

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60-2**

RIN 1215-AB53

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) commissioned two studies to determine whether data submitted by contractors in response to the Equal Opportunity Survey (EO Survey) could be used to develop an effective and efficient tool to target those contractors most likely to be discriminating. The first study failed to find a correlation between the predictive variables generated from the EO Survey and determinations of noncompliance. The second study showed that the EO Survey did not provide sufficiently useful data for enforcement targeting purposes. In light of these findings, together with a review of both the costs associated with the EO Survey and the utility of the EO Survey in accomplishing any of its stated objectives, OFCCP is proposing to remove the current requirement for nonconstruction federal contractors to file the EO Survey under Section 60-2.18. This proposed change is intended to more effectively focus enforcement resources and to eliminate a regulatory requirement that fails to provide value to either OFCCP enforcement or contractor compliance. OFCCP's resources could be better directed for the benefit of victims of discrimination, the government, contractors, and taxpayers.

DATES: Comments must be received on or before March 21, 2006.**ADDRESSES:** You may submit comments, identified by RIN number 1215-AB53, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: ofccp-mail@dol.esa.gov. Include "RIN number 1215-AB53" in the subject line of the message.
- Fax: (202) 693-1304 (for comments of 6 pages or fewer).

- Mail: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room N3422, 200

Constitution Avenue, NW., Washington, DC 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-0102 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C3325, 200 Constitution Avenue, NW., Washington, DC 20210. People needing assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rulemaking will be made available in the following formats: Large print; electronic file on computer disk; and audiotape. To schedule an appointment to review the comments and/or to obtain this Notice of Proposed Rulemaking in an alternate format, contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC 20210. Telephone: (202) 693-0102 (voice) or (202) 693-1337 (TTY).

SUPPLEMENTARY INFORMATION:**I. Background***A. History of Equal Opportunity Survey*

Executive Order 11246, as amended, requires that Federal Government contractors and subcontractors "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." Section 202(1). Affirmative action under the Executive Order means more than passive nondiscrimination; it requires that contractors take affirmative steps to identify and eliminate impediments to equal employment opportunity. The affirmative steps include numerous recordkeeping obligations designed to assist the contractor, in the first instance, and also OFCCP in monitoring the contractor's employment practices. For example, contractors are generally required to maintain employment and personnel records for two years, to file annually an EEO-1 Report, and to develop an affirmative action program (AAP) that includes several quantitative analyses, identification of problem areas, development and execution of an action-oriented program to correct any

problems identified, and development and implementation of an auditing system to periodically measure the effectiveness of the AAP. See 41 CFR 60-1.7, 60-1.12(a), 60-2.1, 60-2.10, and 60-2.17. Today's notice proposes no changes to these requirements.

On November 13, 2000, OFCCP published a final rule (165 FR 68046) revising regulations found at 41 CFR parts 60-1 and 60-2 relating to affirmative action programs and recordkeeping. Section 60-2.18 of the final rule requires that nonconstruction contractor establishments designated by OFCCP prepare and file an Equal Opportunity Survey (EO Survey). The EO Survey contains information about personnel activities, compensation and tenure data, and certain information about the contractor's affirmative action program. OFCCP recordkeeping rules require contractors to maintain information necessary to complete the EO Survey, although not in the format called for by the survey instrument. See 65 FR 26100 (May 4, 2000). The EO Survey had three major objectives:

- (1) To improve the deployment of scarce federal government resources toward contractors most likely to be out of compliance;
- (2) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts, thereby allowing better resource allocation; and
- (3) To increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations.

See 165 FR 68039 (Nov. 13, 2000); see also 65 FR 26101 (May 4, 2000).

The development of the EO Survey began in March 1999. During the initial development stage, discussions were held with OMB and meetings were held with contractors and contractor representatives, civil rights groups, and women's groups. A version of the EO Survey was field tested beginning in August 1999.

In April 2000, a pilot EO survey was sent to 7,000 contractors. After receipt of pilot EO Survey responses, OFCCP commissioned a study to determine whether the pilot EO Survey results could be used to predict whether a contractor would have findings of non-compliance. Bendick & Eagan Economic Consultants, Inc., The Equal Opportunity Survey: Analysis of a First Wave of Survey Responses (September 2000) (Bendick Report). The Bendick Report failed to find a correlation between the predictive variables, generated from the EO Survey, and determinations of noncompliance. Data problems prevented Bendick from

conducting a full-scale analysis of the pilot EO Survey's predictive power. The report stated that the EO Survey results might in the future be a way of finding contractors that discriminate, but the pilot EO Survey was not. Bendick Report at 18–27.¹ The EO Survey sent to contractors in December 2000 was not substantively different from the pilot EO Survey.

OFCCP mailed 53,000 EO Surveys between December 2000 and March 2001, 10,000 in December 2002, 10,000 in December 2003, and 10,000 in December 2004.

B. Analysis of the Equal Opportunity Survey

In January 2003, OFCCP published a Notice in the **Federal Register** seeking a two-year extension of the PRA clearance that stated: "Time constraints and a number of data problems affected an earlier pilot study of the EO Survey data in such a way so as not to be able to assess the Survey's predictive power. To perform a study that is not limited by these obstacles, OFCCP has engaged an outside contractor to study the Survey data. The contractor will assess data from the EO Survey submissions as part of its study."

OFCCP contracted with Abt Associates, Inc. (Abt), of Cambridge, Massachusetts, to study whether EO Survey data could be used to develop a model to more effectively target those contractors engaging in systemic discrimination. OFCCP conducted compliance evaluations of a sample of supply and service contractor establishments completing the 2002 EO Survey.² Ultimately the study focused

on 1,888 establishments that had completed compliance reviews and had reliable EO Survey data. Of these 1,888 cases, OFCCP found systemic discrimination in 67 cases (3.5%). Results of the compliance reviews and EO Surveys were analyzed to determine whether a model could be developed that would predict which contractors in the sample were engaged in systemic discrimination based solely on the EO Survey data submitted. An Evaluation of OFCCP's Equal Opportunity Survey (Abt Report) at 12–37.

In summer 2005, Abt Associates presented OFCCP with its report reviewing the 2002 EO Survey in the Abt Report. The Abt Report is posted on OFCCP's Web site at <http://www.dol.gov/esa/ofccp/index.htm> and is available for public inspection during normal business hours at Room C3325, 200 Constitution Avenue, NW., Washington, DC 20210.

Abt utilized standard statistical techniques to determine if there was any relation between the data reported on the EO Surveys and the determinations of systemic discrimination found through OFCCP compliance reviews. Abt developed potential predictor variables from Part B (personnel activity by EEO–1 category) and Part C (compensation data by EEO–1 category) of the EO Survey for the purpose of developing a statistical model aimed at targeting establishments that are more likely to be engaged in systemic discrimination.³ Nearly all the predictor variables fell into two broad groups. One group attempted to measure the treatment of females relative to males within the same establishment. Another group of variables, in a parallel fashion, compared the treatment of minorities with that of non-minorities within the same establishment. Corresponding comparative variables were also developed to reflect the extent to which an individual establishment departs from other establishments in its comparison group, defined by industry and geography. *Id.* at 15–20.

After insuring data quality and performing a preliminary analysis on the data, Abt constructed a total of 125 potential predictor variables, derived from all reported aspects of personnel activity, compensation, and tenure. The

significant number, 763, had missing or incoherent data on the EO Survey, and were not used in the study. Ultimately the study focused on 1,888 cases that had completed compliance reviews and had reliable EO Survey data. An Evaluation of OFCCP's Equal Opportunity Survey (Abt Report) at 5–6, 10–14, 28; Abt Report, Appendix E, Tables A and B.

³ Abt also considered previous work on discrimination including the data from the 2000 Pilot Test of the EO Survey, carried out by OFCCP, and the Bendick Report.

first phase of analysis examined the relation between the findings of systemic discrimination in compliance reviews and each of the predictor variables. Most predictor variables derived from the EO Survey data were found to have no relation to findings of systemic discrimination. No single variable was found to have a high level of predictive ability. *Id.* at 21–24. Further, those establishments with findings of systemic discrimination did not share any combination of modeled characteristics that set them apart from establishments with findings of no systemic discrimination. *Id.* at 39.

Only 22 of the 125 potential predictor variables were found to have "some association" with the systemic discrimination determinations.⁴ Combinations of the 22 predictors were examined both by including all of those variables in a multiple-variable logistic regression model and by a stepwise logistic regression model.⁵ Abt identified, and used in a final model, only four variables, out of the initial 125 potential predictor variables, that when used in combination, were related to the presence or absence of systemic discrimination:

- Whether the establishment reported more than 200 full-time employees;
- The average (over EEO–1 categories) of the ratio of average tenure among minority employees to average tenure among non-minority employees;
- The absolute value of the difference between the proportion of female employees and the proportion of male employees in EEO–1 Category 3 (technicians);
- The average (over EEO–1 categories) of the ratio of the female-to-male tenure ratio to the median of those ratios in the establishment's comparison group (defined by industry and geography).

Id. at 24–38. However, Abt found the model's predictive power to be only slightly better than chance. Screening on the basis of the model produced large numbers of false positives, that is, the model predicted numerous instances of systemic discrimination in the sample where OFCCP identified none. Specifically, using a cutoff for the probability that an establishment discriminates near the overall rate, the model suggests that 637 out of the 1,888

⁴ Abt broadly defined "some association" to take into account the possibility that several predictors, each individually having a very weak association, may combine to make a strong contribution in a multiple-variable model.

⁵ A stepwise regression model considers, at each iteration, whether any variable should be added to the model and then considers whether any variables in the model should be removed.

¹ Although the Executive Summary of the Bendick Report states that the EO Survey could enhance the efficiency and effectiveness of OFCCP's monitoring of contractor compliance, the report itself does not find data to support that statement. It acknowledges that the April 2000 pilot EO Survey, which the report reviews, "does not offer circumstances in which the full predictive power of the survey can be revealed." Bendick Report at 20. It explains that the report "presents only a preliminary examination of the ability of selected variables drawn from the EO Survey to differentiate establishments likely to have non-compliance findings from those not likely to have such outcomes." Bendick Report at 22. The report concludes only that given the limitations of the study there are "preliminary positive indications" of predictive power that could "eventually" be demonstrated in the future. However, the report could not fully validate the predictive powers of the EO Survey. Bendick Report at 25.

² As a basis for the Abt study, the 2002 EO Survey was sent to a statistical sample of 10,018 supply and service contractor establishments. A random subsample of 6,400 of these establishments was designated for compliance evaluations. Of these 6,400, only 3,723 establishments responded to the EO Survey. Of these 3,723, only 2,651 had data that allowed OFCCP to complete a compliance evaluation. Thus, OFCCP completed about 2,651 compliance evaluations. However, of the 2,651, a

establishments in the study discriminate, yet only 42 (6.5%) of these are true positives. Thus, of 637 establishments that would be classified by the EO Survey results as suspected of having systemic discrimination, 93% would be false positives. *Id.* at 33. Even at a higher cutoff rate, where only 143 establishments are inspected, 127 were found to have no systemic discrimination, so the false positive rate remains high at 89% (i.e., 127/143).

Furthermore, the EO Survey model wrongly classifies a significant portion of true discriminators as non-discriminators, and thus would not target them for compliance evaluations. If the 637 establishments were chosen for review on the basis of the EO Survey model, 1,251 establishments would not have been reviewed. This group of 1,251 predicted by the EO Survey to lack discriminators would, in fact, have contained 21 of the 63 cases (33%) of systemic discrimination. Under the higher cutoff rate, about 75% of the establishments (47 contractors) that were found to have systemic discrimination would not have been reviewed under the EO Survey model. *Id.* at 34–35.⁶

In addition, two of the variables in the Abt model (whether the establishment reported more than 200 full-time employees and the absolute value of the difference between the proportion of female employees and the proportion of male employees in EEO–1 Category 3) can be obtained without the EO Survey from the EEO–1 form, which contractors are required to submit to OFCCP pursuant to 41 CFR 60–1.7 and which OFCCP already uses in targeting its compliance activities.

The Abt Report concludes that a model based on the two data elements that can be derived from EEO–1 forms has predictive ability only “slightly lower” than the four-variable model. *Id.* at 37. The Abt Report also suggests that OFCCP could explore developing a

⁶ The Abt Report stated that a model based on 4 out of a possible 125 (see *infra*) predictor variables “fit the data reasonably well and had acceptable predictive ability.” However, this statement is purely in the context of statistical modeling, not of enforcement utility. The Abt report continues that “models tend to be ‘tuned’ to the data that are used in fitting them, and so measures of their performance may be optimistic.” It further observed that “the low prevalence of systemic discrimination in the population of supply and service contractors, and its relation to some of the predictor variables, however, limit the usefulness of the model and the survey.” Abt Report at pp. 38–39. While use of these few predictor variables may have some statistical usefulness, this does not imply that the EO Survey has statistical validity or enforcement value. Rather, as discussed above, the Abt Report’s findings of a false positive rate of 93% and a false negative rate of 33% demonstrate the EO Survey’s lack of enforcement utility.

selection model based on data collected during compliance reviews rather than through an EO Survey. This approach would have several advantages, including collection of more accurate and more pertinent data than provided by the current EO Survey. *Id.* at 39.

C. Limited Utility of the EO Survey

As is discussed in more detail below, OFCCP has concluded that the EO Survey misdirects valuable enforcement resources and does not meet any of its three objectives set out in the November 13, 2000 preamble.

1. The EO Survey Does Not Improve the Deployment of Scarce Federal Government Resources Toward Contractors Most Likely To Be Out of Compliance

In promulgating the EO Survey requirement, OFCCP expected that it would “enable OFCCP to more effectively and efficiently select contractor establishments that may have possible problems for compliance evaluations, thus enhancing the agency’s ability to focus its enforcement resources on those establishments most likely to be out of compliance.” 65 FR 26100 (May 4, 2000). This expectation has not been fulfilled. The Abt Report found selection models based on EO Survey data would have predictive power only slightly better than chance. EO Survey data does not in any meaningful way improve OFCCP’s ability to target for review those contractors engaging in systemic discrimination. The vast majority of contractors identified for review under an EO Survey-based selection model would not be found by OFCCP to have engaged in systemic discrimination. In addition, the model would not identify for review a significant portion of establishments where OFCCP would in fact find systemic discrimination. A survey that produces 93% false positives and misses a substantial percentage of the cases of systemic discrimination is, in the language of the November 13, 2000 Preamble, “no longer of value.”⁷

The Abt Report suggests that selection models based on EEO–1 data or data collected during compliance evaluations may be essentially equivalent or better than the models based on the EO Survey. Models based on these types of data would provide a significant administrative and cost saving to OFCCP, allowing the agency to more

⁷ When promulgating the final rule, OFCCP anticipated that some data elements may not be useful and suggested they could be altered or deleted when “the data element in question is no longer of value.” 165 FR 68037 (Nov. 13, 2000).

vigorously investigate systemic discrimination cases.

In addition, the development of the EO Survey was expensive. Moreover, the distribution, collection, and processing of the EO Survey has cost an average of \$356,000 per year and this does not account for the cost of validating the data, nor any of the time spent by OFCCP personnel working on the EO Survey. This would be money well spent if the EO Survey provided an accurate targeting model. However, as the Abt Report explains, it does not. If OFCCP were to make the EO Survey a focus of its targeting for compliance reviews, then a significant amount of compliance officer time would be consumed by enforcing compliance with the EO Survey reporting requirement, rather than investigating systemic discrimination. Further, the Abt Report demonstrates that using the EO Survey for targeting would direct compliance officers away from contractors who are discriminating. In addition, the EO Survey would direct them—93% of the time—to contractors who are not discriminating. Such a broad implementation of the EO Survey would divert scarce resources away from enforcement methods that are effective.

In light of these EO Survey shortcomings and OFCCP’s general practice of continually improving its process, OFCCP has continued its efforts to develop a selection model to better identify contractors who may be engaging in systemic discrimination. The agency is in the process of developing and implementing a new system for selecting contractors for compliance evaluations, called the Federal Contractor Selection System (FCSS). Although in the initial stages, OFCCP believes that FCSS will better target compliance evaluations based on indications of potential workplace discrimination. The new system is based on a thorough study of data from 10 years of OFCCP compliance evaluations to formally identify and characterize relationships between reported EEO–1 workforce profiles and findings of discrimination. OFCCP is currently working to refine the new selection model. OFCCP expects that the improved targeting objective of the EO Survey can be better achieved through another selection system, such as the FCSS, that is more effective in identifying potential discrimination and is more cost effective for the agency, than through a model based on the EO Survey. Irrespective of the effectiveness of the FCSS, the Department has determined that the EO Survey has, at best, only marginal value in improving

the deployment of scarce federal government resources toward contractors most likely to be out of compliance. And any marginal value is more than offset by the costs EO Survey, which divert scarce resources away from effective enforcement programs.

2. The EO Survey Does Not Increase Agency Efficiency by Building on the Tiered-review Process Already Accomplished by OFCCP's Regulatory Reform Efforts, Thereby Allowing Better Resource Allocation

OFCCP anticipated that it would use the EO Survey to increase agency efficiency by building on OFCCP's tiered review process. OFCCP has found, however, that the EO Survey has not contributed to agency efficiency in this manner. As discussed above, the Abt Report demonstrates that EO Survey data does not improve OFCCP's ability to target for review those contractors engaged in systemic discrimination. These findings of the Abt Report lead OFCCP to conclude that the EO Survey data would have similar disutility in predicting discrimination in the context of an individual compliance evaluation. In other words, because the EO Survey data has limited utility in predicting which contractors are engaged in systemic discrimination, it follows that EO Survey data would have limited utility in predicting whether and how the selected contractors are discriminating.

Moreover, the EO Survey data is largely duplicative of the information OFCCP receives during the first stages of a compliance evaluation. Under the tiered review system, a compliance evaluation consists of any one or any combination of the following investigative procedures: Compliance checks, off-site review of records, focused reviews and full compliance reviews. 41 CFR 60-1.20(a). The level of agency resources expended on a review is based on the likelihood of uncovering substantive violations as determined at the early stages of the review.

A compliance evaluation generally begins with a review of the data submitted by the contractor in response to a scheduling letter. OFCCP refers to this tier of the review as the desk audit. The contractor submits detailed establishment-specific information on personnel activities such as hiring, promotion, and termination, organized by job group or job title, and also submits detailed, establishment-specific annualized compensation data, organized by salary range, rate, grade, or level. OFCCP evaluates this data in the desk audit stage to determine whether it

discloses potential discrimination that warrants more in-depth review.

The data submitted in response to the EO Survey is largely duplicative of desk audit data; indeed, the four EO Survey data elements found to have some discrimination predictive ability are available to OFCCP at the desk audit stage. The EO Survey data is presented, however, in a less-detailed, aggregate form, whereas the desk audit data is more detailed and tailored to an actual compliance evaluation. To the extent the EO Survey data is not duplicative of the desk audit data, the EO Survey data is presented in such an aggregate form that it cannot be used to identify discrimination, and thus does not contribute to the tiered review process.

OFCCP has continued its efforts to refine the tiered review process to better identify systemic discrimination in general, and compensation discrimination in particular, through methods other than use of the EO Survey. In 2003, OFCCP introduced new Active Case Management (ACM) procedures to be used in connection with desk audit reviews. Under ACM procedures, OFCCP opens a larger number of reviews than in the past, uses automated statistical methods, and ranks and prioritizes establishments for a full review based on the probability that discrimination would be uncovered during a more in-depth review. OFCCP closes cases during the desk audit if no statistical indicators are found that imply the presence of discrimination and thereby warrant further attention. More resources are then focused on full scale compliance evaluations of establishments where statistical indicators of systemic discrimination are found.

Additionally, OFCCP is developing guidance for use by OFCCP and contractors to assist in better identifying systemic compensation discrimination. On November 16, 2004, OFCCP published in the **Federal Register**, for notice and comment, a set of formal guidelines "Interpreting the Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination." 69 FR 67246 (Nov. 16, 2004). The proposed Interpretative Standards for Systemic Compensation Discrimination under Executive Order 11246 are intended to govern OFCCP's analysis of contractors' compensation practices. In addition, these proposed standards are intended to constitute a definitive interpretation of the Sex Discrimination Guidelines, codified at 41 CFR 60-20, and EO 11246 with respect to systemic compensation discrimination. The proposed standards

govern how OFCCP investigates systemic compensation discrimination, describing when employees are similarly situated for purposes of evaluating compensation decisions and when statistically significant compensation disparities constitute evidence of discrimination. The data required to make these judgments are not available in the EO Survey.

OFCCP expects that the improved tiered review procedures objective of the EO Survey can be better achieved through new procedures such as ACM and proposed compensation discrimination standards than through the EO Survey. The new procedures promise to be more effective in identifying potential discrimination and are more cost effective for the agency.

3. The EO Survey Does Not Increase Compliance With Equal Opportunity Requirements by Improving Contractor Self-Awareness and Encourage Self-Evaluations

OFCCP expected that the EO Survey requirement would "heighten contractor awareness of each establishment's equal employment opportunity performance, which should encourage contractors to conduct self-audits of their performance and to make any necessary corrections and improvements in their equal employment opportunity programs [and that] the heightened awareness of performance, along with increased monitoring presence, will improve the level of compliance." 65 FR 26100 (May 4, 2000). The data contained in the EO Survey includes information, in summary form, about personnel activities, compensation and tenure data, and information about the contractor's affirmative action program. None of this information alone is sufficient to indicate discrimination or the lack of discrimination at a contractor establishment. As discussed above, the information lacks utility to OFCCP in targeting contractors and in conducting compliance evaluations. Similarly, the information would appear to provide no additional insights to the contractor. As the EO Survey responses do not indicate discrimination, they do not assist contractors in correcting and improving their equal employment opportunity programs. Moreover, since the EO Survey is only being sent to federal contractors—a group already subject to extensive equal employment opportunity and affirmative action obligations—it does not expand the population of employers who would undertake self-evaluations.

Furthermore, in recent years, OFCCP has significantly increased its compliance assistance efforts in order to

heighten contractors' awareness of their equal opportunity obligations and to encourage self-evaluations through methods other than the EO Survey. OFCCP's compliance assistance includes over 1,000 regular compliance assistance seminars and workshops conducted throughout the country every year, and an extensive amount of compliance assistance material has been updated and added to OFCCP's webpage since 2001. In FY2005, OFCCP developed and made available to contractors on its webpage an *elaws* advisory interactive electronic tool that permits contractors to determine whether they are covered by the laws enforced by OFCCP and, if so, identifies their specific obligations. The OFCCP webpage contains extensive guidance about complying with OFCCP's laws, including a copy of the OFCCP compliance manual, OFCCP directives, compliance guides, and responses to frequently asked questions. OFCCP has established a National Office telephone help desk and an e-mail mailbox contractors can use to obtain specific compliance information tailored to their individual needs.

OFCCP compliance assistance materials include guidance about performing contractor self-analyses. For example, OFCCP has made available a sample affirmative action program on its webpage, as well as a link to Census data that provides contractors with easy access to statistical data on the availability of women and minorities in particular occupational categories and geographic areas. This Census data helps contractors to develop required availability analyses. OFCCP has also proposed a set of general guidelines that contractors can use to evaluate their compensation practices: "Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination." 69 FR 67252 (Nov. 16, 2004). Moreover, OFCCP regulations already require contractors to conduct self-evaluations, including a compensation self-evaluation, see 41 CFR 60-2.10 *et seq.*

D. Burdens Imposed by the EO Survey

The EO Survey imposes a significant burden on the contractor establishments that are required to complete the EO Survey. As discussed in greater detail in the Paperwork Reduction Act section, below, each EO Survey is estimated to take each respondent 21 hours to complete. Based upon an estimated 10,000 respondents per year, the EO Survey costs contractor establishments

210,000 hours per year. Using data from the Bureau of Labor Statistics' 2004 National Compensation Survey, the total annual cost imposed on the regulated community by the EO Survey requirements approaches \$6 million.

The EO Survey also consumes scarce OFCCP resources, diverting them away from effective enforcement programs, as discussed above. In addition, the development of the EO Survey was expensive. Moreover, the distribution, collection, and processing of the EO Survey has cost an average of \$356,000 per year and this does not account for the cost of validating the data, nor any of the time spent by OFCCP personnel working on the EO Survey.

E. Proposal To Eliminate the EO Survey Requirement

OFCCP has concluded that the EO Survey has failed to provide the utility anticipated when the regulation was promulgated in 2000, and consequently does not provide sufficient programmatic value to be maintained as a requirement. In light of the failure of the EO Survey as an enforcement tool, OFCCP concludes that it is no longer of value to accomplish the objectives it was designed to address. OFCCP has developed, and will continue to develop, other more useful and cost effective methods to accomplish these objectives. Therefore, OFCCP has determined that continued use of the EO Survey cannot be justified and proposes to eliminate this regulatory requirement as no longer of value to OFCCP. Elimination of this requirement allows OFCCP to focus more effectively its enforcement resources to further the overall goal of the OFCCP program to promote and ensure equal opportunity for those employed or seeking employment with Government contractors. 41 CFR 60-1.1.

II. Authority

Authority: E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501.

III. Overview of the Rule

OFCCP proposes eliminating the requirement under Section 60-2.18 that nonconstruction federal contractors file the EO Survey. OFCCP proposes the removal of Section 60-2.18 from part 60-2. Elimination of the EO Survey requirement will not affect any other regulatory obligation to collect and maintain information or any other recordkeeping or nondiscrimination requirement. See, *e.g.*, 41 CFR 60-1.7, 60-1.4, 60-1.12(a), 60-2.1, 60-2.10, and 60-2.17.

IV. Regulatory Procedures

A. Paperwork Reduction Act

The proposed rule eliminates an information collection which is subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. The Equal Opportunity Survey was reviewed and approved by OMB under OMB No. 1215-0196. The EO Survey burden is estimated to be 21 hours per respondent. (The EO Survey does not impose any recordkeeping requirements since the information required for the EO Survey comes from the records contractors are required to retain by 41 CFR Part 60.) Based upon an estimated 10,000 respondents per year, the proposed rule would reduce the total burden by 210,000 hours per year (*i.e.*, 21 hours times 10,000 respondents).

OFCCP estimated the annual cost reduction to the respondents based on Bureau of Labor Statistics' 2004 National Compensation Survey, which lists the hourly average wages for executive, administrative, and managerial as \$36.22 and the hourly average wages for administrative support as \$14.21. OFCCP then multiplied these figures by 1.4 to account for fringe benefits to arrive at an annual hourly cost of \$50.71 for executive, administrative, and managerial and the hourly average wages for administrative support as \$19.89. As for the 2000 final rule, OFCCP estimates that for the EO Survey, 25% of the burden hours will be executive, administrative, and managerial and 75% will be administrative support.

OFCCP has calculated the total estimated annualized cost of the EO Survey as follows:

- Executive, Administrative, and Managerial: $210,000 \times 0.25 \times \$50.71 = \$2,662,275$
- Administrative Support: $210,000 \times 0.75 \times \$19.89 = \$3,132,675$
- Total Estimated Annual Reduction in Respondent Costs = \$5,794,950

Thus, OFCCP estimates that the proposed elimination of the EO Survey will reduce the costs for the respondents by almost \$6 million each year.

B. Executive Order 12866

This proposed rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this notice of proposed rulemaking is a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. The Department has determined that this

notice of proposed rulemaking is not “economically significant” as defined in section 3(f)(1) of Executive Order 12866. Based on an analysis of the data the proposed rule is not likely to: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof. As was discussed above in Section A, OFCCP estimates that the proposed elimination of the EO Survey will reduce the costs for respondents by \$6 million each year. Therefore, the information enumerated in section 6(a)(3)(C) of the order is not required. Pursuant to Executive Order 12866, this proposed rule has been reviewed by the Office of Management and Budget.

C. Small Business Regulatory Enforcement Fairness Act

The Department has concluded that the proposed rule is not a “major” rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). In reaching this conclusion, the Department has determined that the proposed rule will

not likely result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

D. Executive Order 13132

OFCCP has reviewed the proposed rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” The proposed rule does not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

E. Unfunded Mandates Reform

Executive Order 12875—This proposed rule, if promulgated in final, will not create an unfunded Federal mandate upon any State, local, or tribal government.

Unfunded Mandates Reform Act of 1995—This proposed rule, if promulgated in final, will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate,

of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

List of Subjects in 41 CFR Part 60–2

Civil rights, Discrimination in employment, Employment, Equal employment opportunity, Government contracts, and Labor.

Signed at Washington, DC, this 17th day of January, 2006.

Victoria A. Lipnic,

Assistant Secretary for Employment Standards.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

In consideration of the foregoing the Office of Federal Contract Compliance Programs, Employment Standards Administration, Department of Labor, proposes to amend part 60–2 of Title 41 of the Code of Federal Regulations as follows:

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

1. The authority citation for part 60–2 continues to read as follows:

Authority: E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501.

§ 60–2.18 [Removed and reserved]

2. Remove and reserve § 60–2.18.

[FR Doc. E6–646 Filed 1–19–06; 8:45 am]

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