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| **Title:** | **FINAL RULE--Enforcement of Nondiscrimination on the Basis of Handicap--12 CFR Part 606** |
| **Date of Issuance:** | **6/1/1988** |
| **Agency:** | **FCA** |
| **Federal Register Cite:**  | **53 FR 19884** |

FARM CREDIT ADMINISTRATION

12 CFR Part 606

Enforcement of Nondiscrimination on the Basis of Handicap

**ACTION:** Final rule.

**SUMMARY:** The Farm Credit Administration Board (Board) adopts final regulations prohibiting discrimination on the basis of handicap in programs and activities conducted by the Farm Credit Administration (FCA or agency). These regulations provide for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap, as it applies to the programs and activities conducted by the FCA.

**EFFECTIVE DATE:** The regulations shall become effective upon the expiration of 30 days after this publication during which either or both Houses of Congress are in session. Notice of effective date will be published in the **Federal Register** .

**FOR FURTHER INFORMATION CONTACT:** Nancy E. Lynch, Senior Attorney, Office of General Counsel, Farm Credit Administration, 1501 Farm Credit Drive, McLean, Virginia 22102-5090, (703) 883-4020, TDD (703) 883-4444.

**TEXT: SUPPLEMENTARY INFORMATION:** On December 18, 1985, the Farm Credit Administration published a notice of proposed rulemaking ([50 FR 51540](file://fcahome/DavWWWRoot/readingrm/fedreg/Federal%20Register%20Documents/50%20FR%2051540.docx)) for the enforcement of section 504 of the Rehabilitation Act of 1973, as amended. The prohibitions against discrimination on the basis of handicap contained in the proposed regulation applied only to those Farm Credit Administration programs and activities which are available to members of the general public. The proposed regulations also stated that the Farm Credit Administration did not have to take any action to accommodate individuals with handicaps if such action would result in a fundamental alteration in the nature of the program or activity or in undue financial and administrative costs. The deadline for receiving comments on the proposed regulation was February 17, 1986. Five comments were received in response to the notice, three from organizations representing handicapped persons and two from other Federal entities, the Department of Justice and the Equal Employment Opportunity Commission (EEOC). In general, one commentor expressed disappointment that the agency proposed an adaptation of the prototype regulation prepared by the Department of Justice. The Board has determined that FCA's programs and activities do not require unique regulatory language and that these regulations are, therefore, appropriate for FCA. The commentors objected to the limitation of the application of the proposed regulations to only those programs and activities in which the general public participates and to the use of the fundamental alteration and undue burdens defenses in areas which they argued are inappropriate. A complete analysis of the comments and of the changes made to the proposed regulation is provided below.

The Board has determined that these regulations are not a major rule within the meaning of Executive Order 12291, and therefore a regulatory impact analysis has not been prepared. One commentor expressed the belief that small entities should comply with the rule because of their substantial number and the fact that they do affect a considerable number of individuals. The Board notes that the Regulatory Flexibility Act (5 U.S.C. 601-612) requires that an agency must undertake certain analyses of proposed rules which may have an impact on small business entities and disclose the results of such analyses in its notice of proposed rulemaking. Because these regulations regarding nondiscrimination on the basis of handicap are applicable solely to the programs and activities of the Farm Credit Administration, the Board has again determined these regulations do not impact on small business entities and are, therefore, not subject to the Regulatory Flexibility Act.

**Section-by-Section Analysis and Response to Comments**

***Section 606.601 Purpose.***

This section describes the general purpose of the regulation which is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973, to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service. No comments were made to the regulation and it is unchanged.

***Section 606.602 Application.***

In the proposed regulation this section stated that Part 606 applies to all programs or activities conducted by the Farm Credit Administration which are available to members of the general public but listed the "programs and activities" which constitute the "programs and activities" of the FCA for purposes of the regulation.

One commentor to the regulation stated that the FCA erroneously excluded "the regulation, supervision, and examination of Farm Credit System institutions" from this regulation. The commentor believed that these FCA functions not only constitute an FCA program or activity but also will likely involve contact with the public, and that the regulation should be amended accordingly. In addition, it objected to the assertion in the regulation that the programs and activities listed therein constitute the sole "programs and activities of the FCA," as being far too narrow. It recommended that the regulation be amended to describe the list of "programs and activities" as illustrative only and not exhaustive. The proposed section also provides that the institutions of the Farm Credit System (System), which are supervised, regulated, and examined by the FCA, are not governed by this regulation. The commentor agreed with this provision in the regulation.

The section has been modified in response to the comments received and now states that this rule applies to all activities and programs conducted by the FCA. Since this rule will most likely apply to the programs and activities which are open to the members of the general public, the final regulation retains the list of such programs and activities that was contained in the proposed rule to provide notice to interested persons. However, the regulation has been amended to provide that the list contains examples of such programs and activities of the FCA, and that an omission does not necessarily mean that the activity is not covered. The FCA has added language to paragraph (b) which specifically states that FCA personnel will comply with this part in their interaction with employees of System institutions and employees of other Federal agencies during the discharge of their official FCA duties. The exclusion from coverage of System institutions that are regulated or examined by the FCA remains unchanged except that the word "supervised" has been deleted consistent with the Farm Credit Amendments Act of 1985 (Pub. L. 99-205).

***Section 606.603 Definitions.***

The regulation defines the significant terms used in Part 606. "Auxiliary aids" is defined to mean services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in and benefit from the agency's activities, and provides examples of commonly used auxiliary aids. One commentor suggested that attendant services should be added to the "laundry list" of auxiliary aids appearing in the regulation. It was suggested that this would remove any confusion for those individuals required to comply with this regulation, since attendant services might be necessary to achieve program accessibility, even where all the requirements to accessibility have been met. Another commentor suggested that auxiliary aid should be expanded to include attendant services needed to aid severely disabled persons traveling during the course of their work. The FCA Board has declined to incorporate attendant services in the definition of "auxiliary aids" since such services are generally personal in nature and thus they are properly outside the scope of "auxiliary aids." Nevertheless, to the extent that attendant services are not personal in nature and are directly related to a program or activity of the FCA, such service may be provided when necessary. A wheelchair is considered a personal aid and has been excluded from this definition. However, FCA may choose to provide wheelchairs on occasion as a special benefit. This same commentor also stated that the term "auxiliary" implies something that is extra or discretionary and recommended that FCA change the section to "Aids for Reasonable Accommodation." This suggestion has not been adopted. The FCA Board believes the term "reasonable accommodation" is a term of art applicable to discrimination in employment under the Rehabilitation Act. The use of the term in Part 606 would be inappropriate and confusing, since Part 606 covers more than employment programs and activities.

One commentor suggested that the regulation should be amended to clarify that auxiliary aids are required in all aspects of the FCA programs and to remove any ambiguity that the FCA has an obligation to make programs accessible and overcome barriers that may not be related to communication. This suggestion has not been adopted as the FCA Board believes that the term "auxiliary aids" adequately indicates what is intended and what is required.

"Complete Complaint" is defined to include all the information necessary to enable the agency to investigate the complaint. The definition is necessary to enable the agency to determine the beginning of its obligations to investigate a complaint.

"Facility" is defined similar to that in the section 504 Coordination Regulation for Federally Assisted Programs (28 CFR 41.3(f)), except that certain inapplicable phrases have been deleted and the phrase "rolling stock or other conveyances" has been added. The definition does, however, apply to all programs and activities conducted by the agency regardless of whether the facility in which they are conducted is owned, leased, or used on some other basis by the agency. One commentor objected to the omission of the phrase "or interest in such property" from the definition of "facility." As used in this regulation, the term "facility" refers to structures, and does not include intangible property rights. The phrase has been omitted because the requirement that a facility be accessible would have no meaning if applied to such things as a lease, life estate, mortgage, etc. This definition has not changed.

"Individual with handicaps" is defined identical to the definition of "handicapped person" appearing in the section 504 Coordination Regulation for Federally Assisted Programs (28 CFR 41.31). Although section 103(d) of the Rehabilitation Act Amendments of 1986 changed the statutory term "handicapped individual" to "individual with handicaps," the legislative history of this amendment indicates that no substantive change was intended. Thus, although the term has been changed in this regulation to be consistent with the statue as amended, the definition is unchanged. In particular, although the term as revised refers to "handicaps" in the plural, it does not exclude persons who have only one handicap.

The definition of "qualified individual with handicaps" is the same as the definition of "qualified handicapped person" with respect to services appearing in the section 504 Coordination Regulation for Federally Assisted Programs (28 CFR 41.32(b)). The definition provides that a qualified individual with handicaps is an individual with handicaps who meets the essential eligibility requirements of participation in the program or activity. One commentor noted that the FCA had used the Department of Justice "Federally Assisted" guidelines as a model for its definition for "qualified handicapped individual." But the commentor stated that the FCA had not addressed the extent to which the agency must provide aids or accommodations to ensure that such person has equal opportunity to participate in and benefit from the program. The commentor questioned why the agency had omitted "reasonable accommodation" from the language in the definition. The commentor referred FCA to the regulations of the Federal Election Commission and to the Supreme Court decision in *Alexander v. Choate , 469 U.S. 287 (1985) as support for its position that applicants for employment were to be provided reasonable accommodation. The FCA Board has determined that § 606.640 adequately addresses this commentor's concerns. However, the Board has amended the regulation to include a sentence that indicates that a qualified individual with handicaps with respect to employment is a qualified handicapped person as defined in 29 CFR 1613.702(f), which is made applicable to this part by § 606.640. The addition of this language does not change existing regulations applicable to employment.*

"Section 504" means section 504 of the Rehabilitation Act of 1973, as amended. This definition has not been changed except that a reference to the 1986 Amendment has been added.

One commentor on a technical matter stated that the numbering used by the agency is not consistent with proper **Federal Register** format. This has been corrected in the final regulation.

***Section 606.610 Self-evaluation.***

The regulation provides that the agency shall conduct self-evaluation of its compliance with section 504 within one year of the effective date of the regulation. The regulation has been changed to eliminate references to consultation but provides that the self-evaluation process shall include an opportunity for interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process and the development of transition plans by submitting comments (both oral and written).

One commentor welcomed the requirement that the agency maintain "a list of the interested persons consulted" in the performance of the self-evaluation. Experience has shown that self-evaluation is a valuable means of establishing a working relationship with individuals with handicaps that promotes both effective and efficient implementation of section 504. This final rule has been amended to utilize language that provides an opportunity for interested persons to participate in the process consistent with the Federal Advisory Committee Act (5 U.S.C. app.).

***Section 606.611 Notice.***

The regulation requires the agency to disseminate sufficient information to employees, applicants, participants, beneficiaries, and other interested persons to apprise them of rights and protections afforded by section 504. The regulation leaves to the agency the discretion to use whatever manner the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

One commentor suggested that notification of the FCA policy regarding nondiscrimination should also be included in the regulation and distributed in recruitment materials as well as in general information. The commentor also suggested that the FCA should make available to the persons enumerated in the regulation information regarding the provisions of this part and its applicability to the programs and activities of the FCA. Another commentor suggested the FCA amend the regulation to provide that the information "effectively" apprise persons of their rights and protections against discrimination. In this manner, the commentor believed the agency would be in a position to test the methods it selected to accomplish the purposes of notification.

The Board has not adopted these suggestions. In allowing the agency to have the flexibility to determine the best method by which information may be conveyed to various interested parties, the agency is in the best position to specifically target its audience to fully inform such persons of their protections against discrimination.

With respect to the suggestion of the inclusion of the term "effectively" in the regulation, the Board believes this is already addressed in the regulation. The regulation provides that information shall be made available to persons in the manner the agency finds necessary to apprise them of their rights. A method of communication that does not make this information available in an accessible form to individuals with handicaps would not comply with the regulation. The regulation has not been changed.

***Section 606.630 General prohibitions against discrimination.***

The regulation is an adaptation of the corresponding section of the section 504 Coordination Regulation for Federally Assisted Programs (28 CFR 41.51). Paragraph (a) restates the nondiscrimination mandate of section 504. The remaining paragraphs in the regulation establish the general principles for analyzing whether any particular action of the agency violates the mandate. These principles serve as the analytical foundation for the remaining sections of the regulation. If the agency violates a provision in any of the subsequent sections, it will also violate one of the general prohibitions found here. Where there is no applicable subsequent provision, the general prohibitions stated in this section apply.

Paragraph (b) prohibits overt denials of equal treatment of individuals with handicaps. The agency may not refuse to provide an individual with handicaps with an equal opportunity to participate in or benefit from a program simply because the person is handicapped. The preamble to the proposed regulation states that such blatantly exclusionary practices often result from the use of irrebuttable presumptions that absolutely exclude certain classes of disabled persons from participation in programs or activities without regard to an individual's actual ability to participate. Use of an irrebuttable presumption is permissible only when in all cases a physical condition by its very nature would prevent an individual from meeting the essential eligibility requirements for participation in the activity in question. It would be permissible, therefore, to exclude without an individual evaluation all persons who are blind in both eyes from eligibility for employment as an operator of an agency vehicle; but it may not be permissible to disqualify automatically all those who are blind in just one eye. Two commentors objected to the use of the irrebuttable presumption in applying the FCA regulations. One commentor believed such presumption is never justified, while the other commentor noted that the mere possession of a handicap is not permissible grounds for assuming an inability to function in a particular context. While the Board agrees that such a presumption would be valid only in extremely narrow circumstances, it does not agree that it may never be used. The Board believes that the agency may utilize the presumption in appropriate circumstances. Paragraph (b) also prohibits the agency from directly, or through other arrangements, undertaking actions the purpose or effect of which would be to discriminate against individuals with handicaps on the basis of their handicap or defeat or substantially impair a program or activity especially targeted at individuals with handicaps.

Paragraph (c) provides that the exclusion of nonhandicapped persons from the programs specially targeted at individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program targeted at another class of individuals with handicaps is not prohibited by this part.

Paragraph (d) states that the agency shall conduct its programs and activities in the most integrated setting, appropriate to the needs of qualified individuals with handicaps.

Two commentors objected to the FCA's omission of the section of the section 504 Coordination Regulation for Federally Assisted Programs, which would have prohibited the FCA from aiding or assisting an agency, organization, or person that discriminates on the basis of handicap in providing an aid, benefit, or service to the beneficiaries of the recipient's program. FCA does not provide such assistance and the Board has determined that including such language in this regulation would be inappropriate.

One commentor believed that the United States Supreme Court's decision in *Community Television of South California v. Gottfried,* 459 U.S. 498 (1983), permits Federal agencies, through their rulemaking procedures, to impose upon prospective licensees or certified entities a duty not to discriminate against individuals with handicaps. Section 504 does not, of itself, extend an agency's regulatory authority to the activities of entities subject to its regulation. Contrary to the assertion of the commentor, *Community Television* does not support the exercise of such authority, as the focus of the decision is on the underlying regulatory statute. The Court does not indicate that section 504 itself could serve as a source of such regulatory authority. Neither the Farm Credit Act of 1971, as amended, nor any other statute provides the FCA with a clear grant of statutory authority to enforce section 504 against the Farm Credit System institutions.

One commentor noted that construction of additional buildings at an existing site should not be excluded from the coverage of this section. The Board has determined that such an inclusion would be redundant as § 606.650 addresses this issue.

A Federal agency commentor suggested inclusion of provisions regarding participation of a qualified individual with handicaps as a member of a planning or advisory board, and for not otherwise limiting a qualified individual with handicaps in the enjoyment of some right or privilege given to others receiving aid, benefit, or service from the agency. These two sections were inadvertently omitted from the proposed regulation and have been incorporated in the final version.

***Section 606.640 Employment.***

Section 640 prohibits discrimination on the basis of handicap in employment by the agency. Courts have held that section 504, as amended in 1978, covers the employment practices of Executive agencies. *Gardner v. Morris,* 752 F.2d 1271, 1277 (8th Cir. 1985); *Smith v. United States Postal Service,* 742 F.2d 257, 259-260 (6th Cir. 1984); *Prewitt v. United States Postal Service,* 662 F.2d 292, 302-04 (5th Cir. 1981); *Contra McGuiness v. United States Postal Service,* 744 F.2d 1318, 1320-21 (7th Cir. 1984); *Boyd v. United States Postal Service,* 752 F.2d 410, 413-14 (9th Cir. 1985).

Courts uniformly have held that in order to give effect to section 501 of the Rehabilitation Act, which covers Federal employment, the administrative procedures of section 501 must be followed in processing complaints of employment discrimination under section 504. *Smith,* 742 F.2d at 262; *Prewitt,* 662 F.2d at 304.

Accordingly, § 606.640 of this rule adopts the definitions, requirements, and procedures of section 501 as established in regulations of the EEOC at 29 CFR Part 1613. In addition to this section, § 606.670(b) specifies that the agency will use the existing EEOC procedures to resolve allegations of employment discrimination. Responsibility for coordinating enforcement of Federal laws prohibiting discrimination in employment is assigned to the EEOC by Executive Order 12067, 3 CFR, 1978 Comp. p. 206. Under this authority, the EEOC established Governmentwide standards on nondiscrimination in employment on the basis of handicap.

Although one commentor argued that this section is too brief and weak and one commentor requested a list of examples of reasonable accommodations, the Board has adopted the EEOC's recommendation that to avoid duplicative, competing, or conflicting standards with respect to Federal employment, reference to the Governmentwide EEOC rules is sufficient. The final rule has not been changed except that a reference to the EEOC has been added.

***Section 606.649 Program accessibility: Discrimination prohibited.***

This regulation states the general nondiscrimination principle underlying the program accessibility requirements of § § 606.650 and 606.651. No comments were received to the regulation and the regulation is unchanged.

***Section 606.650 Program accessibility: Existing facilities.***

The proposed regulation adopts the program accessibility concept found in the section 504 coordination regulation for programs or activities receiving Federal financial assistance (28 CFR 41.57), with certain modifications. Thus, § 606.650 requires that each agency program or activity, when viewed in its entirety, be readily accessible to and usable by individuals with handicaps. The regulation also makes clear that the agency is not required to make each of its existing facilities accessible (§ 606.650(a)(1)). However, § 606.650, unlike 28 CFR 41.57, places explicit limits on the agency's obligation to ensure program accessibility (§ 606.650(a)(2)). The "undue financial and administrative burdens" language found at § 606.650(a)(2) is based on the Supreme Court's statement in *Southeastern Community College v. Davis,* 442 U.S. 397 (1979), that section 504 does not require modifications that would result in "undue financial and administrative burdens." 442 U.S. at 412.

This interpretation is supported by the Supreme Court's decision in *Alexander v. Choate,* 469 U.S. 287 (1985). *Alexander* involved a challenge to the State of Tennessee's reduction of inpatient hospital care coverage under Medicaid from 20 to 14 days per year. Plaintiffs argued that this reduction violated section 504 because it had an adverse impact on handicapped persons. The Court assumed without deciding that section 504 reaches at least some conduct that has an unjustifiable disparate impact on handicapped people, but held that the reduction was not "the sort of disparate impact" discrimination that might be prohibited by section 504 or its implementing regulation. *Id.* at 299. *Alexander* supports the position, based on *Davis* and earlier lower court decisions, that in some situations, certain accommodations may so alter an agency's program or activity, or entail such extensive costs and administrative burdens that the refusal to undertake the accommodations is not discriminatory. Two commentors objected to the use of the fundamental alteration and undue financial and administrative burdens language in the regulation. One commentor stated that the agency is interpreting the *Davis* case too broadly. It suggested that the alteration and burdens language be deleted, and that "undue hardship" be utilized as more specific, less discriminatory, and a more positive term than "burden." The other commentors stated that by adopting this language the FCA has failed to parallel rules for federally assisted programs, contrary to the intent of Congress. It believed the agency's interpretation of the *Davis* case is inaccurate. It criticized the case law cited by the agency and stated that a number of more recent cases support the commentor's position.

In the alternative, two commentors suggested that, should the regulation contain the fundamental alteration and burdens language, the budget of the agency as a whole should be the standard for determining whether an accommodation is burdensome. They believed that, without this approach, every accommodation is likely to be unduly burdensome, and that as all of the resources of the agency are taxpayers' monies, none may be used to support discrimination. One commentor noted as support for its position that the Department of Labor adopted a similar regulation and suggested that the FCA pattern the regulation after the Department of Labor.

The Supreme Court in *Davis* was not explicit in specifying what constitutes an "undue burden." The Board notes that subsequent court decisions have not given equal weight to each factor and have focused on the total impact the requested modification would have on the program or activity in question. See, e.g., *Alexander v. Choate,* supra; *Dopico v. Goldschmidt,* 518 F. Supp. 1161 (S.D.N.Y. 1981) rev'd on other grounds, 687 F.2d (2d Cir. 1982), *American Public Transit Assn. v. Lewis,* 655 F.2d 1272 (D.C. Cir. 1981). However, the Board believes its interpretation of *Davis* is both proper and consistent with the lower courts' interpretation of *Davis.* The commentors cited no case law overturning *Davis* or other regulations which include the fundamental alteration or undue burdens language. The case law cited by the FCA remains valid. Accordingly, the Board rejects the suggestions of the commentors.

For the record, the Board wishes to emphasize that the agency is not funded by taxpayers' monies but rather the agency is funded by assessments on the institutions of the Farm Credit System. An accommodation that results in an excessive financial burden on the agency, causing an increase in assessments to System institutions, could be challenged by those institutions. Accordingly, the Board believes that the fundamental alteration an undue burdens language is reasonable and necessary.

The Board does not agree with the commentor's suggestion that the relevant inquiry is whether there would be an undue hardship based on the resources of the agency as a whole. Were the agency to consider the entire budget, diverting funds from one program to another could result in the agency's being unable to carry out its statutorily mandated functions. The agency has a strong and vigorous commitment to section 504 and these regulations. The Board expects the agency to consider all reasonable approaches for providing accommodations to individuals with handicaps and expects that the agency will assert the undue burdens defense only where it is clear that no reasonable alternatives exist. The Board disagrees with the commentor's assertion that every accommodation is likely to be defined as unduly burdensome.

Section 606.650(b) sets forth the means by which program accessibility may be achieved and specifies that in choosing methods, the agency shall give priority to those methods that provide the most integrated setting appropriate. In the interest of effective and cost efficient accommodations, the Board has adopted the suggestion of one commentor that the agency provide an opportunity for the person to be accommodated to provide input regarding accommodations to be made. Sections 606.650(a)(2) and 606.660(d) of the regulation have been amended accordingly. Another commentor suggested that the agency have wheelchairs on hand to accommodate disabled, elderly, or weary persons. It is the agency's policy to maintain the necessary auxiliary aids to assist individuals with handicaps with whatever their disability may require. However, wheelchairs are considered a personal aid and not an auxiliary aid as defined in this regulation. Therefore, FCA has no obligation to provide this benefit but may choose to do so as a special service.

Paragraphs (c) and (d) establish time periods for complying with the accessibility requirements and state that aside from structural changes, all other necessary steps to achieve compliance shall be taken within 60 days. Where structural modifications are required, they shall be made as soon as practicable, but in no event later than 3 years after the effective date of the regulation. Paragraph (d) of the regulation has been amended to provide an opportunity for interested persons to participate consistent with the Federal Advisory Committee Act (5 U.S.C. app.).

***Section 606.651 Program accessibility: New construction and alterations.***

Section 606.651 provides that those buildings that are constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered to be readily accessible to and usable by individuals with handicaps in accordance with 41 CFR 101-19.600 to 101-19.607.

The proposed regulation adopts the existing Architectural Barriers Act (42 U.S.C. 4151-4157) standard for section 504 compliance, as applicable to agency buildings. As the buildings subject to this regulation would also be subject to the Architectural Barriers Act, adopting this standard will avoid duplicative and possibly inconsistent standards. However, existing buildings leased by the agency after the effective date of the regulation are not required to meet the new construction standard. It should be noted, however, that the requirement of § 606.650 do apply to such structures. Two commentors objected to excluding buildings leased by the FCA after the effective date of the regulation. One commentor stated that such buildings leased after August 7, 1984, the effective date of the Uniform Federal Accessibility Standards, should be required to meet the new construction standards. The other commentor stated that the decision in *Rose v. United States Postal Service,* 774 F.2d 1355 (9th Cir. 1985) held that leased buildings are required to meet the new construction standard. In addition, the commentor suggested that the final regulation should clarify the fact that leased buildings are require to comply with the Architectural Barriers Act. It notes that such clarification has already been made by 18 other agencies and that FCA action on this matter will both reflect and accepted practice and prevent confusion about the reach of the Architectural Barriers Act.

In *Rose v. United States Postal Service,* the Ninth circuit held that the Architectural Barriers Act requires accessibility at the time of lease. The *Rose* court did not address the issue of whether section 504 likewise requires accessibility as a condition of lease, and the case was remanded to the District Court for, among other things, consideration of that issue. The agency may provide more specific guidance on section 504 requirements for leased buildings after litigation is completed.

***Section 606.660 Communications.***

The regulation contains the standards by which the FCA will ensure effective communication with participants in its programs and activities. One commentor suggested that the FCA add a provision to the regulation that would require the agency to provide captioning on its films and videotapes. The Board believes it is unnecessary to specify a particular manner of compliance with the regulation and has rejected this suggestion. One commentor reiterated its comments made to § 606.650 regarding the use of the fundamental alteration/undue burdens defenses by the FCA. For the reasons set forth in regard to § 606.650, the Board believes the retention of the language is appropriate and the regulation has not been changed.

***Section 606.670 Compliance procedures***

The regulation establishes a detailed complaint processing and review procedure for resolving allegations of discrimination in FCA's programs and activities in violation of section 504. One commentor recommended expanding this section to include (1) a provision for obtaining the expertise of the Architectural Barriers Compliance Board to help resolve deficiencies in construction or location of facilities; (2) a provision for judicial review; (3) a provision to ensure that all other regulations, forms, and directives issued by the FCA are superseded by the nondiscrimination requirements of this regulation; (4) a provision for the award of attorney's fees in administrative procedures; and (5) a provision for the availability of compensation to the prevailing party. The Board has not adopted these suggestion as they go beyond the requirements of section 504. The Board believes the existing provisions in the regulation fully protect the rights of individuals with handicaps and carry out both the letter and spirit of section 504.

One commentor noted the FCA proposed rules failed to inform complainants of the address to which complaints should be sent and recommended this be included in the final regulation. The regulation has been amended to include the address and to correct the title of the designated official.

Another suggestion related to the language in paragraph (e) of the regulation which states that the agency shall make reasonable efforts in referring a complaint over which it does not have jurisdiction. The commentor stated that FCA's obligation to refer these complaints is absolute and recommended the agency adopt language similar to that contained in the Federal Election Commission's final regulation. The Board has not adopted this suggestion because the agency may not always be able to refer a complaint, e.g., when no Federal agency would have jurisdiction or insufficient information was provided.

One commentor requested that the FCA amend the regulation to provide notice to the complainant if a decision is made to dismiss the complaint without prejudice. The commentor also suggested that the FCA amend its regulations to provide that a complainant is able to pursue a private right of action in the courts without invoking the FCA's internal procedures, or after preliminary but not final findings have been issued by the FCA. The commentor was concerned that the existence of an administrative hearing process may result in the waiver of an individual complainant's right to have his or her action heard in court.

This commentor expressed concern that the regulation provide that any person be allowed to file on behalf of an individual or class of persons when the complainant has been subjected to discrimination. It was pointed out that this procedure may be necessary in the case of individuals with handicaps because, due to their disability, such persons may be unable to fully effectuate their rights. Having someone else file on their behalf would ensure that their rights are protected. The commentor also questioned the absence of any statement regarding the availability of compensatory damages to a complainant. The commentor believed it is very difficult for an agency employee or an applicant for benefits or services to successfully sue a Federal agency. It was argued that such compensatory relief would encourage agency compliance with the regulations and would result in the agency responding in a more expeditious manner to those complaints than the agency might otherwise. It believed there is no reason why the "make whole" philosophy in all compensatory relief situations should not apply to enforcement under these regulations.

With respect to the commentor's concern regarding the availability of a complainant's right to obtain direct judicial relief, the Board notes that the Administrative Procedures Act, 5 U.S.C. 554-557, provides a Federal court jurisdiction to review an agency's final decision. It is beyond the Board's jurisdiction to specify that a de novo review is available to complainants seeking judicial review of final agency decisions. This issue is for the courts to decide. That is also true for the issue of availability of a private right of action, either without invoking FCA's compliance procedures or after issuance of letters of findings.

In response to the question of the commentor regarding who may file a complaint, the Board notes the definition of "complete complaint" and that the regulation provides that the agency is required to accept and investigate all complete complaints. The Board believes it is not necessary to amend the regulation in this regard. One commentor made the suggestion that the agency notify a complainant when a complaint is incomplete and provide an opportunity to remedy the defect. The Board believes that it is unnecessary to provide for this in the regulation as a rejection of the complaint as incomplete serves this purpose.

In a technical suggestion, a Federal agency commentor suggested that wording be inserted in paragraph (b) to clarify that the regulations governing the filing of employment-related complaints are those established by the EEOC. The regulation has been amended to include this reference.

**List of Subjects in 12 CFR Part 606**

Blind, Civil rights, Deaf, Disabled, Discrimination against handicapped, Equal employment opportunity, Federal buildings and facilities, Handicapped, Nondiscrimination, Physically handicapped.

Chapter VI, Title 12, of the Code of Federal Regulations is amended by adding Part 606 as follows:

**PART 606 -- ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE FARM CREDIT ADMINISTRATION**

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**Authority:** 29 U.S.C. 794.

**§ 606.601 Purpose.**

The purpose of this part is to effectuate section 119 of the Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

**§ 606.602 Application.**

(a) This part applies to all programs or activities conducted by the agency. For example, members of the public may participate in the following "programs and activities" of the FCA:

(1) Attending open meetings of the Farm Credit Board.

(2) Making inquiries or filing complaints.

(3) Using the FCA library in McLean, Virginia.

(4) Seeking employment with FCA.

(5) Attending any meeting, conference, seminar, or other program open to the public.

This list is illustrative only and failure to include an activity does not necessarily mean that it is not covered by this regulation.

(b) This regulation does not apply to the institutions that are regulated or examined by the FCA. However, this regulation governs the conduct of FCA personnel, in their interaction with employees of such institutions and employees of other Federal agencies, while discharging their official FCA duties.

**§ 606.603 Definitions.**

For purposes of this part, the term:

(a) "Agency" means the Farm Credit Administration.

(b) "Assistant Attorney General" means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

(c) "Auxiliary aids" means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDDs), interpreters, note-takers, written materials, and other similar services and devices.

(d) "Complete complaint" means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(e) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

(f) "Individual with handicaps" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) "Physical or mental impairment" includes:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term " physical or mental impairment" includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) "Major life activities" includes functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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

(4) "Is regarded as having an impairment" means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (f)(1) of this definition but is treated by the agency as having such an impairment.

(g) "Qualified individual with handicaps" means an individual with handicaps who meets the essential eligibility requirements for participation in the program or activity conducted by the agency. With respect to employment, a qualified individual with handicaps is one who meets the definition of "qualified handicapped person" set forth in 29 CFR

1613.702(f), which is made applicable to this part by § 606.640 of this rule.

(h) "Section 504" means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810).

**§ § 606.604-606.609 [Reserved]**

**§ 606.610 Self-evaluation.**

(a) The agency shall, within one year of the effective date of this part, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part, and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the evaluation required under paragraph (a) of this section, maintain on file and make available for public inspection:

(1) A list of the interested persons who commented, with copies of comments received;

(2) A description of areas examined and any problems identified; and

(3) A description of any modifications made.

**§ 606.611 Notice.**

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

**§ § 606.612 -- 606.629 [Reserved]**

**§ 606.630 General prohibitions against discrimination.**

(a) No qualified individual with handicaps, on the basis of handicap, shall be excluded from participation in, be denied the benefits of, or otherwise, be subjected to discrimination under any program or activity of the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual or other arrangements, on the basis of handicap:

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the activity, aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs of activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would:

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would:

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

**§ § 606.631-606.639 [Reserved]**

**§ 606.640 Employment.**

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR Part 1613, shall apply to employment in the agency.

**§ § 606.641-606.648 [Reserved]**

**§ 606.649 Program accessibility: Discrimination prohibited.**

Except as otherwise provided in § 606.650, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§ 606.650 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not:

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with paragraph (a) of this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. In preparing the report, the agency shall make reasonable efforts to ensure that the person(s) to be accommodated has an opportunity to provide relevant information. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section within sixty days of the effective date of this part except that where structural changes in facilities are undertaken, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve accessibility, the agency shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section, and if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period;

(4) Indicate the official responsible for implementation of the plan; and

(5) Identify the persons or groups who commented on the plan.

**§ 606.651 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

**§ § 606.652-606.659 [Reserved]**

**§ 606.660 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in and enjoy the benefits of a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDDs) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. In preparing the report, the agency shall make reasonable efforts to ensure that the person(s) to be accommodated has an opportunity to provide relevant information. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

**§ § 606.661-606.669 [Reserved]**

**§ 606.670 Compliance procedures.**

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for implementation and operation of this section shall be vested in the Director, Office of Administration, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing:

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by this paragraph. The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Equal Employment Opportunity Manager, or his/her designee, Farm Credit Administration, 1501 Farm Credit Drive, McLean, VA 22102-5090.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

**§ § 606.671 -- 606.999 [Reserved]**

May 23, 1988.

**David A. Hill,**

Secretary, Farm Credit Administration Board.

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