

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Parts 60-1 and 60-2**

RIN 1215-AA01

Government Contractors; Affirmative Action Requirements

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

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to revise certain regulations implementing Executive Order 11246, as amended. The Executive Order prohibits 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, or national origin. Today's proposal would refocus, revise, and restructure 41 CFR Part 60-2, the regulations that establish the requirements for affirmative action programs, and related sections in 41 CFR Part 60-1. The proposal would refocus the regulatory emphasis from the development of a written document that complies with highly prescriptive standards, to a performance based standard that effectively implements an affirmative action program into the overall management plan of the contractor. The proposal also would introduce a new tool that would aid contractors in assessing their pay and other personnel practices, while increasing the efficiency and effectiveness of program monitoring. This tool, the Equal Opportunity Survey, would be primarily submitted electronically.

The proposal would help fulfill the Administration's Equal Pay Initiative to provide contractors with the necessary tools to assess and improve their pay policies. The proposal also would help fulfill the Department's goal of increasing the number of federal contractors brought into compliance. A means to fulfill that goal is for OFCCP to more effectively monitor the pay practices of federal contractors.

In addition, today's proposal to revise and restructure the regulations relating to affirmative action programs is part of OFCCP's continuing efforts to meet the objectives of the Reinventing Government Initiative. These objectives

include obtaining input from those most directly affected by the regulations, reducing paperwork and compliance burdens wherever possible, more effectively focusing Government resources where most needed in order to administer the law most efficiently, making the regulations easier to understand by streamlining and simplifying them and writing them in plain language, and updating the regulations to accommodate modern organizational structures and to take advantage of new technologies.

DATES: To be assured of consideration, comments must be in writing and must be received on or before July 3, 2000.

ADDRESSES: Comments should be sent to James I. Melvin, Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Receipts of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling (202) 693-0102 (voice), (202) 693-1308 (TTY).

FOR FURTHER INFORMATION CONTACT:

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

SUPPLEMENTARY INFORMATION:**Background***a. History of the Part 60-2 Regulations*

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." Affirmative action under Executive Order 11246, as amended, connotes more than passive

nondiscrimination; it requires that contractors take affirmative steps to identify and eliminate impediments to equal employment opportunity.

The principles and concepts underlying the current blueprint for affirmative action under Executive Order 11246, as amended, have their origins in Plans for Progress (PFP), conceived and successfully implemented in 1961 by a group of 300 leading corporations committed to achieving equal employment opportunity through voluntary affirmative action. Each company adopted a "plan for progress" for the corporation as a whole and for each of its individual establishments. These plans for progress, as a management tool for achieving equal employment opportunity, were the precursors to the current written affirmative action programs (AAPs).

In July 1969, after having successfully tested this model over an eight-year period, PFP merged with the National Alliance of Business, and turned its focus to youth employment. Seven months later, on February 7, 1970, the Office of Federal Contract Compliance incorporated PFP's Guidelines on Affirmative Action as the centerpiece of its affirmative action program regulations applicable to larger Federal nonconstruction contractors. These regulations—41 CFR Part 60-2—have served as reasonable and successful tools that aid in breaking down barriers to equal employment opportunity for women and minorities without impinging upon the rights and reasonable expectations of other members of the workforce.

b. Overview of the Affirmative Action Program

The current regulations require Federal Government nonconstruction contractors and subcontractors with 50 or more employees and a contract of \$50,000 or more to prepare and implement a written AAP for each of their establishments. The basic elements of the AAP are discussed in more detail in the Section-by-Section Analysis which follows, but an overview is provided here for ease of understanding.

Under the current regulations, the written AAP must contain several elements. One element of the AAP is a "workforce analysis," which essentially is a snapshot of all employment at the establishment. The snapshot shows all the job titles, arranged by department or other organizational unit, and reveals the number of employees in each job by gender, race, and ethnicity. Examination of the employment patterns documented in the workforce analysis is intended to

alert the contractor to potential problems of discrimination and inadequate affirmative action.

The current written AAP also must contain a multi-step analysis to identify whether minorities or women are being employed at a rate that would be expected based upon their availability for employment. This analysis is focused on contractor-defined "job groups," which consist of one or a group of jobs that are similar in content, wage rates, and opportunities. The contractor utilizes census and other available demographic data to conduct a prescribed "eight factor analysis," to calculate the number of qualified women and minorities that should be available in the labor market to work in each job group. The contractor then compares the number of minorities and women it actually employs in each job group against the calculated "availability" for that group to determine whether minorities and women are being employed at a rate reasonably expected given their availability to work in those jobs. If so, the analysis is concluded. If women and minorities are being employed at a rate lower than reasonably would be expected given their availability to work in those jobs, the contractor determines that "underutilization" exists. Underutilization means that the representation of minorities or women in a specific job group is less than reasonably would be expected given the availability of candidates.

If these analyses show underutilization in certain job groups, the contractor must analyze its policies, practices, and procedures to determine possible causes, and take corrective action that is designed to overcome the underutilization. For example, the AAP would include outreach and other affirmative steps precisely tailored to eliminate barriers to equal employment opportunity, and, when necessary, goals and organizational objectives to measure success toward achieving that result.

In addition to the quantitative analyses, the current AAP contains an explanation of the nondiscrimination and equal opportunity policies the contractor has established, the methods elected to implement and disseminate those policies, and the recruitment and community outreach programs implemented. The contractor is instructed to identify various problem areas in the AAP together with plans for appropriate solutions.

The affirmative action measures prescribed by the regulations, including the establishment of goals, are intended to implement Executive Order 11246 that contractors "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." These requirements are rooted in many significant governmental interests, including: that Federal funds may not be used to support discrimination (*e.g.*, *Cannon v. University of Chicago*, 441 U.S. 677 (1979)); that the Federal Government may rightfully fix the terms upon which it will make needed purchases, including that it may expect more of Government contractors than is expected of employers generally (*e.g.*, *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940)); and that the Federal Government's suppliers should not increase the costs of Government work and delay programs by excluding from the labor pool available minority and female workers (*Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971)).

The goals component of the AAP was not designed for, nor may it properly or lawfully be interpreted as, permitting or requiring unlawful preferential treatment or quotas with respect to persons of any race, color, religion, sex, or national origin. The regulations specifically prohibit employment discrimination based on these factors, and affirmative action goals may not be used to impose a quota or preference based on race, color, religion, sex, or national origin.

The policy and practice of the agency is to measure the compliance of the contractor by evaluating the steps the contractor took to analyze its policies, practices, and procedures, and the good faith efforts the contractor has undertaken to overcome any underutilization found and to meet the goals established to correct underutilization. Under that policy and practice, moreover, a contractor will not be charged with a violation of the Executive Order solely because the goals were not met.

c. The Proposed Revision

The basic structure of the Part 60-2 written AAP regulations has remained essentially unchanged since the regulations first were promulgated in 1970. Feedback over the years, from the regulated community of contractors, from groups representing minorities and women, and from OFCCP field staff, suggested that portions of the regulations should be improved. For instance, contractors and some OFCCP staff as well, long have been critical of the eight factors that must be considered in determining the "availability" of

minorities and women for employment in the contractor's workplace. In addition, the workforce analysis requirement has received its share of criticism as being the most expensive and time consuming portion of the AAP, while also being an analytical tool out of touch with the changing nature of the workforce. Therefore, under the umbrella of Executive Order 12866 and the Clinton Administration's Reinventing Government Initiative, a regulatory team was appointed several years ago to review the Part 60-2 regulations.

The regulatory team began work with a number of objectives. These included eliminating outdated, duplicative and unnecessary provisions; eliminating unnecessary compliance burdens by reducing paperwork, providing more flexibility to contractors, and seeking greater consistency between compliance requirements and standard business practices; improving the quality and effectiveness of contractors' affirmative action efforts, and the rate of voluntary compliance; making it easier for contractors to understand and comply with the regulations by simplifying the requirements and stating them as clearly as possible; enhancing the ability of OFCCP personnel to monitor compliance in a time of smaller Government and diminishing resources; and reducing unnecessary friction between contractors and OFCCP compliance officers.

More recently, an additional objective of the proposed revision has been to advance the Department of Labor's goal of pay equity; that is, ensuring that employees are compensated equally for performing equal work. Today working women earn just 76.5 cents on the dollar compared to men. Black women earn 64 cents on the dollar compared to White men, and Hispanic women earn only 55 cents. The pay disparity exists even after accounting for differences in jobs, education, and experience. This NPRM encourages contractors to analyze their own compensation packages to ensure that all their employees are being paid fairly.

As is prescribed by Executive Order 12866, and in accordance with the established rulemaking practices of OFCCP, prior to drafting this notice of proposed rulemaking (NPRM) OFCCP engaged in extensive consultations with its stakeholders regarding the regulatory requirements for the AAP. In the fall of 1994, officials in OFCCP invited contractors, civil rights groups, and women's rights groups to participate in roundtable discussions as to whether and to what extent the required contents of the AAP should be changed. Front

line staff in regional and district offices of OFCCP also submitted recommendations for changing the regulatory requirements for the AAP. As a result of these preliminary discussions and recommendations, the agency identified a number of issues desirable to address through regulatory reforms.

In the Spring of 1995, OFCCP officials convened a series of public meetings with the agency's stakeholders to elicit their recommendations for clarifying and simplifying the regulations at 41 CFR Part 60-2. Several hundred representatives from the contractor, civil rights, and women's rights communities attended these "partnership" meetings, which were held in Dallas, Pittsburgh, San Diego, and Chicago. In addition, during this consultation process, interested parties submitted written comments and suggestions for revising the regulatory requirements for the AAP. Thus, over an 18 month period OFCCP engaged in broad consultations that focused on changing the regulatory requirements for the AAP. Further stakeholder meetings, at which elements of the regulatory package were discussed, have been held over the past year.

OFCCP analyzed the comments and recommendations that were received. Then OFCCP thoroughly examined and pilot-tested the available options for effecting the desired changes in the regulations. Based on this analysis, OFCCP drafted the NPRM being published today.

This is the second step in revising the basic regulations implementing Executive Order 11246, as amended. First, on August 19, 1997, OFCCP published (62 FR 44174) revisions to the regulations at 41 CFR Part 60-1, which eliminated a certification requirement, clarified sanction authority, streamlined the compliance evaluation process, and made several other changes. Those revisions are improving agency efficiency and enforcement effectiveness, while reducing burdens on contractors.

Today's proposal covers the regulations at 41 CFR Part 60-2, which address the content of AAPs. We also propose a corresponding revision of § 60-1.12, which covers records that must be retained, and § 60-1.40, which covers who must develop and maintain an AAP.

This proposal represents a significant departure from OFCCP's existing approach to implementing Government contractor nondiscrimination and affirmative action obligations under Executive Order 11246. After drafting and considering several alternative revisions of Part 60-2 we opted in favor

of this new direction, which we believe will greatly benefit the interests of contractors, minorities and women, and OFCCP itself. Our proposed new approach to the nondiscrimination and affirmative action regulations is based upon the following principles:

- Contractor workplaces should be free of discrimination.
- Contractors should have greater freedom to design their AAPs around their unique business structure and needs.
- OFCCP would like to place greater focus on contractors' actual nondiscrimination and affirmative action activities, and less focus on item-by-item review of whether contractor AAPs meet detailed technical standards.
- OFCCP can do a better job of enforcing the Executive Order if it has detailed and up-to-date data up-front about the contractor's hiring and advancement of minorities and women and its affirmative action performance.
- The regulatory requirements should lead to heightened awareness by contractor officials of each establishment's equal employment opportunity and affirmative action performance.
- Heightened awareness of performance, coupled with increased compliance presence by OFCCP, should dramatically improve the level of compliance.

Accordingly, as we outline in more detail in the Section-by-Section Analysis below, the proposal contains a number of new approaches.

We propose to greatly reduce the number of elements required to be included in contractor AAPs. Beyond the required elements, contractors would include in their AAPs those elements and actions that they considered necessary and appropriate to carry out the nondiscrimination and affirmative action commitments of their Government contracts.

We propose to make it easier for contractors to prepare the remaining required elements of an AAP in two ways. First, we have sought to streamline requirements, for example, by proposing that contractors consider only two availability factors instead of the current eight. Second, we have sought to enhance contractor understanding of the rules by stating the requirements in clear terms, and by providing in the preamble explanations and illustrations of how the requirements are intended to be applied.

As the proposal makes clear, an AAP consists of a diagnostic component through which the contractor analyzes its workforce to determine whether there are problems of underutilization

that need to be addressed, an action-oriented programs component through which the contractor takes steps to address the identified problems, and an evaluative component through which the contractor establishes and uses internal auditing and reporting systems to ensure that the diagnostic and action-oriented components of the AAP are effective.

Under the proposed regulations, an AAP is effective when the diagnostic component is accurately identifying problem areas, and when good faith efforts are being actively undertaken through action-oriented programs to effectively address those areas. Together, these components would form the cornerstone of the new AAP.

To help OFCCP better monitor compliance, and to further the objective of contractor self-analysis, we propose a new Equal Opportunity Survey, to be submitted by a subset of nonconstruction establishments each year. The Survey would provide OFCCP with the data necessary to more effectively identify contractor establishments that may have problems with their Executive Order 11246 obligations, and to select those contractors for further evaluation under OFCCP's new compliance evaluation procedures.

Finally, the proposal performs several "housekeeping" functions with respect to the Part 60-2 regulations. 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 an NPRM published on that same date (46 FR 42968; supplemented at 47 FR 17770, April 23, 1982). No further action on the August 25, 1981, proposal, or consequently on the 1980 stayed final rule, has been taken. Both the 1980 final rule and the 1981 proposal addressed 41 CFR Part 60-2. To avoid conflict with the NPRM published today, OFCCP proposes to withdraw Part 60-2 of the 1980 final rule, and hereby withdraws the 1981 and 1982 NPRMs in their entirety. Additionally, consistent with the President's 1998 "Plain Language" Memorandum, we have replaced the word "shall" with "must" or "will" as appropriate to the context.

Section-by-Section Analysis

Section 60-1.12 Record Retention

OFCCP published a final rule revising 41 CFR Part 60-1 on August 19, 1997. The revision proposed today would

further amend the record retention provisions in § 60–1.12 to harmonize them with the proposed changes to Part 60–2.

Current paragraph (b) recites that contractors subject to the “written” affirmative action program (AAP) requirement shall maintain and preserve their current and immediately prior AAPs and documentation of good faith effort. Consistent with today’s proposed changes to Part 60–2, which de-emphasize the written nature of the AAPs, we propose to remove the modifier “written” from this section.

Paragraphs (c) and (d) would be redesignated as paragraphs (d) and (e) respectively, and the first sentence of the newly designated paragraph (d) would reflect the addition of a new paragraph (c). The new paragraph (c) would require that the contractor be able to identify:

- the gender, race, and ethnicity of each employee; and,
- where possible, the gender, race, and ethnicity of each applicant in any records the contractor maintains pursuant to this section. In addition, the contractor would be required to supply this information to OFCCP upon request. This provision is necessary for OFCCP to verify EEO data. Although not expressly stated in the regulations, OFCCP traditionally has required contractors to maintain and submit upon request information about the gender, race, and ethnicity of their applicants and employees. *See, for example*, OFCCP’s Federal Contract Compliance Manual at Section 2H01 and Figure 2–2. Methods for collecting data on gender, race, and ethnicity are discussed in Question and Answer 88 in the “Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,” 44 F.R. 11996, 12008 (March 2, 1979).

Section 60–1.40 Affirmative Action Programs

Current § 60–1.40 describes at paragraph (a) which contractors are required to develop “written” AAPs. Paragraph (a) also discusses the importance of identification of problem areas and the evaluation of opportunities for the utilization of minority employees. Finally, paragraph (a) requires that AAPs contain specific steps for addressing identified problems, and a table of job classifications detailing jobs, duties, rates of pay, and other pertinent information. Paragraph (b) of the current regulation describes utilization evaluations, and paragraph (c) describes

when AAPs are to be developed and how they are to be maintained. Current paragraph (c) also indicates that the required information pertaining to the AAP is to be made available to representatives of the Director of OFCCP.

We propose several modifications to § 60–1.40. The proposal retains in paragraph (a) current standards for who must develop and maintain an AAP, although the standards are slightly edited for clarity. Additionally, as we proposed for § 60–1.12(b), we would remove from paragraph (a) references to “written” AAPs.

The remainder of existing paragraph (a), as well as all of current paragraphs (b) and (c), would be removed from this section. Much of the material is outdated, in that it references only employment problems relating to minorities, and not those relating to women. As appropriate, we have updated the material and incorporated it into Part 60–2 with the rest of the regulatory material relating to contents of AAPs.

In addition, to further consolidate requirements relating to AAPs in Part 60–2, specific information as to when the obligation to develop and maintain an AAP arises, which is addressed in current paragraph (c), has been significantly abbreviated and moved to proposed § 60–2.1(c). Finally, we are proposing a new paragraph (b), which directs construction and nonconstruction contractors to the regulations that establish the affirmative action requirements applicable to each.

Part 60–2

Subpart A—General

Section 60–2.1 Scope and Application

Existing § 60–2.1 describes the purpose and scope of the regulations contained in 41 CFR Part 60–2. Current paragraph (a) specifies which contractors are required to develop AAPs and provides a general overview of the regulations contained in Part 60–2. Paragraph (b) of the current regulation states that relief, including back pay where appropriate, must be provided for an affected class in all conciliation agreements entered into to resolve violations uncovered during a compliance review. Paragraph (b) also states that an “affected class” problem must be remedied in order for a contractor to be considered in compliance, and indicates that a contractor may be subject to the enforcement procedures set forth in § 60–2.2 for its failure to remedy past discrimination.

Consistent with the goals of streamlining and simplifying the regulations, the proposal would revise and restructure § 60–2.1. The proposal would revise paragraph (a) by limiting the language to a brief description of the scope of the regulations contained in Part 60–2.

The proposal would delete as redundant the contents of paragraph (b) of current § 60–2.1, because the requirement that conciliation agreements include provisions for back pay and other remedies also is set forth in § 60–1.33. The removal of the back pay and affected class language from paragraph (b), however, is not intended to affect OFCCP’s ability to recover back pay or other affirmative relief for victims of discrimination.

The proposal also would delete the historical reference to “Revised Order No. 4,” the predecessor to the current Part 60–2, as it would not be appropriate or necessary in light of the changes proposed to be made to Part 60–2.

Paragraph (b) in proposed § 60–2.1 would specify who must develop an AAP; it would repeat the standards found in § 60–1.40, because recitation of the scope of coverage is important for completeness in both parts of the regulation.

The proposal would add a paragraph (c) that specifies that AAPs must be developed by the contractor within 120 days from the commencement of the contract. This requirement was previously set out in 41 CFR 60–1.40(c). Since Part 60–2 addresses the requirements of AAPs, it appears more appropriate to include information specifying when the obligation to develop AAPs begins as part of Part 60–2.

The proposal would add a paragraph (d) describing who is included in affirmative action programs. Proposed subparagraph (2) provides three options for contractors with fewer than 50 employees at a particular establishment to account for those employees for AAP purposes. Proposed subparagraph (3) is designed to clarify that the AAP at the establishment that makes the selection decision is the appropriate establishment for inclusion of their selectees. This is particularly important for corporate headquarters AAPs, since selection decisions are likely to be made at corporate headquarters for employees who are assigned to other establishments within the corporation. This reflects OFCCP’s “corporate initiative” (53 FR 24830, June 28, 1988). Paragraph (e) of the proposed regulation explains how to identify employees who

are included in AAPs at establishments other than where they are located.

Section 60-2.2 Agency Action

Paragraph (a) of existing § 60-2.2 deals with agency approval of AAPs. The entire paragraph would be revised for clarity, and a few technical changes (such as substituting "Deputy Assistant Secretary" for "Director") would be made as well. No substantive change is intended.

Paragraph (b) of existing § 60-2.2 deals with responsibility determinations. A few technical changes similar to those in paragraph (a) would be made, but no substantive changes are proposed for paragraph (b) at this time. Pursuant to the authority set forth in 5 U.S.C. 552(b)(3)(A), which allows Federal agencies to alter "rules of agency organization, procedure, or practice" without notice and comment, OFCCP is not accepting comments on paragraph (b).

Paragraphs (c) and (d) of the current § 60-2.2 address show cause notices and other enforcement procedures for a contractor's failure to develop an AAP as prescribed in the regulations. Consistent with the goals of streamlining and simplifying the regulations, the proposal would delete as superfluous paragraphs (c) and (d) because the subjects are also addressed in §§ 60-1.26 and 60-1.28.

Subpart B—Purpose and Contents of Affirmative Action Programs

Section 60-2.10 General Purpose and Contents of Affirmative Action Programs

The current § 60-2.10 describes an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. It generally describes the contents of AAPs and states that the good faith efforts must be directed to correct the deficiencies and achieve prompt and full utilization of minorities and women.

A complete rewrite of § 60-2.10 is proposed. The rewrite is intended to convey that an AAP should be considered a management tool—an integral part of the way a corporation conducts its business. The proposed revision emphasizes the philosophy OFCCP intends to convey throughout the regulation, that affirmative action is not to be a mere paperwork exercise but rather a dynamic part of the contractor's management approach. Paragraph (a) of proposed § 2.10 states that the premise underlying AAPs is that absent discrimination, a contractor's workforce would be expected to generally reflect

the available qualified labor force. The proposed revision explains that, in addition to identifying and correcting underutilization, AAPs also are intended to institutionalize the contractor's commitment to equality in every aspect of employment. AAPs institutionalize the contractor's commitment to equality by establishing procedures to monitor and examine the contractor's employment decisions and compensation systems. AAPs establish these procedures to ensure that the contractor's employment decisions and compensation systems are free of discrimination.

Paragraph (b) of proposed § 60-2.10 outlines the required elements of an AAP. Contractors, thus, at the outset, can get a general sense of what is required for an AAP. It may also prove useful when a contractor is checking to see if all of the required AAP elements have been addressed in its AAP.

Finally, the proposal would add a paragraph (c) requiring that contractors maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 2.17.

Section 60-2.11 Organizational Profile

The current § 60-2.11 is entitled "Required utilization analysis." It contains an introductory paragraph which identifies broad job areas (EEO-1 categories) in which racial and ethnic minorities or women are likely to be underutilized, and sets forth in lettered paragraphs the core contents of a written AAP. Proposed § 60-2.11 would address only paragraph (a) of the current regulation, which deals with the workforce analysis. Paragraph (b) of the current regulation, which addresses the job group analysis, would be revised and moved to new § 60-2.12 discussed below in this preamble. The introductory paragraph of current § 60-2.11 would be deleted as outdated and unnecessary.

Paragraph (a) of current § 60-2.11 provides that a workforce analysis is a listing of job titles (not job groups) ranked from the lowest paid to highest paid within each department or similar organizational unit. The workforce analysis also shows the lines of progression or promotional sequences of jobs, if applicable. If no lines of progression or usual promotional sequences exist, job titles are listed by departments, job families or disciplines, in order of wage rates or salary ranges. For each job title, the workforce analysis must reflect the wage rate or salary range, and the number of incumbents by race, ethnicity, and sex. In short, the workforce analysis is a map pinpointing the location of jobs and incumbent

employees and their relationship to other jobs and employees in the contractor's workforce.

During the consultation process, several contractor representatives criticized the current workforce analysis regulation. Some felt that the requirement to present a hierarchical array of jobs by job title and by pay for departments or organizational units, along with lines of progression, is too burdensome. These contractor representatives recommended that the workforce analysis be eliminated as a required element of the AAP.

Other contractor representatives contended that the current regulation does not permit contractors to capture the structural characteristics of today's workforces, and that in many instances contractors develop "artificial" workforce analyses solely for the purpose of complying with the regulations. Specifically, they asserted that the current regulation does not recognize the increasing use of the fluid team structure (e.g., a multi-disciplinary team drawn from several components of an organization to work for a limited time on a project), does not allow contractors to indicate that a job is part of a chain of command outside of the establishment (e.g., sales personnel who report directly to a sales manager in another office), and is not meaningful when small numbers of employees work at remote locations (e.g., small branch banks). These critics of the current workforce analysis urged OFCCP to revise the regulations to permit contractors to base their workforce analyses on how their businesses actually are organized, using data that are readily available and compiled to meet other business needs. To that end, they urged removal of the current geographical restriction that the workforce analysis (indeed the entire AAP) cover a single establishment, and revision of the workforce analysis regulation so as to permit contractors to:

- (1) Include several small locations in one workforce analysis (and corresponding AAP; this sometimes is referred to as a "consolidated" AAP);
- (2) prepare a workforce analysis (and AAP) for a group or groups within a single establishment; or
- (3) prepare a single workforce analysis (and AAP) based on a business function or a line of business, without regard to the geographic locations of the establishments and employees (sometimes referred to as a "functional" AAP).

Other contractor representatives were satisfied with the current workforce analysis requirement. Some observed that "wholesale changes" in the AAP format could be costly for those

contractors that have been developing the AAP for many years in accordance with the current regulatory requirements.

A central function of the workforce analysis, and any substitute, is to provide a picture of a contractor's organizational structure. The picture enables an individual reviewing equal employment opportunity at the establishment to understand how the establishment functions. Adding gender, race, and ethnicity to the picture provides a graphic representation of where minorities and women may be underrepresented or concentrated, which permits preliminary review for potential discrimination and the need for affirmative action. This graphic representation is useful to contractors engaging in self analysis, and it is useful to OFCCP's compliance officers. OFCCP believes that the concept is well worth retaining.

In response to the concerns discussed above, however, OFCCP has attempted to "reengineer" the workforce analysis into a shorter, simpler format which we propose to call an "organizational profile." The organizational profile is described in proposed § 60-2.11(b)(1). In basic terms, the organizational profile is an organization chart for the

establishment, showing each of the organizational units and their relationships to one another, and the gender, race, and ethnic composition of each organizational unit. Unlike the current workforce analysis, the profile would focus only on organizational units; it would not require the identification of individual job titles with the exception of the supervisor, if any. Likewise, reporting of race, sex, and salary information by job title would be eliminated.

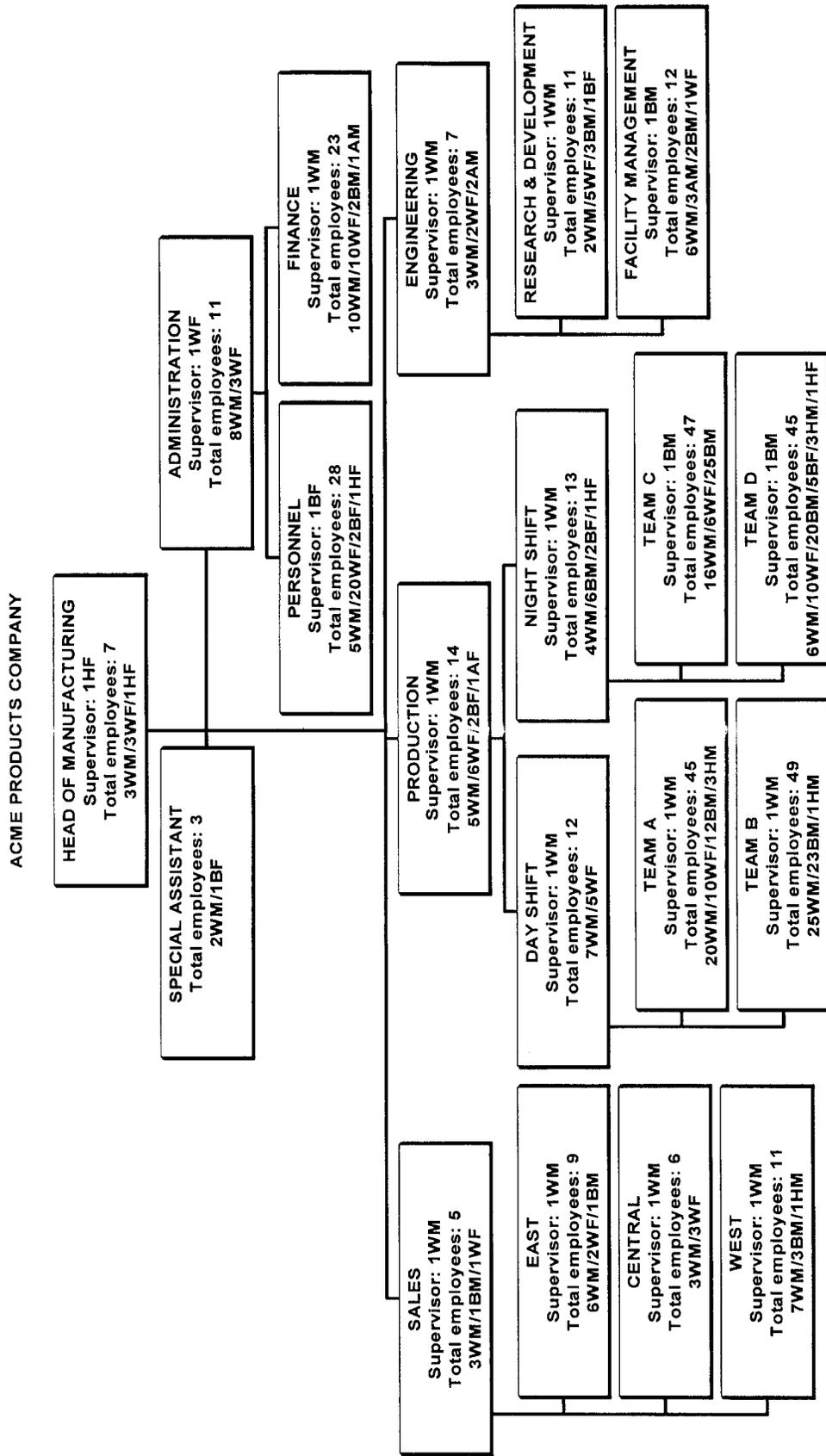
In drafting the proposed rule we have attempted to avoid a minutely itemized prescription for the organizational profile. Thus, we specify only that the profile is "a detailed organizational chart or similar graphical presentation of the contractor's organizational structure," and that it must identify: each organizational unit; the job title, gender, race, and ethnicity of the unit supervisor; and the gender, race, and ethnic composition of the total employees in each unit. Our intent is that the profile be presented in a visual, rather than narrative, format, and that it account for all elements of the establishment's workforce.

Beyond those basic requirements, however, the proposal leaves contractors substantial latitude to

present the organizational profile in a manner that best fits their operational needs. In most cases, contractors should be able to use existing organizational charts as the core for their profiles. The only additional work required would be to annotate the charts with information about supervisors, and with the gender, race, and ethnic composition of each unit.

A key definitional question is what is meant by the term "organizational unit." As we set forth in section (b)(2) of the proposed rule, an organizational unit is any component that is part of the contractor's corporate structure. In a more traditional organization, an organizational unit might be a department, division, section, branch, group, or similar unit. Typically, such a unit would be headed by a supervisor. In a less traditional organization, an organizational unit might be a project team, job family, or similar unit. Such a unit might not have a direct supervisor.

Following is a sample organizational profile. This sample is provided for illustrative purposes only, and should not be construed to represent a required format or template.



In OFCCP's estimation the proposed organizational profile simplifies and

improves upon the existing workforce analysis. The proposed rule's focus on

actual organizational units, and particularly the notion that the core of

the organizational profile can be the contractor's actual organizational chart, should result in the profile being more accurate, more useful, easier for contractors to produce, and significantly shorter, than the workforce analysis it would replace. These changes should benefit both contractors and OFCCP.

During the consultations it was asserted that the current regulations do not provide contractors the flexibility to report on their organizations as they actually exist, and that this results in contractors creating special report formats solely for AAP purposes. Because the proposed rule permits, indeed encourages, the use of existing organizational structures and organizational charts, the asserted practice of creating special report formats should diminish, thus reducing contractor burden. In turn, if the organizational profile more closely reflects the actual organization of the establishment, it should be a more useful and reliable analytical tool.

Finally, as noted above, under the proposal the organizational profile would not require the itemization of individual job titles, or the reporting of gender, race, ethnicity, and salary information by job title. This will greatly reduce the volume of the organizational profile, as compared to the existing workforce analysis (which often is one of the largest sections of the AAP).

Regarding the structure of the AAP, except as provided in 60-2.1(d), OFCCP decided not to adopt the recommendation that would allow for the development of a "consolidated" or "functional" AAP at this time. Although some of the concepts may have merit, they appear to also have shortcomings that will require lengthy and substantive consultation among stakeholders.

Finally, in subsection (c)(4), the minority group designations would be changed to conform to the designations of minorities currently used in the EEO-1 report. At a later date, OFCCP intends to revisit the racial and ethnic designations used in the regulations at 41 CFR Chapter 60 to render them consistent with the revised standards set forth in OMB's Statistical Policy Directive No. 15, Race and Ethnic Standards for Federal Statistics and Administrative Reporting (62 FR 58782, October 30, 1997). OFCCP will coordinate any changes in these designations with the Equal Employment Opportunity Commission (EEOC) so that recordkeeping and reporting requirements for both agencies are compatible.

Section 60-2.12 Job Group Analysis.

[Current § 60-2.12 entitled "Establishment of goals and timetables" would be revised, renamed, and moved to § 60-2.16 as discussed below in the preamble.]

Contractors use the job group analysis for combining job titles in their workforce. This is the first step in comparing the representation of minorities and women in the contractor's workforce with the estimated availability of qualified minorities and women who could be employed. When the representation of minorities or women within a job group is less than their availability by some identifiable measure (see discussion of § 60-2.16, below) the contractor must establish goals.

The reason for combining job titles is to organize the workforce into manageable size groups to facilitate analysis, while still maintaining elements of commonality among the jobs grouped together. The jobs included in a job group must have elements in common, i.e., similar job duties, similar compensation, and similar opportunities for advancement within the contractor's workforce. Contractors have considerable discretion in determining which jobs to combine, but the resulting job groups must contain jobs with the requisite common elements. If the job groups are inappropriately drawn, the availability and utilization analyses based on those job groups will be flawed.

The current regulations (§ 60-2.11(b)) define a job group as one or more jobs having similar content, wage rates and opportunities. The structure of the job group analysis in the current regulation often is criticized by contractors and by OFCCP compliance staff. Some view the instruction to combine jobs by similar content, wage rates and opportunities as too general to provide clear, consistent guidance. The result, according to this appraisal, is inconsistent interpretations among different OFCCP offices, and needless disagreements between contractors and compliance officers about the grouping of particular jobs. Others say that the current regulation does not give larger contractors enough flexibility to tailor the job group analysis to the idiosyncrasies of different organizational structures, places too much emphasis on tracking lines of progression, and precludes compliance officers from making fair and accurate evaluations of contractor achievements. Further, critics claim that for smaller contractors, the existing job group analysis regulation often results in the formation of job groups that are

too small to conduct a meaningful utilization analysis.

Despite the criticisms of the current job group regulation, contractors and OFCCP staff have expressed divergent views on whether it should be revised, and if so, how. During the consultation process, some contractor representatives recommended that OFCCP retain the job group regulation as it currently exists. Those who favored keeping the current regulatory approach observed that the current approach of contractor-developed job groups can best accommodate the diversity in organizational structures that exists among contractor establishments.

Other contractor representatives supported the idea of basing job grouping on the standard EEO-1 categories, a concept which OFCCP explored during the consultation process. The term "EEO-1 categories" refers to nine broad occupational groupings: officials and managers, professionals, technicians, sales workers, office and clerical, craft workers (skilled), operatives (semi-skilled), laborers (unskilled), and service workers. These groupings are used in the EEO-1 report (the Employer Information Report), which most employers file annually with the Joint Reporting Committee (an entity composed of OFCCP and the EEOC).

Proponents of the EEO-1 job grouping approach observed that most contractors and employers already are familiar with the EEO-1 categories and that, in practice, those categories already serve as the baseline for most job groups. They asserted that another advantage of EEO-1 category job grouping is that, in many cases, it would address the problem of job groups with too few employees to conduct a meaningful utilization analysis.

Still other contractor representatives recommended that OFCCP revise the regulations in a manner that would allow contractors the option of selecting either approach—the contractor-developed job group prescribed by the current regulations or the EEO-1 category-based job group.

After considerable thought about the wide range of views described above, OFCCP has decided to continue the traditional approach to the job group analysis, as reflected in current § 60-2.11(b), for larger employers (contractors with 150 or more employees). Accordingly, proposed § 60-2.12(b) states that jobs at the establishment with similar content, wage rates, and opportunities, must be combined to form job groups. OFCCP is proposing, at § 60-2.12(e), that smaller employers (contractors with fewer than 150

employees) may use EEO-1 categories as job groups.

In response to criticisms that the current regulations provide inadequate guidance, the proposed regulation would further explain the criteria that the contractor must consider when determining which jobs to combine into job groups. Proposed § 60-2.12(b) states "similarity of job content refers to the duties and responsibilities of the job titles which make up the job group." Further, the proposed regulation provides that "similarity of opportunities refers to training, transfers, promotions, pay mobility, and other career enhancement opportunities offered by the jobs within the job group." Although OFCCP's Federal Contract Compliance Manual contains detailed guidance on job group formation, the agency believes the expanded regulatory definition will address many of the issues that arise when decisions are being made about job groups.

Once the appropriate job groups are determined, proposed § 60-2.12(c) would require the contractor to prepare a list of the job titles that comprise each job group. The paragraph also would reflect the provisions of proposed §§ 60-2.1(d) and (e) relating to jobs located at another establishment.

Proposed § 60-2.12(d) would provide that all jobs located at an establishment must be included in the establishment's job group analysis, except as provided in § 60-2.1(d).

Finally, as noted above, proposed § 60-2.12(e) permits smaller employers to use EEO-1 categories as job groups. OFCCP considers job grouping by EEO-1 category to be simpler both for smaller employers and for OFCCP than grouping by similarity of content, wage rates and opportunities (the scheme found in § 60-2.11(b) of the current regulations and § 60-2.12(b) of this proposal). Contractors that are smaller employers tend to have so few employees that to subdivide them into smaller job groups than required by the EEO-1 categories would make goal setting unreliable. We are expressly soliciting comments on this issue.

Section 60-2.13 Placement of Incumbents in Job Groups

[Current § 60-2.13 entitled "Additional required ingredients of affirmative action programs" would be revised, renamed, and moved to § 60-2.17 as is discussed below in the preamble.]

This proposed new section would require the contractor to record separately the percentage of minorities and women it employs within each job

group. The current regulations (§ 60-2.11) do not directly address this procedure. This step may seem obvious, but it is expressly included here in an effort to make the process of preparing an AAP clearer to first-time and infrequent users of the regulations and to casual readers.

Section 60-2.14 Determining Availability

[Current § 60-2.14 entitled "Program summary" would be moved to § 60-2.31.]

Proposed § 60-2.14 contains the guidelines for determining availability and would replace the regulations that are currently found at §§ 60-2.11(b)(1) and (2). The purpose of the availability analysis is to determine the representation of minorities and women among those qualified (or readily qualifiable) for employment for each job group in the contractor's workforce. Availability is the yardstick against which the actual utilization of minorities or women in the contractor's job group is measured.

Under the current regulation, the contractor is required to compute availability, separately for minorities and for women, for each job group. In determining availability, the contractor must consider each of eight factors listed in the regulations. The factors are similar, but not identical, for minorities and women. Although the contractor must consider all eight factors, it is not required to utilize each factor in determining the final availability estimate. Only the factors that are relevant to the actual availability of workers for the job group in question must be used. Most contractors actually use only a few of the eight factors to compute the final availability estimates.

The "eight-factor analysis" for determining availability is one of the most frequently criticized elements of the Executive Order 11246 program. Common complaints among contractors are that the requirements are unnecessarily complex and not sufficiently focused. For instance, critics suggest that factors such as the minority population of the labor area surrounding the facility (factor (1)(i)), the size of the minority and female unemployment force in the labor area surrounding the facility (factors (1)(ii) and (2)(i)), and the percentage of the minority and female workforce as compared with the total workforce in the immediate labor area (factors (1)(iii) and (2)(ii)), are inappropriately broad because they do not focus on the skills needed to perform the particular jobs in the contractor's workplace. Even for jobs for which no special skill is needed, the

factor on minority population is criticized because it commingles those who are ready to work with those who are under 16 or over 65 years of age, completely unable to work due to disability, or otherwise unavailable. Similarly, consideration of the existence of training institutions capable of training persons in the requisite skills (factors (1)(vii) and (2)(vii)) is said to focus on those who may be available several years in the future and not on those who can work now. Why, contractors ask, is it necessary to analyze or consider these factors if it is improper to use them?

Accordingly, contractors frequently recommend that the number of factors be limited to the few most commonly used. Contractors further suggest that for ease of application the same availability factors be used for minorities and for women. During our consultations, groups representing minorities and women were not strongly opposed to collapsing the list of factors to concentrate on those that best identify persons available for employment. However, the civil rights and women's groups felt strongly that the concept of affirmative action required consideration of those who reasonably could be trained for a job, as well as those who already have the skills.

Today's proposal would simplify the availability computations by reducing the number of factors from eight to two. The proposed regulation would use the same factors for minorities and for women, but availability would be computed separately for minorities and women for each job group, as is done under the current regulations. Under proposed § 60-2.14(c), the following factors would be considered in determining availability:

(1) The percentage of minorities or women with requisite skills in the reasonable recruitment area, where "reasonable recruitment area" refers to the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question; and

(2) The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization, where "trainable" refers to employees who could, with appropriate training, become promotable or transferable within the AAP year.

To determine the percentages in § 60-2.14(c)(2), the contractor would undertake one or both of the following steps:

- Determine which job groups are "feeder pools" for the job group in question. The feeder pools are job

groups from which individuals are promoted.
 • Ascertain which employees could be promoted or transferred with appropriate training.

Example #1: A contractor has a job group of Engineering Managers. Over the past year,

all individuals who have been promoted into the Engineering Managers job group have been promoted from only two other job groups: Chemical Engineering Project Leaders and Petroleum Engineering Project Leaders. The Chemical Engineering Project Leaders job group has 100 incumbents, of which 20 are minority and 25 are female. The

Petroleum Engineering Project Leader job group also has 100 incumbents, of which 15 are minority and 20 are female. The “feeder pool” availability is the total number of minority or female incumbents divided by the total number of incumbents for the two job groups.

Job group	Total incumbents	Minority incumbents	Female incumbents	Minority promotables (in percent)	Female promotables (in percent)
Chem.E PL	100	20	25	20	25
Pet.E PL	100	15	20	15	20

Minority Availability $(20 + 15) / (100 + 100) = 17.5\%$

Female Availability $(25 + 20) / (100 + 100) = 22.5\%$

Example #2: A contractor has a job group of Entry Level Managers. This contractor has a management training program. A review of the training program shows that of the 200 employees in the program last year, 100 completed the program and are eligible for

Entry Level Manager positions this AAP year. Of those 100 who completed the program, 45 are minority and 40 are female. The availability in this example is the percentage of minorities or females who completed the training program.

Total individuals eligible for promotion	Minorities eligible for promotion	Females eligible for promotion	Minority availability (in percent)	Female availability (in percent)
100	45	40	45	40

Our experience has shown that these factors are the ones most contractors use to compute availability estimates. Taken together, they reflect contractors’ assertions of who is qualified and available for employment. In addition to the percentage of minorities or women in the reasonable recruitment area and within the contractor’s workforce who already possess the requisite skills, proposed § 60–2.14(c) would require the contractor to consider the percentage of minorities or women among its employees who could, with appropriate training, become promotable or transferable during the AAP year, when determining availability. This provision is intended to address the recommendations of civil rights and women’s groups that the availability computation include consideration of training opportunities. It is a refinement of the requirement in the current regulations (§§ 60–2.11(b)(1)(viii) and (b)(2)(viii)) that the contractor consider the degree of training which it is reasonably able to undertake as a means of making all job classes available to minorities and to women.

Proposed § 60–2.14(e) would require a contractor to define its recruitment area reasonably so as not to exclude minorities and women, and to develop a brief written rationale for selection of that recruitment area. On occasion, defining the recruitment area in a slightly different way can significantly enlarge or reduce the proportion of minorities or women with requisite skills available for employment. In such

a case, the contractor would be required to assure that the recruitment area chosen would not have the effect of excluding minorities or women.

Proposed § 60–2.14(f) would require contractors to define the pool of promotable, transferable, and trainable employees in such a way as not to exclude minorities or women, and to develop a brief documented rationale for the selection of the pool. This provision responds to concerns expressed by civil rights and women’s groups that a contractor may have relatively low levels of available incumbent minorities and women due to prior discrimination in access to training and employment opportunities in general, and, perhaps, within the contractor’s workforce. When barriers to equal employment opportunity have prevented minorities and women from entering the pipeline to promotional consideration, contractors must critically evaluate the criteria they use to identify candidates. Otherwise, generations of minority and female workers, barred from equal consideration in the past, may continue to experience the effects of prior discrimination and lack of affirmative action.

Further, proposed § 60–2.14(d) would require contractors to use the most current and discrete statistical data to conduct its availability analyses. This is addressed in Section 2G05(e) and Appendix 2B of the Federal Contract Compliance Manual. Examples of such information include census data, data

from local job service offices, and data from colleges and other training institutions.

When a job group is composed of job titles with different availability rates, proposed § 60–2.14(g) would require the contractor to compute a composite availability estimate. The composite availability figure would represent a weighted average of the availability estimates for all the job titles in the job group.

The composite weighted average availability is computed by determining the percentage of total job group incumbents represented by the incumbents in each job title, multiplying each incumbent percentage by the corresponding availability for that job title, and summing the results. The computation is illustrated by the following job group of professionals with a total of 80 incumbents:

Job title	Number incumbents	Availability (in percent)
Accountant	20	35
Auditor	40	20
Analyst	20	15

1. Accountant = $20/80$ incumbents, or .25

Auditor = $40/80$ incumbents, or .5
 Analyst = $20/80$ incumbents, or .25

2. Accountant = $.25 \times .35 = .0875$
 Auditor = $.5 \times .20 = .1$

Analyst = $.25 \times .15 = .0375$

3. Composite Availability = $.0875 + .1 + .0375 = .225$ or 22.5%

The proposed regulation would retain the requirement that contractors determine the availability of total minorities. OFCCP requests comments on whether the regulation should be changed to require the contractor to compute availability for individual minority subgroups and invites commenters to address the following questions:

1. Should contractors be required to compute availability separately for individual minority subgroups as a general rule?

2. Should contractors be required to compute availability for individual minority subgroups only when the minority subgroup represents a specified percentage of the population in the immediate labor area?

3. How large must the minority subgroup population be before the contractor is required to compute the separate availability for minority subgroups?

Section 60-2.15 Comparing Incumbency to Availability

[Current § 60-2.15 entitled "Compliance status" would be revised and moved to § 60-2.35, discussed below in the preamble.]

Proposed § 60-2.15 addresses an aspect of the existing regulations that is referred to as the "utilization analysis," and would replace one portion of existing § 60-2.11(b). Proposed § 60-2.15(a) would require the contractor to compare the representation of minorities and women in each job group with their representation among those available to be employed in that group. During compliance reviews, OFCCP typically finds that more minorities and women are available for employment in particular occupations and job groups than are actually employed in those positions. Indeed, OFCCP Regional Directors report that virtually every AAP reviewed by their offices contains one or more job groups in which availability exceeds actual employment. If the availability for a job group is greater than incumbency, and the difference is of a sufficient magnitude, the contractor must establish a goal.

The current regulation refers to the difference between availability and incumbency as "underutilization," which is defined as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." When this condition exists, the contractor must establish a goal. Under the current practice, contractors are permitted to identify underutilization using a variety of methods, including: the "any difference" rule, *i.e.*, whether any

difference exists between the availability of minorities or women for employment in a job group and the number of such persons actually employed in the job group; the "one person" rule, *i.e.*, whether the difference between availability and the actual employment of minorities or women equals one person or more; the "80 percent rule," *i.e.*, whether actual employment of minorities or women is less than 80 percent of their availability; and a "two standard deviations" analysis, *i.e.*, whether the difference between availability and the actual employment of minorities or women exceeds the two standard deviations test of statistical significance. We propose no substantive change from the current regulation. The proposal, which is slightly reworded for clarity, appears at § 60-2.15(b).

Finally, current § 60-2.11(b) specifies that the AAP shall contain "[a]n analysis of all *major* job groups" for which underutilization determinations will be made (emphasis added). The regulations do not define "major," nor do they distinguish major job groups from other job groups. Most contractors have treated all job groups as major, and have conducted the analyses for each. This approach correctly reflects that no job groups are so insignificant that further analysis of them should not be performed. Any job group of such insignificance probably should not be considered a job group at all. Accordingly, OFCCP proposes to drop the word "major," thereby requiring that contractors determine availability, compare incumbency to availability, and set placement goals (where comparison of availability to incumbency indicates a need to do so) for all job groups. OFCCP is soliciting comments concerning dropping the word "major" from job groups.

Section 60-2.16 Placement Goals

The procedures outlined in the preceding sections of this proposed rule would require a Federal contractor to analyze its workforce and evaluate its employment practices for the purpose of identifying and correcting gender-, race- and ethnicity-based obstacles to equal employment opportunity. Where the need for corrective action is revealed, the AAP must include outreach and other steps precisely tailored to eliminate the barriers disclosed, and placement goals to target and measure the effectiveness of efforts directed towards achieving that result.

In 1970, when the goals requirement first was incorporated into the regulations, the then Office of Federal Contract Compliance recognized that

some might misunderstand goals to be quotas which must be achieved, or that gender-, race-, and ethnicity-based preferences were permitted or required in the pursuit of goals. Accordingly, the Office of Federal Contract Compliance squarely addressed these issues in the regulations, stating that: quotas are expressly forbidden; compliance is judged by a contractor's efforts rather than whether goals have been met; and goals should not be used to discriminate against any employee or applicant because of race, color, religion, sex, or national origin. (See, for example, §§ 60-2.12(e), 2.15 and 2.30 of the current regulations, respectively.)

To further clarify and maintain the proper focus of affirmative action in the contract compliance program, OFCCP periodically issued supplemental guidance and instructions explaining the difference between permissible goals, on the one hand, and unlawful preferences, on the other. The latest such guidance is contained in an OFCCP Administrative Notice entitled "Numerical Goals under Executive Order 11246," which was issued in December 1995. The Administrative Notice reiterates a number of critical points about goals, including the following:

- The goals component of the AAP is not designed to be, nor may it properly or lawfully be interpreted as, permitting unlawful preferential treatment and quotas with respect to persons of any race, color, religion, sex, or national origin.

- Goals are neither quotas, set-asides, nor a device to achieve proportional representation or equal results; rather, the goal-setting process is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent barriers to equal employment opportunity.

- Goals under Executive Order 11246, as amended, do not require that any specific position be filled by a person of a particular gender, race, or ethnicity; instead, the requirement is that contractors engage in outreach and other efforts to broaden the pool of qualified candidates to include minorities and women.

- The use of goals is consistent with principles of merit, because goals do not require an employer to hire a person who does not have the qualifications needed to perform the job successfully, hire an unqualified person in preference to another applicant who is qualified, or hire a less qualified person in preference to a more qualified person.

- Goals may not be treated as a ceiling or a floor for the employment of members of particular groups.

- A contractor's compliance is measured by whether it has made good faith efforts to meet its goals, and failure to meet goals, by itself, is not a violation of the Executive Order.

Against this backdrop, OFCCP today proposes to revise its regulation on the establishment of goals by contractors. Goal setting currently is addressed in § 60-2.12; today's proposal would move the goals provision to § 60-2.16, and would revise the section to provide additional clarity on how to set goals and guidance regarding the use of goals. The substance of current § 60-2.30 also is included in this section.

Under the existing regulations, after determining that there is underutilization of minorities or women in a specific job group, the contractor must establish goals. Existing §§ 60-2.10 and 60-2.12 refer to "goals and timetables" to which a contractor's "good faith efforts" must be directed to correct deficiencies in the utilization of minorities or women.

The current regulation provides general guidance regarding the establishment of goals. For instance, contractors are required to consider the availability of minorities or women for the job group as revealed by the requisite utilization analysis. Additionally, the current regulation provides that "goals may not be rigid and inflexible quotas which must be met, but must be goals reasonably attainable by means of applying every good faith effort * * *." However, the regulation does not further define the term "goals," nor explain how they should be set.

In order to clarify that AAPs (including goals) involve annual planning, which accounts for changes in the contractor's business, proposed § 60-2.16(c) would require the contractor to establish a "percentage annual placement goal" for a particular job group. Thus, under proposed § 60-2.16, the concept of "timetables" would not be retained because it implies a requirement of multi-year or ultimate goals.

Further, proposed paragraph (c) would require the contractor to set goals at a level "at least equal to the availability figure" derived for minorities or women for the job group at issue. Proposed paragraph (c) is not a new requirement; it is consistent with OFCCP's current practice. To illustrate: If pursuant to § 60-2.14 the contractor determined that the availability of women for employment in a particular job group was 17.3 percent, the contractor would set a goal to place women, during the current AAP year, in

(at least) 17.3 percent of the openings in that job group.

The focus on annual planning and the concomitant deletion of timetables in the proposal should not be misunderstood to mean that a contractor must fully resolve all differences between availability and actual utilization within the current AAP year. In many cases (for instance, few hiring opportunities during the year), it would be mathematically impossible to bridge that gap in such a short time. More important, however, is that compliance, as in the past, always is measured by good faith effort, and not by the achievement of a particular numerical result.

The proposal would considerably strengthen existing language so as to reaffirm that goals prescribed by the regulations implementing Executive Order 11246, as amended, are not to be used as quotas which must be achieved through gender-, race-, or ethnicity-based preferences. Although OFCCP does not consider it necessary to repeat verbatim in the regulations the principles set forth in its December 1995 policy statement, the proposed rule is intended to reflect those concepts. The proposed regulation would set forth the principles that govern the establishment and use of placement goals. Specifically, proposed paragraph (e) states that: (1) Quotas are expressly forbidden and that goals are neither a floor nor ceiling for the employment of particular groups; (2) employment selection decisions must be made in a nondiscriminatory manner, and that placement goals do not provide a contractor justification to extend a preference to any individual, select an individual, or to adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin; (3) placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results; and (4) placement goals may not be used to supersede merit principles.

Proposed paragraph (f) states that contractors extending an authorized preference for American Indians living on or near a reservation, may reflect such a preference in their placement goals. This provision appears at § 60-2.12(j) of the current regulations. We have added the adjective "American" when referring to Indians.

Section 60-2.17 Additional Required Elements of Affirmative Action Programs

The preceding sections of the regulations have focused primarily on the diagnostic component of AAPs—the

statistical analyses of the contractor's workforce to identify equal employment opportunity problems. However, meaningful affirmative action also requires that the contractor develop and carry out action-oriented programs to eliminate the identified problems, and establish procedures for monitoring its employment activities to determine whether the AAP is effective.

The current regulations address the action-oriented and evaluative components of AAPs in a section designated "Additional required ingredients of affirmative action programs." The current regulation appears at § 60-2.13. OFCCP proposes to eliminate a number of elements that no longer need to be specifically and separately set forth in regulatory form. The remaining provisions would be moved to § 60-2.17 and would be renamed "Additional required elements of affirmative action programs." Although OFCCP is eliminating these provisions from the mandatory requirements of the AAP, the contractor may voluntarily choose to retain these elements in its program.

First, OFCCP proposes to delete as specific required elements the following items:

- § 60-2.13(a)—reaffirmation of the contractor's EEO policy in all personnel matters;
- § 60-2.13(b)—formal internal and external dissemination of the contractor's EEO policy;
- § 60-2.13(e)—establishment of goals and objectives by organizational units and job groups, including timetables for completion;
- § 60-2.13(i)—active support of local and national community action programs and community service programs; and
- § 60-2.13(j)—consideration of minorities and women not currently in the workforce having requisite skills.

Effective affirmative action is not a rote, or follow-the-numbers, exercise. As was suggested during the consultation process, overly prescriptive requirements sometimes lead to contractors simply going through the motions, and not really working to achieve affirmative action. Instead, effective affirmative action is intensely situation specific. The contractor must assess its individual circumstances—for example, the types of equal employment opportunity problems in evidence, how the problems developed, previous efforts to address the problems, and the types of resources available to the contractor—and devise mechanisms and programs to address those particular circumstances.

In addition, OFCCP is proposing the deletion of § 60–2.13(h)—compliance of personnel policies and practices with the Sex Discrimination Guidelines (41 CFR Part 60–20). The Sex Discrimination Guidelines are an independent regulatory requirement to which contractors are subject, regardless of whether the Guidelines are mentioned as “additional required elements.” Eliminating redundancy by not referencing the Guidelines in proposed § 60–2.17, therefore, would in no way affect the contractor’s obligation to comply with the Guidelines nor OFCCP’s commitment to enforcing the Guidelines.

The proposed rule would retain four of the original 10 “additional required ingredients.” OFCCP intends that these remaining items capture the essence of effective affirmative action, including subsuming many aspects of the specific “ingredients” proposed to be deleted. They should energize and encourage contractors to improve upon and eliminate any weaknesses in their equal employment opportunity performance. The following elements in the current § 60–2.13 would be retained:

- § 60–2.13(c)—establishment of responsibilities for implementation of the contractor’s AAP (to be codified as § 60–2.17(a));
- § 60–2.13(d)—identification of problems areas by organizational units and job groups (to be codified as § 60–2.17(b));
- § 60–2.13(f)—development and execution of action-oriented programs designed to eliminate problems and further designed to attain established goals and objectives (to be codified as § 60–2.17(c)); and
- § 60–2.13(g)—design and implementation of internal audit and reporting systems to measure effectiveness of the total program (to be codified as § 60–2.17(d)).

The “required ingredients” that would be retained in the proposed rule have been rewritten to enhance clarity. OFCCP is soliciting comments concerning the proposed deletion and retention of the additional required elements of the AAP. In addition, OFCCP proposes to modify the provision in § 60–2.13(c) of the current regulations (proposed § 60–2.17(a)) concerning the “establishment of responsibilities for implementation of the contractor’s affirmative action program.” This proposed modification is derived from § 60–2.22(a) of the current regulations, which recommends, but does not require, that the contractor assign an executive as director or manager of company equal opportunity programs and give that person the

management support and staffing to carry out the assignment. The revised provision would expressly require that the contractor provide for the implementation of the affirmative action program by assigning responsibility and accountability to a company official. However, the official is not required to be an executive of the company.

OFCCP believes that responsibility and accountability are essential to an effective affirmative action program. Affirmative action programs are not self-executing; an official in the contractor’s organization must be responsible for the development of the affirmative action program. Moreover, the official must be held responsible for the program’s implementation and accountable for results. Accordingly, OFCCP proposes to make this provision mandatory.

Section 60–2.18 Equal Opportunity Survey

Proposed § 60–2.18 would require that nonconstruction contractor establishments designated by OFCCP prepare and file an Equal Opportunity Survey. The Equal Opportunity Survey contains information about personnel activities and compensation concerning minorities and women, and the contractor’s affirmative action programs. Contractors are already required to maintain information necessary for completing the Survey, although not in the precise format called for by the Survey instrument.

This proposal codifies the Equal Opportunity Survey which has been under development since March 1999, with the assistance of other DOL agencies. During the initial development stage there were also discussions with OMB, and meetings with contractors and contractor representatives, civil rights groups, and women’s groups. The Survey was also field tested beginning in August 1999.

The data reported in the Survey will 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. In addition, the Survey will streamline the compliance evaluation process by enabling OFCCP to obtain compliance information earlier in the process. This should also alleviate any potential undue burden on contractors under review by allowing more focused compliance evaluations. Finally, the Survey requirement is expected to 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. OFCCP expects that the heightened awareness of performance, along with increased monitoring presence, will improve the level of compliance.

The proposal establishes as a base standard that OFCCP will require a substantial portion of all nonconstruction contractor establishments to submit the Survey each year. At this time, OFCCP contemplates sending the Survey to no less than 50% of all nonconstruction contractor establishments each year, which is the minimum number we consider necessary in order for the Survey to be a credible evaluation method. Although other models may be used, the most likely initial scenario is that OFCCP will require most contractor establishments to submit the Survey biennially, with approximately one half of all establishments submitting the Survey each year. This approach would enable OFCCP to obtain at least minimal information about the entire contractor universe every two years. Although the large majority of establishments will be required to submit the Survey only once every two years, OFCCP might also require additional Survey responses in special situations, including, but are not limited to: (1) annual follow-up on establishments that are not selected for compliance evaluation but whose survey responses indicate potential equal employment problems; and (2) one-time monitoring of all establishments in a particular industry that is suspected of having industry-wide equal employment problems. We do not contemplate requiring any establishment to submit the Survey more than once in a year. OFCCP is considering whether to include in the final rule codification of the “50% of nonconstruction establishments” floor mentioned in this Preamble.

Proposed paragraph (b) provides that the Survey must be prepared in accordance with the format specified by the Deputy Assistant Secretary. The paragraph further stipulates that the Survey will include information that will allow for an accurate assessment of contractor personnel activities, pay practices, and affirmative action performance. This may include data elements such as applicants, hires, promotions, terminations, and compensation by race and gender.

Proposed paragraph (c) describes how, when, and where contractors must file the Equal Opportunity Survey. Contractors are encouraged to file the

Survey in electronic format. Submission in electronic format should result in savings for many contractors. It also will greatly expedite OFCCP's receipt and analysis of submitted data. Contractors also may mail or fax the Survey to OFCCP.

A recurring concern of contractors is that information submitted to OFCCP may be disclosed to competitors or the public under the Freedom of Information Act (FOIA). Proposed paragraph (d) states that OFCCP will treat information contained in the Equal Opportunity Survey as confidential to the maximum extent the information is exempt from public disclosure under FOIA. OFCCP explains in proposed paragraph (d) that its practice is not to release data where the contractor still is in business and where the contractor asserts, and through the Department of Labor review process it is determined, that the data are confidential and that disclosure would subject the contractor to commercial harm.

The Equal Opportunity Survey will require no additional recordkeeping on the part of a contractor. Current regulations already require a contractor to keep the information needed to complete the EO Survey.

Subpart C—Miscellaneous

Subpart C of the current regulations contains suggested methods for implementing the required ingredients of AAPs. For instance, current § 60–2.21 suggests steps that a contractor may take to disseminate its equal employment opportunity policy, both within the organization and externally. Section 60–2.22 suggests appropriate responsibilities for a corporate manager of equal opportunity programs. Although the provisions of Subpart C are intended to be advisory only, they frequently are confused as being mandatory. OFCCP is aware also that conflicts develop between compliance officers and contractors as to whether certain portions of Subpart C should be implemented. Some of the guidance also has been criticized as being outdated.

The proposal would remove the contents of current Subpart C from the regulations. As is discussed above with respect to proposed § 60–2.17, one goal of the proposal is to state the essence of an AAP, without binding contractors into prescriptive, one-size-fits-all solutions that may, at times, prove counterproductive to the objective of enhancing opportunity. OFCCP recognizes, however, that much of the information contained in current Subpart C is of value to many contractors. Accordingly, while the proposal would remove the provisions

from the regulations, the agency intends to incorporate suggestions for implementing affirmative action programs in a technical assistance manual for contractors.

The proposal would substitute for current Subpart C, a new Subpart C containing miscellaneous items. In current Subpart D (Miscellaneous), sections 2.31 (Preemption) and 2.32 (Supersedure) would move to proposed Subpart C in a modified form. The remainder of current Subpart D would be eliminated.

Section 60–2.30 Corporate Management Compliance Evaluations

OFCCP pioneered the concept of corporate management—or “glass ceiling”—compliance reviews almost ten years ago. This proposed new section draws upon OFCCP's experience in conducting glass ceiling reviews, addressing several issues that are unique to the corporate management environment.

Proposed paragraph (a) briefly explains the purpose of corporate management compliance evaluations—to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management positions. The term “compliance evaluation” is used in the proposed regulation to clarify that the agency may use any of the methods authorized under § 60–1.20, *i.e.*, compliance review, off-site review of records, compliance check and focused review, to investigate the employment practices at a corporate headquarters facility.

Proposed paragraph (b) provides that OFCCP may expand the scope of a corporate management compliance evaluation beyond a company's headquarters establishment, if, during the course of a compliance evaluation, it comes to OFCCP's attention that compliance problems exist at other locations. This provision codifies longstanding OFCCP policy and practice concerning the appropriate scope of corporate management evaluations. The basic policy is stated in OFCCP's compliance manual, which provides that corporate management reviews may include analysis of positions at lower-level establishments, *i.e.*, “feeder pools” from which selections for management positions at the headquarters establishment may be made. *See* Federal Contract Compliance Manual, Section 5A04.

The regulation currently at § 60–2.30 (Use of goals) would be eliminated with its substance included in proposed § 60–2.16 Placement goals.

In addition, OFCCP is considering including in the regulatory text a number of approaches we have found to be particularly effective in addressing glass ceiling problems. These approaches are drawn from OFCCP's report, “The Glass Ceiling Initiative: Are There Cracks in the Ceiling?” (June 1997). The approaches are the following:

(1) commitment of top management to equal employment opportunity and affirmative action principles;

(2) development of a system to identify high potential minority and female employees and track their progress;

(3) management development programs, including early identification of senior management potential, developmental assignments, and special training opportunities;

(4) succession planning, designed to identify and develop employees with management or executive potential so that individuals are trained and prepared to assume greater responsibility as opportunities arise;

(5) mentoring programs;

(6) active recruitment at colleges and universities with predominantly minority or female enrollment;

(7) monitoring equal employment opportunity performance and reporting it to the Chief Executive Officer on a regular basis to ensure maximum accountability; and

(8) making equal employment opportunity performance an evaluation factor for top level managers.

OFCCP is soliciting comments concerning whether this list of approaches should be included in the regulations or in subregulatory guidance only.

Section 60–2.31 Program Summary

The regulation currently at § 60–2.14 (Program summary) would be redesignated at § 60–2.31. In addition, the regulation would be revised to make one technical change—to substitute the title “Deputy Assistant Secretary” for “Director.” Pursuant to the authority set forth in 5 U.S.C. 552(b)(3)(a), which allows Federal agencies to alter “rules of agency organization, procedure, or practice” without notice and comment, OFCCP is not accepting comments on this regulation. OFCCP intends to replace the program summary requirements at some point in the future should it be found to be duplicative of the Equal Opportunity Survey.

Section 60–2.32 Affirmative Action Records

The proposed regulation would add a provision specifying that the contractor

must make relevant records, including records maintained pursuant to §§ 60–1.12 and 2.10, available to OFCCP on request. This provision is derived from the last sentence of § 60–1.40(c) of the current regulations. It is designed to ensure that OFCCP will have access to the records it needs to ascertain a contractor's compliance with its obligations under part 60–2.

Section 60–2.33 Preemption

OFCCP intends to move this provision from § 60–2.31 in the current regulations to § 60–2.33 without alteration, except for several technical wording changes. Pursuant to the authority set forth in 5 U.S.C. 552(b)(3)(A), which allows Federal agencies to alter “rules of agency organization, procedure, or practice” without notice and comment, OFCCP is not accepting comments on this regulation.

Section 60–2.34 Supersedure

This provision would be moved from § 60–2.32 in the current regulations to § 60–2.34. OFCCP proposes to retain the first sentence of this section essentially as it appears in the current regulations. The second sentence, which references an old version of “Order No. 4” (a precursor to the part 60–2 regulations), and the third sentence, which states that nothing in part 60–2 is intended to amend parts 60–3 and 60–20, are omitted as outdated and unnecessary at this time.

Section 60–2.35 Compliance Status

This section would expand upon and restructure a provision that appears at § 60–2.15 of the current regulations. The new section would begin, as does the current rule, with the assurance that no contractor's compliance status will be judged alone by whether the contractor reaches its goals.

Consistent with the proposal contained in § 60–2.16 above, we would remove from this section the existing reference to “timetables.” We propose to further reinforce this point by adding a new sentence that restates OFCCP's longstanding position that the composition of the contractor's workforce does not, by itself, serve as the basis for imposing sanctions.

The remainder of the section would address, in turn, compliance with affirmative action and nondiscrimination obligations. A sentence on affirmative action obligations would be similar to the second sentence of the current regulation, stating that a contractor's compliance status will be determined by the entirety of its affirmative action

activities and good faith efforts. A sentence on compliance with nondiscrimination obligations would recite that a contractor's compliance status will be determined by analysis of statistical data and other non-statistical information that would indicate whether employees and applicants are being treated without regard to their race, color, religion, sex, or national origin. Examples of nonstatistical information are collective bargaining agreements, company policy statements, and training notices.

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 the Office of Management and Budget. This proposal meets 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 contained in the Paperwork Reduction Act Section below. The proposed changes to the regulations in this NPRM will decrease the total estimated annualized cost to contractors of developing, updating, and maintaining an AAP by \$147,950,698. The estimated average cost savings per establishment of developing, updating, and maintaining an AAP is \$1378. See Paperwork Reduction Act section below.

Executive Order 13132

OFCCP has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” The 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.”

Regulatory Flexibility Act

The proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small business entities.

The proposals to eliminate the workforce analysis requirement and instead require an organizational profile, to allow smaller contractors to use EEO–1 categories for their job groups, to reduce the number of factors that must be considered to determine the availability of women and minorities from eight to two, and to

eliminate more than half of the additional required ingredients of the documentation of the AAP will reduce costs associated with these provisions for all covered contractors. The proposal to require an Equal Opportunity Survey will increase costs, but the overall result of the proposed rule should be a reduction in the recordkeeping and reporting burden.

Thus, the Department concludes that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12875, the proposed rule, if promulgated, will not include any Federal mandate that may result in increased expenditures by state, local, and tribal governments, or increased expenditures by the private sector, of \$100,000,000 or more in any one year.

Paperwork Reduction Act

This proposed rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. The proposed rule would revise regulations which contain information collection requirements which are currently approved under OMB No. 1215–0072. The proposal includes a new requirement, the Equal Opportunity Survey, which was reviewed and approved by OMB under OMB No. 1215–0196. The title and description of the information collections are shown below with an estimate of the effect the revised requirements would have on the recordkeeping hours contained in the approved 1215–0072 on file at OMB.

The six information collections discussed below relate to Federal nonconstruction contractor and subcontractor responsibilities under Executive Order 11246, as amended, and its implementing regulations at 41 CFR parts 60–1 and 60–2. Five of these collections are revisions of current methods and procedures used in developing and implementing an AAP. The sixth collection relates to the proposed annual Equal Opportunity Survey. The AAP is updated annually by the contractor.

OFCCP invites the public to comment on whether each of the proposed

collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes 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).

Title: 41 CFR 60-1.12 Record Retention

Description: The proposed rule would amend the record retention provisions in § 60-1.12(c) to add a requirement that contractors be able to identify the gender, race, and ethnicity of employees and applicants in any record the contractors maintain pursuant to this section, and submit this information to OFCCP on request. This proposal, it is estimated, would increase the burden of developing, maintaining, and updating an AAP by 5 percent.

Title: 41 CFR 60-2.11 Organizational Profile

Description: This proposed rule would replace the current portion of 41 CFR 60-2.11(a) which describes the method to be used in developing a workforce analysis. The current rule requires a listing of job titles (not job groups) ranked from the lowest paid to highest paid within each department or similar organizational unit and the race and sex of incumbents. The proposal would not require listings of job titles, with the exception of supervisors; instead, the contractor would include in its AAP an organizational profile which shows each of the work units and their relationships to one another, and the gender, race, and ethnic composition of each work unit. In most cases, a contractor should be able to use its existing organizational chart as the core for its organizational profile. This proposal, it is estimated, would reduce the burden of developing, maintaining, and updating an AAP by 20 percent.

Title: 41 CFR 60-2.12 Job Group Analysis

Description: For larger contractors, the proposed rule would continue the current practice of grouping jobs by similarity of content, wage rates, and opportunities. Thus, for contractors with 150 or more employees there would be no change from the current regulation. For contractors with fewer than 150 employees, the proposal permits the use of the nine occupational groups used in the EEO-1 report rather than requiring such contractors to develop specific job groups. Many of these contractors are already grouping their employees this way for the annual EEO-1 report and the proposal would relieve them of any additional grouping analysis. This proposal, it is estimated, would decrease the burden of developing, maintaining, and updating an AAP by 10 percent for smaller contractors.

Title: 41 CFR 60-2.14 Determining Availability

Description: This proposed rule would replace the current portion of 41 CFR 60-2.11(b) which describes the method of determining the availability of minorities or women for each job group. The present method requires the contractor to assess each of eight factors, separately for minorities and women, to determine the availability for each job group. The proposal would reduce the number of factors to two. This proposal, it is estimated, would reduce the burden of developing, maintaining, and updating an AAP by 10 percent.

Title: 41 CFR 60-2.17 Additional Required Elements of Affirmative Action Programs

Description: The proposed rule would replace the current 41 CFR 60-2.13 which lists 10 required additional ingredients of affirmative action programs. The proposed rule would retain four of the items, some rewritten to enhance clarity, and one of which is modified slightly. OFCCP believes that these changes would reduce the burden of developing, maintaining, and updating an AAP by an estimated 20 percent.

Title: 41 CFR 60-2.18 Equal Opportunity Survey

Description: This proposal would require contractors to submit

Affirmative Action Program, Personnel Activity, and Compensation Data information to OFCCP. The information required for the Equal Opportunity Survey would be drawn from the records required to be retained by 41 CFR part 60. The Equal Opportunity Survey would not impose any new recordkeeping requirements. The Equal Opportunity Survey was reviewed and approved by OMB under OMB No. 1215-0196. The format would be available from OFCCP in electronic form. The Equal Opportunity Survey would provide contractors with an economical means of assessing their affirmative action efforts and provide OFCCP with an improved basis for compliance evaluations. This proposal, it is estimated, would increase burden by 12 hours per respondent or 720,000 hours for the current estimate of 60,000 respondents (see **Federal Register** Notices 64 FR 54056 (October 5, 1999) and 65 FR 5689 (February 4, 2000)).

Description of respondents: Nonconstruction Contractors and Subcontractors Subject to the Requirements of 41 CFR 60-1.40

These estimates are an approximation of the average time expected to be necessary to accomplish the desired results. The personnel information being recorded and included in the AAP is currently available during the normal course of business. Estimated operating and maintenance costs are included below.

OFCCP seeks comments on these estimates.

The contractors subject to these proposed regulations are currently covered by the approved information collection request on file with OMB under No. 1215-0072. That document represents information collection requirements for 89,807 establishments which, on average, expend approximately 150 hours each on developing, maintaining, and updating the AAP.

At this time, OFCCP records indicate that the number of establishments has increased from approximately 89,807 to 107,414. Application of the estimated changes in burden hours discussed above for §§ 60-1.12, 60-2.11, 60-2.12, 60-2.14, and 60-2.17 results in the following burden estimates as compared with the current inventory under 1215-0072.

BURDEN CHANGE SUMMARY

	Current inventory	Current inventory adjusted for # of firms	Revised estimate	Changes
AAP Development	161,155	192,750	99,624	- 93,126
AAP Updating	6,658,288	7,963,670	4,391,335	- 3,572,335
AAP Maintenance	6,725,543	8,044,110	4,435,692	- 3,608,418
Total Recordkeeping Burden	13,544,986	16,200,530	8,926,651	- 7,273,879
Average hours per respondent	@150	@150	@83	

Section 60-2.18 requires contractors to submit an Equal Opportunity Survey to OFCCP. The information required for the Survey would come from the records contractors are required to retain by 41 CFR Part 60. The Survey would not impose any new recordkeeping requirements. Although we estimate that this proposal would increase burden by 12 hours per respondent, these burden hours are not included in this NPRM. OFCCP has already included the Survey burden hours in a previous submission to OMB. See Federal Register Notices 64 FR 54056 (October 5, 1999) and 65 FR 5689 (February 4, 2000).

The estimated annualized cost to respondents is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (USDL: 99-173), which lists total compensation for executive, administrative, and managerial as \$35.18 per hour and administrative support as \$16.63 per hour. OFCCP estimates that 20 percent of the burden hours will be executive, administrative, and managerial and 80 percent will be administrative support. We have calculated the total estimated annualized cost as follows:

Executive 7,273,879 × .20 × \$35.18 = \$51,179,012
 Admin. Supp. 7,273,879 × .80 × \$16.63 = \$96,771,686
 Total annualized cost savings estimate = \$147,950,698
 Estimated average cost savings per establishment is: \$147,950,698 / 107,414 = \$1,378

OFCCP estimates that contractors will have some operations and maintenance cost associated with this collection. For Supply & Service compliance evaluations, contractors copy their AAPs and mail the AAPs to OFCCP. We estimate an average copying cost of 8 cents per page. Under the proposed regulations, the size of an AAP will decrease, on average, by 85.5%, from 150 pages to 22 pages. This decrease is associated with a reduction in burden hours. The estimated total copying cost to contractors will be: 22 pages × \$0.08

× 2762 = \$4861. In addition, we estimate an average mailing cost of \$5.00 per contractor. The total mailing cost for contractors will be \$5 × 2762 = \$13,810.

A copy of this proposed rule has been submitted to OMB for its review and approval of these information collections. Interested persons are requested to send comments regarding this information collection, including suggestions for reducing this burden, to the Office of Information and Regulatory Affairs, OMB, New Executive Office Building, 725 17th Street NW, Room 10235, Washington, DC 20503, Attention: Desk Officer for DOL/ESA.

List of Subjects in 41 CFR Parts 60-1 and 60-2

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

Signed at Washington, DC, this 28th day of April 2000.

Alexis M. Herman,
Secretary of Labor.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, part 60-2 of the rule amending 41 CFR Chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely on August 25, 1981 (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 withdrawn in its entirety; and parts 60-1 and 60-2 of Title 41 of the Code of Federal Regulations are proposed to be amended as follows.

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

1. 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. 11375 (32 FR 14303) and E.O. 12086 (43 FR 46501).

1a. In § 60-1.12, paragraph (b) is revised to read as follows:

§ 60-1.12 Record retention.

* * * * *

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

* * * * *

2. In § 60-1.12, paragraphs (c) and (d) are redesignated as paragraphs (d) and (e), respectively, and the first sentence of newly redesignated paragraph (d) is revised to read as follows:

§ 60-1.12 Record retention.

* * * * *

(d) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraphs (a) through (c) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this part. * * *

* * * * *

3. In § 60-1.12, a new paragraph (c) is added to read as follows:

§ 60-1.12 Record retention.

* * * * *

(c)(1) In any record the contractor maintains pursuant to this section, the contractor must be able to identify:

(i) The gender, race, and ethnicity of each employee; and

(ii) Where possible, the gender, race, and ethnicity of each applicant.

(2) The contractor must supply this information to the Office of Federal Contract Compliance Programs upon request.

* * * * *

4. Section 60-1.40 is revised to read as follows:

§ 60-1.40 Affirmative action programs.

(a) Each nonconstruction contractor that has 50 or more employees and has a contract of \$50,000 or more; or has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more; or serves as a depository of Government funds in any amount; or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, must develop and maintain an affirmative action program for each of its establishments.

Each contractor and subcontractor must require each nonconstruction subcontractor that has 50 or more employees and has a subcontract of \$50,000 or more; or has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more; or serves as a depository of Government funds in any amount; or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, to develop and maintain an affirmative action program for each of its establishments.

(b) Nonconstruction contractors should refer to part 60-2 of this chapter for specific affirmative action requirements. Construction contractors should refer to part 60-4 of this chapter for specific affirmative action requirements.

5. Part 60-2 is revised to read as follows:

PART 60-2—AFFIRMATIVE ACTION PROGRAMS**Subpart A—General**

Sec.

60-2.1 Scope and application.

60-2.2 Agency action.

Subpart B—Purpose and Contents of Affirmative Action Programs

60-2.10 General purpose and contents of affirmative action programs.

60-2.11 Organizational profile.

60-2.12 Job group analysis.

60-2.13 Placement of incumbents in job groups.

60-2.14 Determining availability.

60-2.15 Comparing incumbency to availability.

60-2.16 Placement goals.

60-2.17 Additional required elements of affirmative action programs.

60-2.18 Equal Opportunity Survey.

Subpart C—Miscellaneous

60-2.30 Corporate management compliance evaluations.

60-2.31 Program summary.

60-2.32 Affirmative action records.

60-2.33 Preemption.

60-2.34 Supersedure.

60-2.35 Compliance status.

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

Subpart A—General**§ 60-2.1 Scope and application.**

(a) *General.* The requirements of this part apply to nonconstruction contractors. The regulations prescribe the contents of affirmative action programs, standards and procedures for evaluating the compliance of affirmative action programs implemented pursuant to this part, and related matters.

(b) *Who must develop affirmative action programs.* Each nonconstruction contractor that has 50 or more employees and has a contract of \$50,000 or more; or has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more; or serves as a depository of Government funds in any amount; or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, must develop and maintain an affirmative action program for each of its establishments.

Each contractor and subcontractor must require each nonconstruction subcontractor that has 50 or more employees and has a subcontract of \$50,000 or more; or has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more; or serves as a depository of Government funds in any amount; or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, to develop and maintain an affirmative action program for each of its establishments.

(c) *When affirmative action programs must be developed.* The affirmative action programs required under paragraph (b) of this section must be developed within 120 days from the commencement of a contract and must be updated annually.

(d) *Who is included in affirmative action programs.* Contractors subject to the affirmative action program requirements must develop and maintain an affirmative action program for each of their establishments. Each employee in the contractor's workforce must be included in an affirmative action program. Each employee must be included in the affirmative action program of the establishment at which he or she works, except that:

(1) Employees who perform their normal and customary duties at locations other than that of the manager to whom they report, must be included in the affirmative action program of their manager.

(2) Employees who work at an establishment where the contractor employs fewer than 50 employees, may be included under any of the following three options: in an affirmative action program which covers just that establishment; in the affirmative action program which covers the location of the personnel function which supports the establishment; or, in the affirmative action program which covers the location of the official to whom they report.

(3) Employees for whom selection decisions are made at a higher level establishment within the organization must be included in the affirmative action program of the establishment where the selection decision is made.

(e) *How to identify employees included in affirmative action programs other than where they are located.* If pursuant to paragraph (d) of this section employees are included in an affirmative action program for a location other than the one in which the employees are located, the organizational profile and job group analysis of the affirmative action program in which the employees are included must be annotated to identify the actual location of such employees. If the establishment at which the employees actually are located maintains an affirmative action program, the organizational profile and job group analysis of that program must be annotated to identify the program in which the employees are included.

§ 60-2.2 Agency action.

(a) Any contractor required by § 60-2.1 of this chapter to develop and maintain an affirmative action program for each of its establishments that has not complied with that section is not in full compliance with Executive Order 11246, as amended. When a contractor is required to submit its affirmative action program to OFCCP (e.g., for a compliance evaluation), the affirmative action program will be deemed to have been accepted by the Government at the time OFCCP notifies the contractor of completion of the compliance evaluation or other action, unless within 45 days thereafter the Deputy Assistant Secretary has disapproved such program.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his/her agency or through the OFCCP or other Government agencies, that the contractor does not have an affirmative action program at each of its establishments, or has substantially deviated from such an approved

affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer must declare the contractor/bidder nonresponsible and so notify the contractor and the Deputy Assistant Secretary, unless the contracting officer otherwise affirmatively determines that the contractor is able to comply with the equal employment obligations.

Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Deputy Assistant Secretary to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request must set forth the basis upon which the contractor/bidder seeks such a determination.

If the Deputy Assistant Secretary, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60–1.26; or the Deputy Assistant Secretary may require the investigation or compliance evaluation be developed further or additional conciliation be conducted: Provided, That during any pre-award conferences, every effort will be made through the processes of conciliation, mediation, and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in this part so that, in the performance of the contract, the contractor is able to meet its equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: Provided further, That a contractor/bidder may not be declared nonresponsible more than twice due to past noncompliance with the equal opportunity clause at a particular establishment or facility without receiving prior notice and an opportunity for a hearing.

Subpart B—Purpose and Contents of Affirmative Action Programs

§ 60–2.10 General purpose and contents of affirmative action programs.

(a) *Purpose.* (1) An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects.

Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools.

Affirmative action programs also include action-oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination.

(2) An affirmative action program also ensures equal employment opportunity by institutionalizing the contractor's commitment to equality in every aspect of the employment process. Therefore, as part of its affirmative action program, a contractor monitors and examines its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.

(3) An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination.

(b) *Contents of affirmative action programs.* (1) An affirmative action program must include the following quantitative analyses:

- (i) Organizational profile § 60–2.11;
- (ii) Job group analysis § 60–2.12;
- (iii) Placement of incumbents in job groups § 60–2.13;
- (iv) Determining availability § 60–2.14;
- (v) Comparing incumbency to availability § 60–2.15; and
- (vi) Placement goals § 60–2.16.

(2) In addition, an affirmative action program must include the following components specified in the § 60–2.17 of this part:

- (i) Designation of responsibility for implementation;
- (ii) Identification of problem areas;
- (iii) Action-oriented programs; and
- (iv) Periodic internal audits.

(c) *Documentation.* Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60–2.11 through 60–2.17.

§ 60–2.11 Organizational profile.

(a) *Purpose.* An organizational profile is a snapshot of the staffing pattern within an establishment. It is one method contractors use to determine whether barriers to equal employment opportunity exist in their organizations. The profile provides an overview of the workforce at the establishment that may assist in identifying organizational units where women or minorities are underrepresented or concentrated.

(b)(1) An organizational profile is a detailed organizational chart or similar graphical presentation of the contractor's organizational structure. The profile must identify each organizational unit in the establishment, and show the relationship of each organizational unit to the other organizational units in the establishment.

(2) An organizational unit is any component that is part of the contractor's corporate structure. In a more traditional organization, an organizational unit might be a department, division, section, branch, group or similar component. In a less traditional organization, an organizational unit might be a project team, job family, or similar component. The term includes an umbrella unit (such as a department) that contains a number of subordinate units, and it separately includes each of the subordinate units (such as sections or branches).

(c) For each organizational unit, the organizational profile must indicate the following:

- (1) The name of the unit;
- (2) The job title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor);
- (3) The total number of male and female incumbents; and
- (4) The total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.

§ 60–2.12 Job group analysis.

(a) *Purpose.* A job group analysis is a method of combining job titles within the contractor's establishment. This is the first step in the contractor's comparison of the representation of

minorities and women in its workforce with the estimated availability of minorities and women qualified to be employed.

(b) In the job group analysis, jobs at the establishment with similar content, wage rates, and opportunities, must be combined to form job groups. Similarity of content refers to the duties and responsibilities of the job titles which make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay mobility, and other career enhancement opportunities offered by the jobs within the job group.

(c) The job group analysis must include a list of the job titles that comprise each job group. If, pursuant to §§ 60–2.1(d) and (e) the job group analysis contains jobs that are located at another establishment, the job group analysis must be annotated to identify the actual location of those jobs. If the establishment at which the jobs actually are located maintains an affirmative action program, the job group analysis of that program must be annotated to identify the program in which the jobs are included.

(d) Except as provided in § 60–2.1(d), all jobs located at an establishment must be reported in the job group analysis of that establishment.

(e) *Smaller employers.* If a contractor has a total workforce of fewer than 150 employees, the contractor may prepare a job group analysis that utilizes EEO–1 categories as job groups. EEO–1 categories refers to the nine occupational groups used in the Standard Form 100, the Employer Information EEO–1 Survey: officials and managers, professionals, technicians, sales, office and clerical, craft workers (skilled), operatives (semiskilled), laborers (unskilled), and service workers.

§ 60–2.13 Placement of incumbents in job groups.

The contractor must separately state the percentage of minorities and the percentage of women it employs in each job group established pursuant to § 60–2.12.

§ 60–2.14 Determining availability.

(a) *Purpose.* Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can

be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups.

(b) The contractor must separately determine the availability of minorities and women for each job group.

(c) In determining availability, the contractor must consider at least the following factors:

(1) The percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question.

(2) The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization. Trainable refers to those employees within the contractor's organization who could, with appropriate training provided by the contractor, become promotable or transferable during the AAP year.

(d) The contractor must use the most current and discrete statistical information available to derive availability figures. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions.

(e) The contractor may not draw its reasonable recruitment area in such a way as to have the effect of excluding minorities or women. For each job group, the reasonable recruitment area must be identified, with a brief explanation of the rationale for selection of that recruitment area.

(f) The contractor may not define the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women. For each job group, the pool of promotable, transferable, and trainable employees must be identified with a brief explanation of the rationale for the selection of that pool.

(g) Where a job group is composed of job titles with different availability rates, a composite availability figure for the job group must be calculated. The contractor must separately determine the availability for each job title within the job group and must determine the proportion of job group incumbents employed in each job title. The contractor must weight the availability for each job title by the proportion of job group incumbents employed in that job group. The sum of the weighted availability estimates for all job titles in the job group must be the composite availability for the job group.

§ 60–2.15 Comparing incumbency to availability.

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to § 60–2.13 with the availability for those job groups determined pursuant to § 60–2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with § 60–2.16.

§ 60–2.16 Placement goals.

(a) *Purpose.* Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity.

(b) Placement goals must be designed to correct any identifiable deficiencies. A contractor's determination under § 60–2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination.

(c) Where, pursuant to § 60–2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group.

(d) The placement goal-setting process described above contemplates that contractors will, where required, establish a single goal for all minorities. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor may be required to establish separate goals for those groups.

(e) In establishing placement goals, the following principles also apply:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

(f) A contractor extending a publicly announced preference for American Indians as is authorized in 41 CFR 60-1.5(a)(6) may reflect in its placement goals the permissive employment preference for American Indians living on or near an Indian reservation.

§ 60-2.17 Additional required elements of affirmative action programs.

In addition to the elements required by § 60-2.10 through § 60-2.16, an acceptable affirmative action program must include the following:

(a) *Designation of responsibility.* The contractor must provide for the implementation of equal employment opportunity and the affirmative action program by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official's sole responsibility. He or she must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program.

(b) *Identification of problem areas.* The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

(1) The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (*i.e.*, employment in the unit or group), or of minority or female distribution (*i.e.*, placement in the different jobs within the unit or group);

(2) Personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;

(3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;

(4) Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and

(5) Any other areas that might impact the success of the affirmative action program.

(c) *Action-oriented programs.* The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60-2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

(d) *Internal audit and reporting system.* The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:

(1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;

(2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;

(3) Review report results with all levels of management; and

(4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

§ 60-2.18 Equal Opportunity Survey.

(a) *Survey requirement.* Each year, OFCCP will designate a substantial portion of all nonconstruction contractor establishments to prepare and file an Equal Opportunity Survey. OFCCP will notify those establishments required to prepare and file the Equal Opportunity Survey. The Survey will provide OFCCP compliance data early in the compliance evaluation process, thus allowing the agency to more effectively identify contractor establishments for further evaluation. The Survey will also provide contractors with a useful tool for self-evaluation.

(b) *Survey format.* The Equal Opportunity Survey must be prepared in accordance with the format specified by the Deputy Assistant Secretary. The Equal Opportunity Survey will include information that will allow for an accurate assessment of contractor personnel activities, pay practices, and affirmative action performance. This

may include data elements such as applicants, hires, promotions, terminations, and compensation by race and gender.

(c) *How, when, and where to file.* Contractors are encouraged to submit the Equal Opportunity Survey in electronic format, *i.e.*, a computerized version prepared in accordance with the requirements of this section. The Equal Opportunity Survey may be submitted in electronic format or via facsimile to the address indicated in the Survey instructions. Paper versions of the Equal Opportunity Survey must be mailed to the address indicated in the Survey instructions. The filing deadline will be specified by the Deputy Assistant Secretary.

(d) *Confidentiality.* OFCCP will treat information contained in the Equal Opportunity Survey as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

Subpart C—Miscellaneous

§ 60-2.30 Corporate management compliance evaluations.

(a) *Purpose.* Corporate Management Compliance Evaluations are designed to ascertain whether individuals are encountering artificial barriers to advancement into midlevel and senior corporate management, *i.e.*, glass ceiling. During Corporate Management Compliance Evaluations, special attention is given to those components of the employment process that affect advancement into mid- and senior-level positions.

(b) If, during the course of a Corporate Management Compliance Evaluation, it comes to the attention of OFCCP that problems exist at locations outside the corporate headquarters, OFCCP may expand the compliance evaluation beyond the headquarters establishment. At its discretion, OFCCP may direct its attention to and request relevant data for any and all areas within the corporation to ensure compliance with Executive Order 11246.

§ 60-2.31 Program summary.

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be

prescribed by the Deputy Assistant Secretary and published in the **Federal Register** as a notice before becoming effective. Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

§ 60-2.32 Affirmative action records.

The contractor must make available to the Office of Federal Contract Compliance Programs, upon request, records maintained pursuant to § 60-1.12 and written or otherwise documented portions of AAPs maintained pursuant to § 60-2.10 for such purposes as may be appropriate to the fulfillment of the agency's responsibilities under Executive Order 11246.

§ 60-2.33 Preemption.

To the extent that any state or local laws, regulations or ordinances,

including those that grant special benefits to persons on account of sex, are in conflict with Executive Order 11246, as amended, or with the requirements of this part, they will be regarded as preempted under the Executive Order.

§ 60-2.34 Supersedure.

All orders, instructions, regulations, and memorandums of the Secretary of Labor, other officials of the Department of Labor and contracting agencies are hereby superseded to the extent that they are inconsistent with this part 60-2.

§ 60-2.35 Compliance status.

No contractor's compliance status will be judged alone by whether it reaches its goals. The composition of the contractor's workforce (*i.e.*, the employment of minorities or women at a percentage rate below, or above, the goal level) does not, by itself, serve as

a basis to impose any of the sanctions authorized by Executive Order 11246 and the regulations in this chapter. Each contractor's compliance with its affirmative action obligations will be determined by reviewing the nature and extent of the contractor's good faith affirmative action activities as required under § 60-2.17, and the appropriateness of those activities to identified equal employment opportunity problems. Each contractor's compliance with its nondiscrimination obligations will be determined by analysis of statistical data and other non-statistical information which would indicate whether employees and applicants are being treated without regard to their race, color, religion, sex, or national origin.

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