OFCCP Fundamentals

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OFCCP AND FEDERAL CONTRACTORS

I. INTRODUCTION

Companies that enter into contracts with the federal government are subject to a number of special provisions concerning their employment practices. Those requirements that relate to equal employment opportunity and affirmative action are Executive Order 11246 (the “Executive Order”), Section 503 of the Rehabilitation Act of 1973 (“Section 503”), and §402 of the Jobs for Veterans Act (“Veterans Act”). These laws, which impose both nondiscrimination and affirmative action obligations on holders of covered federal government contracts and subcontracts, are enforced by the Office of Federal Contract Compliance Programs (OFCCP), a branch of the U.S. Department of Labor’s Employment Standards Administration.

The Executive Order prohibits discrimination based upon race, national origin religion, and sex, and mandates affirmative action for minorities and women. Section 503 prohibits discrimination against, and mandates affirmative action with respect to, individuals with disabilities. The Veterans Act, similarly, prohibits discrimination against, and mandates affirmative action for, disabled veterans, veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, veterans who participated in a military operation for which an Armed Forces service medal was awarded, and, recently, separated veterans (collectively, “covered veterans”). It is estimated that there are more than 100,000 employers covered by these laws.

The Executive Order’s requirements are set forth in the order itself and its implementing regulations. Section 503 and the Veterans Act requirements are set forth in the respective statutes and their implementing regulations. OFCCP has also developed a Federal Contract Compliance Manual (“the Manual”), which describes the agency’s compliance processes for all three OFCCP programs. The decisions of the Department of Labor’s Administrative Review Board, which are the Department’s final decisions in litigation under these laws, also provide guidance on the

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1 These materials are drawn in significant part from Lindemann & Grossman, Employment Discrimination Law, 4th Ed. (BNA 2007).
2 Executive Order No. 11246.
4 38 U.S.C. §§ 4211–4212, as amended. These provisions were historically referred to as the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). Since 2002, because the group of veterans covered by the law has been broadened to include those who have served in a number of post-Vietnam military actions, the popular name of the statute has been changed to the Jobs for Veterans Act.
5 Originally, the Executive Order did not refer to sex as a protected characteristic. In 1967, however, President Johnson issued Executive Order No. 11375, expanding the original Order to include sex.
6 41 CFR Chapter 60, Parts 1-60.
7 Section 503 of the Rehabilitation Act and 38 U.S.C.§4211 are Attachments B and C to this paper. The regulations pertaining to Section 503 appear at 41 CFR Part 60-741; those pertaining to the Veterans Act are at 41 CFR Part 60-250.
8 FED. CONTRACT COMPL. MAN., reprinted in 1 & 2 AFFIRM ACTION COMPL. MAN. (BNA). Many of the OFCCP practices and procedures discussed in this paper may be found in the Manual. However, the Manual has not been routinely updated and, in some instances, OFCCP practice no longer conforms to the Manual’s provisions. The Manual does not have the binding force and effect of regulations.
requirements of the three OFCCP programs, and are available on-line through the major legal
search sites.  

II. COVERAGE AND EXEMPTIONS

A. Definition of a “Government Contract”

A “government contract” is defined by OFCCP as any agreement, or modification of an
agreement, between any contracting agency and any person for the purchase, sale, or use of
personal property or non-personal services. The definition is very broad and has been held to cover
both situations in which the government is the purchaser or lessee of goods or services, and those in
which it is the seller or lessor. In general, federal financial assistance agreements, such as grants,
are not covered contracts. Federally assisted construction contracts, however, are covered under
the Executive Order.

1. Subcontracts

OFCCP’s requirements apply both to prime contracts and to subcontracts entered
into by the prime. A “subcontract” covered by OFCCP’s programs is defined in the
regulations as any agreement or arrangement between a contractor and any person for the
purchase, sale, or use of personal property or non-personal services which, in whole or in
part, is necessary to the performance of the covered contract, or under which any portion of
the covered contract is performed.

A few cases have litigated the issue of whether a subcontract is “necessary” to the
performance of a government contract. In Liberty Mutual Insurance Co. v. Friedman, the Fourth
Circuit held that workers’ compensation policies issued to government contractors are covered
subcontracts. The court held that because all states require employers to provide their workers with
this protection as a prerequisite to performing any contract, the issuance of such policies is
necessary to the performance of the government contract. In Department of Labor v. Coldwell,
Banker & Co., the Secretary of Labor held that a company that manages buildings leased to
federal agencies is a covered subcontractor, because it is performing services that would otherwise
be performed by the landlord.

9 Before 1996, the Secretary of Labor was responsible for issuing final litigation decisions for the Department under the
Executive Order. Final decisions under Section 503 and the Veterans Act were issued by the Assistant Secretary of
Labor for Employment Standards. Presently, all final Department decisions in OFCCP cases are issued by a three-
member Administrative Review Board (ARB), appointed by the Secretary to fixed terms. 61 Fed. Reg. 19,978 (1996).
10 The term “contracting agency” means “any department, agency, establishment or instrumentality of the United States,
including any wholly owned Government corporation, which enters into contracts.” 41 C.F.R. 60-1.3, -250.2(i)(2), -
741.2(i)(2) (2005). Although the regulations for all three laws use the same definition, because the Executive Order is an
act of the President without legislative approval, it applies only to agencies of the executive branch of the government.
11 Construction that is paid for in whole or in part fit federal funds or funds borrowed on the credit of the government. 41
C.F.R. 60-1.3. In determining whether a federally assisted construction contract is covered, the controlling factor is the
amount of the contract, not the amount of the federal assistance. 41 C.F.R. 60-1.5.
12 Federally assisted construction is not covered under the Veterans Act or Section 503.
13 639 F.2d 164, 166 (4th Cir. 1981).
In *OFCCP v. Loffland Brothers*, \(^{15}\) the company had contracts to drill oil wells on land that a prime contractor had leased from the government. OFCCP claimed that this was sufficient to make it a covered subcontractor. However, the Secretary of Labor ruled that merely doing business with a government contractor was insufficient to trigger coverage. Loffland was not a covered contractor because OFCCP failed to demonstrate that any of the oil the company derived from its wells was sold to the government. \(^{16}\) In contrast, in *OFCCP v. Monongahela Railroad*, \(^{17}\) a railroad was found to be a covered subcontractor because it hauled coal that eventually was used by a utility that supplied power to the government. Monongahela argued that it should not be treated as a covered subcontractor because it was not the sole source of the utility’s coal supply; and, it was impossible to determine which coal generated the electricity provided to the government. The Administrative Law Judge held that the fact that the utility received coal from other sources was irrelevant, provided that the other criteria of Executive Order 11246 were met.

2. Separate Facilities

OFCCP treats all facilities of a covered contractor (including its non-contracting divisions, affiliates, and subsidiaries) as subject to the requirements of the laws it enforces. In determining the extent of such coverage, courts have relied upon several different tests. In *Board of Governors v. Department of Labor*, \(^{18}\) the Court of Appeals applied an “ultimate authority” test, finding that a government contract at one campus of the state university system resulted in all campuses of the system, even those that did not have government contracts, being covered.

An employer that wishes to exempt a non-contracting division or affiliate from OFCCP’s requirements must apply to the Deputy Assistant Secretary for Federal Contract Compliance and demonstrate, through a detailed presentation, that the facility or affiliate is entirely separate from the contracting unit. The non-contracting unit may neither derive profit from, nor furnish assistance to, the contracting unit, and its employees may not be in any preferred position over others in the qualified labor pool for employment with, or advancement in, the covered unit. \(^{19}\)

3. Not All Contracts Covered

There are two tiers of coverage under OFCCP’s laws. The size of the employer and the amount of the contract determine whether a particular employer who does business with the government is subject to OFCCP’s basic requirements, or whether the employer must meet the AAP requirements as well.

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\(^{15}\) 1984 WL 484538 (Final Decision, Apr. 16, 1984).

\(^{16}\) The contract did not require the lessor of the property to drill wells on the property at all. Thus, Loffland was not performing a portion of the lessor’s undertaking.

\(^{17}\) No. 85-OFC-2 (Apr. 2, 1986).

\(^{18}\) 917 F.2d 812, 814 (4th Cir. 1990).

A contractor meets the basic threshold under the Executive Order and Section 503 if it has a single government contract or subcontract of at least $10,000, and at least 25 full-time employees.\(^{20}\) The Veterans Act of 2002 sets the threshold for coverage under that law at $100,000 for contracts or subcontracts entered into on or after December 1, 2003.\(^{21}\)

The basic threshold is triggered where there is a master agreement with an aggregate total value, or expected value, that exceeds $10,000 in any 12-month period ($100,000 under the Veterans Act), even if no single purchase order under that agreement equals or exceeds $10,000.\(^{22}\) In addition, coverage under the Executive Order exists where the contractor has government bills of lading in any amount;\(^{23}\) or is a financial institution serving as either a depository of federal funds in any amount, or an issuing paying agent for U.S. savings bonds and notes.\(^{24}\) Contracts for indefinite quantities, including open end and requirements contracts, also meet the basic threshold for the Executive Order and the Rehabilitation Act, unless the government contracting entity has reason to believe that the amount to be ordered in any year will not exceed $10,000. Coverage for the first year is determined at the time of the initial contract award and, thereafter, on an annual basis.\(^{25}\)

The regulations exempt contracts\(^{26}\) from coverage if they are:

1. performed outside the United States by employees who were not recruited within or transferred from this country;\(^{27}\)
2. performed by a government subdivision which has no federal contracts and does not participate in work on a federal contract held by another subdivision of that government;\(^{28}\)
3. exempted by the OFCCP Director when “the national interest so requires;” or,

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\(^{20}\) 41 C.F.R. 60-1.5 (a) (1), -741.4 (a) (1).


\(^{22}\) 41 C.F.R. 60-1.5 (a) (4), -250.4 (a) (2), -741-4(a)(2). The Secretary of Labor has made clear that contracts otherwise are not aggregated to establish the threshold coverage. *Department of Labor v. Bruce Church, Inc.,* 1987 WL 774233, at *2 (Final Decision, June 30, 1987) (there is no aggregation of contracts other than as provided in the regulations); see also *Burnett v. Brock,* 806 F.2d 265, 267 (11th Cir. 1986) (per curiam) (in the absence of a master contract, individual purchase orders are considered individual contracts).

\(^{23}\) 41 C.F.R. 60-1.5 (a).

\(^{24}\) Id.

\(^{25}\) Id. 60-1.5 (a) (2), -741.4 (a) (2). If the amount of any single order under the agreement exceeds $10,000, coverage remains in effect for the duration of the contract, regardless of the amounts actually ordered the ensuing year.

\(^{26}\) In addition to those exemptions listed in the text, religiously oriented church-related schools, colleges, universities, and other educational institutions may employ persons of a particular religion. *Id.* 60-1.5(a) (5). A contractor may extend a preference in employment to Indians living on or near an Indian reservation for employment opportunities on that reservation, or within a reasonable commuting distance. However, no discrimination based upon religion, sex, or tribal affiliation is permitted. *Id.* 60-1.5(a) (6).

\(^{27}\) Id. 60-1.5(a) (3), -250.3(a) (3), -741.4(a) (4). If a contractor cannot obtain a visa due to discrimination, it must notify the Department of State and the OFCCP Director. *Id.* 60-1.10.

\(^{28}\) Id. 60-1.5 (a) (4), -250.4 (a) (4), -741.4 (a) (5). For example, a county adoption agency that has no federal contract would not be covered by any OFCCP program simply because another county agency is a party to such a contract. Moreover, agencies, instrumentailities, and subdivisions of a state or local government (except for educational institutions and medical facilities) are not required to maintain a written AAP or file an annual compliance report. *Id.* 60-1.5 (a) (4).
If a contractor satisfies the basic threshold, it is prohibited from discriminating on the basis of race, sex, religion, national origin, or because of a person’s status as a qualified individual with a disability or a covered veteran. The contractor also must take affirmative action (e.g., outreach recruiting, training, and other steps) as necessary to ensure equal employment opportunity. The OFCCP may review the compliance of any non-exempted facility of such a covered contractor and, if necessary, require remedial action.

A non-construction contractor that has (1) at least 50 employees, and (2) a federal contract of $50,000 or more is subject to obligations beyond OFCCP’s basic requirements. A contractor that meets this higher threshold must (1) develop written AAPs for minorities and women, individuals with disabilities, and covered veterans at each of its establishments; and, (2) file a standard Form 100 (EEO-1) and a VETS-100 report every year.

### III. EXECUTIVE ORDER 11246

#### A. Mandates of the Order

The government’s standard contract clause requires that each contractor agree to comply with provisions of the Executive Order and the rules, regulations, and orders of the Secretary of Labor issued under those laws; post notices setting forth provisions of the nondiscrimination clause; furnish required information and reports; permit access to its books and records for purposes of investigation by the Secretary of Labor [OFCCP]; and, include the equal employment opportunity clause in every covered subcontract or purchase order into which it enters. It further provides that in the event of noncompliance with the clause itself, or with any rule, regulation, or order issued under the Executive Order, then after a hearing, the contract may be canceled, terminated, or suspended, or the contractor may be debarred from bidding on further government contracts.

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29 Id. 60-1.5 (b) (1), -250.4 (b) (1), -741.4 (b) (1).
30 Id. 60-1.5 (c), -250.4 (b) (2), -741.4 (b) (2).
31 E.g., OFCCP v. Burlington Indus., Inc., No. 90-OFCC-10, (Recommended Decision Nov. 1, 1991) (“a contract between a corporate owner of the plant and the government is enough, even though the particular plant may not be involved in government work.”); OFCCP v. Priester Constr. Co., 1983 WL 411026, at *20, (Final Decision, Feb. 23, 1983) (if a contractor has a federal contract or subcontract over $10,000, its entire workforce is covered). In order to exempt any of its facilities from coverage, the contractor must obtain a waiver before OFCCP schedules that facility for review. Trinity Industries v. Herman, 173 F.3d 527 (4th Cir. 1999).
33 See OFCCP v. Star Mach. Co., No. 83-OFCCP-4 (Final Decision, Sept. 21, 1983) (blanket purchase agreements are contracts within the meaning of 41 C.F.R. 60-1.40; a blanket purchase contract is one contract with the value measured by the total amount of orders the parties reasonably anticipate to be placed during the life of the contract).
35 Id. 60-1.7, -250.6 (c).
B. AAP Requirements for Supply and Service Contractors

A covered contractor who meets the AAP threshold must develop, maintain, and periodically update a written AAP setting forth action plans to achieve equal opportunity for women and men of all racial and ethnic groups. The contractor must maintain records of all personnel actions\textsuperscript{36} and make them available to OFCCP during a review of its AAP.

OFCCP generally requires a separate AAP for each of the contractor’s establishments.\textsuperscript{37} However, contractors are afforded several options with respect to an establishment that employs fewer than 50 people. Such a facility may be covered by an AAP that pertains only to that establishment, by the AAP that covers the facility housing the personnel function that supports that establishment, or by the AAP that covers the facility housing the official to whom employees at that small facility report.\textsuperscript{38}

As an alternative to maintaining establishment-specific AAPs, a contractor may request OFCCP approval to establish a multi-facility plan “based on functional or business units.”\textsuperscript{39} In 2002, OFCCP issued a directive setting forth the procedures for obtaining approval of a functional AAP.\textsuperscript{40} There are advantages to both the establishment-specific and the functional AAP. The establishment AAP facilitates evaluation of workforce availability by recruitment area. The FAAP, however, allows management to hold a specific executive accountable for an organization’s performance, and may be a more logical way to track a mobile or diffuse group of workers, e.g., a sales force that reports to a regional or national office.

\textsuperscript{36} Id. 60-1.40, -1.12 (b), 60-2.32. For any record that relates to an individual, the contractor must be able to identify: (1) the gender, race, and ethnicity of each employee; and (2) where possible, the gender and race/ethnicity of each applicant. Some records that must be maintained under OFCCP’s regulations do not relate to individuals, e.g., job advertisements and postings, written personnel policies, and test validation studies.

\textsuperscript{37} In Coldwell, Banker & Co., 1987 WL 774232, the Secretary held that each physically separate contractor facility is prima facie an ‘establishment;’ but, that several facilities could be grouped and treated as one establishment where there is central authority for employment and personnel decisions, including the power to set wages and assign personnel to different locations. While facilities in different labor markets or recruiting areas should not be combined, small facilities might be combined for goal-setting purposes if the failure to combine them would result in meaningless goals of a fraction of a person.

\textsuperscript{38} 41 C.F.R. 60-2.1(d)(2) (2005). The regulations address situations where an employee works in one facility but reports to another, and situations where the employee works in one facility but personnel decisions affecting him/her (promotion, discipline, termination) are made elsewhere. Employees who work at establishments other than that of the manager to whom they report are to be included in the AAP that covers their manager’s facility. Employees for whom selection decisions are made at a higher level establishment within the organization than the one where they work are to be included in the AAP of the establishment where the selection decision is made.” Id. 60-2.1 (d) (1), (3). If an employee is included in an AAP for an establishment other than the one at which he or she is located, the organizational profile and job group analysis of both the AAP in which the employee is included, and that of the facility at which he/she is actually located, must be annotated to identify the actual location of such employee. Id. 60-2.1 (e).

\textsuperscript{39} Id. 60-2.1 (d) (4).

\textsuperscript{40} See OFCCP Directive No. 254 (Mar. 21, 2002), at http://www.dol.gov/esa/media/reports/ofccp/directive/02aapdir.htm. The contractor must submit a written request explaining why it believes that use of a functional AAP would be most appropriate for a functional area or business unit that operates somewhat autonomously. Id. Functional AAP agreements, once approved, automatically expire 5 years after approval, unless a timely renewal request is submitted by the contractor.
The regulations require that the Executive Order AAP include various narrative and statistical sections. In preparing the plan, it is important to keep in mind that a contractor’s compliance status will not be judged solely by whether it reaches the goals established in its AAP.\textsuperscript{41} Instead, compliance with affirmative action obligations is determined by reviewing the nature and extent of a contractor’s good faith affirmative action activities, and the appropriateness of those activities to identified equal employment problems.\textsuperscript{42}

1. The AAP Narrative

The narrative portion of an Executive Order AAP, which describes the contractor’s equal opportunity/affirmative action policy and its implementation, is thus extremely important.\textsuperscript{43}

The Executive Order AAP must include a statement assigning responsibility and accountability for implementation of the AAP to an official who has the authority, resources, and support of and access to top management in order to ensure effective implementation.

The contractor must evaluate its workforce, by organizational unit and job group, to determine whether there are issues concerning minority or female utilization or distribution. Personnel activity must be studied to determine whether there are selection disparities. There must be an examination of compensation systems and of selection, recruitment, and other personnel procedures to see if they cause disparities in the treatment of women or minorities, as well as any other areas that might impact the success of an AAP. The details and results of this self-analysis must be described in the narrative, and the problem areas that are identified must be set forth with specificity.

The contractor must take steps (“action-oriented programs”) to address each identified problem area. The regulations provide guidance as to the development and execution of such programs, but they must be individually tailored to the contractor’s situation: remedial steps must constitute more than following the same procedures which have previously produced inadequate results, and the contractor must describe its good faith efforts to remove barriers, expand employment opportunities, and produce measurable results. A contractor should avoid making commitments that are not realistically achievable during the program year.

\textsuperscript{41} Id. 60-2.35.
\textsuperscript{42} Id.
\textsuperscript{43} Although a preamble asserting confidentiality is not required, most employers include some qualifying language indicating, for example, that the AAP does not confer enforceable rights on employees, that numerical goals in the AAP are not quotas and do not require individual preferences, or that certain terms used in the AAP are terms of art and are limited in meaning to the usages defined by OFCCP. The primary reason for these qualifiers is that courts have permitted plaintiffs in Title VII cases to obtain AAPs through discovery or a request under the Freedom of Information Act (FOIA).

Typically, before it responds to a FOIA request for an AAP, OFCCP will notify the contractor and permit sufficient time for the company to take legal steps to prevent disclosure, should it choose to do so. Contractors often stamp pages containing numerical data, analyses of status and progress, and action plans to address concerns with a “confidential” legend. While this designation makes OFCCP aware of the contractor’s desire to protect information, it does not have any legal effect upon the disclosure requirements of FOIA.
The contractor must design and implement audit and reporting provisions to monitor progress under the AAP. A description of the auditing procedures should be included in the narrative. The auditing system should monitor records of all personnel activity to ensure that nondiscriminatory policies are fulfilled. Also, there should be internal reporting on a scheduled basis as to the degree to which objectives are attained. Finally, report results should be reviewed with all levels of management, and top management should be advised of the effectiveness of the AAP.

2. Required Statistical Analyses

The ultimate purpose of the AAP is to provide a framework through which the contractor performs an in-depth analysis of its total employment process in order to determine whether and where impediments to equal employment opportunity arise. The Executive Order AAP contains five statistical sections: the organizational profile; job group analysis; availability analysis; utilization analysis (comparison of incumbency to availability); and placement goals. The contractor’s review should be ongoing. Therefore, it must develop and implement auditing systems that periodically measure the effectiveness of its AAPs.

(a) Organizational Profile. The organizational profile depicts the staffing pattern within an establishment by organizational unit. A contractor may select one of two formats for the profile: (1) an organizational display; or, (2) a workforce analysis.

The organizational display must identify each unit (e.g., department, division, section, group, branch, project team, job family, or similar component) within the establishment, and show the relationship between the units. For each unit listed, the contractor must include: (1) its name; (2) the job title, gender, race, and ethnicity of any unit supervisors; (3) the total number of male and female incumbents; and, (4) the total number of male and female incumbents in each of several listed minority groups (Hispanic or Latino; White; Black or African American; Asian; Native Hawaiian or other Pacific Islander; American Indian or Alaska Native; and, “Two or More Races, Not Hispanic or Latino”).

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44 Id. 60-2.10 (b) (1).
45 Id. 60-2.17 (d).
46 Id. 60-2.11 (b).
47 See id. 60-2.11 (b) (3) (i)–(iv). In the past, OFCCP has required contractors to use five race/ethnic categories: White, Black, Hispanic, Asian/Pacific Islander, and Native American in analyzing their work forces. This was consistent with the categories used both by the Census and the EEO-1 Form. The EEO-1 Form, due on September 30, 2007, adopts the seven categories listed above, which were utilized by the Census beginning in 2000. OFCCP has issued guidance stating that it expects contractors to adjust their AAPs to reflect this change. However, because it appreciates the difficulties attendant in reanalyzing the EEO data, OFCCP says that, for the time being, it will not penalize contractors who are still using the older system of categorization.
The workforce analysis, which a contractor may use in lieu of the organizational display, is a slightly different breakdown of the contractor’s workforce changes. The contractor begins by listing each unit within the facility that is covered by the AAP. The analysis must list each job title within the unit (including the unit supervisor), ranked by wage rate or salary range – from the lowest paid to the highest paid. If there are separate work units or lines of progression within an organizational unit, the contractor must prepare a separate list for each line in order of the progression.49

For each job title, in each organizational unit or progression line, the contractor must list: (1) the total number of incumbents; (2) the total number of incumbents by gender; (3) the total number by gender and race/ethnicity; and, (4) the wage rate or salary range for the job. A contractor who wishes to keep wage or salary data confidential may assign wage and salary codes, but must supply the codes to OFCCP during a review.

(b) Job Group Analysis. A job group is a set of jobs with “similar content, wage rates, and opportunities.”50 The job group analysis is not divided along organizational unit lines. For example, executive secretaries in the sales department would be counted as part of the same job group as executive secretaries in human resources, even though they would not be counted together for purposes of the organizational profile. A contractor with fewer than 150 employees may utilize the ten EEO-1 categories as job groups;51 however, a contractor with more employees is expected to subdivide each EEO-1 category into two or more groups, to ensure that the jobs categorized together have similar content, wage rates, and opportunities.

Each job group should have enough incumbents to permit meaningful statistical analysis. A typical group should have at least 50 incumbents, and EEO-1 categories should not be divided unless they yield this result. Each group should contain jobs that have similar rates of pay, benefits, and opportunities for training, transfer, promotion, and pay mobility. Thus, a contractor generally should avoid combining senior jobs with entry-level positions where differences in pay and opportunities are too dissimilar for meaningful comparison.

After the appropriate job groups are determined, a contractor must include, for each job group, a list of the job titles that comprise the group. A contractor is required to state separately the percentage of minorities and the percentage of women it employs in each job group.52 OFCCP prefers that the list also reflect the number of employees in each job group and their racial and gender composition.53

49 41 C.F.R. 60-2.11 (c) (2).
50 41 C.F.R. 60-2.12. “Similarity of content” means similarity in “the duties and responsibilities of the job titles which make up the group.” “Similarity of opportunities” relates to “training, transfers, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the group.”
51 41 C.F.R. 60-2.12 (e).
52 41 C.F.R. 60-2.13.
53 Id. 60-2.12 (c). Additionally, as discussed above, if the job group analysis contains jobs that are located at another establishment, it must be annotated to identify the actual location of those jobs. If the establishment at which the jobs are actually located also maintains an AAP, that establishment’s analysis must also be annotated to identify the AAP in which the jobs are included.
(c) Availability Analysis. After the contractor has defined its job groups, it must separately determine the availability of minorities and women for each group.\(^{54}\) Availability is the percentage of women or minorities having the skills required to fill the positions in each job group. The purpose of this determination is to establish a benchmark against which the demographic composition of the incumbent workforce can be compared. In determining availability, the contractor must consider at least two factors:\(^{55}\)

1. the percentage of minorities or women possessing the skills required for a particular job within the job title and living within a reasonable recruitment area, \(i.e.,\) the geographical area from which the contractor usually seeks, \(or\) reasonably could seek, workers to fill the applicable position;\(^{56}\) and,

2. the percentage of minorities or women within the contractor’s organization who are promotable or transferable, or who could become promotable or transferable during the AAP year with appropriate training which the employer is able to provide.\(^{57}\)

A contractor may not draw the “reasonable recruitment area” in a way that has the effect of excluding minorities or women.\(^ {58}\) Nor may it “define the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women.”\(^ {59}\)

Where a job group is composed of job titles with different availability rates, contractors must prepare a composite availability figure\(^{60}\) by separately determining the availability for each job title within the group, and the proportion of job group incumbents employed in each title. The contractor must weight the availability for each job title by the proportion of job group incumbents employed in that title and use the weighted availability estimate to calculate the composite availability for the group.\(^{61}\)

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\(^{54}\) Id. 60-2.14 (b).

\(^{55}\) Id. 60-2.14 (c). A contractor should identify the source for each availability figure (\(e.g.,\) most recent census for job titles or the representation of incumbents in feeder jobs). The regulations at 41 C.F.R. 60-2.14 (d) specify that the contractor must use the most current and discrete statistical information available.

\(^{56}\) Id. 60-2.14(c)(1). The most useful data on the availability of minorities/women with the requisite skills typically will be census data on more than 500 occupations, which is available from the Bureau of Census and many private companies.

\(^{57}\) 41 C.F.R. 60-2.14 (c) (2).

\(^{58}\) Id. 60-2.14 (e). The contractor must identify the reasonable recruitment area for each job group and provide a brief explanation of the reasoning behind selection of that area. The “reasonable recruitment area” will vary depending upon the types of jobs in the job group.

\(^{59}\) 41 C.F.R. 60-2.14 (f) (2005). For each job group, a contractor must identify the pool of such employees and provide an explanation of the reasons for selecting that pool. Id.

\(^{60}\) 41 C.F.R. 60-2.14 (g).

\(^{61}\) A detailed sample computation may be found in the preamble to OFCCP’s regulations. 65 Fed. Reg. at 68,033. A sample AAP is available on the OFCCP’s website at [http://www.dol.gov/esa/regs/compliance/ofccp/pdf/sampleaap.pdf](http://www.dol.gov/esa/regs/compliance/ofccp/pdf/sampleaap.pdf). A separate sample plan for small employers is available at the same site.
Utilization Analysis. The next step in the AAP is a comparison of the percentage of minorities and women employed in each job group with the availability for those groups. Where the employment of women or minorities in a particular job group is less than would reasonably be expected given availability, the contractor must establish goals designed to increase their representation. There are a variety of methods to determine whether the difference between incumbency and availability is "unreasonable." The OFCCP permits each contractor to select the measure that it believes is most appropriate.

Goal Setting. Numerical goals "serve as objectives or targets reasonably attainable by applying every good faith effort" to ensure that every aspect of the AAP works. A contractor’s determination that a goal is required under the regulations is not an admission of discrimination.

Where a contractor determines that it is required to establish a goal for a particular job group, that goal must be expressed as a percentage placement rate that is at least equal to the availability figure derived for women or minorities for that job group. A number of principles apply when establishing placement goals:

1. Goals are not rigid and inflexible quotas, nor are they a ceiling or a floor for the employment of particular groups;
2. Goals do not permit a contractor to extend a preference to an individual on the basis of sex, race, religion, or national origin;
3. Goals do not create set-asides for specific groups, nor are they to be used for the purpose of achieving proportional representation or equal results; and,
4. Goals must not supersede merit selection principles.

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62 41 C.F.R. 60-2.15.
64 Id.
65 41 C.F.R. 60-2.16.
66 41 C.F.R. 60-2.16 (a).
67 Id. 60-2.16 (b).
68 Id. 60-2.16 (c).
69 However, a contractor extending a publicly announced preference for Native Americans (authorized by 41 C.F.R. § 60-1.5 (a) (6)) may reflect in its placement goals permissive employment preference for Native Americans living on or near a reservation.
70 The philosophy underlying goal setting is that a contractor, engaged in good faith outreach for applicants, should normally generate applicant flow reflective of the racial and gender makeup of the qualified labor pool within its relevant recruiting area, and further that, given a good faith selection process, the race and ethnicity of those selected will roughly mirror the applicant pool.
3. Definition of an Applicant

(a) General. The definition of an applicant is pivotal to the affirmative action planning process. A contractor’s affirmative action efforts in recruiting are judged, in the first instance, by comparing applicant flow to labor market availability. Analysis of hiring decisions begins with a comparison of applicant flow to hires.

The general definition of an applicant is simply a person who expresses to the contractor an interest in employment. In the past, when most people applied for employment in person or by submitting a written application/resume with a cover letter, this general definition was not difficult to implement, and the employer was required to seek race/gender identification and keep records on any such individual that it considered no matter how superficial the consideration. Today, however, many employers and potential employees avail themselves of internet job boards, e-mail, and other technology. A single search to, e.g., Monster.com, can generate thousands of resumes.

(b) Internet Applicant. OFCCP has adopted a definition of an “Internet Applicant,” setting forth the record-keeping requirements for a contractor who solicits or accepts expressions of interest via the Internet or related technologies,72 including a contractor’s obligation to solicit race, gender, and ethnicity data from individuals who utilize electronic technology to facilitate their job search.

An “Internet Applicant” is someone who:

1. submits an “expression of interest” in employment through “the internet or related electronic data technologies;”73
2. is considered by the contractor for employment in a particular position;
3. indicates that he or she possesses the “basic qualifications” for the position; and,
4. at no point prior to receiving an offer of employment removes himself or herself from consideration or indicates a loss of interest in the position.

(i) Expression of Interest. Although the regulations create a distinction between Internet applicants and traditional applicants, a contractor who uses both Internet and related electronic technology along with more traditional paper methods (e.g., resumes delivered by mail or paper applications) to identify candidates for the same position, contractors are permitted to treat all who express an interest in that position as Internet applicants, provided they meet all the elements of the definition. The only time that traditional applicants are not treated as Internet applicants is when

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72 41 C.F.R. Part 60-1.
73 The term includes expressions of interest submitted by e-mail and through resume databases, job banks, electronic scanning technology, applicant screeners, and applicant service providers. As new technologies enter the market, OFCCP intends this regulation to cover those technologies as well.
the contractor solicits and accepts expressions of interest only through methods other than electronic technologies.

In order to more efficiently manage a large applicant pool, a contractor may dictate the manner in which it chooses to receive expressions of interest for employment. Only those candidates who comply with the contractor’s specified procedures will have properly “expressed interest” in a position. Any such limitation must be applied uniformly and consistently. For example, a contractor may decline to consider unsolicited paper submissions so long as it discards them all. Similarly, a contractor may refuse to consider unsolicited electronic submissions, so long as this is done uniformly and consistently.

(ii) “Considered for” employment. An individual is not an “Internet Applicant” unless he or she is “considered” for a particular position, i.e., unless the contractor assesses the information the individual provides about his or her qualifications for that position.

The regulations provide a number of data management techniques that a contractor may use to limit the candidates that it considers for a particular position, as long as the technique does not depend upon an assessment of an individual’s qualifications.

Once the contractor applies its standard procedures and any data management strategies, the remaining pool will be deemed to have been “considered” for the position being filled. At that point, the contractor’s record-keeping obligations are triggered, regardless of whether the individual meets the remaining criteria for “Internet Applicant.”

(iii) Meeting “basic qualifications.” In order to be classified as an “Internet Applicant,” an individual’s expression of interest must reveal that the candidate meets the contractor’s established “basic qualifications” for the position being filled. Basic qualifications are those requirements that the contractor advertises for a position, or establishes in advance, before considering any expressions of interest. Basic qualifications must be objective and relevant to performance of the particular position “enable[ing] the contractor to accomplish business-related goals.” Relevance to the particular position does not mean “job related” as that term is used under Title VII, but rather is intended to provide reasonable parameters for a first screen by the employer. Although the contractor is not required to monitor its basic qualifications for adverse impact, it must maintain records sufficient to enable OFCCP to conduct such an evaluation during a compliance review.

(iv) Removal from consideration. Individuals cease to be “Internet Applicants” if the contractor concludes that they have removed themselves from further consideration or are no longer interested in the position. A contractor may conclude that an individual is not interested on the basis of statements made in the expression of interest that conflict with the features of the position (e.g.,
geographic limitations, salary requirements, or other work requirements that are incompatible with the position), provided that its policy of not considering similarly situated job seekers has been uniformly and consistently applied. Likewise, a candidate who is repeatedly non-responsive to inquiries from the contractor may be deemed to have removed himself or herself from consideration. In order to remain in compliance, a contractor must consistently exclude from consideration individuals who indicate disinterest in the position in one of the ways described above.

(v) Record-keeping requirements. A contractor must maintain certain records regarding each individual who expresses interest through the Internet or related electronic technologies if the contractor “considers [the individual] for” a position. Thus, the required records include those pertaining to individuals the employer screens out, not merely those who ultimately qualify as “Internet Applicants.”

For internal databases, the contractor must maintain records identifying the candidates contacted regarding their interest in a position, each resume added to the database and the date it was added, and each search of the database, including the position for which the search was made, the substantive search criteria, and the date of the search.

For external databases, the contractor must retain for each position for which it uses the database a record of each search and the date on which it was conducted, the substantive search criteria used, the resumes of any candidates who met the basic qualifications for the position and who were “considered” by the contractor, and records identifying all candidates contacted regarding their interest in the position.

(vi) Solicitation of race, gender, and ethnicity data from “Internet Applicants.” The regulations require contractors to solicit race, gender, and ethnicity data from all applicants (both “Internet” and “traditional”) — but do not specify a particular point in the hiring process when this must be done. Self-reporting or self-identification is the preferred method for collecting race, gender, and ethnicity data. Contractors may use the variety of methods of collecting this information, including e-mail, a postcard, or an electronic ‘tear-off sheet.’ If an “Internet Applicant” declines to self-identify, but appears in person during the hiring process, the contractor may gather the data through visual observation.

C. Construction Contractors

Employers who perform federal or federally assisted construction contracts face requirements similar to the requirements for supply and service contractors: (1) nondiscrimination

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70 Id. at subsection (5).
71 Id.
72 41 C.F.R. 60-1.12 (a).
73 Id.
74 41 C.F.R. 60-1.12 (a).
75 Id.
76 “Contractor Data Tracking Responsibilities,” OFCCP Order ADM 04-1 (2004) states that a contractor is not required to guess at the race, gender, or ethnicity of an applicant who refuses to self-identify. Such applicants should be logged as unknown and should not be included in any adverse impact analysis.
based upon race, color, religion, sex, and national origin;\textsuperscript{86} (2) posting of notices detailing the provisions of the nondiscrimination clause;\textsuperscript{87} (3) inclusion of a mandatory contract clause in every nonexempt subcontract or purchase order;\textsuperscript{88} and, (4) compliance with the Executive Order and the Secretary of Labor’s rules, regulations, and orders.\textsuperscript{89} The mandatory contract language obligates construction contractors and subcontractors to take many of the same steps as supply and service providers; however, there is no requirement of a written plan.

Construction goals and timetables are not formulated by the facility, but are set periodically on an area-wide basis by the director of OFCCP (all contractors in a given area have the same goals). Compliance is measured by hours worked by minorities and women, rather than by number of people employed.

A notice advises bidders for covered construction contracts of the applicable goals for the area where the project will be located.\textsuperscript{90} Goals are set for minority and female participation in the contractor’s aggregate construction workforce “in each trade on all construction work in the covered area,”\textsuperscript{91} and are thusly expressed as percentages of total hours worked by the contractor’s entire on-site construction workforce.\textsuperscript{92} OFCCP has established a single national goal – currently 6.9 percent – for utilization of women in a contractor’s on-site construction workforce (including workers who are not performing work on federal or federally assisted construction contracts). Goals for minority construction employment are designated by geographic area.\textsuperscript{94}

As a condition of bidding, a contractor must agree to make a good faith effort to meet the specified goal, subscribe to an equal opportunity clause,\textsuperscript{95} and satisfy certain other contract specifications.\textsuperscript{96} These requirements apply to each contractor and subcontractor that holds any federal or federally assisted construction contract in excess of $10,000, and extend to all of the contractor’s employees engaged in on-site construction, whether or not on a federal or federally-assisted project.\textsuperscript{97}

\textsuperscript{86} Id. 60-1.4 (b) (1).
\textsuperscript{87} Id.
\textsuperscript{88} Id. 60-1.4(b)(7).
\textsuperscript{89} Id. 60-1.4(b)(4).
\textsuperscript{90} Id. 60-4.2.
\textsuperscript{91} Id. 60-4.2(d).
\textsuperscript{92} Id.
\textsuperscript{93} See \url{http://www.dol.gov/esa/regs/compliance/ofccp/aa.htm}.
\textsuperscript{94} 41 C.F.R. pt. 60-4. Although, in theory, these geographic goals are to be updated by OFCCP following each decennial census, this has not occurred.
\textsuperscript{95} 41 C.F.R. 60-1.4 (b), -4.3(a).
\textsuperscript{96} The equal opportunity clause requires a contractor, \textit{inter alia}, to maintain a working environment free of harassment and intimidation, in part by (where possible) assigning two or more women to each construction project; to conduct and document special recruiting activities directed toward minorities and women; to notify the OFCCP if any union referral process is impeding efforts to meet the affirmative action obligation; provide on-the-job training to women and minorities; disseminate the EEO policy; hold and maintain a written record of attendees at an annual review of affirmative action obligations of supervisors; conduct an annual inventory of minority and female personnel for purposes of promotion; and, annually review supervisors’ adherence to EEO policies. \textit{Id.}
\textsuperscript{97} Id. 60-4.1. The requirements also apply to construction work performed by subcontractors of federal non-construction contractors, if the construction work is necessary in whole or in part of the performance of the federal non-construction contract.
IV. SECTION 503 OF THE REHABILITATION ACT OF 1973

Section 503 requires that all nonexempt federal government contracts include provisions requiring: (1) nondiscrimination on the basis of disability; and, (2) affirmative action to employ and advance in employment qualified persons with disabilities. The statute covers a contract or subcontract of $10,000 or more “for the procurement of personal property and non-personal services (including construction).”

The definition of a “qualified individual with a disability” under the Rehabilitation Act parallels that under the Americans with Disabilities Act (ADA) – any person who (1) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (2) has a record of such impairment, or (3) is regarded as having such an impairment, and who is “capable of performing a particular job, with reasonable accommodation to his or her handicap.”

The term “substantially limits” is defined as: (i) unable to perform a major life activity that the average person in the general population can perform; or, (ii) significantly restricted in the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration in which the average person in the general population can perform that same activity.

The term “reasonable accommodation” is defined as: (i) a modification or adjustment to a job application process that enables a qualified applicant with a disability to be considered for the position such applicant desires; (ii) a modifications or adjustment to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enables a qualified individual with a disability to perform the essential functions of that position; or, (iii) a modifications or adjustment that enables the contractor’s employee with a disability to enjoy benefits and privileges of employment equal to those enjoyed by similarly situated employees without disabilities.

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98 Id. § 793(a); see also 41 C.F.R. 60-741.1.

99 Section 107 of the ADA states that it is to be interpreted and applied in a manner consistent with the application and interpretation of the Rehabilitation Act. Thus, the nondiscrimination provisions of Section 503 are essentially the same as those to which a contractor is subject under the ADA.

100 “People have a range of abilities with regard to many major life activities such as walking, lifting, and bending, and a range of such abilities may be considered average[. . .].” Id. 60-741.2.(q) n.1.

101 “A contractor’s duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application),” Id. § 60-741.2(v) n.2.
V. THE VETERANS ACT

A federal contractor is barred from discriminating against, and is required to take affirmative action to employ and advance in employment, qualified disabled veterans, veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized, veterans who, while serving on active duty in the Armed Forces, participated in a U.S. military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985, and recently separated veterans.

The term “disabled veteran” means a veteran who is entitled to compensation (or who, but for the receipt of military retired pay, would be entitled to compensation) under laws administered by the Secretary, or a person who was discharged or released from active duty because of service-connected disability. Thus, a disabled veteran may or may not be an individual with disabilities under the terms of the ADA or Section 503.

“Recently separated veteran” means the three-year period beginning on the date of disabled veteran’s discharge or release from active duty.

Pursuant to the Jobs for Veterans Act of 2002, every nonexempt federal government contract of at least $100,000 must include the dual requirements of nondiscrimination against and affirmative action to employ and advance qualified covered veterans.

VI. AFFIRMATIVE ACTION PROGRAMS FOR VETERANS AND INDIVIDUALS WITH DISABILITIES

The Veterans Act and Section 503 require a contractor with at least 50 employees, and a contract of at least $50,000 in the case of the Rehabilitation Act (and $100,000 in the case of the Veterans Act), to prepare, maintain, and annually update an AAP covering individuals with disabilities and covered veterans. Unlike the Executive Order AAP, this AAP must be available for inspection by any applicant or employee. The contractor must post at each facility the location and hours during which this AAP may be obtained.

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102 42 U.S.C. § 4211(3).
103 Id. § 4211(6).
104 In addition to their AAPs contractors covered by the Veterans Act must file annually a Federal Contractor Veterans Employment Report (VETS-100) with the Office of the Assistant Secretary for Veterans Employment and Training.
105 41 C.F.R. 60-250.41, -741.41. The contractor may establish the times and location that the AAP is available for inspection. Because it is available, the Section 503/Veterans AAP is often maintained as a separate document from the Executive Order AAP.
Each contractor must invite all protected veterans and individuals with disabilities to identify themselves in order to benefit under the AAP. The contractor should issue the invitation to self-identify an individual with disabilities after it has made an offer of employment, but before the applicant begins his or her employment. \(^{106}\) However, the contractor may, but is not required to, invite an individual with a disability or a disabled veteran to self-identify before an offer of employment, if the invitation is made as part of affirmative action at the pre-offer stage, or if the invitation is made pursuant to federal, state, or local law requiring affirmative action for individuals with disabilities. \(^{107}\)

The invitation to self-identify must summarize the relevant portions of the appropriate Act, as well as the contractor’s AAP. \(^{108}\) It must state that information is provided voluntarily, will be kept confidential, and will be used only in accordance with law, and that refusal to provide it will not lead to adverse treatment. \(^{109}\) The invitation also must contain a statement informing the individual that his or her request can be made immediately upon receipt of the invitation, or at any time in the future. Upon receipt of a self-identification, the contractor, after extending the job offer, is required to seek the individual’s input regarding any need for reasonable accommodation. The contractor may make additional inquiries into the abilities of the individual to the extent those inquiries are consistent with the ADA. \(^{110}\)

The Veterans and Section 503 AAPs contain no statistical analyses. Because their narrative sections are very similar to one another, most contractors combine them into a single document containing the following sections:

1. “Policy statement” communicating the contractor’s commitment to non-discrimination and its establishment of affirmative action in all levels of employment and all employment practices (e.g., hiring, upgrading, demotion, transfer, recruitment, layoff, termination, compensation, and selection for training). \(^{111}\)

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\(^{106}\) The Veterans Act allows contractors to invite veterans to self-identify before or after a job offer is extended. \textit{Id.} 60-250.42.

\(^{107}\) \textit{Id.} 60-741.42. These requirements are consistent with the ADA’s provisions regarding pre-employment inquiries.

\(^{108}\) 41 C.F.R. 60-250.42 (c), -741.42 (b).

\(^{109}\) \textit{Id.} The individual’s failure to identify disability status does not relieve the contractor from its nondiscrimination obligation or its obligation to take affirmative action, if it has actual knowledge of the disability.

\(^{110}\) \textit{Id.} These include asking applicants to describe or demonstrate how they would perform the job. \textit{Id.}

\(^{111}\) 41 C.F.R. 60-250.44, -741.44. The policy statement should: (1) indicate the chief executive officer’s support of affirmative action; (2) assign overall responsibility for implementation of the AAP; (3) provide an audit and reporting system; and, (4) state that the contractor will recruit, hire, train, and promote persons in all job titles and ensure that all employment decisions are based on nondiscriminatory job requirements. The policy must state as well that employees and applicants will not be subject to harassment, intimidation, or discrimination because they have engaged in activities protected by Section 503, Veterans Act, or any other federal, state, or local law requiring equal employment opportunity for veterans or individuals with disabilities. The contractor should post this policy statement on company bulletin boards and ensure that all applicants and employees are aware of its contents.
“Review of personnel processes” committing the contractor to review, periodically, personnel processes to determine whether they assure systematic consideration of the job qualifications of known disabled and covered veteran applicants and employees for all available hiring, promotion, and training opportunities, and to modify its processes as appropriate. 112

“Physical and mental qualifications” establishing a schedule for periodic review of all physical or mental job qualification requirements, to ensure that those that tend to screen out covered veterans and qualified individuals with disabilities are job-related and consistent with business necessity (e.g., required for safe job performance). 113

“Reasonable accommodation to physical and mental limitations” committing the contractor to reasonably accommodate the physical and mental limitations of covered veterans and individuals with disabilities, unless the contractor can show that the accommodations would impose an undue hardship on the operation of its business. 114

“Prohibition of harassment” in which the contractor must produce a statement regarding implementation of procedures to ensure that employees are not harassed because of their disability or covered veteran status. 115

“External dissemination of policy, outreach and positive recruitment” committing the contractor to a review of its employment practices to determine whether personnel programs provide the required affirmative action, and to engage in appropriate outreach and recruitment activities based on results of this review. 116

112 Id. 60-250.44 (b), -741.44 (b). The appendices to the regulations set forth suggested procedures.
113 Id. 60-250.44 (c), -741.44 (c). The contractor bears the burden of demonstrating that the job requirements satisfy these requirements. It may defend against allegations of discrimination under Section 503 or the Veterans Act by demonstrating, inter alia, that the person seeking a particular position poses a direct threat to the health or safety of those in the workplace or the individual himself or herself. See 60-250.2 (u) (definition of “direct threat”). Comprehensive medical examinations may be conducted after a job offer has been extended or a change in employment status occurs, to the extent permitted by the Americans with Disabilities Act (ADA).
114 41 C.F.R. 60-250.44 (d), -741.44 (d). If an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability.
115 Id. 60-250.44 (e), -741.44 (e).
116 Id. 60-250.44 (f), -741.44 (f). The contractor’s size and resources are factors considered in formulating appropriate outreach. Suggested activities include, among others, enlistment of assistance from recruiting and on-the-job training sources, veterans’ offices, agencies, representatives, and service organizations, 41 C.F.R. 60-741.44(1) (2005), and state and national labor, employment, and education agencies; engaging in recruitment efforts at educational institutions that make a special effort to reach students who are covered veterans or individuals with disabilities; establishment of meaningful contacts with appropriate veterans’ service organizations, social service agencies, and organizations of and for individuals with disabilities; inclusion of employees with disabilities in consumer, promotional, or help-wanted advertising; encouraging the participation of covered veterans and individuals with disabilities in career days and other related activities in the community; and in the hiring context, consideration of applicants who are known covered veterans or who have known disabilities for all available positions for which they may be qualified, to the extent that each position applied for is unavailable.
“Internal dissemination of policy” setting forth steps the contractor will take to disseminate its policy internally and ensure internal support from supervisory and management-level personnel and other employees.\textsuperscript{117}

An “audit and reporting system” designed to measure the effectiveness of the contractor’s AAP; to determine the degree to which the contractor’s objectives have been attained; to determine whether known individuals with disabilities or known veterans have had the opportunity to participate in all company-sponsored educational, training, recreational, and social activities; to measure the contractor’s compliance with the AAP’s specific obligations; and, to indicate any need for remedial action.\textsuperscript{118}

Establishing “responsibility for implementation” by designating an executive to direct the affirmative action activities, indicating that the executive shall be given top-managerial support to implement the programs, and stating that his or her identity will appear both on internal and external communications regarding the AAP.\textsuperscript{119}

“Training” committing the contractor to train all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes to help ensure that the AAP obligations are implemented.\textsuperscript{120}

Additionally, the Veterans Act requires the contractor to list “all of its employment openings with the appropriate employment service delivery system.”\textsuperscript{121} The statute provides that the contractor may also list such openings with one-stop career centers or other appropriate service delivery points.\textsuperscript{122} The statute exempts openings for “executive and senior management positions,” those that will be filled from within the organization, and positions lasting three days or less.

\textsuperscript{117} Id. 60-250.44 (g), -741.44 (g). Recommended actions include, among other things, printing the policy in the policy manual; periodically informing employees and prospective employees of the contractor’s commitment to affirmative action; publicizing the policy in the contractor’s newsletters, magazine, and other in-house media (including articles on the accomplishments of veterans and employees with disabilities); meeting with executive, management, and supervisory personnel to underscore the intent of the policy and individual responsibility for effective implementation, emphasizing the chief executive officer’s attitude; discussing the policy thoroughly in both employee orientation and management training programs; and, meeting with union officials to inform them of the policy and request their cooperation.

\textsuperscript{118} Id. 60-250.44 (h), -741.44 (h). Id. 60-250.44 (h) (1), -741.44 (h) (1).

\textsuperscript{119} Id. 60-250.44 (i), -741.44 (i).

\textsuperscript{120} Id. 60-250.44(j), -741.44(j).


\textsuperscript{122} Id.
VII. OFCCP ENFORCEMENT

A. Compliance Evaluation

The term “compliance evaluation” embraces a wide range of actions taken by the OFCCP to audit a federal contractor or subcontractor’s compliance with the obligations imposed by Executive Order 11246 Section 503 and the Veterans Act. A compliance evaluation may consist of one or a combination of the following: (1) a compliance review, (2) an off-site review of records, (3) a compliance check, and (4) a focused review.\textsuperscript{123}

\textit{1. Compliance Review}

A compliance review is a comprehensive analysis and evaluation by the OFCCP of a contractor’s employment practices at the facility at which the audit takes place.\textsuperscript{124} The review typically focuses on three broad issues:

1. whether the contractor has discriminated against minorities, women, individuals with disabilities, or covered veterans, in hiring, promotion, transfer, training, compensation, benefits, or termination;
2. whether the contractor has taken the required affirmative action to recruit, train, and advance in the organization members of these groups; and,
3. whether the contractor has complied with OFCCP’s regulations regarding postings, record keeping, AAP content, recruitment, and other practices.

A compliance review of a supply or service contractor\textsuperscript{125} generally is divided into several phases: (1) a “desk audit” review, in which OFCCP analyzes the contractor’s written AAP and support data;\textsuperscript{126} (2) an on-site review, in which OFCCP visits the contractor’s premises;\textsuperscript{127} (3) when necessary, a further off-site review of information; and, (4) in some cases, an exit conference to review findings with the contractor. OFCCP will treat the information it obtains in the course of a compliance evaluation “as confidential to the maximum extent the information is exempt from public” under FOIA.

\textsuperscript{123} 41 C.F.R. 60-1.20 (g).
\textsuperscript{124} If the contractor’s AAP covers multiple facilities, all facilities the AAP encompasses may be included in the review.
\textsuperscript{125} By far, the majority of OFCCP’s compliance reviews in the past decade have been of supply and service contractors, rather than of construction contractors.
\textsuperscript{126} During the desk audit, the OFCCP determines whether the AAP meets agency standard of reasonableness and acceptability and notes any apparent substantive issues.
\textsuperscript{127} The on-site review usually includes an entrance conference with the chief executive or designee, a tour of the facility, a review and perhaps copying of records, and interviews with employees, supervisors, and human resources staff.
2. Off-Site Review

An off-site review of records consists of an analysis and evaluation of the AAP (or any part thereof) and supporting documentation and other documents related to the contractor’s personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations.

The scope of the off-site review of records may stand alone, similar to the scope of the “desk audit,” or it may supplement and explicate issues identified during the on-site visit.

3. Compliance Check

A compliance check is a ‘mini’ review in which OFCCP determines whether the contractor has maintained certain records required by the regulations. At the contractor’s option, the documents may be provided either on-site or off-site.

4. Focused Review

A focused review is an on-site review that is restricted to one or more components of the contractor’s organization, or one or more aspects of the contractor’s employment practices. OFCCP has indicated that it intends to follow the standards already established for the frequency and duration of the compliance review, and that it will establish similar standards for the off-site review of records, compliance checks, and focused reviews to ensure they are not overly intrusive.

5. Corporate Management Compliance Evaluations

Corporate management compliance reviews are designed to determine whether individuals are faced with “artificial barriers to advancement into mid-level and senior corporate management.” The analyses used to find these barriers are similar to those looked to in the work force as a whole. However, the jobs being reviewed often involve subjective qualifications such as leadership or compatibility with clients. In these reviews, OFCCP typically evaluates recruitment, succession plans, pipelines, and selection practices for corporate management jobs. If OFCCP discovers violations involving management positions at an establishment outside of corporate headquarters (e.g., during an ordinary compliance review), it may expand the evaluation to include the headquarters and request relevant data across the corporation to ensure compliance with the Executive Order.

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128 41 C.F.R. 60-1.12, 60-250.80, and 60-741.80 include record retention provisions. These provisions require contractors to retain personnel or employment records for 2 years if the contractor has more than 150 employees or has a government contract of at least $150,000. If the contractor has fewer than 150 employees or does not have a government contract of at least $150,000, the contractor is required to retain the records for 1 year. Failure to retain the required records constitutes noncompliance with the contractor’s obligations under the Executive Order and regulations; and, destruction of or failure to retain the records may lead to the presumption that the information would have been unfavorable to the contractor. This presumption will not apply if the contractor demonstrates that the destruction or failure to retain records results from circumstances beyond the contractor’s control.

129 41 C.F.R. 60-1.20 (a) (3).

130 41 C.F.R. 60-2.30.
B. Selection for Evaluation

Although the OFCCP may select a contractor for a compliance evaluation for any number of reasons, there are some common triggers.

1. Federal Contractor Selection System

In July 2004, the OFCCP implemented a new Federal Contractor Selection System (FCSS), replacing the former Equal Employment Data System (EEDS) to select contractors for compliance reviews. The FCSS, based upon research conducted by an outside data collection and analysis firm, compares a contractor establishment’s workforce profiles to others in the same industry and to the local labor market based on the 2000 Census.

2. Discrimination Complaint

A discrimination complaint, or series of discrimination complaints, may trigger a compliance evaluation. Anyone claiming a violation of the Executive Order must file an administrative complaint with the OFCCP within 180 days of the alleged violation, unless the time for filing is extended by the Deputy Assistant Secretary for good cause shown. The Rehabilitation Act and the Veterans Act allow a filing period of 300 days, unless the time for filing is extended by the OFCCP for good cause shown.

The OFCCP and EEOC have overlapping, but not co-extensive, jurisdiction. Pursuant to a revised Memorandum of Understanding (MOU) between the agencies, the OFCCP normally will retain, investigate, and attempt to resolve systemic or class discrimination allegations, as well as individual complaints alleging discrimination against or failure to accommodate individuals with disabilities and covered veterans. It will refer to the EEOC allegations of individual discrimination on the basis of race, gender, or national origin, which will be investigated as possible Title VII violations. However, the OFCCP may retain these individual complaints or charges "to avoid duplication and assure effective law enforcement;" and, in so doing, act as EEOC’s agent to process and resolve the claims. Any information shared by the EEOC with the OFCCP is subject to the confidentiality provisions of the Trade Secrets Act and Privacy Act.

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131 Coordination of Functions; Memorandum of Understanding, 64 Fed. Reg. 17,664 (1999).
132 Under regulations issued by the EEOC and OFCCP regarding the agencies’ overlapping jurisdiction with respect to the Americans with Disabilities Act (42 U.S.C. §§ 12101–12213 (ADA)) and Section 503 of the Rehabilitation Act, OFCCP will retain jurisdiction over complaints of discrimination on the basis of disability, unless the complaint also includes: (1) an EEOC priority litigation issue; (2) additional individual allegations of Title VII discrimination; or, (3) additional allegations of age discrimination. If complaints within any of the above categories also contain allegations that the contractor violated the affirmative action requirements under Section 503, OFCCP will bifurcate the complaint and retain jurisdiction over those affirmative action issues. 29 C.F.R. 1641.5(e) (2004); 41 C.F.R. 60-742.5(e) (2005).
133 “Complaints of employment discrimination filed with OFCCP under Executive Order 11246 will be considered charges simultaneously filed under Title VII whenever the complaints also fall within the jurisdiction of Title VII.” MOU, ¶ 7, 64 Fed. Reg. at 17,666.
134 MOU, ¶ 7(b)-(c), 64 Fed. Reg. at 17,666 (Apr. 12, 1999).
135 MOU, ¶ 7(d), 64 Fed. Reg. at 17,666 (Apr. 12, 1999).
C. The “Desk Audit”

1. Purpose of the “Desk Audit”

Most compliance reviews of supply and service contractors start with a “desk audit” by a Compliance Officer (CO) at OFCCP’s office. During this phase, the CO: (1) examines the contractor’s basic organizational structure, personnel policies, and procedures; (2) reviews the contractor’s AAP for technical compliance; (3) identifies areas in which the contractor has made little progress in increasing protected-group representation, where further investigation on-site may be necessary to evaluate the contractor’s good faith efforts; and, (4) identifies areas for an in-depth investigation of potential discrimination, such as adverse impact in hiring, promotion, termination rates, as well as the under-representation or concentration of minorities or women in particular organizational units.

2. OFCCP’s Activities Preceding the Desk Audit

Before beginning the compliance review, OFCCP issues a “scheduling letter” notifying the contractor of the compliance review and requesting the contractor’s AAPs and supporting documentation. The letter may request examples of job advertisements, listings with state employment services, and accommodations made for persons with disabilities. Most importantly, it includes an itemized checklist of the information the contractor is required to submit.

At approximately the same time, OFCCP contacts the EEOC and state and local fair employment practices agencies, requesting information on complaints filed against the contractor. In evaluating the information received, OFCCP looks for patterns in the types of complaints filed that might indicate potential systemic discrimination. The agency also contacts the Veterans Employment and Training Service representative at the state employment security office. The VETS representative is invited to provide information pertinent to the evaluation, such as affirmative action recruiting efforts by the contractor.

If the contractor has been reviewed previously, OFCCP examines the prior case file for violations and other problems identified, as well as for commitments made to resolve the audit. During the review, the agency evaluates whether past problems have been remedied or have remained.

3. OFCCP’s Initial Review of the AAP and Supporting Data

OFCCP initially reviews the contractor’s AAP and support data for currency and completeness. If the AAP has not been updated within the past year, the agency may treat the omission as a failure to submit an AAP and the basis for a finding of violation. If the AAP is current, OFCCP determines whether all the other materials requested in the “scheduling letter” have been submitted.

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137 41 C.F.R. 60-1.20 (a) (1) (i).
138 AAPs must be updated annually. 41 C.F.R. 60-2.1 (c), 250.40 (c), 741.40 (c).
OFCCP evaluates whether the AAPs contain all the components required by the regulations. If the AAPs are complete, they are then reviewed for reasonableness.\textsuperscript{139} To be deemed reasonable, the Executive Order AAP organizational profile, comparison of incumbency to availability, and goals development must meet the standards specified in OFCCP’s Compliance Manual as discussed in Part III, B, above. If the OFCCP deems the Executive Order AAP reasonable, it and its supporting data then will be reviewed for acceptability. If not, the agency may issue a notice of violation.

(a) Review of Executive Order AAP for Acceptability. If the Executive Order AAP is deemed reasonable, OFCCP next evaluates the acceptability of each element of the contractor’s submission.

(i) Personnel activity data. The “scheduling letter” requests information on personnel activities for the prior AAP year. If at least six months have elapsed in the current AAP year, then current year data must be produced as well. For each job group or job title, the data submitted for applicants, hires, promotions, and terminations must include at least: (1) the total number of transactions (e.g., the total of individuals who applied or were hired, promoted, or terminated); (2) the total number of women; and, (3) the total number from each racial/ethnic group (i.e., Hispanic or Latino; White; Black or African American; Asian; Native Hawaiian or other Pacific Islander; American Indian or Alaska Native; and, “Two or More Races, Not Hispanic or Latino.”).

If the contractor does not submit the required personnel activity data for applicants, hires, promotions, or terminations, OFCCP may issue a notice of violation. Where the format of the data submitted is unacceptable, the agency may request that the appropriate changes be made and the data resubmitted.

(ii) Goals and good faith efforts. The contractor’s report on prior year goals typically will list both the percentage and the total number of placements for minorities and women for each job group for which a goal was required or for which a goal was established. For each unmet goal, the contractor should describe its good faith efforts in sufficient detail for OFCCP to evaluate their adequacy.

OFCCP considers good faith efforts at the “desk audit” stage, examining the contractor’s progress in eliminating underutilization in job groups for which it had both goals and actual placement opportunities, and evaluating the contractor’s overall goals performance (i.e., how many annual minority and female placement goals were achieved; how many were missed; and, for those missed, how close the contractor’s actual placement rate was to its percentage goal for that job group). If the contractor achieved placement- goals in a job group, but nevertheless made little or no progress in moving minority and female utilization closer to availability, OFCCP examines whether, from the agency’s standpoint, the reasons are positive (e.g., promotions of minorities or women out of that job group) or negative (e.g., terminations of minority or female employees).

The evaluation of the contractor’s good faith effort takes into account several factors, e.g., whether the contractor made progress in most job groups for which goals were established, and whether deficiencies in one area were outweighed by strong performance in similar but higher-level

\textsuperscript{139} \textit{Id.}
jobs. OFCCP also notes whether the contractor has repeatedly failed to meet placement goals over a period of years. The review seeks to identify the reason(s) goals were not met, the type of affirmative action that may correct the problem, and whether other AAP narrative and statistical commitments were fulfilled.

If there is insufficient desk audit information to assess the adequacy of the contractor’s good faith effort toward any particular goal, OFCCP may ask for additional documentation, or may flag the need for additional information, to be provided during the on-site review. The regulations provide that:

Each contractor’s compliance with its affirmative action obligations will be determined by reviewing the nature and extent of the contractor’s good faith affirmative action activities [ . . . ] and the appropriateness of those activities to identified equal employment opportunity problems. . . .

(b) Review for Acceptability of AAPs for Individuals With Disabilities and Veterans. As with the Executive Order AAP, OFCCP evaluates for acceptability, at the “desk audit” stage, the contractor’s Rehabilitation Act and Veterans Act AAPs. To be acceptable, the AAPs must address at least those items listed in the implementing regulations for the two statutes.


a. Summary of Personnel Activity. During the “desk audit,” OFCCP prepares an overview, by EEO-1 category, of the contractor’s personnel activity during the prior year, charting out by gender and race/ethnicity the number of applicants, hires, promotions, and terminations for each EEO-1 category in each of those race/ethnic and gender groups.

b. EEO Trend Analysis. OFCCP next prepares statistical and narrative summaries of trends in the contractor’s workforce by EEO-1 categories. The current representation is compared with the contractor’s past EEO-1 profiles. The agency notes the direction and magnitude of changes for each race and gender in the total workforce, and in particular EEO-1 categories.

c. Workforce Structure/Personnel Practices. A narrative description of the contractor’s organization, operations, pay structure, and human resources policies – particularly those relating to selection and promotion – is compiled as part of this initial phase.
5. Preliminary Discrimination Analyses

a. General Considerations. In conducting analyses of potential discrimination under the Executive Order, OFCCP follows general principles derived from Title VII. The analyses are performed for women and for total minorities. However, if there appears to be a substantial disparity in the representation of a particular minority group, OFCCP may conduct separate discrimination analyses for that minority group, as well as for total minorities.\(^{145}\)

b. Review of the Organizational Profile or Workforce Analysis. Where OFCCP observes a pattern of, e.g., men supervising work units composed predominantly of women, or a concentration of the contractor’s Hispanic employees in one department,\(^\text{146}\) the issue may be flagged for further investigation on site.

The finding of under-representation, or of a concentration of employees of one gender or race/ethnic group, is not dispositive of whether discrimination has occurred; it simply flags the area for further examination during the on-site review. OFCCP may question the qualifications required in the underrepresented and concentrated job areas, whether positions in other areas required similar qualifications, and whether there is an employment policy or system in effect that has created or perpetuated such disparity. High priorities for on-site review are areas where relatively few minorities or women are employed, and where relatively few have been hired or promoted during the two years preceding the evaluation.\(^\text{147}\)

c. Audit of Personnel Activity. OFCCP also analyzes selection rates (i.e., hiring, promotion, transfer, and termination rates) by job group to identify personnel activity that should be looked at in more detail on site. Generally, the OFCCP will flag for further investigation those hiring, promotion, and transfer activities where the selection rates for minorities or women are 80 percent (two or more negative standard deviations) less than those for Caucasians or men.

OFCCP decides what information is needed during the on-site review to determine whether facially troublesome selection rates in fact represent discrimination. At this stage, the agency may focus on individual job titles within job groups and on the details of the contractor’s selection process. The contractor’s failure to retain required records becomes particularly important at this time.

If the minority group or gender for which the selection rate is adverse, is also underutilized for that job group, OFCCP also may draw an inference of adverse impact from the contractor’s failure to maintain, by job title, the required data.\(^\text{148}\) Even in these circumstances, however, the adverse inference is only a preliminary indicator of potential discrimination. OFCCP will conduct a further investigation onsite to determine whether discrimination has occurred.”

\(^{145}\) The Uniform Guidelines on Employee Selection Procedure state that “adverse impact determinations should be made at least annually for each [. . .] subgroup which constitutes at least 2 percent of the relevant labor force or [. . .] the applicable workforce. 41 C.F.R. 60-3.15 (A) (2).

\(^{146}\) 1AFFIRMATIVE ACTION COMPL. MAN. (BNA) 2:0019.

\(^{147}\) Id. at 2:0020.

\(^{148}\) 41 C.F.R. 60-3.4(D)
6. Treatment of Adverse Impact in the Selection Process. Where the contractor’s data shows that the selection process for a particular job or job group has an adverse impact for a gender or minority group, the Uniform Guidelines on Employee Selection Procedures (UGESP) require the contractor to analyze the individual components of the selection process for adverse impact.\textsuperscript{149} OFCCP will review the contractor’s records concerning each step (e.g., written test, oral interview, background check) or criterion (e.g., degree requirement) utilized during the process to determine the factor that disproportionately screens out minorities and women.\textsuperscript{150} The contractor will be asked to produce evidence which demonstrates that any step or criterion that has an adverse impact is job related and justified by business necessity. OFCCP will assess whether that evidence meets the legal and professional standards established by the UGESP.

Finally, OFCCP will consider, on-site, those job families or job titles identified during the “desk audit” as showing significant negative disparities in the compensation of minorities or women, and will subsequently examine the reasons for specific pay decisions.

7. Summary of Potential Discrimination Problems and On-Site Investigative Plan. At the end of the “desk audit,” OFCCP will summarize each potential discrimination problem that has been identified during the “desk audit.” Some contractor AAP commitments cannot be evaluated without an on-site inspection, including corroborating interviews. If potential problems have not been identified during the “desk audit,” the OFCCP may issue a compliance letter, or the agency may continue with the on-site phase of the review.

D. The On-Site Review

1. Scope

In general, the on-site review\textsuperscript{151} will include an investigation of findings made during the desk audit, an evaluation of the contractor’s implementation of AAP commitments, and a review of its compliance with (1) regulatory obligations, such as the guidelines on religion, national origin, and sex discrimination; (2) affirmative action and nondiscrimination requirements pertaining to individuals with disabilities and veterans; and, (3) miscellaneous technical requirements, including mandatory collection and retention of the contractor’s I-9 forms.\textsuperscript{152}

\textsuperscript{149} 41 C.F.R. 60-3.4(C), -3.15(A)(2). The UGESP applies to matters arising under Title VII as well as those arising under Executive Order 11246. 29 C.F.R. § 1607.

\textsuperscript{150} 1 AFFIRMATIVE ACTION COMPL. MAN. (BNA) 2:0022.

\textsuperscript{151} Although the OFCCP cannot come to the contractor’s facility without its consent, the agency is authorized to seek an injunction to enforce its right of access either in federal district court or in an administrative proceeding. 41 C.F.R. 60-1.26(b), (c). The Fifth Circuit has held that the inspection provision does not run afoul of the Fourth Amendment because the regulations provide the safeguard of an adversarial hearing in federal court before an inspection can be mandated. United States v. Mississippi Power & Light Co., 638 F.2d 899, 907, 25 FEP 250 (5th Cir. 1981).

\textsuperscript{152} Although OFCCP does not enforce the Immigration Reform and Control Act, it is one of several agencies charged with reviewing a contractor’s I-9 records when reviewing the employer’s compliance with its own programs. Inadequacies in IRCA recordkeeping are reported to the Department of Homeland Security.
OFCCP will notify the contractor in advance of the date and time of the on-site review as to the documents that should be available at that time. The IRCA requires that at least three day’s notice be given before an I-9 form inspection. 153

The on-site review typically begins with the entrance conference. The OFCCP uses this conference as an opportunity to meet the contractor’s highest executive, generally the chief executive officer. During this initial conference, the OFCCP typically will attempt to:

1. Arrange access to data, employees (including managers), and facilities (both for a tour and to obtain a place to work);

2. Form an impression of the executive’s understanding of, and attitude toward, equal employment opportunity and affirmative action, and familiarity with and involvement in the organization’s AAP; and.

3. Determine the executive’s view of the role the organization’s affirmative action manager should and does play in the contractor’s operations.

OFCCP is interested in an explanation of the corporate organizational structure (e.g., headquarters, subsidiaries), and recent and anticipated changes therein.

Following the entrance conference, the OFCCP often discusses (with the persons responsible for an organization’s affirmative action efforts) the specific deficiencies in the AAP that were uncovered during the “desk audit,” and clarifies the OFCCP’s desire to investigate potential discrimination issues. The OFCCP, at this meeting, typically attempts to:

1. Obtain a description (sometimes a step-by-step walk-through) of how recruitment, hires, transfers, promotions, succession planning, training, compensation decisions, and terminations occur(s);

2. Determine the existence of, and obtain access to, personnel files, human resources records, pay and benefits records, and additional information needed for the review;

3. Request specific information needed to respond to issues raised during the “desk audit;”

4. Learn about, and evaluate, the contractor’s internal audit and reporting systems for EEO and affirmative action matters. For example, the CO may ask whether the contractor prepares written reports; and, if so, how often, who prepares and reads them, and what else, if anything, the contractor does with them;

5. Review areas where good faith efforts were perceived to be lacking, or areas where discrimination seems to have occurred, and ask the representative to explain what might be the cause;

(6) Identify personnel processes that are likely impediments to equal employment opportunity and affirmative action;

(7) Identify the criteria used in, and the decision makers responsible for, specific personnel decisions that particularly appear to be at issue;

(8) Determine where a specific item of information can be found in the contractor’s records; and,

(9) Arrange to interview other supervisors and employees, and schedule a tour of the facility.

A major component of the on-site investigation is the tour of the facility. If OFCCP has identified work units in which minorities or women are concentrated, the agency usually will include these areas as part of the tour. The work areas with concentrations of protected-group members will be compared with those where protected groups are underrepresented. Some OFCCP COs conduct informal interviews with employees as they pass through work areas during the tour.

During this walk-through, OFCCP confirms that information such as the federal EEOC/OFCCP poster, the contractor’s policy statements, the invitations for self-identification of disability status, and the notice of the times and places where the AAPs for veterans and individuals with disabilities can be reviewed have been posted where employees can see them. The agency is alert during the tour for signs of sexual, racial, or other unlawful harassment. OFCCP also examines whether the facility is accessible to individuals with disabilities, including those in wheelchairs (or others with mobility impairments) and those with hearing, sight, and other disabilities.

During the on-site review, the OFCCP conducts interviews and examines documents such as personnel records, internally filed EEO complaints, and validity studies, if any exist, for selection devices or criteria that have an adverse impact upon women and minorities. The interviews and examinations occur in order to determine whether there has been any discrimination against women or minorities (as distinct from a failure of affirmative action).

OFCCP often is most interested in speaking with supervisors in work units that have concentrations, under-representation (incumbency of minorities or women below availability), and/or apparent adverse impact against minority groups or women in hiring and/or promotion. The contractor is entitled to be represented during interviews of supervisors, so long as the interviewee is speaking for management and not as a potential victim of discrimination.

OFCCP also interviews non-supervisory employees. In particular, OFCCP may want to interview minorities and women who have current discrimination or harassment complaints (internal or external), or who approach OFCCP with a complaint during the review. The contractor does not have the right to be present at interviews of employees who do not have supervisory or policymaking authority, unless the employee requests such representative’s presence. OFCCP may use these interviews to:

154 41 C.F.R. 60-1.4 (a) (1), -250.44(a), -741.44(a).
(1) Verify the employee’s background and qualifications;
(2) Determine the employee’s views of how personnel practices work;
(3) Verify the contractor’s version of some specific decision or event in which the employee was involved;
(4) Determine what the employee knows about the contractor’s AAP;
(5) Ascertain the employee’s view of the contractor’s AAP commitment and performance;
(6) Learn about the duties of specific jobs, and the employee’s view of the qualifications needed for competent performance;
(7) Inquire whether the employee has been a victim of discrimination or harassment, or has witnessed discrimination or harassment against others; and,
(8) Assess the employee’s view of his/her future opportunities with the contractor.

OFCCP also interviews the individuals responsible for personnel decisions and benefits practices in order to:

(1) Elicit descriptions of the actual recruiting, hiring, transfer, promotion, training, compensation, and termination processes from those who implement them;
(2) Obtain copies of policies and procedures and job descriptions;
(3) Ascertain the stated and actual criteria for selecting, promoting, and terminating employees;
(4) Learn how the contractor determines starting-pay levels and raises; and,
(5) Determine whether the human resources staff is familiar with its specific responsibilities under the AAP.

2. Document Review. OFCCP has a broad right to review records during an on-site review. The regulations and the terms of its government contract require the contractor to permit OFCCP access to its premises, books, records (including computerized records), accounts, and other material that may be relevant to the matter under investigation and pertinent to compliance with the Order.\textsuperscript{155}

\textsuperscript{155} The regulation does not require a contractor to reprogram its computers in order to generate data in a format responsive to an OFCCP request; it simply requires affording the agency access to existing records and data in computerized forms. 62 Fed. Reg. at 44,186 (Aug. 19, 1997).

\textsuperscript{156} 41 C.F.R. 60-1.26 (a). Interference with an investigation also may be a basis for the imposition of sanctions. \textit{Id.} at 60-1.32.
For example, depending upon the issues it has identified, OFCCP may seek recruitment activity records; logs of applicant flow, new hires, promotions, transfers, and terminations; policy statements; job advertisements and requisitions; position descriptions; training activity records; compensation records; benefits policies; application forms; relevant personnel files; tests administered to employees or applicants as a condition of promotion/hire; lists of persons tested; adverse impact records; validation studies; termination rosters (designating name, race, gender, and the reasons for termination); succession plans; and, lists of “high potential” employees. OFCCP also looks for written proof of good faith efforts, action plan achievement, and other compliance.

If OFCCP finds a pattern or practice of discrimination, it may issue a predetermination letter identifying the alleged discrimination, the employment action(s) giving rise to the allegation, whether the agency is proceeding on a disparate treatment and/or adverse impact theory, and the deadline for the contractor’s response. Although the Compliance Manual refers to such a letter, in practice, OFCCP does not always issue a formal predetermination notice. However, it will generally convey the same information to the contractor informally before an official notice of violations is issued.157

The final stage of the on-site review is the exit conference. OFCCP brings to the contractor’s attention problems that have been identified during the review, and requests that the contractor resolve them. If OFCCP has identified any individual victims of discrimination, it will insist that the contractor make each such victim whole by paying them back pay (with interest) and benefits, and placing them in the jobs from which each was excluded. If the agency finds no violations, it will so inform the contractor. Any issues identified by OFCCP that are not fully resolved will be the subject of a formal notice of violation, which will also include any individual findings and any other deficiencies identified during the evaluation.

3. Notices of Violation and Conciliation Agreements

For each pattern-or-practice issue, the notice of violation restates the problem, analyzes the contractor’s response, and states that the contractor may present any legitimate defenses available regarding liability and those entitled to relief. It also describes the proposed remedy in class terms, including the type and scope of relief and the time period involved. This notification specifically requires termination of the identified discriminatory practice (if that has not occurred already). It also states that resolution of the pattern-or-practice violation, and any other violations included in the notice, must be memorialized in a conciliation agreement.

157 Even if a predetermination is issued, the initial notice of findings of individual discrimination will be deferred by OFCCP until the formal notice of violations.
Under OFCCP’s published guidance concerning compensation discrimination (attached as “Attachment D” to this paper), any notice of violation alleging systemic discrimination with respect to pay will be based on that guidance. In most cases, the OFCCP will not issue a notice of results of investigation for systemic compensation discrimination, unless it has both anecdotal evidence and statistical analysis of existing disparities that controls for the factors reasonably used in setting pay. The agency is not foreclosed, however from proceeding on statistical or anecdotal evidence alone in appropriate circumstances. With its notice, OFCCP will attach the results of any regression analysis it has performed, and a summary of its anecdotal evidence.\footnote{As noted in Attachment D, OFCCP may find a compensation discrimination violation, \textit{inter alia}, where the contractor uses a market survey in a manner that pays the full market rate for predominantly male-occupied jobs, but pays below the market rate for predominantly female- or minority-occupied jobs, or otherwise makes wage-rate decisions based on the sex, race, or ethnicity of the incumbent employees that predominate in each job.}

A conciliation agreement is a formal resolution of alleged violations that contains three parts. Part I consists of mandatory provisions. These, \textit{inter alia}, allow OFCCP to reopen the audit and initiate enforcement proceedings. Part II specifies the violations identified by OFCCP and proposed remedies for each. Part III states the terms of the agreement and the compliance reporting required of the contractor. The OFCCP Director must approve any provision that precludes OFCCP from issuing a press release or otherwise publicizing the results of compliance actions.

\textit{“[P]roof of compliance or noncompliance with conciliation agreements may be admitted in Title VII actions as circumstantial evidence of discriminatory intent.”}\footnote{\textit{Langland v. Vanderbilt Univ.}, 589 F. Supp. 995, 1016, (M.D. Tenn. 1984), \textit{aff’d}, 772 F.2d 907 (6th Cir. 1985).} Most cases hold that individuals, who are beneficiaries of relief provided under a conciliation agreement, may sue to obtain it.\footnote{\textit{See Eatmon v. Bristol Steel & Iron Works, Inc.}, 769 F.2d 1503, 1505, 1516, 38 FEP 1364 (11th Cir. 1985) (the plaintiffs, 14 former employees, and one former applicant, named in a conciliation agreement between a contractor and OFCCP, did not receive all the back pay provided for in the agreement because the contractor unilaterally made deductions for the interim earnings; plaintiffs were permitted to enforce the conciliation agreement on a third-party beneficiary theory and to pursue an action for breach of release agreements to which they were parties). \textit{Amalgamated Clothing & Textile Workers Union v. S. Lichtenberg & Co.}, 54 FEP 635, 638 (S.D. Ga. 1990) (although the plaintiffs were not expressly named, they nevertheless could pursue their rights as intended third-party beneficiaries of the Executive Order’s nondiscrimination provisions). \textit{cf. Terry v. Northrop Worldwide Aircraft Servs., Inc.}, 786 F.2d 1558, 1561, 40 FEP 985 (11th Cir. 1986) (conciliation agreement could not be enforced by its third-party beneficiaries where the contractor, after signing the agreement, invoked the regulations’ protest procedures, 41 C.F.R. 60-1.24(c)(4) (2005), which enable a contractor to challenge demands made by the OFCCP without subjecting itself to a sanctions proceeding; since the agency had agreed to stay implementation of the agreement pending resolution of the protest, neither it nor the third-party beneficiaries could enforce it). \textit{But cf. Robinson v. Jacksonville Shipyards, Inc.}, 760 F. Supp. 1486, 1532, 57 FEP 971 (M.D. Fla. 1991) (third-party beneficiary theory was “merely derivative” of private cause of action theory, and the former could not be entertained because the latter was not cognizable).}
In a proceeding involving an alleged violation of a conciliation agreement, OFCCP does not have to present proof of the underlying violation resolved by the agreement when seeking enforcement of the agreement. The contractor may submit a response, in addition to its previous statements, to OFCCP if it contests the findings of violation or proposed remedy. Absent some negotiated resolution following receipt of the contractor’s response, the OFCCP either will withdraw its allegations as improvidently made, or may send the matter for formal enforcement proceedings to the Solicitor of Labor.

4. Notice of Review Completion

If the OFCCP has not identified any violations, it issues a “notice of review completion—no deficiencies found,” commonly referred to as a letter of compliance. When the compliance evaluation closure letter has identified and resolved minor deficiencies, the evaluation concludes with a “notice of review completion, minor deficiencies resolved.” If the contractor and the OFCCP have executed a conciliation agreement to resolve all issues, the agency issues a “notice of review completion, major deficiencies voluntarily resolved.” Any of these officially concludes the compliance evaluation of a supply and service contractor.

VIII. ENFORCEMENT PROCEDURES AND SANCTIONS FOR NONCOMPLIANCE

If a compliance review or complaint investigation asserts a violation that is not resolved by a conciliation agreement, administrative enforcement proceedings may follow. Violations may be alleged, inter alia, on the basis of a contractor’s refusal to submit an AAP; its refusal to cooperate with the compliance review or investigation; its alteration or falsification of required records; deficiencies in affirmative action compliance; findings of discrimination; or, any other material violation, or the threat of substantial or material violation, of the contractual provisions of the Executive Order, Section 503, or the Veterans Act, or of the rules or regulations or orders issued pursuant thereto.

The Executive Order and the regulations enumerate the sanctions that may be imposed for noncompliance. These include administrative determinations to cancellation, termination, or suspension of all government contracts and subcontracts, or debarment from bidding on future government work.

A. Administrative Enforcement

OFCCP relies heavily on its power to negotiate conciliation agreements as a method of resolving violations administratively. When conciliation fails, however, OFCCP may refer the matter to the Office of the Solicitor for the commencement of administrative enforcement.

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161 41 C.F.R. 60-1.34.
162 41 C.F.R. 60-1.26 (a) (1).
163 Id. 60-1.26 (a) (1) (i)–(x).
164 Exec. Order No. 11246, 41 C.F.R. 60-1.4 (b) (6), -250.66, -741.66. Additionally, the regulations implementing the Veterans Act and the Rehabilitation Act permit the withholding of the accrued payment due on the contract, or any other contract, between the government contractor and the federal government, with the prior approval of the Deputy Assistant Secretary to the extent necessary to correct any violations.” Id. 60-250.66 (a), -741.66 (a).
proceedings. In proceedings under the Executive Order, the contractor generally is provided a 30-day show cause notice before such referral, providing a last opportunity to avert litigation. The show cause notice is discretionary under Section 503 and the Veterans Act.\textsuperscript{166}

Administrative enforcement controversies, under all OFCCP programs, are resolved initially by an administrative law judge\textsuperscript{167} in an evidentiary hearing under OFCCP’s rules of practice (which are very similar to Federal Rules of Civil Procedure and Evidence).\textsuperscript{168} After the hearing, the administrative law judge issues recommended findings and conclusions, and a recommended decision.\textsuperscript{169} The contractor and OFCCP each may appeal the administrative law judge’s recommended decision by filing “exceptions.” After reviewing the record, exceptions filed and responses thereto, the Administrative Review Board issues a final order.\textsuperscript{170}

\textsuperscript{166} \textit{Id.} 60-1.28, -250.64, -741.64. However, if the contractor is alleged to have violated the terms of a conciliation agreement, it has only 15 days to demonstrate in writing that no violation has occurred. OFCCP may designate a shorter period if a delay would result in irreparable injury to employment rights of affected applicants or employees. \textit{Id.} 60-1.34 (a), -250.63 (a) (1), -741.63 (a) (1).

\textsuperscript{167} The policy of the Office of the Solicitor is that, once a matter has been referred for enforcement, it may be voluntarily resolved only through a consent decree, not through a conciliation agreement.

\textsuperscript{168} \textit{Id.} pt. 60-30. The most significant difference between the Administrative Law Judge Rules and the F.R.Civ.Pro. concerns the use of depositions at trial.

\textsuperscript{169} 41 C.F.R. 60-30. In a narrow set of circumstances, OFCCP may utilize an expedited hearing procedure provided by the regulations for certain time-sensitive matters, such as denial of access to the contractor’s site.\textsuperscript{169} The hearing is then conducted on an accelerated schedule without an opportunity for extended discovery \textit{Id.} at 60-30.31 to -30.37 (2005).

\textsuperscript{170} 41 C.F.R. 60-30. The regulations permit, and on rare occasions the Administrative Review Board has reviewed and overturned the recommendations of the Administrative Law Judge \textit{sua sponte}. 
Under the Administrative Procedure Act, a contractor, but not the OFCCP, may appeal the order of the Administrative Review Board to the U.S. District Court. Either party thereafter has the right to file an appeal with the U.S. Court of Appeals and, thereafter, a petition with the U.S. Supreme Court.

Failure to follow properly issued OFCCP procedures can be fatal to challenges to the OFCCP’s enforcement actions. In Trinity Industries v. Herman, the company maintained that OFCCP lacked jurisdiction to conduct a compliance review at a facility that had no involvement with the company’s federal contract work. The local agency office advised the company that such an issue could be addressed only by requesting a waiver from the Deputy Assistant Secretary. The company took no further action to request a waiver. The agency then filed an administrative complaint against the company, seeking production of its AAP. An administrative law judge found for the agency, and the Administrative Review Board affirmed. The District Court granted summary judgment in favor of the Secretary of Labor, and on appeal, the appellate court upheld the waiver provisions of OFCCP’s regulations.

Additionally, a party may not challenge OFCCP’s authority preemptively; it must first exhaust administrative remedies. In NationsBank Corp. v. Herman, the bank and its subsidiaries challenged the constitutionality of the OFCCP’s selection of certain of the bank’s offices for compliance reviews. Soon after notifying the bank of alleged violations of the Executive Order at one of its branches, the agency initiated compliance reviews at two other bank offices in different states. The bank refused to cooperate unless the agency revealed the criteria it had used in selecting

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171 5 U.S.C. § 701 et seq. (2000). A reviewing court may set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, or an abuse of discretion; (2) in violation of constitutional rights; (3) in excess of statutory jurisdiction or authority; (4) in violation of procedures required by law; and, (5) unsupported by substantial evidence or unwarranted by the facts. Id. § 706 (2); see, e.g., Timken Co. v. Vaughan, 413 F. Supp. 1183, 1192, 12 FEP 1140 (N.D. Ohio 1976) (setting aside an order debarring Timken; there was not substantial evidence to support the agency’s decision that the contractor’s availability estimate was improper). Commercial Envelope Mfg. Co. v. Dunlop, 11 FEP 117, 119 (S.D.N.Y. 1975) (rejected low bidder, who was declared non-responsible because of its failure to meet Executive Order 11246 affirmative action requirements, has standing under the Administrative Procedure Act to seek review of the finding of non-responsibility).

172 Citing the doctrine of exhaustion of administrative remedies, several courts have refused to entertain suits for a declaratory judgment or preliminary injunction before a final administrative decision has been issued. E.g., St. Regis Paper Co. v. Marshall, 591 F.2d 612, 615, 18 FEP 1635 (10th Cir. 1979) (upholding dismissal, prior to an administrative hearing, of a contractor’s suit challenging the validity of the OFCCP regulations that require “affected class” relief; the possibility of permanent debarment at the administrative level, without assurance that a stay will be granted pending judicial review, is insufficient to trigger any exception to the exhaustion requirement, in part because the possibility of irreparable injury was too speculative and tenuous); Uniroyal, Inc. v. Marshall, 579 F.2d 1060, 1064, 17 FEP 1207 (7th Cir. 1978) (contractor’s pre-enforcement challenge to the OFCCP’s discovery regulation was properly dismissed for failure to exhaust administrative remedies). But cf. National Bank of Commerce v. Marshall, 628 F.2d 474, 479, 24 FEP 98 (5th Cir. 1980) (“The general rule is that where the plaintiff ‘enter[s] the federal courthouse prematurely . . . the district court should [dismiss].’ On consideration, we think an exception to this rule should be made when the exercise of jurisdiction and the granting of preliminary relief will prevent irreparable injury to the plaintiff.”) (citations omitted). Liberty Mut. Ins. Co. v. Friedman, 485 F. Supp. 695, 700, 21 FEP 1016 (D. Md. 1979) (court permits, without comment, contractor’s declaratory judgment action to determine whether it is subject to OFCCP jurisdiction), rev’d on other grounds, 639 F.2d 164 (4th Cir. 1981).

173 173 F.3d 527, 79 FEP 854 (4th Cir. 1999).

174 173 F.3d at 529–31.

175 174 F.3d 424 (4th Cir. 1999).
these two new offices. When the agency did not respond, the bank filed an action for declaratory and injunctive relief in federal District Court, alleging that the document searches incident to the compliance reviews were unreasonable and in violation of the Fourth Amendment, because the agency had not used neutral selection criteria. The District Court granted the bank’s motion for a preliminary injunction. The appellate court, however, quickly dispatched the bank’s arguments and reversed, holding that the bank “must exhaust administrative remedies before bringing its Fourth Amendment suit against the OFCCP.”

B. Cancellation, Debarment, and Other Sanctions Following Administrative Hearing

The Executive Order and the regulations implementing the Veterans Act and Section 503 authorize the Secretary of Labor to preclude a non-complying contractor from working on, or receiving payment, under government contracts. The Secretary may:

1. Withhold as much of the accrued payment due on a government contract as is necessary to correct any violations;

2. Cancel or terminate, in whole or in part, the government contract in question; and/or,

3. Debar from, or declare a contractor ineligible for, future contracts for failing to comply with the equal opportunity/affirmative action clause.

An accused contractor has a right to a hearing if the Deputy Assistant Secretary proposes:

1. the cancellation or termination of a contract;
2. the withholding of progress payments, either in whole or in part; and/or,
3. a declaration that the contractor should be debarred or ineligible for future contracts.

This requirement is satisfied, however, by the administrative hearing leading to a determination of violation. There is no separate hearing required before the imposition of sanctions.

176 Id. at 426–28; see also Volvo v. GM Heavy Truck Corp., 118 F.3d 205, 211-12 (4th Cir. 1997); Goya de Puerto Rico, Inc. v. Herman, 115 F. Supp. 2d 262 (D.P.R. 2000) (Contractor required to exhaust administrative remedies with the OFCCP prior to filing suit challenging constitutionality of AAP under Rehabilitation Act, the Vets Act, and the Executive Order, even though agency did not have jurisdiction to consider constitutional questions).

177 Exec. Order No. 11246, § 209 (a) (6), 41 C.F.R. 60-1.4 (a) (6), -1.26, -1.27.

178 Exec. Order No. 11246, § 208(b), 41 C.F.R. 250.65–66, -741.65–66; cf. id. 60-1.26, -2.2 (b). Where the violation alleged is the breach of a prior conciliation agreement with OFCCP, debarment is always requested as one element of the remedy.
The regulations governing the Executive Order, the Rehabilitation Act, and the Veterans Act allow debarment for an indefinite term or a fixed minimum period of at least six months. The Veterans Act and Section 503 impose a maximum period of three years for a fixed debarment. The Deputy Assistant Secretary decides the length of a fixed-term debarment on a case-by-case basis, considering such factors as the nature and severity of the violations, the contractor’s compliance history, and whether the violations can be remedied in the absence of a fixed-term debarment.

A debarred or ineligible contractor may request reinstatement in a letter to the Deputy Assistant Secretary. A contractor debarred for an indefinite period may file a request for reinstatement at any time after the effective date of debarment. A contractor debarred for a fixed period under the Executive Order may file a request 30 days before the period ends, while a contractor under the regulations governing the Rehabilitation and Veterans Acts must wait six months from the effective date of the debarment. To secure reinstatement, the contractor must show that it has come into, and will maintain, compliance.

Debarment has been used not only as a sanction for actual discrimination or other violations proved in an administrative hearing, but also where a contractor denies that it is covered by the Executive Order; and, on that basis, refuses to prepare an AAP or to cooperate with an OFCCP compliance review.

OFCCP’s debarment authority was challenged and upheld in Uniroyal v. Marshall. In an administrative proceeding alleging discrimination against women and minorities, the government successfully moved to have Uniroyal’s government contracts terminated because of its refusal to allow discovery. Seeking to enjoin this action, Uniroyal sued, contending that the administrative law judge lacked authority under the Executive Order to compel discovery; or that, even if such authority existed, the refusal to comply with the discovery regulations could not be punished by debarment through an administrative proceeding.

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179 41 C.F.R. 60-1.27 (b), -250.66 (c), -741.66 (c).
180 Id. 60-250.66 (c), -741.66 (c).
181 After an enforcement action results in an order to debar, the Deputy Assistant Secretary is required to notify the heads of all contracting governmental agencies. 41 C.F.R. 60-1.30, -250.67, -741.67.
182 Id. 60-250.68(a), -741.68(a).
183 Id. 60-1.31, -250.68(a), -741.68(a).
184 Id.
185 Id. 60-1.31, -250.69, -741.68.
186 See, e.g., Department of Labor v. Coldwell, Banker & Co., 44 FEP 850, 852 (Dep’t of Labor 1987) (respondent claimed it was not a covered subcontractor and refused to submit an AAP); Department of Labor v. Interco, Inc., No. 86-OFC-2 (Mar. 10, 1987) (respondent claimed its autonomous divisions were not subject to the Executive Order and refused to submit an AAP).
187 See, e.g., OFCCP v. Monongahela R.R., No. 85-OFC-2 (Apr. 2, 1986) (Recommended Decision) (employer claimed it was not covered by Section 503 and refused to grant OFCCP access to its establishment).
188 Uniroyal contended that the Secretary’s recourse was to seek enforcement of its discovery requests in federal court. Uniroyal, 482 F. Supp. 364, 373(D.D.C. 1979).
The District Court rejected Uniroyal’s arguments. It held that the administrative law judge had power derived from the Executive Order, and validly promulgated discovery rules to require Uniroyal to produce documents and participate in depositions and other discovery. The court rejected, as well, Uniroyal’s contention that the authority to debar extended only to violations of the substantive nondiscrimination provisions of the Executive Order, and found further that debarment was not an abuse of discretion. In *Department of Labor v. Bruce Church, Inc.*, the Secretary reaffirmed immediate debarment as an appropriate remedy against a contractor that refused to prepare a written AAP.

Although the authority to debar is clear, the sanction is a serious one and should be reserved for serious violations. Debarment orders have been reversed where courts have found the remedy disproportionate to the matter in dispute. In *Firestone Synthetic Rubber & Latex Co. v. Marshall*, the Secretary had debarred a contractor because of a dispute regarding the proper statistical method for determining underutilization in its AAP. The District Court overturned the debarment. In *Timken Co. v. Vaughan*, the Secretary debarred a contractor because it disputed the appropriate recruiting area for goal-setting purposes. That order, too, was overturned. In *First Alabama Bank of Montgomery, N.A. v. Donovan*, the Eleventh Circuit modified a District Court’s immediate debarment order to permit First Alabama to remedy its refusal to cooperate with the OFCCP’s compliance review. In so holding, the court explained, “the purpose of debarment is limited to encouraging compliance and is not intended for use as punishment for non-compliance.”

C. Judicial Enforcement

1. Justice Department Actions

The regulations authorize the OFCCP to refer a matter to the Justice Department in order to: (1) enforce the contractual provisions of the Executive Order; (2) seek injunctive relief; and, (3) seek such additional relief as may be appropriate. The option of litigation in federal court was particularly attractive before 1974 because the Department of Justice had authority to bring Title VII pattern and practice actions, and could pursue a matter under both laws. Relying upon this dual

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189 Id. at 367.
190 Id. at 374.
191 No. 87-OFC-7 (June 30, 1987) (Final Decision).
193 Id. at 1338.
195 Id. at 1192.
196 692 F.2d 714 (11th Cir. 1982).
197 Id. at 722.
198 In *United States v. Whitney National Bank of New Orleans*, 671 F. Supp. 441 (E.D. La. 1987), the District Court reaffirmed the Justice Department’s authority to sue to enforce the Executive Order’s provisions.
199 The ability of the Department of Justice to secure an injunction is a particularly important enforcement option in cases involving utilities and other monopolies, where debarment is not realistic because the government cannot forego the service.
200 Id. 60-1.26, -250.65, -741.65. The regulations also purport to authorize the Department of Justice to seek back pay as a remedy. See *Whitney National Bank*, 671 F. Supp. at 442.
authority, the Department of Justice brought several industry-wide actions challenging, e.g., employment practices in the trucking, banking, and steel industries. In practice, OFCCP has not referred a case to the Department in more that 25 years.202

2. Standing to Sue the OFCCP

Some courts have held that citizens may sue federal officials to compel performance of their obligations under the Executive Order.203 The most instructive of these cases is Legal Aid Society v. Brennan.204 Organizations and citizens sued federal officials, alleging they had failed to discharge their duty to review AAPs and had regularly approved plans that did not comply with the regulations. The District Court granted plaintiffs’ motion for partial summary judgment, declaring that OFCCP had approved 10 specific AAPs that violated the regulations. It enjoined officials from approving programs that did not comply with the Executive Order. On appeal, the Ninth Circuit affirmed, holding that nothing in the Executive Order precluded judicial review. The decision stated that the order appeared to anticipate such review by preserving remedies “as otherwise provided by law.”205 The court seemed to limit its holding, however, to the performance of nondiscretionary responsibilities, such as disapproving AAPs that do not contain the elements mandated by the regulations.206

202 The authority to bring pattern and practice Title VII actions transferred from the Department of Justice to EEOC in March 1974. See United States v. East Texas Motor Freight Systems, Inc., 564 F.2d 179, 182 (5th Cir. 1977) (although the Justice Department no longer had jurisdiction over pattern-or-practice suits under Title VII, the Attorney General retained authority to enforce Executive Order).

203 E.g., Castillo v. Usery, 14 FEP 1240, 1250–54 (N.D. Cal. 1976) (in a suit by a civil rights organization against the Secretary of Labor, the court ordered OFCCP to: (1) issue a notice of proposed sanctions whenever a contractor fails to show good cause for past noncompliance, even if the contractor is willing to develop an acceptable AAP; and, (2) enter into written conciliation agreements covering all violations and deficiencies disclosed and resolved by the parties). Percy v. Brennan, 384 F. Supp. 800, 805–06, 8 FEP 1213 (S.D.N.Y. 1974) (minority-group members can sue federal officials seeking injunctive relief and declaration of invalidity of “New York Plan” governing affirmative action in federal- and state-assisted construction projects without first exhausting administrative remedies with the EEOC and OFCCP).

204 608 F.2d 1319 (9th Cir. 1979).

205 Executive Order No. 11246, § 202(6).

206 41 C.F.R. 60-2.1(a),” Legal Aid Soc’ y, 608 F.2d at 1331 n.21 (citation omitted).
3. Suits Against Unions

Attempts to sue unions under the Executive Order have resulted in inconsistent rulings. In *United States v. East Texas Motor Freight System, Inc.*,207 the Fifth Circuit ruled that a union, not being a government contractor or subcontractor, could not be subject to an independent action under the Executive Order.208 In *United States v. Operating Engineers Local 701*,209 however, another court enjoined a union from interfering with Executive Order compliance. The union had engaged in work stoppages against government contractors that refused to yield to the union’s demands to discharge African-American employees who were hired from sources other than the union referral system provided for in the collective bargaining agreement. Issuing an injunction, the court ruled that “[i]t is unlawful for a union to interfere with the obligations of contractors and subcontractors under Executive Order 11246.”210

IX. VALIDITY OF THE EXECUTIVE ORDER AND RESULTING ACTIONS

A. Validity of the Executive Order and Implementing Regulations

Courts repeatedly have upheld the basic authority of the President to require a nondiscrimination clause in government contracts, and—at least on that issue—have accorded the Executive Order the force and effect of law, over contentions that it is unconstitutional and in conflict with other statutes.211 In fact, some authorities suggest that the Constitution compels the government to impose the basic condition of nondiscrimination in its contracts.212

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207 564 F.2d 179 (5th Cir. 1977).
208 Id. at 184. The court noted that, if a union discriminates while engaged in work on a government contract, the union would be subject to a Title VII action. Id.; cf. *United States v. Building & Constr. Trades Council*, 271 F. Supp. 447, 451–52, 1 FEP 897 (E.D. Mo. 1966) (dismissing suit by government for an injunction restraining unions from tortiously interfering with a contractor’s performance of obligations under the Executive Order, holding that there was no federal common law remedy for tortious interference with such obligations).
210 Id. at 1407; see also Executive Order § 207, 41 C.F.R. 60-1.26(c)(2) (authorizing injunctive actions against unions that seek to thwart purposes of the Executive Order); id. 60-1.9 (authorizing hearings by the Director to aid in securing compliance by labor unions and by recruiting and training agencies). One distinction between the *East Texas Motor Freight* case and *Operating Engineers* may be the difference in the relationship between supply and service contractors and their unions, and construction companies and unions.
211 See, e.g., *Uilev v. Varian Assocs.*, 811 F.2d 1279, 1285 n.4, (9th Cir. 1987) (separation of powers requires that an Executive Order be “rooted” in an appropriate grant of congressional authority); *First Ala. Bank of Montgomery, N.A. v. Donovam*, 692 F.2d 714, 721–22, (11th Cir. 1982) (due process challenge to the Executive Order summarily rejected; bank had challenged the order’s administrative procedures that permit quasi-judicial hearings to be conducted by administrative law judges who are employed by the same agency that initiates review); *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 905, (5th Cir. 1981) (proposition that the Executive Order has the force and effect of law is well established).
212 See *NAACP v. Federal Power Comm’n*, 520 F.2d 432, 444–46 (D.C. Cir. 1975) (Federal Power Commission has a constitutional duty under the Fifth Amendment to prohibit employment discrimination by regulatees), aff’d, 425 U.S. 662 (1976); *Castillo v. Usery*, 14 FEP 1240, 1250 (N.D. Cal. 1976) (“‘Eradication of employment discrimination is a national policy of ‘the highest priority.’ In the federal compliance program the policy has constitutional dimensions since public funds may not constitutionally be used to subsidize employment discrimination.”) (citations omitted).
Nevertheless, the precise source of the President’s authority to carry out the contract compliance program has not been conclusively agreed upon. Most courts identify the procurement power, granted by the Federal Property and Administrative Services Act of 1949, as the sole or principal basis for the Executive Order. Other courts have found additional statutory support for the Executive Order in Title VII itself, or its 1972 amendments.

The origins of the congressional authority for Executive Order 11246 have been roundly debated by commentators and courts. While courts have reached varying conclusions regarding the source of that authority, no court to date has held that the Order exceeded Presidential authority.

A broader question is the validity of the affirmative action requirement. A number of early decisions rejected constitutional and statutory challenges to the validity of government-imposed AAPs requiring goals and timetables in the construction industry. These cases, however, predate the Supreme Court’s development of “reverse discrimination” jurisprudence. It remains an open question whether OFCCP-mandated AAPs, which are required even without a finding of past discrimination by the contractor, are permissible under Title VII and consistent with equal protection. Lower courts have found no unlawful discrimination when contractors have defended employment actions based upon Executive Order AAP commitments, but these cases also predate many, if not most, of the major Supreme Court precedents. In McLaughlin v. Great Lakes Dredge

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215 See United States v. East Tex. Motor Freight Sys., 564 F.2d 179, 184 (5th Cir. 1977) (“The order is authorized by the broad grant of procurement authority.”); Contractors Ass’n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 170 (3d Cir. 1971) (“It is in the interest of the United States in all procurement to see that its suppliers are not over the long run increasing its costs and delaying its programs by excluding from the labor pool available minority workmen”); Farkas v. Texas Instruments, Inc., 375 F.2d 629, 632 n.1 (5th Cir. 1967) (“We would be hesitant to say that the antidiscrimination provisions of Executive Order No. 10925 are so unrelated to the establishment of ‘an economical and efficient system for [. . .] the procurement and supply’ of property and services, 40 U.S.C.A. § 471, that the order should be treated as issued without statutory authority.”).
216 See Eatmon v. Bristol Steel & Iron Works, Inc., 769 F.2d 1503, 1516 (11th Cir. 1985) (Executive Order 11246 is authorized by Title VII) (citing Contractors Ass’n of E. Pa., 442 F.2d at 171); United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 467 (5th Cir. 1977) (legislative history of Title VII and the 1972 Act indicates the congressional intent that the Executive Order program continue, and that Title VII not be the exclusive federal remedy in this area), vacated and remanded on other grounds, 436 U.S. 942 (1978); Legal Aid Soc’y v. Brennan, 608 F.2d 1319, 1329 n.14 (9th Cir. 1979) (essential features of affirmative action regulations were effectively ratified by Congress in adopting the 1972 Act because frontal attacks on OFCCP goal-and-timetable enforcement system were defeated).
218 For example, Fullilove v. Klutznick, 448 U.S. 448 (1980), involved a congressional set-aside of federal funds for the promotion of minority business participation in local public works projects. Congress itself explicitly authorized the set-aside. According to one of the concurring opinions in Fullilove, for race-conscious remedies to be constitutional they must be imposed by an appropriate governmental body authorized to act in this area, following findings that demonstrate the existence of illegal discrimination. Id. at 498 (Powell, J., concurring). The Executive Order is an administrative, rather than a legislative, program. Its principal source of legislative authority, the procurement law, makes no mention of affirmative action.
a white man alleged that he was discriminated against, in violation of Title VII and the Fifth and Fourteenth Amendments, when a less-experienced minority applicant was recalled ahead of him from layoff. The District Court held that an AAP was “adopted voluntarily” by the contractor (even though it was required by the company’s government contract), and did not create unlawful reverse discrimination. Other cases are to the same effect.

Support for OFCCP’s requirements may be found in United States v. New Orleans Public Service, Inc. The defendant, New Orleans Public Service, Inc. (NOPSI), a public utility, challenged the government’s authority to impose Executive Order obligations on NOPSI when it had not agreed to be bound. NOPSI supplied gas and electric services to various federal agencies within its territory. The Fifth Circuit held that the government could compel NOPSI to comply with the Executive Order even though the company had not consented to be so bound. The court stated that NOPSI’s lack of consent was irrelevant.

The regulation, which incorporates by operation of the Executive Order the nondiscrimination clause into every government contract, would be a dead letter if the Government could not apply it to a government contractor like NOPSI merely because the company refused to consent. There was no unfairness, the court said, in NOPSI’s lack of choice as to whether to accept the government’s business. A utility enjoying the benefits of a monopoly situation cannot force upon the government the dilemma of either acquiescing or going without necessary services by refusing to consent. The court concluded that “equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of the [Executive] Order.”

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220 Id. at 861.
221 See also Freeze v. ARO, Inc., 503 F. Supp. 1045, 1048, (E.D. Tenn. 1980) (no Title VII violation in granting an African-American employee preferential seniority pursuant to Executive Order conciliation agreement with Secretary of Labor), aff’d mem., 708 F.2d 723 (6th Cir. 1982); Tangren v. Wackenhut Servs., Inc., 480 F. Supp. 539, 547 (D. Nev. 1979) (upholding, under the Weber criteria, a seniority override provision in favor of minorities; it was established to bring the contractor into compliance with the Executive Order), aff’d, 658 F.2d 705 (9th Cir. 1981); cf. Hunter v. St. Louis-San Francisco Ry., 639 F.2d 424, 426 (8th Cir. 1981) (railroad did not violate Title VII by rejecting a white female applicant in favor of African-American male applicants, pursuant to an Executive Order AAP valid under the Weber criteria; by articulating a racial criterion that was permissible under Title VII, the railroad stated a nondiscriminatory reason).
222 553 F.2d 459 (5th Cir. 1977), vac. and rem. on other grounds, 436 U.S. 942 (1978).
223 Id. at 470. Following the intervening decision in Chrysler Corp v. Brown, 441 U.S. 281 (1979), the Fifth Circuit reaffirmed its holding that the Executive Order had proper statutory authority and could validly be applied to the utilities. United States v. Mississippi Power & Light Co., 638 F.2d 899, 905–06 (5th Cir. 1981).
224 Id. at 470. Following the intervening decision in Chrysler Corp v. Brown, 441 U.S. 281 (1979), the Fifth Circuit reaffirmed its holding that the Executive Order had proper statutory authority and could validly be applied to the utilities. United States v. Mississippi Power & Light Co., 638 F.2d 899, 905–06 (5th Cir. 1981).
225 New Orleans Pub. Serv., Inc., 553 F.2d at 467; cf. AFL-CIO v. Kahn, 618 F.2d 784, 796 (D.C. Cir. 1979) (the Procurement Act gave the President the authority to condition the letting of contracts in excess of $5 million on the contractor’s compliance with wage and price guidelines); Contractors Ass’n of E. Pa. v. Secretary of Labor, 442 F.2d at 176 (sustaining the validity of the “Philadelphia Plan;” the source of the affirmative action requirement was a voluntary contractual agreement: “Plaintiffs [.] are merely being invited to bid on a contract with terms imposed by the source of the funds. The affirmative action covenant is no different in kind than other covenants specified in the invitation to bid. [.] The Plan [.] exacts a covenant for present performance.”).
Claims for back pay under the Executive Order have arisen in two distinct situations. First, the government has sought back pay as a remedy in a lawsuit or an administrative enforcement proceeding, in which the contractor is found to have engaged in discrimination in violation of the equal employment clause of its government contract. In *United States v. Duquesne Light Co.*, a District Court refused to strike a claim for back pay from an action brought by the Attorney General to enforce Duquesne Light’s Executive Order and contractual obligations. The court held that there was statutory authority, or inherent executive authority, for the government to seek back pay, because such “restitutionary relief” would provide an incentive to eliminate discriminatory employment practices that increase the costs of government contracts.

Second, the OFCCP also has sought back pay for the class of individuals affected by a pattern and practice of discrimination. The OFCCP takes the position that an “‘affected class’ problem” must be remedied—i.e., there must be no continuing effects of discrimination—in order for a contractor to be in compliance. Contractors have disputed this position, claiming it goes beyond the authority of the Executive Order. These challenges, to date, have been unsuccessful.

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228 *Id.* at 509.
229 See 41 C.F.R. 60-1.26(a)(2), -1.33, -250.62(a), -741.62(a). In 1987, the OFCCP clarified that back pay may be awarded for violations that occur within 2 years of the time the contractor is notified of a compliance review. OFCCP Order No. 640a5, (Feb. 23, 1982). There is a suggestion in a few earlier Recommended Decisions that back pay may be sought for violations prior to the 2-year period if a continuing violation exists. *Department of Labor v. Harris Trust & Sav. Bank*, No. 78-OFCCP-2 (Dec. 22, 1986) (Recommended Decision) (recommending a class-wide back-pay remedy, retroactive to a date prior to the 2-year period). This view is inconsistent with the subsequent position expressed by the Department of Labor in OFCCP Order No. 640a5, and thus, should not be considered authoritative.
ATTACHMENT A

RELEVANT PORTIONS OF EXECUTIVE ORDER 11246
Subpart A - Duties of the Secretary of Labor

SEC. 201. The Secretary of Labor shall be responsible for the administration and enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of Parts II and III of this Order.


Subpart B - Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States. [Sec. 202 amended by EO 11375 of Oct. 13, 1967, 32 FR 14303, 3 CFR, 1966-1970 Comp., p. 684, EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230].

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: Provided, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers or providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the Secretary of Labor as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.
(d) The Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer’s practices and policies do not discriminate on the grounds of race, color, religion, sex or national origin, and that the signer either will affirmatively cooperate in the implementation of the policy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the Secretary of Labor may require.


SEC. 204 (a) The Secretary of Labor may, when the Secretary deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order.

(b) The Secretary of Labor may, by rule or regulation, exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier.

(c) Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.

(d) The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor that are in all respects separate and distinct from activities of the contractor related to the performance of the contract: provided, that such an exemption will not interfere with or impede the effectuation of the purposes of this Order: and provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C - Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. The Secretary of Labor shall be responsible for securing compliance by all Government contractors and subcontractors with this Order and any implementing rules or regulations. All contracting agencies shall comply with the terms of this Order and any implementing rules, regulations, or orders of the Secretary of Labor. Contracting agencies shall cooperate with the Secretary of Labor and shall furnish such information and assistance as the Secretary may require.


SEC. 206. The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor.

(b) The Secretary of Labor may receive and investigate complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order.


SEC. 207. The Secretary of Labor shall use his/her best efforts, directly and through interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.


SEC. 208. The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D - Sanctions and Penalties

SEC. 209. In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

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(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) After consulting with the contracting agency, direct the contracting agency to cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with equal employment opportunity provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the Secretary of Labor.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Pursuant to rules and regulations prescribed by the Secretary of Labor, the Secretary shall make reasonable efforts, within a reasonable time limitation, to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under subsection (a)(2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under subsection (a)(5) of this Section.


SEC. 210. Whenever the Secretary of Labor makes a determination under Section 209, the Secretary shall promptly notify the appropriate agency. The agency shall take the action directed by the Secretary and shall report the results of the action it has taken to the Secretary of Labor within such time as the Secretary shall specify. If the contracting agency fails to take the action directed within thirty days, the Secretary may take the action directly.


SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor.

SEC. 212. When a contract has been cancelled or terminated under Section 209(a)(5) or a contractor has been debarred from further Government contracts under Section 209(a)(6) of this Order, because of noncompliance with the contract provisions specified in Section 202 of this Order, the Secretary of Labor shall promptly notify the Comptroller General of the United States.


Subpart E - Certificates of Merit

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

Part III - Nondiscrimination Provisions in Federally Assisted Construction Contracts

SEC. 301. Each executive department and agency, which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 202 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations and relevant orders of the Secretary, (2) to obtain and to furnish to the Secretary of Labor such information as the Secretary may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.


SEC. 302. "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.
(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he/she becomes a recipient of such Federal assistance.

SEC. 303. The Secretary of Labor shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor and to furnish the Secretary such information and assistance as the Secretary may require in the performance of the Secretary's functions under this Order.

(b) In the event an applicant fails and refuses to comply with the applicant's undertakings pursuant to this Order, the Secretary of Labor may, after consulting with the administering department or agency, take any or all of the following actions: (1) direct any administering department or agency to cancel, terminate, or suspend in whole or in part the agreement, contract or other arrangement with such applicant with respect to which the failure or refusal occurred; (2) direct any administering department or agency to refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received by the Secretary of Labor from such applicant; and (3) refer the case to the Department of Justice or the Equal Employment Opportunity Commission for appropriate law enforcement or other proceedings.

(c) In no case shall action be taken with respect to an applicant pursuant to clause (1) or (2) of subsection (b) without notice and opportunity for hearing.


SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of nondiscrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: Provided, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.
ATTACHMENT B

SECTION 503 OF THE REHABILITATION ACT OF 1973
Employment Under Federal Contracts

Sec. 503. (a) Any contract in excess of $10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of $10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. The President shall implement the provisions of this section by promulgating regulations within ninety days after the date of enactment of this section.

(b) If any individual with a disability believes any contractor has failed or refused to comply with the provisions of a contract with the United States, relating to employment of individuals with disabilities, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

(c)(1) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract, in accordance with guidelines set forth in regulations which the President shall prescribe, when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.

(2)(A) The Secretary of Labor may waive the requirements of the affirmative action clause required by the regulations promulgated under subsection (a) with respect to any of the prime contractor’s or subcontractor’s facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this Act.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

(D) The standards used to determine whether this section has been violated in a complaint alleging nonaffirmative action employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(E) The Secretary shall develop procedures to ensure that administrative complaints filed under this section and under the Americans with Disabilities Act of 1990 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this section and the Americans with Disabilities Act of 1990.
ATTACHMENT C

38 U.S.C. §4212

“JOBS FOR VETERANS ACT”
Sec. 4212. Veterans' employment emphasis under Federal contracts

(a)(1) Any contract in the amount of $100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of $100,000 or more entered into by a prime contractor in carrying out any such contract.

(2) In addition to requiring affirmative action to employ such qualified covered veterans under such contracts and subcontracts and in order to promote the implementation of such requirement, the Secretary of Labor shall prescribe regulations requiring that--

(A) each such contractor for each such contract shall immediately list all of its employment openings with the appropriate employment service delivery system (as defined in section 4101(7) of this title), and may also list such openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor), except that the contractor may exclude openings for executive and senior management positions and positions which are to be filled from within the contractor's organization and positions lasting three days or less;

(B) each such employment service delivery system shall give such qualified covered veterans priority in referral to such employment openings; and

(C) each such employment service delivery system shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of this title.

(3) In this section:

(A) The term "covered veteran" means any of the following veterans:

(i) Disabled veterans.

(ii) Veterans who served on active duty in the Armed Forces during a war or in a campaign or expedition for which a campaign badge has been authorized.

(iii) Veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order No. 12985 (61 Fed. Reg. 1209).

(iv) Recently separated veterans.

(B) The term "qualified", with respect to an employment position, means having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability.
(b) If any veteran covered by the first sentence of subsection (a) believes any contractor of the United States has failed to comply or refuses to comply with the provisions of the contractor's contract relating to the employment of veterans, the veteran may file a complaint with the Secretary of Labor, who shall promptly investigate such complaint and take appropriate action in accordance with the terms of the contract and applicable laws and regulations.

(c) The Secretary of Labor shall include as part of the annual report required by section 4107(c) of this title the number of complaints filed pursuant to subsection (b) of this section, the actions taken thereon and the resolutions thereof. Such report shall also include the number of contractors listing employment openings, the nature, types, and number of positions listed and the number of veterans receiving priority pursuant to subsection (a)(2)(B).

(d)(1) Each contractor to whom subsection (a) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on--

(A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified veterans;

(B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified veterans; and

(C) the maximum number and the minimum number of employees of such contractor during the period covered by the report.

(2) The Secretary of Labor shall ensure that the administration of the reporting requirement under paragraph (1) is coordinated with respect to any requirement for the contractor to make any other report to the Secretary of Labor.
ATTACHMENT D
OFCCP COMPENSATION GUIDANCE


These Voluntary Guidelines consist of two sections: I. Voluntary Guidelines and II. Procedures.

I. Voluntary 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 these Voluntary Guidelines, OFCCP will deem a contractor in compliance with section 60-2.17(b)(3) and will coordinate its compliance monitoring activities as explained in Section II of these Voluntary Guidelines, if the contractor's compensation self-evaluation program meets the standards outlined below. These guidelines are strictly voluntary. A contractor's decision not to implement a self-evaluation program that comports with these Voluntary Guidelines shall not be a consideration in OFCCP's assessment of a contractor's compliance with Executive Order 11246 or OFCCP's regulations. However, failure to adopt any self-evaluation method will be a basis for a finding of non-compliance with 41 CFR 60-2.17(b)(3). The mandatory language used to describe methods of compensation self-evaluation under these Voluntary Guidelines means that these methods are required if the contractor wishes to obtain the compliance coordination incentive offered under these Voluntary Guidelines. Use of such mandatory terms in these Voluntary Guidelines shall not be construed to imply that the methods outlined in these Voluntary Guidelines are mandatory or to imply any limit on a contractor's discretion to use any self-evaluation technique it deems appropriate to comply with 41 CFR 60-2.17(b)(3). However, OFCCP will deem a contractor in compliance with 41 CFR 60-2.17(b)(3), and will coordinate its compliance monitoring activities as explained in Section II of these Voluntary Guidelines, if the contractor's self-evaluation program 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 they perform similar work and occupy positions which are similar in responsibility level, and similar in the skills and qualifications involved in the positions. Employees may not be grouped in an SSEG for purposes of these Voluntary Guidelines unless the work performed, responsibility level, and requisite skills 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. In addition to work performed, responsibility level, and skills/qualifications involved in the positions, other factors may have a significant bearing on whether employees are similarly situated. Such additional factors may include, for example, department or other functional unit of the employer, employment status (e.g., full-time versus part-time), compensation status (e.g., union versus non-union, hourly versus salaried versus commissions), etc. Contractors should consider the applicability of such factors in developing SSEGs, in addition to similarity in work performed and in responsibility level, skills, and qualifications involved in the positions.

B. The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis. However, the SSEGs must in all events conform to Section IA of these Voluntary Guidelines. 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. Some 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 should attempt to develop statistical analyses that encompass a significant majority of the employees in the particular
affirmative action program (AAP) or establishment. Where the statistical analyses do not encompass at least 70% of the employees in the AAP or establishment, OFCCP will carefully scrutinize the statistical analyses and associated non-statistical self-evaluations. Contractors are afforded discretion to develop self-evaluation programs that encompass various groupings of employees other than AAPs or establishments, subject to the requirements outlined in these Voluntary Guidelines.

C. On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs (as defined in Section IA of these Voluntary Guidelines) 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 establishments or AAPs with 500 or more employees, the type of statistical analysis must be multiple regression analysis. 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 decision-making. The analyses 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 identified 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. 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 program, 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 program after the initial implementation, the remedy would involve correcting current disparities. Through the sources of information available to OFCCP under Section IE of these Voluntary Guidelines, 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 these Voluntary Guidelines;

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 compliance with Executive Order 11246, as described in Section IIB of these Voluntary Guidelines;

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231 This significance level roughly translates to a measured absolute disparity that is more than two times the standard error of the estimated value. See David H. Kaye & David A. Freedman Reference Guide on Statistics, in Federal Judicial Center, Reference Manual on Scientific Evidence, at 124 n. 138 (2d ed. 2000). 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.
(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 of these Voluntary Guidelines 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 program meets the general standards set forth in Section I of these Voluntary Guidelines, OFCCP will coordinate its compliance monitoring activities as follows:

A. During a compliance review, OFCCP will assess whether the contractor's compensation self-evaluation program comports with the general standards outlined in Section I of these Voluntary Guidelines. A contractor that seeks the compliance coordination incentive under these Voluntary Guidelines should respond to the Item 11 request in OFCCP's Scheduling Letter by noting that the contractor "seeks compliance coordination under the voluntary OFCCP compensation self-evaluation voluntary guidelines."

B. If the contractor's compensation self-evaluation system reasonably meets the general standards outlined in Section I of these Voluntary Guidelines, OFCCP will consider the contractor's compensation practices to be in compliance with Executive Order 11246. However, OFCCP may suggest in a written letter that the contractor make prospective modifications to improve the self-evaluation program's conformity with the general standards outlined in Section I of these Voluntary Guidelines, where OFCCP concludes that the self-evaluation program is only marginally reasonable under these Voluntary Guidelines; thereafter, during future compliance reviews, OFCCP will assess whether the contractor made the suggested changes in determining the contractor's prospective compliance with these Voluntary Guidelines. 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 program will no longer be deemed to comport with the general standards outlined in Section I of these Voluntary Guidelines.

C. OFCCP may review the documents and data set forth in Section IE to determine whether the contractor's compensation self-evaluation program reasonably meets the general standards outlined in these Voluntary Guidelines 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 program meets the general standards outlined in Section I of these Voluntary Guidelines to OFCCP's Director of Statistical Analysis in the National Office, or his or her designee.

E. Confidentiality of Compensation and Personnel Information: OFCCP will treat compensation and other personnel information provided by the contractor to OFCCP under these Voluntary Guidelines as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

F. 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 these 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 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 establishment at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation 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 these Voluntary Guidelines, a contractor that opts for this compliance certification alternative will not be entitled to the compliance coordination incentive outlined in Section IIB of these Voluntary Guidelines. 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 their compensation self-evaluation. This Alternative Compliance Certification is an alternative to the contractor disclosing the self-evaluation and results to OFCCP. It is not to be construed as a limit on contractors' discretion to implement any self-evaluation technique it deems appropriate in order to comply with 41 CFR 60-2.17(b)(3).