DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1 and 60–60

Government Contractors, Affirmative Action Requirements; Implementation of Executive Order 11246

AGENCY: Office of Federal Contract Compliance Programs (OFCCP), ESA, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposal would revise certain provisions of the current regulations implementing Executive Order 11246, as amended, to reduce burdens on the regulated community and to improve administration of the Order. The Executive Order prohibits all nonexempt Government contractors and subcontractors, and federally assisted construction contractors and subcontractors, from discriminating in employment, and requires these contractors to take affirmative action to ensure that employees and applicants are treated without regard to race, color, religion, sex and national origin. The proposed revisions to the regulations on obligations of contractors and subcontractors concern record retention, compliance monitoring, and segregated facilities. In addition, the proposal would amend certain provisions of the regulations to parallel provisions included in OFCCP's final rule implementing Section 503 of the Rehabilitation Act of 1973, as amended, which was published in the Federal Register on May 1, 1996. The proposal also would transfer some sections of the regulations on contractor evaluation procedures for supplies and services to the regulations on obligations of contractors and subcontractors and delete the remainder of the sections. Finally, this proposal would withdraw portions of a final rule published on December 30, 1980 (and subsequently suspended), and it hereby withdraws a proposed rule published on August 25, 1981 (and supplemented on April 23, 1982).

DATES: To be assured of consideration, comments must be in writing and must be received on or before July 22, 1996.

ADDRESSES: Comments should be sent to Joe N. Kennedy, Deputy Director, OFCCP, Room C–3325, 200 Constitution Avenue, N.W., Washington, DC 20210.

As a convenience to commenters, OFCCP will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is 202–219–6195. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Receipts of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at 202–219–9430 (voice), 1–800–326–2577 (TDD).

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, OFCCP, Room C–3325, 200 Constitution Avenue, N.W., Washington, DC 20210. Telephone 202–219–9475 (voice), 1–800–326–2577 (TDD). Copies of this NPRM, including copies in alternate formats, may be obtained by calling 202–219–9430 (voice), 1–800–326–2577 (TDD). The alternate formats available are large print, electronic file on computer disk and audio-tape.

SUPPLEMENTARY INFORMATION:

Background

OFCCP's regulations at 41 CFR chapter 60 implementing Executive Order 11246, as amended (30 FR 12319, September 28, 1965) have not undergone substantive revision since the 1970s. A final rule was published on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), but was stayed in accordance with Executive Order 12291 on January 28, 1981 (46 FR 9084). This rule later was stayed indefinitely on August 25, 1981 (46 FR 42865), pending action on a notice of proposed rulemaking (NPRM) published on that same date (46 FR 42968; supplemented at 47 FR 17770, April 23, 1982). OFCCP has taken no further action on the August 25, 1981, proposal, or consequently on the 1980 stayed final rule.

Both the 1980 final rule and the 1981 proposal addressed 41 CFR part 60–1. The changes they would have made to 41 CFR part 60–1 have been considered in developing today's NPRM and, where pertinent, are discussed in the Section-by-Section analysis below. To avoid conflict with today's NPRM, OFCCP proposes to withdraw part 60–1 of the 1980 final rule, and hereby withdraws the 1981 and 1982 NPRMs in their entirety.

As discussed in the Section-by-Section analysis, today's NPRM proposes changes to 41 CFR part 60–1 provisions concerning record retention, compliance monitoring, and segregated facilities. In addition, to ensure consistency in OFCCP programs, today's NPRM proposes conforming certain part 60–1 provisions to parallel provisions revised by OFCCP's final rule implementing Section 503 of the Rehabilitation Act of 1973, as amended (61 FR 19336; May 1, 1996). These proposed conforming changes would affect several definitions and, for example, some aspects of enforcement.

Finally, today's NPRM proposes the deletion of most sections of part 60–60 from the regulations and the transfer of a few sections to part 60–1. The deleted sections describe OFCCP's traditional compliance review process and the transferred sections relate to preservation of confidentiality of data submitted by contractors, the timeframe within which a contractor must submit an affirmative action program and supporting documents and authorization for agreements concerning nationwide AAP formats. Similar deletions and transfers were contained in the 1980 final rule and the 1981 proposal.

Section-by-Section Analysis

Section 60–1.3 Definitions

The proposal adds one new definition for compliance evaluation and revises several others to render them consistent with the definitions included in OFCCP's Section 503 final rule.

''Compliance Evaluation.'' The proposal adds a new definition of the term ''compliance evaluation'' to reflect OFCCP's authority to conduct a variety or range of activities to assess a contractor's compliance status. Previously OFCCP generally has conducted a full compliance review of a contractor, assessing all its employment practices, whenever it reviewed a contractor's status. As discussed in more detail in the preamble discussion of § 60–1.20, the proposal would allow OFCCP to use any one or a combination of actions to examine a contractor's compliance with one or more of the Executive Order 11246 requirements. Thus, the proposal would allow OFCCP to streamline the review process for many contractors. The proposal also would allow OFCCP to focus its investigatory resources where they are needed, while conducting some level of review of a broader segment of the contractor universe.

''Contract.'' The current regulation defines the term ''contract'' as ''any Government contract or any federally assisted construction contract.'' The proposal adds the word ''subcontract'' to this definition (''any Government contract or subcontract or any federally assisted construction contract or subcontract'') to eliminate the need to reference ''subcontract'' each time ''contract'' is referenced in the body of the regulation. Accordingly, the proposal generally references the term ''subcontract'' only when necessary to

the context. This same change would have been made by the 1980 final rule.

''Deputy Assistant Secretary.'' The Director of OFCCP recently was redesignated the Deputy Assistant Secretary for Federal Contract Compliance Programs. The proposal, therefore, substitutes a definition of ''Deputy Assistant Secretary,'' for the definition of ''Director'' in the current regulations, and makes this title change throughout the proposal. To ensure internal consistency, OFCCP intends to issue a rule making a corresponding universal change to its regulations before publishing the final rule resulting from this proposal.

''Government Contract.'' The proposed definition of ''Government contract'' is revised to clarify that covered contracts include those under which the Government is a seller of goods or services, as well as those under which it is a purchaser. This change reflects OFCCP's long-standing interpretation of the scope of the Executive Order, upheld in *Crown Central Petroleum Corp.* v. *Kleppe* (424 F. Supp. 744 (D. Md. 1976)), that sales by the Government result in covered contracts. Hence, the proposal substitutes a reference to contracts for the ''purchase, sale or use of personal property or nonpersonal services'' and a definition of the term ''personal property'' for the existing reference to the ''furnishing'' of supplies or services, or for the use of real or personal property, including lease arrangements.

''Rules, regulations and relevant orders of the Secretary of Labor.'' A rule published on May 3, 1996 (61 Fed. Reg. 19982) amended the definition of ''Secretary'' to include a ''designee'' of the Secretary of Labor. The definition of ''rules, regulations and relevant orders of the Secretary of Labor'' in the current regulations, which makes reference to the designee of the Secretary, therefore is no longer necessary and is omitted in this proposal.

''Subcontract.'' The proposal conforms the current definition of ''subcontract'' to the proposed definition of ''Government contract'' above; that is, as revised, the proposed definition references agreements for the ''purchase, sale or use'' of personal property or nonpersonal services.

''United States.'' OFCCP proposes to revise the current definition of ''United States'' by deleting the Panama Canal Zone (which was ceded back to Panama under the terms of the Panama Canal Treaty) and by specifying the possessions and territories of the United States as: the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

Section 60–1.8 Segregated Facilities

Today's proposal would revise § 60–1.8, which currently sets out a general prohibition regarding the maintenance of segregated facilities (paragraph (a)) and a certification requirement regarding compliance with that obligation (paragraph (b)).

Specifically, under paragraph (a) of § 60–1.8, nonexempt contractors and subcontractors must ensure that facilities they provide to their employees are not segregated on the basis of race, color, religion or national origin. Further, paragraph (a) states that this obligation extends to all contracts containing the equal opportunity clause, regardless of the amount of the contract.

Paragraph (b) of the regulation provides that, prior to the award of a Government contract or federally assisted construction contract, each contracting agency or applicant for Federal financial assistance involving a construction contract shall require the prospective prime contractor to submit a certification that it does not and will not maintain segregated employee facilities. Paragraph (b) also requires prime contractors and subcontractors, prior to the award of subcontracts, to obtain such a certification from their prospective subcontractors.

This proposal would conform § 60–1.8 with the Executive Order's general nondiscrimination requirements, by adding sex to the list of bases upon which segregation is prohibited, with the proviso that separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes. The proposal also would make a number of stylistic changes to existing paragraph (a).

OFCCP proposes to withdraw the written certification requirement (paragraph (b) of the current regulation). The certification requirement originally was incorporated into the Executive Order regulations in 1967 (see 32 FR 7439, May 19, 1967). At that time, segregation in employee facilities, especially on the basis of race, was not uncommon. The certification requirement was intended in large part to put contractors on notice that such segregation was unlawful and would not be tolerated. In the intervening 28 years, as a result of civil rights law enforcement and other factors, employers have become aware that segregation in employee facilities is unlawful. Indeed, such segregation has been significantly reduced. Because today's proposal would retain and strengthen the basic prohibition regarding segregated facilities, which OFCCP will continue to monitor through compliance investigations, the proposed withdrawal of the certification requirement will not reduce protections afforded to workers.

Withdrawing the certification requirement will significantly reduce compliance burdens on contractors. The Government lets approximately 350,000 prime contracts each year. If it is assumed that each prime contract results in an average of four subcontracts, and that it takes about one-half hour to prepare and submit the written certification, eliminating the certification requirement would reduce compliance burdens on the contractor community by roughly 875,000 hours. This estimate may significantly understate the savings; many contractors annually solicit the certification from all of their prospective vendors rather than limiting their request to those firms that actually are subcontractors on Federal projects.

The 1980 final rule, and the 1981 proposal, would have made similar revisions to the segregated facilities regulation.

Section 60–1.12 Record Retention

OFCCP's primary Executive Order recordkeeping and record retention regulations are contained in 41 CFR 60–1.40 and 60–4.3, and parts 60–2 and 60–3 (the Uniform Guidelines on Employee Selection Procedures, hereafter UGESP). The regulations require certain contractors to develop, implement and maintain a written affirmative action program (AAP) for each of their establishments; to compile the results of the program; to update the program annually; and to provide the program and supporting documentation to OFCCP upon request; to maintain data on applicants, selection and referral procedures and, as applicable, adverse impact and evidence of validity; and, if engaged in Federal or federally assisted construction, to compile and maintain data on employees and applicants for construction jobs. Although retention of relevant records is implicit in the requirement to analyze selection decision data, prepare an annual update, and provide supporting documentation, the Executive Order regulations, with one exception, do not expressly prescribe a record retention period. That exception is the requirement under the UGESP to keep certain adverse impact data for two years after the adverse impact has been eliminated.

Paragraph (a) of the proposal amends this obligation in several ways: First it

makes the record retention obligation applicable to any personnel or employment record made or kept by the contractor, and sets out a listing of examples of the types of records that must be retained. This provision conforms to the analogous requirement under Title VII of the Civil Rights Act of 1964. (Thus, contractors with 15 or more employees, i.e., those that are covered by Title VII of the Civil Rights Act, already are required to comply with this requirement. The only contractors that will be newly covered by this requirement are those that have Government contracts subject to the Executive Order's regulations (e.g., those with contracts that exceed $10,000) and that have fewer than 15 employees. This group of contractors consists almost entirely of small construction contractors.)

Second, proposed paragraph (a) stipulates that the required record retention period is two years. It is OFCCP's practice to review the contractor's employment practices dating back two years prior to the initiation of a compliance evaluation and to assess liability for discriminatory practices dating back two years. Proposed paragraph (a) requires smaller contractors (those that have fewer than 150 employees or that do not have a Government contract of at least $150,000) to retain records for a minimum of one year, rather than two years. Most contractors are covered by the one year record retention period imposed by Title VII. OFCCP is proposing a shorter record retention period for smaller contractors as a method of reducing regulatory burden on such contractors. This proposal is consistent with a provision included in OFCCP's Section 503 final rule.

Third, proposed paragraph (a) requires that when a contractor has been notified that a complaint has been filed, that a compliance evaluation has been initiated or that an enforcement action has been commenced, the contractor shall preserve all relevant personnel records until the final disposition of the action. This provision conforms to the corresponding record retention requirement under Title VII. The purpose of this requirement is obvious—to ensure that OFCCP can obtain all relevant documents during a compliance investigation or enforcement action.

Proposed paragraph (b) provides that a contractor establishment required to develop a written affirmative action program (AAP) shall maintain its current AAP and its AAP for the preceding AAP year, along with documentation of good faith efforts taken under the AAPs. Such documentation might reflect, for example, the contractor's outreach and recruitment efforts undertaken to increase its pool of female or minority applicants, or training programs instituted to enhance the skills and talents of incumbent employees to increase the pool of those eligible for promotion. This provision is intended to ensure that the AAPs are available to OFCCP during a compliance evaluation.

Proposed paragraph (c) provides that the failure to preserve the records required by proposed paragraphs (a) and (b) constitutes noncompliance with the Order. Additionally, proposed paragraph (c), in a provision that is not paralleled in the current regulations, states that where a contractor has destroyed or failed to preserve required records, there may be a presumption that such records would have been unfavorable to the contractor. However, this presumption will not apply where a contractor demonstrates that the destruction or failure to preserve records resulted from circumstances beyond the contractor's control (e.g., fires, floods, tornados, or other natural disasters). This provision is consistent with EEOC's practice under Title VII, as set forth at § 632.3(b)(2)(ii) of EEOC's Compliance Manual. The intent of this provision is to deter contractors from deliberate attempts to frustrate OFCCP's compliance monitoring and enforcement efforts by destroying or failing to preserve records. The adverse inference established by paragraph (c) would be used by OFCCP in both investigations of compliance and in enforcement litigation.

Proposed paragraph (d), which is not paralleled in the current regulations, would clarify that the contractor is obligated to preserve only those records which are created or kept on or after the effective date of the regulations.

The proposed regulation has been carefully drafted to comport with requirements under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA) and the requirement included in OFCCP's final rule implementing Section 503 of the Rehabilitation Act of 1973, as amended. The Title VII, ADEA, and ADA regulations contain record retention requirements for similar records that vary from one to three years. The vast majority of Federal contractors already are subject to one or more of these statutes and thus already are required to maintain the records described in this proposed regulation.

Section 60–1.20 Compliance Evaluations

The proposal would revise paragraphs (a) and (d) of this section, which respectively address compliance reviews in general, and preaward clearance requirements.

In the current regulations, paragraph (a) describes the purpose of a compliance review of a contractor's implementation of its nondiscrimination and affirmative action obligations, provides that the review shall consist of a comprehensive analysis of all relevant practices, and provides that recommendations for appropriate sanctions shall be made. The proposal specifically authorizes OFCCP's use of additional methods to evaluate a contractor's compliance with the regulations. The proposal specifies that the compliance evaluation methods available to OFCCP, other than the full compliance review, may include a range of activities designed to focus, for example, on the contractor's written affirmative action plan; the accuracy of data submitted for review at desk audit; or on one component or organizational unit of the contractor's workforce. Thus, the proposal would allow OFCCP to streamline the review process in many cases.

The proposal also would revise paragraph (d), which currently requires OFCCP to conduct a preaward compliance review of contractors being considered for contracts of $1 million or more. The preaward provision has been a component of OFCCP's regulatory procedures since 1968. The intent of the preaward clearance provision is to prevent the award of large dollar contracts to contractors which are either in noncompliance or unwilling to comply with the EEO clause of the contract.

Specifically, § 60–1.20(d) requires the awarding agency to obtain clearance from OFCCP prior to awarding Federal supply/ service contracts of $1 million or more. OFCCP must certify that a Federal contractor/prospective contractor is in compliance before the award of a contract.

The concept of preaward compliance reviews was premised on three assumptions: (1) Contracts of a sizable dollar amount tend to generate expanded hiring, promotion and upgrading opportunities; (2) the conduct of a compliance review immediately prior to the award is the most efficient way of ensuring that those employment opportunities be used to address the consequences of any past job discrimination; and (3) contractors tend to be more amenable to achieving

compliance across-the-board when it is an immediate condition of the contract. Although these assumptions generally are still correct, the preaward review has not been a successful compliance mechanism for the past 15 years.

OFCCP has been severely hampered in its efforts to plan and carry out compliance reviews because of the regulatory and other requirements associated with preaward requests. OFCCP recognized the shortcomings of the preaward process as early as 1979 and attempted to modify the provision in the 1980 final rule. The 1981 proposal would have eliminated the requirements for preaward clearance. The ineffectiveness of the preaward provision also was identified and cited in 1985 and 1988 reports of the Department of Labor Inspector General.

Several factors contribute to the difficulties with the preaward process, including: insufficient staff and budget to process the large volume of preaward requests—approximately 27,625 preaward requests were received in FY '93; the short time available within which to conduct preaward reviews; and court rulings that require a hearing before OFCCP may declare a contractor ineligible for contracts. See *e.g., Illinois Tool Works* v. *Marshall,* 601 F.2d 943 (7th Cir. 1979).

In addition, some contracting agencies have expressed concerns about the traditional preaward process. OFCCP has held consultations with various contracting agencies during the past year and has adopted a number of administrative reforms as a result. Those reforms relate to its interactions with the contracting agencies during the preaward process, and they were implemented in order to ensure that the process is as streamlined as possible. Those consultations are ongoing and OFCCP will continue to work with the contracting agencies to improve the process.

Based on the foregoing concerns with the current preaward provision, OFCCP considered a number of options including the complete elimination of the preaward provision, an increase in the dollar amount of the preaward contract threshold, and the replacement of the preaward review with a postaward review. OFCCP decided to promulgate this proposal which modifies the provision by making the preaward compliance review optional. Thus, preaward reviews will be conducted if OFCCP determines that a review would constitute the best use of its limited resources. OFCCP may consider factors such as whether the contract is likely to generate significant employment opportunities, whether the contractor has held a covered Federal contract before, whether the contractor has been reviewed before and, if so, whether prior reviews have revealed noncompliance at the same or other establishments, the length of time that has passed since a prior review, and the EEO–1 profile of the contractor. It is difficult to describe more precisely the factors OFCCP will use, because they may change over time as economic conditions change. For example, in recent years the most growth in employment opportunities has occurred in small businesses and that growth has occurred in the service sector of the economy. Because these facts may change in future years, they are not specified as factors OFCCP will consider when deciding whether to conduct a preaward review. By making the preaward review optional, the proposal allows OFCCP the necessary flexibility and latitude in establishing the agency's enforcement priorities, rather than continuing to allow those priorities to be dictated by the incoming preaward requests. OFCCP invites commenters to address whether it should make preaward reviews optional, or should retain such reviews as mandatory.

This proposal provides, as does the current regulation, that OFCCP will provide an awarding agency with its conclusions regarding clearance for an award. However, the proposal requires that OFCCP inform an awarding agency within 15 days of its intention to conduct a preaward review. If OFCCP does not inform an awarding agency within that period of its intention to conduct a preaward review, clearance shall be presumed and the agency is authorized to proceed with the award. If OFCCP informs an awarding agency of its intention to conduct a preaward review, OFCCP shall be allowed an additional 20 days after the date that it so informs the agency to provide its conclusions. If OFCCP does not provide an awarding agency with its conclusions within that period, clearance shall be presumed and the agency is authorized to proceed with the award. This proposal ensures that the preaward review process will not contribute to any unnecessary delay in the procurement process.

This proposal continues the threshold for preaward notification at $1 million. However, OFCCP invites commenters to address whether the existing threshold should be changed or retained, in light of the dual goals of streamlining the procurement process and ensuring that OFCCP has the information necessary to allow it to evaluate the compliance status of companies that may be awarded new Government contracts. In addition, OFCCP invites commenters to address the option of moving from preaward reviews to a system under which OFCCP reviews would be performed concurrent with the awarding of a Federal contract.

Finally, as discussed under the heading of part 60–60 below, the proposal moves provisions now contained in part 60–60 that relate to confidentiality of data, timely submission of documents to OFCCP, and nationwide AAP formats to this section.

Section 60–1.26 Enforcement Proceedings

The proposal revises and restructures for clarity § 60–1.26, which details Executive Order enforcement procedures. With the exception of the provision relating to calculating interest, this proposal is not intended to make substantive changes to this section. Proposed subsection (a) contains general provisions applicable to both administrative and judicial enforcement. Proposed subsection (b) addresses administrative enforcement procedures, and proposed subsections (c) and (d) cover judicial enforcement proceedings, which are handled by the Department of Justice.

The proposal also makes several specific changes to this section that are consistent with provisions included in OFCCP's Section 503 final rule at 41 CFR 60–741.65(a)(1). First, it clarifies in subsection (a)(2) that OFCCP may seek relief for victims of discrimination identified either during a compliance evaluation or a complaint investigation whether or not such individuals have filed a complaint with OFCCP. OFCCP has long maintained that such a limitation on available relief clearly is inconsistent with the Order. OFCCP's position recently was upheld in a case under Section 503, *OFCCP* v. *Commonwealth Aluminum,* 82–OFC–6 (Assistant Secretary for Employment Standards, February 10, 1994), Federal court review pending *sub nom. Commonwealth Aluminum Corporation* v. *United States* (WD Ky., No. 94–0071–O(C)).

Second, the proposal states, also in subsection (a)(2), that interest on back pay shall be compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes. This provision would reverse the ruling of the Department of Labor's Assistant Secretary for Employment Standards in *OFCCP* v. *Washington Metropolitan Area Transit Authority,* 84–OFC–8 (orders dated August 23 and November 17, 1989), that simple interest, rather

than compounded interest, should be used in the calculation of back pay awards under Section 503. That Section 503 ruling, which relied upon the Department's regulations (at 29 CFR part 20) implementing Section 11 of the Debt Collection Act of 1982 (31 U.S.C. 3717), could be construed as applicable also to relief under the Executive Order. OFCCP had a longstanding policy of requiring that interest on back pay awards under the Executive Order be compounded; such policy is consistent with the case law under Title VII of the Civil Rights Act of 1964. OFCCP believes that it must reinstate this policy to ensure that victims of discrimination obtain complete ''make whole'' relief.

Third, the proposal provides in subsection (b)(1) that administrative enforcement proceedings also may be instituted where OFCCP determines that referral for formal enforcement (rather than settlement) is appropriate. Fourth, the proposal specifies in subsection (b)(1) that the administrative enforcement referral will be made to the Solicitor of Labor.

The proposal states that the rules of evidence set out in the hearing rules applicable to the Department's Administrative Law Judges shall also apply to hearings conducted under 41 CFR part 60–30. These rules, which were issued in 1990, are generally applicable to the Department's formal adversarial adjudications. Consistent with a requirement included in OFCCP's Section 503 final rule, the proposal also requires that the Department's Final Administrative Order in an Executive Order case be issued within one year from the date of the Administrative Law Judge's recommended decision, or the submission of the parties' exceptions and responses to exceptions to such decision (if any), whichever is later. OFCCP believes that this time limit is needed to ensure that aggrieved individuals obtain expeditious relief and that contractors are assured of closure of the administrative proceedings.

Section 60–1.27 Sanctions

The current sanction regulation provides only that the sanctions authorized by section 209 of the Executive Order may be exercised by or with the approval of the Director of OFCCP. The 1980 final rule and the 1981 proposal deleted the current sanction regulation as a separate provision, and they both generally merged the sanction regulation with the regulation pertaining to enforcement proceedings. The regulation pertaining to enforcement proceedings currently is set forth at § 60–1.26. In the 1980 final rule the combined sanctions and enforcement proceedings regulation appeared at § 60–1.29, and in the 1981 proposal the combined regulation appeared at § 60–1.68.

The proposal adds a new paragraph specifically addressing the sanction of debarment. Paragraph (b) of the proposal provides for a fixed term debarment for a period of six months or more, as well as indefinite term debarment. The Secretary already has ordered the imposition of a fixed term debarment in *OFCCP* v. *Disposable Safety Wear*, 92–OFC–11 (Decision and Final Administrative Order of the Secretary of Labor, September 29, 1992). See also *OFCCP* v. *Blaine Construction Co.*, 94–OFC–4 (Decision and Final Administrative Order of the ALJ, March 9, 1994); *OFCCP* v. *KRT Drywall/ Acoustical*, 94–OFC–14 (Order of the ALJ, August 18, 1994); *OFCCP* v. *State Construction of Southeast Wisconsin*, 94–0FC–18 (Orders of the ALJ, August 31 and September 8, 1994). The proposal simply provides contractors with greater notice that a fixed term debarment of six months or more may be imposed in some cases instead of an indefinite term debarment. OFCCP believes that the use of fixed period debarments will serve as a more effective deterrent and encourage compliance among the recalcitrant contractors who repeatedly break their promises of future compliance with respect to affirmative action and recordkeeping and retention requirements. OFCCP has found that the current practice of reinstating the contractor upon its simple demonstration of compliance is insufficient to ensure voluntary compliance. Under the current procedure the contractor may be reinstated immediately without incurring any economic loss for a violation of an affirmative action requirement (e.g., a contractor which has failed to develop an AAP can simply do so to be eligible for reinstatement). A fixed term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that will ensure continued compliance with the requirements of the Executive Order. Thus, in a Final Administrative Order, the Adminstrative Review Board could order a company to take specific action to come into compliance and to submit periodic reports to OFCCP regarding its compliance status during the fixed term debarment period. A fixed term debarment scheme will strengthen the Executive Order program by deterring contractors from engaging in violations based upon ''a cold weighing of the costs and benefits of noncompliance.'' *Janik Paving & Construction* v. *Brock*, 828 F.2d 84 (2d Cir. 1987). Where fixed term debarment is ordered, in lieu of an indefinite term debarment, the length of the debarment period will be determined on a case-by-case basis, depending upon factors such as the nature and severity of the violations. A contractor debarred for a fixed term will not be automatically reinstated upon the conclusion of the fixed term debarment period. In making his or her determination as to whether reinstatement of such a contractor is appropriate, the Deputy Assistant Secretary shall consider whether the contractor has demonstrated that it has established and will carry out employment policies and practices in compliance with the Executive Order. If the contractor failed to comply with the Department's Final Administrative Order, it would not be eligible for reinstatement at the conclusion of the fixed term debarment period.

Section 60–1.30 Notification of Agencies

Consistent with a regulation in OFCCP's Section 503 final rule, the proposal would delete the requirement that OFCCP distribute a list of debarred contractors to all executive departments and agencies, and substitute a requirement that the Deputy Assistant Secretary ensure that the heads of agencies are notified of debarments. Accordingly, the section would be renamed ''Notification of agencies'' instead of ''Contract ineligibility list.'' The General Services Administration now publishes a listing of debarred contractors, and it would be redundant for OFCCP to issue a separate list.

The 1980 final rule would have required that OFCCP promptly notify the Comptroller General of the United States regarding contract cancellations and debarments. Further, that section of the final rule would have required that OFCCP take appropriate steps to notify prime contractors of the debarred contractor's ineligibility for subcontracts. Notice now is provided adequately by the General Services Administration's list of debarred contractors.

Section 60–1.31 Reinstatement of Ineligible Prime Contractors and Subcontractors

The proposal would revise this section to make it consistent with proposed § 60–1.27(b), which authorizes debarment either for an indefinite

period or for a fixed period of not less than six months. Accordingly, the proposal provides that a contractor debarred for an indefinite period may request reinstatement at any time, and that a contractor debarred for a fixed period may request reinstatement after the expiration of the fixed period. In either type of debarment, the contractor, as under the current regulations, would be required to show that it has established and will carry out employment practices in compliance with the Executive Order.

Further, the proposal would adopt some of the 1980 final rule's reinstatement procedures. For instance, similar to the 1980 final rule, the proposal specifies that the contractor may be subject to a compliance evaluation before a final determination is made on the reinstatement request. The 1980 final rule would have established some additional detailed procedures that OFCCP, upon reconsideration, does not believe need to be incorporated into the regulations.

Section 60–1.32 Intimidation and Interference

Currently, the regulations provide that the sanctions and penalties contained therein may be exercised against any contractor which fails to ensure that no person intimidates, threatens, coerces or discriminates against any individual because he or she files a complaint or otherwise participates in compliance activity under the Executive Order or a similar Federal, state or local law. The proposal contains a similar prohibition but specifies that the contractor itself shall not engage in such activities and shall ensure that all persons under its control do not do so, and adds that the prohibition applies to harassment. Further, the proposal states that the prohibition applies to an individual's opposition to any practice that is unlawful under the Order or similar Federal, state or local laws, and to the exercise of any other right protected by the Order. The proposal is consistent with a provision included in OFCCP's Section 503 final rule, and it is substantially similar to the counterpart provision in the 1980 final rule (§ 60–1.28). The intent of the proposal is to incorporate strengthened provisions that ensure that individuals fully enjoy all rights protected under the Order, the regulations and comparable Federal, state and local laws without the threat of harassment or intimidation.

Section 60–1.34 Violation of a Conciliation Agreement or Letter of Commitment

The proposal contains a clarification that in enforcement proceedings related to violation of a conciliation agreement, OFCCP is not required to present proof of the underlying violations resolved by the agreement. This provision, which reflects OFCCP's current practice and which is consistent with OFCCP's Section 503 final rule, is to remove any doubt that OFCCP need not litigate claims that have already been resolved through the agreement.

Section 60–1.42 Notices to be Posted

Technical corrections are made to the wording of the poster regarding the jurisdictional coverage of Title VII and the address of EEOC.

Section 60–1.43 Access to Records and Site of Employment

Consistent with a provision included in OFCCP's Section 503 final rule, the proposal specifies that computerized records are among the records to which the contractor shall permit OFCCP access for inspection and copying. In addition, the proposal specifies that contractors must permit OFCCP access to their premises for the purpose of conducting compliance evaluations and complaint investigations (the current regulation mentions only compliance reviews). Further, the proposal revises the list of uses which can be made of information OFCCP obtains from a contractor, to include the administration of other laws that are enforced, in whole or in part, by OFCCP.

Part 60–60—Contractor Evaluation Procedures for Contractors for Supplies and Services

Part 60–60 is to be deleted. Most of part 60–60 is properly characterized as internal operating procedures. A number of the procedures have been incorporated into OFCCP's Federal Contract Compliance Manual, and the provisions regarding confidentiality of data furnished to OFCCP by contractors are proposed to be incorporated into part 60–1. Specifically, provisions currently found at §§ 60–60.2(a), 60–60.3(a)(3), 60–60.3(d) and 60–60.4(a–d) will be incorporated into § 60–1.20 with minor changes. The 1980 final rule, and the 1981 proposal, would have made similar revisions to part 60–60.

Regulatory Procedures

Executive Order 12866

The Department is issuing this proposed rule in conformance with Executive Order 12866. This proposal has been determined to be significant for purposes of Executive Order 12866 and therefore has been reviewed by OMB. This proposal does not meet the criteria of Section 3(f)(1) of Executive Order 12866 and therefore the information enumerated in Section 6(a)(3)(C) of that Order is not required.

In accordance with section 6 of Executive Order 12866, an assessment of the potential costs and benefits of the proposal has been made. Potential costs and benefits of record retention and certification proposals are discussed below in the sections on the Regulatory Flexibility Act and the Paperwork Reduction Act. As noted therein, this proposal would significantly reduce the compliance burden on the contractor community by eliminating the segregated facilities certification requirement. OFCCP anticipates publishing an additional proposal relating to 41 CFR part 60–2 and the requirements of written affirmative action programs that would, if adopted, further reduce the burdens on contractors. OFCCP's goal in proposing regulatory changes is to streamline its existing regulations and to reinvent its current processes in order make both contractor compliance and agency enforcement more efficient and cost effective. Therefore, OFCCP invites comments on additional ways to reduce compliance burdens such as simplified compliance procedures for small contractors.

Regulatory Flexibility Act

The proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small business entities. A requirement that records be maintained for one to two years (depending upon contractor size) might result in a slight additional storage burden for some small entities; conversely, small entities and other contractors would benefit from the elimination of the segregated facilities certification. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Paperwork Reduction Act

The proposed rule would slightly revise information collection requirements currently approved by OMB under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*).

As previously stated, withdrawing the certification requirement will significantly reduce compliance burdens on contractors. The Government lets approximately 350,000 prime contracts each year. If it is assumed that each prime contract results in an average of four

subcontracts, and that it takes about one-half hour to prepare and submit the written certification, eliminating the certification requirement would reduce compliance burdens on the contractor community by roughly 875,000 hours. This estimate may significantly understate the savings; many contractors annually solicit the certification from all of their prospective vendors rather than limiting their request to those firms that actually are subcontractors on Federal projects.

Although for contractors with 150 or more employees and a contract of $150,000 or more this proposal extends to two years the current obligations such contractors already have under Title VII and the ADA to retain records for one year, there will be only a minimal increase in burden imposed on contractors as a result of this change. A similar conclusion was reached by EEOC in 1991 when it doubled its existing six-month retention period under Title VII to one year—an obligation that applies to a significantly larger universe of employers than does the obligation under the Executive Order. *See* 56 FR 35753 (July 26, 1991). Employers, especially larger ones, are increasingly maintaining electronic records. Where this is the case, compliance with the requirement will impose little or no additional burden. In many cases, additional storage space would be needed only for applications of persons not hired (which generally are not cost effective to record and store electronically).

In addition, the proposal makes this retention obligation applicable to a broader range of records than was previously required by the Executive Order regulations. However, this proposal would conform the obligation to the analogous requirement under EEOC's regulations (29 CFR 1602.14) issued pursuant to Title VII and the ADA.

OFCCP solicits comments concerning the proposed revisions to the collections of information contained in this proposed rule. OFCCP solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The revised collections of information contained in this proposed rule have been submitted to OMB for review under section 3507(d) of the Paperwork Reduction Act of 1995. Written comments on these proposed information collection revisions may also be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment Standards, Washington, D.C. 20503.

Unfunded Mandates Reform Act

The proposed rule, if promulgated, will not include any Federal mandate that may result in the expenditure by state, local and tribal governments in the aggregate, or by the private sector, of $100,000,000 or more in any one year.

List of Subjects

41 CFR Part 60–1

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Reporting and recordkeeping requirements.

41 CFR Part 60–60

Equal employment opportunity, Government procurement, Reporting and recordkeeping requirements.

Signed at Washington, D.C., this 10th day of May, 1996.

Robert B. Reich,

Secretary of Labor.

Bernard E. Anderson,

Assistant Secretary for Employment Standards.

Shirley J. Wilcher,

Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, part 60–1 of the rule amending 41 CFR chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely at 46 FR 42865, is proposed to be withdrawn; the proposed rule published on August 25, 1981 (46 FR 42968; supplemented at 47 FR 17770, April 23, 1982) is hereby withdrawn in its entirety; and under the authority of Executive Order 11246, as amended, Title 41 of the Code of Federal Regulations, chapter 60, is proposed to be amended as follows:

60–1—[AMENDED]

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

Authority: Sec. 201, E.O. 11246 (30 FR 12319), as amended by E.O. 12086.

2. Section 60–1.3 is amended by removing the definitions of *Director* and *Rules, regulations, and relevant orders of the Secretary of Labor,* by revising the definitions of *Contract, Government contract, Subcontract* and *United States,* and by adding, in alphabetical order, the definitions of *Compliance evaluation* and *Deputy Assistant Secretary* to read as follows:

§ 60–1.3 Definitions.

* * * * *

Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the Executive Order 11246 requirements.

* * * * *

Contract means any Government contract or subcontract or any federally assisted construction contract or subcontract.

* * * * *

Deputy Assistant Secretary means the Deputy Assistant Secretary for Federal Contract Compliance Programs, United States Department of Labor, or his or her designee.

* * * * *

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term ''personal property,'' as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ''nonpersonal services'' as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federally assisted construction contracts.

* * * * *

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one of more contracts is performed, undertaken or assumed.

* * * * *

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

3. Section 60–1.8 is revised to read as follows:

§ 60–1.8 Segregated facilities.

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term ''facilities,'' as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees: *Provided,* That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

4. A new § 60–1.12 is added to subpart A to read as follows:

§ 60–1.12 Record retention.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least $150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of not less than two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least $150,000 shall keep such records for a period of not less than one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or enforcement action until final disposition of the complaint, compliance evaluation or enforcement action. The term ''personnel records relevant to the complaint,'' for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers submitted by unsuccessful applicant and by all other candidates for the same position as that for which the complainant unsuccessfully applied. Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation.

(b) *Affirmative action programs.* A contractor establishment required under § 60–1.40 to develop a written affirmative action program (AAP) shall maintain its current AAP and documentation of good faith effort, and shall preserve its AAP and documentation of good faith effort for the immediately preceding AAP year, unless it was not then covered by the written AAP requirement.

(c) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraphs (a) and (b) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: *Provided,* That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(d) The requirements of this section shall apply only to records made or kept on or after [30 days after date of publication of final rule].

5. In § 60–1.20, the section heading and paragraphs (a) and (d) are revised and paragraphs (e), (f) and (g) are added to read as follows:

§ 60–1.20 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. A compliance evaluation may consist of any one of the following or any combination thereof:

(1) A compliance review, which consists of comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom;

(2) An off-site review of records, which could consist of a full desk audit, a review of the contractor's affirmative action plan or parts thereof, or a review of particular records such as personnel activity data;

(3) A compliance check, where OFCCP ascertains whether or not the contractor has maintained records consistent with § 60–1.12 and/or has developed an AAP consistent with § 60–1.40; or

(4) A focused review, where OFCCP restricts its on-site review to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

* * * * *

(d) *Preaward compliance evaluations.* Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should exceed the amount of $1 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of $1 million or more may be subject to a compliance evaluation before the award of the contract. The awarding agency will notify OFCCP and request appropriate action and findings

in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a preaward review. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward review, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward review, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.

(e) Each prime contractor or subcontractor with 50 or more employees and a contract of $50,000 or more is required to develop a written affirmative action program for each of its establishments (§ 60–1.40). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 15 days of a request, the enforcement procedures specified in § 60–1.26(b) shall be applicable. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.

(f) *Confidentiality and relevancy of information.* If the contractor is concerned with the confidentiality of such information as lists of employee names, reasons for termination, or pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for desk audit purposes. The contractor must provide full access to all relevant data on-site as required by § 60–1.43. Where necessary, the compliance officer may take information made available during the on-site evaluation off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made. The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis. Such data may only be coded if the contractor makes the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director. The OFCCP District/Area Director shall issue a ruling promptly. The contractor may appeal that ruling to the OFCCP Regional Director within 10 days of receipt. The Regional Director shall issue a final ruling promptly. Pending a final ruling, such information may not be copied by OFCCP and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the investigation will be returned to the contractor immediately.

(g) *Public access to information.* The disclosure of information obtained from a contractor will be evaluated pursuant to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR part 70.

6. Section 60–1.26 is revised to read as follows:

§ 60–1.26 Enforcement proceedings.

(a) *General.* (1) Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings. Violations may be found based upon, *inter alia*, any of the following:

(i) The results of a complaint investigation;

(ii) The results of a compliance review;

(iii) The results of a compliance evaluation;

(iv) Analysis of an affirmative action program;

(v) The results of an on-site review of the contractor's compliance with the Order and its implementing regulations;

(vi) A contractor's refusal to submit an affirmative action program;

(vii) A contractor's refusal to allow an on-site compliance evaluation to be conducted;

(viii) A contractor's refusal to establish, maintain and supply records or other information as required by the regulations in this chapter or applicable construction industry requirements;

(ix) A contractor's alteration or falsification of records and information required to be maintained by the regulations in this chapter; or

(x) Any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations in this chapter.

(2) OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

(b) *Administrative enforcement.* (1) OFCCP may refer matters to the Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate. However, if a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review, and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter.

(2) Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60–30 of this chapter and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided,* That a Final Administrative Order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any), whichever is later.

(c) *Referrals to the Department of Justice.* (1) The Deputy Assistant Secretary may refer matters to the Department of Justice with a recommendation for the institution of judicial enforcement proceedings. There are no procedural prerequisites to a referral to the Department of Justice. Such referrals may be accomplished without proceeding through the conciliation procedures in this chapter,

and a referral may be made at any stage in the procedures under this chapter.

(2) Whenever a matter has been referred to the Department of Justice for consideration of judicial enforcement, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction (including relief against noncontractors, including labor unions, who seek to thwart the implementation of the Order and regulations), and an order for such additional sanctions or relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above in this paragraph (c)(2).

(3) The Attorney General is authorized to conduct such investigation of the facts as he/she may deem necessary or appropriate to carry out his/her responsibilities under the regulations in this chapter.

(4) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Deputy Assistant Secretary, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. The Attorney General may do so by providing the contractor and any other respondent with reasonable notice of his/her findings, his/her intent to file suit, and the actions he/she believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(5) As used in the regulations in this part, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(6) The Deputy Assistant Secretary or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(d) *Initiation of lawsuits by the Attorney General without referral from the Deputy Assistant Secretary.* In addition to initiating lawsuits upon referral under this section, the Attorney General may, subject to approval by the Deputy Assistant Secretary, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor has in fact violated the Order or the rules and regulations issued thereunder, he/she shall make reasonable efforts to secure compliance with the contract provisions of the Order. He/she may do so by providing the contractor and any other respondent with reasonable notice of the Department of Justice's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Deputy Assistant Secretary, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional sanctions or equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above in this paragraph (d).

(e) To the extent applicable, this section and part 60–30 of this chapter shall govern proceedings resulting from any Deputy Assistant Secretary's determinations under § 60–2.2(b) of this chapter.

7. Section 60–1.27 is revised to read as follows:

§ 60–1.27 Sanctions.

(a) *General.* The sanctions described in subsections (1), (5), and (6) of Section 209(a) of the Order may be exercised only by or with the approval of the Deputy Assistant Secretary. Referral of any matter arising under the Order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Deputy Assistant Secretary.

(b) *Debarment.* A contractor may be debarred from receiving future contracts or modifications or extensions of existing contracts, subject to reinstatement pursuant to § 60–1.31, for any violation of Executive Order 11246 or the implementing rules, regulations and orders of the Secretary of Labor. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

8. Section 60–1.30 is revised to read as follows:

§ 60–1.30 Notification of agencies.

The Deputy Assistant Secretary shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

9. Section 60–1.31 is revised to read as follows:

§ 60–1.31 Reinstatement of ineligible prime contractors and subcontractors.

A prime contractor or subcontractor debarred from further contracts for an indefinite period under the Order may request reinstatement in a letter filed with the Deputy Assistant Secretary at any time after the effective date of the debarment; a prime contractor or subcontractor debarred for a fixed period may make such a request upon the expiration of the fixed debarment period. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Order and implementing regulations. Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary shall issue a written decision on the request.

10. Section 60–1.32 is revised to read as follows:

§ 60–1.32 Intimidation and interference.

(a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;

(3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or

(4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such

harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

11. In § 60–1.34, paragraph (a)(4) is added to read as follows:

§ 60–1.34 Violation of a conciliation agreement or letter of commitment.

(a) * * *

(4) In any proceeding involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

* * * * *

12. Section 60–1.42 is amended by revising paragraph (a) to read as follows:

§ 60–1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Deputy Assistant Secretary, the notices which prime contractors and subcontractors are required to post by paragraphs (1) and (3) of the equal opportunity clause in § 60–1.4 will contain the following language and be provided by the contracting or administering agencies:

EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER No. 11246

Title VII of the Civil Rights Act of 1964–*Administered by:*

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 15 or more employees, by Labor Organizations, by Employment Agencies, and by Apprenticeship or Training Programs.

ANY PERSON

Who believes he or she has been discriminated against

SHOULD CONTACT

THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

1801 L Street N.W., Washington, D.C. 20507

Executive Order No. 11246–*Administered by:*

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

ANY PERSON

Who believes he or she has been discriminated against

SHOULD CONTACT

THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

U.S. Department of Labor, Washington, D.C. 20210

* * * * *

13. Section 60–1.43 is revised to read as follows:

§ 60–1.43 Access to records and site of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance evaluations and complaint investigations. Each contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary. Information obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP.

PART 60–60—[REMOVED]

14. Part 60–60 is removed.

[FR Doc. 96–12687 Filed 5–20–96; 8:45 am]

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