DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1, 60–2

RIN 1215–AA01

Government Contractors, Affirmative Action Requirements

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

ACTION: Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is revising 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. The final rule will 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 rule will refocus the regulatory emphasis from the development of a 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 rule also will introduce a new tool, the Equal Opportunity Survey, that will aid contractors in assessing their pay and other personnel practices, while increasing the efficiency and effectiveness of program monitoring. OFCCP is encouraging contractors to file the Survey electronically.

The rule will help fulfill the Administration's Equal Pay Initiative to provide contractors with the necessary tools to assess and improve their pay policies. The rule also will 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, the final rule revising and restructuring 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.

EFFECTIVE DATES: These regulations are effective December 13, 2000.

FOR FURTHER INFORMATION CONTACT: James I. Melvin, Director, Division of Policy, Planning and Program Development, OFCCP, Room C–3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693–0102 (voice), (202) 693–1308 (TTY). Copies of this 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 rule also is available on the Internet at. *http://www.dol.gov/dol/esa*.

SUPPLEMENTARY INFORMATION:

Current Regulations and Rulemaking History

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 history, principles and concepts underlying the current blueprint for affirmative action under Executive Order 11246, as amended, were recounted in the notice of proposed rulemaking (NPRM), 65 FR 26088, published on May 4, 2000, and readers interested in that background information may refer to that discussion.

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 Affirmative Action Program (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.

On May 4, 2000, OFCCP published a proposed rule, 65 FR 26088, to revise specific regulations found at 41 CFR parts 60–1 and 60–2. The comment period closed on July 3, 2000. A total of 187 comments were received within the comment period from five contractor advocacy organizations; 137 labor, civil rights, and women's advocacy organizations and their individual members; four law firms that advise or represent contractors or contractor advocacy organizations; 14 contractors; 17 consulting firms; 9 civil rights and affirmative action officials of state and local governments and institutions of higher learning; and one Member of Congress. All the comments were reviewed and carefully considered in the development of this final rule.

The final rule revises the regulations at 41 CFR part 60–2, which address the content of AAPs. The rule also makes 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.

The rule also 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 rule published today, OFCCP hereby withdraws part 60–2 of the 1980 final rule. Additionally, consistent with the President's 1998 ''Plain Language'' Memorandum, OFCCP has replaced the word ''shall'' with ''must'' or ''will'' as appropriate to the context.

Overview of the Final Rule

The final rule, for the most part, adopts the revisions that were proposed in the May 4 NPRM. However, some of the proposed provisions have been modified in response to the public comments. The changes between the NPRM and the final rule are explained in detail in the Section-by-Section Analysis.

The discussion which follows identifies the significant comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed revisions.

Section-by-Section Analysis of Comments and Revisions

Section 60–1.12 Record Retention

OFCCP published a final rule revising 41 CFR part 60–1 on August 19, 1997. The proposed rule published on May 4, 2000 would further amend the record retention provisions in § 60–1.12 to harmonize them with the proposed changes to part 60–2. Specifically, the NPRM would amend paragraph (b) to eliminate the modifier ''written'' from a contractor's current requirement to develop a written affirmative action program. Furthermore, the proposal called for a new paragraph (c) that would codify in this part a longstanding regulatory obligation for contractors to be able to identify their employees and, where possible, applicants by gender, race, and ethnicity. Existing paragraph (a) would remain unchanged, while paragraphs (c) and (d) would be redesignated as paragraphs (d) and (e) respectively, with the first sentence of the newly designated paragraph (d) reflecting the addition of new paragraph (c).

Section 60–1.12(b) Affirmative Action Programs

In response to a number of comments, OFCCP has decided not to remove the modifier ''written'' from the phrase ''written affirmative action program.'' See further discussion under § 60–1.40 below.

Section 60–1.12(c)

The NPRM proposed a new paragraph (c) that 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.

The agency received fifteen comments pertaining to paragraph (c), which fit into several categories. Most prominently, three consultants and two law firms sought a clear definition of which job seekers contractors must track as ''applicants.'' More narrowly, a contractor objected to tracking as job applicants those persons it perceives as lacking requisite skills. Still another contractor hoped that the ''where possible'' language in the proposal indicated OFCCP has not definitively resolved the applicant issue, but rather intends to pursue a flexible approach that reflects modern realities.

Three contractors, three consultants, and a law firm representing an employer association expressed their view that it is an undue burden to obtain demographic data for prospective employees, especially unsolicited applicants. Another commenter, an organization representing contractors, agreed that this practice is burdensome, but also observed that collection of such demographic information for employee and applicant records is already required. In actuality, all employers with fifteen or more employees, including Federal contractors, have been covered by the Uniform Guidelines on Employee Selection Procedures since 1978.

The agency wishes to make clear that it is not revising the meaning of ''applicant'' in the final rule. OFCCP and other Federal civil rights agencies have adhered to the same definition since Question and Answer 15 was published in the **Federal Register** in 1979 (see ''Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures,'' 44 F.R. 11996, 11998 (March 2, 1979)). On the other hand, the final rule recognizes that some job applicants refuse to divulge demographic information to identify themselves. Therefore, OFCCP wishes to be reasonable through inclusion of the ''where possible'' phrase referring to applicants in § 60–1.12(c)(1)(ii).

A consultant and a law firm representing a business association expressed concern about marking the actual records of employees and applicants with demographic information. As one of them noted, such a requirement would be contrary to normal equal employment opportunity procedures. OFCCP agrees and does not intend for contractors to place gender, race, and ethnicity information directly on the employment records of their employees or job candidates. Thus, for sake of clarity, in the final rule the agency substitutes the preposition ''for'' for ''in,'' which appeared in the proposed rule. Therefore, § 60–1.12(c)(1) now reads: ''For 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.'' Consistent with the Uniform Guidelines on Employee Selection Procedures (UGESP), the burden is on the contractor to demonstrate that every reasonable effort has been made to identify the gender, race, and ethnicity of the applicant. In the case of electronic applications, the contractor may use an electronic tear-off sheet.

Each of the remaining categories of comments on proposed § 60–1.12(c) came from just one or two commenters. A consultant wondered whether a contractor could be found in violation if an employee or job applicant refused to provide demographic information. In a similar vein, the same commenter wanted to know whether a contractor could justifiably discipline such a person. In fact, such concerns are groundless because a contractor's invitation to an employee or applicant to self-identify his or her gender, race, and ethnicity should always make plain that the provision of such information is voluntary. Consequently, OFCCP would not hold a contractor responsible for an employee or applicant's refusal to self-identify.

One contractor requested more guidance on how to collect applicant data. Such detailed ''how-to'' information does not belong in the regulation itself. However, the agency does offer some guidance here in today's preamble. Specifically, while self-identification is the most reliable and the preferred method for compiling information about a person's race, sex, and ethnicity, such as through use of a ''tear off sheet,'' other alternatives are likewise acceptable. Some contractors send a short form or post card requesting demographic information from applicants who respond to job advertisements in newspapers, electronic job posting services, or other places. Although self-identification is the preferred method, visual observation also can be an acceptable method for identifying demographic data, although it may not be reliable in every instance. Methods for collecting data on gender, race, and ethnicity are also 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 FR 11996, 12008 (March 2, 1979).

Two other commenters urged delaying implementation of § 60–1.12(c) until 2002, arguing that collection of race and ethnicity information is not required until then. In fact, OMB published a Notice stating that ''Federal programs should adopt the standards [for race and ethnicity classification] as soon as possible, but not later than January 1, 2003,'' 62 FR 58781, 58782

(October 30, 1997). As per these requirements, OFCCP is adopting the new standards as soon as possible.

Finally, a contractor asserted that the proposal at § 60–1.12(c)(2) to require contractors to supply demographic information to OFCCP upon request would violate the attorney-client privilege. In fact, contractor personnel prepare most such documentation without the involvement of legal counsel. Even when they do not, it is clear that an enforcement agency must have access to pertinent records in order to carry out its lawful duties.

Accordingly, except as noted above, § 60–1.12(c) is adopted as proposed.

Section 60–1.40 Affirmative Action Programs

OFCCP proposed several modifications to § 60–1.40. The proposal retained in paragraph (a) current standards for those who must develop and maintain an affirmative action program, removed from paragraph (a) references to ''written'' affirmative action program, and deleted the remainder of paragraph (a), as well as all of paragraphs (b) and (c).

Several commenters strongly encouraged the retention of the designation ''written'' affirmative action programs. One commenter asserted, in part, that ''the 'written' AAP provides a structure on which to build and subsequently evidence a company's affirmative action efforts.'' Another commenter asserted that the ''written AAP is essential to adequate discussions of: the nature of an organization, the methodology used to develop goals, identify problem areas, good faith efforts; and to aid in the development of a Program Summary.'' OFCCP believes that these comments have merit. Consequently, OFCCP has decided to retain the reference to ''written'' affirmative action program in paragraph (a) of this section. ''Written'' also is reinserted into § 60–2.1 and inserted into § 60–2.2 for clarity. A ''written'' AAP may include electronic maintenance of the AAP. A contractor may maintain its AAP in electronic format if all of its employees who are permitted or required to have access to the AAP have equal access to the electronic version of the AAP. If some of a contractor's employees lack access to an electronic version of the AAP, the contractor also must provide access to a hard (paper) copy of the AAP.

The retention of the current language ''written'' by no means vitiates the spirit of the proposed language that affirmative action is more than a paper exercise and that it be an indelible aspect of the entire corporate enterprise or business process. Pursuant to these regulatory changes, OFCCP will focus its resources on the action undertaken to promote equal employment opportunity, rather than on the technical compliance.

One commenter, noting what it characterized as ''the magnitude of the systems and other changes that will be required,'' recommended that the new regulations apply only to AAPs created or updated after January 1, 2002, or after one full AAP year has elapsed after the new requirements become effective. The new regulations impose very few, if any, new requirements other than the Equal Opportunity Survey. Therefore, contractors will not need to make substantial changes to their AAPs in order to comply with the revised regulations. Nevertheless, a contractor that has prepared an AAP under the old regulations may maintain that AAP without penalty for the duration of the AAP year even if that AAP year overlaps with the effective date of the regulations.

In addition, in order to avoid confusion OFCCP has inserted into §§ 60–1.40(a)(1) and 60–2.1(a), the phrase ''(supply and service)'' after the term ''nonconstruction.'' Finally, OFCCP has revised slightly the structure of paragraph (a) to conform to **Federal Register** format requirements; no change of substance is intended by the revision.

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 rule revises and restructures § 60–2.1. The rule revises paragraph (a) by limiting the language to a brief description of the scope of the regulations contained in Part 60–2. No comments were received on this provision. The final rule adopts paragraph (a) as proposed.

The final rule deletes 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 final rule also deletes 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 to be made to part 60–2.

Paragraph (b) of the new § 60–2.1 specifies who must develop an AAP; it repeats the standards found in § 60–1.40, because recitation of the scope of coverage is important for completeness in both parts of the regulation. OFCCP has written the requirements in a list form for the reader's ease of understanding. As OFCCP did in § 60–1.40, OFCCP has revised slightly the structure of paragraph (b) to conform to **Federal Register** format requirements; no change of substance is intended by the revision.

Several commenters recommended that in the final rule this provision not be limited to full-time employees only. OFCCP did not intend for this provision to be read as including only full time employees. Some of the confusion concerning the provision may have arisen because the Equal Opportunity (EO) Survey form requested information about full time employees only. The request for information about full-time employees in the Survey was not intended to signal any change in OFCCP's requirement for reporting part-time, temporary and full time employees in written AAPs now or in the future.

The new § 60–2.1 provision does not make reference to particular categories of employees but rather refers generally to ''employees.'' The term ''employees'' is broad enough to include part-time, temporary and full time employees. Therefore, the final rule adopts paragraph (b) of the proposal without change.

The final rule adds a paragraph (c) that specifies that the contractor must develop AAPs 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. One commenter, a law firm representing a business group, recommended that the final rule specify when the next AAP is to be in place. OFCCP has consistently held that the new AAP should be developed and in effect on the date that the old AAP expires. OFCCP believes that the AAP should be an ongoing management tool and not just an exercise to be performed annually. The provision is carried forward in the final rule as proposed.

The final rule contains a paragraph (d) describing who is included in affirmative action programs. Subparagraph (2) provides three options for contractors with fewer than 50 employees at a particular establishment to account for those employees for AAP purposes. 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).

Several commenters recommended that OFCCP permit contractors to develop their AAPs based on how their businesses actually are organized. Specifically these commenters asked to be allowed to 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).

In response to these commenters, OFCCP has added a subparagraph 4 to the final rule. This provision reads as follows:

> (4) Contractors may reach agreement with OFCCP on the development and use of affirmative action plans based on functional or business units. The Deputy Assistant Secretary, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

The purpose of this provision is to permit contractors to negotiate with OFCCP, subject to the approval of the Deputy Assistant Secretary, for permission to use affirmative action programs organized along business or functional lines. Some contractors have indicated that they would prefer a functional affirmative action program because it would allow them to better manage their equal employment opportunity programs and to hold the appropriate managers accountable for the performance of that program. This provision provides a mechanism by which the contractor can achieve these efficiencies. The provision also makes it clear that while OFCCP is willing to negotiate the structure of the contractor's affirmative action program, it is not offering to negotiate how the agency will conduct its compliance evaluations. Thus, while a contractor may receive permission to use functional or business unit affirmative action programs, OFCCP could still conduct an evaluation of a facility at a single geographic location. OFCCP hopes to have procedures for handling requests for functional AAPs in place before the effective date of the regulations. When the procedures are completed, OFCCP will post them on its Web site and/or include them in its Federal Contract Compliance Manual (FCCM).

At the suggestion of one commenter, the final rule substitutes ''work'' for the reference to ''perform their normal and customary duties'' in paragraph (d)(1). This change is necessary to clarify that ''work'' is the consistent meaning that OFCCP desires to convey throughout this provision. The proposed language implied a different meaning. Thus, the final rule provides, in relevant part, ''Employees who work at locations other than that of the manager to whom they report, must be included in the affirmative action program of their manager.''

Paragraph (e) of the proposed regulation explains how to identify employees who are included in AAPs at establishments other than where they are located. AAPs created according to paragraphs (d)(1) through (3) must identify these employees according to paragraph (e). Paragraph (d)(4) is not included in the requirements of paragraph (e) because the reporting formats for ''functional'' AAPs will be addressed on a case-by-case basis as part of the approval process.

One commenter, a law firm, suggested that the requirement to annotate where the employees are located would present an additional burden. As noted in the NPRM, the purpose of the proposed subparagraph was to clarify that the AAP at the establishment where the selection decision is made is the appropriate establishment for inclusion of their selectees. OFCCP does not agree that this requirement creates additional burden; it simply clarifies the agency's current policy and practice. Paragraph (e) of the proposal is adopted in the final rule as proposed.

Several commenters stated that OFCCP's use of more than one term when referring to a contractor's ''establishment'' or ''location'' was inconsistent or confusing. OFCCP agrees that using one term is clearer. Therefore, the final rule replaces the term ''location'' with ''establishment'' whenever ''location'' was used as a synonym for ''establishment.'' OFCCP replaced ''location'' with ''establishment'' in §§ 2.1 and 2.30.

Section 60–2.2 Agency Action

Paragraph (a) deals with agency approval of AAPs. In the NPRM, OFCCP proposed revising paragraph (a) for clarity. One proposed change was to state that a contractor's AAP would be deemed to be accepted by the Government ''at the time OFCCP notifies the contractor of the completion of the compliance evaluation or other action''; the existing provision says that the AAP is deemed accepted ''at the time the appropriate OFCCP * * * office has accepted such plan. * * *'' A commenter expressed concern that the change in paragraph (a) resulted in a change in the acceptance requirements. That is not the case. OFCCP has not changed the acceptance date requirements in paragraph (a). The only changes were for clarity.

OFCCP proposed in the NPRM to delete paragraphs (c) and (d) of the current § 60–2.2 which address show cause notices and other enforcement procedures for a contractor's failure to develop an AAP as prescribed in the regulations. OFCCP stated that since these subjects are addressed in §§ 60–1.26 and 60–1.28 there was no reason to repeat them in § 60–2.2.

Four commenters representing the interests of contractors objected to the deletion of these paragraphs. They expressed concern that the deletion of these paragraphs eliminates contractors' due process protections and the procedural safeguards of the show cause notice (SCN) process. They stated that without the SCN procedure, OFCCP could proceed directly to enforcement without offering contractors the opportunity to cure apparent violations.

OFCCP is persuaded that the proposed deletion may not have the limited impact originally contemplated by the agency. Therefore, the final rule restores the provisions in paragraphs (c) and (d) of § 60–2.2 with a minor change; paragraph (c)(1) has been modified to reflect the existing exceptions in § 60–1.26(b)(1) to the general rule that a show cause notice will be issued whenever

administrative enforcement is contemplated.

The existing exceptions in § 1.26(b)(1) are as follows:

> * * * if a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review, and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter.

Subpart B—Purpose and Contents of Affirmative Action Programs

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

A complete rewrite of § 60–2.10 was proposed. The rewrite was intended to convey that an AAP should be considered a management tool—an integral part of the way a corporation conducts its business. Further, the intent of the proposed revision was to encourage self-evaluation in every aspect of employment by establishing systems to monitor and examine the contractor's employment decisions and compensation systems to ensure that they are free of discrimination.

Two commenters opposed portions of this section: One stated the belief that the proposed section was redundant; and the other asserted that it was ''not aware of any authority for the OFCCP to dictate or prescribe the 'management approach' or policies of firms that perform federal contracts.''

One commenter, a civil rights organization, supported the proposal, stating that ''wholly integrating the monitoring and evaluative components of the AAP will ensure that contractors are assuming full responsibility for meaningful compliance as opposed to merely complying with a paperwork obligation.''

OFCCP continues to believe that this introductory section should emphasize the philosophy that an affirmative action program is ''more than a paperwork exercise. * * * Affirmative action, ideally, is a part of the way the contractor regularly conducts its business.'' Accordingly, § 60–2.10 is adopted as proposed.

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 and women are likely to be underutilized, and sets forth in lettered paragraphs the core contents of a written AAP.

This final rule addresses only paragraph (a) of the current § 60–2.11, which deals with the workforce analysis. Paragraph (b) of the current regulations, which addresses the job group analysis, has been revised and moved to new 60–2.12 discussed below in this preamble. The introductory paragraph of current § 60–2.11 has been deleted as outdated and unnecessary.

Paragraph (a) of the 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 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.

In the NPRM, OFCCP proposed to ''reengineer'' the workforce analysis into a shorter, simpler format called an ''organizational profile.'' In basic terms, the organizational profile was an organization chart showing each of the organizational units and their relationships to one another, and the gender, racial, and ethnic composition of each organizational unit. Unlike the current workforce analysis, the proposed profile focused only on organizational units and did 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 using the organizational profile.

Eleven commenters stated that the organizational profile would be more burdensome than the workforce analysis. A number of commenters indicated that most of their companies either did not have an organizational chart or that if they had such charts, the charts only reflected the top levels of the organization. Other commenters indicated that the organizational structure of their companies was so fluid that charts would become quickly outdated. Many commenters representing or servicing the contractor community indicated that the current workforce analysis was not a burden to produce because their systems are configured to produce the analysis with very little effort. These commenters also indicated that there are numerous software products that facilitate the creation of a workforce analysis. Ten commenters specifically recommended that OFCCP permit contractors the option of continuing to use the workforce analysis if the contractor found this less burdensome.

In addition, some commenters, including women's and civil rights groups and a labor organization, raised concerns that adoption of the organizational profile, in lieu of the workforce analysis, might result in the loss of valuable compliance information. Others supported the organizational profile but cautioned against any further simplification because of the potential of the loss of important information.

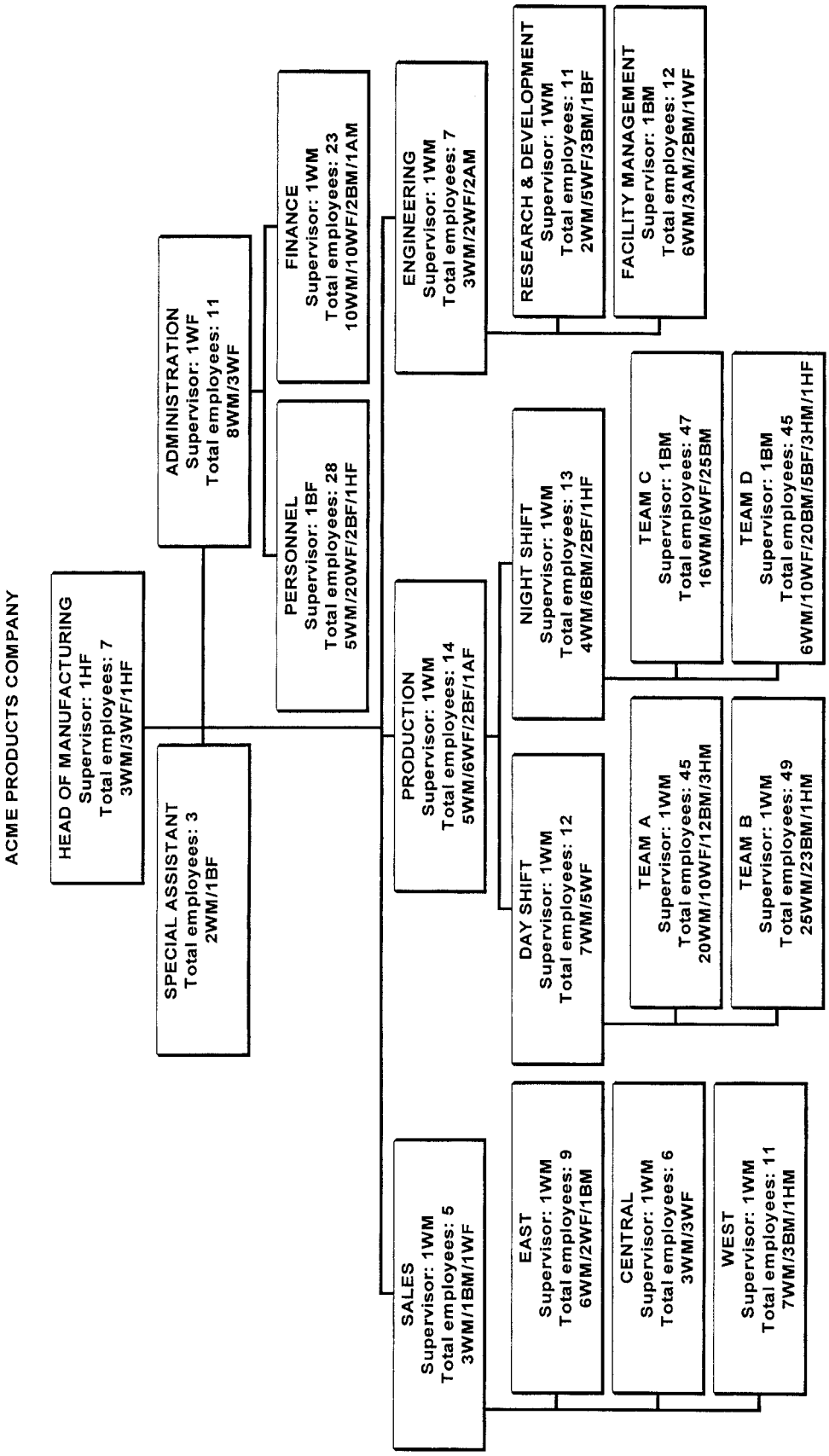
OFCCP proposed the adoption of an organizational profile, in part, to decrease the burden on contractors. Prior to the publication of the NPRM, many stakeholders had raised concerns about the workforce analysis and had indicated that it was burdensome. However, since many contractors have now indicated that there is very little burden in preparing a workforce analysis and that there may be more burden for them in preparing an organizational profile, in this final rule OFCCP permits contractors to submit either the old style workforce analysis or an organizational display as the organizational profile. OFCCP believes that this is responsive to concerns about burden and to concerns that OFCCP not further simplify the organizational profile.

A number of commenters from the contractor community objected to the requirement that the proposed organizational profile be presented as a ''detailed organizational chart or similar graphical representation.'' Five commenters indicated that the creation of a graphical representation would be burdensome because they did not have the software or systems to create such a chart and significant manual work would be required. In response to these concerns, OFCCP has made the provision of a ''graphical representation'' optional. The final rule permits contractors choosing the organizational display to use ''detailed graphical or tabular chart, text, spreadsheet, or similar presentation of the contractor's organizational structure'' for displaying the required information.

Following is a sample organizational display. This sample is provided for illustrative purposes only, and should

not be construed to represent a required format or template.

BILLING CODE 4510–15–P



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Under the final rule, the organizational display would still not require the itemization of individual job titles, or the reporting of gender, race, ethnicity, and salary information by job title. Thus, the volume of the organizational display should be less than the volume of a workforce analysis (which often is one of the largest sections of the AAP).

Some commenters requested that OFCCP specify that it intends for the organizational profile to reflect the organization down to the level of the first line supervisor. It is OFCCP's intent that each organizational unit and all subordinate units, including the first-line supervisor level be accounted for in the organizational profile. OFCCP believes that the language of § 60–2.11 accomplishes this.

Some commenters questioned the usefulness of the proposed organizational profile. Contractors who feel it would be more helpful for their self-audit and affirmative action purposes to continue to develop a workforce analysis are at liberty to do so under the final rule. However, for those contractors electing to submit an organizational display, OFCCP believes that the display will provide a 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 representation will be useful to many contractors engaging in self-analysis, and it is useful to OFCCP's compliance evaluation process. By introducing the flexibility to continue using the current workforce analysis or to adopt an organizational display that is not necessarily a graphic representation, OFCCP allows contractors to elect the method that is most meaningful for the particular contractor.

As noted in the NPRM, in subsection (c)(4), the minority group designations conform to the designations of minorities currently used in the EEO–1 report. OFCCP intends the racial and ethnic designations used in the regulations at 41 CFR Chapter 60, to be consistent with the revised standards set forth by OMB. OFCCP will coordinate any changes in these designations with the Equal Employment Opportunity Commission (EEOC) so that record keeping and reporting requirements for both agencies are compatible.

Section 60–2.12 Job Group Analysis

The NPRM would provide much greater guidance and clarification on how to structure job groups than is contained in the current regulation at § 60–2.11(b). Many commenters supported the majority of the proposal but added specific recommendations, especially for paragraph (e).

Section 60–2.12(a) Purpose

Job group analysis 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.

No comments were received regarding proposed paragraph (a) and it is adopted without change.

Section 60–2.12(b)

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 three 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.

As was noted in the NPRM, some view the current instruction to combine jobs by similar content, wage rates, and opportunities as too general to provide clear, consistent guidance. Therefore, as proposed, paragraph (b) of the final rule describes similarity of content and similarity of opportunities, the two criteria most open to divergent interpretations. This rule states ''similarity of content refers to the duties and responsibilities of the job titles which make up the job group.'' In addition, it 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.'' One commenter desired an explanation of similar wage rates. However, OFCCP believes ''wage rates'' to be a generally understood term. Moreover, the degree of similarity in wage rates appropriate for job group formation varies depending upon the size of a contractor's workforce and the structure of its compensation system.

Two other comments were received concerning paragraph (b). One explicitly expressed support for OFCCP's traditional method of job group formation based on similarity of jobs' content, wage rates, and opportunities, an approach that is continued in this final rule. The other commenter wanted the regulation to state that contractors have discretion in forming their job groups. However, such a provision is unnecessary, since contractors themselves decide which job titles are appropriately grouped to produce job groups, given the three regulatory parameters. Paragraph (b) is adopted as proposed.

Section 60–2.12(c)

Paragraph (c) of the final rule provides that a contractor's job group analysis must include a list of the job titles comprising each job group, a requirement that OFCCP's experience demonstrates most contractors already incorporate into their affirmative action programs. No comments were received on this provision.

Paragraph (c) also would reflect the provisions of §§ 60–2.1(d) and (e) relating to jobs located at another establishment. Specifically, new § 60–2.1(d) requires inclusion of each employee in the affirmative action program of the establishment at which he or she works, with exceptions made for employees who normally work at establishments other than that of the manager to whom they report, employees at establishments with fewer than 50 employees, and employees for whom selection decisions are made at a higher level establishment. Then, for identification purposes, § 60–2.1(e) requires contractors to annotate their affirmative action programs to indicate when employees are included in affirmative action programs for establishments other than where they are physically located. Five commenters objected to having to annotate the job group analysis as too burdensome. Most contractors would have to make only a small number of annotations. Without notations showing who is accountable for personnel actions affecting particular employees, or which affirmative action programs cover specific workers, it is difficult for designated contractor official(s) to adequately monitor progress or address problem areas. Similarly, OFCCP needs the ability to easily identify where responsibility lies for each of a contractor's employees in order to carry out its regulatory obligations during compliance evaluations. For these reasons, paragraph (c) is adopted in the final rule without change.

Section 60–2.12(d)

The NPRM proposed in § 60–2.12(d) that all jobs located at an establishment must be included in that establishment's job group analysis, except as provided in § 60–2.1(d). Just two commenters opposed the proposal, on the grounds that it would be too restrictive by preventing contractors from forming ''functional'' job groups across establishments. The discussion of functional AAPs in the preamble discussion of § 60–2.1 above addresses this issue. OFCCP adopts § 60–2.12(d) without change in the final rule.

Section 60–2.12(e) Smaller Employers

As a way of reducing unnecessary burden, the final rule makes explicit that a contractor with fewer than 150 employees may choose to utilize EEO–1 categories as job groups. The agency considers job grouping by EEO–1 category to be simpler both for smaller employers and for OFCCP.

Most commenters welcomed this regulatory revision for reducing the burden on smaller contractors when preparing their affirmative action programs. However, some felt the revision carried risks by going too far, while a few maintained the change should apply to a wider group of contractors.

Five commenters wrote that this proposal should go further. For example, a law firm and a contractor wanted to extend the optional use of EEO–1 categories to small establishments of larger employers. Another law firm would have OFCCP expand the option so as to grant it to any contractor with no more than fifty employees in an EEO–1 category. Finally, a municipality and a consultant recommended widening the option so that all contractors, regardless of size, could choose to use EEO–1 categories as job groups.

These recommendations are problematic. The agency is concerned with reducing burden on smaller employers, which lack the financial and human resources larger contractors possess. However, inappropriate mingling of many highly disparate jobs in large EEO–1 category-based job groups would likely occur for larger employers. Such mingling risks ignoring potentially vast differences in job content, wage rates and opportunities.

Here is an example of what happens if a larger contractor uses EEO–1 categories for job groups: Contractor Y has 450 employees. Of the 450 employees, 300 are classified as EEO–1 Professional. The breakdown is as follows:

	Total number of employees	Number of females	Females (percent)	Number of minorities	Minorities (percent)
Accountants	25	10	40	5	20
Financial Analysts	25	5	20	5	20
Human Resource Specialists	50	40	80	10	20
Computer Programmers	100	30	30	50	50
Electrical Engineers	50	10	20	20	40
Systems Analysts	50	5	10	10	20

A job group analysis by content, wage rate, and opportunities would look something like this: (Job Groups are in **bold** with Job Titles underneath)

ACCOUNTANTS
Accountant I
Accountant II
Accountant III

Computer programmers
Computer programmer I
Computer Programmer II
Computer programmer III

FINANCIAL ANALYSTS
Jr. Financial analyst
Sr. Financial analyst

Electrical engineers
Electrical engineer I
Electrical Engineer II
Electrical engineer III

HUMAN RESOURCE SPECIALISTS
Staffing specialists.
Benefits specialists.
Payroll specialists.

Systems analysts
Jr. Systems analyst.
Sr. Systems analyst.

If jobs are grouped by EEO–1 category, all professional jobs go into one Job Group as follows: (Job Groups are in **bold** with Job Titles underneath)

Professionals
Accountant I
Accountant II
Accountant III
Computer Programmer I
Computer Programmer II
Computer Programmer III
Electrical Engineer I
Electrical Engineer II
Electrical Engineer III
Jr. Systems Analyst
Sr. Systems Analyst
Jr. Financial Analyst
Sr. Financial Analyst
Staffing Specialists
Benefits Specialists
Payroll Specialists

The problem with using EEO–1 categories for job groups becomes clear when the percentages of employees, availability, and utilization data are examined:

A job group analysis using content, wage rates, and opportunities looks like this:

Job group	Total number of employees	Percent of females	Female availability (percent)	Females underutilized?	Percent of minorities	Minority availability (percent)	Minorities underutilized?
Accountants	25	40	24	N	20	28	Y
Financial Analysts	25	20	32	Y	20	16	N
Human Resource Specialists	50	80	54	N	20	30	Y
Computer Programmers	100	30	30	N	50	65	Y
Electrical Engineers	50	20	28	Y	40	40	N
Systems Analysts	50	10	10	N	20	36	Y

EEO–1 based grouping looks like this:

Job group	Total number of employees	Percent of females	Female availability (percent)	Females underutilized?	Percent of minorities	Minority availability (percent)	Minorities underutilized?
Professionals	300	33	30	N	33	43	Y

EEO–1-based grouping masks the utilization problems in six areas:

• Female utilization problems in **Financial Analysts** and **Electrical Engineers.**

• Minority utilization problems in **Accountants, Human Resource Specialists, Computer Programmers,** and **Systems Analysts.**

With EEO–1 based grouping:

• There do not appear to be any utilization problems among female professionals, which is incorrect. Grouping all female professionals together masks the utilization problems and the need to set goals for female Financial Analysts and Electrical Engineers.

• There appear to be utilization problems among all minority professionals, which is incorrect. Grouping all minority professionals together makes it unlikely that the contractor will focus affirmative action efforts on the four job areas in which utilization problems actually occur.

Five commenters urged OFCCP to limit its burden reduction proposal to contractors with total workforces of 100 or fewer employees, instead of 150. The 150 threshold is consistent with the threshold for smaller employers in the record keeping provisions of part 60–1. Two women's organizations and a labor organization were concerned that allowing larger employers to use EEO–1 categories would sacrifice ''meaningful data, (given that) proper job groupings are central to the aims of 60–2 and vital to the mission of OFCCP.'' Two consultants were more specific about their worries, fearing that even smaller employers could mask discrimination. One pointed out that a smaller contractor might easily have two or three levels of management in its officials and managers job group. For example, a chief executive officer, a chief financial officer, and a vice president could be joined with a director of the mailroom, hiding potential race or gender discrimination.

While these concerns may be valid in some instances, they must be balanced with the goal of reducing contractors' burdens whenever possible without undue sacrifice to the agency's ability to enforce its mission. Section 60–2.12(e) is adopted as proposed.

Section 2.13 Placement of Incumbents in Job Groups

No comments were received on this section. It is adopted without change.

Section 60–2.14 Determining availability

(Current § 60–2.14 entitled ''Program summary'' is found at § 60–2.31.)

Section 60–2.14 in the final rule, contains the guidelines for determining availability and replaces the current regulations 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.

In the current rule, the contractor is required to compute availability, separately for minorities and for women, for each job group. In determining availability, the contractor considers each of eight factors listed in the regulations. The factors are similar, but not identical, for minorities and women. Although contractors are required to consider all eight factors, they are 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 are to 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. As proposed in the NPRM, this section simplifies the availability computations by reducing the number of factors from eight to two. These two factors are the same for minorities and for women.

Under this final rule, as under the current regulation, the contractor is required to compute availability, separately for minorities and for women, for each job group.

Fourteen commenters specifically supported the proposed reduction from eight factors to two. The proposed rule was equally popular among contractors, contractor associations, consultants, and civil rights and women's organizations.

One commenter association recommended that a reasonableness standard be included in the definition of ''trainable'' described in the second of the two factors. This commenter noted that the current regulation contains such a standard. Without this limitation, the commenter was concerned that the calculation of availability would be rendered impractical.

The inclusion of individuals who are ''trainable'' 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 previous 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.

In response to this comment, OFCCP has revised the final rule to restore a reasonableness standard regarding the concept of ''trainable employees.'' OFCCP believes that this modification will make it easier for contractors to calculate ''trainable employees'' while achieving the goal of requiring contractors to consider this pool of available workers.

The final rule now provides at § 60–2.14(c) that the two factors to be considered in determining availability are:

(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 which the contractor is reasonably able to provide,

become promotable or transferable during the AAP year.

Contractors would be required to determine the percentages in § 60–2.14(c)(2), by undertaking one or both of the following steps:

1. Determine which job groups are ''feeder pools'' for the job group in question. The feeder pools are job groups from which individuals are promoted.

2. Ascertain which employees could be promoted or transferred with appropriate training which the contractor is reasonably able to provide.

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 whom 20 are minority and 25 are female. The Petroleum Engineering Project Leader job group also has 100 incumbents, of whom 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
Chem.E PL	100	20	25
Pet.E PL	100	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 that completed the training program.

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

OFCCP's 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.

Section 60–2.14(e) requires a contractor to define its reasonable recruitment area 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 is required to assure that the recruitment area chosen will not have the effect of excluding minorities or women.

Three commenters, a contractor and two consultants, expressed concern about the prohibition against drawing the reasonable recruitment area in a way that has the effect of excluding minorities or women. One noted that even if such exclusion is unintentional, contractors will be found in violation. Accordingly, the commenters recommended adding the term ''unreasonably'' or ''intentionally'' in front of the word ''excluding.'' OFCCP does not agree that this change is necessary or desirable. The objective of this section of the regulations is to have the contractor compute, as accurately as possible, the availability of minorities and women for employment. Accurate computation of availability is essential to the entire goal setting process. Improper drawing of the reasonable recruitment area has the effect of misstating availability. The effect is the same, whether the improper drawing is intentional or inadvertent, and it cannot be accepted. If a contractor is found in violation for unintentionally drawing its recruitment area in a way that excludes minorities or women, it will be given ample opportunity to correct the error before the conclusion of the compliance evaluation.

Section 60–2.14(f) requires that contractors 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. One commenter recommended a clarification that this subsection will not be interpreted to mean that contractors will be found in violation for defining feeder groups in a way that unintentionally has the effect of excluding minorities or women. For reason similar to that discussed above, OFCCP declines to add this clarification.

Further, § 60–2.14(d) requires that the contractor 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 FCCM. Examples of such information include census data, data from local job service offices, and data from colleges and other training institutions. One commenter asserted that it is difficult to identify the most current statistical data in practice because few contractors have access to data more current than the decennial census. Sections 2G04 and 2G05 of the FCCM provide guidance on other sources of availability data. Moreover, decennial census data or some variant thereof often will satisfy the requirement to use the most current information ''available.'' Another commenter asserted that determining availability is laborious for large, national companies that hire from the top educational institutions across the nation for professional ranks. OFCCP disagrees as to the difficulty of this task. Data on college and university graduates are readily available in private publications, from the U.S. Department of Education, and from the schools themselves.

When a job group is composed of job titles with different availability rates, § 60–2.14(g) requires 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 of incumbents	Availability (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 x .35=.0875 Auditor=.5 x .20=.1 Analyst=.25 x .15=.0375
3. Composite Availability=.0875+.1+.0375=.225 or 22.5%.

A comment from a law firm representing a business association urged OFCCP to delete the composite availability requirement entirely, or to at least clarify it to provide that determining availability for each job title is not required when a contractor uses ''appropriate census data that encompasses a broader range of job titles and/or occupational categories.'' The basis for the request was the commenter's assertion that ''census data already encompasses a range of job titles'' and ''already represents ''composite'' availability data when applied to a specific job group.'' OFCCP does not object, *per se,* to the use of aggregated census data in lieu of the job title by job title computation of composite availability, *when the aggregated data truly represent composite availability data for the job group in question.* However, in order for the use of aggregated census data to be acceptable, there must be a close match between the actual jobs included in the census data and those in the contractor's job group. Additionally, so as to remain true to the concept of weighted averaging, the percentage representation of each job in the census group must closely match the percentage representation of the corresponding job in the contractor's job group.

In the NPRM, OFCCP requested comments concerning whether contractors should be required to compute availability separately for individual minority subgroups as a general rule. Five commenters—two law firms, a contractor, a contractor representative, and an individual consultant— expressed opposition to computing availability separately for individual minority subgroups. One of these commenters expressed concern that it would cause confusion in that employees or applicants could identify themselves with multiple ethnic or racial characteristics. A law firm indicated that it would create rivalry between minority subgroups.

One commenter, a consultant, noted examples where it may be beneficial to calculate minority subgroups. This commenter stated that using total minorities allows the masking of discrimination against specific minority subgroups. This commenter indicated this practice of discriminating against minority subgroups could be self-perpetuating because management hires new employees as a result of referrals from current employees, with the effect of excluding other groups.

The regulation retains the requirement that contractors determine the availability of total minorities. The language in the proposal, which does not require calculating availability separately by individual minority subgroup, was not modified and has been adopted in the final rule.

Section 60–2.15 Comparing incumbency to availability

(Current § 60–2.15 entitled ''Compliance status'' was revised and moved to § 60–2.35, discussed below in the preamble.)

Section 60–2.15 addresses an aspect of the current regulations that is referred to as the ''utilization analysis,'' and replaces one portion of the current § 60–2.11(b). Section 60–2.15(a) requires 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. 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,'' 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. As noted in the preamble to the NPRM, OFCCP traditionally has permitted contractors 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.

Seven commenters addressed the standards for comparing incumbency to availability. Five of the seven commenters—two organizations representing women, a consultant, an association and a labor organization—advocated that OFCCP adopt some variation of the ''any difference'' standard across the board. They argued that contractors should be required to set placement goals for women and minorities whenever analysis demonstrates any difference between availability and utilization. They indicated that allowing contractors to choose the standard by which they will be evaluated introduces unnecessary inconsistency to the process, resulting in similarly situated establishments being held to different measures in assessing their employment of women and minorities. Another civil rights

membership organization commented that contractors should be required to set placement goals whenever analysis reveals a difference of one person between availability and utilization. One commenter, a consultant, stated that the proposal does not address the ''inappropriate nature'' of using the standard deviation approach when either the job groups or availability are too small. The commenter further stated that OFCCP continues to avoid implementing a regulation regarding determination of underutilization.

Conversely, two commenters, both law firms, recommended that OFCCP continue to permit contractors flexibility, arguing that the various acceptable methods be included in the regulatory text.

On balance, OFCCP believes that retaining the current practice of permitting various methods for determining availability is the appropriate approach to take. OFCCP further believes that the proposed wording of § 60–2.15 is sufficient to suggest to the contractor community when there exists the need to establish a goal. Therefore, the provision, § 60–2.15(b), is adopted without change.

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. In the NPRM OFCCP proposed to discontinue the use of 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.

In the preamble of the NPRM, OFCCP expressly solicited comments on the proposal to drop the word ''major'' in reference to job groups. OFCCP received a comment from a law firm representing a business association objecting to the proposal to drop the term major. This commenter stated this change would ''make little practical difference to large contractors'' but would ''negatively impact small contractors.'' This commenter further stated that small contractors, ''relied on the current language to reasonably conclude they need not assess utilization of those job groups that are too small to permit meaningful analysis.'' This commenter concluded that the deletion of ''major'' would ''only add work, but no additional value, to a small contractor's AAP.'' OFCCP believes that this concern becomes less of an issue inasmuch as § 60–2.12 allows smaller contractors to use EEO–1 categories as their job groups.

In contrast, another association commented that it anticipated no added burden because contractors already have a practice of treating all job groups as ''major'' and stated that contractors already perform these analyses on each job group. A labor organization commented that requiring that underutilization analysis be performed for each job group rather than just ''major'' job groups is a sound step, consistent with the program's goals of promoting equal opportunity.

This section is adopted as proposed in the NPRM. This language assures that no one is excluded when comparing incumbency to availability because of the size of the job group.

Section 60–2.16 Placement Goals

The earlier sections of the final rule 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 the preamble to the NPRM, OFCCP provided a brief history of how it has addressed the question of goals and how the regulatory provisions requiring goals fits into that history.

Section 60–2.16(a) sets out the purpose of placement goals. It explains that goals ''serve as objectives or targets reasonably attainable by every good faith effort.'' It also explains that goals are used to measure progress toward equal employment opportunity.

One contractor association commented that in its view there was no meaningful distinction between the use of goals and the use of quotas. The commenter stated, ''OFCCP requires contractors to pursue a race-based or gender-based hiring and promotion system.'' The commenter suggested that goals could only be justified by a demonstration that they are needed to remedy specifically identified past discrimination. Absent evidence of such demonstration, the commenter suggests that there is no ''compelling governmental interest'' that would justify the setting of goals and that to do so would violate the equal protection clause of the U.S. Constitution. The commenter cites a number of court decisions to support its position.

OFCCP disagrees with this commenter. OFCCP does not require contractors to pursue a race- or gender-based hiring and promotion system. As noted in the NPRM, what OFCCP requires is that contractors engage in outreach and other efforts to broaden the pool of qualified candidates to include minorities and women. Contrary to the suggestion made by the commenter, goals are not a device to achieve proportional 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. OFCCP's position with respect to goals is explained more fully in an OFCCP Administrative Notice entitled ''Numerical Goals under Executive Order 11246,'' which was issued in December 1995.

A contractor association questioned whether the first sentence of § 2.16(b) was necessary, since § 60–2.15 discusses when a goal must be set and § 60–2.16(c) establishes the level at which a goal must be set. Another commenter requested clarification of terms in this same sentence. In response to these comments, OFCCP has deleted the first sentence of § 60–2.16(b) in the final rule.

Another commenter urged OFCCP to ''state loud and clear, that there is no presumption of discrimination'' based on the fact that a contractor is required under the regulations to set a goal. OFCCP believes that the statement at § 60–2.16(b) that ''A contractor's determination under § 2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination'' is a very ''loud and clear'' statement of this point.

Commenters, generally, raised no concerns about § 60–2.16(c). This provision is adopted without change in the final rule.

Two commenters representing a number of contractors raised a concern about the statement at § 60–2.16(d) that ''In the event of a substantial disparity in the utilization of a particular minority group, a contractor may be required to establish separate goals for those groups.'' The commenter was concerned because the term ''substantial disparity'' is not defined and feared that the requirement ''will have the practical result of producing quotas and will, no doubt pit one minority group against another.''

As indicated in § 60–2.16(d), setting a single goal for all minorities is expected

to continue to be the norm for most contractors. The purpose of the additional language concerning substantial disparities for a particular group is intended to address specific situations where a particular minority group, or men and women of a particular minority group, are substantially underutilized. This approach is taken directly from OFCCP's current regulations at § 60–2.12(l). In appropriate circumstances, OFCCP will continue to require separate goals for particular minority groups or by gender within minority groups. It is not intended to represent a change. Therefore, OFCCP has not changed this language in the final rule.

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 written 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 existing regulations address the action-oriented and evaluative components of AAPs in a section designated ''Additional required ingredients of affirmative action programs.'' That provision appears at § 60–2.13 in the existing regulations. OFCCP has eliminated a number of elements that no longer need to be specifically and separately set forth in regulatory form. The remaining provisions have been moved to § 60–2.17 and are now named ''Additional required elements of affirmative action programs.'' Although OFCCP has eliminated these provisions from the mandatory requirements of the AAP, the contractor may voluntarily choose and is encouraged to retain these elements in its program.

In the final rule, OFCCP has deleted, 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.

In addition, OFCCP has deleted existing § 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 § 60–2.17, therefore, in no way affects the contractor's obligation to comply with the Guidelines nor OFCCP's commitment to enforcing the Guidelines.

OFCCP has retained four of the original 10 ''additional required ingredients.'' OFCCP believes that these remaining items capture the essence of effective affirmative action, including subsuming many aspects of the specific ''ingredients'' that were 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 existing § 60–2.13 are retained in the new § 60–2.17:

§ 60–2.13(c)—establishment of responsibilities for implementation of the contractor's AAP (codified as § 60–2.17(a));

§ 60–2.13(d)—identification of problem areas by organizational units and job groups (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 (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 (codified as § 60–2.17(d)).

OFCCP proposed to modify the provision in § 60–2.13(c) of the existing regulations (§ 60–2.17(a) of this rule) concerning the ''establishment of responsibilities for implementation of the contractor's affirmative action program.'' This modification is derived from § 60–2.22(a) of the existing 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 proposal expressly requires 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 received several comments on proposed subsection 60–2.17(a), the majority of which strongly supported the proposal. Those commenters stated, for example, that for the affirmative action program to be effectively implemented, adequate attention and resources must be devoted to its administration.

One commenter, an organization representing contractors, agreed that management responsibility and accountability are important factors in implementing a successful affirmative action program, but noted that many experienced human resources professionals believe that an ''affirmative action czar'' approach is not particularly effective. According to the commenter, this is because the czar model ''allows others in the organization to believe that nondiscrimination and affirmative action are the czar's responsibility not theirs.'' Therefore, the commenter argued, exactly how accountability and responsibility are to be accomplished should be left to the contractor. Another commenter took a different approach, writing, ''The OFCCP fails to recognize that frequently the person assigned with the responsibility for equal employment opportunity is often a staff member who serves in an advisory capacity, without the authority to implement these changes and therefore cannot be held accountable.''

OFCCP certainly encourages contractors to hold all managers accountable for equal employment opportunity and affirmative action. However, OFCCP also feels strongly that a company official must oversee equal opportunity and affirmative action efforts, and must have the authority and responsibility to make them effective, lest no-one is held accountable and responsible.

Finally, a few commenters expressed concern about the last sentence of subsection (a), which states that the official responsible for equal employment opportunity must have the authority, resources, support of and access to top management to ensure effective implementation of the AAP.

One wondered how a contractor would demonstrate to the compliance officer that the designated official has the required authority. OFCCP is confident that authority would be easily demonstrated by a few inquiries during the compliance evaluation process. The commenter also wondered whether, over time, this would lead to more boilerplate in AAPs designed to prove the necessary authority and access to top management. OFCCP considers this concern to be highly speculative.

A contractor, a law firm, and several consultants and organizations representing contractors expressed concerns with proposed subsection (b). Subsection (b) requires the contractor to perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. Areas to be analyzed include: (1) The workforce by organizational unit and job group; (2) personnel activity; (3) compensation systems; (4) selection, recruitment, referral and other personnel procedures; and (5) other areas that might impact the success of the affirmative action program. Many of the comments focused on the requirement to review compensation systems, with several commenters asserting that OFCCP does not have authority to enforce equal pay concerns, that analysis of compensation systems is not required by the current regulations, that compensation analyses impose an additional burden, or that OFCCP did not specify the types of analyses it would find acceptable. However, one of the contract clauses that Executive Order 11246 requires be inserted in all government contracts requires that the contractor agree not to discriminate on the basis of race, color, religion, sex or national origin. Areas in which discrimination expressly is prohibited include ''rates of pay and other forms of compensation.'' Section 202(1). Since the compensation analysis requirement is not new, it imposes no additional burden. The question of burden is also discussed in the Paperwork Reduction Act section below. In addition, contractors have the ability to choose a type of compensation analysis that will determine whether there are gender-, race-, or ethnicity-based disparities.

Commenters also expressed confusion about how the information gained from the analyses conducted under subsection (b) should be used by contractors, and how the contractor's actions will be evaluated by OFCCP. Much of the answer is found in subsection (c), which requires the contractor to develop and execute action-oriented programs designed to correct any problem areas identified pursuant to subsection (b), and to demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results. Of course, if the contractor's analyses disclosed discrimination, the contractor would be expected to eliminate the discriminatory practices and provide appropriate remedies.

A few commenters asserted that little or no reduction of the burden or cost of implementing provisions of the rule would result from the revisions that were made to § 60–2.17. See discussion of burden reduction in the section below addressing the Paperwork Reduction Act.

Section 60–2.18 Equal Opportunity Survey

The proposed § 60–2.18 requires that nonconstruction contractor establishments designated by OFCCP prepare and file an Equal Opportunity (EO) Survey. The EO Survey contains information about personnel activities, compensation and tenure data and specific information about the contractor's affirmative action programs.

Virtually every commenter addressed the EO Survey. There were two general categories of comments: (1) comments on the Survey as a concept and its utility as an instrument to select contractors for compliance evaluations, including comments on the burden hours and (2) comments on the specific format and content of the Survey document.

There were numerous comments from women's and civil rights groups, labor organizations, and a consultant in favor of the EO Survey as a useful instrument to select contractors for compliance evaluations. These comments indicated that it will enhance, strengthen, and improve enforcement efforts; it will increase contractor accountability; it will aid in disclosing possible discriminatory personnel and compensation practices; it will encourage contractor self-audits and corrective actions; it will aid OFCCP in tailoring its evaluation activities to those contractors that appear to need the most help; and it will not be a burden on contractors. However, there were also numerous comments from contractors, law firms, employer associations, and consultants that asserted that the EO Survey is not a useful instrument, or expressed other concerns about the EO Survey.

One commenter asserted that the Administrative Procedure Act requires that OFCCP subject the actual EO Survey format to notice and comment rulemaking. OFCCP disagrees. As the Federal agency charged with enforcing Federal contractor compliance with Executive Order 11246, OFCCP has ample authority to investigate such compliance by, among other things, requesting general information relevant to whether a contractor is fulfilling its affirmative action duties or engaging in discriminatory employment practices. Section 202(5) of Executive Order 11246, and the regulations promulgated thereunder, mandate as a condition of each Government contract, that the contractor agree to furnish all information required by the Executive Order and to permit the Secretary of Labor access to the contractor's books, records and accounts for purposes of investigation to ascertain compliance with the rules, regulations and orders. 41 CFR 60–1.4(a)(5). The requirements of § 60–1.4(a) with respect to the production of data are not limited to information sought by OFCCP as part of a compliance evaluation. Nothing in the Administrative Procedure Act or elsewhere requires OFCCP to publish for notice and comment an enumeration of, or the format for, every item it will examine to determine whether contractors are complying with their contractual obligations. Moreover, OFCCP notes that public notice and comment on the Survey format were provided under the Paperwork Reduction Act.

Several comments were related to OFCCP's projection of the burden hours that it should take contractors to complete the EO Survey. Three organizations representing contractors surveyed a sample of their members concerning the length of time it took to complete the EO Survey. One organization found that the average completion time was 23 hours; the second, 30 hours, and the third stated that 80% of its sample took longer than 12 hours to complete the EO Survey. Given the newness of the EO Survey and the requisite learning curve of the individuals completing the EO Survey, the time required to complete a contractor establishment's initial EO Survey is undoubtedly greater than the time that will be required for subsequent EO Survey submissions. To take this learning curve into account, OFCCP has increased the estimated time to complete the EO Survey from 12 hours to 21 hours for the first two years the Survey is distributed. See Paperwork Reduction Act section below.

Several commenters believed OFCCP should explain how the EO Survey data would be used to select contractors for compliance evaluations. Another

commenter indicated that Part C of the EO Survey (which collects compensation data) is inadequate to help OFCCP select contractors for compliance evaluations. In actuality, the data in all three components of the EO Survey—Parts A, B and C—as well as other information, will be used in the contractor selection process.

Each part of the Survey will provide indicators of potential compliance problems for which further inquiry may be appropriate. For example, negative answers to the questions in Part A about the contractor maintaining AAPs under each of the laws enforced by OFCCP might suggest the need for follow-up in that area. Likewise, Part C data that indicate possible disparities in pay between men and women in particular EEO–1 categories might suggest the need for closer scrutiny of actual pay practices. The Survey responses do not prove that a problem exists, but rather are used as an indicator to guide OFCCP compliance evaluations.

One commenter suggested that construction contractors also be required to submit the EO Survey. Part 60–2 pertains solely to contractors with supply and service contracts. The current EO Survey was intended for nonconstruction contractors. OFCCP will, however, consider expanding the Survey to cover construction contractors in the future. It should be noted also that construction companies that have supply and service contracts, e.g., architectural, engineering, survey and the like, are subject to part 60–2.

Several other commenters indicated that the Survey was not appropriate for colleges and universities because they complete the IPEDS or EEO–6 form rather than the EEO–1 form. Currently OFCCP is not requiring colleges and universities to complete the Survey and there are no current plans to expand the EO Survey to include higher education contractors; however, OFCCP will consider this comment if the Survey is subsequently expanded to include higher education contractors.

A recurring concern of contractors is that information submitted to OFCCP, compensation information being the most frequently cited item, may be disclosed to competitors or the public under the Freedom of Information Act (FOIA).

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 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. Several comments suggested that neither regulations nor case law under FOIA is adequate to ensure protection of information in the EO Survey. However, the more specific the information is about a particular employer, the more protection it is afforded under FOIA. Moreover, the Department's FOIA regulations at 29 CFR 70.26 require OFCCP to notify contractors on a case-by-case basis whenever a FOIA request is made. This notification gives contractors the opportunity to object to the disclosure of any data they consider confidential.

Throughout its history OFCCP has routinely collected compensation information during the course of its compliance evaluations, and OFCCP is not aware of any instance in which compensation data were disclosed without the consent of the contractor. It has always been OFCCP's policy not to release data that is determined to be confidential or has the potential to subject the contractor to commercial harm if disclosed, and this policy will be applied to EO Survey data as well. OFCCP believes that the concerns about the security of EO Survey data are unfounded.

Paragraph (b) of the NPRM provided that the Survey must be prepared in accordance with the format specified by the Deputy Assistant Secretary, but the specific format was not published in the NPRM. Paragraph (b) further stipulated that the Survey will include information that will allow for an accurate assessment of contractor personnel activities, pay practices, and affirmative action performance.

The NPRM also indicated that the Survey ''may'' include data elements such as applicants, hires, promotions, terminations, and compensation by race and gender. In this final rule, this provision is made mandatory, because these data are essential to OFCCP's analyses of contractors' personnel and compensation practices.

As use of the EO Survey develops and evolves, the Department may at some time determine that one or more of the data elements currently included in the EO Survey should be altered or deleted. In the event consideration is given to changing a data element requirement, the following circumstances must exist: (1) the Secretary must clearly demonstrate through statistical analyses of EO Survey submissions that the data element in question is no longer of value; and (2) the Secretary must follow Notice and Comment procedures.

Many comments addressed the content (i.e., format, definitions, etc.) of the EO Survey form as it is being implemented by OFCCP. Because § 60–2.18 does not provide for a specific format, OFCCP does not consider the specific contents of the Survey form now in use to have been part of the NPRM. Nevertheless, in the interest of full discussion of the EO Survey, OFCCP addresses those comments below.

During the first implementation phase of the EO Survey, which began in April 2000, a Survey format, reviewed and approved by OMB, was sent to approximately 7,000 contractors to complete and submit. While many of the comments concerning the format were favorable, a number of comments from law firms, employer associations, consultants and one or two contractors were critical of the format for a variety of reasons. Some indicated that the use of EEO–1 categories rather than job groups renders the data too broad to be meaningful in identifying noncompliance, as an indicator for potential problems, or as a self-auditing tool for contractors. Some other commenters said that using EEO–1 data would require companies to maintain two sets of data: one set for the AAP based on job groups and one for the EO Survey. On August 31, 2000, four organizations representing contractors met pursuant to Executive Order 12866 with OMB and OFCCP to discuss the Survey. These four organizations asserted that reporting Survey data by EEO–1 category represented an additional burden, because contractors usually maintain data by job groups.

OFCCP proposed the use of the nine EEO–1 job categories because (1) they are well known to Federal contractors, and have been in use for several decades; (2) many contractors now use the categories as job groups; (3) the categories are fixed and common across industries and therefore provide a ready means of comparing employment data from one contractor to another (this would not be the case with job groups, whose makeup varies from contractor to contractor); and, (4) job groups generally do not cross EEO–1 categories, which means that a contractor could determine EEO–1 category data simply by combining the data from several job groups. Additionally, OFCCP intends to use the EO Survey data to identify indicators of potential problems for purposes of scheduling and focusing compliance evaluations and not as evidence of discrimination, so detailed data are not necessary. While OFCCP's Equal Employment Data System (EEDS) is also based on EEO–1 data, the EO

Survey provides more in-depth data than the EEDS does, thus greatly increasing OFCCP's ability to predict potential problems when using the EO Survey as the instrument to select contractors for compliance evaluations. By the same token, the EO Survey should also be a useful tool for self-auditing purposes, to enable companies to focus on specific potential problems that may exist.

In response to the requests that OFCCP permit reporting by job group, and in the interest of flexibility, OFCCP has decided to allow contractors the option of submitting personnel activity and compensation data either by job group or by EEO–1 category. Contractors may submit EO Survey data by job group only under these circumstances:

(1) Contractors must submit both personnel activity and compensation data by job groups.

(2) Contractors may submit EO Survey data by job groups only via the Internet.

(3) Contractors must identify the EEO–1 category to which each job group belongs.

(4) Contractors may not submit a job group that crosses EEO–1 category lines.

One consultant asserted that the 30-day timeframe for completion of the Survey did not allow contractors sufficient time, and extensions beyond the May 31, 2000, due date were not granted. OFCCP will take this comment under advisement when determining the due date for future EO Survey submissions.

Several commenters expressed concern over the fact that the EO Survey does not allow for the reporting of data on part-time employees. Some commenters felt that this lack of data would impair OFCCP's ability to identify areas of potential discrimination. One commenter asserted that since many women and minorities are part-time employees, excluding them on the Survey underrepresents the number of women and minorities employed by contractors. Others objected to the exclusion of part-time employees as it was inconsistent with their Affirmative Action Program reporting systems.

OFCCP recognizes that excluding part-time employees from the EO Survey may restrict the Survey's effectiveness as a predictor of potential problems in the area of part-time employment. As a practical matter, including data on part-time incumbency and compensation would have increased the size of the EO Survey by several pages. OFCCP intends to use the EO Survey data as merely an indicator of potential problems and not as evidence of discrimination, so areas of potential discrimination concerning part-time employees can and will still be investigated during compliance evaluations.

Several commenters complained that the definition of ''applicant'' contained in the EO Survey instructions is ambiguous, and were concerned with how contractors could obtain race/gender information. The definition of applicant contained in the EO Survey is the same definition OFCCP and other civil rights agencies have relied upon for more than 20 years. It is taken from and is consistent with the Uniform Guidelines on Employee Selection Procedures (refer to Question and Answer No. 15, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (Qs and As), 44 FR 11996, 11998 (March 2, 1979)). With regard to obtaining race and gender information for reporting on the EO Survey, OFCCP notes that this is not a new requirement nor an additional burden, as contractors have had an affirmative obligation to ascertain the race and gender of their applicants, where possible, for as long as OFCCP has enforced Executive Order 11246. It is also consistent with § 60–3.4 of the Uniform Guidelines on Employee Selection Procedures.

Several commenters stated that they had problems with the definition of ''promotion'' used in the EO Survey, as it differed from the definition they used. The definition is consistent with previous guidance issued by OFCCP, as it was taken verbatim from the Glossary in Chapter 1 of OFCCP's FCCM. Promotions are to be captured within EEO–1 categories as well as from one EEO–1 category to a higher category (*e.g.,* from Professionals to Officials and Managers). To offer an alternative definition in the EO Survey would only create confusion and possibly additional burden on contractors.

One commenter said that the definition of ''hire'' needed clarification. OFCCP did not include a definition of ''hire'' in the most recent EO Survey, as it was found during cognitive testing that the word was well understood and no definition was necessary. OFCCP recognizes that while there may be slight variations in the way hires are reported (*i.e.,* the date the employee accepts the position, the date the employee first reports for work, etc.) from contractor to contractor, the variations are acceptable as long as the contractor is internally consistent. OFCCP does not see the need for a restrictive definition of this term.

A number of comments addressed the compensation data requested by the EO Survey. Many commenters supported requesting compensation data, because of the role of compensation in employment discrimination. Other commenters were not in favor of including compensation data. One such commenter indicated that the EO Survey fails to identify compensation discrimination. Another indicated that the contractor should be allowed to explain all the factors that influence compensation. One commenter noted that tenure is not a good indicator of compensation discrimination. Another stated that the EO Survey erroneously assumes that tenure with a company is the only important pay variable. Still another commenter was of the opinion that only tenure within the position currently held was relevant to compensation analysis. Another indicated that salary data should be aggregated to protect the confidentiality of individual salary data.

OFCCP believes that compensation data must be used in identifying potential problems as early in the process as possible and it, therefore, intends to retain compensation data in the EO Survey. Furthermore, the compensation data are used only as an indicator, a reason for further inquiry, not as evidence of discrimination. Therefore, OFCCP has decided to retain ''tenure'' in future versions of the EO Survey, and tenure is included as a required data element in § 2.18(b). If a compliance evaluation is scheduled and compensation is a focus area, the contractor will have the opportunity to explain all the additional factors that influence compensation.

Finally, the compensation information requested in the EO Survey is aggregated by gender and minority/non-minority status within each EEO–1 category and does not contain identifying information on individuals.

In the preamble to the NPRM OFCCP stated that it contemplated sending the Survey to no fewer than half of all nonconstruction contractor establishments each year; the most likely scenario was described as contractors submitting the Survey biennially, with approximately one half of all establishments submitting the Survey each year. OFCCP also stated that it was considering whether to codify this one half floor as part of the final rule. Several commenters, including women's organizations and labor unions, felt that codification of the number of Surveys was critical to the success of the project. OFCCP has decided that sending the Survey to half of all nonconstruction contractor establishments each year is the only way to ensure that the Survey will

continue to be a credible evaluation tool. Therefore, OFCCP will send the Survey to half of all nonconstruction contractor establishments each year. The final rule states that ''OFCCP will designate a substantial portion of all nonconstruction contractor establishments to prepare and file and Equal Opportunity Survey.'' OFCCP interprets ''a substantial portion'' to mean half of all nonconstruction contractor establishments. Interpreting ''substantial portion'' as ''half'' enhances OFCCP's ability to achieve the three stated objectives of the Survey:

(1) To increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations.

(2) To improve the deployment of scarce federal government resources toward contractors most likely to be out of compliance.

(3) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts, thereby allowing better resource allocation.

Proposed paragraph (c) described how, when, and where contractors must file the Equal Opportunity Survey. The NPRM stated that contractors are encouraged to file the EO Survey in electronic format. Since ''electronic format'' may refer either to the means of transmission or the form in which the data are sent, OFCCP has clarified paragraph (c) to state that contractors are encouraged to submit the EO Survey via the Internet. Internet submission will greatly expedite OFCCP's receipt and analysis of submitted data. Contractors also may mail or fax the EO Survey to OFCCP. For clarification, paragraph (c) now states that the fax telephone number will be indicated in the EO Survey instructions. Two commenters suggested that the EO Survey due dates should be staggered. Staggered filing/submission dates are currently under consideration by OFCCP.

After considering all the comments received, the final rule adopts the EO Survey as a regulatory instrument. Certain issues such as the submission date and the time allowed for completion of the Survey are not part of this rule and will be addressed at a later date.

Section 60–2.30 Corporate Management Compliance Evaluations

This new section draws upon OFCCP's experience in conducting glass-ceiling reviews, addressing several issues that are unique to the corporate management environment.

Paragraph (a) briefly explains that the purpose of Corporate Management Compliance Evaluations is to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management positions.

Paragraph (b) provided 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 outside the corporate headquarters.

A number of commenters endorsed this section. Other commenters endorsed or did not oppose the general concept of codifying Corporate Management Evaluations, even as they expressed concerns about a particular portion of the proposal.

Several commenters, including a law firm, consultants, and organizations representing contractors, stated concern about paragraph (b) of the proposal. They felt that the provision would give OFCCP unlimited authority to expand the scope of Corporate Management Evaluations beyond corporate headquarters to any and all facilities within a corporation. OFCCP's purpose in looking beyond corporate headquarters is to examine ''glass ceiling'' barriers to promotional opportunities that are found at facilities outside the headquarters. For example, OFCCP may wish to analyze ''feeder pools'' at lower-level establishments from which selections for management positions at the headquarters establishment are made. See, generally, FCCM Section 5A04. It is not OFCCP's policy or practice to routinely expand corporate management compliance evaluations into broad-ranging reviews of subordinate facilities, or to audit for issues outside the scope of the glass ceiling. However, if in the course of pursuing a corporate management evaluation at a subordinate establishment, the agency learns of other practices or conditions that may violate the Executive Order (racially discriminatory graffiti in a restroom, for example), OFCCP believes that it has the right and the obligation to investigate those practices or conditions.

In the preamble to the NPRM, OFCCP asked for comments on whether to incorporate into the regulatory text a number of approaches that the agency has found to be particularly effective in addressing glass-ceiling problems. The comments were about equally divided between including the material in the regulations and including it in subregulatory guidance. Upon consideration, OFCCP finds persuasive the argument that inclusion in the regulations would be inconsistent with the objective of simplifying and streamlining the rules. OFCCP encourages contractors to seek guidance on eliminating barriers to the executive suite from publications on the subject of the glass ceiling, including OFCCP's 1997 report on the glass ceiling.

Section 60–2.31 Program Summary

OFCCP proposed to redesignate the current regulation at § 60–2.14 (Program Summary) as § 60–2.31, and to make one technical change to substitute the title ''Deputy Assistant Secretary'' for ''Director.'' OFCCP stated that it would replace the program summary requirement at some point in the future should the summary be found to be duplicative of the Equal Opportunity Survey. Comments were not sought on this simple redesignation. The changes have been adopted.

Section 60–2.32 Affirmative action records

This regulation adds 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.

Six organizations representing the interests of organized labor, women, minorities, and affirmative action officers characterized the proposal as reasonable and stated that it will aid OFCCP in enforcing the requirements of Executive Order 11246.

On the other hand, one contractor and two consultants representing the interests of contractors were concerned that OFCCP would: request attorney-client privileged material; seek records and information ''outside'' the compliance evaluation process thereby potentially violating the Fourth Amendment to the Constitution; and, not protect contractors' secret data and confidential information.

There is no foundation for these concerns. Because OFCCP most commonly requests only the AAP and supporting documentation that are developed by the contractor pursuant to its contractual obligations, OFCCP does not usually request documents that would be subject to the attorney-client privilege. In fact, contractor personnel prepare most such documentation without the involvement of legal

counsel. Even when they involve legal counsel, it is clear that an enforcement agency must have access to pertinent records in order to carry out its lawful duties. OFCCP does not request material ''outside'' the compliance evaluation process other than to investigate complaints of alleged violations of the regulations. The confidentiality of contractors' information is protected by the requirements of the Trade Secrets Act and the Freedom of Information Act, and the Department's regulations implementing the FOIA.

The final rule adopts the proposal without change.

Section 60–2.33 Preemption

In the NPRM OFCCP stated its intent to move this provision from § 60–2.31 in the current regulation to § 60–2.33 without alteration, except for several technical wording changes. Notice and comment were not required, and comments were not solicited. The final rule adopts § 60–2.33 without change.

Section 60–2.34 Supersedure

OFCCP proposed to move this provision from § 60–2.32 in the current regulation to § 60–2.34, and to omit as outdated and unnecessary the second and third sentences of the current regulation. No comments were submitted.

The final rule adopts § 60–2.34 without change.

Section 60–2.35 Compliance Status

OFCCP proposed to expand upon and restructure a provision that appears at § 60–2.15 of the current regulations.

One commenter, a law firm, objected to a proposed sentence providing that the 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. The commenter felt that ''OFCCP's current approach to 'statistical analyses' in the investigation or compliance process * * * does not provide for a reliable means to measure compliance status.'' The commenter referred to the ''median analysis'' OFCCP uses at the investigative stage to examine pay equity issues. OFCCP disagrees with the commenter's view. Median analysis is a valid tool for the first step of the investigative process and may demonstrate the need for further inquiry. The final rule adopts § 60–2.35 as proposed.

Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. This rule has been determined to be nonsignificant for purposes of Executive Order 12866. In the NPRM, OFCCP stated that the proposed changes to the regulations in this NPRM would decrease the total estimated annualized cost to contractors of developing, updating, and maintaining an AAP by $147,950,698 and that the estimated average cost savings per establishment of developing, updating, and maintaining an AAP would be $1378, therefore making this regulation significant for purposes of Executive Order 12866.

Upon reviewing the comments to the NPRM concerning burden hours for the EO Survey and AAP, OFCCP has determined that this initial estimated decrease was too high. In the final rule, OFCCP is taking into account the reduction of the decrease in burden hours. Therefore, the changes to the regulations in this final rule will decrease the total estimated annualized cost to contractors of developing, updating, and maintaining an AAP by $89,357,163. The estimated average cost savings per establishment of developing, updating, and maintaining an AAP is $831. See Paperwork Reduction Act section below.

Congressional Review Act

In view of the revised cost savings as discussed above, this regulation is not a major rule for purposes of the Congressional Review Act.

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 rule will not have a significant economic impact on a substantial number of small business entities.

Permitting contractors to prepare either a traditional workforce analysis or the new-style organizational profile, allowing smaller contractors to use EEO–1 categories for their job groups, reducing the number of factors that must be considered to determine the availability of women and minorities from eight to two, and eliminating more than half of the additional required ingredients of the documentation of the AAP, will reduce costs associated with these provisions for all affected contractors. The Equal Opportunity Survey requirement will increase costs, but the overall result of the rule should be a reduction in the recordkeeping and reporting burden.

Thus, the Department concludes that the 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 13132, the rule does 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 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 rule revises regulations which contain information collection requirements (ICR) which are currently approved under OMB No. 1215–0072. The rule codifies a new requirement, the Equal Opportunity Survey, which was reviewed and approved by OMB under OMB No. 1215–0196. The EO Survey burden is being adjusted to 21 hours. That ICR is being adjusted in conjunction with this final rule.

The information collections affected by this final rule were identified in the NPRM. Those collections and their predicted effect on the recordkeeping hours contained in the approved 1215–0072 on file at OMB are summarized as follows:

- 60–1.12 Record Retention—5 percent increase
- 60–2.11 Organizational Profile—20 percent decrease
- 60–2.12 Job Group Analysis—10 percent decrease for contractors with fewer than 150 employees
- 60–2.14 Determining Availability—10 percent decrease
- 60–2.17 Additional Required Elements of Affirmative Action Programs—20 percent decrease

OFCCP invited 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).

There were no responses that specifically addressed the issues listed above. However, a significant number of commenters representing the contractor community expressed opinions about the burdens associated with the organizational profile requirement in their comments on the regulatory provision. They indicated that the current workforce analysis, for most contractors, is a computer generated product that is easily updated from data routinely stored for other purposes. Furthermore, it was indicated that, for many contractors, creating an organizational profile may prove to be time consuming and costly because it is not something they currently do. There appears to be general agreement that moving from the work force analysis to the organizational profile will not result in the 20 percent burden reduction that OFCCP estimated in the NPRM. Upon further consideration, OFCCP agrees that the original estimate may be too high. In its final ICR submission to OMB, OFCCP is revising the organizational profile burden reduction from 20% to 10%. In the absence of experience data, we estimate 50% of the contractors will use the organizational profile, resulting in a reduction in the estimated burden savings from 20% to 10%.

A few commenters also argued that OFCCP overstated the expected cost savings from the changes in the ''Additional required elements'' section of the rule (§ 60–2.17), primarily based upon their notion that the ''required elements'' being retained impose new burdens. Contrary to the commenters' beliefs, virtually everything required of contractors under the new § 60–2.17 already is required of contractors under existing regulations. Notably, no commenter disputed the basic proposition that the reduction in the number of required elements would reduce burdens. Further, OFCCP believes that the commenters disputing the size of the cost saving underestimate the efforts contractors should be making under the existing regulations.

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 number of firms	Revised estimate	Changes
AAP Development	161,155	192,750	118,903	−73,847
AAP Updating	6,658,288	7,963,670	5,268,677	−2,694,993
AAP Maintenance	6,725,543	8,044,110	5,321,896	−2,722,214
Total Recordkeeping Burden	13,544,986	16,200,530	10,709,476	−5,491,054
Average hours per respondent	@150	@150	@99	

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. We estimate that this proposal would increase burden by 21 hours per respondent, for a total increased burden of 1,050,000 hours.

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 for the Survey, 25 percent of the burden hours will be executive, administrative, and managerial and 75 percent will be administrative support. OFCCP has calculated the total estimated annualized cost of the Survey as follows:

Executive 1,050,000 × .25 × $35.18 = $9,234,750

Admin. Supp. 1,050,000 × .75 × $16.63 = $13,096,125

Total annualized cost estimate = $22,330,875

For §§ 60–1.12, 60–2.11, 60–2.12, 60–2.14, and 60–2.17 concerning AAP development, maintenance, and updating, OFCCP estimates that 20 percent of the burden hours will be executive, administrative, and managerial and 80 percent will be administrative support. OFCCP has calculated the total estimated annualized cost savings as follows:

Executive 5,491,054 × .20 × $35.18 = $38,635,056

Admin. Supp. 5,491,054 × .80 × $16.63 = $73,052,982

Total annualized cost savings estimate = $111,688,038

Total annualized cost savings estimate of sect;§ 60–1.12, 60–2.11, 60–2.12, 60–2.14, and 60–2.17 = $111,688,038

Total annualized cost estimate of EO Survey = $22,330,875

Total annualized cost savings estimate = $89,357,163

Estimated average cost savings per respondent = $831

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 3rd day of November, 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 hereby withdrawn; and Parts 60–1 and 60–2 of Title 41 of the Code of Federal Regulations are 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).

2. Section 1.12 is revised to read as follows:

§ 60–1.12 Record retention.

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

(b) *Affirmative action programs.* A contractor establishment required under § 60–1.40 to develop and maintain a written 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.

(c) *Contractor identification of record.* (1) For 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.

(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. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control.

(e) *Applicability.* The requirements of this section shall apply only to records made or kept on or after December 22, 1997.

3. Section 60–1.40 is revised to read as follows:

§ 60–1.40 Affirmative action programs.

(a)(1) Each nonconstruction (supply and service) contractor must develop and maintain a written affirmative action program for each of its establishments, if it has 50 or more employees and:

(i) Has a contract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(2) Each contractor and subcontractor must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a subcontract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(b) Nonconstruction contractors should refer to Part 60–2 for specific affirmative action requirements. Construction contractors should refer to Part 60–4 for specific affirmative action requirements.

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

4. Part 60–2 is revised to read as follows:

Subpart A—General

Sec.

Subpart B—Purpose and Contents of Affirmative Action Programs

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 (supply and service) 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.*

(1) Each nonconstruction contractor must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a contract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(2) Each contractor and subcontractor must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and:

(i) Has a subcontract of $50,000 or more; or

(ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or

(iii) Serves as a depository of Government funds in any amount; or

(iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

(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 a written 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 work at establishments 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.

(4) If a contractor wishes to establish an affirmative action program other than by establishment, the contractor may reach agreement with OFCCP on the development and use of affirmative action programs based on functional or business units. The Deputy Assistant Secretary, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

(e) *How to identify employees included in affirmative action programs other than where they are located.* If pursuant to paragraphs (d)(1) through (3) of this section employees are included in an affirmative action program for an establishment 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 to develop and maintain a written 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.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, that fact shall be recorded in the investigation file. Except as provided in § 60–1.26(b)(1), whenever administrative enforcement is contemplated, the notice to the contractor shall be issued giving the contractor 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts, or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for its failure or fails to remedy that failure by developing and implementing an acceptable affirmative action program within 30 days, the case file shall be processed for enforcement proceedings pursuant to § 60–1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with part 60–30 of this chapter.

(3) During the ''show cause'' period of 30 days, every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of nonresponsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the case shall be processed for enforcement proceedings pursuant to § 60–1.26 of this chapter.

(d) During the ''show cause'' period and formal proceedings, each contracting agency must continue to determine the contractor's responsibility in considering whether or not to award a new or additional contract.

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 depiction 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. The contractor must use either the organizational display or the workforce analysis as its organizational profile:

(b) *Organizational display.* (1) An organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of the contractor's organizational structure. The organizational display 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).

(3) For each organizational unit, the organizational display must indicate the following:

(i) The name of the unit;

(ii) The job title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor);

(iii) The total number of male and female incumbents; and

(iv) the total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.

(c) *Workforce analysis.* (1) A workforce analysis is a listing of each job title as appears in applicable collective bargaining agreements or payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision.

(2) If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line.

(3) Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(4) For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

§ 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 which the contractor is reasonably able to provide, 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) 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. At a minimum, this will include such data elements as applicants, hires, promotions, terminations, compensation, and tenure by race and gender. As use of the EO Survey develops and evolves, the Department may at some time determine that one or more of the data elements currently included in the EO Survey should be altered or deleted. In the event consideration is given to changing a data element requirement, the following circumstances must exist:

(1) The Secretary must clearly demonstrate through statistical analyses of EO Survey submissions that the data element in question is no longer of value; and

(2) The Secretary must follow Notice and Comment procedures.

(c) *How, when, and where to file.* Contractors are encouraged to submit the Equal Opportunity Survey via the Internet. The Equal Opportunity Survey may also be submitted via facsimile to the telephone number 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 mid-level 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 establishments 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 of this chapter 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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