

evidence of discrimination (as discussed in Paragraph 6, below, which notes that, except in unusual cases, OFCCP will not issue a Notice of Violation (NOV) alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis) and where there exists a statistically significant (as defined in Paragraph 4, below) compensation disparity based on a multiple regression analysis that compares similarly situated employees (as defined in Paragraph 3, below) and controls for factors that OFCCP's investigation reveal were used in making pay decisions. OFCCP may reject inclusion of such a factor upon proof that the factor was actually tainted by the employer's discrimination. OFCCP will attach the results of the regression analysis to, and summarize the anecdotal evidence in, the Notice of Violations issued to the contractor or subcontractor.

3. Employees are similarly situated under these standards if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions. In determining whether employees are similarly situated under these standards, OFCCP will collect and rely on actual facts regarding employees' work activities, responsibility, and skills and qualifications. In addition, OFCCP will investigate whether preexisting groupings, such as pay grades or AAP job groups, do in fact group employees with similar work, skills and qualifications and responsibility levels, by evaluating and comparing information obtained from job descriptions and from employee interviews. OFCCP will not base its determination that employees are similarly situated on the fact that the contractor or subcontractor has grouped employees into a particular grouping, such as a pay grade or pay range, or that employees' pay can progress to the top of the pay grade or range based on performance or without changing jobs. Rather, OFCCP will investigate whether such preexisting groupings do in fact group employees who perform similar work, and who occupy positions involving similar skills, qualifications, and responsibility levels, by looking at job descriptions and conducting employee interviews.

4. A compensation disparity is statistically significant under these standards if it is significant at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

5. OFCCP will determine whether a pooled regression model is appropriate based on two factors: (a) The objective to include at least 80% of the employees (in the workforce subject to OFCCP's compliance review) in some regression analysis; and (b) whether there are enough incumbent employees in a particular regression to produce statistically meaningful results. If a pooled regression is required, OFCCP will conduct statistical tests generally accepted in the statistics profession (e.g., the "Chow test"), to determine which interaction terms should be included in the pooled regression model.

6. In determining whether a violation has occurred, OFCCP will consider whether there is anecdotal evidence of compensation discrimination, in addition to statistically significant compensation disparities. Except in unusual cases, OFCCP will not issue a Notice of Violation (NOV) alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis. In unusual cases, OFCCP may assert a systemic discrimination violation based only on anecdotal evidence, if such evidence presents a pattern or practice of compensation discrimination.

7. OFCCP will also assert a compensation discrimination violation if the contractor establishes compensation rates for jobs (not for particular employees) that are occupied predominantly by women or minorities that are significantly lower than rates established for jobs occupied predominantly by men or non-minorities, where the evidence establishes that the contractor made the job wage-rate decisions based on the sex, race or ethnicity of the incumbent employees that predominate in each job. Such evidence of discriminatory intent may consist of the fact that the contractor adopted a market survey to determine the wage rate for the jobs, but established the wage rate for the predominantly female or minority job lower than what that market survey specified for that job, while establishing for the predominantly male or non-minority job the full market rate specified under the same market survey.

Signed at Washington, DC this 10th day of November, 2004.

Victoria A. Lipnic,

Assistant Secretary for the Employment Standards Administration.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

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DEPARTMENT OF LABOR

Employment Standards Administration

Office of Federal Contract Compliance Programs; Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, Notice

AGENCY: Office of Federal Contract Compliance Programs, Employment Standards Administration, Department of Labor.

ACTION: Notice of proposed guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination; request for comments.

SUMMARY: The Office of Federal Contract Compliance Programs requests comments on proposed guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination.

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be postmarked by December 16, 2004.

Facsimile: Your comments must be sent by December 16, 2004.

ADDRESSES: Comments should be submitted to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP. Electronic mail is the preferred method for submittal of comments. Comments by electronic mail must be clearly identified as pertaining to the notice of guidelines for self-evaluation of compensation practices for compliance with nondiscrimination requirements of Executive Order 11246 with respect to systemic compensation discrimination, and sent to ofccp-public@dol.gov. As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Where necessary, hard copies of comments, clearly identified as pertaining to the notice of proposed standards and methodologies for evaluating contractors' and subcontractors' compensation practices, may also be delivered to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW.,

Washington, DC 20210. Because of delays in mail delivery, OFCCP suggests that commenters planning to submit comments via U.S. Mail place those comments in the mail well before the deadline by which comments must be received. Receipt of submissions will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202) 693-0102 (voice), or (202) 693-1308 (TTY).

FOR FURTHER INFORMATION CONTACT:

Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693-0102 (voice), or (202) 693-1308 (TTY). Copies of this notice in alternative formats may be obtained by calling (202) 693-0102 (voice), or (202) 693-1308 (TTY). The alternative formats available are large print, electronic file on computer disk, and audiotape. The Notice is available on the Internet at <http://www.dol.gov/esa>.

SUPPLEMENTARY INFORMATION: On May 4, 2000, OFCCP proposed substantial revisions to affirmative action program requirements. 65 FR 26089 (May 4, 2000). As OFCCP explained in the preamble to these May 4, 2000 proposed revisions:

More recently, an additional objective of the proposed revision has been to advance the Department of Labor's goal of pay equity; that is, ensuring that employees are compensated equally for performing equal work. * * * This NPRM encourages contractors to analyze their own compensation packages to ensure that all their employees are being paid fairly.

65 FR 26089 (May 4, 2000).

On November 13, 2000, OFCCP published a Final Rule adopting many of the proposed revisions to the regulatory requirements for written affirmative action programs. 65 FR 68022 (Nov. 13, 2000). OFCCP adopted a requirement that covered contractors evaluate their "[c]ompensation system(s) to determine whether there are gender-, race- or ethnicity-based disparities." 65 FR 68046 (Nov. 13, 2000) (referencing 41 CFR 60-2.17(b)(3)).

OFCCP received many comments in response to the Proposed Rule on this compensation self-evaluation requirement. As explained in the Preamble to the November 13, 2000 Final Rule:

Many of the comments focused on the requirement to review compensation systems, with several commenters asserting that OFCCP does not have authority to enforce equal pay concerns, that analysis of compensation systems is not required by the

current regulations, that compensation analyses impose an additional burden, or that OFCCP did not specify the types of analyses it would find acceptable. Commenters also expressed confusion about how the information gained from [the compensation analysis] should be used by contractors, and how the contractor's actions will be evaluated by OFCCP.

65 FR 68036 (Nov. 13, 2000).

OFCCP responded to these commenters in the Preamble to the November 13, 2000 Final Rule: "[C]ontractors have the ability to choose a type of compensation analyses that will determine whether there are gender-, race-, or ethnicity-based disparities." 65 FR 68036 (Nov. 13, 2000).

OFCCP has not, however, provided guidance to contractors or to OFCCP personnel on suggested techniques for compliance with this compensation self-evaluation requirement. This Directive is intended to provide suggested techniques for complying with the compensation self-evaluation requirement, although compliance with this Directive is not required for compliance with Section 60-2.17(b)(3). OFCCP has included an incentive for contractors to adopt voluntarily the general standards outlined in this Directive. Specifically, if a contractor, in good faith, reasonably implements the general standards outlined herein, OFCCP will coordinate its compliance monitoring activities with the contractor's self-evaluation approach. However, compliance with this Directive is not the only way to comply with Section 6-2.17(b)(3).

While developing these guidelines for conducting compensation self-evaluations, OFCCP recognizes the risk of liability that an employer faces when making corrective compensation adjustments under a self-evaluation process. For example, female or minority employees may bring claims based on the theory that the employer's own self-evaluation study established that the employer engaged in discrimination or that the employer did not make sufficient compensation adjustments to remedy the discrimination. *See, e.g., Cullen v. Indiana Univ.*, 338 F.3d 693, 701-04 (7th Cir. 2003) (female professor sued university alleging compensation discrimination and basing her claim, in part, on university's pay equity study). Similarly, male or non-minority employees may sue the employer alleging violation of Title VII because the employer gave salary adjustments to female or minority employees under the compensation self-evaluation. *See, e.g., Rudenbusch v. Hughes*, 313 F.3d 506,

515-16 (9th Cir. 2002) (employer's self-audit, regression analysis was not technically sufficient to foreclose male professor's discrimination claim against the employer); *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1016-18 (8th Cir. 1998) (same); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996) (same). OFCCP has attempted to provide guidelines that are technically sufficient to withstand judicial scrutiny, so that contractors do not face potential liability for implementing a robust and effective self-evaluation process.

Proposed Guidelines:

Proposed Guidelines for Self-Evaluation of Compensation Practices for Compliance With Executive Order 11246 With Respect to Systemic Compensation Discrimination

I. Guidelines

OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques to comply with 41 CFR 60-2.17(b)(3). However, as an incentive for contractors to implement a compensation self-evaluation system that conforms to the general standards outlined in this Notice, OFCCP will deem a contractor in compliance with Section 60-2.17(b)(3) and coordinate its compliance monitoring activities as explained in Section II of this Notice, if the contractor's compensation self-evaluation system meets the following general standards:

A. The self-evaluation is performed by groupings of employees that are similarly situated, referenced hereinafter as "Similarly Situated Employee Groupings," or "SSEGs." Employees may be placed into the same SSEG if they are "similarly situated"; that is, if the work they perform is similar in content, responsibility, and requisite skill and qualifications. Employees may not be grouped in an SSEG for purposes of this Notice unless the work performed, responsibility level, and requisite skill and qualifications involved in their positions are actually similar, regardless of any employer-created designation, such as job title, job classification, pay grade or range, etc. The fact that an employer has grouped employees into a particular pay grade or range does not necessarily mean that these employees are similarly situated; the determining factors are whether the employees are performing similar work, have similar responsibility level, and occupy positions involving similar skills and qualifications.

B. The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis. In general, SSEGs should contain at least 30 employees overall, and contain five or more incumbents who are members of either of the following pairs: male/female or minority/non-minority. In certain cases, small numbers of employees will not be sufficiently similarly situated to other employees to permit them to be grouped in an SSEG. Such employees may be eliminated from the statistical evaluation process; however, the contractor is expected to conduct a self-evaluation of pay decisions related to such employees using non-statistical methods. Further, the contractor's statistical analyses must encompass a significant majority of the employees in the particular affirmative action program or workplace. Where the statistical analyses do not encompass at least 80% of the employees in the affirmative action program or workplace, OFCCP will carefully scrutinize the statistical analyses and associated non-statistical self-evaluations.

C. On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs (as defined in Section IA of this Notice) and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc. For contractors with 250 or more employees, the statistical analysis must be multiple regression analyses. The contractor must ensure that any factor within the contractor's control that is included in the analysis is not itself subject to discrimination, although such a factor may be included unless there is evidence that the factor actually was subject to discrimination. Correlation between such a factor and a protected characteristic does not automatically disqualify the factor, if the employer has implemented formal standards to constrain subjective decisionmaking. The analysis must include tests of statistical significance that are generally recognized as appropriate in the statistics profession.

D. The contractor must investigate any statistically significant compensation disparities produced by the self-evaluation analyses that it has developed. OFCCP considers an identified disparity to be statistically significant if the significance level of the disparity is two or more standard

deviations from a zero disparity level.¹ The contractor must adequately determine whether such statistical disparities are explained by legitimate factors or otherwise are not the product of unlawful discrimination. If the statistical disparities cannot be explained, the contractor must provide appropriate remedies. The remedies that are appropriate will depend on the time period in which the disparities emerged. For the initial implementation of the compensation self-evaluation system, the contractor may have to make adjustments based on both current disparities and prior disparities. OFCCP uses a two-year window for back pay corrections. For periodic iterations of the self-evaluation system after the initial implementation, the remedy would involve correcting current disparities. Through the sources of information available to OFCCP under Section IE of this Notice, OFCCP will carefully evaluate whether the contractor has properly investigated such disparities and has adequately corrected any disparities that are not explained by legitimate factors.

E. The contractor must contemporaneously create and retain the following documents and data:

(1) Documents necessary to explain and justify its decisions with respect to SSEGs, exclusion of certain employees, factors included in the statistical analyses, and the form of the statistical analyses. Such documents must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in compliance with Executive Order 11246, as described in Section IIB of this Notice;

(2) The data used in the statistical analyses and the results of the statistical analyses for two years from the date that the statistical analyses are performed;

(3) The data and documents explaining the results of the non-statistical methods that the contractor used to evaluate pay decisions of those employees who were eliminated from the statistical evaluation process, which must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in

¹ This significance level roughly translates to a measured absolute disparity that is more than two times the standard error of the estimated value. Kaye, David H. and Freedman, David A. (2000), Reference Manual on Scientific Evidence Second Edition, Federal Judicial Center, Washington, DC, p. 124, note 138. Using a two-tailed test, a statistically significant disparity is a disparity with a significance level of 0.05 or less (subject to the consideration of what is a meaningful difference). This criterion means that, e.g., a disparity in the pay between males and females being either positive or negative, would have a less than a 1-in-20 chance of occurrence unrelated to potential discrimination.

compliance with Executive Order 11246, as described in Section IIB of this Notice;

(4) Documentation as to any follow-up investigation into statistically significant disparities, the conclusions of such investigation, and any pay adjustments made to remedy such disparities. These documents must be retained for a period of two years from the date that the follow-up investigation is performed.

F. The contractor must make all of the documents and data referenced in Section IE available to OFCCP during a compliance review. OFCCP may also review any personnel records and conduct any employee interviews necessary to determine the accuracy of any representation made by the contractor in such documentation or data.

II. Procedure

If the contractor's compensation self-evaluation system meets the standards set forth in Section I of this Notice, OFCCP will coordinate its compliance monitoring activities as follows:

A. During a compliance review, OFCCP will assess whether the contractor's compensation self-evaluation system comports with the general standards outlined in Section I of this Notice.

B. If the contractor's compensation self-evaluation system reasonably meets the general standards outlined in Section I of this Notice, OFCCP will consider the contractor's compensation practices to be in compliance with Executive Order 11246. However, OFCCP may suggest in writing that the contractor make prospective modifications to improve the self-evaluation system's conformity with the general standards outlined in Section I of this Notice, where OFCCP concludes that the self-evaluation system is only marginally reasonable under these guidelines; thereafter, during future compliance reviews, OFCCP will assess whether the contractor made the suggested changes in determining the contractor's prospective compliance with E.O. 11246. If, during a future compliance review, OFCCP determines that the contractor has not made the changes that OFCCP suggested during the prior compliance review, the contractor's self-evaluation system will no longer be deemed to comport with the general standards outlined in Section I of this Notice.

C. OFCCP may review the documents and data set forth in Section IE to determine whether the contractor's compensation self-evaluation system reasonably meets the general standards

outlined in this Notice and, if applicable, whether the contractor reasonably made the changes that OFCCP suggested during a prior compliance review.

D. OFCCP personnel will direct technical issues about whether a contractor's self-evaluation system meets the general standards outlined in Section I of this Notice to OFCCP's Director of Statistical Analysis in the National Office, or his or her designee.

E. Alternative Compliance Certification: OFCCP understands that some contractors may take the position, based on advice of counsel, that their compensation self-evaluation is subject to certain protections from disclosure, such as the attorney client privilege or attorney work product doctrine, and that these protections would be waived if the contractor disclosed the self-evaluation. OFCCP does not take any position as to the applicability of such protections in the context of a compensation self-evaluation. However,

to avoid protracted legal disputes over the applicability of such protections, OFCCP will permit the contractor to certify its compliance with 41 CFR 60–2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation analyses to OFCCP during a compliance review. The certification must be in writing, signed by a duly authorized officer of the contractor under penalty of perjury, and the certification must state that the contractor has performed a compensation self-evaluation with respect to the affirmative action program or workplace at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation analyses and results are subject to the attorney-client privilege and/or the attorney work product doctrine. Because in such an instance OFCCP cannot evaluate the contractor's compliance with the general standards outlined in Section I of this Notice, a

contractor that opts for this compliance certification alternative will not be entitled to the coordination outlined in Section IIB of this Directive. That is, contractors that opt for this alternative compliance certification do not receive the benefit of OFCCP coordination of agency compliance monitoring activities. Thus, for contractors that elect only to certify compliance with Section 60–2.17(b)(3), OFCCP will evaluate their compensation practices without regard to the analysis or results of their compensation self-evaluation systems.

Signed at Washington, DC this 10th day of November, 2004.

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Deputy Assistant Secretary for Federal Contract Compliance.

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