how that disability affects that person for that

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job.

I'm going to focus first on the pre-employment physicals, and when safety concerns are raised. That's supposed to be an individual assessment relying on the most current medical knowledge, and the best available objective evidence. What we find, instead, are things that range from de jure, blanket bans. That's what Jeff Kapche faced when he sought to be a police officer in San Antonio and was told you use insulin to control your diabetes, you need not apply.

I'm hoping that is somewhat in the past, but not really, those things still exist. Yesterday's *Boston Globe* talks about a Massachusetts regulation which prohibits anyone with an insulin pump from obtaining any job in law enforcement. Beyond the de jure, blanket bans, we find de facto blanket bans. That means, the medical science and the assessment is so slip-shod that anyone with that medical condition is not going to make it through the individual assessment. That's what happened to Gary Branham when he sought a law enforcement position in the IRS. There was simply no one who understood diabetes making that assessment, no one with diabetes would have made it through that individual assessment.

The lack of scientific basis is widespread. Gilberto Wise was working successfully in the United States Marshall Service until he came up with a hemoglobin A1C test of over 8. While I don't have time to explain what that test is, medical science people who understand diabetes will tell you that that doesn't have anything to do with whether he could safely do the job, but employers often want that clear cut-off, one test, the person is or isn't safe. It just isn't medically valid.

And we even get to the absurd. Rudy Rodriguez wanted a job in a factory. He'd been doing it successfully. Based on a urine test, a test which was antiquated decades ago, the doctor who had been contracted with ConAgra said, "There's no job this man can safely do, even in a padded room," based on a test which is, frankly, laughable within the diabetes community.

What all of these folks have in common is that they were evaluated without current medical knowledge, and no looking at what that person could do in that job. What's also common among these people is that they successfully fought back, and were eventually determined to be able to do these jobs. But what we had are years, sometimes up to a decade of expensive litigation.

The hallmark of successful individual evaluation is individual evaluation for the job and the person, bearing in mind that most jobs don't have a safety component. The expertise of occupational medicines and experts in the relevant medical area working together, and including the expertise of the treating physician, and then there often is no easy one-step test, which employers often want to find. The solution, then, is a collaboration between occupational medicine experts, experts in the employment field, and advocates to develop protocols which can be put in place ahead of time, rather than all of this expensive and time consuming litigation, that can easily be implemented, and they really are not that difficult.

I've given several examples in my written testimony, some which come as a result of litigation, one which has happened even since I wrote my testimony, is a collaboration between the American Diabetes Association and the American College of Occupational Environmental Medicine. We've worked together to come up with a protocol for people with diabetes in law enforcement which employers can use ahead of time, rather than be involved in litigation.

There are a number of other tests, some of which have been talked about before, which have an adverse impact on people with disabilities. We spoke earlier about the Minnesota Multiphasic Personality Inventory; psychological testing often ferrets out psychological and mental disabilities at a pre-offer stage when that is not --when it's simply not available to the employer, but yet these questions are being asked.

A final barrier I'd like to mention, and we talked about that with Jean Kamp and Paula Liles's

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case, are screening devices which impact people with disabilities because they look at physical prowess, strength, agility, have a great impact on people with disabilities, and often are not job-related or consistent with business necessity.

There are a number of proposals for EEOC action that I have set out. The first is really redoubling the Commission's efforts to educate employers about their obligations to individually assess people with disabilities, and to provide guidance on how to construct protocols for individual assessment.

I also have some other, and I see I'm out of time, but a few other recommendations. I do think that factual research and systemic litigation in the area focused on, which is the employment physical, and how that would be very useful. And last, I would strongly urge the Commission to become actively involved when other federal agencies are involved in setting employment standards. An example that's very current is right now the Federal Motor Carrier Safety Administration is working with the Medical Review Board to review 15 different medical conditions, and the employment of people with various disabilities in commercial driving. I think it's urgent that the Commission become involved in that, and help the Federal Motor Carrier Safety Administration to look beyond meta analysis and group-based studies to the individual assessment and medical expertise of the community, so that the standards that the Federal Motor Carrier Safety Administration ultimately comes up with are ones which are based upon the goals of the ADA to avoid stereotyping and to look at individual assessment of people with disabilities. Thank you very much.

CHAIR EARP: Thank you. Mr. Ashe.

MR. ASHE: Good morning. I am Lawrence Ashe of Ashe, Rafuse & Hill in Atlanta, Georgia. I listened with interest to my friend Cyrus Mehri's approach and views on some things, and I'd like to provide the other side of several of them.

(Laughter.)

MR. ASHE: First, let me note that we agree on the fact that the EEOC could make good use of additional experts in industrial psychology on its staff. And I would like to remind the Commission of what is arguably its least used provision in Title VII, Section 705(g)3. "The Commission shall have power to furnish to persons subject to this sub-chapter such technical assistance as they may request to further their compliance with this sub-chapter or an order issued thereunder."

The times in which I've written over the years to the Commission seeking such technical assistance, I either get no response or one which says we don't have funding for that, write your member of Congress. Nonetheless, in terms of allocation of your resources, I think it's an ounce of prevention versus pound of cure, pound of cure is litigation category, and it could be put to good use.

The OFCCP, for example, when there are tests used on a large-scale basis by members of a particular industry, for instance, the electric utility industry uses Edison Electric Institute's massively validated test, and has reviewed them, and approved the validation, not the use by a particular member, but approved the validation nationally so they don't have to keep doing it over, and over, and over again. They issued a directive to that effect, which I could share with the Commission, if you're interested.

I would --also, OFCCP has a, obviously, heightened interest in testing these days. I've seen more of those cases in the last two years than I've seen in the preceding 10 or 15. And I would suggest coordination between the two of you could be beneficial. Justice probably has enough on its plate these days, so that --

(Laughter.)

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MR. ASHE: One of Cyrus's views was that - he said, "The experts I've talked to say that the guidelines are just fine and totally current." I'd like to know who they are. They aren't either Jim Outtz or Kathleen Lundquist, who will testify here shortly. I wrote Jim a note, and I got his permission to read this. "Jim, do you think" - and he's primarily a plaintiff's expert. "Do you think the Uniform Guidelines are current professionally today?" "Some ways yes, some ways no."

"So should be reviewed and updated, where appropriate?"

"Absolutely!"

Start with the fact that the guidelines adopted the APA standards in effect in 1978. Those have been revised twice, quite substantially. As far as I know, you haven't issued any guidance as to whether that means it's the pre-`78 APA standards that are incorporated, or do we sort of infer that it's each successive version of it, even though you hadn't reviewed them officially.

In addition, SIOP did not have principles at that time, and they are the most relevant. I think most would agree they are the single most relevant document for interpretation of professional standards in that area, but that's just an easy example. Mr. Willner gave some others.

I don't know of a single Ph.D. industrial psychologist who thinks that they are fully current. Now what changes ought to be made, you can get some argument about. And, indeed, politically I don't think it's likely to happen in the next 21 months, anyway. I would note for the record that we've done reading level difficulty analyses of the Uniform Guidelines. They come out at the 21st grade level - excuse me - the 19th grade level, which, coincidentally, is college plus law school or Ph.D. They are an improvement over the preceding EEOC guidelines, which came out at the 25th grade level, so that is progress.

I have listed some thoughts on performance appraisals, which are the most used test, as far as I know. They are a test in the guidelines in my written remarks.

On a job analysis, that would not be for low population jobs, that you can only practically, economically do job analyses for larger population jobs. And the impact, they should be audited for impact. My experience has been they almost always, in large data samples, have impact against minorities, sometimes against females, sometimes there's a different distribution for females. I've seen situations with large data samples where there's not average adverse impact, average rating impact, but there's a clustering of the female ratings towards the middle, where the males are more likely to get rated either awful or superstar. That has implications for rapid advancement, or rapid termination, as the case may be.

In the age area, and, of course, we now have adverse impact there, my experience has been that the impact starts occurring around age 47 or 48 and then tends to evaporate around age 60. I don't know whether that's because most people take early retirement or there's not enough data set there or not.

I see the light's on, but I'll save the rest of my time for rebuttal. Thank you.

(Laughter.)

MR. ALVAREZ: Well, you're not going to get argument from me.

(Laughter.)

MR. ALVAREZ: I'm Fred Alvarez, Wilson, Sonsini in Palo Alto. It's a treat to return to these hallowed halls, though, I'll tell you that. And I salute you for digging into this very complicated issue. I

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guess my principal feeling is that I'm relieved that you have to make sense of this, and I don't.

(Laughter.)

MR. ALVAREZ: My basic assignment was to give you, at least, my perspective on the practical advice that's available to employers who are considering testing, and to suggest something about best practices. I've submitted a statement, which I know you've looked at, so I won't repeat that.

My message, I think, is a simple one. It's that employers who are contemplating using objective skill testing are facing what I describe as a rock and three hard places. The rock is the guidelines, which you don't need to hear anything more from me about. The hard places are really more of a continuum, and I would encourage you to look at it as a continuum. At one end of the continuum is using an armor-plated state-of-the-art, super-validated test, and then hoping that another expert doesn't come along in litigation who will find the seams in the armor, or think of another alternative, which is what these cases tend to be. That's at one end of the continuum.

At the other end of the continuum is to do nothing at all, just to make purely hiring on a hunch kind of employment decisions. And I know there are cases that attack that, but I'm not saying - I don't think that's a very good place either. We know what happens when there's excessive subjectivity. It's a place for preconceptions and stereotypes.

I'm suggesting to you that there is a murky middle, in which employers seek to use objective skill-based tests to make objective decisions. It's a kind of a hazy place, because there's no regs that tell you how to do that. Oftentimes, they're a piece of the job-type tests, and the employers have to sort of rely on their ability to prove that it's job-related for the position in question and consistent with business necessity, which is a question of fact.

My message to you is I think that people in that middle space could use your help in getting some guidance as to how to do that, if you're not at both ends of the spectrum, either with an armor-plated validity study, or purely subjective hiring.

I don't want my point to be somehow a criticism of the testing profession. They do great work. They're very valuable. The tests they develop are super useful, but my point is simpler. It's when you think of piece of the job-type testing and validation, why does it have to be so hard? I mean, if you can ask people whether they can type to be a typist, why can't you give them a typing test? If you can ask them whether they can drive before you hire them to drive a truck, why can't you give them a driving test? If you can look at a writing sample for a lawyer, why can't you ask him to write a paragraph? I mean, there have to be some species of tests that are more accessible to people.

I understand adverse impact, I understand *Griggs*. I believe in all of that, but my point is that we're so suspicious of tests that we're making them too hard to use. Think of, we assess motive all the time. You get 80,000 charges a year, you're trying to figure out what the motive of the employer was. We don't have to hire a psychoanalyst to make that decision, we look at common sense. We look at the facts, the circumstances. And I think tests are objective ways to try to find qualified people without regard to race, national origin, disability. We ought to try to find a way to make that process more accessible. We should engage the IO profession to help us come up with easier to do validation for tests that seem to be very distinctly job-related.

I just think that the more feasible alternatives that we have and that the Commission helps us develop to do sort of piece-of-the-job tests will encourage employers to stop hiring on a hunch, and start to be more focused on the requirements of the job. And I'd urge the Commission to help us find alternatives to these two polar extremes, and let people make sensible use of sensible tests. And I think there's ways that even --and have it be done in ways that even I could understand, not having a Ph.D. And I think the Commission could really help with that process. So that's my message to you, and I appreciate the opportunity to be here.

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CHAIR EARP: Thank you. Vice Chair.

VICE CHAIR SILVERMAN: Mr. Alvarez, in your written testimony, you suggested that an employer should be permitted to develop job-related tests or purchase professionally developed off-the-shelf tests without specific validation, and to defend those tests under Section 703(h) of Title VII. How does 703(h), we didn't really talk about that much today, work with Section 703(k), the disparate impact section? Where there's adverse impact, does an employer still have to show job-relatedness and business necessity, and could a plaintiff still prevail by showing a less discriminatory alternative?

MR. ALVAREZ: I think the answer to that all those is yes. I mean, the adverse impact standard totally applies. I have no question with it. My only point in raising 703(h) was, I think there should be some guidance associated with 703(h), because the statute itself contemplates skills testing, as long as the skills test is not used as a subterfuge for discrimination. And I guess the way I put the two together is I'd say if you can put together a factual proof that that job is consistent with the position in question, because it's a business necessity and job-related to the position in question, you ought to be able to prevail in that case. But that piece of Title VII, which isn't even referenced in the guidelines, hasn't been fully developed, and I just think it's an area in which you might consider giving some guidance as to what a professionally developed skills test might be that would be at some level less than one of these heavily scientific validation studies.

VICE CHAIR SILVERMAN: So what you're suggesting or recommending to the Commission is both that we have to develop some guidance in this area and, also, that you believe the Uniform Guidelines themselves should be updated, as well. We need both, in your opinion?

MR. ALVAREZ: I guess I'd say yes, although I think that the guidance is more important than the new regulations. But the regulations were written a long time ago.

VICE CHAIR SILVERMAN: Yes.

MR. ALVAREZ: And a lot has changed since then.

VICE CHAIR SILVERMAN: Mr. Ashe, based on your experience, do you see differences in how performance appraisals are conducted or used across industry and job categories?

MR. ASHE: Yes. The higher the level of job, to the extent it occurs, the more subjective the performance appraisals tend to be. I do not see uniformity that necessarily larger employers do a better job with performance appraisals than smaller employers, nor do I even see that law firms who have a lot of people practicing employment law necessarily do a good job.

VICE CHAIR SILVERMAN: We instruct. We don't do - employment lawyers.

MR. ASHE: There are still large law firms that, for example, do not give their associates copies of their performance appraisals, which I consider mind boggling. Psychologists will tell you that we tend to hear what we're listening for, we listen in a maximum of 15 second bursts. Also, if you're a partner relying upon some hardworking associate to prop you up, even though they may have need for improvement, you're going to sugar coat it if you're giving it to him orally in ordinary human events. Also, very few law firms give training to the partners in doing performance ratings, so things like recency tend to swamp the ratings. In other words, what did you do right or wrong the last three weeks?

VICE CHAIR SILVERMAN: Ms. Arent, again, I'm focused on what EEOC can do here as we move forward. We've issued a guidance, as you know, on medical inquiries under the ADA and issued specific guidance with regard to diabetes. Do you feel that these documents go far enough in addressing certain areas, or should our focus be more on outreach?

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MS. ARENT: I think both of those guidance are very useful and very helpful. I think where we don't quite --where we could use further guidance is there seems to be a tendency to say you have a doctor involved, for example, and that's enough, and not really going beyond helping the employers to understand that expertise is needed in the medical condition. Again, this is before an explicit disqualification because of a disability, so I think that sort of guidance would be useful.

Another sort of guidance that I think would be useful internally for investigators is to help them also understand what they're looking for, in terms of whether there was truly a valid medical assessment made. I think both employers and internal EEOC could use that. I also think that guidance for employers on how to construct valid tests - there's been a lot of discussion about the sort of complex validity studies that are done in terms of testing under Title VII, and I think employers really don't have ideas on how to set up a protocol which would really do that kind of evaluation, which I think would then be valid, so they go with what's the quick cut-off, what's a quick fix? Does this person have an M.D.? That's enough, move on. And I think that would be useful from the EEOC.

VICE CHAIR SILVERMAN: Okay. Thank you.

CHAIR EARP: Commissioner.

COMMISSIONER ISHIMARU: Thank you, Madam Chair. I want to welcome Secretary Alvarez back to Washington from the Promised Land in California, and wanted also to note Mr. Ashe, who we do a lot of work with through the ABA, and both Secretary Alvarez and Mr. Ashe have been very helpful to me, personally, and I wanted to welcome you both here.

Mr. Alvarez, you talked about typing tests and driving tests, and I walk away with the impression that employers can't do that because of a problem with the test. Is that true for truck drivers and typists, that they can't --

MR. ALVAREZ: Well, the theory would be that you have a test that could have an adverse impact, and you'll have to validate it. And, presumably, you could hire an expert to do all the study associated with doing it, and another expert to say well, you could do it a different way, and you'd end up with a battle of experts, even on a driving test.

COMMISSIONER ISHIMARU: But has that happened in --

MR. ALVAREZ: I'm not aware of any cases.

COMMISSIONER ISHIMARU: Okay. Right.

MR. ALVAREZ: But I'm just telling you when you counsel an employer who wants to do a test, that's what you've got to tell them; that, theoretically, they'd have to validate that test under the Uniform Guidelines, and any other permutations of the sort of piece-of-the-job test. That's the extreme example, but my point is that even something like that, theoretically, would have to be --it's a selection procedure under the guidelines. Where's the validation study, where's the data, what are the alternatives?

COMMISSIONER ISHIMARU: Yes, yes, but you don't know of instances where --

MR. ALVAREZ: I'm not aware of any.

COMMISSIONER ISHIMARU: --where people have been prohibited from administering a driving test or a typing test for a job that would entail that sort of performance.

MR. ALVAREZ: Not that I'm aware of.

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COMMISSIONER ISHIMARU: Okay. Mr. Ashe, could you talk to me some more about performance appraisals and give me some specific examples of how they may come up under an adverse impact theory?

MR. ASHE: You can - even the ones that aren't scored that use adjectives you can assign numerical scores to the various ratings. And you can then see if they have adverse impact against a particular protected group. And if you have a very large sample in the age area, I wouldn't do just under 40 and over 40. For the reasons previously stated, I'd break it down at least into the 40s and 50s, and if you have a very large sample, maybe even five-year increments.

They come up because performance appraisals are typically used to defend differences in promotion rates or differences in pay, and so the plaintiffs or the government does an analysis of pay by gender, age, or race, or whatever, or an analysis of promotion rates, and they discover adverse impact. And the employer says well, we base it on our performance appraisals, that shifts the burden to the employer to defend their performance appraisal system. And I've listed in my written remarks what I regard as some best practices, but I think they're one of the most litigated tests that currently exist today, and they're ones for which there is not a suitable alternative that I'm aware of. And, indeed, although Mr. Mehri assures us that they're a very achievable goal in response to your question, he didn't cite any cases, and I'm unaware of any case law that says the employer should have adopted X instead of the one they're using, if the one they're using was validated. In 40 years, I've never had anybody establish a less adverse, equally useful alternative in a case.

COMMISSIONER ISHIMARU: But could the performance appraisal be, say, structured so the same things are looked at and analyzed?

MR. ASHE: Yes. I mean, the major problem I see with performance appraisals in application is that the raters aren't trained. I mean, that would include, of course, EEO training, and training as I've suggested. It's an annual appraisal, let's update it from the whole year, not just the last three weeks. I mean, when I'm dealing with associates, I keep an annual file, and I put some work of their's that I've edited and keep it in there, and other information, so that when I fill out a performance appraisal, I'm in a position to talk about the whole year and not just what I remember in my increasingly short shelf life.

(Laughter.)

MR. ASHE: There are clearly best practices, and that's an area - that and job analysis are two areas where the Commission, as far as I know, has never provided any guidance on best practices. And I think it would be useful to the community that you regulate and serve to do so.

COMMISSIONER ISHIMARU: Thank you. If you'll permit me one last comment, Madam Chair. I thought on Ms. Arent's testimony, the continuing exclusion of people with diabetes and people with disabilities from safety-related positions and governmental jobs continues to be troubling. And I don't know how we get to that, we at the EEOC, but people being excluded per se from these jobs. I think we need to think about how we can get to it in a better sense. And I also was very intrigued by the whole MMPI testing issue, and that being a screen to get to mental disability. Again, I hope we have a chance to look at that some more. Thank you, Madam Chair.

CHAIR EARP: Commissioner Griffin.

COMMISSIONER GRIFFIN: I have actually been sitting up here all morning, and actually thinking in my head, does any of this apply to the federal sector, and then Shereen actually testified about the Federal Motor Carrier Safety Administration. So could you tell us a little bit more about what's going on there? Here's a current situation that we probably should have some knowledge about.

MS. ARENT: Yes. As a result of SAFETEA-LU, which is legislation which was passed in 2005, the

end of 2005, Federal Motor Carrier was tasked with developing a medical review board, which is to look at 15 different medical conditions, and reassess their standards. As you know, right now, commercial driving ranges from epilepsy, which is a blanket ban, to diabetes, which is a blanket ban on the books, but after years of work we now have an exemption program which puts people through an individual assessment process, to other conditions that probably should be regulated, but which aren't. And so, the medical review board was put together to look at this, mostly made up of occupational medicine doctors. There's four people on that panel, and then they set up diabetes expert panel, and various expert panels.

What my concern is, is that the overall view of this seems to be let's look at group studies to see how groups apply, and if there's any sort of higher risk, that that's enough to take that whole group out of the picture; whereas, experts in diabetes and other disabilities say no, we can take 20 people with this medical condition. We can tell you which ones are safe, and which ones aren't. And I do think that the EEOC's voice as the medical review board continues would be very useful in helping them to understand that the rest of EEO law and the rest of employment law has really gone into the direction of individual assessment. And that was the role I would see the EEOC having.

COMMISSIONER GRIFFIN: Thank you, because as Commissioner Ishimaru just mentioned, we are concerned about this blanket type of exclusion, coming up with this one test for all exclusion based on risk, and a lot of times not very good science. And really getting away from an individualized assessment about, in the case of someone with epilepsy, when was the last time they had a seizure? What kind of seizure do they have? Does this really impact their life and their ability to do the job at all? And so, we are very concerned about that.

Unfortunately, in the public safety types of occupations, it's really - we can't litigate those cases. We can investigate them, conciliate them, but it's really the Department of Justice who has that responsibility, so I know that's something that the people from the Epilepsy Foundation are very concerned about. Gary Gross is here from that organization. He's their legal director, and I know that he's raised that issue with us on numerous occasions, so it is something that I think I can safely say the EEOC is concerned about and that we're looking at. And I'm really glad that you raised that.

Anyone else, Mr. Ashe or Mr. Alvarez, know of any other connection with employment testing and federal sector issues, at all?

MR. ALVAREZ: I don't, Commissioner.

COMMISSIONER GRIFFIN: No?

MR. ASHE: You've got the intersection with pilots and regulations of both commercial pilots and private pilots who fly for corporations and stuff, and similar regulations there.

COMMISSIONER GRIFFIN: Yes.

MR. ASHE: And I would think flexibility ought to be available when you've got three pilots in the cockpit, or even two pilots in the cockpit, which I would think might be less flexible if you've got one.

COMMISSIONER GRIFFIN: Yes. Very good.

MR. ASHE: Speaking as a passenger.

(Laughter.)

COMMISSIONER GRIFFIN: Yes. Mr. Alvarez, you talk about that murky middle, and these facially valid piece-of-job tests, and are you arguing that validity studies shouldn't be required when

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other alternatives exist, such as sort of when an employer can prove the factors that you list in your statement that we have about --that come out of Guardians case?

MR. ALVAREZ: I guess I'm arguing that there should be a validity process that isn't so --

COMMISSIONER GRIFFIN: So difficult.

MR. ALVAREZ: --so unreachable for so many employers.

COMMISSIONER GRIFFIN: Yes.

MR. ALVAREZ: I think you should have validity in some fashion, but I just think there is a big void right now out there, that needs to be filled; otherwise, employers will just not do it, and that's not a good thing.

COMMISSIONER GRIFFIN: Yes. Okay. Thank you very much.

MR. ASHE: One thing employers can do to economize is what the electric utilities have done. You get trade organizations to do massive validation studies for sales clerks or cashiers, or what have you. And even though you've got a small operation, at very little cost, individual members can give those tests, which are very well validated. And EEI is currently 25 and 0 in defending its tests around the country.

COMMISSIONER GRIFFIN: Yes. I just want to add to that. But there is a concern, I mean, some of the trade organizations and the public safety, firemen, policemen-type jobs have come up with sort of this risk analysis when someone has epilepsy, that I'm not sure there's really good science behind that. And it truly takes away the individual assessment.

MR. ASHE: I was not saying to respond to that. I was responding to Fred's concern about the cost to an individual employer, paper and pencil test. And when it's shared, it can be a lot less.

COMMISSIONER GRIFFIN: Thank you.

CHAIR EARP: Sounds good. Thank you very much to this panel. We'll invite the experts, the final panel of the day, experts on test designing, validating. The Vice Chair reminded me that all of our speakers today are experts, and that's true, but, you are the experts on the tests that they're either defending, or otherwise fighting, so we're very anxious to hear from you. Why don't we start with you, Dr. Outtz?

DR. OUTTZ: Thank you, Madam Chair, Commissioners. I would like to thank the Commission for providing me the opportunity to speak today on the important topic of employment testing. I'm going to discuss three topics. First, I'll address how employment tests and other selection procedures are used. Next, I'll examine methods for minimizing the likelihood of discrimination. And finally, I will explore emerging trends and challenges. I'll give special emphasis to the interrelationship between sound personnel practices and scientific research, particularly research in the field of industrial and organizational psychology.

The use of employment tests and other selection procedures - employment tests are quite prevalent in America. Employers, both public and private, utilize a variety of standardized selection devices and procedures to make staffing decisions. Employment selection instruments commonly used today include cognitive ability tests, physical ability tests, assessment centers, work samples, structured interviews, situational judgment tests, background checks, integrity tests, and other personality measures to mention just a few. These tests are used for such staffing decisions as hiring, promotion, job assignment, selection, and determining minimum qualifications, again, to mention just

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a few.

It should be noted, however, that the use of tests extends beyond employment. College admissions, professional licensure, and other high stakes selection decisions also rely heavily on tests of one sort or another.

I'd like to discuss for a few minutes minimizing the likelihood of discrimination. Before discussing specific ways to minimize the likelihood of employment discrimination, it may be helpful to describe the history of the employment testing, employment discrimination controversy.

Title VII brought an exponential rise in governmental and legal involvement in personnel selection issues beginning in the 1970s. Personnel selection practices had been the purview of human resource professionals and professional psychologists. One result of this mushrooming government and legal involvement was a focus, attention on the nexus between employment discrimination case law and what was considered best practices, or best practice in employment selection. These external influences on personnel selection created a number of concerns. One was that employers would abandon valid, objective, merit-based selection practices in favor of highly subjective, arbitrary procedures designed to comply with legal requirements.

Another concern was that scientific advances in selection would be overshadowed by programs and practices aimed at balancing selection outcomes on the basis of demographic characteristics, rather than increasing the accuracy of selection decisions.

Since the mid-70s, there's been an increase in the number of research studies investigating not only validity evidence associated with different selection devices, but also the degree to which those devices produce adverse impact and, thus, are possibly discriminatory.

The issue of validity combined with adverse impact has moved forward and still exists today. It's labeled alternatives, alternative selection devices, and we've heard some testimony about it here today, that if an employer has a selection device that the employer proposes is valid, the plaintiffs may come back and say well, that may be valid, but here's another procedure that's just as valid but has less adverse impact. That started really in the mid-70s.

Two important findings that emerged from this research conducted to look at both validity and adverse impact were as follows, very important findings. Some tests have less adverse impact than others; however, the research typically shows that the average score for minority applicants is almost always lower than that for non-minority applicants, regardless of the test. The average criterion or job performance score of minority group applicants, particularly African Americans, is typically lower than that of non-minority applicants, and I believe we heard some testimony to that effect from the previous panel.

Now some chose to interpret these findings as indicating that employment tests were valid and non-discriminatory; that is, the tests simply reflect real differences between groups in their ability to perform a job. That argument is still made today. Others have chosen to interpret the findings as indicating the possibility that both the tests and the measures of job performance are biased and unfair to minority group members. Thus began a debate, both legal and scientific, over what validity really means and what constitutes a fair test or selection procedure. That argument still exists today.

One aspect of this debate focused on the issue of test bias. I believe one of the panel members was asked earlier, Mr. Robinson was asked, when he took the test for the apprenticeship, could he look at the test and see something was wrong with it? Could he sort of see that the test was biased?

Some researchers, in terms of the bias argument, some researchers have interpreted the average score differences between minority and non-minority applicants on employment tests as an indication that the tests were simply culturally biased; that is, test content was geared toward

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information more prevalent among non-minority group members giving those persons an unfair advantage. As a result, they argued, the test produced systematic errors in measurement or prediction. Issues such as test bias led to a broader discussion of fairness. The fairness debate was more than a scientific exercise. The EEOC guidelines stipulate that the fairness of a selection procedure should be investigated whenever possible. This is one of the vexing issues that comes up between defense attorneys and plaintiffs attorneys about whether the guidelines ought to be changed. This is one of those issues, where the fairness ought to be investigated, and what is fairness?

Fairness is, in part, a social term that encompasses consideration of testing outcomes. Some researchers proposed a model of fairness predicated on the relationship between test scores and performance outcomes. According to this model, a selection procedure is fair only if the proportion of minority applicants selected on the basis of the procedure is equal to the proportion that would be selected on the basis of actual job performance. A rather common sense notion; that is, if you could select people with full knowledge of how they would perform, what would be the proportional difference in minorities and non-minorities hired? The test should reflect whatever that difference is, or if the test is unfair in some way.

This sort of common sense approach has really been used by many, including courts, in my opinion, to decide Title VII cases. Well, does it make --this test is a proxy for your actually being on the job. Is it a decent proxy, and are the proportions that you find with this proxy the same as the proportions you would find if you would actually hire people and put them on the job? That's sort of the common sense. I'm not sure the courts were aware that they were using this model, but they were. They have been, rather.

There were other fairness models offered in the 70s. Agreement on a given model has proven elusive. Debates about fairness revealed a concern beyond the specific issues. It became clear that there was a sense within the scientific community that employment tests and other selection procedures were under attack by advocates of social change. Most within the scientific community believe that the scientific issues in selection should be kept separate from the social issues. I really don't agree with that. I think that the science and the social issues merge, and you have to use some common sense to deal with them.

The fairness issue has continued today. It's related to one of the trends that's happening today, which is a look at implicit bias, which is unconscious bias in selection. Can unfairness exist and the perpetrator be unaware that this unfairness exists? I'm going to move to a different area because of my time, to reducing adverse impact.

Researchers proposed back in the mid-80s that using different predictors in conjunction with cognitive ability tests; that is, using a bundle of predictors might improve validity and reduce adverse impact, but they cautioned that a database didn't exist back then to determine that. That database exists today. The outcome of science since then has shown that you can combine predictors with cognitive ability tests and reduce adverse impact. So one way to reduce adverse impact and, by implication, reduce the probability of discrimination is to combine predictors or tests, use a variety of tests measuring different attributes, as opposed to a narrow test, like cognitive ability, that you put all your weight on, which has a high degree of adverse impact.

Another method is to alter the medium that you use to present the testing information. You can do it visually, you can do it through hearing, you can do it in any number of ways, using video-based presentation of information, having the candidate respond orally, as opposed to in writing. There are any number of combinations that you can use.

A third way to do it is to differentially weight the different components of the selection system. What weight are you going to give in college admissions to the SAT, versus the letter of recommendation, versus the history of the student, and so forth? The issue really isn't whether you ought to use the SAT. I mean, we can muster up enough data to show that the SAT has some validity. The question is, how much weight do you give to it, compared to the other ones? Therein lies probably

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the level of adverse impact.

So three things I've mentioned is combining predictors, the second is the medium that you use to present the test, and differential weighting. Emerging trends, there is emerging a consistency between stakeholders as to what adverse impact is, and how it ought to be addressed. The scientific community is catching up, believe it or not, with the EEOC guidelines when it comes to the notion of well, adverse impact, shouldn't we really study it as a scientific endeavor?

There was a time, years ago, when it wasn't considered a scientific endeavor at all to study adverse impact. It was just a fact; it represented true differences between subgroups, and didn't need much study. That's changed a lot.

Also, an emerging trend is that the definition of performance is being refined. If you're going to try to predict performance, what do you mean by performance? Do you mean individual performance, or do you mean organizational effectiveness? The argument that universities use that we are not trying to select individual students, we are trying to construct a class of students with certain characteristics to attend our university. It's a different criteria, would require different predictors.

Future challenges - there's a critical need to be more accurate in describing what you mean by a test. We talk about alternatives, we've heard testimony about alternatives, we've heard testimony that certain alternatives are better than others, and we've heard terms like work samples, assessment center, situational judgment test, what does that mean? Just within the category of work samples, covers a multitude of tests, so we need a better definition of what we mean by a test, before we can even engage in whether we have an alternative.

Also, in most selection situations, there isn't one particular group that's affected. There may be three or four by race or ethnicity. The employer has to minimize adverse impact for all of them under the Uniform Guidelines. That's a difficult thing to do, and that challenge still exists for employers today. And I think it's a very difficult thing to do. Thank you for your time.

CHAIR EARP: Thank you. Dr. Lundquist?

DR. LUNDQUIST: Good morning, Madam Chair, Madam Vice Chair, Commissioners, ladies and gentlemen. Thank you for the opportunity to share some of my thoughts with you about the role employment testing can play in creating a fair and effective workforce. As the last of your speakers today, I will try to be brief.

I have had the opportunity to work for employers in creating tests for plaintiffs, and evaluating employers' tests, and in settlement where everyone came together and said let's fix this and go forward. That's been my role in Ford, in Coca-Cola, in Abercrombie & Fitch, and in other public sector kind of testing situations, so I've been on the front line of now what do we do? And hopefully, some of what we see might be helpful to the Commission as you move forward.

Professionally developed selection procedures can serve a legitimate business purpose. They allow an employer to base hiring and promotional decisions on solid job-related information. Particularly to the extent that you've heard today, that the test looks and feels and asks people to perform in the way they do on the job, those decisions will be better predictive of how the person will ultimately perform the job.

The evidence that a selection procedure measures behavior consistently; that is, is it reliable, is it consistent, is it going to tell me the same thing about the person today and tomorrow, and two months from now? And is it an accurate measure of job performance; that is, is it valid? That's the basis on which we make a determination about whether the procedure is job-related.

Job-related procedures ensure that employees possess the necessary skills to perform the job,

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and those procedures are used to predict who will be successful on the job.

In short, good selection procedures are fair to candidates. They're standardized, and they're objective in their administration and scoring, and they're useful to organizations; that is, they can result in overall productivity.

In terms of the standardization and objectivity, I believe that that's an area that the Commission's efforts could be directed to, particularly in terms of how a well-validated test is used on an ongoing basis, where cutoff scores are put on tests, for instance, as well as the extent to which the test information has become obsolete, or no longer predictive of performance on the job.

One of the things I would like to focus on is the challenge of ensuring that the procedure itself fairly represents what the individual is able to do on the job. Particularly with the advent of computer technology, it's been possible to simulate more of the job, and to give a person an experience that is very much like the job in terms of assessing their skills, so it's no longer necessary, for instance, to use paper and pencil multiple choice tests in order to measure a person's potential performance on the job.

Research in industrial psychology has shown that high fidelity selection procedures, such as work samples, video simulations, and assessment center exercises can enhance the candidate's acceptance of the test and often reduce adverse impact. In fact, the research is showing that the extent to which a candidate believes that this is a good measure of what they're ultimately going to be doing on the job will increase their motivation to perform well on the test and is likely to reduce the amount of adverse impact that's experienced on the test, so there's some not simply that it appears to be like the job, but it actually changes the performance of the person who's going through the test to the extent that they buy into the fact that this is a reasonable thing to ask me about for the job I'm applying for.

In an attempt to search for less adverse alternatives, in our recent work on the Ford apprentice testing program, we reviewed the research literature on alternative testing measures that demonstrate good validity with less adverse impact. Test administration format and test medium is an important factor in this equation, as Jim has mentioned.

Research has shown that video-based testing has comparable validity to paper-based tests and lower adverse impact. That adverse impact was found to be reduced by enhancing applicant's job-relatedness perceptions, by positively impacting test taker motivation, and reducing the reading comprehension demands of the test. And we've provided for you some comparisons of paper and pencil, computer-based, and video-based testing.

In addition, research has shown that for some jobs, measuring more than just cognitive ability can result in better prediction of overall job success and result in lower adverse impact. Considering both the cognitive and the non-cognitive aspects of the job, for instance, conscientiousness, as was mentioned earlier, or customer focus, may give a more complete picture of the candidate's qualifications. Oftentimes, it's not just what you know; it's how you show it. And when employers start to measure that full picture, they get a better --they're better able to predict ultimate success on the job.

Work sample or situational judgment tests have also been shown to be promising ways to maintain validity and decrease adverse impact. These assessments are designed to mirror or simulate the actual tasks performed on the job, for instance, through a manager in-basket exercise or a video simulation of a production line. That is, in fact - the video simulation of a production line is, in fact, the test that we are trying out at Ford for the apprentice program, where we are teaching - we're animating a production line and teaching concepts about this fictional production line, and then asking candidates to answer questions about what they've just been taught.

Such tests measure the ability to identify and understand job-related issues or problems, and

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to select the proper course of action to resolve the problem. Their good validity stems from having the candidate actually perform part of the job, and their reduced adverse impact appears to result from candidate acceptance and motivation.

Now on the full range of different kinds of item-type simulations, trainability tests, or measures of interpersonal characteristics, we've provided to Carol for the Commission's use, sample test items so that you might get a chance to experience what that is, including some of the video clips that we've developed to measure in simulations.

In our work on the Ford testing program, we've combined a cognitive test, a non-cognitive assessment, and a video-based simulation to measure candidates' qualifications for the apprenticeships. And we expect that validation will occur, as Jeff mentioned, later this summer. It's important that we have both the full picture in terms of predicting the job, but also to have sufficient information to provide feedback to candidates, like Mr. Robinson, of where their areas for improvement might be, and where they might be successful in spending their efforts before they come and take the test again.

The two areas that I'm most concerned about in terms of the Commission focusing its emphasis beyond what's already been presented by earlier speakers is really this operational validity concept about the test. You can develop and validate a test, and then put it into use in the field, and somehow the way it's being administered is not consistent, it's not being scored in a consistent fashion, or over time its validity is eroding. And, as we found from looking at most human resources processes, if you are not engaged in ongoing monitoring and checking of the procedures, simply having done a good job in the beginning in putting it out there is not going to be sufficient to make sure that either the employer is getting the best valid evidence out of the test, or that the candidates are getting a fair experience, so I would encourage you to think about some procedures for reviewing how employers are using tests on an operational basis, along with initial validity.

In addition, I think it's important to recognize good testing programs. There are a number of good testing programs, even in the murky middle that we talked about before, and it's important for employers, I believe, to feel that it is possible to measure the qualifications for a job in an objective way, in a way that candidates will buy-in, and in a way that they can move forward and not be sued, or at least prevail if they are. Thank you very much.

CHAIR EARP: Thank you. I think we'll do one brief round of questions, and then closing statements. Vice Chair?

VICE CHAIR SILVERMAN: I want to thank this panel of experts, as well as the last one. I just jumped right into the questions, I'm sorry.

To just walk us through a little bit about what you do, practically, so understanding it - when you're hired as an expert and you do find that there's an adverse impact, how do you actually go about determining whether there are less discriminatory alternatives?

DR. LUNDQUIST: Well, usually, the first place you start is by looking at the original validation study to see if the person who was developing the original validation study considered alternatives at that point in time.

There may also be possible ways to look at the existing information about how the test is used, either what passing score is used on the test? For instance, is it set higher than is required by the job, lowering it might reduce the amount of adverse impact, different weighting, as Jim has talked about, may change it, so there are ways both by looking at a completely different test or series of tests, or by looking at how you manipulate the existing test in terms of its weights or passing scores to reduce adverse impact.

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DR. OUTTZ: Typically, I would start with a job analysis. Hopefully, there is an existing job analysis in terms of those who develop the test, they did a proper job analysis. If that is the case, then one can start from there to determine what they were trying to measure with this test. You know what the job is about now because you've done a sufficient job analysis. That job analysis should tell you what you ought to be measuring, and so is there a logical trail from the job analysis to the particular instrument that they're using and what they're trying to measure. Once you establish what they're trying to measure, and here's, I think, the important point - there is literature today, there's a lot of research that's been put into how you measure things differently and get the same outcome. You measure them accurately in different ways. There's published research in refereed journals in IO psychology about the combination of different predictors, and so you can then estimate from that the likelihood that you might have an alternative. You also have the data from the actual test. You can actually run studies using different combinations, weighted different ways to see if the validity is the same, but there's less adverse impact.

VICE CHAIR SILVERMAN: So there are times when you look at the test and say there's nothing else out there that has the less adverse impact, I mean, after you go through all of this. It seems like you'd always get to something, or am I wrong, that has less adverse impact? I mean, isn't there always something out there that seems like it would --

DR. OUTTZ: I think the standard for demonstrating that it has less adverse impact, and equivalent validity, or similar validity is a rigorous one, so that's not easy to show.

VICE CHAIR SILVERMAN: Right.

DR. OUTTZ: So I don't think you would find, yes, there's about 15 tests out here that you could have used that have less - you have to demonstrate that, you can't simply assert that.

VICE CHAIR: Okay.

CHAIR EARP: But you might find less adverse impact on a particular group. You mentioned that the employer would have to satisfy or minimize the impact on every group that's in the workplace, age, ethnicity, race, gender.

DR. OUTTZ: Correct. The employer faces that burden; although, there does seem to be, depending upon the dimension being measured, a progression of adverse impact by race and by ethnicity. For example, we will find that cognitive ability tests tend to have the greatest adverse impact against African Americans, and have far less adverse impact - not, excuse me, far less, but would have less adverse impact based on ethnicity and other characteristics, and certainly not gender.

DR. LUNDQUIST: But to the extent that you're looking at the total picture of the person to match it to the total picture of the job, you may be in a better position to not have that alternative very available. In other words, you've incorporated alternatives, and oftentimes the less adverse alternatives are non-cognitive measures. So to the extent that you're looking at the total picture, it makes it less possible to have substantially the same validity but less adverse impact.

DR. OUTTZ: And I might add that cost and other factors come in, also. Okay, you propose an alternative, and your alternative costs the standard $1 billion. Well, the organization says I don't have $1 billion, so there are other factors that come into play here, so that it isn't easy, really, to show that there is an alternative.

VICE CHAIR SILVERMAN: So that's focusing on your job, and our job is to try to make this a little bit clearer and easier. I know, Dr. Lundquist, you've already provided us some guidance in this area on what it is that we could do. I'm wondering, Dr. Outtz, if you have any thoughts?

DR. OUTTZ: I think training and awareness is the biggest issue. The issue of testing, validity,

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fairness, alternatives, is something that to really discuss properly would take you three days. If you put 50 IO psychologists in a room, they would take eight days.

(Laughter.)

DR. OUTTZ: So it's awareness, first, training, and developing the expertise to address these issues with employers.

VICE CHAIR SILVERMAN: I just have one further question. We talked earlier about testing for conscientiousness, and I'm just dying to know what that is.

DR. LUNDQUIST: Well, that's in those sample items I gave Carol. Conscientiousness is part of a bundle of research that's been done on personality factors that make a difference in the workplace. So, typically, conscientiousness has been shown to be the most predictive of the big five personality factors that could be measured in the workplace, or generally are seen across studies.

It's oftentimes measured by self-report, so you may ask a person questions about their background or experience that would indicate in their past work what kinds of behaviors they engaged in in the workplace, or how they were perceived by others in the workplace, which tends to predict conscientiousness. Sometimes, there are personality measures that are less self-report that can be used, as well.

CHAIR EARP: And is there a correlation to cultural concerns or ethnicity when you're looking at a test like conscientiousness because not all groups have that kind of --my son, what he considers to be his conscientiousness is far down on my predictor of what it should be.

(Laughter.)

DR. LUNDQUIST: Yes. We haven't been looking so much for the age-related differences. In terms of ethnic differences, we find far fewer differences among groups, but that really is restricted to those groups who are typically acculturated within the United States and are here. When we've done similar tests for employers where the tests are used globally, the norms are quite different for things like the non-cognitive side of performance, than they are for what we see in people typically acculturated in our culture here.

CHAIR EARP: Interesting. Leslie, are you done?

VICE CHAIR SILVERMAN: I'm done. Thank you.

CHAIR EARP: Commissioner.

COMMISSIONER ISHIMARU: Fascinating, Dr. Outtz, you had talked about a number of alternatives. Would these alternatives have as much or better validity as a cognitive-only paper and pencil test?

DR. OUTTZ: The research shows that they would have at least as equal validity. Sometimes, they might add incrementally to the validity of a cognitive ability test, seldom would they exceed a cognitive ability test that's used by itself, so that the combination of the cognitive ability test with these other measures, typically, is equal to the cognitive ability test, and sometimes slightly higher than the cognitive ability test alone. So they certainly meet the criterion of offering similar validity and less adverse impact.

COMMISSIONER ISHIMARU: And, Dr. Lundquist, you talked about these job-like tests that are out there. I would assume that there are studies, again, that show that these are as equally valid or

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more valid.

DR. LUNDQUIST: Well, they have been shown to be, in some cases, more valid, and certainly, often equally valid, as well, so there really is a great deal of promise. But the promise largely comes from the availability of the technology to do these kinds of things.

COMMISSIONER ISHIMARU: I see. And that's something that's really recently come about.

DR. LUNDQUIST: Within the past 10, 15 years.

COMMISSIONER ISHIMARU: One thing that's always of interest to me is that quite often adverse impact in these examinations is exacerbated by how the employer uses a test, where they set the cut score, doing it in rank order, this is the end-all and be-all. How do you advise employers where to set the cut score on tests, or whether they should be using rank order, or whether they should be using banding? I throw that out there to both of you.

DR. OUTTZ: Having written on banding quite a bit, I typically, suggest that an employer not use strict rank ordering unless there is validity evidence to substantiate it, so that the method of use should dictate. And level of validity associated with the method of use should dictate whether you should use it in a particular way.

I have difficulty finding situations in which one can justify strict rank ordering for any selection device, really. I mean, it's like saying that a student back in the day when the SAT was -- the maximum was 1600 points, a person with 590 is far more qualified than the person --a person with 1590 is far more qualified than the person with 1585. I don't think so, and most universities don't think so, so there is a difference, but it's not a meaningful difference, so that exists with any measure. Any measure has some variability in it that's due to random chance, and therein lies my difficultly with strict rank ordering, so I would typically recommend some more flexible use of a test than strict rank order.

DR. LUNDQUIST: From a pragmatic standpoint in advising employers, we usually look at a couple of things. We look at the job analysis for the information about really what level of that particular characteristic or skill is required on the job. We will look at how currently performing individuals on the job do on the test. So, for instance, if you give the test to the current workforce, and they don't do very well on the test, perhaps that standard is being set inappropriately. We'll look at what the consequences of error are for people who don't perform at that level. And, frankly, we'll look at the relative amount of adverse impact.

At the end of the day, I agree with Dr. Outtz, that the measurement characteristic of the instrument itself, or of the battery of tests that you're using, has to be considered. So if it's only good within plus or minus 10 points to differentiate, then you need to be taking that kind of information into consideration when you're making decisions and using the test, so you need to set up bands in which you'll look at individuals, for instance, or look at that in terms of where you're going to set your cut score.

COMMISSIONER ISHIMARU: Thank you to both of you. Thank you, Madam Chair.

CHAIR EARP: Thank you. Commissioner Griffin?

COMMISSIONER GRIFFIN: I want to ask a little bit about the video-based tests, which seem to, according to both of you, have less of an adverse impact. I know you gave Carol some samples, but I'm impatient, so can you explain what they consist of? Is this like simulation-type, computer simulation of a job or something like that?

DR. LUNDQUIST: Yes, it can vary. The situation --the test that we've provided for you to look

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at is really a situation where you're using the test to select whether or not somebody should be promoted into management. And you provide the person with some almost day-in-the-life kind of information about this job into which they're being placed, and then you might show them a video clip of an employee coming in and bringing a problem to them with whatever information is available to them, and then you ask them how they would handle that particular situation.

COMMISSIONER GRIFFIN: And then you do that by paper and pencil. Is that correct?

DR. LUNDQUIST: Yes, they can answer the question at that point by paper or pencil, or touch pad, or whatever. Since the advent of doing computer administered testing more inexpensively and more accessibly, you can actually create something that almost looks like the in-box of the person so that you could listen to phone calls, or you might say gee, I'd like to know what that person's performance evaluation was, so you could click on the performance evaluation before you answered the question and looked at it, or look at what questions --what kind of message slips you might have. Those kinds of things just give it more of the look and feel and more of the way a person would process information in the job.

COMMISSIONER GRIFFIN: Do you know --have you run across any situations where an employer would have to accommodate someone, let's say with a visual impairment, in taking a test like that?

DR. LUNDQUIST: Yes, because with most of the employers that we deal with, their large-scale use of the test. It makes it difficult to do that, obviously, on a video-based, but it's been our experience that that has to be individually dealt with, particularly in terms of how the person might be accommodated on the job, and then looking at how you'd accommodate them similarly on the test, if that's possible.

DR. OUTTZ: Video-based testing simply allows the candidate to use a broader spectrum of abilities, a spectrum similar to the spectrum that would be used on the job. As a manager, if you watch a video of employees interacting a certain way, you see non-verbal behavior, you see verbal behavior, and so forth. You then are asked how would you address that if you were a manager. That has a lot more fidelity than writing that out on a sheet of paper, saying here's a written version of that situation; now tell us what you would do.

Video-based simulation is simply, for me, is in the genre of changing the medium. And I've done that all the way from actually, for example, creating a mini-training situation for candidates that's exactly like the training situation they're going to be put in later on, to using some proxy for that, like a video, or in the case of firefighting, showing them an actual picture of a building with flames, and having them react to that, as opposed to a written scenario saying here is a building that is on fire, and the fire is on such-and-such a floor. So it allows them to use different abilities, a package of abilities similar to the ones that they would use on the job; and, therefore, typically would have less adverse impact.

I should caution, however, that none of these constitutes a panacea. They all have their pros and cons. Sometimes they work, and sometimes they don't.

COMMISSIONER GRIFFIN: Why does it eliminate adverse impact?

DR. OUTTZ: Because, I'll take the simple example of, say, a manager in the fire service. In the fire service, when you come upon a scene and there's a fire, you have to use your technical knowledge and expertise that you've gathered through experience and through training to know how to fight that fire. The information comes to you through different stimuli. You see the flame, you see the location of the flame, you see the intensity of the flame, you see the direction of the flame, you see the direction of the wind, these are all things you see, and it only takes you a split second to do that.

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If I give you a written version of that, I'm simply asking you to interpret words. That is injected into the measurement, so much so that some would argue that the measurement becomes irrelevant now. It's really a reading comprehension paragraph, so that a person who actually knows how to put out a fire might perform far less well on the paragraph than when they see that flame and they know exactly what to do. And that tends to not vest itself in any particular racial group, that they can handle that. That's why you see people out on the job, who can do the job, but when you give them a paper and pencil test, by some group, like race or whatever, one group scores below the other.

DR. LUNDQUIST: It also tends to reduce test anxiety. When you're actually showing - people are more comfortable looking at that movie of the situation they'd be in than when they're faced with this multiple choice question, and they have to answer the question. There's a whole variety of factors, and I don't think we know exactly which ones and which buttons to push. There's still a lot of research going on about it, but it does seem to have that effect.

CHAIR EARP: It might, also - just to comment, follow-up your point - it might also remove some situations where stereotypes play in very, very heavily. For example, in corporate situations we remain concerned about Asians, let's say, as a group, who don't have under-representation at entry level, but as they move up in the organization, there are fewer and fewer because of the stereotype that either they don't make good managers, not good leaders, too quiet, too inscrutable, whatever.

It occurs to me that in the in-box situational scenario that you lay out, that let's that person be and react in an environment that they know without the burden of someone else's stereotype.

DR. LUNDQUIST: Right.

DR. OUTTZ: I would agree. I would also offer the caution, though, that, as I said in my remarks, the research has shown that no matter what you use, whether it's a work sample, whether it's an in-basket, whether it's video-based, you will typically find some difference, usually to the disadvantage of minorities, so that's -- we don't know why that is. I wish I knew, and we're studying that, but that is the case. You can reduce adverse impact substantially, which is what the guidelines require. Thinking that you're going to eliminate adverse impact totally across all of the groups that are represented is probably unrealistic at this point, in my opinion.

COMMISSIONER GRIFFIN: The only problem I see is, aside from the accommodation of someone who is visually impaired taking the test who could perpetuate the myth that you have to see. In some cases, you do have to see, but in managerial positions, a person who's blind or visually impaired doesn't have to see that body language always to really be a good manager and know what's going on.

DR. OUTTZ: Absolutely. I think thatit's an individual issue, and it has to be addressed very, very carefully.

COMMISSIONER GRIFFIN: Right.

DR. OUTTZ: As to what accommodations are necessary, and you should make those accommodations.

DR. LUNDQUIST: And consistent with what you're planning to do to accommodate the person on the job, if they're successful.

COMMISSIONER GRIFFIN: Thank you.

CHAIR EARP: The fact that we still have an audience at this hour demonstrates how important and complex the issue is, so I would ask that the Commissioners do closing statements, and then we'll end.

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VICE CHAIR SILVERMAN: As the Chair just indicated, this isn't the most flashy or headline grabbing topic that the Commission has taken up, but I think that everyone in this room can agree that it is still incredibly important because it is vital to what we do. We know there's been an increase in the use of tests and other screening devices by employers. The internet makes it easier, and often from an employer's perspective, the internet makes it necessary.

Some of the witnesses today have talked about the many benefits of tests and other objective screening devices, such as identifying strong candidates who will likely be solid performers and decreasing reliance on stereotypes or unconscious bias in the selection process. On the other hand, they're clearly not the panacea. We still need to ensure that in terms of discrimination, they are not doing more harm than they do good.

I'm so pleased that the Commission is taking this up right now, because this area is critical to several Commission priorities, including the Chair's E-RACE Initiative, which is aimed at combating race discrimination, and my Systemic Initiative, because after all, all of these cases raise class issues. And when the Commission approved the Systemic Initiative last year, we talked about how we have a need to be more proactive on this issue, and this really presents an area where we certainly are trying, and we can do more.

Also, as part of the Systemic Initiative, we talked about the expanded use of technology, the need for industrial psychologists and other experts, and I'm happy to report that since the Commission approved the recommendations last year, much progress has been made in that area, so we are moving that way.

Of course, the issues that we're grappling with today have an even broader impact than just those issues, because they're ultimately critical to this agency's effort to combat discrimination in hiring and in promotion. And particularly in the hiring area, that presents just a special issue for us. It's very difficult to get to, because people often don't know why they have been discriminated against, and so it's incredibly important that we are spotlighting this issue today.

I really appreciate the testimony from all the panelists. I want to especially thank, once again, Ms. Liles and Mr. Robinson for coming forward and talking to us today. And many thanks to Jean Kamp and Jeff Stern, and all of your colleagues back in Ohio and Milwaukee in the enforcement, as well as the litigation side, who helped develop these cases, and bring them to such successful conciliations and resolutions. And to all of our panelists, all the experts that we brought forward, for bringing your insights and recommendations.

I think at bottom, in some ways I agree, in many ways I agree with Mr. Alvarez' sentiment, that in many ways, employers are between a rock and a hard place on the use of tests and other screening devices. But one thing is clear, any guidance that we could provide would be extremely beneficial to employers, as well as courts, and the public, in general, so I really look forward to working with my colleagues, and our Office of Legal Counsel as we move forward on these issues. Thank you.

CHAIR EARP: Commissioner.

COMMISSIONER ISHIMARU: Thank you, Madam Chair. I want to thank you for holding this meeting on this very important issue as part of our E-RACE Initiative, and I want to really thank the people at the Office of Legal Counsel.

When I looked at the line-up for today, I thought how is this going to make sense? It struck me from reading the line-up that this was a huge hodge-podge of very interesting things, but not that it would pull together, and I think it did. I wish we had more time, and perhaps at some point we will, but my congratulations on an excellent hearing.

I think it's clear that the EEOC, employers, and stakeholders should be focused on less

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discriminatory alternatives, as we did in our case in Ford. From an employer standpoint, these alternatives get you good workers and reduce adverse impact. From the enforcement standpoint, less discriminatory alternatives win cases.

Cognitive tests have their uses, but they also have a lot of adverse impact. They're sort of like the SUVs of employment selection. They'll get you there, but the cost to the environment is great. Employers should be moving towards using the less discriminatory alternatives that were highlighted in Ford, and less discriminatory alternatives should be part of our regular training for investigators and attorneys.

Taking my SUV analogy a little bit farther, these are sort of like the new hybrid cars, both get you to where you want to go, but hybrids, like less discriminatory alternatives, have much less adverse impact on those around you. In fact, these less discriminatory alternatives may be even better at getting what you want, identifying even better, more qualified workers.

As employers compete for better and more qualified workers, I think that they would do well to consider Mr. Klein's testimony regarding the lack of validation evidence for credit checks and how criminal background information should be used. And I hope, Madam Chair, that we will issue, in the not too distant future, some sort of guidance document on credit checks, particularly keeping in mind the analysis set forth by Mr. Klein.

I believe, though, that it was unfortunate that we did not hear today from a speaker on the topic of selection devices and criteria that especially affect members of different national origin groups, such as English fluency tests and English-only policies. Given the current anti-immigration sentiments that we are seeing and the debate on the immigration bill in the Senate as we speak today, I think this topic merits our attention.

The Commission has cited in our most recent strategic plan and in our budget request statistics from a Gallup poll that the EEOC co-sponsored, finding that Asians and Hispanics report experiencing significant amounts of discrimination, much more than the number of charges filed with the EEOC would suggest. If the Commission is serious about addressing that gap, we need to ensure that we are inclusive and diverse in the types of issues that we cover in meetings such as these.

Some of our field offices are doing excellent work in the area of English fluency examinations. For example, last year our Phoenix office settled a case against a Utah candy maker that had instituted an English proficiency examination. We received charges from workers who had worked for the employer for six years without any performance problems, or any concerns being raised about their ability to speak English. These workers held manual labor jobs that involved the scraping of candy out of bowls and into machines. Once they failed the English test, they were fired. Both Asian and Hispanic workers were fired because of these test results.

Through conciliation, our Phoenix office got the employer to drop the test, pay money to the victims, and to establish a scholarship fund for its employees. To the employer's credit, the case was settled early on.

Last year, our appellate section filed a very successful amicus brief in the case of *Maldonado v. City of Altus*, where we argued, pursuant to our regulations on this issue, that English-only rules have an adverse impact on language minorities and must be shown to be job-related and consistent with business necessity. The Tenth Circuit agreed with our arguments and reversed summary judgment for the employer.

Recently, our New York office filed a case against the Salvation Army in Massachusetts for its English-only policy that resulted in the firing of two Hispanic workers. These women had worked at the location for five years sorting donations without any complaints about their conversing in Spanish.

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Certainly, there are times in the workplace where speaking and understanding or reading English is a requirement, and employers should be allowed to test for them. All workers understand that to get ahead in this country, a worker needs to speak English. The reality is that there are long wait lists for adult English classes, and taking classes require time, money, trained teachers, transportation, and, many times, childcare. Penalizing individuals who do not speak English when the job really doesn't demand of it, is exactly what the Supreme Court prohibited in _Griggs_, a built-in head-wind for minority groups that is unrelated to measuring job capability.

The EEOC's longstanding policy on the issue of English-only requirements and English fluency examinations finds the right balance, and I'm proud of the work that our field offices and General Counsel's office are doing on these issues.

So with that, let me thank the panelists for coming here today. And thank you, Madam Chair, for holding the hearing. I thought it was excellent.

CHAIR EARP: Commissioner Griffin.

COMMISSIONER GRIFFIN: I, too, want to thank you for holding this Commission meeting, and thank our Office of Legal Counsel. Anyone that's put a meeting of this caliber together knows that it's not easy, that it's a lot of hard work, and so I commend you for putting this meeting together. And thanks to today's panelists for taking the time. It's at your own time and expense for you to come here, and help educate us about an important issue for employees and employers alike. And as dense as this topic can be, I really have to say it was very interesting. It really was so thank you.

We're seeing an increase in employment testing, and someone suggested this is so difficult for employers that maybe they're not using it and should be using it, but the fact remains, we're seeing an increase in the use of it. And more and more companies accept applications or conduct their hiring process on-line. One study pointed out to me showed that 50 percent of the surveyed companies who used an on-line recruitment process, also administered one or more tests on-line, as well. So when you are receiving thousands of applications on-line, employers are turning to tests to whittle down those applications.

The use of employment testing and screening raises several concerns for me. First, how are on-line processes impacting all potential applicants, including individuals with disabilities? For example, older applicants may not be computer literate; and, therefore, won't be able to apply, or won't apply on-line. We somehow assume that everyone has access to the internet, yet we also know this is an added expense that some people can't afford. Are on-line applications and tests available to applicants who speak another language? For those companies who accept and even require job applications be made on-line, how accessible are their web sites, especially for people who are visually impaired?

For example, there have been numerous lawsuits against retail establishments and banking institutions because their web sites were not accessible to people who are blind and use screen-reader software to access those web sites. Are applicants for employment facing those same barriers, where the employer uses an on-line application process?

Second, I'm especially concerned about the increasing use of employment tests which measure personality traits. It was mentioned, we didn't talk about it very much, and I wish we had. These types of tests can provide a mechanism by which employers do screen out individuals with psychiatric disabilities. I read that two years ago, approximately 30 percent of all companies used personality-type tests in some phase of either hiring or advancement, and I expect that percentage has increased since then.

We know that the ADA requires that employment tests be job-related in order to be non-discriminatory. Such tests can run afoul of the ADA in a number of ways, and Rich Tonowski actually talked about that when he testified earlier about tests like this that constitute a medical exam. And the

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use of such tests really is only limited to very specific situations.

We also know that some occupations have blanket exclusions of some people with disabilities. For instance, people with epilepsy, people with diabetes, that Shereen Arent talked about, that may be discovered during a post-offer medical exam without doing an individual assessment regarding how that disability may or may not even affect their ability to do the job.

Moreover, not making reasonable accommodations available, including during the administration of the test may also result in a violation of the ADA. For example, time limits may be an important factor in determining test scores. I think you probably see that a lot. However, extra time may be a necessary accommodation for some individuals with disabilities to take the test. An Office of Personnel Management study found that accommodations to time limits for some test-takers who are visually impaired required double the original time limit.

I'm equally concerned about employers that may be using genetic testing of any type. While these tests can provide pre-symptomatic medical information with the promise of early detection of certain illnesses, they can also provide the potential for abuse in the employment setting. Are employers beginning to base personnel decisions on information drawn from such tests? If this happens, will it result in individuals who may benefit from early detection becoming reluctant to actually take those tests for fear that an employer or their insurance carrier may use such information against them in the future?

And like Commissioner Ishimaru, I, too, am concerned about limited English proficiency as a barrier to employment and advancement, when it's truly not related to job performance. While we typically hear about how this affects people who are Asian or Hispanic, fewer people are aware how this impacts individuals who are deaf, who communicate using American Sign Language. All too often, people who are deaf are told they cannot be seriously considered for a job because of their limited English proficiency, despite their being able to communicate effectively.

I hope that we'll be able to address this issue at a meeting in the near future. And I'm hopeful that today's Commission meeting will help us ensure that the use of employment testing and screening will not be used to discriminate against minorities, women, older people, and individuals with disabilities. Thank you.

CHAIR EARP: Thank you. Well, let me add my thanks, also, to all of our experts today and to the staff. I think former Commissioner Alvarez has added to the EEO lexicon with the murky middle, and it's our responsibility now to take the advice, the insights, the expertise that you have shared with us so generously and try to bring some clarity to the murkiness.

That being said, and there being no further business, do I hear a motion to adjourn the meeting?

VICE CHAIR SILVERMAN: So moved.

CHAIR EARP: Is there a second?

COMMISSIONER ISHIMARU: Second.

CHAIR EARP: All in favor?

(Chorus of ayes.)

CHAIR EARP: The ayes have it, and the meeting's adjourned. Thank you.

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(Whereupon, the proceedings went off the record at 12:57 p.m.).

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

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- (7) Uses and applications
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- (9) Accuracy and completeness

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Authority:
Secs. 709 and 713, Civil Rights Act of 1964 (78 Stat. 265) as amended by the Equal Employment Opportunity Act of 1972 (Pub. L. 92—261); 42 U.S.C. 2000e—8, 2000e—12.
Source:
43 FR 38295, 38312, Aug. 25, 1978, unless otherwise noted.
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General Principles

§§1607.1 Statement of Purpose.

A. Need for uniformity - Issuing agencies.

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

B. Purpose of guidelines.

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

C. Relation to prior guidelines.

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

§§1607.2 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

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under section 208(b)(1) of the Intergovernmental-Personnel Act; by the Department of Justice in exercising its responsibilities under Federal law; by the Office of Revenue Sharing of the Department of the Treasury under the State and Local Fiscal Assistance Act of 1972, as amended; and by any other Federal agency which adopts them.

B. Employment decisions.

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

C. Selection procedures.

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

D. Limitations.

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

E. Indian preference not affected.

These guidelines do not restrict any obligation imposed or right granted by Federal law to users to extend a preference in employment to Indians living on or near an Indian reservation in

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connection with employment opportunities on or near an Indian reservation.

§§1607.3 Discrimination defined: Relationship between use of selection procedures and discrimination.

A. Procedure having adverse impact constitutes discrimination unless justified.

The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines, or the provisions of section 6 below are satisfied.

B. Consideration of suitable alternative selection procedures.

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

§§1607.4 Information on impact.

A. Records concerning impact.

Each user should maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group as set forth in paragraph B of this section, 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.

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B. Applicable race, sex, and ethnic groups for recordkeeping.

The records called for by this section are to be maintained by sex, and the following races and ethnic groups: Blacks (Negroes), American Indians (including Alaskan Natives), Asians (including Pacific Islanders), Hispanic (including persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish origin or culture regardless of race), whites (Caucasians) other than Hispanic, and totals. The race, sex, and ethnic classifications called for by this section are consistent with the Equal Employment Opportunity Standard Form 100, Employer Information Report EEO—1 series of reports. The user should adopt safeguards to insure that the records required by this paragraph are used for appropriate purposes such as determining adverse impact, or (where required) for developing and monitoring affirmative action programs, and that such records are not used improperly. See sections 4E and 17(4), below.

C. Evaluation of selection rates.

The ""bottom line."" If the information called for by sections 4A and B above shows that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection. However, in the following circumstances the Federal enforcement agencies will expect a user to evaluate the individual components for adverse impact and may, where appropriate, take enforcement action with respect to the individual components: (1) Where the selection procedure is a significant factor in the continuation of patterns of assignments of incumbent employees caused by prior discriminatory employment practices, (2) where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job related in the same or similar circumstances. In unusual circumstances, other than those listed in (1) and (2) of this paragraph, 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

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significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

E. Consideration of user's equal employment opportunity posture.

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

(Approved by the Office of Management and Budget under control number 3046—0017)
(Pub. L. 96—511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))
[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]

§§1607.5 General standards for validity studies.

A. Acceptable types of validity studies.

For the purposes of satisfying these guidelines, users may rely upon criterion-related validity studies, content validity studies or construct validity studies, in accordance with the standards set forth in the technical standards of these guidelines, section 14 below. New strategies for showing the validity of selection procedures will be evaluated as they become accepted by the psychological profession.

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B. Criterion-related, content, and construct validity.

Evidence of the validity of a test or other selection procedure by a criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance. See section 14B below. Evidence of the validity of a test or other selection procedure by a content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated. See 14C below. Evidence of the validity of a test or other selection procedure through a construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance in the job for which the candidates are to be evaluated. See section 14D below.

C. Guidelines are consistent with professional standards.

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

D. Need for documentation of validity.

For any selection procedure which is part of a selection process which has an adverse impact and which selection procedure has an adverse impact, each user should maintain and have available such documentation as is described in section 15 below.

E. Accuracy and standardization.

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

F. Caution against selection on basis of knowledges, skills, or ability learned in brief orientation period.

In general, users should avoid making employment decisions on the basis of measures of knowledges, skills, or abilities which are normally learned in a brief orientation period, and which have an adverse impact.

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G. Method of use of selection procedures.

The evidence of both the validity and utility of a selection procedure should support the method the user chooses for operational use of the procedure, if that method of use has a greater adverse impact than another method of use. Evidence which may be sufficient to support the use of a selection procedure on a pass/fail (screening) basis may be insufficient to support the use of the same procedure on a ranking basis under these guidelines. Thus, if a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis (see section 5H below), the user should have sufficient evidence of validity and utility to support the use on a ranking basis. See sections 3B, 14B (5) and (6), and 14C (8) and (9).

H. Cutoff scores.

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

I. Use of selection procedures for higher level jobs.

If job progression structures are so established that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees'' potential may be expected to change in significant ways, it should be considered that applicants are being evaluated for a job at or near the entry level. A ""reasonable period of time"" will vary for different jobs and employment situations but will seldom be more than 5 years. Use of selection procedures to evaluate applicants for a higher level job would not be appropriate: (1) If the majority of those remaining employed do not progress to the higher level job; (2) If there is a reason to doubt that the higher level job will continue to require essentially similar skills during the progression period; or (3) If the selection procedures measure knowledges, skills, or abilities required for advancement which would be expected to develop principally from the training or experience on the job.

J. Interim use of selection procedures.

Users may continue the use of a selection procedure which is not at the moment fully supported by the required evidence of validity, provided: (1) The user has available substantial evidence of validity, and (2) the user has in progress, when technically feasible, a study which is designed to produce the additional evidence required by these guidelines within a reasonable time. If such a

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study is not technically feasible, see section 6B. If the study does not demonstrate validity, this provision of these guidelines for interim use shall not constitute a defense in any action, nor shall it relieve the user of any obligations arising under Federal law.

K. Review of validity studies for currency.

Whenever validity has been shown in accord with these guidelines for the use of a particular selection procedure for a job or group of jobs, additional studies need not be performed until such time as the validity study is subject to review as provided in section 3B above. There are no absolutes in the area of determining the currency of a validity study. All circumstances concerning the study, including the validation strategy used, and changes in the relevant labor market and the job should be considered in the determination of when a validity study is outdated.

§§1607.6 Use of selection procedures which have not been validated.

A. Use of alternate selection procedures to eliminate adverse impact.

A user may choose to utilize alternative selection procedures in order to eliminate adverse impact or as part of an affirmative action program. See section 13 below. Such alternative procedures should eliminate the adverse impact in the total selection process, should be lawful and should be as job related as possible.

B. Where validity studies cannot or need not be performed.

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

(1) Where informal or unscored procedures are used.

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

(2) Where formal and scored procedures are used.

When a formal and scored selection procedure is used which has an adverse impact, the validation techniques contemplated by these guidelines usually should be followed if technically feasible. Where the user cannot or need not follow the validation techniques anticipated by these

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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.

§§1607.7 Use of other validity studies.

A. Validity studies not conducted by the user.

Users may, under certain circumstances, support the use of selection procedures by validity studies conducted by other users or conducted by test publishers or distributors and described in test manuals. While publishers of selection procedures have a professional obligation to provide evidence of validity which meets generally accepted professional standards (see section 5C above), users are cautioned that they are responsible for compliance with these guidelines. Accordingly, users seeking to obtain selection procedures from publishers and distributors should be careful to determine that, in the event the user becomes subject to the validity requirements of these guidelines, the necessary information to support validity has been determined and will be made available to the user.

B. Use of criterion-related validity evidence from other sources.

Criterion-related validity studies conducted by one test user, or described in test manuals and the professional literature, will be considered acceptable for use by another user when the following requirements are met:

(1) Validity evidence.

Evidence from the available studies meeting the standards of section 14B below clearly demonstrates that the selection procedure is valid;

(2) Job similarity.

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

(3) Fairness evidence.

The studies include a study of test fairness for each race, sex, and ethnic group which constitutes a significant factor in the borrowing user's relevant labor market for the job or jobs in question. If the studies under consideration satisfy paragraphs (1) and (2) of this paragraph B., 1/4 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

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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 section 14B below, evidence of validity specific to each unit will not be required unless there are variables which are likely to affect validity significantly.

D. Other significant variables.

If there are variables in the other studies which are likely to affect validity significantly, the user may not rely upon such studies, but will be expected either to conduct an internal validity study or to comply with section 6 above.

§§1607.8 Cooperative studies.

A. Encouragement of cooperative studies.

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

B. Standards for use of cooperative studies.

If validity evidence from a cooperative study satisfies the requirements of section 14 below, evidence of validity specific to each user will not be required unless there are variables in the user's situation which are likely to affect validity significantly.

§§1607.9 No assumption of validity.

A. Unacceptable substitutes for evidence of validity.

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

B. Encouragement of professional supervision.

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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.

§§1607.10 Employment agencies and employment services.

A. Where selection procedures are devised by agency.

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

B. Where selection procedures are devised elsewhere.

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

§§1607.11 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 guideline – cannot be imposed upon members of a race, sex, or ethnic group where other employees, applicants, or members have not been subjected to that standard. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, the persons who were in the class of persons discriminated against during the period the user followed the discriminatory practices should be allowed the opportunity to

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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.

§§1607.12 Retesting of applicants.

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

§§1607.13 Affirmative action.

A. Affirmative action obligations.

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

B. Encouragement of voluntary affirmative action programs.

These guidelines are also intended to encourage the adoption and implementation of voluntary affirmative action programs by users who have no obligation under Federal law to adopt them; but are not intended to impose any new obligations in that regard. The agencies issuing and endorsing these guidelines endorse for all private employers and reaffirm for all governmental employers the Equal Employment Opportunity Coordinating Council's ""Policy Statement on Affirmative Action Programs for State and Local Government Agencies"" (41 FR 38814, September 13, 1976). That policy statement is attached hereto as appendix, section 17. Technical Standards

§§1607.14 Technical standards for validity studies.

The following minimum standards, as applicable, should be met in conducting a validity study. Nothing in these guidelines is intended to preclude the development and use of other professionally acceptable techniques with respect to validation of selection procedures. Where it is not technically feasible for a user to conduct a validity study, the user has the obligation otherwise to comply with these guidelines. See sections 6 and 7 above.

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A. Validity studies should be based on review of information about the job.

Any validity study should be based upon a review of information about the job for which the selection procedure is to be used. The review should include a job analysis except as provided in section 14B(3) below with respect to criterion-related validity. Any method of job analysis may be used if it provides the information required for the specific validation strategy used.

B. Technical standards for criterion-related validity studies.

(1) Technical feasibility.

Users choosing to validate a selection procedure by a criterion-related validity strategy should determine whether it is technically feasible (as defined in section 16) to conduct such a study in the particular employment context. The determination of the number of persons necessary to permit the conduct of a meaningful criterion-related study should be made by the user on the basis of all relevant information concerning the selection procedure, the potential sample and the employment situation. Where appropriate, jobs with substantially the same major work behaviors may be grouped together for validity studies, in order to obtain an adequate sample. These guidelines do not require a user to hire or promote persons for the purpose of making it possible to conduct a criterion-related study.

(2) Analysis of the job.

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

(3) Criterion measures.

Proper safeguards should be taken to insure that scores on selection procedures do not enter into any judgments of employee adequacy that are to be used as criterion measures. Whatever criteria are used should represent important or critical work behavior(s) or work outcomes. Certain criteria may be used without a full job analysis if the user can show the importance of the criteria to the particular employment context. These criteria include but are not limited to production rate, error rate, tardiness, absenteeism, and length of service. A

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standardized rating of overall work performance may be used where a study of the job shows that it is an appropriate criterion. Where performance in training is used as a criterion, success in training should be properly measured and the relevance of the training should be shown either through a comparsion of the content of the training program with the critical or important work behavior(s) of the job(s), or through a demonstration of the relationship between measures of performance in training and measures of job performance. Measures of relative success in training include but are not limited to instructor evaluations, performance samples, or tests. Criterion measures consisting of paper and pencil tests will be closely reviewed for job relevance.

(4) Representativeness of the sample.

Whether the study is predictive or concurrent, the sample subjects should insofar as feasible be representative of the candidates normally available in the relevant labor market for the job or group of jobs in question, and should insofar as feasible include the races, sexes, and ethnic groups normally available in the relevant job market. In determining the representativeness of the sample in a concurrent validity study, the user should take into account the extent to which the specific knowledges or skills which are the primary focus of the test are those which employees learn on the job. Where samples are combined or compared, attention should be given to see that such samples are comparable in terms of the actual job they perform, the length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or that these factors are included in the design of the study and their effects identified.

(5) Statistical relationships.

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

(6) Operational use of selection procedures.

Users should evaluate each selection procedure to assure that it is appropriate for operational use, including establishment of cutoff scores or rank ordering. Generally, if other factors 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

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covered by the criteria, the more likely it is that the procedure will be appropriate for use. Reliance upon a selection procedure which is significantly related to a criterion measure, but which is based upon a study involving a large number of subjects and has a low correlation coefficient will be subject to close review if it has a large adverse impact. Sole reliance upon a single selection instrument which is related to only one of many job duties or aspects of job performance will also be subject to close review. The appropriateness of a selection procedure is best evaluated in each particular situation and there are no minimum correlation coefficients applicable to all employment situations. In determining whether a selection procedure is appropriate for operational use the following considerations should also be taken into account: The degree of adverse impact of the procedure, the availability of other selection procedures of greater or substantially equal validity.

(7) Overstatement of validity findings.

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

(8) Fairness.

This section generally calls for studies of unfairness where technically feasible. The concept of fairness or unfairness of selection procedures is a developing concept. In addition, fairness studies generally require substantial numbers of employees in the job or group of jobs being studied. For these reasons, the Federal enforcement agencies recognize that the obligation to conduct studies of fairness imposed by the guidelines generally will be upon users or groups of users with a large number of persons in a a job class, or test developers; and that small users utilizing their own selection procedures will generally not be obligated to conduct such studies because it will be technically infeasible for them to do so.

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

(b) Investigation of fairness. Where a selection procedure results in an adverse impact on a race, sex, or ethnic group identified in accordance with the classifications set forth in section 4 above and that group is a significant factor in the relevant labor market, the user generally should investigate the possible existence of unfairness for that group if it is

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technically feasible to do so. The greater the severity of the adverse impact on a group, the greater the need to investigate the possible existence of unfairness. Where the weight of evidence from other studies shows that the selection procedure predicts fairly for the group in question and for the same or similar jobs, such evidence may be relied on in connection with the selection procedure at issue.

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

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

(e) Technical feasibility of fairness studies. In addition to the general conditions needed for technical feasibility for the conduct of a criterion-related study (see section 16, below) an investigation of fairness requires the following:

> **(i)** An adequate sample of persons in each group available for the study to achieve findings of statistical significance. Guidelines do not require a user to hire or promote persons on the basis of group classifications for the purpose of making it possible to conduct a study of fairness; but the user has the obligation otherwise to comply with these guidelines.
>
> **(ii)** The samples for each group should be comparable in terms of the actual job they perform, length of time on the job where time on the job is likely to affect performance, and other relevant factors likely to affect validity differences; or such factors should be included in the design of the study and their effects identified.

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

C. Technical standards for content validity studies.

(1) Appropriateness of content validity studies.

Users choosing to validate a selection procedure by a content validity strategy should determine whether it is appropriate to conduct such a study in the particular employment context. A selection procedure can be supported by a content validity strategy to the extent that it is a representative sample of the content of the job. Selection procedures which purport to measure knowledges, skills, or abilities may in certain circumstances be justified by content validity, although they may not be representative samples, if the knowledge, skill, or ability measured by the selection procedure can be operationally defined as provided in section 14C(4) below, and if that knowledge, skill, or ability is a necessary prerequisite to successful job performance.

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

(2) Job analysis for content validity.

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

(3) Development of selection procedures.

A selection procedure designed to measure the work behavior may be developed specifically from the job and job analysis in question, or may have been previously developed by

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the user, or by other users or by a test publisher.

(4) Standards for demonstrating content validity.

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

In addition, to be content valid, a selection procedure measuring a skill or ability should either closely approximate an observable work behavior, or its product should closely approximate an observable work product. If a test purports to sample a work behavior or to provide a sample of a work product, the manner and setting of the selection procedure and its level and complexity should closely approximate the work situation. The closer the content and the context of the selection procedure are to work samples or work behaviors, the stronger is the basis for showing content validity. As the content of the selection procedure less resembles a work behavior, or the setting and manner of the administration of the selection procedure less resemble the work situation, or the result less resembles a work product, the less likely the selection procedure is to be content valid, and the greater the need for other evidence of validity.

(5) Reliability.

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

(6) Prior training or experience.

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

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abilities required on the job, whether or not there is close resemblance between the experience or training as a whole and the job as a whole.

(7) Content validity of training success.

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

(8) Operational use.

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

(9) Ranking based on content validity studies.

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

D. Technical standards for construct validity studies.

(1) Appropriateness of construct validity studies.

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

(2) Job analysis for construct validity studies.

There should be a job analysis. This job analysis should show the work behavior(s) required for successful performance of the job, or the groups of jobs being studied, the critical or important work behavior(s) in the job or group of jobs being studied, and an identification of the construct(s) believed to underlie successful performance of these critical or important work

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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 behav- iors at a comparable level of complexity.

(3) Relationship to the job.

A selection procedure should then be identified or developed which measures the construct identified in accord with subparagraph (2) above. The user should show by empirical evidence that the selection procedure is validly related to the construct and that the construct is validly related to the performance of critical or important work behavior(s). The relationship between the construct as measured by the selection procedure and the related work behavior(s) should be supported by empirical evidence from one or more criterion-related studies involving the job or jobs in question which satisfy the provisions of section 14B above.

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

(a) Standards for use. Until such time as professional literature provides more guidance on the use of construct validity in employment situations, the Federal agencies will accept a claim of construct validity without a criterion-related study which satisfies section 14B above only when the selection procedure has been used elsewhere in a situation in which a criterion-related study has been conducted and the use of a criterion-related validity study in this context meets the standards for transportability of criterion-related validity studies as set forth above in section 7. However, if a study pertains to a number of jobs having common critical or important work behaviors at a comparable level of complexity, and the evidence satisfies subparagraphs 14B (2) and (3) above for those jobs with criterion-related validity evidence for those jobs, the selection procedure may be used for all the jobs to which the study pertains. If construct validity is to be generalized to other jobs or groups of jobs not in the group studied, the Federal enforcement agencies will expect at a minimum additional empirical research evidence meeting the standards of subparagraphs section 14B (2) and (3) above for the additional jobs or groups of jobs.

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

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§§1607.15 Documentation of impact and validity evidence.

A. Required information.

Users of selection procedures other than those users complying with section 15A(1) below should maintain and have available for each job information on adverse impact of the selection process for that job and, where it is determined a selection process has an adverse impact, evidence of validity as set forth below.

(1) Simplified recordkeeping for users with less than 100 employees.

In order to minimize recordkeeping burdens on employers who employ one hundred (100) or fewer employees, and other users not required to file EEO—1, et seq., reports, such users may satisfy the requirements of this section 15 if they maintain and have available records showing, for each year:

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

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

(c) The selection procedures utilized (either standardized or not standardized). These records should be maintained for each race or national origin group (see section 4 above) constituting more than two percent (2%) of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and/or national origin (see §§4 above) if one race or national origin group in the relevant labor area constitutes more than ninety-eight percent (98%) of the labor force in the area. If the user has reason to believe that a selection procedure has an adverse impact, the user should maintain any available evidence of validity for that procedure (see sections 7A and 8).

(2) Information on impact.

(a) Collection of information on impact. Users of selection procedures other than those complying with section 15A(1) above should maintain and have available for each job records or other information showing whether the total selection process for that job has an adverse impact on any of the groups for which records are called for by sections 4B above. Adverse impact determinations should be made at least annually for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce. Where a total selection process for a job has an adverse impact, the user should maintain and have available records or other information showing which components have an adverse impact. Where the total selection process for a job does not have an adverse impact, information need not be maintained for individual

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components except in circumstances set forth in subsection 15A(2)(b) below. If the determination of adverse impact is made using a procedure other than the ""four-fifths rule,"" as defined in the first sentence of section 4D above, a justification, consistent with section 4D above, for the procedure used to determine adverse impact should be available.

(b) When adverse impact has been eliminated in the total selection process. Whenever the total selection process for a particular job has had an adverse impact, as defined in section 4 above, in any year, but no longer has an adverse impact, the user should maintain and have available the information on individual components of the selection process required in the preceding paragraph for the period in which there was adverse impact. In addition, the user should continue to collect such information for at least two (2) years after the adverse impact has been eliminated.

(c) When data insufficient to determine impact. Where there has been an insufficient number of selections to determine whether there is an adverse impact of the total selection process for a particular job, the user should continue to collect, maintain and have available the information on individual components of the selection process required in section 15(A)(2)(a) above until the information is sufficient to determine that the overall selection process does not have an adverse impact as defined in section 4 above, or until the job has changed substantially.

(3) Documentation of validity evidence.

(a) Types of evidence. Where a total selection process has an adverse impact (see section 4 above) the user should maintain and have available for each component of that process which has an adverse impact, one or more of the following types of documentation evidence:

> **(i)** Documentation evidence showing criterion-related validity of the selection procedure (see section 15B, below).
>
> **(ii)** Documentation evidence showing content validity of the selection procedure (see section 15C, below).
>
> **(iii)** Documentation evidence showing construct validity of the selection procedure (see section 15D, below).
>
> **(iv)** Documentation evidence from other studies showing validity of the selection procedure in the user's facility (see section 15E, below).
>
> **(v)** Documentation evidence showing why a validity study cannot or need not be performed and why continued use of the procedure is consistent with Federal law.

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

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

B. Criterion-related validity studies.

Reports of criterion-related validity for a selection procedure should include the following information:

(1) User(s), location(s), and date(s) of study.

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

(2) Problem and setting.

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

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(3) Job analysis or review of job information.

A description of the procedure used to analyze the job or group of jobs, or to review the job information should be provided (Essential). Where a review of job information results in criteria which may be used without a full job analysis (see section 14B(3)), the basis for the selection of these criteria should be reported (Essential). Where a job analysis is required a complete description of the work behavior(s) or work outcome(s), and measures of their criticality or importance should be provided (Essential). The report should describe the basis on which the behavior(s) or outcome(s) were determined to be critical or important, such as the proportion of time spent on the respective behaviors, their level of difficulty, their frequency of performance, the consequences of error, or other appropriate factors (Essential). Where two or more jobs are grouped for a validity study, the information called for in this subsection should be provided for each of the jobs, and the justification for the grouping (see section 14B(1)) should be provided (Essential).

(4) Job titles and codes.

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

(5) Criterion measures.

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

(6) Sample description.

A description of how the research sample was identified and selected should be included (essential). The race, sex, and ethnic composition of the sample, including those groups set forth in section 4A above, should be described (essential). This description should include the size of each subgroup (essential). A description of how the research sample compares with the relevant labor market or work force, the method by which the relevant labor market or work force was defined, and a discussion of the likely effects on validity of differences between the sample and the relevant labor market or work force, are also desirable. Descriptions of educational levels, length of service, and age are also desirable.

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(7) Description of selection procedures.

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

(8) Techniques and results.

Methods used in analyzing data should be described (essential). Measures of central tendency (e.g., means) and measures of dispersion (e.g., standard deviations and ranges) for all selection procedures and all criteria should be reported for each race, sex, and ethnic group which constitutes a significant factor in the relevant labor market (essential). The magnitude and direction of all relationships between selection procedures and criterion measures investigated should be reported for each relevant race, sex, and ethnic group and for the total group (essential). Where groups are too small to obtain reliable evidence of the magnitude of the relationship, need not be reported separately. Statements regarding the statistical significance of results should be made (essential). Any statistical adjustments, such as for less then perfect reliability or for restriction of score range in the selection procedure or criterion should be described and explained; and uncorrected correlation coefficients should also be shown (essential). Where the statistical technique categorizes continuous data, such as biserial correlation and the phi coefficient, the categories and the bases on which they were determined should be described and explained (essential). Studies of test fairness should be included where called for by the requirements of section 14B(8) (essential). These studies should include the rationale by which a selection procedure was determined to be fair to the group(s) in question. Where test fairness or unfairness has been demonstrated on the basis of other studies, a bibliography of the relevant studies should be included (essential). If the bibliography includes unpublished studies, copies of these studies, or adequate abstracts or summaries, should be attached (essential). Where revisions have been made in a selection procedure to assure compatability between successful job performance and the probability of being selected, the studies underlying such revisions should be included (essential). All statistical results should be organized and presented by relevant race, sex, and ethnic group (essential).

(9) Alternative procedures investigated.

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

(10) Uses and applications.

The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and

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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

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study was conducted should be provided. A description of existing selection procedures and cutoff scores, if any, should be provided.

(3) Job analysis.

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

(4) Selection procedure and its content.

Selection procedures, including those constructed by or for the user, specific training requirements, composites of selection procedures, and any other procedure supported by content validity, should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be described by title, form, and publisher (essential). The behaviors measured or sampled by the selection procedure should be explicitly described (essential). Where the selection procedure purports to measure a knowledge, skill, or ability, evidence that the selection procedure measures and is a representative sample of the knowledge, skill, or ability should be provided (essential).

(5) Relationship between the selection procedure and the job.

The evidence demonstrating that the selection procedure is a representative work sample, a representative sample of the work behavior(s), or a representative sample of a knowledge, skill, or ability as used as a part of a work behavior and necessary for that behavior should be provided (essential). The user should identify the work behavior(s) which each item or part of the selection procedure is intended to sample or measure (essential). Where the selection procedure purports to sample a work behavior or to provide a sample of a work product, a comparison should be provided of the manner, setting, and the level of complexity of the selection procedure with those of the work situation (essential). If any steps were taken to reduce adverse impact on a race, sex, or ethnic group in the content of the procedure or in its administration, these steps should be described. Establishment of time limits, if any, and how these limits are related to the speed with which duties must be performed on the job, should be explained. Measures of central tend- ency

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(e.g., means) and measures of dispersion (e.g., standard deviations) and 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) Uses and applications.

The methods considered for use of the selection procedure (e.g., as a screening device with a cutoff score, for grouping or ranking, or combined with other procedures in a battery) and available evidence of their impact should be described (essential). This description should include the rationale for choosing the method for operational use, and the evidence of the validity and utility of the procedure as it is to be used (essential). The purpose for which the procedure is to be used (e.g., hiring, transfer, promotion) should be described (essential). If the selection procedure is used with a cutoff score, the user should describe the way in which normal expectations of proficiency within the work force were determined and the way in which the cutoff score was determined (essential). In addition, if the selection procedure is to be used for ranking, the user should specify the evidence showing that a higher score on the selection procedure is likely to result in better job performance.

(8) Contact person.

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

(9) Accuracy and completeness.

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

D. Construct validity studies.

Reports of construct validity for a selection procedure should include the following information:

(1) User(s), location(s), and date(s) of study.

Date(s) and location(s) of the job analysis and the gathering of other evidence called for by these guidelines should be provided (essential).

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(2) Problem and setting.

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

(3) Construct definition.

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

(4) Job analysis.

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

(5) Job titles and codes.

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

(6) Selection procedure.

The selection procedure used as a measure of the construct should be completely and explicitly described or attached (essential). If commercially available selection procedures are used, they should be identified by title, form and publisher (essential). The research evidence of the relationship between the selection procedure and the construct, such as factor structure, should be included (essential). Measures of central tendency, variability and reliability of the selection procedure should be provided (essential). Whenever feasible, these measures should be

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provided separately for each relevant race, sex and ethnic group.

(7) Relationship to job performance.

The criterion-related study(ies) and other empirical evidence of the relationship between the construct measured by the selection procedure and the related work behavior(s) for the job or jobs in question should be provided (essential). Documentation of the criterion-related study(ies) should satisfy the provisions of section 15B above or section 15E(1) below, except for studies conducted prior to the effective date of these guidelines (essential). Where a study pertains to a group of jobs, and, on the basis of the study, validity is asserted for a job in the group, the observed work behaviors and the observed work products for each of the jobs should be described (essential). Any other evidence used in determining whether the work behavior(s) in each of the jobs is the same should be fully described (essential).

(8) Alternative procedures investigated.

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

(9) Uses and applications.

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

(10) Accuracy and completeness.

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

(11) Source data.

Each user should maintain records showing all pertinent information relating to its study of construct validity.

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(12) Contact person.

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

E. Evidence of validity from other studies.

When validity of a selection procedure is supported by studies not done by the user, the evidence from the original study or studies should be compiled in a manner similar to that required in the appropriate section of this section 15 above. In addition, the following evidence should be supplied:

(1) Evidence from criterion-related validity studies.

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

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

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

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

e. Bibliography.

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

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and address of the source, an adequate abstract or summary of the validity study and data, and a contact person in the source organization should be provided (essential).
(2) Evidence from content validity studies. See section 14C(3) and section 15C above.
(3) Evidence from construct validity studies. See sections 14D(2) and 15D above.

F. Evidence of validity from cooperative studies.

Where a selection procedure has been validated through a cooperative study, evidence that the study satisfies the requirements of sections 7, 8 and 15E should be provided (essential).

G. Selection for higher level job.

If a selection procedure is used to evaluate candidates for jobs at a higher level than those for which they will initially be employed, the validity evidence should satisfy the documentation provisions of this section 15 for the higher level job or jobs, and in addition, the user should provide: (1) a description of the job progression structure, formal or informal; (2) the data showing how many employees progress to the higher level job and the length of time needed to make this progression; and (3) an identification of any anticipated changes in the higher level job. In addition, if the test measures a knowledge, skill or ability, the user should provide evidence that the knowledge, skill or ability is required for the higher level job and the basis for the conclusion that the knowledge, skill or ability is not expected to develop from the training or experience on the job.

H. Interim use of selection procedures.

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

(Approved by the Office of Management and Budget under control number 3046—0017)
(Pub. L. 96—511, 94 Stat. 2812 (44 U.S.C. 3501 et seq.))
[43 FR 38295, 38312, Aug. 25, 1978, as amended at 46 FR 63268, Dec. 31, 1981]
Definitions

§§1607.16 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.

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B. Adverse impact.

A substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group. See section 4 of these guidelines.

C. Compliance with these guidelines.

Use of a selection procedure is in compliance with these guidelines if such use has been validated in accord with these guidelines (as defined below), or if such use does not result in adverse impact on any race, sex, or ethnic group (see section 4, above), or, in unusual circumstances, if use of the procedure is otherwise justified in accord with Federal law. See section 6B, above.

D. Content validity.

Demonstrated by data showing that the content of a selection procedure is representative of important aspects of performance on the job. See section 5B and section 14C.

E. Construct validity.

Demonstrated by data showing that the selection procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important for successful job performance. See section 5B and section 14D.

F. Criterion-related validity.

Demonstrated by empirical data showing that the selection procedure is predictive of or significantly correlated with important elements of work behavior. See sections 5B and 14B.

G. Employer.

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

H. Employment agency.

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

I. Enforcement action.

For the purposes of section 4 a proceeding by a Federal enforcement agency such as a lawsuit or

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an administrative proceeding leading to debarment from or withholding, suspension, or termination of Federal Government contracts or the suspension or withholding of Federal Government funds; but not a finding of reasonable cause or a conciliation process or the issuance of right to sue letters under title VII or under Executive Order 11246 where such finding, conciliation, or issuance of notice of right to sue is based upon an individual complaint.

J. Enforcement agency.

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

K. Job analysis.

A detailed statement of work behaviors and other information relevant to the job.

L. Job description.

A general statement of job duties and responsibilities.

M. Knowledge.

A body of information applied directly to the performance of a function.

N. Labor organization.

Any labor organization subject to the provisions of the Civil Rights Act of 1964, as amended, and any committee subject thereto controlling apprenticeship or other training.

O. Observable.

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

P. Race, sex, or ethnic group.

Any group of persons identifiable on the grounds of race, color, religion, sex, or national origin.

Q. Selection procedure.

Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and

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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 were utilized; and (3) having or being able to devise unbiased, reliable and relevant measures of job performance or other criteria of employee adequacy. See section 14B(2). With respect to investigation of possible unfairness, the same considerations are applicable to each group for which the study is made. See section 14B(8).

V. Unfairness of selection procedure.

A condition in which members of one race, sex, or ethnic group characteristically obtain lower scores on a selection procedure than members of another group, and the differences are not reflected in differences in measures of job performance. See section 14B(7).

W. User.

Any employer, labor organization, employment agency, or licensing or certification board, to the extent it may be covered by Federal equal employment opportunity law, which uses a selection procedure as a basis for any employment decision. Whenever an employer, labor organization, or employment agency is required by law to restrict recruitment for any occupation to those applicants who have met licensing or certification requirements, the licensing or certifying authority to the extent it may be covered by Federal equal employment opportunity law will be

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considered the user with respect to those licensing or certification requirements. Whenever a State employment agency or service does no more than administer or monitor a procedure as permitted by Department of Labor regulations, and does so without making referrals or taking any other action on the basis of the results, the State employment agency will not be deemed to be a user.

X. Validated in accord with these guidelines or properly validated.

A demonstration that one or more validity study or studies meeting the standards of these guidelines has been conducted, including investigation and, where appropriate, use of suitable alternative selection procedures as contemplated by section 3B, and has produced evidence of validity sufficient to warrant use of the procedure for the intended purpose under the standards of these guidelines.

Y. Work behavior.

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

Appendix

§§1607.17 Policy statement on affirmative action (see section 13B).

The Equal Employment Opportunity Coordinating Council was established by act of Congress in 1972, and charged with responsibility for developing and implementing agreements and policies designed, among other things, to eliminate conflict and inconsistency among the agencies of the Federal Government responsible for administering Federal law prohibiting discrimination on grounds of race, color, sex, religion, and national origin. This statement is issued as an initial response to the requests of a number of State and local officials for clarification of the Government's policies concerning the role of affirmative action in the overall equal employment opportunity program. While the Coordinating Council's adoption of this statement expresses only the views of the signatory agencies concerning this important subject, the principles set forth below should serve as policy guidance for other Federal agencies as well.

(1) Equal employment opportunity is the law of the land. In the public sector of our society this means that all persons, regardless of race, color, religion, sex, or national origin shall have equal access to positions in the public service limited only by their ability to do the job. There is ample evidence in all sectors of our society that such equal access frequently has been denied to members of certain groups because of their sex, racial, or ethnic characteristics. The remedy for such past and present discrimination is twofold.

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On the one hand, vigorous enforcement of the laws against discrimination is essential. But equally, and perhaps even more important are affirmative, voluntary efforts on the part of public employers to assure that positions in the public service are genuinely and equally accessible to qualified persons, without regard to their sex, racial, or ethnic characteristics. Without such efforts equal employment opportunity is no more than a wish. The importance of voluntary affirmative action on the part of employers is underscored by title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations——all of which emphasize voluntary action to achieve equal employment opportunity.

As with most management objectives, a systematic plan based on sound organizational analysis and problem identification is crucial to the accomplishment of affirmative action objectives. For this reason, the Council urges all State and local governments to develop and implement results oriented affirmative action plans which deal with the problems so identified.
The following paragraphs are intended to assist State and local governments by illustrating the kinds of analyses and activities which may be appropriate for a public employer's voluntary affirmative action plan. This statement does not address remedies imposed after a finding of unlawful discrimination.

(2) Voluntary affirmative action to assure equal employment opportunity is appropriate at any stage of the employment process. The first step in the construction of any affirmative action plan should be an analysis of the employer's work force to determine whether percentages of sex, race, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups available in the relevant job market who possess the basic job-related qualifications.

When substantial disparities are found through such analyses, each element of the overall selection process should be examined to determine which elements operate to exclude persons on the basis of sex, race, or ethnic group. Such elements include, but are not limited to, recruitment, testing, ranking certification, interview, recommendations for selection, hiring, promotion, etc. The examination of each element of the selection process should at a minimum include a determination of its validity in predicting job performance.

(3) When an employer has reason to believe that its selection procedures have the exclusionary effect described in paragraph 2 above, it should initiate affirmative steps to remedy the situation. Such steps, which in design and execution may be race, color, sex, or ethnic ""'conscious,'"" include, but are not limited to, the following:

(a) The establishment of a long-term goal, and short-range, interim goals and timetables for the specific job classifications, all of which should take into account the availability of basically qualified persons in the relevant job market;

(b) A recruitment program designed to attract qualified members of the group in question;

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(c) A systematic effort to organize work and redesign jobs in ways that provide opportunities for persons lacking ""journeyman"" level knowledge or skills to enter and, with appropriate training, to progress in a career field;

(d) Revamping selection instruments or procedures which have not yet been validated in order to reduce or eliminate exclusionary effects on particular groups in particular job classifications;

(e) The initiation of measures designed to assure that members of the affected group who are qualified to perform the job are included within the pool of persons from which the selecting official makes the selection;

(f) A systematic effort to provide career advancement training, both classroom and on-the-job, to employees locked into dead end jobs; and

(g) The establishment of a system for regularly monitoring the effectiveness of the particular affirmative action program, and procedures for making timely adjustments in this program where effectiveness is not demonstrated.

(4) The goal of any affirmative action plan should be achievement of genuine equal employment opportunity for all qualified persons. Selection under such plans should be based upon the ability of the applicant(s) to do the work. Such plans should not require the selection of the unqualified, or the unneeded, nor should they require the selection of persons on the basis of race, color, sex, religion, or national origin. Moreover, while the Council believes that this statement should serve to assist State and local employers, as well as Federal agencies, it recognizes that affirmative action cannot be viewed as a standardized program which must be accomplished in the same way at all times in all places.

Accordingly, the Council has not attempted to set forth here either the minimum or maximum voluntary steps that employers may take to deal with their respective situations. Rather, the Council recognizes that under applicable authorities, State and local employers have flexibility to formulate affirmative action plans that are best suited to their particular situations. In this manner, the Council believes that affirmative action programs will best serve the goal of equal employment opportunity.

Respectfully submitted,

Harold R. Tyler, Jr.,
Deputy Attorney General and Chairman of the Equal Employment Coordinating Council.

Michael H. Moskow,
Under Secretary of Labor.

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Ethel Bent Walsh,
Acting Chairman, Equal Employment Opportunity Commission.

Robert E. Hampton,
Chairman, Civil Service Commission.

Arthur E. Flemming,
Chairman, Commission on Civil Rights.

Because of its equal employment opportunity responsibilities under the State and Local Government Fiscal Assistance Act of 1972 (the revenue sharing act), the Department of Treasury was invited to participate in the formulation of this policy statement; and it concurs and joins in the adoption of this policy statement.
Done this 26th day of August 1976.
Richard Albrecht,
General Counsel,
Department of the Treasury.

§§1607.18 Citations.
The official title of these guidelines is ""Uniform Guidelines on Employee Selection Procedures (1978)'"'. The Uniform Guidelines on Employee Selection Procedures (1978) are intended to establish a uniform Federal position in the area of prohibiting discrimination in employment practices on grounds of race, color, religion, sex, or national origin. These guidelines have been adopted by the Equal Employment Opportunity Commission, the Department of Labor, the Department of Justice, and the Civil Service Commission.

The official citation is:
Section &lowbarm;&lowbarm;, Uniform Guidelines on Employee Selection Procedure (1978); 43 FR &lowbarm;&lowbarm; (August 25, 1978).
The short form citation is:
Section &lowbarm;&lowbarm;, U.G.E.S.P. (1978); 43 FR &lowbarm;&lowbarm; (August 25, 1978).

When the guidelines are cited in connection with the activities of one of the issuing agencies, a specific citation to the regulations of that agency can be added at the end of the above citation. The specific additional citations are as follows:
Equal Employment Opportunity Commission
29 CFR part 1607
Department of Labor
Office of Federal Contract Compliance Programs
41 CFR part 60—3
Department of Justice
28 CFR 50.14

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Civil Service Commission
5 CFR 300.103(c)
Normally when citing these guidelines, the section number immediately preceding the title of the guidelines will be from these guidelines series 1—18. If a section number from the codification for an individual agency is needed it can also be added at the end of the agency citation. For example, section 6A of these guidelines could be cited for EEOC as follows:
Section 6A, Uniform Guidelines on Employee Selection Procedures (1978); 43 FR &lowbarm;&lowbarm;, (August 25, 1978); 29 CFR part 1607, section 6A.

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Questions & Answers
Interpreting the Uniform Guidelines on Employee Selection Procedures

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Federal Register
44 Fed. Reg. 11996
Friday, March 2, 1979

ADOPTION OF QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE A COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Introduction

The problems addressed by the Uniform Guidelines on Employee Selection Procedures (43 FR 38290 et seq., August 25, 1978), are numerous and important, and some of them are complex. The history of the development of those Guidelines is set forth in the introduction to them (43 FR 38290-95). The experience of the agencies has been that a series of answers to commonly asked questions is helpful in providing guidance not only to employers and other users, but also to psychologists and others who are called upon to conduct validity studies, and to investigators, compliance officers and other Federal personnel who have enforcement responsibilities.

The Federal agencies which issued the Uniform Guidelines—the Departments of Justice and Labor, the Equal Employment Opportunity Commission, the Civil Service Commission (which has been succeeded in relevant part by the office of Personnel Management), and the Office of Revenue Sharing, Treasury Department—recognize that the goal of a uniform position on these issues can best be achieved through a common interpretation of the same guidelines. The following Questions and Answers are part of such a common interpretation. The material included is intended to clarify and interpret, but not to modify, the Uniform Guidelines. The questions selected are commonly asked questions in the field and those suggested by the Uniform Guidelines themselves and by the extensive comments received on the various sets of proposed guidelines prior to their adoption. Terms are used in the questions and answers as they are defined in the Uniform Guidelines.

The agencies recognize that additional questions may be appropriate for similar treatment at a later date, and contemplate working together to provide additional guidance in interpreting the Uniform Guidelines. Users and other interested persons are invited to submit additional questions.

ELEANOR HOLMES NORTON
Chair, Equal Employment Opportunity Commission

ALAN K. CAMPBELL
Director, Office of Personnel Management

DREW S. DAYS III
Assistant Attorney General, Civil Rights Division, Department of Justice

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WELDEN ROUGEAU
Director, Office of Federal Contract Compliance, Department of Labor

KENT A. PETERSON
Acting Deputy Director, Office of Revenue Sharing

I. Purpose and Scope

1. Q. What is the purpose of the Guidelines?

A. The guidelines are designed to aid in the achievement of our nation's goal of equal employment opportunity without discrimination on the grounds of race, color, sex, religion or national origin. The Federal agencies have adopted the Guidelines to provide a uniform set of principles governing use of employee selection procedures which is consistent with applicable legal standards and validation standards generally accepted by the psychological profession and which the Government will apply in the discharge of its responsibilities.

2. Q. What is the basic principle of the Guidelines?

A. A selection process which has an adverse impact on the employment opportunities of members of a race, color, religion, sex, or national origin group (referred to as "race, sex, and ethnic group," as defined in Section 16P) and thus disproportionately screens them out is unlawfully discriminatory unless the process or its component procedures have been validated in accord with the Guidelines, or the user otherwise justifies them in accord with Federal law. See Sections 3 and 6.1. This principle was adopted by the Supreme Court unanimously in *Griggs v. Duke Power Co.*, 401 U.S. 424, and was ratified and endorsed by the Congress when it passed the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act of 1964.

3. Q. Who is covered by the Guidelines?

A. The Guidelines apply to private and public employers, labor organizations, employment agencies, apprenticeship committees, licensing and certification boards (see Question 7), and contractors or subcontractors, who are covered by one or more of the following provisions of Federal equal employment opportunity law: Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (hereinafter Title VII); Executive Order 11246, as amended by Executive Orders 11375 and 12086 (hereinafter Executive Order 11246); the State and Local Fiscal Assistance Act of 1972, as amended; Omnibus Crime Control and Safe Streets Act of 1968, as amended; and the Intergovernmental Personnel Act of 1970, as amended. Thus, under Title VII, the Guidelines apply to the Federal Government with regard to Federal employment. Through Title VII they apply to most private employers who have 15 or more employees for 20 weeks or more a calendar year, and to most employment

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agencies, labor organizations and apprenticeship committees. They apply to state and local governments which employ 15 or more employees, or which receive revenue sharing funds, or which receive funds from the Law Enforcement Assistance Administration to impose and strengthen law enforcement and criminal justice, or which receive grants or other federal assistance under a program which requires maintenance of personnel standards on a merit basis. They apply through Executive Order 11246 to contractors and subcontractors of the Federal Government and to contractors and subcontractors under federally-assisted construction contracts.

4. Q. Are college placement offices and similar organizations considered to be users subject to the Guidelines?

A. Placement offices may or may not be subject to the Guidelines depending on what services they offer. If a placement office uses a selection procedure as a basis for any employment decision, it is covered under the definition of "user". Section 16. For example, if a placement office selects some students for referral to an employer but rejects others, it is covered. However, if the placement office refers all interested students to an employer, it is not covered, even though it may offer office space and provision for informing the students of job openings. The Guidelines are intended to cover all users of employee selection procedures, including employment agencies, who are subject to Federal equal employment opportunity law.

5. Q. Do the Guidelines apply only to written tests?

A. No. They apply to all selection procedures used to make employment decisions, including interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance. Sections 2B and 16Q, and see Question 6.

6. Q. What practices are covered by the Guidelines?

A. The Guidelines apply to employee selection procedures which are used in making employment decisions, such as hiring, retention, promotion, transfer, demotion, dismissal or referral. Section 2B. Employee selection procedures include job requirements (physical, education, experience), and evaluation of applicants or candidates on the basis of application forms, interviews, performance tests, paper and pencil tests, performance in training programs or probationary periods, and any other procedures used to make an employment decision whether administered by the employer or by an employment agency. See Section 2B.

7. Q. Do the Guidelines apply to the licensing and certification functions of state and local governments?

A. The Guidelines apply to such functions to the extent that they are covered by Federal law. Section 2B. The courts are divided on the issue of such coverage. The Government has taken the position that at least some kinds of licensing and certification which deny

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persons access to employment opportunity may be enjoined in an action brought pursuant to Section 707 of the Civil Rights Act of 1964, as amended.

8. Q. What is the relationship between Federal equal employment opportunity law, embodied in these Guidelines, and State and Local government merit system laws or regulations requiring rank ordering of candidates and selection from a limited number of the top candidates?

A. The Guidelines permit ranking where the evidence of validity is sufficient to support that method of use. State or local laws which compel rank ordering generally do so on the assumption that the selection procedure is valid. Thus, if there is adverse impact and the validity evidence does not adequately support that method of use, proper interpretation of such a state law would require validation prior to ranking. Accordingly, there is no necessary or inherent conflict between Federal law and State or local laws of the kind described.

Under the Supremacy Clause of the Constitution (Art. VI, Cl. 2), however, Federal law or valid regulation overrides any contrary provision of state or local law. Thus, if there is any conflict, Federal equal opportunity law prevails. For example, in *Rosenfeld v. So. Pacific Co.*, 444 F.2d 1219 (9th Cir., 1971), the court held invalid state protective laws which prohibited the employment of women in jobs entailing long hours or heavy labor, because the state laws were in conflict with Title VII. Where a State or local official believes that there is a possible conflict, the official may wish to consult with the State Attorney General, County or City attorney, or other legal official to determine how to comply with the law.

II. Adverse Impact, the Bottom Line and Affirmative Action

9. Q. Do the Guidelines require that only validated selection procedures be used?

A. No. Although validation of selection procedures is desirable in personnel management, the Uniform Guidelines require users to produce evidence of validity only when the selection procedure adversely affects the opportunities of a race, sex, or ethnic group for hire, transfer, promotion, retention or other employment decision. If there is no adverse impact, there is no validation requirement under the Guidelines. Sections 1B and 3A. See also, Section 6A.

10. Q. What is adverse impact?

A. Under the Guidelines adverse impact is 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. Sections 4D and 16B. See Questions 11 and 12.

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11. Q. What is a substantially different rate of selection?

A. The agencies have adopted a rule of thumb under which they will generally consider a selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate as a substantially different rate of selection. See Section 4D. This "4/5ths" or "80%" rule of thumb is not intended as a legal definition, but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions.

For example, if the hiring rate for whites other than Hispanics is 60%, for American Indians 45%, for Hispanics 48%, and for Blacks 51%, and each of these groups constitutes more than 2% of the labor force in the relevant labor area (see Question 16), a comparison should be made of the selection rate for each group with that of the highest group (whites). These comparisons show the following impact ratios: American Indians 45/60 or 75%; Hispanics 48/60 or 80%; and Blacks 51/60 or 85%. Applying the 4/5ths or 80% rule of thumb, on the basis of the above information alone, adverse impact is indicated for American Indians but not for Hispanics or Blacks.

12. Q. How is adverse impact determined?

A. Adverse impact is determined by a four-step process.
(1) Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).
(2) Observe which group has the highest selection rate.
(3) Calculate the impact ratios, by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).
(4) Observe whether the selection rate for any group is substantially less (i.e., usually less then 4/5ths or 80%) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances. See Section 4D.

For example:

Applicants	Hires	Selection Rate/Percent Hired
80 White	48	48/80 or 60%
40 Black	12	12/40 or 30%

A comparison of the black selection rate (30%) with the white selection rate (60%) shows that the black rate is 30/60, or one-half (or 50%) of the white rate. Since the one-half (50%) is less than 4/5ths (80%) adverse impact is usually indicated.

The determination of adverse impact is not purely arithmetic however; and other factors may be relevant. See, Section 4D.

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13. Q. Is adverse impact determined on the basis of the overall selection process or for the components in that process?

A. Adverse impact is determined first for the overall selection process for each job. If the overall selection process has an adverse impact, the adverse impact of the individual selection procedure should be analyzed. For any selection procedures in the process having an adverse impact which the user continues to use in the same manner, the user is expected to have evidence of validity satisfying the Guidelines. Sections 4C and 5D. If there is no adverse impact for the overall selection process, in most circumstances there is no obligation under the Guidelines to investigate adverse impact for the components, or to validate the selection procedures used for that job. Section 4C. But see Question 25.

14. Q. The Guidelines designate the "total selection process" as the initial basis for determining the impact of selection procedures. What is meant by the "total selection process"?

A. The "total selection process" refers to the combined effect of all selection procedures leading to the final employment decision such as hiring or promoting. For example, appraisal of candidates for administrative assistant positions in an organization might include initial screening based upon an application blank and interview, a written test, a medical examination, a background check, and a supervisor's interview. These in combination are the total selection process. Additionally, where there is more than one route to the particular kind of employment decision, the total selection process encompasses the combined results of all routes. For example, an employer may select some applicants for a particular kind of job through appropriate written and performance tests. Others may be selected through an internal upward mobility program, on the basis of successful performance in a directly related trainee type of position. In such a case, the impact of the total selection process would be the combined effect of both avenues of entry.

15. Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines?

A. The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice.

The term "candidate" has been included to cover those situations where the initial step by the user involves consideration of current employees for promotion, or training, or other employment opportunities, without inviting applications. The procedure by which persons are identified as candidates is itself a selection procedure under the Guidelines.

A person who voluntarily withdraws formally or informally at any stage of the selection process is no longer an applicant or candidate for purposes of computing adverse impact.

Employment standards imposed by the user which discourage disproportionately applicants of a race, sex or ethnic group may, however, require justification. Records should be kept for persons who were applicants or candidates at any stage of the process.

16. Q. Should adverse impact determinations be made for all groups regardless of their size?

A. No. Section 15A(2) calls for annual adverse impact determinations to be made for each group which constitutes either 2% or more of the total labor force in the relevant labor area, or 2% of more of the applicable workforce. Thus, impact determinations should be made for any employment decision for each group which constitutes 2% or more of the labor force in the relevant labor area. For hiring, such determination should also be made for groups which constitute more than 2% of the applicants; and for promotions, determinations should also be made for those groups which constitute at least 2% of the user's workforce. There are record keeping obligations for all groups, even those which are less than 2%. See Question 86.

17. Q. In determining adverse impact, do you compare the selection rates for males and females, and blacks and whites, or do you compare selection rates for white males, white females, black males and black females?

A. The selection rates for males and females are compared, and the selection rates for the race and ethnic groups are compared with the selection rate of the race or ethnic group with the highest selection rate. Neutral and objective selection procedures free of adverse impact against any race, sex or ethnic group are unlikely to have an impact against a subgroup. Thus there is no obligation to make comparisons for subgroups (e.g., white male, white female, black male, black female). However, there are obligations to keep records (see Question 87), and any apparent exclusion of a subgroup may suggest the presence of discrimination.

18. Q. Is it usually necessary to calculate the statistical significance of differences in selection rates when investigating the existence of adverse impact?

A. No. Adverse impact is normally indicated when one selection rate is less than 80% of the other. The federal enforcement agencies normally will use only the 80% (4/5ths) rule of thumb, except where large numbers of selections are made. See Questions 20 and 22.

19. Q. Does the 4/5ths rule of thumb mean that the Guidelines will tolerate up to 20% discrimination?

A. No. The 4/5ths rule of thumb speaks only to the question of adverse impact, and is not intended to resolve the ultimate question of unlawful discrimination. Regardless of the amount of difference in selection rates, unlawful discrimination may be present, and may be demonstrated through appropriate evidence. The 4/5ths rule merely establishes a numerical basis for drawing an initial inference and for requiring additional information.

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With respect to adverse impact, the Guidelines expressly state (section 4D) that differences in selection rates of less than 20% may still amount to adverse impact where the differences are significant in both statistical and practical terms. See Question 20. In the absence of differences which are large enough to meet the 4/5ths rule of thumb or a test of statistical significance, there is no reason to assume that the differences are reliable, or that they are based upon anything other than chance.

20. Q. Why is the 4/5ths rule called a rule of thumb?

A. Because it is not intended to be controlling in all circumstances. If, for the sake of illustration, we assume that nationwide statistics show that use of an arrest record would disqualify 10% of all Hispanic persons but only 4% of all whites other than Hispanic (hereafter non-Hispanic), the selection rate for that selection procedure is 90% for Hispanics and 96% for non-Hispanics. Therefore, the 4/5 rule of thumb would not indicate the presence of adverse impact (90% is approximately 94% of 96%). But in this example, the information is based upon nationwide statistics, and the sample is large enough to yield statistically significant results, and the difference (Hispanics are 21/2 times as likely to be disqualified as non-Hispanics) is large enough to be practically significant. Thus, in this example the enforcement agencies would consider a disqualification based on an arrest record alone as having an adverse impact. Likewise, in *Gregory v. Litton Industries*, 472 F.2d 631 (9th Cir. 1972), the court held that the employer violated Title VII by disqualifying persons from employment solely on the basis of an arrest record, where that disqualification had an adverse impact on blacks and was not shown to be justified by business necessity.

On the other hand, a difference of more than 20% in rates of selection may not provide a basis for finding adverse impact if the number of persons selected is very small. For example, if the employer selected three males and one female from an applicant pool of 20 males and 10 females, the 4/5ths rule would indicate adverse impact (selection rate for women is 10%; for men 15%; 10/15 or 662/3% is less than 80%), yet the number of selections is too small to warrant a determination of adverse impact. In these circumstances, the enforcement agency would not require validity evidence in the absence of additional information (such as selection rates for a longer period of time) indicating adverse impact. For record keeping requirements, see Section 15A(2)(c) and Questions 84 and 85.

21. Q. Is evidence of adverse impact sufficient to warrant a validity study or an enforcement action where the numbers involved are so small that it is more likely than not that the difference could have occurred by chance?

For example:

Applicants	Not Hired	Hired	Selection Rate/Percent Hired
80 White	64	16	20
20 Black	17	3	15

White Selection Rate 20
Black Selection Rate 15
15 divided by 20 = 75% (which is less than 80%).

A. No. If the numbers of persons and the difference in selection rates are so small that it is likely that the difference could have occurred by chance, the Federal agencies will not assume the existence of adverse impact, in the absence of other evidence. In this example, the difference in selection rates is too small, given the small number of black applicants, to constitute adverse impact in the absence of other information (see Section 4D). If only one more black had been hired instead of a white the selection rate for blacks (20%) would be higher than that for whites (18.7%). Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.

On the other hand, if a lower selection rate continued over a period of time, so as to constitute a pattern, then the lower selection rate would constitute adverse impact, warranting the need for validity evidence.

22. Q. Is it ever necessary to calculate the statistical significance of differences in selection rates to determine whether adverse impact exists?

A. Yes. Where large numbers of selections are made, relatively small differences in selection rates may nevertheless constitute adverse impact if they are both statistically and practically significant. See Section 4D and Question 20. For that reason, if there is a small difference in selection rates (one rate is more than 80% of the other), but large numbers of selections are involved, it would be appropriate to calculate the statistical significance of the difference in selection rates.

23. Q. When the 4/5th rule of thumb shows adverse impact, is there adverse impact under the Guidelines?

A. There usually is adverse impact, except where the number of persons selected and the difference in selection rates are very small. See Section 4D and Questions 20 and 21.

24. Q. Why do the Guidelines rely primarily upon the 4/5ths rule of thumb, rather than tests of statistical significance?

A. Where the sample of persons selected is not large, even a large real difference between groups is likely not to be confirmed by a test of statistical significance (at the usual .05 level of significance). For this reason, the Guidelines do not rely primarily upon a test of statistical significance, but use the 4/5ths rule of thumb as a practical and easy-to-administer measure of whether differences in selection rates are substantial. Many decisions in day-to-day life are made without reliance upon a test of statistical significance.

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25. Q. Are there any circumstances in which the employer should evaluate components of a selection process, even though the overall selection process results in no adverse impact?

A. Yes, there are such circumstances: (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. Assume, for example, an employer who traditionally hired blacks as employees for the "laborer" department in a manufacturing plant, and traditionally hired only whites as skilled craftsmen. Assume further that the employer in 1962 began to use a written examination not supported by a validity study to screen incumbent employees who sought to enter the apprenticeship program for skilled craft jobs. The employer stopped making racial assignments in 1972. Assume further that for the last four years, there have been special recruitment efforts aimed at recent black high school graduates and that the selection process, which includes the written examination, has resulted in the selection of black applicants for apprenticeship in approximately the same rates as white applicants.

In those circumstances, if the written examination had an adverse impact, its use would tend to keep incumbent black employees in the laborer department, and deny them entry to apprenticeship programs. For that reason, the enforcement agencies would expect the user to evaluate the impact of the written examination, and to have validity evidence for the use of the written examination if it has an adverse impact.

(2) Where the weight of court decisions or administrative interpretations holds that a specific selection procedure is not job related in similar circumstances.
For example, courts have held that because an arrest is not a determination of guilt, an applicant's arrest record by itself does not indicate inability to perform a job consistent with the trustworthy and efficient operation of a business. Yet a no arrest record requirement has a nationwide adverse impact on some minority groups. Thus, an employer who refuses to hire applicants solely on the basis of an arrest record is on notice that this policy may be found to be discriminatory. *Gregory v. Litton Industries*, 472 F.2d 631 (9th Cir. 1972) (excluding persons from employment solely on the basis of arrests, which has an adverse impact, held to violate Title VII). Similarly, a minimum height requirement disproportionately disqualifies women and some national origin groups, and has been held not to be job related in a number of cases. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court held that height and weight requirements not shown to be job related were violative of Title VII. Thus an employer using a minimum height requirement should have evidence of its validity.

(3) In addition, there may be other circumstances in which an enforcement agency may decide to request an employer to evaluate components of a selection process, but such circumstances would clearly be unusual. Any such decision will be made only at a high level in the agency. Investigators and compliance officers are not authorized to make this decision.

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26. Q. Does the bottom line concept of Section 4C apply to the administrative processing of charges of discrimination filed with an issuing agency, alleging that a specific selection procedure is discriminatory?

A. No. The bottom line concept applies only to enforcement actions as defined in Section 16 of the Guidelines. Enforcement actions include only court enforcement actions and other similar proceedings as defined in Section 16I. The EEOC administrative processing of charges of discrimination (investigation, finding of reasonable cause/no cause, and conciliation) required by Section 706(b) of Title VII are specifically exempted from the bottom line concept by the definition of an enforcement action. The bottom line concept is a result of a decision by the various enforcement agencies that, as a matter of prosecutorial discretion, they will devote their limited enforcement resources to the most serious offenders of equal employment opportunity laws. Since the concept is not a rule of law, it does not affect the discharge by the EEOC of its statutory responsibilities to investigate charges of discrimination, render an administrative finding on its investigation, and engage in voluntary conciliation efforts. Similarly, with respect to the other issuing agencies, the bottom line concept applies not to the processing of individual charges, but to the initiation of enforcement action.

27. Q. An employer uses one test or other selection procedure to select persons for a number of different jobs. Applicants are given the test, and the successful applicants are then referred to different departments and positions on the basis of openings available and their interests. The Guidelines appear to require assessment of adverse impact on a job-by-job basis (Section 15A[2][a]). Is there some way to show that the test as a whole does not have adverse impact even though the proportions of members of each race, sex or ethnic group assigned to different jobs may vary?

A. Yes, in some circumstances. The Guidelines require evidence of validity only for those selection procedures which have an adverse impact, and which are part of a selection process which has an adverse impact. If the test is administered and used in the same fashion for a variety of jobs, the impact of that test can be assessed in the aggregate. The records showing the results of the test, and the total number of persons selected, generally would be sufficient to show the impact of the test. If the test has no adverse impact, it need not be validated.

But the absence of adverse impact of the test in the aggregate does not end the inquiry. For there may be discrimination or adverse impact in the assignment of individuals to, or in the selection of persons for, particular jobs. The Guidelines call for records to be kept and determinations of adverse impact to be made of the overall selection process on a job by job basis. Thus, if there is adverse impact in the assignment or selection procedures for a job even though there is no adverse impact from the test, the user should eliminate the adverse impact from the assignment procedure or justify the assignment procedure.

28. Q. The Uniform Guidelines apply to the requirements of Federal law prohibiting employment practices which discriminate on the grounds of race, color, religion, sex or national origin. However, records are required to be kept only by sex and by specified

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race and ethnic groups. How can adverse impact be determined for religious groups and for national origin groups other than those specified in Section 4B of the Guidelines?

A. The groups for which records are required to be maintained are the groups for which there is extensive evidence of continuing discriminatory practices. This limitation is designed in part to minimize the burden on employers for record keeping which may not be needed.

For groups for which records are not required, the person(s) complaining may obtain information from the employer or others (voluntarily or through legal process) to show that adverse impact has taken place. When that has been done, the various provisions of the Uniform Guidelines are fully applicable.

Whether or not there is adverse impact, Federal equal employment opportunity law prohibits any deliberate discrimination or disparate treatment on grounds of religion or national origin, as well as on grounds of sex, color, or race.

Whenever "ethnic" is used in the Guidelines or in these Questions and Answers, it is intended to include national origin and religion, as set forth in the statutes, executive orders, and regulations prohibiting discrimination. See Section 16P.

29. Q. What is the relationship between affirmative action and the requirements of the Uniform Guidelines?

A. The two subjects are different, although related. Compliance with the Guidelines does not relieve users of their affirmative action obligations, including those of Federal contractors and subcontractors under Executive Order 11246. Section 13.

The Guidelines encourage the development and effective implementation of affirmative action plans or programs in two ways. First, in determining whether to institute action against a user on the basis of a selection procedure which has adverse impact and which has not been validated, the enforcement agency will take into account the general equal employment opportunity posture of the user with respect to the job classifications for which the procedure is used and the progress which has been made in carrying out any affirmative action program, Section 4E. If the user has demonstrated over a substantial period of time that it is in fact appropriately utilizing in the job or group of jobs in question the available race, sex or ethnic groups in the relevant labor force, the enforcement agency will generally exercise its discretion by not initiating enforcement proceedings based on adverse impact in relation to the applicant flow. Second, nothing in the Guidelines is intended to preclude the use of selection procedures, consistent with Federal law, which assist in the achievement of affirmative action objectives. Section 13A. See also, Questions 30 and 31.

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30. Q. When may a user be race, sex or ethnic-conscious?

A. The Guidelines recognize that affirmative action programs may be race, sex or ethnic conscious in appropriate circumstances, (See Sections 4E and 13; See also Section 7, Appendix). In addition to obligatory affirmative action programs (See Question 29), the Guidelines encourage the adoption of voluntary affirmative action programs. Users choosing to engage in voluntary affirmative action are referred to EEOC's Guidelines on Affirmative Action (44 FR 4422, January 19, 1979). A user may justifiably be race, sex or ethnic-conscious in circumstances where it has reason to believe that qualified persons of specified race, sex or ethnicity have been or may be subject to the exclusionary effects of its selection procedures or other employment practices in its work force or particular jobs therein. In establishing long and short range goals, the employer may use the race, sex, or ethnic classification as the basis for such goals (Section 17[3][a]).

In establishing a recruiting program, the employer may direct its recruiting activities to locations or institutions which have a high proportion of the race, sex, or ethnic group which has been excluded or underutilized (section 17[3][b]). In establishing the pool of qualified persons from which final selections are to be made, the employer may take reasonable steps to assure that members of the excluded or underutilized race, sex, or ethnic group are included in the pool (Section 17[3][e]).

Similarly, the employer may be race, sex or ethnic-conscious in determining what changes should be implemented if the objectives of the programs are not being met (Section 17[3][g]).

Even apart from affirmative action programs a user may be race, sex or ethnic-conscious in taking appropriate and lawful measures to eliminate adverse impact from selection procedures (Section 6A).

31. Q. Section 6A authorizes the use of alternative selection procedures to eliminate adverse impact, but does not appear to address the issue of validity. Thus, the use of alternative selection procedures without adverse impact seems to be presented as an option in lieu of validation. Is that its intent?

A. Yes. Under Federal equal employment opportunity law the use of any selection procedure which has an adverse impact on any race, sex or ethnic group is discriminatory unless the procedure has been properly validated, or the use of the procedure is otherwise justified under Federal law. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); Section 3A. If a selection procedure has an adverse impact, therefore, Federal equal employment opportunity law authorizes the user to choose lawful alternative procedures which eliminate the adverse impact rather than demonstrating the validity of the original selection procedure.

Many users, while wishing to validate all of their selection procedures, are not able to conduct the validity studies immediately. Such users have the option of choosing

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alternative techniques which eliminate adverse impact, with a view to providing a basis for determining subsequently which selection procedures are valid and have as little adverse impact as possible.

Apart from Federal equal employment opportunity law, employers have economic incentives to use properly validated selection procedures. Nothing in Section 6A should be interpreted as discouraging the use of properly validated selection procedures; but Federal equal employment opportunity law does not require validity studies to be conducted unless there is adverse impact. See Section 2C.

III. General Questions Concerning Validity and the Use of Selection Procedures

32. Q. What is "validation" according to the Uniform Guidelines?

A. Validation is the demonstration of the job relatedness of a selection procedure. The Uniform Guidelines recognize the same three validity strategies recognized by the American Psychological Association:

(1) Criterion-related validity--a statistical demonstration of a relationship between scores on a selection procedure and job performance of a sample of workers.
(2) Content validity--a demonstration that the content of a selection procedure is representative of important aspects of performance on the job.
(3) Construct validity--a demonstration that (a) a selection procedure measures a construct (something believed to be an underlying human trait or characteristic, such as honesty) and (b) the construct is important for successful job performance.

33. Q. What is the typical process by which validity studies are reviewed by an enforcement agency?

A. The validity study is normally requested by an enforcement officer during the course of a review. The officer will first determine whether the user's data show that the overall selection process has an adverse impact, and if so, which component selection procedures have an adverse impact. See Section 15A(3). The officer will then ask for the evidence of validity for each procedure which has an adverse impact. See Sections 15B, C, and D. This validity evidence will be referred to appropriate personnel for review. Agency findings will then be communicated to the user.

34. Q. Can a user send its validity evidence to an enforcement agency before a review, so as to assure its validity?

A. No. Enforcement agencies will not review validity reports except in the context of investigations or reviews. Even in those circumstances, validity evidence will not be reviewed without evidence of how the selection procedure is used and what impact its use has on various race, sex, and ethnic groups.

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35. Q. May reports of validity prepared by publishers of commercial tests and printed in test manuals or other literature be helpful in meeting the Guidelines?

A. They may be. However, it is the user's responsibility to determine that the validity evidence is adequate to meet the Guidelines. See Section 7, and Questions 43 and 66. Users should not use selection procedures which are likely to have an adverse impact without reviewing the evidence of validity to make sure that the standards of the Guidelines are met.

The following questions and answers (36-81) assume that a selection procedure has an adverse impact and is part of a selection process that has an adverse impact.

36. Q. How can users justify continued use of a procedure on a basis other than validity?

A. Normally, the method of justifying selection procedures with an adverse impact and the method to which the Guidelines are primarily addressed, is validation. The method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B. In *Griggs v. Duke Power Co.*, 401 U.S. 424, the Supreme Court indicated that the burden on the user was a heavy one, but that the selection procedure could be used if there was a "business necessity" for its continued use; therefore, the Federal agencies will consider evidence that a selection procedure is necessary for the safe and efficient operation of a business to justify continued use of a selection procedure.

37. Q. Is the demonstration of a rational relationship (as that term is used in constitutional law) between a selection procedure and the job sufficient to meet the validation requirements of the Guidelines?

A. No. The Supreme Court in *Washington v. Davis*, 426 U.S. 229 (1976) stated that different standards would be applied to employment discrimination allegations arising under the Constitution than would be applied to employment discrimination allegations arising under Title VII. The Davis case arose under the Constitution, and no Title VII violation was alleged. The Court applied a traditional constitutional law standard of "rational relationship" and said that it would defer to the "seemingly reasonable acts of administrators and executives." However, it went on to point out that under Title VII, the appropriate standard would still be an affirmative demonstration of the relationship between the selection procedure and measures of job performance by means of accepted procedures of validation and it would be an "insufficient response to demonstrate some rational basis" for a selection procedure having an adverse impact. Thus, the mere demonstration of a rational relationship between a selection procedure and the job does not meet the requirement of Title VII of the Civil Rights Act of 1964, or of Executive Order 11246, or the State and Local Fiscal Assistance Act of 1972, as amended (the revenue sharing act) or the Omnibus Crime Control and Safe Streets Act of 1968, as amended, and will not meet the requirements of these Guidelines for a validity study. The three validity strategies called for by these Guidelines all require evidence that the

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selection procedure is related to successful performance on the job. That evidence may be obtained through local validation or through validity studies done elsewhere.

38. Q. Can a user rely upon written or oral assertions of validity instead of evidence of validity?

A. No. If a user's selection procedures have an adverse impact, the user is expected to produce evidence of the validity of the procedures as they are used. Thus, the unsupported assertion by anyone, including representatives of the Federal government or State Employment Services, that a test battery or other selection procedure has been validated is not sufficient to satisfy the Guidelines.

39. Q. Are there any formal requirements imposed by these Guidelines as to who is allowed to perform a validity study?

A. No. A validity study is judged on its own merits, and may be performed by any person competent to apply the principles of validity research, including a member of the user's staff or a consultant. However, it is the user's responsibility to see that the study meets validity provisions of the Guidelines, which are based upon professionally accepted standards. See Question 42.

40. Q. What is the relationship between the validation provisions of the Guidelines and other statements of psychological principles, such as the Standards for Educational and Psychological Tests, published by the American Psychological Association (Wash., D.C., 1974) (hereinafter "American Psychological Association Standards")?

A. The validation provisions of the Guidelines are designed to be consistent with the generally accepted standards of the psychological profession. These Guidelines also interpret Federal equal employment opportunity law, and embody some policy determinations of an administrative nature. To the extent that there may be differences between particular provisions of the Guidelines and expressions of validation principles found elsewhere, the Guidelines will be given precedence by the enforcement agencies.

41. Q. When should a validity study be carried out?

A. When a selection procedure has adverse impact on any race, sex or ethnic group, the Guidelines generally call for a validity study or the elimination of adverse impact. See Sections 3A and 6, and Questions 9, 31, and 36. If a selection procedure has adverse impact, its use in making employment decisions without adequate evidence of validity would be inconsistent with the Guidelines. Users who choose to continue the use of a selection procedure with an adverse impact until the procedure is challenged increase the risk that they will be found to be engaged in discriminatory practices and will be liable for back pay awards, plaintiffs' attorneys' fees, loss of Federal contracts, subcontracts or grants, and the like. Validation studies begun on the eve of litigation have seldom been found to be adequate. Users who choose to validate selection procedures should consider

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the potential benefit from having a validation study completed or well underway before the procedures are administered for use in employment decisions.

42. Q. Where can a user obtain professional advice concerning validation of selection procedures?

A. Many industrial and personnel psychologists validate selection procedures, review published evidence of validity and make recommendations with respect to the use of selection procedures. Many of these individuals are members or fellows of Division 14 (Industrial and Organizational Psychology) or Division 5 (Evaluation and Measurement) of the American Psychological Association. They can be identified in the membership directory of that organization. A high level of qualification is represented by a diploma in Industrial Psychology awarded by the American Board of Professional Psychology.

Individuals with the necessary competence may come from a variety of backgrounds. The primary qualification is pertinent training and experience in the conduct of validation research.

Industrial psychologists and other persons competent in the field may be found as faculty members in colleges and universities (normally in the departments of psychology or business administration) or working as individual consultants or as members of a consulting organization.

Not all psychologists have the necessary expertise. States have boards which license and certify psychologists, but not generally in a specialty such as industrial psychology. However, State psychological associations may be a source of information as to individuals qualified to conduct validation studies. Addresses of State psychological associations or other sources of information may be obtained from the American Psychological Association, 1200 Seventeenth Street, NW., Washington, D.C. 20036.

43. Q. Can a selection procedure be a valid predictor of performance on a job in a certain location and be invalid for predicting success on a different job or the same job in a different location?

A. Yes. Because of differences in work behaviors, criterion measures, study samples or other factors, a selection procedure found to have validity in one situation does not necessarily have validity in different circumstances. Conversely, a selection procedure not found to have validity in one situation may have validity in different circumstances. For these reasons, the Guidelines require that certain standards be satisfied before a user may rely upon findings of validity in another situation. Section 7 and Section 14D. See also, Question 66. Cooperative and multi-unit studies are however encouraged, and, when those standards of the Guidelines are satisfied, validity evidence specific to each location is not required. See Section 7C and Section 8.

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44. Q. Is the user of a selection procedure required to develop the procedure?

A. No. A selection procedure developed elsewhere may be used. However, the user has the obligation to show that its use for the particular job is consistent with the Guidelines. See Section 7.

45. Q. Do the Guidelines permit users to engage in cooperative efforts to meet the Guidelines?

A. Yes. The Guidelines not only permit but encourage such efforts. Where users have participated in a cooperative study which meets the validation standards of these Guidelines and proper account has been taken of variables which might affect the applicability of the study to specific users, validity evidence specific to each user will not be required. Section 8.

46. Q. Must the same method for validation be used for all parts of a selection process?

A. No. For example, where a selection process includes both a physical performance test and an interview, the physical test might be supported on the basis of content validity, and the interview on the basis of a criterion-related study.

47. Q. Is a showing of validity sufficient to assure the lawfulness of the use of a selection procedure?

A. No. The use of the selection procedure must be consistent with the validity evidence. For example, if a research study shows only that, at a given passing score the test satisfactorily screens out probable failures, the study would not justify the use of substantially different passing scores, or of ranked lists of those who passed. See Section 5G. Similarly, if the research shows that a battery is valid when a particular set of weights is used, the weights actually used must conform to those that were established by the research.

48. Q. Do the Guidelines call for a user to consider and investigate alternative selection procedures when conducting a validity study?

A. Yes. The Guidelines call for a user, when conducting a validity study, to make a reasonable effort to become aware of suitable alternative selection procedures and methods of use which have as little adverse impact as possible, and to investigate those which are suitable. Section 3B.

An alternative procedure may not previously have been used by the user for the job in question and may not have been extensively used elsewhere. Accordingly, the preliminary determination of the suitability of the alternative selection procedure for the user and job in question may have to be made on the basis of incomplete information. If on the basis of the evidence available, the user determines that the alternative selection

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procedure is likely to meet its legitimate needs, and is likely to have less adverse impact than the existing selection procedure, the alternative should be investigated further as a part of the validity study. The extent of the investigation should be reasonable. Thus, the investigation should continue until the user has reasonably concluded that the alternative is not useful or not suitable, or until a study of its validity has been completed. Once the full validity study has been completed, including the evidence concerning the alternative procedure, the user should evaluate the results of the study to determine which procedure should be used. See Section 3B and Question 50.

49. Q. Do the Guidelines call for a user continually to investigate "suitable alternative selection procedures and suitable alternative methods of using the selection procedure which have as little adverse impact as possible?"

A. No. There is no requirement for continual investigation. A reasonable investigation of alternatives is called for by the Guidelines as a part of any validity study. Once the study is complete and validity has been found, however, there is generally no obligation to conduct further investigations, until such time as a new study is called for. See, Sections 3B and 5K. If a government agency, complainant, civil rights organization or other person having a legitimate interest shows such a user an alternative procedure with less adverse impact and with substantial evidence of validity for the same job in similar circumstances, the user is obliged to investigate only the particular procedure which has been presented. Section 3B.

50. Q. In what circumstances do the Guidelines call for the use of an alternative selection procedure or an alternative method of using the procedure?

A. The alternative selection procedure (or method of use) should be used when it has less adverse impact and when the evidence shows that its validity is substantially the same or greater for the same job in similar circumstances. Thus, if under the original selection procedure the selection rate for black applicants was only one half (50 percent) that of the selection rate for white applicants, whereas under the alternative selection procedure the selection rate for blacks is two-thirds (67 percent) that of white applicants, the new alternative selection procedure should be used when the evidence shows substantially the same or greater validity for the alternative than for the original procedure. The same principles apply to a new user who is deciding what selection procedure to institute.

51. Q. What are the factors to be considered in determining whether the validity for one procedure is substantially the same as or greater than that of another procedure?

A. In the case of a criterion-related validity study, the factors include the importance of the criteria for which significant relationships are found, the magnitude of the relationship between selection procedure scores and criterion measures, and the size and composition of the samples used. For content validity, the strength of validity evidence would depend upon the proportion of critical and/or important job behaviors measured, and the extent to which the selection procedure resembles actual work samples or work

behaviors. Where selection procedures have been validated by different strategies, or by construct validity, the determination should be made on a case-by-case basis.

52. Q. The Guidelines require consideration of alternative procedures and alternative methods of use, in light of the evidence of validity and utility and the degree of adverse impact of the procedure. How can a user know that any selection procedure with an adverse impact is lawful?

A. The Uniform Guidelines (Section 5G) expressly permit the use of a procedure in a manner supported by the evidence of validity and utility, even if another method of use has a lesser adverse impact. With respect to consideration of alternative selection procedures, if the user made a reasonable effort to become aware of alternative procedures, has considered them and investigated those which appear suitable as a part of the validity study, and has shown validity for a procedure, the user has complied with the Uniform Guidelines. The burden is then on the person challenging the procedure to show that there is another procedure with better or substantially equal validity which will accomplish the same legitimate business purposes with less adverse impact. Section 3B. See also, *Albemarle Paper Co. v. Moody*, 422 U.S. 405.

53. Are the Guidelines consistent with the decision of the Supreme Court in *Furnco Construction Corp. v. Waters*, -- U.S. --, 98 S. Ct. 2943 (1978) where the Court stated: "Title VII *** does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees."

A. Yes. The quoted statement in *Furnco v. Waters* was made on a record where there was no adverse impact in the hiring process, no different treatment, no intentional discrimination, and no contractual obligations under E.O. 11246. Section 3B of the Guidelines is predicated upon a finding of adverse impact. Section 3B indicates that, when two or more selection procedures are available which serve a legitimate business purpose with substantially equal validity, the user should use the one which has been demonstrated to have the lesser adverse impact. Part V of the Overview of the Uniform Guidelines, in elaborating on this principle, states: "Federal equal employment opportunity law has added a requirement to the process of validation. In conducting a validation study, the employer should consider available alternatives which will achieve its legitimate purpose with lesser adverse impact."

Section 3B of the Guidelines is based on the principle enunciated in the Supreme Court decision in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) that, even where job relatedness has been proven, the availability of other tests or selection devices which would also serve the employer's legitimate interest in "efficient and trustworthy workmanship" without a similarly undesirable racial effect would be evidence that the employer was using its tests merely as a pretext for discrimination.

Where adverse impact still exists, even though the selection procedure has been validated, there continues to be an obligation to consider alternative procedures which reduce or remove that adverse impact if an opportunity presents itself to do so without

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sacrificing validity. Where there is no adverse impact, the *Furnco* principle rather than the *Albemarle* principle is applicable.

IV. Technical Standards

54. Q. How does a user choose which validation strategy to use?

A. A user should select a validation strategy or strategies which are (1) appropriate for the type of selection procedure, the job, and the employment situation, and (2) technically and administratively feasible. Whatever method of validation is used, the basic logic is one of prediction; that is, the presumption that level of performance on the selection procedure will, on the average, be indicative of level of performance on the job after selection. Thus, a criterion-related study, particularly a predictive one, is often regarded as the closet to such an ideal. See American Psychological Association Standards, pp. 26-27.

Key conditions for a criterion-related study are a substantial number of individuals for inclusion in the study, and a considerable range of performance on the selection and criterion measures. In addition, reliable and valid measures of job performance should be available, or capable of being developed. Section 14B(1). Where such circumstances exist, a user should consider use of the criterion-related strategy.

Content validity is appropriate where it is technically and administratively feasible to develop work samples or measures of operationally defined skills, knowledges, or abilities which, are a necessary prerequisite to observable work behaviors. Content validity is not appropriate for demonstrating the validity of tests of mental processes or aptitudes or characteristics; and is not appropriate for knowledges, skills or abilities which an employee will be expected to learn on the job. Section 14C(1).

The application of a construct validity strategy to support employee selection procedures is newer and less developed than criterion-related or content validity strategies. Continuing research may result in construct validity becoming more widely used. Because construct validity represents a generalization of findings, one situation in which construct validity might hold particular promise is that where it is desirable to use the same selection procedures for a variety of jobs. An overriding consideration in whether or not to consider construct validation is the availability of an individual with a high level of expertise in this field.

In some situations only one kind of validation study is likely to be appropriate. More than one strategy may be possible in other circumstances, in which case administrative considerations such as time and expense may be decisive. A combination of approaches may be feasible and desirable.

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55. Q. Why do the Guidelines recognize only content, construct, and criterion-related validity?

A. These three validation strategies are recognized in the Guidelines since they represent the current professional consensus. If the professional community recognizes new strategies or substantial modifications of existing strategies, they will be considered and, if necessary, changes will be made in the Guidelines. Section 5A.

56. Q. Why don't the Uniform Guidelines state a preference for criterion-related validity over content or construct validity?

A. Generally accepted principles of the psychological profession support the use of criterion-related, content or construct validity strategies as appropriate. American Psychological Association Standards, E, pp. 25-26. This use was recognized by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 247, fn. 13. Because the Guidelines describe the conditions under which each validity strategy is inappropriate, there is no reason to state a general preference for any one validity strategy.

57. Q. Are the Guidelines intended to restrict the development of new testing strategies, psychological theories, methods of job analysis or statistical techniques?

A. No. The Guidelines are concerned with the validity and fairness selection procedures used in making employment decisions, and are not intended to limit research and new developments. See Question 55.

58. Q. Is a full job analysis necessary for all validity studies?

A. It is required for all content and construct studies, but not for all criterion-related studies. See Sections 14A and 14B(2). Measures of the results or outcomes of work behaviors such as production rate or error rate may be used without a full job analysis where a review of information about the job shows that these criteria are important to the employment situation of the user. Similarly, measures such as absenteeism, tardiness or turnover may be used without a full job analysis if these behaviors are shown by a review of information about the job to be important in the specific situation. A rating of overall job performance may be used without a full job analysis only if the user can demonstrate its appropriateness for the specific job and employment situation through a study of the job. The Supreme Court held in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), that measures of overall job performance should be carefully developed and their use should be standardized and controlled.

59. Q. Section 5J on interim use requires the user to have available substantial evidence of validity. What does this mean?

A. For purposes of compliance with 5J, "substantial evidence" means evidence which may not meet all the validation requirements of the Guidelines but which raises a strong

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inference that validity pursuant to these standards will soon be shown. Section 5J is based on the proposition that it would not be an appropriate allocation of Federal resources to bring enforcement proceedings against a user who would soon be able to satisfy fully the standards of the Guidelines. For example, a criterion-related study may have produced evidence which meets almost all of the requirements of the Guidelines with the exception that the gathering of the data of test fairness is still in progress and the fairness study has not yet produced results. If the correlation coefficient for the group as a whole permits the strong inference that the selection procedure is valid, then the selection procedure may be used on an interim basis pending the completion of the fairness study.

60. Q. What are the potential consequences to a user when a selection procedure is used on an interim basis?

A. The fact that the Guidelines permit interim use of a selection procedure under some conditions does not immunize the user from liability for back pay, attorney fees and the like, should use of the selection procedure later be found to be in violation of the Guidelines. Section 5J. For this reason, users should take steps to come into full compliance with the Guidelines as soon as possible. It is also appropriate for users to consider ways of minimizing adverse impact during the period of interim use.

61. Q. Must provisions for retesting be allowed for job-knowledge tests, where knowledge of the test content would assist in scoring well on it the second time?

A. The primary intent of the provision for retesting is that an applicant who was not selected should be given another chance. Particularly in the case of job-knowledge tests, security precautions may preclude retesting with the same test after a short time. However, the opportunity for retesting should be provided for the same job at a later time, when the applicant may have acquired more of the relevant job knowledges.

62. Q. Under what circumstances may a selection procedure be used for ranking?

A. Criterion-related and construct validity strategies are essentially empirical, statistical processes showing a relationship between performance on the selection procedure and performance on the job. To justify ranking under such validity strategies, therefore, the user need show mathematical support for the proposition that persons who receive higher scores on the procedure are likely to perform better on the job.

Content validity, on the other hand, is primarily a judgmental process concerned with the adequacy of the selection procedure as a sample of the work behaviors. Use of a selection procedure on a ranking basis may be supported by content validity if there is evidence from job analysis or other empirical data that what is measured by the selection procedure is associated with differences in levels of job performance. Section 14C(9); see also Section 5G.

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Any conclusion that a content validated procedure is appropriate for ranking must rest on an inference that higher scores on the procedure are related to better job performance. The more closely and completely the selection procedure approximates the important work behaviors, the easier it is to make such an inference. Evidence that better performance on the procedure is related to greater productivity or to performance of behaviors of greater difficulty may also support such an inference.

Where the content and context of the selection procedure are unlike those of the job, as, for example, in many paper-and-pencil job knowledge tests, it is difficult to infer an association between levels of performance on the procedure and on the job. To support a test of job knowledge on a content validity basis, there must be evidence of a specific tie-in between each item of knowledge tested and one or more work behaviors. See Question 79. To justify use of such a test for ranking, it would also have to be demonstrated from empirical evidence either that mastery of more difficult work behaviors, or that mastery of a greater scope of knowledge corresponds to a greater scope of important work behaviors.

For example, for a particular warehouse worker job, the job analysis may show that lifting a 50-pound object is essential, but the job analysis does not show that lifting heavier objects is essential or would result in significantly better job performance. In this case a test of ability to lift 50 pounds could be justified on a content validity basis for a pass/fail determination. However, ranking of candidates based on relative amount of weight that can be lifted would be inappropriate.

In another instance, a job analysis may reflect that, for the job of machine operator, reading of simple instructions is not a major part of the job but is essential. Thus, reading would be a critical behavior under the Guidelines. See Section 14C(8). Since the job analysis in this example did not also show that the ability to read such instructions more quickly or to understand more complex materials would be likely to result in better job performance, a reading test supported by content validity alone should be used on a pass/fail rather than a ranking basis. In such circumstances, use of the test for ranking would have to be supported by evidence from a criterion-related (or construct) validity study.

On the other hand, in the case of a person to be hired for a typing pool, the job analysis may show that the job consists almost entirely of typing from manuscript, and that productivity can be measured directly in terms of finished typed copy. For such a job, typing constitutes not only a critical behavior, but it constitutes most of the job. A higher score on a test which measured words per minute typed, with adjustments for errors, would therefore be likely to predict better job performance than a significantly lower score. Ranking or grouping based on such a typing test would therefore be appropriate under the Guidelines.

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63. Q. If selection procedures are administered by an employment agency or a consultant for an employer, is the employer relieved of responsibilities under the Guidelines?

A. No. The employer remains responsible. It is therefore expected that the employer will have sufficient information available to show: (a) What selection procedures are being used on its behalf; (b) the total number of applicants for referral by race, sex and ethnic group; (c) the number of persons, by race, sex and ethnic group, referred to the employer; and (d) the impact of the selection procedures and evidence of the validity of any such procedure having an adverse impact as determined above.

A. CRITERION-RELATED VALIDITY

64. Q. Under what circumstances may success in training be used as a criterion in criterion-related validity studies?

A. Success in training is an appropriate criterion when it is (1) necessary for successful job performance or has been shown to be related to degree of proficiency on the job and (2) properly measured. Section 14B(3). The measure of success in training should be carefully developed to ensure that factors which are not job related do not influence the measure of training success. Section 14B(3).

65. Q. When may concurrent validity be used?

A. A concurrent validity strategy assumes that the findings from a criterion-related validity study of current employees can be applied to applicants for the same job. Therefore, if concurrent validity is to be used, differences between the applicant and employee groups which might affect validity should be taken into account. The user should be particularly concerned with those differences between the applicant group and current employees used in the research sample which are caused by work experience or other work related events or by prior selection of employees and selection of the sample. See Section 14B(4).

66. Q. Under what circumstances can a selection procedure be supported (on other than an interim basis) by a criterion-related validity study done elsewhere?

A. A validity study done elsewhere may provide sufficient evidence if four conditions are met (Sec. 7B):

1. The evidence from the other studies clearly demonstrates that the procedure was valid in its use elsewhere.
2. The job(s) for which the selection procedure will be used closely matches the job(s) in the original study as shown by a comparison of major work behaviors as shown by the job analyses in both contexts.

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3. Evidence of fairness from the other studies is considered for those groups constituting a significant factor in the user's labor market. Section 7B(3). Where the evidence is not available the user should conduct an internal study of test fairness, if technically feasible. Section 7B(3).
4. Proper account is taken of variables which might affect the applicability of the study in the new setting, such as performance standards, work methods, representative ness of the sample in terms of experience or other relevant factors, and the currency of the study.

67. Q. What does "unfairness of selection procedure" mean?

A. When a specific score on a selection procedure has a different meaning in terms of expected job performance for members of one race, sex or ethnic group than the same score does for members of another group, the use of that selection procedure may be unfair for members of one of the groups. See section 16V. For example, if members of one group have an average score of 40 on the selection procedure, but perform on the job as well as another group which has an average score of 50, then some uses of the selection procedure would be unfair to the members of the lower scoring group. See Question 70.

68. Q. When should the user investigate the question of fairness?

A. Fairness should be investigated generally at the same time that a criterion-related validity study is conducted, or as soon thereafter as feasible. Section 14B(8).

69. Q. Why do the Guidelines require that users look for evidence of unfairness?

A. The consequences of using unfair selection procedures are severe in terms of discriminating against applicants on the basis of race, sex or ethnic group membership. Accordingly, these studies should be performed routinely where technically feasible and appropriate, whether or not the probability of finding unfairness is small. Thus, the Supreme Court indicated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, that a validation study was "materially deficient" because, among other reasons, it failed to investigate fairness where it was not shown to be unfeasible to do so. Moreover, the American Psychological Association Standards published in 1974 call for the investigation of test fairness in criterion-related studies wherever feasible (pp. 43-44).

70. Q. What should be done if a selection procedure is unfair for one or more groups in the relevant labor market?

A. The Guidelines discuss three options. See Section 14B(8)(d). First, the selection instrument may be replaced by another validated instrument which is fair to all groups. Second, the selection instrument may be revised to eliminate the sources of unfairness. For example, certain items may be found to be the only ones which cause the unfairness to a particular group, and these items may be deleted or replaced by others. Finally, revisions may be made on the method of use of the selection procedure to ensure that the

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probability of being selected is compatible with the probability of successful job performance.

The Federal enforcement agencies recognize that there is serious debate in the psychological profession on the question of test fairness, and that information on that concept is developing. Accordingly, the enforcement agencies will consider developments in this field in evaluating actions occasioned by a finding of test unfairness.

71. Q. How is test unfairness related to differential validity and to differential prediction?

A. Test unfairness refers to use of selection procedures based on scores when members of one group characteristically obtain lower scores than members of another group, and the differences are not reflected in measures of job performance. See Sections 16V and 14B(8)(a), and Question 67.

Differential validity and test unfairness are conceptually distinct. Differential validity is defined as a situation in which a given instrument has significantly different validity coefficients for different race, sex or ethnic groups. Use of a test may be unfair to some groups even when differential validity is not found.

Differential prediction is a central concept for one definition of test unfairness. Differential prediction occurs when the use of the same set of scores systematically over predicts or under predicts job performance for members of one group as compared to members of another group.

Other definitions of test unfairness which do not relate to differential prediction may, however, also be appropriately applied to employment decisions. Thus these Guidelines are not intended to choose between fairness models as long as the model selected is appropriate to the manner in which the selection procedure is used.

72. Q. What options does a user have if a criterion-related study is appropriate but is not feasible because there are not enough persons in the job?

A. There are a number of options the user should consider, depending upon the particular facts and circumstances such as:

1. Change the procedure so as to eliminate adverse impact (see Section 6A);
2. Validate a procedure through a content validity strategy, if appropriate (see Section 14C and Questions 54 and 74);
3. Use a selection procedure validated elsewhere in conformity with the Guidelines (see Sections 7-8 and Question 66);
4. Engage in a cooperative study with other facilities or users (in cooperation with such users either bilaterally or through industry or trade associations or governmental groups), or participate in research studies conducted by the state employment security system. Where different locations are combined, care is needed to insure that the jobs studied are

in fact the same and that the study is adequate and in conformity with the Guidelines (see Sections 8 and 14 and Question 45).

5. Combine essentially similar jobs into a single study sample. See Section 14B(1).

B. CONTENT VALIDITY

73. Q. Must a selection procedure supported by content validity be an actual "on the job" sample of work behaviors?

A. No. The Guidelines emphasize the importance of a close approximation between the content of the selection procedure and the observable behaviors or products of the job, so as to minimize the inferential leap between performance on the selection procedure and job performance. However, the Guidelines also permit justification on the basis of content validity of selection procedures measuring knowledges, skills, or abilities which are not necessarily samples of work behaviors if: (1) The knowledge, skill, or ability being measured is operationally defined in accord with Section 14C(4); and (2) that knowledge, skill, or ability is a prerequisite for critical or important work behaviors. In addition users may justify a requirement for training, or for experience obtained from prior employment or volunteer work, on the basis of content validity, even though the prior training or experience does not duplicate the job. See Section 14B(6).

74. Q. Is the use of a content validity strategy appropriate for a procedure measuring skills or knowledges which are taught in training after initial employment?

A. Usually not. The Guidelines state (Section 14C[1]) that content validity is not appropriate where the selection procedure involves knowledges, skills, or abilities which the employee will be expected to learn "on the job". The phrase "on the job" is intended to apply to training which occurs after hiring, promotion or transfer. However, if an ability, such as speaking and understanding a language, takes a substantial length of time to learn, is required for successful job performance, and is not taught to those initial hires who possess it in advance, a test for that ability may be supported on a content validity basis.

75. Q. Can a measure of a trait or construct be validated on the basis of content validity?

A. No. Traits or constructs are by definition underlying characteristics which are intangible and are not directly observable. They are therefore not appropriate for the sampling approach of content validity. Some selection procedures, while labeled as construct measures, may actually be samples of observable work behaviors. Whatever the label, if the operational definitions are in fact based upon observable work behaviors, a selection procedure measuring those behaviors may be appropriately supported by a content validity strategy. For example, while a measure of the construct "dependability" should not be supported on the basis of content validity, promptness and regularity of attendance in a prior work record are frequently inquired into as a part of a selection procedure, and such measures may be supported on the basis of content validity.

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76. Q. May a test which measures what the employee has learned in a training program be justified for use in employment decisions on the basis of content validity?

A. Yes. While the Guidelines (Section 14C[1]) note that content validity is not an appropriate strategy for knowledges, skills or abilities which an employee "will be expected to learn on the job," nothing in the Guidelines suggests that a test supported by content validity is not appropriate for determining what the employee has learned on the job, or in a training program. If the content of the test is relevant to the job, it may be used for employment decisions such as retention or assignment. See Section 14C(7).

77. Q. Is a task analysis necessary to support a selection procedure based on content validity?

A. A description of all tasks is not required by the Guidelines. However, the job analysis should describe all important work behaviors and their relative importance and their level of difficulty. Sections 14C(2) and 15C(3). The job analysis should focus on observable work behaviors and, to the extent appropriate, observable work products, and the tasks associated with the important observable work behaviors and/or work products. The job analysis should identify how the critical or important work behaviors are used in the job, and should support the content of the selection procedure.

78. Q. What is required to show the content validity of a paper-and-pencil test that is intended to approximate work behaviors?

A. Where a test is intended to replicate a work behavior, content validity is established by a demonstration of the similarities between the test and the job with respect to behaviors, products, and the surrounding environmental conditions. Section 14B(4).

Paper-and-pencil tests which are intended to replicate a work behavior are most likely to be appropriate where work behaviors are performed in paper and pencil form (e.g., editing and bookkeeping). Paper-and-pencil test of effectiveness in interpersonal relations (e.g., sales or supervision), or of physical activities (e.g., automobile repair) or ability to function properly under danger (e.g., firefighters) generally are not close enough approximations of work behaviors to show content validity.
The appropriateness of tests of job knowledge, whether or not in pencil and paper form, is addressed in Question 79.

79. Q. What is required to show the content validity of a test of a job knowledge?

A. There must be a defined, well recognized body of information, and knowledge of the information must be prerequisite to performance of the required work behaviors. The work behavior(s) to which each knowledge is related should be identified on an item-by-item basis. The test should fairly sample the information that is actually used by the employee on the job, so that the level of difficulty of the test items should correspond to

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the level of difficulty of the knowledge as used in the work behavior. See Section 14C(1) and (4).

80. Q. Under content validity, may a selection procedure for entry into a job be justified on the grounds that the knowledges, skills or abilities measured by the selection procedure are prerequisites to successful performance in a training program?

A. Yes, but only if the training material and the training program closely approximate the content and level of difficulty of the job and if the knowledges, skills or abilities are not those taught in the training program. For example, if training materials are at a level of reading difficulty substantially in excess of the reading difficulty of materials used on the job, the Guidelines would not permit justification on a content validity basis of a reading test based on those training materials for entry into the job.

Under the Guidelines a training program itself is a selection procedure if passing it is a prerequisite to retention or advancement. See Section 2C and 14C(17). As such, the content of the training program may only be justified by the relationship between the program and critical or important behaviors of the job itself, or through a demonstration of the relationship between measures of performance in training and measures of job performance.

Under the example given above, therefore, where the requirements in the training materials exceed those on the job, the training program itself could not be validated on a content validity basis if passing it is a basis for retention or promotion.

C. CONSTRUCT VALIDITY

81. Q. In Section 5, "General Standards for Validity Studies," construct validity is identified as no less acceptable than criterion-related and content validity. However, the specific requirements for construct validity, in Section 14D, seem to limit the generalizability of construct validity to the rules governing criterion-related validity. Can this apparent inconsistency be reconciled?

A. Yes. In view of the developing nature of construct validation for employment selection procedures, the approach taken concerning the generalizability of construct validity (section 14D) is intended to be a cautious one. However, construct validity may be generalized in circumstances where transportability of tests supported on the basis of criterion-related validity would not be appropriate. In establishing transportability of criterion-related validity, the jobs should have substantially the same major work behaviors. Section 7B(2). Construct validity, on the other hand, allows for situations where only some of the important work behaviors are the same. Thus, well-established measures of the construct which underlie particular work behaviors and which have been shown to be valid for some jobs may be generalized to other jobs which have some of the same work behaviors but which are different with respect to other work behaviors. Section 14D(4).

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As further research and professional guidance on construct validity in employment situations emerge, additional extensions of construct validity for employee selection may become generally accepted in the profession. The agencies encourage further research and professional guidance with respect to the appropriate use of construct validity.

V. Records and Documentation

82. Q. Do the Guidelines have simplified record keeping for small users (employers who employ one hundred or fewer employees and other users not required to file EEO-1, et seq. reports)?

A. Yes. Although small users are fully covered by Federal equal employment opportunity law, the Guidelines have reduced their record-keeping burden. See option in Section 15A(1). Thus, small users need not make adverse impact determinations nor are they required to keep applicant data on a job-by-job basis. The agencies also recognize that a small user may find that some or all validation strategies are not feasible. See Question 54. If a small user has reason to believe that its selection procedures have adverse impact and validation is not feasible, it should consider other options. See Sections 7A and 8 and Questions 31, 36, 45, 66, and 72.

83. Q. Is the requirement in the Guidelines that users maintain records of the race, national origin, and sex of employees and applicants constitutional?

A. Yes. For example, the United States Court of Appeals for the First Circuit rejected a challenge on constitutional and other grounds to the Equal Employment Opportunity Commission regulations requiring State and local governmental units to furnish information as to race, national origin and sex of employees. *United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976), *cert. denied, sub nom. New Hampshire v. United States*, 429 U.S. 1023. The Court held that the record keeping and reporting requirements promulgated under Title VII of the Civil Rights Act of 1964, as amended, were reasonably necessary for the Federal agency to determine whether the state was in compliance with Title VII and thus were authorized and constitutional. The same legal principles apply to record keeping with respect to applicants.

Under the Supremacy Clause of the Constitution, the Federal law requiring maintenance of records identifying race, sex and national origin overrides any contrary provision of State law. See Question 8.

The agencies recognize, however, that such laws have been enacted to prevent misuse of this information. Thus, employers should take appropriate steps to ensure proper use of all data. See Question 88.

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84. Q. Is the user obliged to keep records which show whether its selection processes have an adverse impact on race, sex, or ethnic groups?

A. Yes. Under the Guidelines users are obliged to maintain evidence indicating the impact which their selection processes have on identifiable race, sex or ethnic groups. Sections 4 A and B. If the selection process for a job does have an adverse impact on one or more such groups, the user is expected to maintain records showing the impact for the individual procedures. Section 15A(2).

85. Q. What are the record keeping obligations of a user who cannot determine whether a selection process for a job has adverse impact because it makes an insufficient number of selections for that job in a year?

A. In such circumstances the user should collect, maintain, and have available information on the impact of the selection process and the component procedures until it can determine that adverse impact does not exist for the overall process or until the job has changed substantially. Section 15A(2)(c).

86. Q. Should applicant and selection information be maintained for race or ethnic groups constituting less than 2% of the labor force and the applicants?

A. Small employers and other small users are not obliged to keep such records. Section 15A(1). Employers with more than 100 employees and other users required to file EEO-1 et seq. reports should maintain records and other information upon which impact determinations could be made, because section 15A2 requires the maintenance of such information for "any of the groups for which records are called for by section 4B above." See also, Section 4A.

No user, regardless of size, is required to make adverse impact determinations for race or ethnic groups constituting less than 2% of the labor force and the applicants. See Question 16.

87. Q. Should information be maintained which identifies applicants and persons selected both by sex and by race or ethnic group?

A. Yes. Although the Federal agencies have decided not to require computations of adverse impact by subgroups (white males, black males, white females, black females--see Question 17), the Guidelines call for record keeping which allows identification of persons by sex, combined with race or ethnic group, so as to permit the identification of discriminatory practices on any such basis. Section 4A and 4B.

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88. Q. How should a user collect data on race, sex or ethnic classifications for purposes of determining the impact of selection procedures?

A. The Guidelines have not specified any particular procedure, and the enforcement agencies will accept different procedures that capture the necessary information. Where applications are made in person, a user may maintain a log or applicant flow chart based upon visual observation, identifying the number of persons expressing an interest, by sex and by race or national origin; may in some circumstances rely upon personal knowledge of the user; or may rely upon self-identification. Where applications are not made in person and the applicants are not personally known to the employer, self-identification may be appropriate. Wherever a self-identification form is used, the employer should advise the applicant that identification by race, sex and national origin is sought, not for employment decisions, but for record-keeping in compliance with Federal law. Such self-identification forms should be kept separately from the application, and should not be a basis for employment decisions; and the applicants should be so advised. See Section 4B.

89. Q. What information should be included in documenting a validity study for purposes of these Guidelines?

A. Generally, reports of validity studies should contain all the information necessary to permit an enforcement agency to conclude whether a selection procedure has been validated. Information that is critical to this determination is denoted in Section 15 of the Guidelines by the word "(essential)."

Any reports completed after September 25, 1978, (the effective date of the Guidelines) which do not contain this information will be considered incomplete by the agencies unless there is good reason for not including the information. Users should therefore prepare validation reports according to the format of Section 15 of the Guidelines, and should carefully document the reasons if any of the information labeled "(essential)" is missing.

The major elements for all types of validation studies include the following:
When and where the study was conducted.

A description of the selection procedure, how it is used, and the results by race, sex, and ethnic group.

How the job was analyzed or reviewed and what information was obtained from this job analysis or review.

The evidence demonstrating that the selection procedure is related to the job. The nature of this evidence varies, depending upon the strategy used.

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What alternative selection procedures and alternative methods of using the selection procedure were studied and the results of this study.

The name, address and telephone number of a contact person who can provide further information about the study.

The documentation requirements for each validation strategy are set forth in detail in Section 15 B, C, D, E, F, and G. Among the requirements for each validity strategy are the following:

1. Criterion-Related Validity
A description of the criterion measures of job performance, how and why they were selected, and how they were used to evaluate employees.

A description of the sample used in the study, how it was selected, and the size of each race, sex, or ethnic group in it.

A description of the statistical methods used to determine whether scores on the selection procedure are related to scores on the criterion measures of job performance, and the results of these statistical calculations.

2. Content Validity
The content of the job, as identified from the job analysis.

The content of the selection procedure.

The evidence demonstrating that the content of the selection procedure is a representative sample of the content of the job.

3. Construct Validity
A definition of the construct and how it relates to other constructs in the psychological literature.

The evidence that the selection procedure measures the construct.

The evidence showing that the measure of the construct is related to work behaviors which involve the construct.

90. Q. Although the records called for under "Source Data", Section 15B(11) and section 15D(11), are not listed as "Essential", the Guidelines state that each user should maintain such records, and have them available upon request of a compliance agency. Are these records necessary? Does the absence of complete records preclude the further use of research data compiled prior to the issuance of the Guidelines?

A. The Guidelines require the maintenance of these records in some form "as a necessary part of the study." Section 15A(3)(c). However, such records need not be compiled or

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maintained in any specific format. The term "Essential" as used in the Guidelines refers to information considered essential to the validity report. Section 15A(3)(b). The Source Data records need not be included with reports of validation or other formal reports until and unless they are specifically requested by a compliance agency. The absence of complete records does not preclude use of research data based on those records that are available. Validation studies submitted to comply with the requirements of the Guidelines may be considered inadequate to the extent that important data are missing or there is evidence that the collected data are inaccurate.

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ADOPTION OF ADDITIONAL QUESTIONS AND ANSWERS TO CLARIFY AND PROVIDE A COMMON INTERPRETATION OF THE UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

Because of the number and importance of the issues addressed in the Uniform Guidelines on employee Selection Procedures (43 FR 38290), and the dual needs of providing a common interpretation and providing guidance to employers and other users, psychologists and others who are called upon to conduct validity studies, and Federal personnel who have enforcement responsibilities, the five issuing Federal agencies adopted and issued Questions and Answers (44 FR 11996, Mar. 2, 1979) to clarify and interpret the Uniform Guidelines. The issuing agencies recognized that it might be appropriate to address additional questions at a later date.

By letter dated October 22, 1979, the American Psychological Association, acting through its Committee on Psychological Tests and Assessment, brought to the attention of the government concerns as to the consistency of the Uniform Guidelines with the "Standards for Educational and Psychological Tests," referred to in the guidelines as the "A.P.A. Standards." The Committee noted in its letter of October 22, 1979, that it had found a high degree of consistency between the proposed Uniform Guidelines and the A.P.A. Standards on February 17, 1978, and that an attempt to resolve remaining inconsistencies was made in the published Uniform Guidelines. Stressing the view that the real impact of the Guidelines can only be fully assessed after agency instructions have been issued and applied, and after court rulings, however, the Committee raised areas of possible inconsistency between the Uniform Guidelines, as applied, and the A.P.A. Standards. In particular, the letter raises (among others) three specific concerns: (1) that the Guidelines might call for "a more rigid demand for a search for alternatives than we would deem consistent with acceptable professional practices:; (2) that, with respect to criteria for criterion related validity studies, the Guidelines failed adequately to recognize that "a total absence of bias can never be assured" and that the standards of the profession required only that "there has been a competent professional handling of this problem"; and (3) for criterion related validity studies "in some circumstances there may exist just one or two critical job duties, and that in such cases sole reliance on such a single selection procedure relevant to the critical duties would be entirely appropriate."

Staff of the Federal agencies responded, by letter of January 17, 1980, that "some of the problems discussed in your letter may be due to a lack of a clearly articulated position of the Federal agencies on these matters, rather than to actual differences between the Uniform Guidelines and professional standards." The letter of January 17, 1980, enclosed a draft of three additional Questions and Answers designed to clarify the agencies' interpretation of those three issues, and requested comments on the additional

Questions and Answers, and on the consistency of the Uniform Guidelines so interpreted with professional standards. By letter of February 11, 1980, the American Psychological Association, acting through its Committee on Psychological Tests and Assessment, found each of the Questions and Answers to be helpful and has judged, "given the accuracy of our interpretation of these Q's and A's, that these guidelines have attained consistency with the Standards in those areas in which comparisons can now be meaningfully made."

The validation provisions of the Uniform Guidelines are intended to reflect the standards of the psychological profession (Section 5C, Uniform Guidelines). The issuing agencies are of the view that the three additional Questions and Answers accurately reflect the proper interpretation of the Uniform Guidelines with respect to the three areas of concern raised by the A.P.A. Accordingly, the agencies hereby adopt the three Questions and Answers set forth below to clarify and provide a common interpretation of the Uniform Guidelines. These three additional Questions and Answers supplement the original Questions and Answers published on March 2, 1979 (44 FR 11996). As with the originals, these Questions and Answers use terms as they are defined in the Uniform Guidelines, and are intended to interpret and clarify, but not to modify, the provisions of the Uniform Guidelines."

Questions and Answers 91 and 92 are published exactly as written and attached to the letter of January 17, 1980. As the letter from the A.P.A. correctly noted, the Answer to Question 91 implies that the obligation of a user to study unpublished, professionally available research reports is dependent not only in the degree of adverse impact, but also upon the absolute number of persons who might be adversely affected. Where the number of persons affected is likely to be large, a thorough inquiry into unpublished sources is likely to be appropriate, but where the number is small, a cursory review may be sufficient.

The answer to Question 93 has been modified by the addition of an example, as suggested by the letter from A.P.A., and by clarifying language at the end of the last sentence.

The agencies recognize that additional questions may arise at a later date that warrant a formal, uniform response, and contemplate working together to provide additional guidance interpreting the Uniform Guidelines.

Supplemental Questions and Answers

91. Q. What constitutes a "reasonable investigation of alternatives" as that phrase is used in the Answer to Question 49?

A. The Uniform Guidelines call for a reasonable investigation of alternatives for a proposed selection procedure as a part of any validity study. See Section 3B and Questions 48 and 49. A reasonable investigation of alternatives would begin with a search of the published literature (test manuals and journal articles) to develop a list of currently available selection procedures that have in the past been found to be valid for

the job in question or for similar jobs. A further review would then be required of all selection procedures at least as valid as the proposed procedure to determine if any offer the probability of lesser adverse impact. Where the information on the proposed selection procedure indicates a low degree of validity and high adverse impact, and where the published literature does not suggest a better alternative, investigation of other sources (for example, professionally-available, unpublished research studies) may also be necessary before continuing use of the proposed procedure can be justified. In any event, a survey of the enforcement agencies alone does not constitute a reasonable investigation of alternatives. Professional reporting of studies of validity and adverse impact is encouraged within the constraints of practicality.

92. Q. Do significant differences between races, sexes, or ethnic groups on criterion measures mean that the criterion measures are biased?

A. Not necessarily. However, criterion instruments should be carefully constructed and data collection procedures should be carefully controlled to minimize the possibility of bias. See Section 14B(2). All steps taken to ensure that criterion measures are free from factors which would unfairly alter the scores of members of any group should be described in the validation report, as required by Section 15B(5) of the Guidelines.

93. Q. Can the use of a selection procedure which has been shown to be significantly related to only one or two job duties be justified under the Guidelines?

A. Yes. For example, where one or two work behaviors are the only critical or important ones, the sole use of a selection procedure which is related only to these behaviors may be appropriate. For example, a truck driver has the major duty of driving; and in addition handles customer accounts. Use of a selection procedure related only to truck driving might be acceptable, even if it showed no relationship to the handling of customer accounts. However, one or two significant relationships may occur by chance when many relationships are examined. In addition, in most practical situations, there are many critical and/or important work behaviors or work outcomes. For these reasons, reliance upon one or two significant relationships will be subject to close review, particularly where they are not the only important or critical ones.

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