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U.S. DEPARTMENT OF LABOR EMPLOYMENT AND TRAINING ADMINISTRATION Bureau of Apprenticeship and Training Washington, D.C. 20213 Symbols: TTE:WJM	Distribution: Regional Directors only BAT-C	SUBJECT: Selected Answers to Questions on Title 29 CFR Part 30, Revised. "Equal Employment Opportunin Apprenticeship and Training."	CODE: 501

Purpose: To provide guidance to the Regional Directors in answering questions regarding implementation of Title 29 CFR Part 30, Revised.

Background: Many staff members and sponsors have proposed questions as to the interpretation of various sections of this regulation. The attached questions and answers represent interpretations by the Solicitor's representative.

Action: Staff is instructed to answer queries covered by the attachment in line with the opinions of the Solicitor's representative. Any other questions of widespread impact should be cleared with the national office before an instruction is given to sponsors.

Attachment

REMARKS BY

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"29 CFR 30 -- Equal Employment Opportunity
in Apprenticeship and Training - QUESTIONS AND ANSWERS"

I thought I would like to begin with a short discussion of one particular aspect of this regulation because it seemed to me that from the large number of comments which were received on the proposal, and the number of questions which I received before I came out here, that there still is a great deal of misunderstanding as to the thrust of this regulation and what it requires, particularly with respect to the concept of goals and the concept of so-called quotas. I have given a good deal of thought to how I could describe those concepts, and I thought that I could not improve upon the language which appears in the preamble to the final regulation which is a quote from a memorandum which was issued by the federal agencies which are directly concerned with equal employment opportunity in 1973. Those are the Equal Employment Opportunity Commission, the Department of Justice, the Department of Labor, and the Civil Service Commission. That memorandum was reaffirmed in August of 1976, and I think that with the indulgence of the Committee, I would like to read a portion of that memorandum which I think is particularly relevant to this question. This is a description of the Government's position on the difference between goals and quotas and the significance of that is we feel that this regulation, as well as some other government regulations, such as Executive Order 11246, provide for "goals" but actually prohibit the use of "quotas" except in certain circumstances which I will discuss after reading this langauge.

The definition of a "quota" can best be described as follows: "Quota systems in the past have been used in other contexts as quantified limitation, the purpose of which is exclusion, but this is not its sole definition. A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained or which cannot be exceeded; the crucial consideration would be whether the mandatory number of persons have been hired or promoted. Under such a quota system, that number would be fixed to reflect the population in the area or some other numerical base, regardless of the number of potential applicants who meet necessary qualifications. If the employer failed, he would be subject to sanction. It would be no defense that the quota may have been unrealistic to start with, that he had insufficient vacancies, or that there were not enough qualified applicants although he tried in good faith to obtain them through appropriate recruitment methods."

Moving forward in this same document to the definition of a "goal," it says: "A goal, on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job market. This, if through no fault of the employer, he has fewer vacancies than expected, he is not subject to sanction because he is not expected to displace existing employees or to hire unneeded employees to meet his goal. Similarly, if he has demonstrated every good faith effort to include persons from the group which was the object of discrimination into the group being considered for selection, but has been unable to do so in sufficient numbers to meet his goal, he is not subject to sanction."

I have given a number of talks to various groups on this subject. The example of the application of the concept of "good faith efforts" which I have often used, which I think is an excellent one, comes from the application of the American Telephone and Telegraph Company's consent decree which was the consent decree entered into by the Department of Labor, Department of Justice, and the Equal Employment Opportunity Commission and AT&T in 1973. Under that decree, each operating Bell Telephone Company in the system was committed to goals and timetables for various races, sexes, and ethnic groups in various job categories that they all had around the country. After the first year and each year thereafter, compliance reviews were conducted to determine whether the companies had made good faith efforts to meet those goals. The Government compliance teams did find that certain of the companies were not in compliance with respect to meeting certain of the goals; however, they did find that many of the companies were in compliance and had made good faith efforts and found them in compliance, either on the basis of having actually met the goals or in some instances of making good faith efforts but not having been able to meet the goals and, therefore, were found to be in compliance. In fact, there was one major company on the West Coast in which the Government team found that they were not in compliance with respect to certain of the goals, had not made a good faith effort to seek out minorities, but they were in compliance with certain other of the goals, and there was a follow-up decree which was entered in Federal District Court in New Jersey concerning itself with the failure to meet the requirements of the original decree, and it did not place any additional requirements on those companies which were in compliance. It did not place any additional requirements with respect to those particular goals on that company where we found that they made a good faith effort even though they were not able to meet the goal.

So now, turning to some of the questions which were submitted to me before I came out here, I'd like to read some of those because they really can be grouped together. They raise some similar questions. The first one is, "Why did the Secretary reject the recommendation of the Federal Committee on Apprenticeship's Subcommittee on Equal Apprenticeship Opportunity not to impose quotas as a means of implementing affirmative action for women in apprenticeship?" A similar question is, "Don't you think the goals and timetables for females which are provided in the regulation are unsupportable under the Bakkle ruling for two reasons: (1) there have been formal admini-

strative proceedings and findings regarding discrimination against females; (2) the goals and timetables themselves are not tailored to remedy sex discrimination which may have occurred in different degrees in different areas and/or crafts?" Another similar question is, "Is it appropriate and legal for apprenticeship programs to maintain a separate list for women from which an applicant is picked one out of every five times to assure that the 20 percent goal is achieved? Is this a recommended procedure? If not, which procedures are preferable to assure compliance?" And finally, "When sufficient numbers of 'trainable' people are available, there is no problem. How are we to cope with all these when the number of trainable minorities, women are not available?"

First of all, with respect to the first question, I do not bear a personal message from Secretary Marshall, but I think that the reasons why this regulation was adopted are fully set forth in quite a bit of detail in the preamble to the regulation itself, and again, I don't think I could improve on that from the preamble point of view or discussion of the reasons for the regulation. I will add one thing to that which I pointed out. It is more in the nature of my own personal opinion. It has not been approved by anyone higher than myself in the Solicitor's Office. I believe it is concurred in by a number of other attorneys in the Solicitor's Office, and that is that we felt the Department of Labor was in a vulnerable position with respect to groups which had been urging that this action be taken. I believe, subject to being corrected by anyone, that 29 CFR Part 30, is the only significant major regulation dealing with equal opportunity in which the requirements with respect to one group, namely, minorities, were not the same as the requirements with respect to another group, namely, women. Executive Order 11246, for example, when it was originally promulagated in 1965 did only provide for equal opportunity and affirmative action for minorities, but it was strictly amended in 1967 to include affirmative action and equal opportunity for women. The regulations of the Department of Labor's Office of Federal Compliance Programs provides for affirmative action goals and timetables for both minorities and women. The Equal Employment Opportunity Commission, in its voluntary agreements, also provides for affirmative action goals and timetables for minorities and women. Similarly, the Justice Department, the Civil Service Commission, and, I believe--or I have not researched it extensively--all State and local Fair Employment Practices agencies.

So I think that those are the reasons why this regulation was adopted, and I think that if it is seen in its proper context as a requirement for the establishment of goals and not quotas in accordance with the discussion that I just gave, the difference between those two, that it becomes clear as to what the objectives of the Department of Labor were in adopting this regulation. More specifically, with respect to some of those questions which go to to the issue of goals and timetables, it's my reading of the decision in the Bakke case that there is nothing in that case, to the extent analogies can be drawn from the education context to the employment context, that restricts the Government in any way in the application of affirmative action programs and concepts of goals and timetables. Indeed, I think that to the

extent that the case be summarized in any shorthand way, there was headline in the Washington Post--usually the newspapers are not too good on court cases, but in this case, I think it was accurate when they came out and said, "Affirmative Action Upheld." I think that is an accurate shorthand description of the case. The Bakke case does go into a discussion of the difference between racial hiring and promotion remedies in the situation where specific findings of discrimination have been made and a remedy is being provided for that discrimination; the distinction between that and the concept of affirmative action outreach procedures, in which there has been no specific finding of discrimination and no specific ratio has been set. So I think that in response to the question, "Don't you think the goals and timetables for females which are provided in the regulations are unsupportable under the Bakke ruling for two reasons: (1) There have been no formal administrative proceedings and findings regarding discrimination against females; and (2) the goals and timetables themselves are not tailored to remedy sex discrimination which may have occured in different degrees in different areas and/or crafts?" is that the regulation does not require a ratio or quotas or preference remedy which would be permissible in the context of a specific finding of discrimination by an appropriate body, either a court or an administrative body or by a legislative body as the Supreme Court discussed in the Bakke case, and the goals and timetables themselves are not tailored to remedy sex discrimination, any which may have occurred in different degrees and/or areas and crafts. The underlying assumption seems to me to be that the regulation requires a preference or ratio or quota remedy and it does not, and, therefore, is not intended to be tied to a specific finding of discrimination.

The other side of the coin, "Is it appropriate and legal for an apprenticeship program to maintain a separate list from which an applicant is picked one out of every five times to assure that the 20 percent goal is achieved? Is this a recommended procedure? If not, which procedures are preferable to assure compliance?" I believe that the clear answer to that question is no, this is not a recommended procedure. This, in the absence of a specific finding of discrimination against women, this would not be permissible, and it is not recommended. Procedures which are preferable, I think, are generally outlined in the affirmative action provisions of the regulation, Section 30.4(b). Generally speaking, in terms of describing results of outreach and recruitment, self-examination, critical self-examination is what has been done up to the present time. What kinds of activities the sponsor has undertaken to seek out applicants and critically examining those; trying to put oneself in the position of representatives of minority groups and women, and asking oneself, "Are those procedures and activities designed to achieve the greatest outreach contact with all members of the community or potential applicants in the labor market," and that the selection process itself is based on qualifications. And there is a good deal of discussion in the regulation, Section 30.5 on the application of selection procedures for determining who is qualified. Once the vigorous outreach and recruitment activities have been undertaken and critical examination has been made of the past activities and whatever changes that are necessary have been made, then selection should be made on the basis of qualifications in accordance with appropriate and proper selection procedures as set forth in Section 30.5.

Another question that was along this line is, "When you have sufficient numbers of 'trainable' people available, there is no problem. But how are you to cope with goals where the number of trainable minorities and women are not available?" Again, I think going back to the consent decree example, if it is found upon review that vigorous affirmative activities have been made, including the kinds of things that I was talking about, and nevertheless either women and/or minorities were not applying in numbers that would be required to meet the goal, then I believe that that would warrant a finding that a good faith effort had been made and that there were no violations and no sanctions were appropriate. As I pointed out, these kinds of findings have been made in the past by the Government. Let me take one step back. I just remembered something else which I should have perhaps mentioned about the concept of goals and timetables. There is admittedly a problem in the movement from a regulation where we sit in Washington to the actual implementation and carrying out of that regulation by the people to whom it applies. I think that again that I can't improve on something which was said by a former advisor to the previous President, Leonard Garment, in a speech which he gave in which he was discussing the four-agency memorandum which talked about the difficulty in applying this concept. He said, "In the absence of sensitive administration, affirmative action plans can quickly be transformed into de facto quota systems. It is easy and tempting for those who enforce such programs to substitute such arbitrary quantitative measurements for more complex forms in measuring compliance. To give undue weight to numbers is to allow the goal of advancement for every person on the basis of merit to be lost. When these things happen, a reaction sets in and resentment and resistance builds against the whole idea of affirmative action. It is seen as a sham. Out goes the proverbial baby with the bath water." If there is sensitive administration in this process, both on the part of those expected to carry it out and on the part of those of us in the Government expected to review those activities, then we feel that this distinction can be maintained and can be carried out. So that, again, coming back to this last question, "What does a sponsor do when he cannot find sufficient numbers of qualified individuals?", I think that if the sponsor has taken vigorous affirmative action, the obligation ends there. There is no requirement that specific numbers of individuals be admitted to the program.

I shall stop after each group of questions which I think are related.

At the close of Drachsler's remarks, a period for questions and answers followed.

REPRESENTATIVE R. JENSEN: There is something in the language of the bill about a goal of 50 percent women in the work force in the metropolitan area. It talks about the goals you set for the second year, subsequent years.

DRACHSLER: Yes.

REPRESENTATIVE R. JENSEN: Is that in all cases other than the preceding one?

DRACHSLER: No. Perhaps I ought to explain how we believe that provision of the regulation should apply. That section of the regulation is an attempt to implement what is sometimes called the "roll-up concept" which is a concept which was applied in the steel industry consent decree. The goal for the second year class is based on the percentage of individuals in a particular group in the first year class and, simply, each class thereafter. So that, if I can find the language in the regulations--

DEPUTY ADMINISTRATOR J. MITCHELL: 30, in the middle column on 20768.

REPRESENTATIVE R. JENSEN: Under "f"

DRACHSLER: Yes. It says, "and set a percentage goal for women in each class beyond the entering class which is not less than the participation rate of women currently in the preceding class." Let's assume that you have a four-year apprenticeship program, and that today, in the first year of the program there are 1 or 2 percent women. But next year, after affirmative action has been taken, women have entered the first class of that program, let's say you cannot quite meet the 20 percent goal and have 15 percent of the first class of women. For the year there-after, your goal for the next class, the class in which those women will, so to speak, be graduated or be promoted, would be 15 percent and similarly for each class after that. The concept is that, over a period of years, as women are brought into the process and move up through the program, each of these goals will begin to increase as women in the lower class are increasing.

REPRESENTATIVE R. JENSEN: I'm not clear on that. Let's say there is 40 percent in a work force in a trade area. The goal has been 20 percent. What would make it possible? We get 3 percent. Next year we are still going to be 20.

DRACHSLER: The very last sentence at the end of one year from the effective date of these regulations, "Sponsors are to make appropriate adjustments in goal levels."

REPRESENTATIVE R. JENSEN: Up beyond the 20 or beyond the 3 percent?

DRACHSLER: I think that the ultimate objective, and I really do not know how long it would take to reach that, is to achieve work force parity. It can't be done in the first couple of years.

REPRESENTATIVE R. JENSEN: Let's get back to the problem of the goals in the regulation being 20 percent. Entering year class is only 3 percent. We have to make adjustment in our goal in the next year. Do we adjust about the 20 percent or adjust it above the 3 percent"

DRACHSLER: I would think--and here, again, I am speculating because we don't know what affirmative actions--

REPRESENTATIVE R. JENSEN: Assume "good faith efforts."

DRACHSLER: Assuming all good faith efforts were made, after only one year the goal should be kept at 20 percent and get some experience over a period of years to see if it can be met. The regulation says, "Make appropriate adjustments."

REPRESENTATIVE R. JENSEN: Adjustment, but it doesn't say upward or downward. My goal is 20 percent. But it's unrealistic. I have to make an adjustment the second year. I was only able to get 3 percent based on the people who are available.

DRACHSLER: Your goal for the second year class would be 3 percent, but your goal for the second year of the program, for the second entering class should be kept at 20 percent. I don't think a year is long enough to determine if that's the correct level, but I think that over a period of years, say five years, in which vigorous affirmative action has been taken every year, and it's not possible.

REPRESENTATIVE R. JENSEN: That's what you believe. I want to know what I am required to do. I have to send a memo off to the entire staff across the country. They can't reach this 20 percent. They are all making a good faith effort because we required them to do that. They can only get 3 or 4 percent in. Now, they have to make appropriate adjustments the following year based on those in the entering class.

DRACHSLER: Well, if I may, with all respect, sir, I believe if you start out with the approach that the goal is not going to be met, I think that, even unconsciously, it will be a mind set against doing the kinds of things that are necessary to meet that goal. I don't think that I am able to tell you today without any experience under this, without any attempts having been made yet to see whether it's possible.

REPRESENTATIVE R. JENSEN: We have made attempts.

DRACHSLER: Whether it would be appropriate to reduce your entering year class goals?

REPRESENTATIVE R. JENSEN: I have a corporation where there are 7% women at work now. Every Personnel Manager was told to deliver the class. Real efforts were made long before the law came out. In another corporation, that's also true. Now, we are experienced. We didn't go in there with the attitude that "We can't do it. So we are not going to do it."

DRACHSLER: As I said, I think that if there is sufficient evidence to show that particular labor market for that type of occupation--that 20 percent is not the appropriate goal, I believe that the regulation would permit adjustment downward. I want to hedge a bit with a great deal of qualification. I think that the experience that we have had with a number of programs, such as the AT&T consent decree, the steel industry consent decree, the experience in the maritime industry--all of these things which are pointed out in the preamble to the regulation, it should be possible to acutally increase the 20 percent goals.

REPRESENTATIVE R. JENSEN: If you have unrealistic goals--and that's what they are--for the first year, it is going to turn people off. You should have a more realistic goal.

CH. GLOVER: Any other questions?

REPRESENTATIVE J. AXON: David, as a State Apprenticeship Administrator and having to adopt the regulation within state law--I'm asking questions in that context. The imposition of the goals you are taking about, the consent decrees, I think those are voluntary. Is that a voluntary imposition of goals?

DRACHSLER: It's voluntary to the extent that there was no trial in court before the order. It was not voluntary to the extent that the federal government was reviewing them to determine their compliance with the various statutes.

REPRESENTATIVE J. AXON: If the sponsor doesn't adopt goals or accept goals, then it's up to the Department or the National Apprenticeship Agency to impose these goals. Now, is that within the Bakke decision? We have to impose those goals?

DRACHSLER: We are not talking about imposing goals. We are talking about estabishing a goal for the particular program involved when the reviewing agency, whether it's the State Apprenticeship Council or BAT, feels that the goal was not set at an appropriate level by the sponsor. But it does not mean imposing a quota. I don't think that the concept of ratios or preference enters into it. When we are talking about "imposing a goal," we are not talking about imposing a preferential hiring or a ratio remedy. In distinction to the case where a finding of discrimination has been made, either by a court or by a legislative body or by an administrative agency on the basis of gathering evidence and hearings of whatever it is that may be required, the use of the word "imposing a goal" where--the term "imposing a quota" does not imply imposing a goal. There are quite a number of cases which were brought by the Department of Justice against police and fire departments around the country in which 1:4, 1-2. These were based upon specific findings of past discrimination by those local agencies, fire departments and police departments. That is a separate situation, separate case from the imposing of a goal under this regulation, which would simply mean that, upon review, the appropriate government agency found that the sponsor did not set the goal at an appropriate level. It would not mean that after the goal is imposed, the goal that the sponsor had to meet that goal as if it were a quota. All the things which I said about the concept of goals would still be applicable.

REPRESENTATIVE J. AXON: Within this regulation, would you refer to Title 41, Part 61, which is under Executive Order 11246, which refers to "Public Contracts and Property Management." How does that tie in with the requirements under the law in that regulation?

DRACHSLER: I was going to come to that.

CH. GLOVER: Why don't we take Bill Roark's question. If it is on this group of questions here.

REPRESENTATIVE W. ROARK: These are Joe Maloney's. Joe couldn't be here this morning, and he asked to make sure these were presented. As Chairman of the Committee, I'm just fulfilling that responsibility. I think you have covered four out of five.

CH. GLOVER: Why don't you read the questions into the record. We will make sure that they get in the record.

REPRESENTATIVE W. ROARK: He was sent these questions by telephone, but Maloney wanted these asked. Drachsler answered four of them I am sure, but he hasn't answered number 3, to my knowledge.

DRACHSLER: Number 3 is "Section 30.3(e) of the new regulations obligates apprenticeship program sponsors to adopt the quotas which comply with Section 30.4(f) regardless of whether such program sponsor is already subject to a lower court-imposed quota. Isn't this contrary to law and reason inasmuch as the court-imposed quotas are based upon the court's determination of the extent of past discrimination in the specific program as well as an informed judgment of what can reasonably expected to be accomplished by affirmative action efforts?"

I think there are two responses I would offer to that. First of all, the regulation specifically provides that where there is program which has been approved as meeting the requirements of Title VII or of Executive Order 11246, and this would include court-approved programs, and the sponsor submits satisfactory evidence to the Department that there is compliance with that program, then the provisions of the program continue in effect and supersede the provisions of this regulation with respect to the goals that are being applied except that, when those programs come up for renewal or modification or reapproval, then the requirement of this regulation would come into play.

The other part of my response goes back to what I was saying about the difference between goals and quotas. I think that, again, where a court has made a specific finding of discrimination and has established a ratio hiring or preferential hiring remedy, that was based upon a specific finding of discrimination and a violation of a particular statute, either Title VII or the Civil Rights Act or Executive Order 11246 or a State or local Fair Employment Practices law, and the remedy was designed to get at the specific act of discrimination which occurred in that particular case, and we are not attempting to supersede that by this regulation except that, when it comes up for renewal, we think that it would be an appropriate time for affirmative action goals of the regulation to come into play. Does that answer your question?

REPRESENTATIVE P. HUNTER: This I don't think is answered. There may be legal cases or something that you can give us some guidance on. Assume that you are making a good faith effort at meeting some kind of goal-type of thing. You have layoffs at your plant and layoffs by seniority and you effect those. What happens in those cases? What's the consideration there?

DRACHSLER: That comes under another group of questions which I can take up now, if you would like, on a particular concept.

CH. GLOVER: I had one question on the previous set here. You admitted that in the administration of these regulations that there is a possibility for insensitive administration in the field. My question is: Suppose, say, Bill Konyha, in his Carpenters Union, has a case of a Local where they fear or they believe that there is administration which is more like a quota than a goal, and you have to admit really that enforcing quotas is a whole

lot simpler than enforcing goals. It's easier comparing one number to another than making a judgment about the sufficiency of good faith efforts. Suppose that the Carpenters Local in some particular city feels they have been abused in this way. Is there some kind of appeal procedure for them to go over the head of their local Compliance Officer?

DRACHSLER: There's no formal appeal procedure. There would be all the protection of a full hearing on the record before an administrative law judge if it was decided to take action, but I would think I'd like to call upon Mr. Murphy and Mr. Mitchell. That it would be possible for them to go to the next level within either the State Apprenticeship Council or the local BAT or the BAT in Washington or the Solicitor's Office if they feel they want to use an informal approach before they get to a formal hearing, if they feel that they are not being treated fairly. But even at that point, if it's decided that you feel they were treated unfairly and there is still a difference of opinion on that, there would be the due process of a formal hearing.

ADMINISTRATOR H. MURPHY: To cite an example of how I feel in the administration of this amendment, let me cite the case of North Carolina as an example. We have endeavored to bring North Carolina into compliance with Title XXIX Part 29. We sent them a letter, I believe, in October of last year, gave them several months to bring themselves into compliance. We never heard from them. Just within the past two weeks, we have sent them another letter, but now it's a very friendly warning that from now on they have got about 60 days in which to give us something that we can either deregister that State Apprenticeship Agency or then again go to the legal administrative law judgment and to the regular formal proceeding.

DRACHSLER: They would have full opportunity to present their case with witnesses and documents.

REPRESENTATIVE C. SMITH: I think this question applies to the group that we are already dealing with. I think that under 29-29, apprenticeship sponsors have the opportunity of selecting from lists which would be operative for a period of time, and people are getting lists. I was talking about the Apprenticeship Office in Chicago this week, and the Director indicated that the plumbers are placing some 60 people on the job, and that they are still using a group selected from their 1973 selection procedure. What happens, then, in the case of these regulations now coming into effect? Will they throw out existing lists, or will they not? If they throw out existing lists, how does a person selected or who has knowledge of being in that list--how are the rights of that person protected?

DRACHSLER: I think that it would be inappropriate to throw out the list in its entirety. However, when this amendment becomes effective, I think it would be proper to include in that list women who have applied pursuant to affirmative actions taken,

and I am not exactly sure what the proper word would be, but to meld the lists together. In other words, a sponsor can maintain the names and the application forms and the scores or whatever it is for the individuaals who have already applied. I would assume, of course, that this would include minorities pursuant to the existing 29 CFR, Part 30, and add that list at their appropriate places depending on the qualifications and the scores that they make or whatever the selection procedure that's being used would be. A protection for individuals who feel that their rights are being infringed upon in some manner. I don't think there is anything in the regulation on that point, and I am not sure that their rights can be described as vested rights in any way. I think that to the extent that they feel that they are being treated unfairly, they would have to seek a legal remedy through their own attorneys. There is no provision for appeal procedures or administrative procedure in the regulation for such individuals.

REPRESENTATIVE V. GEE: I have in that same direction a question. Are you suggesting, then, that from the example stated for the 1973 list to incorporate and place out of the normal order the women's names? I am not totally familiar with the lists. I know they rank them, and if the ranking list is composed of 300 and the first 200 or the first 100 are male, then everybody to follow would be minorities and women. Are you saying that we order them. I wasn't clear on your statement.

DRACHSLER: I am not quite sure I understand your question. Are you saying that the list which was made up in 1973 included minorities and women?

REPRESENTATIVE V. GEE: Let's say, hypothetically, it did not.

DRACHSLER: If the list included minorities and women at that time in 1973, but they did not rank high enough to be selected, then I don't think that any changes would have to be made. If the list did not include minorities and women, it should have included some minorities because the regulation should be in effect before that time. But if it did not include any women on the effective date of this regulation or if, after the effective date of this regulation, a new selection is being made for a new group entering, I think that women have to be given the opportunity to apply for that class, that affirmative action should be taken to encourage women to apply, and that women whose scores justify their ranking could be ranked in their appropriate place. Actually, the regulation has gone back to its original promulgation, speaking in terms of non-discrimination and affirmative action with respect to women and minorities. It was only through a change that was made to require goals and timetables for women which it had not required before that. So I hesitate somewhat to use the proper order. I think that I may give the impression that there was some vested interest in an individual's place on that list, and I don't believe there is.

I think women are entitled to be fully and fairly considered, and if they have qualified to be ranked above a male who had been on the list before them, they would be entitled to be placed at the head of that list.

REPRESENTATIVE P. HUNTER: You mention goals and timetables, but it says in here, "percentage goals."

DRACHSLER: Well, the whole concept of a goal is to set some kind of number which attempts can be made to reach. It is something to shoot for so to speak. It is a way of measuring progress. It is not an absolute requirement.

REPRESENTATIVE W. KONYHA: Numerous joint committees in both labor and management are ready to throw up their hands to say, "Look, we don't want to certify because we reach a dead end on getting answers." Here's one of the minor questions, and we have a list. We have a quota to follow. Now the women come along, and if we insert a women somewhere in that list, you say they have no right to that position. We are the ones that have to fight the law suits. We get them immediately, if not sooner, or a class action suit. I think there has to be some specific answers somewhere along the line; otherwise, I know many of the employers that sit on these joint committees say, "I don't need any headaches. I don't need any persons or groups of persons suing me for my life savings," and this is exactly what it boils down to.

DRACHSLER: I understand the position that you are in. I think at this point the only answer I can give you leads into the next set of questions which Mr. Axon raised about the relationship with the state programs, and that is to request a specific opinion from the Department of Labor on the specific questions. I say this recognizing that I am probably generating more business for my office and Hugh Murphy's office. That is a perfect way to deal with that issue. I don't think that it's possible for us to give you an answer without more specific questions of the application of this regulation, which would not apply across the board. I think that we need to know the specifics of the situation, and we will try to provide a specific opinion, a formal opinion from the Department of Labor

REPRESENTATIVE W. KONYHA: That's exactly our problem, however. We have to live with a regulation. We ask the Department of Labor to be our partner in that court case. We don't have a partner. So we're involved. It has cost us thousands of dollars.

DRACHSLER: It's really difficult for me to comment upon a specific case. I think I recall receiving from you a specific letter concerning-- I think it's called Opportunities Centers, the intent to hire situation. We have a specific letter on that issue, and I think that that's the kind of matter that I am talking about in dealing with these problems, which leads into one of the questions that Mr. Axon had asked of the relationship between the Federal Government and this regulation and state and local government. Another one of the questions which was asked didn't actually come in that form. It came to me in the form of a copy of a letter from your organization to Secretary Marshall. It actually raised a number of different things, but one of the issues which was raised was how to comply with the requirement that amendments to state plans for equal opportunity being made within 60 days of the effective date of the regulation. My response to that is that, to date, to my knowledge, we have only received one specific request for an extension of time. There is a response to that which is now working its way up to the policy-making levels of the Department of Labor. Again, I think that if any state has specific reasons in its state law, procedures why it cannot meet this time element, they should be set out in detail in a request for extension from the 60-day requirement. There are specific provisions in the regulation that the Secretary or the Assistant Secretary can grant an extension.

REPRESENTATIVE J. AXON: That would have to apply to every program in the state that has a 90-day requirement.

DEPUTY ADMINISTRATOR J. MITCHELL: It would give you particular months. Program sponsors are in 21 FCA states. Then these SAC states would extend beyond the 60-day limit or the 90-day for performance. It would mean that in those states, for example, California, that request could be made in December. That's going to be different than the neighbor state of Nevada or some other state. I am not presuming what the Solicitor is going to do, but it certainly is the kind of problem that is going to have to be addressed. That is if there is going to be any universal application of the requirements.

DRACHSLER: I think that within a reasonably short time, the requirements are going to be in place in every state whether it's SAC state or not. I think a hard look is going to be taken at any state or program sponsor which requests an exemption and the reason why the request is being made, and particularly if they wait until the last minute. I think it's only now another month before the effect of the 60-day period runs out, August 11.

I think it's in the nature of exemptions that there would be differences in different states. Within a reasonably short period of time, I feel certain by the end of fall, that this will be in place in all states and applicable to all sponsors.

BOB BURKE: What does this do to us that are working so hard to get it done in 60 days?

DRACHSLER: I am not sure whether the other points raided in this letter are really questions or just observations.

REPRESENTATIVE J. AXON: On the point being made, there should be some uniform procedures to try to get some assistance.. We started talking about Title 41. How does that apply to the state adopting this regulation? Does it have to also adopt employee selection procedures? Does it hand it over into another area in the state structure.

DRACHSLER: Those are the kinds of questions technically called assistance.

REPRESENTATIVE J. AXON: How do we get technical assistance? From the Secretary of Labor? From the comments in the last sentence, I guess in the comments talking about the high school diploma not being valid as far as Title 41.

DRACHSLER: In the preamble to the regulation?

REPRESENTATIVE J. AXON: Yes. On 20765

DRACHSLER: Well, again, with all respect, I don't believe that that's an accurate description of that. Either the proposed regulations or the regulation adopted in CFR, which pemits school diplomas. But then it goes on to discuss the law under Title VII and also applicable under the Executive Order of the use of high school diplomas or any other selection device which has an adverse impact. If a selection device, whatever it may be, pen and pencil tests, a high school diploma requirement, a scored oral interview, any of these kinds of things which have an adverse impact, must be validated to satisfy a requirement which has been in effect since 1971. This is nothing new. I don't believe that it will have any particular unusual impact on women.

REPRESENTATIVE J. AXON: But it does have an impact on the administration of the whole regulation?

DRACHSLER: Yes.

REPRESENTATIVE J. AXON: And the 1971 standards were never in this regulation.

DRACHSLER: I believe there has always been a reference over to the Secretary's Office of Federal Contract Compliance Regulation which contained the selection and testing guidelines. Although I think some references have been added where they had not been before.

There has also been an intent to require validation of those procedures which have an adverse impact. On the other side of that coin, of course, I took a question from Mr. Rueda, I think it is, in California. The other side of that coin, if the procedure does not have an adverse impact, it need not be validated. But that requirement has always been present.

REPRESENTATIVE J. AXON: Do you have a mathematical formula determining adverse impact in Title 41?

DRACHSLER: That's right.

CH. GLOVER: We are running a little bit over time. I know there is significant interest in this issue area. If anybody has a question, I guess we could take one more question.

ADMINISTRATOR H. MURPHY: Let me just read something from the preamble here that I have latched onto, Dave. Could this possibly have some impact on the administration of this?

"Sponsors will not be held to an absolute standards of achieving the goal, but are expected to make good faith efforts to meet the goals."

CH. GLOVER: What page was it?

ADMINISTRATOR H. MURPHY: 64. Does that sort of help?

DRACHSLER: That's the best shorthand description of what the amendments to 29 CFR, Part 30, are all about.

ADMINISTRATOR H. MURPHY: In other words, there isn't going to be a punitive--if I can use a legal term--administration of this amendment.

DRACHSLER: That's right. Shall I go on?

CH. GLOVER: Continue with the question.

DRACHSLER: The other question which went to one which has already been raised about the relationship of programs improved under other laws and this regulation. "Does the regulation apply to registered apprenticeship programs in the non-construction area which are covered by Executive Order 11246 and revised on November 4, affirmative action plans?"

I think that there is a specific provision in the regulation which says that programs approved pursuant to Executive Order 11246 shall continue in effect until they are reviewed or modified or amended, and that whatever the level of goals was that was set in those programs will continue until that time, and that would apply, I guess, to what they call "industrial apprenticeship programs."

The last group of questions is a group to which I have to frankly admit I don't have answers at the present time. That is why I lege them until the end. There were two questions asked which are very complex questions and which also involve the policies of other agencies in the federal government, the Justice Department, and the Equal Employment Opportunity Commission. In the case of one of them, it involves the filing of an amicus brief by the Solicitor General, and so we do not have a specific answer to those questions. Those questions are: "When females are also minority, a member of a minority group, do they count toward goals in both groups?" That question has been under consideration and not only in the Department of Labor has there been some difficulty in arriving at a conclusive answer to that question because not only does it directly have impact on the Office of Federal Contract Compliance Programs, regulations recently on affirmative action for women in construction. But it also has impact on the activities of the Equal Employment Opportunity Commission and the Department of Justice in carrying out their responsibilities. So I just have frankly to tell you that I don't have a response for you today. We are working on that, and we will have an answer on that, I hope, very shortly. I am not exactly sure how that will be communicated whether it would be best to publish a notice in the Federal Register or mail it to the appropriate state agencies. I am not sure how the notice of the Department gets circulated, but we will give notice in some manner.

The other question was: "What suggestions do you have for industrial apprenticeship programs which traditionally draw their apprentices from present employees? This pool of workers is predominately male. How can they best achieve the prescribed first-year goals?" This is also a question which impacts on the programs of other agencies, and it also goes to a specific case, which is a petition for certiorari, and has been filed with the Supreme Court. It is called Webber against Kaiser Aluminum Industries, which raises this specific question and which the Solicitor General has asked permission and, I believe, has been granted permission to file an amicus brief with the Supreme Court. They are in the Solicitor General's office working on what they should say in that brief. I don't think it's either possible or appropriate for me to give an answer to that question until the Solicitor General has determined what position the government is going to take in that brief.

REPRESENTATIVE C. SMITH: Could you just say who are the parties?

DRACHSLER: Webber v. Kasiser Aluminum Corporation. It was a case which was decided, I believe, in the Fifth Circuit last year. The company and the union have petitions for certiorari to review the appeals court decision.

REPRESENTATIVE C. SMITH: I did not expect an answer to that question that I raised. I was trying to get on the record the complexity of this total area in which we are dealing.

In that connection, I'd just like to mention one more item. For instance, many of the trades, particularly the mechanical trades, have been using tests through the Employment Service for qualifying entrants. I wonder whether those tests when they were validated, were validated on women? If they were not, they are going to exclude many of the female applicants, and this would probably be so. It's a great waste of time and effort. I want to draw attention to one of the factors that is increasingly complicated in this whole area in which I am deeply interested. We recruit women all the time. Women have not been particularly passing the mechanic comprehension test.

DRACHSLER: I would have to talk to the USES to ask them what kind of statistics they have gathered to know whether the tests are considered valid for women.

REPRESENTATIVE C. PUTKOSKI: If a test is content validated, what difference does it make? It should apply to all.

DRACHSLER: If it's content valid it is a validated test, it wouldn't be different; but if it's a construct or criterion test, then it would have to be validated. I am speculating, but there may be some mechanical aptitudes which are reduced to pencil and paper, and women could carry out the actual function, but they may not be able to understand the terminology. I think I have covered everything.

REPRESENTATIVE P. HUNTER: The answer to the one, no answer, involves seniority people already on the payroll. That would, in particular, answer mine.

CH. GLOVER: Thank you very much. You mentioned your office is available for technical assistance and further questions.

REPRESENTATIVE P. HUNTER: I want to clarify. If I have a question, if we write your office, will we get an opinion?

DRACHSLER: Yes. Either directly to the Solicitor or Assistant Secretary, or either to Hugh C. Murphy.

CH. GLOVER: Assistant Secretary for Employment and Training.