Billing Code

DEPARTMENT OF DEFENSE

32 CFR Part 195

[Docket ID: DOD-2026-OS-0595]

RIN 0790-AM02

Nondiscrimination in Federally Assisted Programs of the Department of Defense—Effectuation of Title VI of the Civil Rights Act of 1964; Amendment

AGENCY: Office of the Under Secretary of War for Personnel and Readiness, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: This rule amends DoD regulations to eliminate disparate-impact liability. These amendments align DoD's regulations with Title VI and current DoD policy, avoid constitutional concerns, and serve the public interest. By reducing regulatory burden, they also minimize compliance costs and ensure appropriate stewardship of taxpayer dollars. In addition, these revisions conform to Executive Order 14281. Finally, this rule also makes minor technical updates to correct outdated provisions.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

DoD is amending its regulations implementing Title VI, 42 U.S.C. 2000d-1, to more closely align them to the statute, which prohibits intentionally discriminatory conduct, *see* 42 U.S.C. 2000d. There are serious statutory and constitutional concerns with DoD's current Title VI regulations because the current regulations go beyond intentional discrimination by prohibiting conduct that has an unintentional disparate impact. This rule accordingly rescinds those portions of the regulations, which are in considerable tension with both the statute and the Constitution and do not sufficiently serve the public interest.

Specifically, this rule rescinds in full 32 CFR 195.4(b)(2), which prohibits the use of "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin . . . ." This rule also rescinds 32 CFR 195.4(b)(4), which permits and, in some instances, requires affirmative-action programs based on race, color, or national origin. Additionally, this rule eliminates the use of the phrase "or effect" in 32 CFR 195.4(b)(1)(iii). This rule also rescinds the full text of 32 CFR 195.4(b)(5), which addresses employment practices subject to Federal financial assistance. Finally, this rule makes minor technical corrections.

The rule's revisions also conform to Executive Order 14281, *Restoring Equality of Opportunity and Meritocracy*, 90 FR 17537 (Apr. 23, 2025). That Order states that "[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." *Id.* at 17537. Although DoD would take this action independent of Executive Order 14281, the Order supports this action.

These amendments also better align DoD's regulations with current agency policy. Consistent with Executive Order 14185, *Restoring America's Fighting Force*, 90 FR 8763 (Feb. 3, 2025), and as summarized in the 29 January 2025 Secretarial issuance, "Restoring America's Fighting Force," it is the policy of DoD to promote meritocracy and uniform standards and eliminate unlawful and unconstitutional policies that discriminate based on race, national origin, or other immutable characteristics. Disparate-impact liability casts doubt on the validity of such facially neutral policies for fear that they might lead to disparate outcomes without a showing of intentional discrimination, which contravenes DoD policy.

In sum, this rule clarifies that Title VI does not prohibit conduct or activities that unintentionally lead to disparate impacts. Rather, as implemented by DoD, Title VI only prohibits intentional discrimination, and DoD will not pursue Title VI disparate-impact liability against its Federal-funding recipients.

II. Discussion

A. Statutory History of Title VI

Title VI of the Civil Rights Act of 1964, as amended, states: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. Title VI also directs Federal departments and agencies that extend Federal financial assistance to "effectuate the provisions of" Title VI "by issuing rules, regulations, or orders of general applicability." 42 U.S.C. 2000d-1. The section of Title VI that sets forth the prohibited conduct, 42 U.S.C. 2000d, prohibits only intentional discrimination and makes no reference to unintentional disparate effects or impact. *See Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) ("[I]t is . . . beyond dispute—and no party disagrees—that [Title VI] prohibits only intentional discrimination."). The statute does not provide any Federal department or agency with authority to prohibit unintentional disparate impact. And despite having ample opportunities, Congress has enacted no subsequent amendments to Title VI to impose disparate-impact liability.

DoD has implemented Title VI via regulation since 1964. *See* 29 FR 19291 (Dec. 31, 1964). DoD's 1964 regulations contained one reference to disparate-impact liability, *see id*. Subsequent amendments to these regulations, *see* 38 FR 17959 (July 5, 1973), added additional disparate-impact and affirmative-action language.

B. Relevant Supreme Court Decisions

The Supreme Court has held that Title VI, 42 U.S.C. 2000d, does not prohibit facially neutral policies that result in disparate outcomes when there is no discriminatory intent. Rather, it prohibits only intentional discrimination. In 1978, the Supreme Court held that Congress intended Title VI to prohibit "only those racial classifications that would violate the Equal Protection Clause" if committed by a government actor. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., announcing the judgment of the Court); *id*. at 325, 328, 352–53 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); *see also Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 198 n.2 (2023) (*SFFA*). Shortly before *Bakke*, the Supreme Court held that the Equal Protection Clause prohibits only intentional discrimination and that "a law or other official act" that has a "racially disproportionate impact" alone does not violate that clause. *Washington v. Davis*, 426 U.S. 229, 239 (1976); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Taken together, these Supreme Court cases establish that Title VI's statutory prohibition, like the Equal Protection Clause, extends only to intentional discrimination.

In 2001, the Supreme Court, in *Alexander v. Sandoval*, reaffirmed that settled understanding. 532 U.S. at 280 ("[I]t is . . . beyond dispute . . . that [Title VI] prohibits only intentional discrimination."). In *Sandoval*, the Supreme Court held that private plaintiffs lacked a private right of action to enforce then-existing "disparate-impact regulations" issued by the Department of Justice (DOJ). *Id.* at 285–87. DoD's current regulations mirror those at issue in *Sandoval*. Although the Supreme Court had previously found a private cause of action to enforce Title VI's bar on intentional discrimination, *id.* at 279–80, that conclusion did not extend to enforcing DOJ's "disparate-impact regulations," *id.* at 285. As the Supreme Court explained, it is "clear" that "the disparate-impact regulations do not simply apply" the statutory prohibition, as the regulations "forbid conduct that [Title VI] permits," so it is equally "clear that the private right of action to enforce [Title VI] does not include a private right to enforce these regulations." *Id.* And although the Supreme Court in *Sandoval* "assume[d]," without deciding, that DOJ's disparate-impact regulations were valid, the Court explained that the then-current version of the regulations were in "considerable tension" with the Supreme Court's Title VI precedents. Similarly, the regulations did not "authoritatively" construe Title VI because the regulations "forbid conduct"—namely, policies that unintentionally result in a disparate impact—that Title VI "permits." *Id.* at 281–82, 284–85; *see also id.* at 286 n.6 ("[Title VI] permits the very behavior that the regulations forbid.").

Finally, in 2024, the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 409–12 (2024). In doing so, the Supreme Court made clear that "statutes . . . have a single, best meaning" that is "'fixed at the time of enactment.'" *Id.* at 400 (quoting *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018)). Thus, Title VI's bar on discrimination can have only one meaning. And under Supreme Court precedent, the single, best meaning of Title VI is that it "prohibits only intentional discrimination" and "permits" facially neutral policies that result in disparate outcomes so long as there is no discriminatory intent. *Sandoval*, 532 U.S. at 280, 286 n.6.

C. Executive Order 14281

On April 23, 2025, the President issued Executive Order 14281. This Order restates the "bedrock principle of the United States . . . that all citizens are treated equally under the law." 90 FR at 17537. The Order explains that this "principle guarantees equality of opportunity, not equal outcomes," and "promises that people are treated as individuals, not components of a particular race or group." *Id.*

That Order also explains that disparate-impact liability "endangers this foundational principle." *Id.* Disparate-impact liability, the Order reasons, "all but requires individuals and businesses to consider race and engage in racial balancing to avoid potentially crippling legal liability." *Id.* As the Order explains, disparate-impact liability "not only undermines our national values, but also runs contrary to equal protection under the law and, therefore, violates our Constitution." *Id.*

The Order relays that because of these problems, "[i]t is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals." *Id.* Accordingly, this rule revises DoD's currently existing Title VI regulations, consistent with the Order's policy and purpose.

In any event, DoD would have independently initiated steps toward making these changes regardless of Executive Order 14281. Even if Executive Order 14281 did not exist, in other words, DoD would have taken steps to adopt the policy to eliminate the use of disparate-impact liability under Title VI. The Order states, and DoD firmly agrees, that a "bedrock principle of the United States is that all citizens are treated equally under the law. This principle guarantees equality of opportunity, not equal outcomes. It promises that people are treated as individuals, not components of a particular race or group. It encourages meritocracy and a colorblind society," not race-, color-, or national-origin-based favoritism. 90 FR at 17537. And adherence to this principle, including in the issuance of grants, "is essential to creating opportunity, encouraging achievement, and sustaining the American Dream." *Id.*

Imposing disparate-impact liability endangers these policy objectives. Disparate-impact liability also raises serious constitutional concerns, is in considerable tension with Title VI, creates confusion, increases the costs of compliance, and does not serve the public interest. After considering the relevant issues and factors and weighing the relevant considerations, DoD concludes that these reasons support eliminating disparate-impact liability from DoD's Title VI regulations. In any event, DoD concludes that each reason is an independent basis for eliminating disparate-impact liability from DoD's Title VI regulations.

D. Need for Rulemaking

32 CFR 195.4(b), entitled "Specific discriminatory actions prohibited," contains several provisions that go beyond Title VI and the Constitution by prohibiting conduct or activities causing an unintentional disparate impact. And in some instances, these provisions may encourage or even require unlawful discrimination labeled as "affirmative action." Section 195.4(b)(2) is the current regulation's general disparate-impact prohibition, which states that a "recipient . . . may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." Beyond that general prohibition, § 195.4(b)(1)(iii) addresses a Federal funding recipient's selection of the site or location of facilities and includes one reference to "effect" that extends to conduct with unintentional disparate impact. Section 195.4(b)(4) addresses "affirmative action," and provides that funding recipients may (and sometimes must) use race, color, or national origin to overcome unintentional disparate "effects." But this provision does not expressly specify that the funding recipient must narrowly tailor such use nor that this use must serve a compelling governmental interest, as is required to satisfy strict scrutiny. Finally, § 195.4(b)(5) addresses prohibited discriminatory employment practices and extends beyond intentional discrimination to prohibiting conduct that "tends" to have a discriminatory effect.

There are serious statutory and constitutional concerns with DoD's Title VI disparate-impact regulations. DoD also has serious policy concerns with its current disparate-impact regulations because they create confusion, undermine public confidence in the nation's civil rights laws and the rule of law, and produce burdensome litigation and compliance costs.

1. Serious Legal Concerns

There are serious statutory concerns as to whether Title VI authorizes the disparate-impact provisions of the current regulations. As the Supreme Court has made clear, Title VI prohibits "only intentional discrimination" and "permits" facially neutral policies that result in disparate outcomes when there is no discriminatory intent. *Sandoval*, 532 U.S. at 280, 286 n.6.

That is the "single, best meaning" of Title VI. *Loper Bright*, 603 U.S. at 400. *Sandoval* calls into serious doubt the legality of DoD's "disparate-impact regulations." *Sandoval*, 532 U.S. at 281–82, 284–85 (noting that DOJ's then-existing regulations were in "considerable tension" with the Supreme Court's Title VI precedents); *see also id.* at 286 n.6 ("[Title VI] permits the very behavior that the regulations forbid.").

Although *Sandoval* resolved only the question of private enforceability, subsequent cases such as *Loper Bright* have made clear that the DoD cannot extend Title VI beyond its best meaning. *See* 603 U.S. at 412–13 (holding that "courts must . . . ensur[e] that [an] agency acts within" its statutory authority). And even in the absence of Supreme Court precedent, DoD would have concluded that the best reading of Title VI is that it prohibits only intentional discrimination.

Title VI authorizes agencies to promulgate regulations "to effectuate" the statute's prohibition of intentional discrimination. 42 U.S.C. 2000d-1. The current prohibition of conduct having an unintentional disparate impact reaches a vastly broader scope than the statute itself. This scope is too broad to be considered a simple prophylactic measure aimed at preventing intentional discrimination. *See Sandoval*, 532 U.S. at 286 n.6 ("[Title VI] permits the very behavior that the regulations forbid."). Thus, the disparate-impact regulations do not "effectuate" Title VI. 42 U.S.C. 2000d-1.

There are also serious concerns about whether DoD's Title VI regulations pass constitutional muster under the Equal Protection Clause. As the Supreme Court recently held in *SFFA*, "the Equal Protection Clause . . . applies without regard to any differences of race, of color, or of nationality—it is universal in its application" and the "guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." 600 U.S. at 206 (internal quotation marks omitted) (first quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); and then quoting *Bakke*, 438 U.S. at 289–90 (Powell, J.)). Despite the promises of the Equal Protection Clause, a funding recipient's risk of disparate-impact liability under DoD's regulations is triggered by unintentional disparate outcomes, which the recipient may not even know about without investigation. To evaluate and avoid this risk, the funding recipient must incur investigatory costs, such as conducting an impact analysis, and is coerced to proactively consider race, color, and national origin, and potentially use it to change unintended disparate outcomes.

In short, disparate-impact liability encourages and, in some cases, requires covered entities to engage in the intentional use of race and racial balancing to eliminate those disparate outcomes by treating certain racial groups differently from others—the exact conduct the Equal Protection Clause forbids. *See id*. The serious constitutional concerns raised by these perverse incentives further confirm that the best reading of Title VI is that it prohibits only intentional discrimination and does not authorize DoD to impose disparate-impact liability. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (citing *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 499–501, 504 (1979)).

This encouraged or coerced use of race, color, or national origin violates the Equal Protection Clause unless it survives review under the "daunting" strict-scrutiny standard. *SFFA*, 600 U.S. at 206; *see also Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2310 (2025) ("Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is 'the most demanding test known to constitutional law.'" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)). The use of race, color, or national origin necessitated by the disparate-impact provisions runs into serious issues with the requirement of narrow tailoring to achieve a compelling interest. *SFFA*, 600 U.S. at 206–07.

Similarly, the "affirmative action" provision authorizes and sometimes requires the intentional use of race without requiring that this intentional use be narrowly tailored to serve a recognized compelling interest. Instead, it encourages intentional racial balancing "to overcome the effects of" unintended racial disparities. 32 CFR 195.4(b)(4). Thus, for substantially the same reasons as above, the "affirmative action" provision raises serious constitutional concerns.

As summarized above, there are serious statutory and constitutional concerns with the DoD's disparate-impact regulations. But even if the regulations were legal, DoD finds that eliminating the potential constitutional concerns addressed above would independently justify the amendment of the regulations. *Cf. U.S. Tel. Ass'n v. FCC*, 188 F.3d 521, 528 (D.C. Cir. 1999) (concluding it was not "arbitrary and capricious" to adopt a certain policy in order to "avoid[] raising a non-trivial constitutional question"). And even if the regulations did not raise serious constitutional concerns, DoD finds that eliminating the costs and confusion caused by the mismatch between the statute and the disparate-impact regulations would independently justify the repeal of the regulations.

2. Serious Policy Concerns

DoD also has serious policy concerns with the imposition of disparate-impact liability. Although DoD expresses its policy concerns with disparate-impact liability independent of Executive Order 14281, that Order sets forth many valid policy concerns with disparate-impact liability. As noted in section 1 of the Order, "On a practical level, disparate-impact liability has hindered businesses from making hiring and other employment decisions based on merit and skill, their needs, or the needs of their customers because of the specter that such a process might lead to disparate outcomes, and thus disparate-impact lawsuits. This has made it difficult, and in some cases impossible, for employers to use bona fide job-oriented evaluations when recruiting, which prevents job seekers from being paired with jobs to which their skills are most suited—in other words, it deprives them of opportunities for success." 90 FR at 17537. Moreover, the legal concerns identified above have caused uncertainty and confusion for Federal-funding recipients as to whether and when they need to comply with the disparate-impact regulations and when they can or must consider race, color, and national origin. As explained above, *Sandoval* casts substantial doubt on the validity of the disparate-impact regulations that many Federal departments and agencies have promulgated pursuant to Title VI. 532 U.S. at 280–82.

Additionally in practice, and as explained above, disparate-impact liability leads covered entities to engage in racial balancing even as Title VI forbids intentional racial discrimination. This tension tends to create confusion and undermine public confidence in the nation's civil rights laws and in the rule of law itself, as the law seems to both forbid and require the same conduct.

These problems are amplified by the arbitrary nature of the racial and ethnic categories typically used to measure disparate effects, which, by virtue of their arbitrariness, typically lack a meaningful connection to a compelling interest. *See, e.g.*, *SFFA*, 600 U.S. at 216–17 (explaining that the "[racial] categories" utilized by Harvard and University of North Carolina were "themselves imprecise in many ways" and "the use of these opaque racial categories undermine[d], instead of promote[d], [their] goals"). This confusion undermines the law's ability to teach principles of nondiscrimination. DoD believes that these policy concerns independently justify repealing certain parts of its regulation to cure this confusion, remove the incentive for covered entities to engage in racial balancing, and maintain clarity and public confidence in the nation's civil rights laws.

DoD has considered the view that looking at disparate effects can sometimes be useful in uncovering or deterring subtle intentional discrimination or intentional indifference to unnecessary and arbitrary barriers. But that view's alleged benefits are outweighed by the other issues and factors DoD has considered. And in any event, eliminating disparate-impact liability does not preclude the use of data on disparate outcomes to help prove intentional discrimination. Indeed, under DoD's Title VI regulations, which the current changes do not alter, "recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs." 32 CFR 195.7(b). Both DoD and private litigants rely on such data as a potential indicator of intentional discrimination. This use of statistical disparity to help establish, as an evidentiary matter, liability for *intentional* discrimination materially differs from using it to impose liability for conduct having an unintentional disparate impact.

DoD has also considered the alternative of trying to adopt a modified version of disparate-impact liability, for example, by requiring covered entities to remedy so-called unintentional discrimination for only certain types of cases. But any version of imposing liability for so-called unintentional discrimination is inconsistent with Title VI. Regardless, even a modified version of disparate-impact liability would not eliminate DoD's serious legal and policy concerns. DoD determines that any benefits from adopting alternative versions of disparate-impact liability are outweighed by DoD's legal and policy concerns. And even if possible, developing such a rule would not solve the confusion or rule-of-law concerns expressed above, nor reduce the compliance and litigation costs that covered entities face. DoD believes that the better course is to avoid the complexities, costs, and litigation associated with this alternative, even if eliminating disparate-impact liability would ultimately leave some problems unaddressed and others inadequately addressed.

DoD has additionally considered the potential reliance interests of funding recipients and others on the disparate-impact regulations. *Sandoval*, however, cast serious doubt on the continuing viability of the regulations more than 20 years ago. And Executive Order 14281 also directed all agencies to "deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability." 90 FR at 17538. DoD accordingly believes that any reliance interests should be minimal and do not outweigh the DoD's legal and other policy concerns. Further, each of DoD's concerns, whether considered cumulatively or separately, outweighs any reliance interests.

DoD notes that *Sandoval* has also led to a divergence between Title VI enforcement by private plaintiffs and enforcement by Federal departments and agencies. After *Sandoval*, private plaintiffs can enforce only Title VI's statutory prohibition on intentional discrimination, while

DoD could continue to pursue disparate-impact liability. Repealing the disparate-impact regulations would eliminate this incongruent enforcement.

Overall, after considering the relevant issues and factors and weighing the relevant considerations, DoD finds that, regardless of the legality of DoD's disparate-impact regulations, the above summarized policy concerns, when viewed separately or cumulatively, independently justify the repeal of its disparate-impact regulations.

III. Regulatory Amendments

This rule's regulatory changes address the concerns that the Supreme Court raised in *Sandoval* and the other legal and policy concerns discussed above, harmonize the implementing regulations with Title VI , promote consistent enforcement among private plaintiffs and Federal departments and agencies, and provide much needed clarity to the courts and Federal funding recipients and beneficiaries.

For the reasons summarized above, DoD amends the following provisions in its Title VI implementing regulations that explain the particular types of discrimination prohibited, located at 32 CFR 195.4.

A. Table Summarizing Amendments

The table below indicates the exact wording changes. For each section indicated in the left column, the text shown in the middle column is removed and the text shown in the right column is added:

SECTION	REMOVE	ADD
195.4(b)(1)(iii)	"or effect"	
195.4(b)(2)	Full text of paragraph: "(2) A recipient . . . or national origin."	"[Reserved]"
195.4(b)(4)	Full text of paragraph (4), subparts (i) and (ii).	"[Reserved]"
195.4(b)(5)	"Where a primary objective of the . . . ."	"[Reserved]"

B. Section-by-Section Analysis

Section 195.4(b)(1)(iii)

Section 195.4(b)(1)(iii) addresses a Federal-funding recipient's or applicant's selection of the site or location of facilities. It provides that a funding recipient may not make selections with the "with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of" Title VI or the DoD's implementing regulations. The paragraph's reference to "effect" extends its scope to unintentional disparate impacts. This rule deletes the "or effect" reference to conform paragraph (b)(1)(iii) more closely to Title VI and to address the legal and policy considerations and determinations described in this document.

Section 195.4(b)(2)

Section 195.4(b)(2) is the general prohibition of conduct having an unintentional disparate impact. It imposes liability on Federal-funding recipients who "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination." Because § 195.4(b)(2)'s only purpose is to prohibit disparate-impact discrimination, this rule deletes this paragraph in its entirety. It thus amends the regulations to conform to Title VI and to address the legal and policy considerations and determinations described in this document. The rule replaces paragraph (b)(2) with a placeholder to maintain the numbering accuracy of previous citations and other references to parts of this section.

Section 195.4(b)(4)

Section 195.4(b)(4) deals with "affirmative action." Paragraph (b)(4)(ii) authorizes affirmative action even in the absence of a finding of prior discrimination in a program "to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." This provision points not to intentional discrimination, but rather to the unintentional "effects of conditions." It consequently encourages intentional racial classifications, racial preferences, and other race-based actions without specifying the compelling governmental interest and narrow tailoring that the Equal Protection Clause demands. This section has long been unlawful under the Equal Protection Clause.

Paragraph (b)(4)(i) requires that a recipient "must take affirmative action to overcome the effects of prior discrimination" if, in "administering a program," the funding "recipient has previously discriminated against persons on the ground of race, color, or national origin." This provision goes beyond the Equal Protection Clause, which permits, but does not mandate, a government to take narrowly tailored action to remedy the effects of its identified past discrimination. *See, e.g.*, *Bakke*, 438 U.S. at 307 (Powell, J.). Moreover, even putting aside the mandatory language, this provision does not expressly require narrow tailoring to counter particular past discrimination, but rather simply "affirmative action to overcome the effects of prior discrimination." This provision accordingly promotes potentially illegal race, color, and national origin discrimination. Moreover, in some instances, it may even coerce recipients to consider and use racial preferences when the recipient may not want to. This is contrary to DoD's goal of promoting and defending a culture of nondiscrimination and is destructive to the public's understanding of and faith in the nation's civil rights laws. This rule, therefore, removes paragraph (b)(4).

Section 195.4(b)(5)

Section 195.4(b)(5) addresses prohibited discriminatory employment practices. Paragraph (b)(5) extends the prohibition on discrimination to employment practices of the funding recipient even "[w]here a primary objective of the Federal financial assistant is not to provide employment" if discrimination in the non-funded "employment practices . . . tends, on the ground of race, color, or national origin of the intended beneficiaries, to exclude intended beneficiaries from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this Directive applies." This paragraph does not prohibit only intentional discrimination but rather extends the prohibition to conduct that "tends" to have a discriminatory effect.

Moreover, DoD notes that paragraph (b)(5)'s extension to employment practices where the Federal funding's primary objective is not to provide employment conflicts with 42 U.S.C. 2000d-3. That section states that "[n]othing contained in [Title VI] shall be construed to authorize action under [Title VI] by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. 2000d-3; *see also Johnson v. Transp. Agency, Santa Clara Cnty.*, 480 U.S. 616, 627–28 n.6 (1987) (citing the statutory limitation and noting Congress's intent that Title VI not "impinge" on Title VII, which prohibits discriminatory employment practices). The rule deletes paragraph (b) to amend the regulation so that it more closely adheres to Title VI and to address the legal and policy considerations and determinations described in this document.

IV. Legal Authority

This rule is issued pursuant to 42 U.S.C. 2000d-1.

V. Severability

DoD's position is that each of the amendments described in this rule serve a vital, related, but distinct purpose. DoD also confirms that each of the amendments is intended to operate independently of each other and that the potential invalidity of one amendment should not affect the other amendments. DoD would adopt any of the amendments independently of the invalidity of a separate amendment.

VI. Regulatory Compliance

A. Administrative Procedure Act.

DoD is issuing this final rule without prior public notice and comment or a delayed effective date pursuant to 5 U.S.C. 553(a)(2), which exempts from such procedure rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts."

Title VI concerns non-discrimination conditions on the receipt of Federal financial assistance, and more particularly to the receipt of Federal "[g]rants and loans," "property," "personnel" and "[a]ny Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance." 35 CFR 195.2(d); *see also* 35 CFR 195.6 (requiring funding recipient sign contractual assurance of compliance with Title VI); *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–18 (2022) (observing that Congress enacted Title VI "[p]ursuant to its authority to 'fix the terms on which it shall disburse federal money'" (internal citation omitted)). *Cf. Education Programs or Activities Receiving or Benefitting from Federal Financial Assistance*, 82 FR 46655, 46655 (Oct. 6, 2017) (invoking the section 553(a)(2) exception to amend Title IX regulations to "promote consistency in the enforcement of Title IX for [the Department of Agriculture] financial assistance recipients"); *Preserving Community and Neighborhood Choice*, 85 FR 47899 (Aug. 7, 2020) (invoking the exception to repeal Housing and Urban Development rule regarding Federal grantees); *Participation by Minority Business Enterprise in Department of Transportation Programs*, 53 FR 18285 (May 23, 1988) (invoking the exception to expand coverage of Department of Transportation regulation regarding Federal Aviation Administration's airport financial assistance program); *Nondiscrimination on the Basis of Handicap in Federally Assisted Programs—Suspension of Guidelines with Respect to Mass Transportation*, 46 FR 40687 (Aug. 11, 1981) (invoking the exception to suspend DOJ guidelines regarding prohibiting disability discrimination in transportation programs and activities receiving Federal financial assistance).

Indeed, invoking 5 U.S.C. 553(a)(2) is consistent with guidance issued by the Office for Management and Budget (OMB) under 2 CFR 200.1, which defines "Federal financial assistance" with the same categories as the Administrative Procedure Act's exception for rules "relating to agency management or personnel or to public property, loans, grants, benefits, or contracts," 5 U.S.C. 553(a)(2). With potentially limited exceptions not applicable to DoD, all the forms of Federal financial assistance set forth under 2 CFR 200.1 that DoD administers would fall under the exception for "public property, loans, grants, benefits, or contracts." Thus, DoD issues this final rule without prior public notice and comment or a delayed effective date under 5 U.S.C. 553(a)(2).

B. Executive Order 12866, "Regulatory Planning and Review," and Executive Order 13563, "Improving Regulation and Regulatory Review"

OMB has determined that this rulemaking is a "significant regulatory action" under section 3(f) of Executive Order 12866, *Regulatory Planning and Review*, 58 FR 51735, 51738 (Sep. 30, 1993), but it is not an "economically significant" action under section 3(f)(1). Accordingly, this rule has been submitted to OMB for review.

This regulation has been drafted and reviewed in accordance with Executive Order 12866 section 1(b), *id.* at 51735, and in accordance with Executive Order 13563 section 1(b), *Improving Regulation and Regulatory Review*, 76 FR 3821, 3821 (Jan. 18, 2011), which supplements and reaffirms the principles of Executive Order 12866. These Executive Orders direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. 58 FR at 51735; 76 FR at 3821. Executive Order 13563 also recognizes that some benefits and costs are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify. *Id.*

As explained in the preamble, the regulatory modifications this rule makes are necessary to conform DoD regulations to Executive Order 14281, address serious legal concerns regarding DoD's Title VI regulation based on the Supreme Court's reading of Title VI in *Sandoval*, harmonize the implementing regulation with Title VI, promote consistency in enforcement among private plaintiffs and Federal departments and agencies, and provide much needed clarity to courts and Federal-funding recipients and beneficiaries regarding the scope of DoD's Title VI regulations. Indeed, with respect to § 195.4(b)(4)(ii), the changes are clearly necessary to bring the regulations into compliance with 42 U.S.C. 2000d-3. In short, this rule is necessary to conform the DoD's regulation to existing statutory law, as interpreted by the Supreme Court.

Data limitations make the costs and benefits of the rule difficult to quantify. For enforcement actions that relate to both intentional discrimination and conduct having an unintentional disparate impact, DoD does not track and cannot reliably quantify the costs attributable to the disparate-impact portions of enforcement actions. That the existence of a disparate impact is sometimes a factor that may be considered in evaluating intentional discrimination further impedes monetizing costs and benefits. Therefore, the overall cost effect on DoD is difficult to quantify. The deregulatory action should decrease DoD's enforcement costs, however. It should also have the benefit, also difficult to quantify, of bringing DoD's conduct in line with the law. Similarly, DoD is unable to quantify how funding recipients will respond to the regulatory changes. But the deregulatory action should result in greater flexibility and lower compliance costs for recipients.

DoD does not envision that this rule will appreciably increase administrative or compliance costs for funding recipients who must also adhere to the regulations of another department or agency. This deregulatory action does not create any new obligations for funding recipients. On the contrary, by eliminating disparate-impact liability from the regulation, this rule eliminates a source of regulatory confusion, narrows the conduct prohibited, and thus lessens the costs of compliance and potential liability. Moreover, recipients who receive funds for the same program or activity from more than one Federal entity already enter into separate contractual assurances with each funding entity. These contractual assurances impose varying requirements that each Federal funding source deems necessary. Funding recipients will continue to be held to the most stringent contractual assurance and regulation. And in any event, DoD notes that other agencies are currently amending their regulations to align with the changes made in this rule, so DoD anticipates that there will be little, if any, disparity in federal requirements regarding disparate-impact liability going forward.

Based on the analysis of the practical qualitative costs and benefits noted above, DoD believes that this rule is consistent with the principles of Executive Orders 12866 and 13563, including the requirements that, to the extent permitted by law, DoD adopt a regulation only upon a reasoned determination that its benefits justify its costs and choose a regulatory approach that maximizes net benefits. *See* 58 FR at 51735; 76 FR at 3821.

C. Executive Order 14192, "Unleashing Prosperity Through Deregulation"

Executive Order 14192 generally requires agencies to repeal ten existing regulations for every new regulation added. This rule reduces regulatory burden by eliminating the requirement that DoD financial-assistance recipients avoid facially neutral actions that unintentionally lead to disparate impacts. As such, this rule is a deregulatory action under Executive Order 14192.

D. Executive Order 13132, ''Federalism''

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has federalism implications. This rule will not have a substantial effect on State and local governments. Indeed, this rule reduces regulatory compliance costs and burdens on funding recipients, including States, and it does not preempt State law. This rule merely aligns existing DoD regulations with statutory law.

E. Executive Order 13175, ''Consultation and Coordination With Indian Tribal Governments''

Executive Order 13175 establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct compliance costs on one or more Indian Tribes, preempts Tribal Law, or effects the distribution of power and responsibilities between the Federal Government and Indian Tribes. This final rule will not have a substantial effect on Indian tribal governments.

F. Congressional Review Act (5 U.S.C. 801, et seq.)

The Congressional Review Act, 5 U.S.C. 801, et seq., generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each house of the Congress and to the Comptroller General of the United

States. DoD will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. The Office of Information and Regulatory Affairs has determined that this final rule is not a ‘‘major rule’’ as defined by 5 U.S.C. 804(2).

G. Unfunded Mandates Reform Act (15 U.S.C. 1531, et seq.)

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) (2 U.S.C. 1532) requires agencies to assess anticipated costs and benefits before issuing any rule that mandates require spending in any one year of $100 million, updated annually for inflation. However, UMRA does not apply to any regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” 2 U.S.C. 1503(2). UMRA therefore does not apply to this rulemaking.

H. Regulatory Flexibility Act (5 U.S.C. Chapter 6)

This final rule is not subject to the Regulatory Flexibility Act (RFA) because, as explained above, notice-and-comment rulemaking is not required under 5 U.S.C. 553(a)(2). See *Or. Trollers Ass'n* v. *Gutierrez*, 452 F.3d 1104, 1123–24 (9th Cir. 2006) (noting that the RFA does not apply when an agency validly invokes an exception to the public comment requirements of 5 U.S.C. 553). Further, DoD believes this rule will not have a significant economic impact on a substantial number of small entities. Indeed, this rule reduces regulatory burden on funding recipients and continues to apply existing statutory law; it does not impose new obligations. Therefore, the RFA, as amended, does not require DoD to prepare a regulatory flexibility analysis.

I. Paperwork Reduction Act of 1995

This rule will not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

J. Executive Order 12250, “Leadership and Coordination of Nondiscrimination Laws”

Pursuant to section 1-202 of Executive Order 12250, DOJ has the responsibility to "review . . . proposed rules . . . of the Executive agencies" implementing nondiscrimination statutes such as Title VI in order to identify those which are inadequate, unclear or unnecessarily inconsistent." Additionally, section 1-101 of Executive Order 12250 delegated the President's responsibility to approve Title VI regulations to the Attorney General. *See* 42 U.S.C. 2000d-1. DOJ has reviewed and approved this rule.

List of Subjects in 32 CFR Part 195

Administrative practice and procedure, Civil rights, Equal employment opportunity, Grant programs.

Accordingly, DoD amends 32 CFR part 195 as follows:

PART 195—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF DEFENSE—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

1. The authority citation for part 195 is revised to read as follows:

Authority: 42 U.S.C. 2000d, 2000d-1; E.O. 14281, 90 FR 17537; and the laws referred to in appendix A to this part.

§195.4 [Amended]

2. Amend §195.4 by:

a. Removing the words "or effect" in paragraph (b)(1)(iii).

b. Removing and reserving paragraphs (b)(2), (4), and (5).

§195.5 [Amended]

3. Amend §195.5 by removing the word "(Manpower)" and adding in its place the words "(Manpower and Reserve Affairs)" in paragraphs (a), (b), and (c).

4. Amend §195.9 by revising and republishing paragraph (d) to read as follows:

§195.9 Procedure for effecting compliance.

* * * * *

(d) *Other means authorized by law.* No action to affect compliance by any other means authorized by law shall be taken until:

(1) The responsible Department official has determined that compliance cannot be secured by voluntary means;

(2) The action has been approved by the Assistant Secretary of Defense (Manpower and Reserve Affairs);

(3) The recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance; and

(4) The expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

§195.10 [Amended]

5. Amend §195.10 by removing the word "(Manpower)" and adding in its place the words "(Manpower and Reserve Affairs)" in paragraph (f).

§195.13 [Amended]

6. Amend §195.13 by removing the words "Orders 10925 and" and adding in their place the word "Order" in paragraph (a).

§195.14 [Amended]

7. Amend §195.14 by removing the word "(Manpower)" and adding in its place the words "(Manpower and Reserve Affairs)".

Dated: July 21, 2026.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

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