

**DEPARTMENT OF LABOR****Office of Labor-Management Standards****29 CFR Part 470**

RIN 1215-AB33

**Obligations of Federal Contractors and Subcontractors; Notice of Employee Rights Concerning Payment of Union Dues or Fees**

**AGENCY:** Office of Labor-Management Standards, Employment Standards Administration, Labor.

**ACTION:** Notice of proposed rule-making; request for comments.

**SUMMARY:** This Notice of Proposed Rule-Making (NPRM) proposes a regulation to implement Executive Order 13201, which was signed by President George W. Bush on February 17, 2001. Executive Order 13201 ("the Executive Order," "the Order," or "EO 13201") requires non-exempt Government contractors and subcontractors to post notices informing their employees that under Federal law, those employees have certain rights related to union membership and use of union dues and fees. The Order also provides the text of contractual provisions that Federal Government contracting departments and agencies must include in every Government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold. These provisions include the language of the required notices, and explain the sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order. Covered Government contractors and subcontractors must include these same provisions in their nonexempt subcontracts and purchase orders, so that the provisions will be binding upon each subcontractor or vendor.

The Proposed Rule would provide the text of the required contractual provisions, explain exemptions, and set forth procedures for ensuring compliance with the Order; it also would contain other related requirements. This NPRM invites comments on the Proposed Rule.

**DATES:** Comment Period: Comments must be received on or before November 30, 2001.

**ADDRESSES:** Comments should be sent to Don Todd, Deputy Assistant Secretary for Labor-Management Programs, Office of Labor-Management-Standards, Employment Standards Administration,

U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5605, Washington, DC 20210.

As a convenience to commenters, comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1340. To assure access to the FAX equipment, only comments of five or fewer pages will be accepted via FAX transmittal. Receipt of submissions, whether by U.S. mail or FAX transmittal, will not be acknowledged.

Comments will be available for public inspection during normal business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Don Todd, Deputy Assistant Secretary for Labor-Management Programs, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room S-2321, Washington, DC 20210, (202) 693-0200 (this is not a toll-free number). Individuals with hearing impairments may call 1-800-877-8339 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:** The preamble to the Proposed Rule is organized as follows:

I. Background—provides a brief description of the development of the Proposed Rule.

II. Authority—cites the legal authority supporting the Proposed Rule, Departmental redelegation authority, and interagency coordination authority.

III. Overview of the Rule—summarizes pertinent aspects of the regulatory text, and describes the purposes and application of that text.

IV. Regulatory Procedure—sets forth the applicable regulatory requirements and requests comments on specific issues.

**I. Background**

Executive Order 13201 (66 FR 11221, February 22, 2001) is designed to promote economy and efficiency in Government procurement by requiring Government contractors to inform their workers that Federal labor laws give those workers certain rights related to union membership and use of union dues and fees. The Order provides the text of a contract clause that Government contracting departments and agencies must include in all nonexempt Government contracts and subcontracts. That clause requires contractors to post a notice, the exact language of which is included in the clause. The clause also requires contractors to include the same clause in their nonexempt subcontracts and purchase orders, and describes generally the sanctions, penalties, and remedies that may be imposed if the contractor

fails to satisfy its obligations under the Order and the clause.

The text of the notice informs employees that they cannot be required to join, or maintain membership in, a union in order to keep their jobs; that under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay dues and fees to the union; and that, even where such union-security agreements exist, employees who are not union members can only be required to pay their share of union costs relating to certain specific activities. The notice also provides a general description of the remedies to which employees may be entitled if these rights have been violated, and provides contact information for further information about those rights and remedies.

The Order contains requirements similar, but not identical, to those included in Executive Order 12800, issued on April 13, 1992, by former President George H. W. Bush. See 57 FR 12985 (April 14, 1992); 57 FR 13413 (April 16, 1992). That earlier Order, in turn, was intended to inform employees of their rights under the decisions of the United States Supreme Court in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and related cases. In *Beck*, the Court held that a union may not use fees and dues that it collects from bargaining unit employees who have not joined the union to finance activities that are not "germane" to the union's representational purposes. Examples of activities the Court considered "germane" include collective bargaining, contract administration, and grievance adjustment. *Beck*, 487 U.S. at 745, 760.

During 1992, the Department of Labor ("the Department") issued a Notice of Proposed Rule-Making (NPRM) and Final Rule implementing Executive Order 12800. See 57 FR 33403 *et seq.* (July 24, 1992) (NPRM); 57 FR 49588 *et seq.* (November 2, 1992) (Final Rule). However, Executive Order 12800 was revoked on February 1, 1993, by Executive Order 12836. 58 FR 7045 (published February 3, 1993). The Final Rule was therefore withdrawn. See 58 FR 15402 (March 22, 1993).

This Proposed Rule, authorized by Section 1 of Executive Order 13201, is based largely upon the November 2, 1992, Final Rule implementing the earlier Order. Most substantive differences between the Proposed Rule and the 1992 Final Rule are necessitated by the differences between the two Executive Orders. The Department has made a few changes to the language of the earlier Final Rule in order to make

the Proposed Rule more consistent with the regulations and procedures of the Office of Federal Contract Compliance Programs (OFCCP). This NPRM provides that OFCCP, under the supervision of the Deputy Assistant Secretary for Federal Contract Compliance, would conduct compliance evaluations and complaint investigations under the Order and the Rule. See Section II(B) of this preamble, "Departmental Authorization." Each substantive difference between the earlier Final Rule and this Proposed Rule is discussed below in section III, "Overview of the Rule."

In addition to such substantive changes, the Department has revised certain sections of the 1992 Final Rule to comply with Executive Order 12988 (February 5, 1996). That Order requires Federal agencies to draft their regulations to be simple and easy to understand. Accordingly, the Department has drafted the Proposed Rule to make it easier to read. For example, the Department has reworded the headings of regulatory sections into the form of questions. Also, the Department has replaced ambiguous or confusing words with plainer language; for example, the word "shall" has been replaced in the Proposed Rule by the terms "must," "will," "is/are," or similar words, as appropriate. Other specific provisions that would differ from the 1992 Final Rule are discussed below in section III.

While this NPRM was being prepared, the Department issued an Interim Procedural Notice (IPN) to provide guidance to contractors and subcontractors about how to comply with Executive Order 13201 pending the publication of a Final Rule implementing the Order. 66 FR 19988 (April 18, 2001). The IPN authorizes covered contractors to fulfill their posting obligations under the Order by replicating the text of the notice set forth in the Order and posting it in conspicuous places in and about their plants and offices, including all places where notices to employees are customarily posted. As noted below in section 470.2(e) of the Proposed Rule, the Department is printing an employee notice poster that will be provided by the contracting agency or may be obtained directly from the Department at the addresses listed in that section. The Rule proposes that once the Department's official employee notice poster is available, contractors may only fulfill their posting obligations by using that official poster or by making and using exact duplicate copies of that poster.

## II. Authority

### A. Legal Authority

The legal authority for the Notice of Proposed Rule-Making is Executive Order 13201, issued pursuant to the Constitution and laws of the United States, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*

### B. Departmental Authorization

Section 1(b) of Executive Order 13201 delegates responsibility for the administration and enforcement of the Order to the Secretary of Labor, and directs the Secretary to adopt rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of the Order. Section 9 of the Order authorizes the Secretary to delegate any function or duty under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Using that delegation authority, Secretary's Order 3-2001, issued March 26, 2001, and published in the **Federal Register** on April 3, 2001 (66 FR 17762), delegates and assigns responsibility for the administration and enforcement of EO 13201 to the Assistant Secretary for Employment Standards. The Assistant Secretary, in turn, has delegated general responsibility for the administration and enforcement of the Executive Order to the Deputy Assistant Secretary for Labor-Management Programs. Under this delegation, the Deputy Assistant Secretary for Labor-Management Programs has specific responsibility for granting and withdrawing exemptions and waivers under this part, and for referring for administrative enforcement cases against contractors that have been found to have violated the provisions of the Order or this part.

The Assistant Secretary has conveyed responsibility for conducting compliance evaluations and complaint investigations under the Order and this part to the Deputy Assistant Secretary for Federal Contract Compliance.

### C. Interagency Coordination

The Civilian Agency Acquisition Council has been requested to insert language implementing the Executive Order into the Federal Acquisition Regulation (FAR).

## III. Overview of the Rule

This Proposed Rule would add a new subchapter C and part 470 to Volume 29 of the Code of Federal Regulations (CFR).

## Preamble, Subpart A

Subpart A would contain definitions, the employee notice clause, and exemptions.

### Sec. 470.1 What definitions apply to this part?

The proposed definitions contained in this section would be derived, for the most part, from the definitions of the same terms, either in OFCCP's regulations at 41 CFR 60-1.3 (which deals with certain obligations of Federal contractors regarding equal employment opportunity, and the procedures used to enforce those obligations), or in the November 2, 1992, Final Rule that implemented Executive Order 12800 ("the earlier Final Rule"). See 57 FR 49588, 49595. With certain exceptions explained below, any substantive differences between the text of a definition in this Proposed Rule and the text of the definition on which it is based are necessitated by differences between Executive Order 13201, which authorizes this NPRM, and Executive Order 12800, which authorized the earlier Final Rule. In addition, pursuant to Executive Order 12988, stylistic or phrasing changes have been made to particular proposed definitions to clarify their meaning or make their wording consistent with the wording of similar definitions in other regulations; such proposed changes are also explained below.

**Assistant Secretary:** The substance of this definition would be based on the definition of the same term in the corresponding section of the earlier Final Rule, and would be consistent with the delegation in Secretary's Order 3-2001. The structure of the Department has been changed since 1992, when the earlier Rule was promulgated; because of those changes, the authority under EO 13201 is now delegated to the Assistant Secretary for Employment Standards, as discussed in section I(B) of this preamble.

**Collective bargaining agreement:** Section 2(a) of EO 13201 exempts from the requirements of the Order those agreements that meet this definition. As required by section 2(a) of the Order, this definition would be based on the definition of the same term in the Civil Service Reform Act, 5 U.S.C. 7103(a)(8). Because that statutory definition, in turn, references the definition of the term "collective bargaining" in 5 U.S.C. 7103(a)(12), the proposed definition would incorporate the relevant portions of the latter statutory definition as well. The Department has revised and reorganized the language of these two statutory definitions in order to make

the proposed definition more understandable.

*Construction:* The definition of this term would be identical to the definition of the same term in the earlier Final Rule, except that, to make the definition easier to understand, the phrase "as used in paragraphs (d) and (j) of this section" would be omitted. The definition also would be substantively consistent with the definition of the term "construction work" in 41 CFR 60-1.3.

*Construction work site:* This definition would be identical to the definition of the same term in the earlier Final Rule.

*Contract, contracting agency, and contractor:* These definitions would be identical to the definitions of the same terms in the earlier Final Rule.

*Department:* This definition would be identical to the definition of the same term in the earlier Final Rule, and would be consistent with the delegation of authority in section 1(b) of EO 13201.

*Employee notice clause:* This term was used, but not defined, in the earlier Final Rule. The Proposed Rule would use the term as a shorthand method of referring to the clause that EO 13201 requires Government contracting departments and agencies, contractors, and subcontractors to include in their non-exempt contracts.

*Government:* This definition would be identical to the definition of the same term in the earlier Final Rule.

*Government contract:* This definition would be identical to the definition of the same term in 41 CFR 60-1.3, with one exception. OFCCP's definition of the term excludes "Federally assisted construction contracts"; the Proposed Rule would delete the word "construction" to signify that all Federally assisted contracts (not just construction contracts) would be exempt from the requirements of the Executive Order.

*Labor organization:* This definition would be identical to the definition of the same term in the earlier Final Rule.

*Modification:* This definition would be substantively similar to the definition of the same term in the earlier Final Rule. The proposed definition has been rewritten slightly to make it easier to understand. This revision is not intended to change the meaning of the definition; the Department intends that the definition would be interpreted in the same way as the corresponding definition in the earlier Final Rule.

*Person:* This definition would be identical to the definition of the same term in the earlier Final Rule, except that, to make the definition easier to understand, the phrase "as used in

paragraphs (j), (o), (r), and (s) of this section" would be omitted.

*Prime contractor:* This definition would be similar to the definition of the same term in the earlier Final Rule. The second part of the definition would state that "for purposes of subparts B and C," the term would apply to any person who has held a contract subject to the Order. In the earlier Final Rule, this second part of the definition, which would have the effect of authorizing the Department to take appropriate action against a prime contractor who may not hold a Government contract at the time the action is being taken, applied only for purposes of subpart B of this part. In this Proposed Rule, the Department would apply the second part of the definition to subpart C in order to ensure that the provisions of section 470.22, which authorize sanctions and penalties for intimidation and interference, would apply to former as well as current prime contractors.

*Related rules, regulations, and orders of the Secretary of Labor:* This definition would be based on the definition of the same term in the earlier Final Rule. The difference between the old and new definitions would reflect two facts addressed above in the discussion of the definition of the term Assistant Secretary: first, that the structure of the Department has been changed since 1992, when the earlier Rule was promulgated; and second, that because of those changes, the authority under EO 13201 is now delegated to the Assistant Secretary for Employment Standards, who has re-delegated that authority to the Deputy Assistant Secretaries for Labor-Management Programs and for Federal Contract Compliance, as discussed in section I(B) of this preamble.

*Subcontract:* This definition would be identical to the definition of the same term in 41 CFR 60-1.3.

*Subcontractor:* This definition would be identical to the definition of the same term in the earlier Final Rule, except that the second clause of the definition would apply to subparts B and C of this part, for the same reasons explained above in the discussion of the definition of "prime contractor."

*Union:* This definition would state that the term "union" is defined in the same way as the term "labor organization." The earlier Final Rule equated these two terms as well.

*Union-security agreement:* This definition would be identical to the definition of the same term in the earlier Final Rule.

*United States:* This definition would be identical to the definition of the same term in 41 CFR 60-1.3, except that the

phrase "shall include" would be replaced by "includes."

*Sec. 470.2 Under the Executive Order, what employee notice clause must be included in Government contracts?*

*Subsection 470.2(a):* This subsection would implement the requirements of section 2(a) of EO 13201. The text of the employee notice clause provided in the subsection would be identical to the text provided in the Executive Order, with three exceptions.

First, paragraph 1 of the clause set forth in section 2(a) of the Order states that, in notices posted in the plants or offices of carriers subject to the Railway Labor Act ("RLA"), "the last sentence" of the notice should not be included. It appears that the Order adopted the quoted phrase because it was included in the 1992 Executive Order. In that earlier Order, "the last sentence" of the notice provided contact information for the National Labor Relations Board ("NLRB"), which does not have jurisdiction over carriers subject to the RLA. However, EO 13201 added a sentence to the end of the notice; that sentence provides the URL for the NLRB's website. The reference in section 2(a) of the Order to "the last sentence" of the notice apparently fails to take into account that additional sentence. In the interest of clarity, and to implement the implicit intent of the Executive Order to exclude the posting of NLRB related information in Railway Labor Act related work sites, the Proposed Rule would replace the phrase "the last sentence" with the phrase "the last two sentences" in the text of the notice.

Second, paragraph 4 of the clause in the Executive Order requires a contractor to pass down only the provisions of paragraphs 1 through 3 of the clause to its subcontractors and vendors. The same requirement was included in the July 1992 NPRM implementing the earlier Executive Order. See 57 FR 33403, 33405. In response, the Associated General Contractors of America (AGC) observed that, since paragraphs 1 through 3 of the clause do not themselves require pass-down, first-tier subcontractors and vendors would not be required to pass down the clause further. 57 FR 49588, 49591 (discussion of section 470.2(a)(4)). As the AGC noted, this result contradicted the NPRM's requirement that the clause be included in the contract document of each tier. *Id.* The Department noted in its response that the intent of Executive Order 12800 was clearly that the clause "flow down beyond the first tier level"; otherwise there would have been no

reason for the provision, in section 3(b)(v) of that Order, that authorized the Secretary to exempt “subcontractors below an appropriate tier.” *Id.* As a result, the Department revised the clause in the earlier Final Rule to require pass-down of paragraphs 1 through 4, rather than only paragraphs 1 through 3. *Id.*

Similarly, Executive Order 13201 contains a provision at section 3(b)(v) that authorizes the Secretary to exempt subcontractors below an appropriate tier. Therefore, for the same reasons discussed in the previous paragraph, the Proposed Rule would revise paragraph 4 of the employee notice clause to require contractors to pass down paragraphs 1 through 4 of the clause to their subcontractors and vendors, rather than only paragraphs 1 through 3.

Third, the words “Provided” and “that” would be deleted from the final sentence in section 4 of the clause, and the word “shall” would be changed to “must” throughout the clause, in order to make the clause easier to understand. This revision is not intended to change the meaning of the clause; the clause would be interpreted in the same way as the corresponding material in the Executive Order.

*Paragraph 470.2(b):* This paragraph is subject to the relevant provisions of the Paperwork Reduction Act of 1995 (PRA) at 44 U.S.C. 3507(d), and will be reviewed by the Office of Management and Budget (OMB) under those provisions. The paragraph would be identical to the corresponding paragraph in the earlier Final Rule, except that the heading of the paragraph would be revised to more accurately describe the contents of the paragraph.

*Paragraph 470.2 (c):* This paragraph would be identical to the corresponding paragraph in the earlier Final Rule.

*Paragraph 470.2 (d):* This paragraph would be identical to the corresponding paragraph in the earlier Final Rule, except that the title of the office to which requests for copies of the poster should be directed would be updated.

*Sec. 470.3 What contracts are exempt from the employee notice clause requirement?*

The exemptions in this section are either required or authorized by the Executive Order.

*Paragraph 470.3(a):* This paragraph would exempt, from the requirements of part 470, contracts for purchases below the Simplified Acquisition Threshold, as that threshold is defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. This exemption is required by section 2(a) of the Executive Order. Subparagraphs (1) and (2) would be

modeled on the parallel section in the earlier Final Rule. *See* 57 FR 49588, 49596. Consistent with plain-language guidelines, the relevant language from the earlier Final Rule has been slightly rewritten for the Proposed Rule, to improve the subparagraphs’ clarity. This revision is not intended to change the meaning of these subparagraphs; they would be interpreted in the same way as the corresponding provisions of the earlier Final Rule.

At the time this Rule is being proposed, Congress has set the Simplified Acquisition Threshold at \$100,000. Therefore, except as provided in subparagraphs (1) and (2), contracts for purchases of less than that amount would not need to include the employee notice clause. If Congress were to amend the threshold after the Proposed Rule is published, this paragraph would be read to exempt contracts for purchases below the amended amount.

*Paragraph 470.3(b):* This paragraph would exempt, from the requirements of part 470, Government contracts that result from solicitations issued before April 18, 2001, the effective date of the Order. This exemption would be based on section 14 of the Executive Order, which provides that the Order applies to contracts resulting from solicitations issued on or after that date.

*Paragraph 470.3(c):* This paragraph would permit the Deputy Assistant Secretary for Labor-Management Programs, upon written request, to exempt contracting agencies or persons from including the employee notice clause in particular contracts, subcontracts, or purchase orders, where special circumstances in the national interest require such exemption. Such exemptions are authorized by section 3(a) of the Executive Order.

*Paragraph 470.3(d):* This paragraph would permit the Deputy Assistant Secretary for Labor-Management Programs to withdraw the exemption for a specific contract or subcontract, or group of contracts or subcontracts, when, in his or her judgment, such a withdrawal is necessary or appropriate to achieve the purposes of the Executive Order. This subparagraph would be similar to the parallel subparagraph, 470.3(c), in the earlier Final Rule; the title of the Departmental officer authorized to withdraw exemptions would be updated to reflect changes in the structure of the Department.

*Sec. 470.4 What contractors or facilities are exempt from the posting requirements?*

*Paragraph 470.4(a):* This paragraph is authorized by section 3(b)(iv) of EO 13201, and would be identical to the

parallel paragraph in the earlier Final Rule.

*Paragraph 470.4(b):* This paragraph is authorized by section 3(b)(iii) of EO 13201, and would be identical to the parallel paragraph in the earlier Final Rule.

*Paragraph 470.4(c):* This paragraph is authorized by section 3(b)(ii) of EO 13201, and would be identical to the parallel paragraph in the earlier Final Rule, except that the phrase “in jurisdictions” would be inserted before the word “where” to conform the language of the regulation to that of the Executive Order.

*Paragraph 470.4(d):* As with paragraph 470.2(b), discussed above, this paragraph is subject to the provisions of the PRA, and will be reviewed by OMB. The contents of the paragraph are authorized by section 3(c) of EO 13201, and would be modeled on 41 CFR 60–1.5(b)(2). The Proposed Rule revises the language of that subparagraph to conform to the requirements of EO 13201 and the current structure of the Department of Labor, and to clarify the meaning of the paragraph.

*Paragraph 470.4(e):* This paragraph is authorized by section 3(b)(i) of EO 13201, and would be identical to the parallel paragraph in the earlier Final Rule.

**Subpart B—Compliance Evaluations, Complaint Investigations, and Enforcement Procedures**

*Sec. 470.10 How will the Department determine whether a contractor is in compliance with the Executive Order and this part?*

This section would be substantively similar to the parallel section in the earlier Final Rule. *See* 57 FR 49588, 49597. The differences between the two sections would be necessitated by the requirements of EO 13201 or result from changes in OFCCP’s general practice and procedures, including changes in the terminology used by OFCCP to refer to those practices and procedures. For example, the process of determining whether a contractor is in compliance with its obligations is now called a “compliance evaluation.” The term encompasses compliance reviews, as well as off-site record reviews and compliance checks. *See* 41 CFR 60–1.20(a). Therefore, the term “compliance evaluation” would replace “compliance review” throughout the section in the Proposed Rule. Additionally, references to “the Department” would be modified to clarify that the Deputy Assistant Secretary for Federal Contract Compliance has responsibility for

conducting compliance evaluations, and subparagraph 470.10(b)(2) would be modified to include the requirements of section 14 of EO 13201.

*Sec. 470.11 What are the procedures for filing and processing a complaint?*

*Paragraph 470.11(a) and (b):* As with paragraphs 470.2(b) and 470.4(d), discussed above, these paragraphs are subject to the provisions of the PRA, and will be reviewed by OMB. The paragraphs would contain the same substantive requirements as the parallel sections in the earlier Final Rule. *See* 57 FR 49588, 49597. The Proposed Rule would revise the language of those previous sections to improve their clarity, correct punctuation errors, and make them more consistent with OFCCP's regulations at 41 CFR 60-1.22 and 1.23.

*Paragraphs 470.11(c)-(d):* These paragraphs would be substantively similar to the corresponding paragraphs in the earlier Final Rule. *See* 57 FR 49588, 49597. They would also be consistent with OFCCP's regulations at 41 CFR 60-1.24(a) and (b). The Proposed Rule would revise the paragraphs slightly to make them easier to understand, and to clarify that the Deputy Assistant Secretary for Federal Contract Compliance has responsibility for conducting complaint investigations. None of the revisions to the paragraphs is intended to change the meaning of the paragraphs; the paragraphs would be interpreted in the same way as the corresponding provisions of the earlier Final Rule.

*Sec. 470.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?*

*Paragraph 470.12(a):* This paragraph would contain the same substantive requirements as the corresponding paragraph in the earlier Final Rule, and would be consistent with OFCCP's regulation at 41 CFR 60-1.24(c)(2). For the reasons explained in the discussion of section 470.10 above, the Proposed Rule would replace the term "compliance review" with "compliance evaluation." *See* 57 FR 49588, 49597. The Proposed Rule would also revise the paragraph slightly to make it easier to understand. This revision is not intended to change the meaning of the paragraph; the paragraph would be interpreted in the same way as the corresponding provision of the earlier Final Rule.

*Paragraph 470.12(b):* This paragraph would contain the same substantive requirements as the corresponding paragraph in the earlier Final Rule. The

Proposed Rule would add examples of ways in which a contractor that has violated the Order or the Rule might correct such a violation. The corrective action that the Deputy Assistant Secretary would require in a given case would depend on the type of violation. The addition of the examples would be made to clarify the Rule, and is not intended to change the meaning of the paragraph; the paragraph would be interpreted in the same way as the corresponding paragraph in the earlier Final Rule.

*Paragraphs 470.12(c) and (d):* These paragraphs would be identical to the corresponding paragraphs in the earlier Final Rule, except that the title of the official responsible for processing a violation would be updated. These paragraphs also would be consistent with OFCCP's regulations at 41 CFR 60-1.24(c)(3) and (5), respectively.

*Sec. 470.13 Under what circumstances, and how, will enforcement proceedings under the Executive Order be conducted?*

This section would be identical to the corresponding section in the earlier Final Rule, with two exceptions. First, for the reasons explained above in the discussion of section 470.10, the terms "compliance review" and "on-site review" would be replaced with "compliance evaluation." Second, the title of the official responsible for referring cases for enforcement would be updated.

The post-hearing procedures that would be set forth in this section for imposing sanctions or penalties would be consistent with section 6 of the Executive Order.

*Sec. 470.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?*

This section would be similar to the corresponding section of the earlier Final Rule. *See* 57 FR 49588, 49597-98. Substantive differences between the two sections are explained below.

*Paragraph 470.14(a):* In this paragraph, references to the "affected contracting agency" would be changed to the plural "affected contracting agencies," to indicate that a particular contractor may hold contracts with more than one Federal agency, and that all affected agencies should be notified when the Department intends to impose sanctions and penalties against such a contractor.

*Paragraph 470.14(b):* Except for the replacement of the word "shall" by "will," this paragraph would contain

language identical to that of the second sentence of paragraph 470.14(a) of the earlier Final Rule. The sentence would be placed in a separate paragraph in order to make the section easier to understand. This change is not intended to alter the meaning of the sentence; the sentence would be interpreted in the same way as the corresponding sentence in the earlier Final Rule.

*Paragraph 470.14(c):* Except for the replacement of the word "shall" by "will," this paragraph would contain language identical to that of the corresponding paragraph in the earlier Final Rule, paragraph 470.14(b).

*Paragraph 470.14(d):* Except for the replacement of the word "shall" by "must," this paragraph would contain language identical to that of the corresponding paragraph in the earlier Final Rule, paragraph 470.14(c).

*Paragraph 470.14(e):* Except for the replacement of the word "shall" by "must" and an update to a citation, this paragraph would contain language identical to that of the final sentence of paragraph 470.14(e) in the earlier Final Rule. The Proposed Rule would move the sentence, which explains what contracting agencies must do when the Assistant Secretary exercises his or her authority under paragraph 470.14(d), to make this section easier to understand.

*Paragraph 470.14(f):* Except for the replacement of the word "shall" by "will," this paragraph would contain language identical to that of the first sentence of paragraph 470.14(d) in the earlier Final Rule. To make the Rule easier to understand, the material discussed in the second sentence of that earlier paragraph would be moved to section 470.15 of the Rule.

*Sec. 470.15 Under what circumstances must a contractor be provided the opportunity for a hearing?*

This section is authorized by section 5(b) of the Executive Order. Paragraph 470.15(b) would contain material similar to that in the second sentence of paragraph 470.14(d) of the earlier Final Rule. The Proposed Rule would revise the relevant language of the Order and the earlier Final Rule to make it easier to understand. These changes are not intended to alter the meaning of this section; the section would be interpreted in the same way as section 5(b) of the Executive Order.

*Sec. 470.16 Under what circumstances may a contractor be reinstated?*

This section would contain language similar to that found in the corresponding section of the earlier Final Rule. The Proposed Rule would revise the section to make it easier to

understand. These changes are not intended to alter the meaning of this section; the section would be interpreted in the same way as the corresponding section of the earlier Final Rule.

### Subpart C—Ancillary Matters

This subpart would address miscellaneous matters as discussed below.

*Sec. 470.20 What authority under this Rule or the Executive Order may the Secretary delegate, and under what circumstances?*

This section would contain language similar to that found in the corresponding section, section 470.21, of the earlier Final Rule. The Proposed Rule would place this section at the beginning of subpart C so that the subpart would follow a more logical order. The section would explain what functions and duties the Secretary of Labor is authorized to delegate to another government officer under section 9 of the Executive Order. The section that was numbered 470.20 in the earlier Final Rule, and that would follow this section under the Proposed Rule, would discuss one of the functions the Secretary has chosen to delegate under the Order.

The Proposed Rule would revise the section slightly to correct an apparent grammatical error in the corresponding section of the earlier Final Rule, and to make the section easier to understand. These changes are not intended to alter the meaning of this section; the section would be interpreted in the same way as section 9 of the Executive Order and the corresponding section of the earlier Final Rule.

*Sec. 470.21 Who will make rulings and interpretations under the Executive Order and this part?*

This section would be identical to the corresponding section, section 470.20, of the earlier Final Rule.

*Sec. 470.22 What actions may the Assistant Secretary take in the case of intimidation and interference?*

This section would contain material and language similar to that of the corresponding section of the earlier Final Rule. The Proposed Rule would revise the language of that earlier section slightly, in order to replace the term “compliance review” with “compliance evaluation” (for the reasons discussed above in section 470.10 of this preamble), and to make the section easier to understand. These changes are not intended to alter the meaning of this section; the section

would be interpreted in the same way as the corresponding section of the earlier Final Rule.

*Sec. 470.23 What other provisions apply to this part?*

*Paragraph 470.23(a):* This paragraph would be identical to the corresponding paragraph in the earlier Final Rule, except that the Executive Order number would be updated.

*Paragraph 470.23(b):* This paragraph, which would require contracting agencies to cooperate with and assist the Assistant Secretary and Deputy Assistant Secretaries in carrying out their duties under the Executive Order and this part, would contain the same substantive requirements as the first sentence of paragraph 470.14(e) of the earlier Final Rule. Because section 470.14 of this Proposed Rule would deal with sanctions and penalties, the material in that sentence would be moved to this general section to indicate that contracting agencies must cooperate with and assist the Assistant Secretary and Deputy Assistant Secretaries in carrying out all of their duties under the Order and this part, not just those duties relating to sanctions and penalties.

*Paragraph 470.23(c):* The language of this paragraph would be identical to the language of the corresponding paragraph, paragraph 470.23(b), of the earlier Final Rule, with two exceptions. First, the reference to section 11 of the Executive Order would be updated to section 13, to correspond with the text of the current Order, EO 13201. Second, the final clause of the earlier paragraph would be deleted, because section 13 of the current Order does not include or authorize that language.

## IV. Regulatory Procedures

### Executive Order 12866

This Notice of Proposed Rule-Making constitutes an “other significant regulatory action” within the meaning of Executive Order 12866, and therefore the Department has provided a cost-benefit analysis below. However, the implementation of the Proposed Rule would not have an annual effect of \$100 million or more on the economy, nor would it adversely affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. Therefore, the Department has concluded that this NPRM is not “economically significant” as defined in section 3(f)(1) of EO 12866.

With regard to the benefits that would result from the Proposed Rule: Section 1(a) of Executive Order 13201 states that

“[w]hen workers are better informed of their rights, including their rights under the Federal labor laws, their productivity is enhanced.” On that basis, the Order and the Proposed Rule, which are intended to ensure that employees of Government contractors are informed of certain rights regarding union dues and fees, are designed to promote economy and efficiency in Government procurement.

In the Department’s view, the only costs that contractors would incur under the Proposed Rule would result from the notice posting requirement in section 470.2(a) of the Rule, and the requirement in section 470.4(d) of the Rule that contractors apply in writing for waivers from the posting requirement for facilities that do not perform work on Government contracts. For the posting requirement, the Department has concluded, based on both OFCCP’s historical experience and the fact that the Department will supply the required employee notice poster at no cost, that the annualized costs would be negligible.

OFCCP receives few requests from contractors for waivers of regulatory requirements for facilities not connected with Government contracts (see 41 CFR 60–741(b)(3)). For those few contractors that do request waivers, the cost consists of drafting a letter and sending the letter to DOL to request the waiver. Based on that experience, the Department estimates that under the Proposed Rule, one-tenth of one percent (.1%) of Federal contractors annually would be likely to submit requests for waivers. Given a total of 200,000 supply, services, and construction contractors who would be subject to the Proposed Rule, the Department estimates that 200 contractors per year (.1% of 200,000) would be likely to request a waiver under the Rule.

The Department estimates that it would take an average of one hour to prepare and mail each waiver request under the Proposed Rule. Of that hour, 20 percent of the burden would be assumed by executive, administrative, or managerial staff, and 80 percent would be assumed by administrative support staff. In the publication “Employer Costs for Employee Compensation” (USDL 99–173), the Bureau of Labor Statistics (BLS) lists average compensation for executive, administrative, and managerial positions as \$35.18 per hour, and for administrative support as \$16.63 per hour. Based on this information and on current postage rates, the Department has calculated the total estimated annualized cost to contractors that

would request waivers under the Proposed Rule as follows:

Executive, Administrative, and

Managerial— $200 \times .20 \times \$35.18 =$   
\$1,407.20

Administrative Support— $200 \times .80 \times$   
\$16.63 = \$2,660.80

Postage— $200 \times .34 =$  \$68.00

Total annualized cost estimate—  
\$4,136.00

Dividing the total annualized cost estimate of \$4,136.00 by the estimated total number of Government supply, service, and construction contractors (200,000), the Department calculates that the estimated average cost per Federal contractor establishment under the Proposed Rule would be \$.02.

The Office of Management and Budget (OMB) has reviewed the NPRM for consistency with the President's priorities and the principles set forth in EO 12866.

#### Regulatory Flexibility Act

The Proposed Rule presented in this NPRM would not substantially change existing obligations for Federal contractors; it would merely require certain contractors to post notices informing their employees of certain rights those employees already hold under Federal law, and to include clauses in contracts with subcontractors and vendors, requiring those subcontractors and vendors to post the same notices. Accordingly, the Proposed Rule would not have a significant economic impact on a substantial number of small business entities. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to that effect. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

#### Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, as well as EO 12875, Enhancing the Intergovernmental Partnership, the Rule proposed in this NPRM would not include any Federal mandate that might result in increased expenditures by State, local, and tribal governments, or increased expenditures by the private sector of more than \$100 million in any one year.

#### Paperwork Reduction Act

Certain sections of this Proposed Rule, including sections 470.2(b), 470.4(d), and 470.11(a) and (b), contain information collection requirements. As required by the Paperwork Reduction Act (PRA), the Department has

submitted a copy of these sections to OMB for its review.

The Proposed Rule would also require contractors to post notices, investigate complaints, and, where appropriate, file requests for waivers. The application of the PRA to those requirements is discussed below.

The Proposed Rule would impose certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and section 470.2(a) of the Rule. As noted in section 470.2(d), the Department will supply the poster, and contractors will be permitted to make and post exact duplicate copies thereof. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The Proposed Rule would also impose certain burdens associated with the filing and processing of a complaint on both the complainant and the contractor. The burdens for the complainant are described in the PRA package the Department will submit to OMB. With regard to the burdens for the contractor, the regulations implementing the PRA exempt from the requirements of the Act any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. See 5 CFR 1320.4. Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. *Id.* Therefore, this exemption would apply to the Department's investigation of complaints alleging violations of the Order or this Rule.

Finally, section 470.4(d) of this Rule would permit a contractor to apply in writing for a waiver from the requirement to post the employee notice contained in section 470.2(a). For the Department's analysis of the burdens that would be imposed on contractors as a result of this requirement, see the discussion of Executive Order 12866 above.

The Department invites the public to comment on whether each of the proposed collections of information: (1) Ensures that the collection of information is necessary to the proper performance of the agency, including whether the information will have

practical utility; (2) estimates the projected burden, including the validity of the methodology and assumptions used, accurately; (3) enhances the quality, utility, and clarity of the information to be collected; and (4) minimizes the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronic submission of responses). Comments must be submitted by November 30, 2001 to: Desk Officer for the Department of Labor, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503.

#### Executive Order 13132 (Federalism)

The Department has reviewed this Proposed Rule in accordance with Executive Order 13132 regarding federalism, and has determined that the Rule does not have "federalism implications." Some States do hold Federal contracts that do not involve the provision of Federal assistance to those States. However, as described above in the discussion of other regulatory procedures, the Department has concluded that the impact of requirements of posting notices, and requesting waivers that would be imposed by the Rule on those States would be negligible. Therefore, 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."

#### Executive Order 13084 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this Proposed Rule does not impose substantial direct compliance costs on Indian tribal governments.

#### Request for Comments

This Proposed Rule would implement Executive Order 13201. The Department invites comments about the NPRM from interested parties, including current and potential Government contractors, subcontractors, and vendors, and current and potential employees of such entities; labor organizations; public interest groups; Federal contracting agencies; and the public.

#### Clarity of This Regulation

Executive Order 12988 and the President's Memorandum of June 1, 1998, require each Federal agency to write all rules in plain language. The

Department invites comments on how to make this Proposed Rule easier to understand. For example:

- Have we organized the material to suit your needs?
- Are the requirements in the Rule clearly stated?
- Does the Rule contain technical language or jargon that is not clear?
- Would a different format (grouping and order of sections, use of headings, paragraphing) make the Rule easier to understand?
- Would more (but shorter) sections be better?
- Could we improve clarity by adding tables, lists, or diagrams?
- What else could we do to make the Rule easier to understand?

#### List of Subjects in 29 CFR Part 470

Administrative practice and procedure, Government contracts, Unions.

Accordingly, OLMS proposes to amend 29 CFR chapter IV by adding a new subchapter C, consisting of part 470, as set forth below.

Signed at Washington, DC, this 6 day of September, 2001.

**Joe N. Kennedy,**

*Acting Assistant Secretary for Employment Standards.*

**Don Todd,**

*Deputy Assistant Secretary for Labor-Management Programs.*

A new subchapter C, consisting of part 470, is added to 29 CFR chapter IV to read as follows:

#### Subchapter C—Employee Rights Concerning Payment of Union Dues or Fees

### PART 470—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTICE OF EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES

#### Subpart A—Preliminary Matters

Sec.

- 470.1 What definitions apply to this part?
- 470.2 Under the Executive Order, what employee notice clause must be included in Government contracts?
- 470.3 What contracts are exempt from the employee notice clause requirement?
- 470.4 What contractors or facilities are exempt from the posting requirements?

#### Subpart B—Compliance Evaluations, Complaint Investigations, and Enforcement Procedures

- 470.10 How will the Department determine whether a contractor is in compliance with the Executive Order and this part?
- 470.11 What are the procedures for filing and processing a complaint?
- 470.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

470.13 Under what circumstances, and how, will enforcement proceedings under the Executive Order be conducted?

470.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

470.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

470.16 Under what circumstances may a contractor be reinstated?

#### Subpart C—Ancillary Matters

470.20 What authority under this part or the Executive Order may the Secretary delegate, and under what circumstances?

470.21 Who will make rulings and interpretations under the Executive Order and this part?

470.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

470.23 What other provisions apply to this part?

**Authority:** 40 U.S.C. 471 *et seq.*; E.O. 13201 (66 FR 11221, February 22, 2001).

#### Subpart A—Preliminary Matters

##### § 470.1 What definitions apply to this part?

*Assistant Secretary* means the Assistant Secretary for Employment Standards, United States Department of Labor, or his or her designee.

*Collective bargaining agreement*, for purposes of § 470.2, means an agreement entered into by the representative of a Federal agency and the exclusive representative of employees in an appropriate unit in the agency, as a result of those representatives performing their mutual obligation to:

- (1) Meet at reasonable times; and
- (2) Consult and bargain in a good-faith effort to reach agreement, with respect to the conditions of employment affecting the employees in the unit; and
- (3) Execute, if requested by either party, a written document incorporating any collective bargaining agreement reached through such meetings, consultation, and bargaining.

*Construction* means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term *construction* also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

*Construction work site* means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension,

demolition, or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

*Contract* means, unless otherwise indicated, any Government contract or subcontract.

*Contracting agency* means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

*Contractor* means, unless otherwise indicated, a prime contractor or subcontractor, at any tier.

*Department* means the U.S. Department of Labor.

*Employee notice clause* means the contract clause that Government contracting departments and agencies must include in all nonexempt Government contracts and subcontracts pursuant to Executive Order 13201.

*Government* means the Government of the United States of America.

*Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or nonpersonal services. The term “personal property,” as used in this part, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term “nonpersonal services” as used in this part includes, but is not limited to, the following services: utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include: (1) Agreements in which the parties stand in the relationship of employer and employee; and (2) Federally assisted contracts.

*Labor organization* means any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

*Modification* of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

*Order* or *Executive Order* means Executive Order 13201 (66 FR 11221, February 22, 2001).

*Person* means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency,

instrumentality, or subdivision of such a government.

*Prime contractor* means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order.

*Related rules, regulations, and orders of the Secretary of Labor*, as used in § 470.2, means rules, regulations, and relevant orders of the Assistant Secretary for Employment Standards, or his or her designee, issued pursuant to the Executive Order or this part.

*Secretary* means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

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

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

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

*Subcontractor* means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order.

*Union* means a labor organization as defined in section.

*Union-security agreement* means an agreement entered into between a contractor and a labor organization which requires certain employees of the contractor to pay uniform periodic dues, initiation fees, or other payments to that labor organization as a condition of employment.

*United States* as used in this part includes the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

**§ 470.2 Under the Executive Order, what employee notice clause must be included in Government contracts?**

(a) *Government contracts.* Except in contracts exempted in accordance with § 470.3 and collective bargaining agreements as defined in § 470.1, all Government contracting agencies must, to the extent consistent with law, include the following provisions in Government contracts, including contracts resulting from solicitations issued on or after April 18, 2001:

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor will prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice must include the following information (except that the last two sentences must not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151-188)).

**"Notice to Employees**

"Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment.

"If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

"For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address: National Labor Relations Board, Division of Information, 1099 14th Street, NW, Washington, D.C. 20570.

"To locate the nearest NLRB office, see NLRB's website at [www.nlr.gov](http://www.nlr.gov)."

"2. The contractor will comply with all provisions of Executive Order 13201 of February 17, 2001, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13201 of February 17, 2001. Such other sanctions or remedies may be imposed as are provided in Executive Order 13201 of February 17, 2001, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order

13201 of February 17, 2001, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: However, if the contractor becomes involved in litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

(b) *Inclusion by reference.* The employee notice clause need not be quoted verbatim in a contract, subcontract, or purchase order. The clause may be made part of the contract, subcontract, or purchase order by citation to 29 CFR part 470.

(c) *Adaptation of language.* The Assistant Secretary may make such changes in the contractual provisions of the Executive Order as may be necessary to reflect Acts of Congress, clarifications in the law by the courts, or otherwise to fully and accurately inform employees of their rights under the Executive Order.

(d) *Obtaining employee notice poster.* The required employee notice poster, printed by the Department, will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, Room N-5605, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

**§ 470.3 What contracts are exempt from the employee notice clause requirement?**

(a) *Transactions below the Simplified Acquisition Threshold.* The requirements of this part do not apply to Government contracts for purchases that fall below the Simplified Acquisition Threshold, as that threshold is defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. Therefore, the employee notice clause need not be included in contracts for purchases below that threshold, *provided that—*

(1) No agency, contractor, or subcontractor is permitted to procure supplies or services in a way designed to avoid the applicability of the Order and this part; and

(2) The employee notice clause must be included in contracts and

subcontracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract or subcontract will be less than the Simplified Acquisition Threshold.

(b) *Government contracts resulting from solicitations issued before April 18, 2001.* Pursuant to section 14 of the Order, the requirements of this part do not apply to Government contracts that result from solicitations issued before April 18, 2001, the effective date of the Order.

(c) *Specific contracts.* The Deputy Assistant Secretary for Labor-Management Programs may exempt a contracting agency or any person from requiring the inclusion of any or all of the employee notice clause in any specific contract, subcontract, or purchase order when the Deputy Assistant Secretary deems that special circumstances in the national interest so require. Requests for such exemptions must be in writing, and must be directed to the Deputy Assistant Secretary for Labor-Management Programs, U.S. Department of Labor, 200 Constitution Avenue, NW, Room S-2321, Washington, D.C. 20210.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Deputy Assistant Secretary for Labor-Management Programs may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when, in the Deputy Assistant Secretary's judgment, such action is necessary or appropriate to achieve the purposes of the Order.

#### **§ 470.4 What contractors or facilities are exempt from the posting requirements?**

(a) *Number of employees.* The requirement to post the employee notice given in § 470.2(a) (hereafter in this part referred to as the posting requirement) does not apply to contractors and subcontractors that employ fewer than 15 persons.

(b) *Union representation.* The posting requirement does not apply to contractor establishments or construction work sites where no union has been formally recognized by the contractor or certified as the exclusive bargaining representative.

(c) *State law.* The posting requirement does not apply to contractor establishments or construction work sites in jurisdictions where state law forbids enforcement of union-security agreements.

(d) *Work not performed under Government contracts.* Upon the written request of the contractor, the Deputy

Assistant Secretary for Labor-Management Programs may waive the posting requirements with respect to any of a contractor's facilities if the Deputy Assistant Secretary finds that the contractor has demonstrated that:

(1) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(2) Such a waiver will not interfere with or impede the effectuation of the Executive Order.

(e) *Work outside the United States.* The posting requirement does not apply to work performed outside the United States that does not involve the recruitment or employment of workers within the United States.

### **Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures**

#### **§ 470.10 How will the Department determine whether a contractor is in compliance with the Executive Order and this part?**

(a) The Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to determine whether a contractor holding a nonexempt contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites not exempted under § 470.4, including all places where notices to employees are customarily posted; and

(2) The provisions of the employee notice clause are included in nonexempt Government contracts, including contracts resulting from solicitations issued on or after April 18, 2001.

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended.

#### **§ 470.11 What are the procedures for filing and processing a complaint?**

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice

as required by the Executive Order and this part; and/or has failed to include the employee notice clause in nonexempt subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW, Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include the name, address, and telephone number of the complainant, the name and address of the contractor alleged to have violated the Executive Order, an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred, and any other pertinent information that will assist in the investigation and resolution of the complaint. The complainant must sign the complaint.

(c) *Referrals.* The Department will refer complaints alleging use of union dues or fees for purposes unrelated to a collective bargaining agreement, and/or seeking a refund or future adjustment of such dues or fees, to the National Labor Relations Board or other appropriate agency.

(d) *Complaint investigations.* In investigating complaints filed with the Department under paragraph (a) of this section, the Deputy Assistant Secretary for Federal Contract Compliance will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

#### **§ 470.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?**

(a) If any complaint investigation or compliance evaluation indicates a violation of the Executive Order or this part, the Department will make reasonable efforts to secure compliance through conciliation.

(b) The contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with nonexempt subcontractors and vendors to include the employee notice clause), and must commit, in writing, not to repeat the violation, before the contractor may be found to be in

compliance with the Executive Order or this part.

(c) If a violation cannot be resolved through conciliation efforts, the Deputy Assistant Secretary for Labor-Management Programs may proceed in accordance with § 470.13.

(d) For reasonable cause shown, the Deputy Assistant Secretary may reconsider, or cause to be reconsidered, any matter on his or her own motion or pursuant to a request.

**§ 470.13 Under what circumstances, and how, will enforcement proceedings under the Executive Order be conducted?**

(a) *General.* (1) Violations of the Executive Order may result in administrative proceedings to enforce the Order. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to provide information as required by the Executive Order and the regulations in this part.

(2) If a determination is made that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, the Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures set forth in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) Unless otherwise provided by the Office of the Solicitor in its complaint, all hearings will be conducted in accordance with the rules for expedited proceedings at 29 CFR 18.42.

(3) The administrative law judge will certify his or her recommended decision issued pursuant to 29 CFR 18.57 to the Assistant Secretary. The decision will be served on all parties and amici.

(4) Within 10 days (25 days in the event that the proceeding is not expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision.

Exceptions may be responded to by the other parties within 7 days (25 days if the proceeding is not expedited) after receipt. All exceptions and responses must be filed with the Assistant Secretary.

(5) After the expiration of time for filing exceptions, the Assistant Secretary will issue a final administrative order. In an expedited proceeding, unless the Assistant Secretary issues a final administrative order within 30 days after the expiration of time for filing exceptions, the administrative law judge's recommended decision will become the final administrative order. If the Assistant Secretary determines that the contractor has violated the Executive Order or the regulations in this part, the final administrative order may enjoin the violations, require the contractor to provide appropriate remedies and, subject to the procedures in § 470.14, impose appropriate sanctions and penalties.

**§ 470.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?**

(a) Before imposing the sanctions and penalties described in paragraph (d) of this section, the Assistant Secretary will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, among which reasons must be a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section, however, will not be imposed if:

(1) The head of the contracting agency continues personally to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been afforded an opportunity for a hearing.

(d) In enforcing the Order and this part, the Assistant Secretary may:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure of the contractor to comply with its contractual provisions as required by section 2 of the Executive Order and the regulations in this part. Contracts may be canceled, terminated, or suspended

absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under section 6(b) of the Order providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any noncomplying contractor.

(e) Whenever the Assistant Secretary has exercised his or her authority pursuant to paragraph (d) of this section, the contracting agency must report the actions it has taken to the Assistant Secretary within such time as the Assistant Secretary will specify.

(f) Periodically, the Assistant Secretary will publish and distribute, or cause to be published and distributed, to all executive agencies a list of the names of contractors that have, in the judgment of the Assistant Secretary under § 470.13(b)(5), failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts or subcontracts under the Executive Order and the regulations in this part.

**§ 470.15 Under what circumstances must a contractor be provided the opportunity for a hearing?**

A contractor must be given the opportunity for a hearing before the Assistant Secretary:

(a) Issues an order debarring the contractor from further Government contracts under section 6(b) of the Executive Order and § 470.14(d)(2); or

(b) Includes the contractor on a published list of noncomplying contractors under section 6(c) of the Executive Order and § 470.14(f).

**§ 470.16 Under what circumstances may a contractor be reinstated?**

Any contractor or subcontractor debarred from or declared ineligible for further contracts or subcontracts under the Executive Order may request reinstatement in a letter to the Assistant Secretary. If the Assistant Secretary finds that the contractor or subcontractor has come into compliance with the Order and this part and has shown that it will carry out the Order and this part, the contractor or subcontractor may be reinstated.

**Subpart C—Ancillary Matters**

**§ 470.20 What authority under this Part or the Executive Order may the Secretary delegate, and under what circumstances?**

Consistent with section 9 of the Executive Order, the Secretary may delegate any function or duty of the Secretary under the Order to any officer

in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

**§ 470.21 Who will make rulings and interpretations under the Executive Order and this part?**

Rulings under or interpretations of the Executive Order or the regulations contained in this part will be made by the Assistant Secretary or his or her designee.

**§ 470.22 What actions may the Assistant Secretary take in the case of intimidation and interference?**

The sanctions and penalties contained in § 470.14 may be exercised by the Assistant Secretary against any contractor or subcontractor who fails to take all necessary steps to ensure that no

person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration of the Executive Order or the regulations in this part.

**§ 470.23 What other provisions apply to this part?**

(a) The regulations in this part implement Executive Order 13201 only, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 8 of the Executive Order, each contracting department and agency must cooperate with the Assistant Secretary, the Deputy Assistant Secretary for Labor-

Management Programs, and/or the Deputy Assistant Secretary for Federal Contract Compliance, and must provide such information and assistance as the Assistant Secretary or Deputy Assistant Secretary may require, in the performance of his or her functions under the Executive Order and the regulations in this part.

(c) Consistent with section 13 of the Executive Order, nothing contained in the Executive Order or this part, or promulgated pursuant to the Executive Order or this part, is intended to confer any substantive or procedural right, benefit, or privilege enforceable at law by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

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