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# NASA Procedural Requirements

**COMPLIANCE IS MANDATORY**

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Request Notification of Change

(NASA Only)

## **Subject: Nondiscrimination in Federally Assisted and Conducted Programs**

**Responsible Office: Office of Diversity & Equal Opportunity**

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## **CHAPTER 4. Compliance Reviews Pursuant to the Civil Rights Act of 1964 (Title VI), the Education Amendments Act of 1972 (Title IX), the Rehabilitation Act of 1973 (Section 504), and the Age Discrimination Act**

### **4.1. Policy**

4.1.1. NASA will be responsible for ensuring that its recipients are in compliance with all applicable policies of nondiscrimination in programs and activities receiving Federal financial assistance.

4.1.2. OEOP will continually monitor its recipients to ensure such compliance and shall establish procedures and systems as a method of ensuring such compliance.

4.1.3. NASA will ensure that all recipients have submitted a signed statement of assurance that all programs and activities will be conducted in compliance with all applicable Federal civil rights laws, rules, regulations, and policies.

4.1.4. Compliance review investigations will be periodically scheduled by OEOP as part of its regular, systematic program of monitoring and evaluating whether, and the extent to which, recipients meet their Federal civil rights obligations.

4.1.5. As an integral element of its civil rights enforcement responsibility, OEOP routinely will maintain a regular, systematic program that includes:

4.1.5.1. Technical guidance and assistance to recipients with the aim of resolving civil rights problems and issues associated with recipient programs and activities, and

4.1.5.2. Monitoring and evaluations of whether, and the extent to which, recipients meet their obligations to ensure that they administer their programs and activities pursuant to applicable civil rights requirements.

4.1.6. In conducting compliance review investigations of NASA-assisted programs and activities, OEOP will be guided by the legal standards, policies, and requirements that have been established in Federal statutes, regulations, Executive Orders, policies, and case law decisions related to discrimination based on race, color, national origin, sex, age, or disability, as applicable to recipients of Federal financial assistance and Federally assisted programs and activities.

## 4.2. Definitions

4.2.1. Compliance Review - A systematically planned and periodically initiated investigation that assesses and evaluates the civil rights and equal opportunity policies, procedures, and practices of an organization or its instrumentality, funded in whole or part by NASA to determine compliance with applicable civil rights statutes, regulations, standards, and policies.

4.2.2. Compliance Review Investigative Plan (CRIP) - A planning document prepared by investigative staff prior to conducting a compliance review. This document provides a detailed "blueprint" of the actions that investigative staff will take in completing a compliance review. At a minimum, the CRIP will include the following information for each compliance review:

- a. Identification of Bases and Issues
- b. Identification of Applicable Legal Theories
- c. Information Request/Data Collection
- d. Determination of Whether Onsite is Necessary

4.2.3. Postaward Desk Audit Review - A structured review of compliance information obtained before or without going onsite after the award of financial assistance.

4.2.4. Postaward Onsite Review - A review that extends to all organizational components of a recipient organization or entity. A postaward onsite review is an in-depth examination of a recipient's entire program conducted periodically in a systemic fashion.

4.2.5. Preaward Desk Audit Review - A structured review of compliance information obtained before or without going onsite prior to the award of financial assistance.

4.2.6. Preaward Onsite Review - An extensive investigation of a recipient's program conducted in the field at program offices.

4.2.7. Program Review (PR) - A compliance review investigation that is limited to a particular recipient program.

## 4.3. Compliance Reviews: Procedural Requirements

### 4.3.1. Distribution of Responsibilities

4.3.1.1. OEOP will be responsible for conducting compliance review investigations of all NASA recipients of Federal assistance. OEOP will exercise its discretion about whether the investigation will extend to all recipient programs or merely to one or more of a recipient's programs and activities.

4.3.1.2. In general, the purposes of compliance reviews include, but are not limited to:

- a. Identification of deficiencies, such as discriminatory barriers to participation or disparate treatment in participation, in recipients' delivery of program services to potential and actual program beneficiaries on the basis of race, color, national origin, sex, disability, or age. [31]
- b. Investigation of allegations of discriminatory barriers to participation or disparate treatment in participation. [32]
- c. Evaluation of recipients' efforts to provide beneficiaries of notice of civil rights protections, public education, program accessibility, and other regulatory requirements for compliance. [33]
- d. Identification of recipients' needs for technical assistance or [further] onsite reviews. [34]

4.3.1.3. The Assistant Administrator, OEOP, will decide whether to conduct a compliance review of a recipient based on consideration of:

- a. Data and information cited in one or more complaints or other reliable information sources;
- b. The receipt of a significant number of complaints that raise the same or similar issue(s) relating to a particular recipient program or activity;
- c. Research, including statistical data on racial/ethnic composition of program applicants or beneficiaries, initiated and conducted by OEOP; and
- d. Other legitimate factors and information including information pertaining to complaints and information gathered OEOP's research.

4.3.1.4. Generally, an investigation will be conducted for each compliance review. The investigation may result in:

- a. A Violation LOF if there is a violation or violation corrected; and
- b. A "No Violation" LOF if there is no violation.

### 4.3.2. Voluntary Compliance and Conciliation

OEOP will engage in voluntary compliance actions, where appropriate, at any stage of the compliance review process, and will provide technical assistance to facilitate a voluntary resolution of any noncompliance issues.

### 4.3.3. Timeframes

4.3.3.1. Unless otherwise stated, all days are calendar days.

4.3.3.2. OEOP will complete a postaward compliance review investigation within 180

days following the receipt of information from the recipient subject to review.

4.3.3.3. OEOP will issue a notice to the recipient subject to review not less than 60 days prior to the date that the compliance review activities will commence. The notice will advise the recipient of the date on which the compliance review will commence, the data and information necessary to conduct an efficient and effective compliance review, and the date on which the data and information are to be received by OEOP. The notice to the recipient will be sent concurrently to the appropriate NASA recipient(s).

4.3.3.4. The "start date" for a compliance review is the date the onsite investigation begins or, if there is no onsite investigation, the date information/data are first requested from the recipient. OEOP will establish a target date for completion of each review when it identifies the review site. OEOP may conduct one or more of the following types of compliance reviews on any recipient of NASA financial assistance: preaward desk audit review; preaward onsite review; postaward desk-audit review; and postaward onsite review.

#### 4.3.4. Preaward Compliance Reviews: Guidelines and Procedures

4.3.4.1. DOJ recommends in its revised Title VI Legal Manual that agencies implement an internal screening process whereby agency officials are notified of potential assistance grants and are provided the opportunity to raise a "red flag" or concern about the potential grant recipient. Consistent with this recommendation, OEOP will screen a significant proportion of assistance applications through preaward compliance reviews. Such reviews will encompass the following activities:

- a. Review of assurances of compliance;
- b. Collection of data from targeted recipients; and
- c. Compliance determination.

#### 4.3.4.2. Reviewing Assurances of Compliance

a. Assurances serve two important purposes:

(1) They remind prospective recipients of their nondiscrimination obligations; and

(2) They provide a basis for the Federal Government to sue to enforce compliance with grant-related civil rights statutes. See United States v. Marion County Sch. Dist., 625 F.2d 607, 609, 612-13 (5th Cir.), reh'g denied, 629 F.2d 1350 (5th Cir. 1980), cert. denied, 451 U.S. 910 (1981).

b. DOJ Title VI Coordination Regulations require that agencies obtain assurances of compliance from prospective recipients. 28 CFR § 42.407(b). Regulations requiring applicants to execute an assurance of compliance as a condition for receiving assistance are valid. Grove City College v. Bell, 465 U.S. 555, 574-575 (Title IX assurances); Gardner v. Alabama, 385 F.2d 804 (5th Cir. 1967), cert. denied, 389 U.S. 1046 (1968) (Title VI assurances).

c. If an applicant refuses to sign a required assurance, the Agency may deny assistance only after providing notice of the noncompliance, an opportunity for a hearing, and other statutory procedures. 42 U.S.C. § 2000d-1; 28 CFR § 50.3 (c)II(a)1. However, the Agency need not prove actual discrimination at the administrative hearing, but only that the applicant refused to sign an assurance of compliance with Title VI (or similar nondiscrimination laws). Grove City, 465 U.S. at 575.

4.3.4.3. Data Collection Section 42.406(d) of the DOJ Title VI Coordination Regulations lists the types of data that shall be submitted to and reviewed by Federal agencies prior to granting funds. In addition to submitting an assurance that it will compile and maintain records as required, an applicant shall provide upon request:

- a. A Notice of all lawsuits (for recipients and complainants) filed against it;
- b. A description of assistance applications that it has pending in other agencies and of other Federal assistance being provided;
- c. A description of any civil rights compliance reviews of the applicant during the preceding 2 years; and
- d. A statement as to whether the applicant has been found in noncompliance with any relevant civil rights requirements.

#### 4.3.4.4. Compliance Determination

a. OEOP will make a written determination as to whether the applicant is in compliance with Title VI, as required under 28 CFR §42.407(b).

b. Where a determination cannot be made from the submitted data, OEOP will require the submission of additional information and take other steps necessary for making a compliance determination, which could include communicating with local government officials or community organizations and/or conducting field reviews.

c. Additional information OEOP will require where a determination cannot be made from the submitted data may include, but is not limited to, the following:

- (1) Information on the manner in which services are or will be provided by the program in question, and related data necessary for determining whether any persons are or will be denied such services on the basis of prohibited discrimination;
- (2) Data on the population eligible to be served by race, color, and national origin;
- (3) Information regarding covered employment, including use or planned use of bilingual public-contact employees serving beneficiaries of the program where necessary to permit effective participation by beneficiaries unable to speak or understand English;
- (4) Information on the location of existing or proposed facilities connected with the program, and related information adequate for determining whether the location has or will have the effect of unnecessarily denying access to any persons on the basis of prohibited discrimination;
- (5) Data on the present or proposed membership, by race, color, and national origin, in any planning or advisory body which is an integral part of the program;
- (6) Where relocation is involved, information regarding the requirements and steps used or proposed to guard against unnecessary impact on persons on the basis of race, color, or national origin.
- (7) Where additional data, such as demographic maps, the racial composition of affected neighborhoods or census data, is necessary or appropriate, for understanding information, federal agencies shall specify, in their guidelines or in other directives, the need to submit such data. Such additional data shall be required, however, only to the extent that it is readily available or can be compiled with reasonable effort.

#### d. Deferral of the Decision Whether to Grant Assistance

(1) The "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," (the "Title VI Guidelines") specifically state that agencies may defer assistance decisions: "In some instances . . . it is legally permissible, temporarily to defer action on an application for assistance, pending initiation and completion of [statutory remedial] procedures--including attempts to secure voluntary compliance with Title VI." 28 CFR § 50.3 (c)I.a. Thus, deferral may occur while negotiations are ongoing to special condition the award, during the pendency of a lawsuit to obtain relief, or during proceedings aimed at refusing to grant the requested assistance.

(2) This interpretation is a reasonable, and even necessary, application of the statutory remedial scheme. The congressional authorization to obtain relief preaward would be sharply reduced, if not rendered a near nullity, if agencies could not postpone the assistance decision while spending the time needed to conduct a full and fair investigation and while seeking appropriate relief. Furthermore, the Attorney General's administrative interpretation is entitled to deference. See, e.g., Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1984).

(3) The Title VI Guidelines recommend that agencies adopt a flexible, case-by-case approach in assessing when deferral is appropriate, and consider the nature of the potential noncompliance problem. Where an assistance application is inadequate on its face, such as when the applicant has failed to provide an assurance or other material required by the Agency, "the Agency head shall defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." 28 CFR § 50.3 (c)II.a.1. Where the application is adequate on its face but there are "reasonable grounds" for believing that the applicant is not complying with Title VI, "the Agency head may defer action on the application pending prompt initiation and completion of [statutory remedial] procedures." Id. (c)II.a.2 .

(4) When action on an assistance application is deferred, remedial efforts "shall be conducted without delay and completed as soon as possible." Id. I.A. Agencies shall also be cognizant of the time involved in a deferral to ensure that a deferral does not become "tantamount to a final refusal to grant assistance." Id. (c)II.c.. The agency shall not completely rule out deferrals where time is of the essence in granting the assistance, but shall consider special measures that may be taken to seek expedited relief (e.g., by referring the matter to the DOJ to file suit for interim injunctive relief).

#### 4.3.4.5. Preaward Authority of Recipients vis-a-vis Subrecipients

a. The Title VI Guidelines provide that the "same [preaward] rules and procedures would apply" where a Federal assistance recipient is granted discretionary authority to dispense the assistance to subrecipients. Id. (c)III: "[T]he Federal Agency shall instruct the approving agency -- typically a state agency -- to defer approval or refuse to grant funds, in individual cases in which such action would be taken by the original granting agency itself. . . .

Provision shall be made for appropriate notice of such action to the Federal Agency which retains responsibility for compliance with [Title VI compliance] procedures."

b. Thus, the Title VI Guidelines support Federal agencies requiring that recipients and subgrantors obtain assurances of compliance from subrecipients. When the recipient receives information preaward that indicates noncompliance by an applicant for a

subgrant, recipients may defer making the grant decision, may seek a voluntary resolution and, if no settlement is reached (after complying with statutory procedural requirements), may refuse to award assistance.

#### 4.3.5. Postaward Compliance Reviews: Guidelines and Procedures

4.3.5.1. Under 28 CFR § 42.407, NASA must "establish and maintain an effective program of postapproval compliance reviews regarding approved new applications, applications for continuation or renewal of assistance and all other federally assisted programs. . . . In carrying out this program, agency personnel shall follow agency manuals which establish appropriate review, procedures, and standards of evaluation." 28 CFR § 42.407(c)(1).

The regulation further states that "[t]he results of postapproval reviews shall be committed to writing and shall include specific findings of fact and recommendations. A determination of the compliance status of the recipient reviewed shall be made as promptly as possible." 28 CFR § 42.407(c)(2).

#### 4.3.5.2. Selection of Targeted Recipients

a. The process of conducting postaward compliance reviews begins with the selection of targeted recipients. The following guidance on selecting recipients is excerpted from DOJ's Title VI Investigative Manual. It is intended to provide background and context for this step in the compliance review process.

(1) Federal agencies have broad discretion in determining which recipients and subrecipients to target for compliance reviews. However, this discretion is not unfettered. In United States v. Harris Methodist Fort Worth, 970 F.2d 94 (5th Cir. 1992), the Fifth Circuit Court of Appeals found that a Title VI compliance review involves an administrative search and, therefore, Fourth Amendment requirements for reasonableness of a search are applied. The court looked at

- (1) whether the proposed search is authorized by statute;
- (2) whether the proposed search is properly limited in scope; and
- (3) how the administrative agency designated the target of the search.

(2) The Harris court suggested that selection of a target for a compliance review will be reasonable if it is based either on

- (1) specific evidence of an existing violation,
- (2) a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]," or
- (3) a showing that the search is "pursuant to an administrative plan containing specific neutral criteria." *Id.* at 101 (citations omitted).

(3) Agencies are cautioned that they shall not select targets randomly for compliance reviews but, rather, they shall base their decisions on neutral criteria or evidence of a violation.

b. In developing targets for compliance reviews, the following are some issues for consideration:

- (1) Issues targeted in NASA Strategic Plans and all Agency planning documents,

including but not limited to, all performance-based strategic planning documents, Agency Enterprise planning documents, and Center Functional Office strategic plans;

- (2) Issues frequently identified as problems faced by program beneficiaries;
- (3) Geographical areas that may be targeted because of the many problems beneficiaries are experiencing or because a NASA Center has not had a "presence" there for some time;
- (4) Issues raised in a complaint or identified during a complaint investigation that could not be covered within the scope of the complaint investigation;
- (5) Problems identified to the Center by community organizations or advocacy groups that are familiar with actual incidents to support their concerns;
- (6) Problems identified to the Center by its block grant recipients; and
- (7) Problems identified to the Center by other Federal, state, or local civil rights agencies.

c. It shall not be assumed that simply because no complaints from a particular segment of beneficiaries, or those in a particular area, have been received, that problems do not exist. In fact, it is likely that people in underserved communities will not be aware of their rights to either program services or to file a complaint for a denial of those services.

#### 4.3.5.3. Overview of the Compliance Review Investigative Process

a. The development of a detailed Compliance Review Investigative Plan (CRIP) will serve to better ensure that all planned compliance reviews meet their stated goals and objectives. At a minimum, the CRIP shall include the following sections:

- (1) Identification of Bases and Issues;
- (2) Identification of Applicable Legal Theories; and
- (3) Information Request/Data Collection.

b. In addition to the CRIP, the following actions shall be taken in preparing the compliance review:

- (1) Determination of Whether Onsite is Necessary; and
- (2) Notification Letter to the Recipient.

c. In general, the investigative process itself shall flow according to these actions, along with several others outside the context of the CRIP that will take place during the investigation and after it has been conducted. These include:

- (1) The interview process;
- (2) Analysis of the evidence; and
- (3) Development of an IR.

d. In general, compliance reviews and complaint investigations will follow the same guidelines and procedures for identification of applicable legal theories, information request/data collection, determination of whether an onsite is necessary, notification, and analysis of evidence. (For complete discussions on these topics, see Section 3.6.)

However, additional information specific to the compliance review context on identification of bases and issues and the interview process is presented below.

#### 4.3.5.4. Identification of Bases and Issues

a. Identify the bases, including race, color, national origin, sex, disability, or age, on which the compliance review will be focused.

b. Develop a general list of investigative goals/objectives. The DOJ Title VI Investigations Manual identifies inquiries of importance in preparing an investigative plan. These include:

(1) Does the recipient have a complaint procedure that is easy to use and is accessible to the public?

(2) How are members of the public notified of how they can file a complaint if they believe they have been discriminated against by the recipient?

(3) Does the complaint procedure provide for an unbiased investigation of the complaint, allow input of the complainant and his/her witnesses, and an appeal if the complainant is not satisfied with the results?

(4) Are complainants advised that they can file a complaint with NASA if they are dissatisfied with the results of the recipient's finding/resolution of their allegations?

(5) Does the recipient conduct community outreach, i.e., does it make all segments of the community (including minority members and those who are not fluent in English) aware of its programs, who can participate, and how? and

(6) Has it contacted local organizations, such as churches, community groups, civil rights or advocacy groups, that could assist in making potential beneficiaries aware of the recipient's programs?

#### 4.3.5.5. Information Request

a. NASA Title VI regulations state the following with regard to "compliance information:"

(1) Each responsible NASA official shall, to the fullest extent practicable, seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(2) Compliance reports. Each recipient shall keep such records and submit to the Principal Compliance Officer or his designee timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the Principal Compliance Officer or his designee may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part

(3) Each recipient shall permit access by the Principal Compliance Officer or his designee during normal business hours to such of its books, records, accounts and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part." 14 CFR § 1250.105(a)-(c).

b. Consistent with DOJ and NASA regulations, information requested for the purposes of making a compliance determination of a recipient postaward may include, but is not limited to, the following:

(1) Information on the manner in which services are or will be provided by the program

in question, and related data necessary for determining whether any persons are or will be denied such services on the basis of prohibited discrimination;

(2) Data on the population eligible to be served by race, color, and national origin;

(3) Information regarding covered employment, including use or planned use of bilingual public-contact employees serving beneficiaries of the program where necessary to permit effective participation by beneficiaries unable to speak or understand English;

(4) Information on the location of existing or proposed facilities connected with the program, and related information adequate for determining whether the location has or will have the effect of unnecessarily denying access to any persons on the basis of prohibited discrimination;

(5) Data on the present or proposed membership, by race, color, and national origin, in any planning or advisory body which is an integral part of the program;

(6) Where relocation is involved, information regarding the requirements and steps used or proposed to guard against unnecessary impact on persons on the basis of race, color or national origin.

(7) Where additional data, such as demographic maps, the racial composition of affected neighborhoods or census data, is necessary or appropriate, for understanding information, federal agencies shall specify, in their guidelines or in other directives, the need to submit such data. Such additional data shall be required, however, only to the extent that it is readily available or can be compiled with reasonable effort.

#### 4.3.5.6. The Interview Process

a. Development of a list of interview subjects. In its Title VI Investigations Manual, DOJ notes that, often, the only way to ensure that investigative goals and objectives, such as those listed above, are met is to contact community members directly and interview them concerning these issues. DOJ recommends that interviews not be limited to names of persons provided by the recipient. Rather, an attempt shall be made to independently confirm information provided by the recipient concerning its outreach efforts and the community's awareness of its complaint procedures.

b. The list of potential interviewees may include the following:

(1) Recipient Officials;

(2) State and local civil rights organizations; and

(3) Community Organizations.

#### 4.3.5.7. Compliance Review Findings

a. OEOP will notify the recipient and the appropriate NASA Center in writing of the findings of the compliance review within 30 days following the completion of the compliance review investigation. The LOF shall identify:

(1) Each issue investigated during the review;

(2) The facts and evidence collected and analyzed in relation to each issue;

(3) The findings of fact and conclusions of laws as related to each issue, including whether or not the Agency is in compliance relative to the issue(s); and

(4) Any actions the Agency must take to remedy any findings of noncompliance as related to the issues.

b. Within 30 days following receipt of the compliance review investigation LOF, the recipient will be required to provide notice to OEOP of the actions it will undertake to remedy any findings of noncompliance.

c. When OEOP issues an LOF, OEOP will send a copy of the letter to the appropriate NASA Center Director. To the extent that the compliance review was initiated in response to complaints, and to the extent appropriate and lawful, OEOP will notify the complainant of the findings of the compliance review and of the actions taken or being taken to remedy the discrimination.

d. Findings of Noncompliance

(1) When OEOP issues a noncompliance LOF following a compliance review investigation, OEOP will monitor the recipient until compliance has been achieved. When all corrective actions are completed, the review will be closed.

(2) If OEOP concludes, or the recipient presents adequate documentation that a violation noted during the review was corrected prior to review completion, the compliance review report and the letter of findings must state that a violation existed at the time of the review, but that it was voluntarily corrected by the recipient.

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