

Access	Location
(A) Ocracoke Inlet .....	Wallace Channel dock to the demarcation line in Ocracoke Inlet near Milepost 1.
(B) Milepost 11B .....	Existing sound-side dock at mile post 11B approximately 4 miles north of Long Point.
(C) Long Point .....	Ferry landing at the Long Point Cabin area.
(D) Old Drum Inlet .....	Sound-side beach near Milepost 19 (as designated by signs), approximately 1/2 mile north of Old Drum inlet (adjacent to the cross-over route) encompassing approximately 50 feet.

(ii) South Core Banks:

Access	Location
(A) New Drum Inlet .....	Sound-side beach near Milepost 23 (as designated by signs), approximately 1/4 mile long, beginning approximately 1/2 mile south of New Drum Inlet.
(B) Great Island Access .....	Carly Dock at Great Island Camp, near Milepost 30 (noted as Island South Core Banks-Great Island on map).

(iii) Cape Lookout:

Access	Location
(A) Lighthouse Area North .....	A zone 300 feet north of the NPS dock at the lighthouse ferry dock near Milepost 41.
(B) Lighthouse Area South .....	Sound-side beach 100 feet south of the "summer kitchen" to 200 feet north of the Cape Lookout Environmental Education Center Dock.
(C) Power Squadron Spit .....	Sound-side beach at Power Squadron Spit across from rock jetty to end of the spit.

(iv) Shackleford Banks:

Access	Location
(A) West End Access .....	Sound-side beach from Whale Creek west to Beaufort Inlet, except the area between the Wade Shores toilet facility and the passenger ferry dock.

(b) The Superintendent may temporarily limit, restrict or terminate access to the areas designated for PWC use after taking into consideration public health and safety, natural and cultural resource protection, and other management activities and objectives.

Dated: August 25, 2006.

David M. Verhey,

Acting Assistant Secretary, Fish and Wildlife and Parks.

[FR Doc. 06-7502 Filed 9-7-06; 8:45 am]

BILLING CODE 4310-XR-P

**DEPARTMENT OF LABOR**

**Office of Federal Contract Compliance Programs**

**41 CFR Part 60-2**

**RIN 1215-AB53**

**Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey**

**AGENCY:** Office of Federal Contract Compliance Programs, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Office of Federal Contract Compliance Programs (OFCCP) is publishing a final rule rescinding the Equal Opportunity Survey (EO Survey) requirement in order to more effectively focus enforcement resources and eliminate a regulatory requirement that fails to provide value to either OFCCP enforcement or contractor compliance. This rule allows OFCCP to better direct its resources for the benefit of victims of discrimination, the government, contractors, and taxpayers.

**DATES:** *Effective Date:* September 8, 2006.

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

**SUPPLEMENTARY INFORMATION:**

**I. Background**

On January 20, 2006, OFCCP published a Notice of Proposed Rulemaking (NPRM), proposing to rescind a rule requiring designated nonconstruction contractors to prepare and file an EO Survey with OFCCP. 71

FR 3374. Created in 2000, the EO Survey was intended to further the goals of Executive Order 11246, as amended. The Executive Order requires that Federal Government contractors and subcontractors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Section 202(1). Affirmative action under the Executive Order means more than passive nondiscrimination; it requires that contractors take affirmative steps to identify and eliminate impediments to equal employment opportunity. The affirmative steps include numerous recordkeeping obligations designed to assist the contractor, in the first instance, and also OFCCP in monitoring the contractor's employment practices.

The EO Survey contains information about personnel activities, compensation and tenure data, and certain information about the contractor's affirmative action program. OFCCP recordkeeping rules require contractors to maintain information necessary to complete the EO Survey, although not in the format called for by the survey instrument. See 65 FR 26100

(May 4, 2000). The specific objectives of the EO Survey were:

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

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

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

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

OFCCP has carefully analyzed the extent to which the EO Survey has accomplished its stated objectives. This analysis included two studies that focused on the predictive ability of the EO Survey. The first study, the Bendick & Eagan Report,<sup>1</sup> analyzed whether the pilot EO Survey results could be used to predict whether a contractor would have findings of non-compliance. The Bendick & Eagan Report did not demonstrate that the EO Survey is a good predictor of noncompliance<sup>2</sup> because as the Report acknowledged, data problems and other methodological issues prevented Bendick & Eagan from conducting a full-scale analysis of the pilot EO Survey's predictive power. Although the report stated that the EO Survey results might in the future be a way of finding contractors that are not in compliance, the report identified four "handicaps" that allowed it to present "only a preliminary examination" of the data's ability to differentiate between non-compliant and compliant establishments.<sup>3</sup>

<sup>1</sup> The Bendick & Eagan Report was produced by Bendick & Eagan Economic Consultants, Inc., and was entitled *The Equal Opportunity Survey: Analysis of a First Wave of Survey Responses* (September 2000) (It was referred to in the NPRM as the Bendick Report, but is referred to here as the Bendick & Eagan Report to distinguish it from the comment submitted by Dr. Marc Bendick on March 2, 2006).

<sup>2</sup> The Executive Summary to the Bendick & Eagan Report concluded that the EO Survey "can enhance the efficiency and effectiveness in OFCCP's monitoring of contractors' compliance with Executive Order 11246," but later acknowledges that its report provides "only an exploratory, rather than a full-scale analysis of the Survey's predictive power." Bendick & Eagan Report at i-ii. The Bendick & Eagan Report did find "preliminary positive indications of predictive power," which suggest that "predictors based on the EO Survey are likely eventually to demonstrate substantial power." (Bendick & Eagan Report at 25) (emphasis added). The exploratory nature of its analysis, however, prevented a definitive finding on any correlation between predictive variables, generated from the EO Survey, and determinations of noncompliance.

<sup>3</sup> Bendick & Eagan Report at 18-27.

The second study, the Abt Report,<sup>4</sup> analyzed whether EO Survey data could be used to develop a model to more effectively target those contractors engaging in systemic discrimination. The following summary of the key findings of the Abt Report was presented in the NPRM (71 FR 3374):

Abt found the model's predictive power to be only slightly better than chance. Screening on the basis of the model produced large numbers of false positives, that is, the model predicted numerous instances of systemic discrimination in the sample where OFCCP identified none. Specifically, using a cutoff for the probability that an establishment discriminates near the overall rate, the model suggests that 637 out of the 1,888 establishments in the study discriminate, yet only 42 (6.5%) of these are true positives. Thus, of 637 establishments that would be classified by the EO Survey results as suspected of having systemic discrimination, 93% would be false positives. Abt Report at 33. Even at a higher cutoff rate, where only 143 establishments are inspected, 127 were found to have no systemic discrimination, so the false positive rate remains high at 89% (i.e., 127/143).

Furthermore, the EO Survey model wrongly classifies a significant portion of true discriminators as non-discriminators, and thus would not target them for compliance evaluations. If the 637 establishments were chosen for review on the basis of the EO Survey model, 1,251 establishments would not have been reviewed. This group of 1,251 predicted by the EO Survey to lack discriminators would, in fact, have contained 21 of the 63 cases (33%) of systemic discrimination. Under the higher cutoff rate, about 75% of the establishments (47 contractors) that were found to have systemic discrimination would not have been reviewed under the EO Survey model.<sup>5</sup>

Based on the results of the studies, and the evaluation of new initiatives implemented by OFCCP to accomplish the same objectives of the EO Survey but in different ways,<sup>6</sup> OFCCP concluded that the EO Survey failed to meet its objectives, and proposed removing the EO Survey requirement from covered contractors' obligations under the Executive Order. The preamble to the proposed rule discusses in depth the results of the studies and the reasons for OFCCP's proposal to rescind the EO Survey. 71 FR 3374-78.

OFCCP received a total of 2,736 comments on the NPRM. Of those, 1,707 comments (62%) supported the proposal to discontinue the EO Survey and 1,029 comments (38%) opposed the

proposed rule. Most of the comments focused on (1) The Abt Report; (2) the alleged intrinsic value of the EO Survey; and/or (3) the implications of rescinding the EO Survey.

After considered review of the comments, OFCCP concludes that the objectives of the Executive Order 11246 program can be better accomplished through means other than the EO Survey, and publishes this final rule to rescind the EO Survey filing requirement. There are no differences between the proposed rule and the final rule.

## II. Discussion of the Comments

### A. Comments on the Abt Report

Many of the commenters who support the proposal to rescind the EO Survey cited the Abt Report and the conclusions that OFCCP drew from it. For example, the Silicon Valley Industry Liaison Group stated:

[I]t is clear to our member companies that the EO Survey has no internal value to the company \* \* \*. Abt Associates, indicated that the EO Survey does not accomplish what it was constructed to do: find systemic discrimination. \* \* \* In the Jan. 20, 2006 Proposed Rule, OFCCP states "that the EO Survey misdirects valuable enforcement resources and does not meet any of its three objectives set out in the November 13, 2000 preamble." Since the EO Survey lacks efficacy and has no internal value to the contractor, we applaud the Agency for its recommendation to withdraw its use.<sup>7</sup>

Likewise, the U.S. Chamber of Commerce stated, "The Abt study—an impartial, comprehensive and statistically sound assessment of the value of the Survey—provides a sound regulatory basis for OFCCP to eliminate the Survey and search for new ways to select establishments for audit."<sup>8</sup> Noting the Abt Report's findings concerning the false positive and false negative rate generated by the EO Survey data, the National Association of Manufacturers commented:

Simply stated, any system that targets compliant contractors for audit, thus punishing those employers striving to comply with their affirmative action and non-discrimination obligations, while allowing non-compliant contractors to avoid detection, utterly fails to serve any legitimate regulatory or enforcement purpose and should be eliminated. Indeed, continuing a system that consciously targets a significant

<sup>4</sup> The Abt Report was produced by Abt Associates of Cambridge, Massachusetts and was entitled *An Evaluation of OFCCP's Equal Opportunity Survey*.

<sup>5</sup> Abt Report at 33-35. See also NPRM at 71 FR 3375-76.

<sup>6</sup> For an explanation of these initiatives, see the discussion in Section C below.

<sup>7</sup> Silicon Valley Industry Liaison Group (SVILG) March 17, 2006 letter. The SVILG comprises one of the largest liaison groups in the country with 272 members, including many leading high-tech, biotech and other major employers in Northern California.

<sup>8</sup> Crowell & Moring LLP March 28, 2006 letter at 4-5 (representing the U.S. Chamber of Commerce).

number of compliant contractors violates fundamental principles of due process.<sup>9</sup>

Conversely, many commenters who support retention of the EO Survey suggest that the Abt study is flawed, and thus no valid inferences regarding the EO Survey's predictive power can be drawn from the Abt study.<sup>10</sup> For example, the Florida Federation of Business and Professional Women's Clubs, Inc. stated:

The proposal to eliminate the EO Survey cites the findings from a research consultant. However, the consultant's analysis was based upon a skewed sample because contractors who did not respond or provided questionable information were not included.<sup>11</sup>

The National Women's Law Center noted:

OFCCP attempts to justify its proposal with findings from the study it commissioned by Abt Associates. Essentially, OFCCP concludes that the Survey's predictive power is little better than chance, and produces so many false positives and false negatives as to be virtually useless in targeting those contractors that have engaged in systemic discrimination. However, neither these nor any other conclusions about the EO Survey's predictive power can be validly drawn from the Abt study, because the study sample given to Abt by OFCCP, and on which these conclusions are based, was hopelessly skewed and unrepresentative of the contractor community.<sup>12</sup>

Given the significance of the Abt study, the commenters' major critiques of the study are addressed below. For presentation purposes, these critiques have been grouped into three areas:

1. The Abt study should have been based upon a larger group of federal contractors.

2. The sample used by Abt was skewed.

3. The Abt study inappropriately focused on systemic discrimination, rather than all violations.

#### 1. The Abt Study Should Have Been Based Upon a Larger Group of Federal Contractors

Some of the comments in opposition to the proposal maintain that the Abt study is flawed because it was not based upon a larger group of federal contractors. Other commenters focused on the decline in the number of EO Surveys OFCCP distributed each year. For example, the Leadership Conference on Civil Rights stated:

The EO Survey's distribution was dramatically reduced—from 50,000 contractors to 10,000—thus undermining the reach of the instrument and raising questions about OFCCP's commitment to carry out the intent of the law. Further, to our knowledge, the data collected through the EO Survey has never been used by OFCCP for targeting of compliance reviews.<sup>13</sup>

In contrast, Maly Consulting LLC suggested that OFCCP should not have sent out any EO Surveys before OFCCP did "a complete job to determine its viability."<sup>14</sup>

OFCCP acknowledges that the number of EO Surveys sent out declined. In fact, the NPRM specifically notes that "OFCCP mailed 53,000 EO Surveys between December 2000 and March 2001, 10,000 in December 2002, 10,000 in December 2003, and 10,000 in December 2004." (71 FR 3375) The reason for this decline was noted in the January 2003, OFCCP notice in the **Federal Register** seeking a two-year extension of the Paperwork Reduction Act clearance (68 FR 4797) and the NPRM to this final rule. That is:

Time constraints and a number of data problems affected an earlier pilot study of the EO Survey data [the Bendick & Eagan Report] in such a way so as not to be able to assess the Survey's predictive power. To perform a study that is not limited by these obstacles, OFCCP has engaged an outside contractor to study the Survey data. The contractor will assess data from the EO Survey submissions as part of its study. \* \* \* OFCCP requests a two-year extension of PRA authorization for the EO Survey, involving 10,000 EO Surveys per year. The two-year extension will permit OFCCP to complete the ongoing study of the EO Survey. Ten-thousand Surveys is the number the outside contractor needs to assess the Survey's reliability for finding employers that discriminate against their employees.<sup>15</sup>

Without a complete validation study of the utility of the EO Survey, it would not have been useful to send EO Surveys to the broader contractor community. Indeed, it was logical and consistent with the Paperwork Reduction Act to send only a sufficient number of EO Surveys to develop the predictive model and to fully test and validate the EO Survey.

Regarding the Abt study, the limiting factor was not the number of EO Surveys sent out but rather the number of compliance evaluations that could be completed. As the Bendick & Eagan Report noted, one of the Bendick & Eagan Report's methodological

shortcomings was its inability to compare compliance evaluations with EO Survey results.<sup>16</sup> Undertaking such a comparison was one of the essential goals of the Abt study. Regardless of the number of EO Surveys, OFCCP expected to be able to conduct only 2,250 compliance reviews for the study. Thus, it was expected that only about 2,250 EO Surveys could be linked to completed compliance evaluations. This linkage is crucial to the study because without it there is no possibility of modeling the data on the EO Survey to a systemic discrimination outcome.

Based on the 2,250 estimate, Abt determined that about 10,000 EO Surveys would have to be sent out. (This is the number that was sent out in December 2002, 2003 and 2004.) As detailed in Chapter 2 of the Abt Report, the selection of the establishments was done in the following manner:

The target population consisted of a subset of the 95,961 establishments with EEO-1 contractor records for FY2000. The subset excluded the following categories:

- Establishments that were sent EO Surveys the previous year.<sup>17</sup>
- Establishments that the OFCCP reviewed within the last two years (FY2001 and FY2002).
- Establishments associated with a parent company for which the OFCCP has approved a Functional Affirmative Action Program.
- Any establishment that had the same parent company as an establishment that had asserted that the OFCCP lacked jurisdiction (for reasons that comprised five categories).
- A small number of establishments that had very questionable records.
- Establishments that were among the 6,863 to which EO Surveys were sent in April 2000, in connection with the pilot study.
- All establishments of two large companies that have traditionally contested jurisdiction and were not sent EO Surveys on the previous round.

The resulting subset contained 26,451 establishments. A sample of approximately 10,000 establishments was drawn from this sampling frame, according to an allocation among a detailed set of strata.<sup>18</sup>

The strata were based upon three factors: region, industry and establishment size. The details of the strata are presented on page 4 of the Abt Report. Page 5 of the Abt Report presents the number of establishments in each stratum:

Because of the random rounding in the allocation procedure, the actual total sample

<sup>9</sup>Fortney & Scott, LLC March 27, 2006 letter at 4 (representing the National Association of Manufacturers).

<sup>10</sup>Leadership Conference on Civil Rights March 20, 2006 letter at 2.

<sup>11</sup>Florida Federation of Business and Professional Women's Clubs, Inc. March 21, 2006 letter.

<sup>12</sup>National Women's Law Center March 28, 2006 letter at 3-4.

<sup>13</sup>Leadership Conference on Civil Rights March 20, 2006 letter at 2.

<sup>14</sup>Maly Consulting LLC March 27, 2006 letter at 2.

<sup>15</sup>68 FR 4797, 4798 (2003). See also NPRM at 71 FR 3375.

<sup>16</sup>Bendick & Eagan Report at 20-21.

<sup>17</sup>In addition to minimizing the burden on a single contractor, this avoided the problem cited in the Bendick & Eagan Report of contaminating the EO Survey data by conducting compliance evaluations prior to collection of EO Survey responses.

<sup>18</sup>Abt Report at 3.

size was 10,018 establishments. The actual sample was obtained by selecting a simple random sample of establishments from each of the 276 final strata. \* \* \* The subsample [for review] was selected in three parts, an initial sample of 3,300 and two supplementary samples (of 1,000 and 2,100, respectively), as experience with the reviews led to revisions in the initial assumptions. Thus, the total size of the subsample was 6,400.

The 6,400 random review subsample was reported in footnote 2 on page 3375 of the NPRM. As was also reported in that note:

Of these 6,400, only 3,723 establishments responded to the EO Survey. Of these 3,723, only 2,651 had data that allowed OFCCP to complete a compliance evaluation. Thus, OFCCP completed about 2,651 compliance evaluations. However, of the 2,651, a significant number (763) had missing or incoherent data on the EO Survey, and were not used in the study. Ultimately the study focused on 1,888 cases that had completed compliance reviews and had reliable EO Survey data.

The number of completed evaluations on contractors that returned the EO Survey (2,651) actually exceeded OFCCP's original goal of completing 2,250 evaluations for the study by almost 18%. Moreover, the 3,618 establishments that were not "used" by Abt<sup>19</sup> could not have an impact on the results of their analysis because the original 10,018 establishments (both the 6,400 review subsample and the 3,618 non-review subsample) were drawn in a random fashion.

If EO Surveys had been sent out to all establishments with EEO-1 contractor records for FY2000, OFCCP still would have only been able to complete about 2,651 compliance evaluations. Thus, it is unlikely that sending the EO Survey to more contractors would have altered the results of the study. On the contrary, the approach of sending out the minimum number of EO Surveys necessary to conduct a statistically valid study not only reduced the burden on federal contractors but also minimized the burden on OFCCP and its resources. The selection strategy utilized by Abt produced a representative sample of federal contractors while avoiding the contamination issues mentioned in the Bendick & Eagan Report. In sum, an adequate number of establishments were sent the EO Survey.

## 2. The Sample Used by Abt Was Skewed

The second major criticism of the Abt Report concerned whether the sample it used was representative. Despite the efforts by Abt to produce a representative sample of Federal

contractors for the study, several commenters opposing the proposal maintain that the Abt study was flawed because it did not use the data from all of the contractors who were sent the EO Survey. For example, the National Women's Law Center stated:

The integrity of OFCCP's sample was compromised from the beginning. Any contractor that refused to respond to the EO Survey (10%), asserted that OFCCP lacked jurisdiction (27%), or went out of business (5%) was simply dropped from the sample. \* \* \* Another 15% of the contractors were dropped from the sample because they had submitted responses to the Survey that contained internal inconsistencies too extreme to address with "suitable cleaning." As a result, *more than half* of the original sample of 10,000 contractors was dropped before the study even began and before Abt built its model of predictive power. Ultimately, the study sample was whittled down to 1,888 contractors for whom Abt had both a Survey containing adequate data and the results from a CR conducted by OFCCP.<sup>20</sup>

Similarly, the Bendick Comment stated:

[T]his OFCCP conclusion is not justified by the *Abt Report* because the sample of employers OFCCP provided to Abt was not appropriate for the study of the Survey's predictive power. The sample consisted of 2,226 firms for which both a compliance audit and a Survey response was available. If the employer refused to answer the EO Survey or provided only apparently-incorrect data, then that firm was simply dropped from the sample. Firms which *were* not included in the sample totaled 3,352 of 6,400 firms which could have been included in the study. That is, 52.4%—more than half—of firms were omitted from the data before Abt began its analysis.<sup>21</sup>

<sup>20</sup> National Women's Law Center March 20, 2006 letter at 4.

<sup>21</sup> Dr. Marc Bendick March 2, 2006 comment at 3 (footnote omitted) (emphasis in original) (hereinafter "Bendick Comment"). The Bendick Comment also asserted that the 2000 Bendick & Eagan Report "found exactly the reverse of what the [NPRM] says it found," pointing specifically to the NPRM's statement that the Bendick & Eagan Report "failed to find a correlation between the predictive variables, generated by the EO Survey, and determinations of noncompliance." *Id.* at 2 (citing 71 FR 3374). Despite the 2006 Bendick Comment, the 2000 Bendick & Eagan Report specifically stated: "The EO Survey data collected in the April 2000 wave does not offer circumstances in which the full predictive power of the survey can be revealed. Four handicaps are important to note. \* \* \* Considering these four circumstances, this report presents only a preliminary examination of the ability of selected variables drawn from the EO survey to differentiate establishments likely to have non-compliance findings from those not likely to have such outcomes." Bendick & Eagan Report at 20–23. In the EO Survey NPRM, OFCCP acknowledged that "data problems prevented Bendick from conducting a full-scale analysis of the pilot EO Survey's predictive power. The report stated that the EO Survey results might in the future be a way of finding contractors that discriminate, but the pilot EO Survey did not." 71 FR 3374–75 (citing Bendick & Eagan Report at 18–27).

Numerous commenters, including American Federation of Government Employees, Local 12, AFL–CIO, echoed the following sentiment:

The proposal to eliminate the EO Survey cites the findings from a research consultant. However, the consultant's analysis was based on a skewed sample because contractors who did not respond or provided questionable information were not included. Earlier research by a different consultant concluded that the very contractors who did not comply with the EO Survey in the first place were more likely to be in violation of the law.<sup>22</sup>

To address these concerns about the Abt sample, it is necessary, as a preliminary matter, to examine the composition of the 6,400 establishments that were sent the EO Survey and in the review subsample used by Abt. Table B presented in Appendix E of the Abt Report provides a breakdown of the 6,400 establishments in the review subsample selected by Abt.

Of the 6,400 contractors sent EO Surveys and in the subsample used by Abt, 2,004 were either out of business or asserted that they did not have to respond (*e.g.*, they were not federal contractors with at least 50 employees). These establishments were excluded from the analysis because it would have been difficult and an inefficient use of resources to include them in the model. It would have been nonsensical, if not impossible, for OFCCP to complete compliance evaluations on the 330 establishments who were out of business. Further, including the small number of establishments that claimed they didn't have to respond to the EO Survey, but should have in the Abt study, could not have significantly skewed the results of the analysis given they were also randomly selected.

Of the remaining 4,396 contractors, 3,723 (about 85%) responded to the EO Survey with data that either passed the initial OFCCP check with an "OK" status or submitted data that generated an "edit condition report." However, OFCCP had not completed compliance evaluations on all of these contractors. As stated in the NPRM, OFCCP completed compliance evaluations on only 2,651 of the contractors that responded to the EO Survey with data (about 71% of 3,723). This represented the pool of available matches of EO Survey data and systemic discrimination determinations.

As was discussed in the NPRM, after further evaluating the data, Abt focused on the set of 1,888 cases that had completed compliance reviews and

<sup>22</sup> American Federation of Government Employees, Local 12, AFL–CIO March 17, 2006 letter at 1.

<sup>19</sup> Abt Report, Appendix E, Table A.

what Abt considered reliable EO Survey data. The results of Abt's analysis of these cases were presented in the NPRM. See 71 FR 3375 n. 2 and Abt Report, Appendix E, Table B.

Before the report was finalized, OFCCP asked Abt to analyze the data with "relaxed" edits due to this very concern that the cases being omitted from the analysis would bias the results. Appendix E presents Abt's findings with the relaxed edits and, "The result, in brief, was that [Abt] emerged with the same four predictor variables. The coefficients were somewhat different, but not greatly so. The qualitative interpretation is pretty much the same."<sup>23</sup>

Based upon this analysis, OFCCP concluded that Abt's data quality standards did not have a significant impact on the results of the study. In short, OFCCP concluded that excluding those establishments from the sample which Abt ultimately analyzed would not have changed Abt's conclusion regarding the predictive power of the EO Survey.

There remains a group of 673 non-respondents out of the subsample of 6,400, or 10.5%. The supposition by many commenters is that this omitted group contains a high portion of noncompliant contractors. Such speculation cannot be verified. In fact, there could be any number of reasonable explanations for the number of non-respondents. For example, contractors may have been unable to properly complete the EO Survey or simply may not have returned it to OFCCP.<sup>24</sup> Moreover, one could just as easily speculate that the non-respondents are not under the jurisdiction of OFCCP and chose to ignore the EO Survey. Whatever the reason, because the review subsample was randomly drawn, the relatively low non-response rate is unlikely to have a statistically significant impact on the results of the Abt Report.

Finally, some commenters who argue for retaining the EO Survey cite the difference in the results of the Bendick & Eagan and Abt reports as evidence that the Abt Report is flawed. For example, the Bendick Comment stated:

In the sample studied by Abt, only 3.0% of firms were found out of compliance (engaged in systemic discrimination). In the sample analyzed in the *Bendick Report*,

38.4% of the firms surveyed were found out of compliance. Thus, the data set Abt analyzed was clearly not representative of all federal contractors.<sup>25</sup>

The reason for this difference is not because the Abt Report is flawed or skewed, but because the Abt Report appropriately focused on systemic discrimination, which is the focus of OFCCP's enforcement strategy, while the Bendick & Eagan Report studied non-compliance in its broadest sense, of which systemic discrimination is only one part. Directly comparing the results of the two studies is not really appropriate and can be misleading.<sup>26</sup> Since systemic discrimination violations are a subset of the types of non-compliance that OFCCP finds in its reviews, and the most harmful to workers, it is not at all surprising that the rate of systemic discrimination in the sample used by Abt is lower than the rate of non-compliance in the sample used by Bendick & Eagan, which included both a wide variety of paperwork violations and systemic discrimination violations.

In short, the sample Abt used was appropriate, statistically valid, and did not skew the results.

### 3. The Abt Report Inappropriately Focused on Systemic Discrimination, Rather Than All Violations

The third major criticism of the Abt Report was its focus on systemic discrimination. Several commenters who support retaining the EO Survey assert that the Abt Report inappropriately focused on systemic discrimination, rather than all violations. They believe that by focusing only on systemic discrimination, the study underestimated the true benefit of the EO Survey. A typical example of this comment is that from Schaeffer and Schaeffer LLC:

OFCCP expressed its intent during the formal rulemaking in 2000 when the agency said that the data in all three parts of the EO Survey were intended "to provide indicators

<sup>25</sup> Bendick Comment at 3 (footnote omitted).

<sup>26</sup> The National Women's Law Center acknowledges that a comparison of the findings of the Bendick & Eagan Report and Abt Report may not be appropriate, but submits that it should have led OFCCP to question the Abt sample: "This comparison of noncompliance rates may not be an apples-to-apples comparison because of the narrow scope of violations OFCCP used in framing its study and in conducting [compliance reviews] \* \* \*. Still, the dramatic difference in rates of noncompliance found through OFCCP's [compliance reviews] should have led OFCCP, at a minimum, to question the representativeness of the sample it was using." National Women's Law Center March 28, 2006 Letter at 5, n. 22. It should be noted that OFCCP did review the sample and methodology used by Abt and determined it to be statistically valid.

of potential compliance problems for which further inquiry may be appropriate." OFCCP also stated "The survey responses do not prove that a problem exists, but rather are used as an indicator to guide OFCCP compliance evaluations." \* \* \* While OFCCP's emphasis on systemic compensation discrimination is a very positive development in many respects for which the agency should be commended, the question remains whether it is the proper standard for the EO Survey to meet.<sup>27</sup>

The National Women's Law Center emphasized, "Systemic discrimination may be OFCCP's enforcement focus, but it is not the sum total of OFCCP's legal mandate nor the EO Survey's only purpose. This cordoning off of the Survey's scope itself may bias the Abt study's findings."<sup>28</sup>

Systemic discrimination is indeed the proper standard for the EO Survey to measure. OFCCP's mission is based on the underlying principle that employment opportunities generated by Federal dollars should be available to all Americans on an equitable and fair basis. To fulfill this mission, it is OFCCP's stated policy to focus on increasing outreach efforts and targeting systemic discrimination in order to make better use of its resources. This policy has proven to be very effective. For example, in September 2004, OFCCP secured \$5.5 million in salary adjustments and other financial remedies for 2,021 current and former female employees of a major financial institution who had been subjected to illegal compensation discrimination. This was OFCCP's fourth largest case in terms of monetary recovery, and was the first systemic compensation discrimination case to be filed in a quarter century. In FY 2005, OFCCP recovered a record \$45.2 million for 14,761 American workers who had been subjected to unlawful employment discrimination—a 56 percent increase over recoveries in FY 2001.

Central to this policy is scheduling and focusing OFCCP's compliance evaluations on those cases most likely to result in findings of systemic discrimination and the recovery of make whole relief for victims of discrimination. It has long been widely recognized that compliance evaluations consume significant resources, that OFCCP can only conduct evaluations on a portion of all federal contractors, and that a large portion of the evaluations conducted do not result in findings of systemic discrimination.<sup>29</sup> Therefore, it

<sup>27</sup> Schaeffer and Schaeffer LLC March 28, 2006 letter at 4-5 (emphasis in original).

<sup>28</sup> National Women's Law Center March 28, 2006 letter at 4, n. 14.

<sup>29</sup> See, e.g., Bendick Comment at 5.

<sup>23</sup> Abt Report, Appendix E, at 1-2.

<sup>24</sup> In a related comment, the U.S. Chamber of Commerce observed: "Many Survey responses had to be disregarded due to clearly erroneous data, demonstrating the difficulties that employers had in providing accurate information." Crowell & Moring LLP March 28, 2006 letter at 4 (representing the U.S. Chamber of Commerce).

is crucial to OFCCP's policy that the evaluations that are conducted be better targeted. Since OFCCP is focusing its compliance evaluations on systemic discrimination and, as noted by Schaeffer and Schaeffer, the stated purpose of the EO Survey was to provide an indication when further inquiry may be appropriate,<sup>30</sup> it was appropriate for the Abt Report to focus on cases of systemic discrimination rather than generally on all types of non-compliance (including, largely, affirmative action program paperwork requirements).

Some commenters also cite the Bendick & Eagan Report to show that the EO Survey has value. For example, National Employment Lawyers Association stated:

The Bendick study found a correlation between the predictive variables generated by the EO Survey and determinations of non-compliance. That report examined 31 predictive variables and found 28 of them (90.4%) to have some predictive power, including 11 (35.5%) in which the predictive power was "statistically significant."<sup>31</sup>

Aside from the data issues discussed on pages 20 to 23 of the Bendick & Eagan Report, OFCCP has determined that the report's use of the broad term "non-compliance" instead of systemic discrimination inflates the predictive power of the variables. Since it was never OFCCP's intention to issue violations solely based upon the EO Survey, OFCCP is required to follow-up the EO Survey results with a compliance evaluation to actually make a finding of "non-compliance." The correlation of the broad definition of non-compliance used in the Bendick & Eagan Report with the predictor values in the EO Survey would do little to advance OFCCP's goal of targeting systemic discrimination and recovering make whole relief for those who suffered from discrimination. On the contrary, by including other violations in the definition of non-compliance, this approach would divert resources from investigating the potential cases of systemic discrimination toward cases involving just paperwork violations. The Bendick Comment acknowledges that "OFCCP resources permit only a very small proportion of federal contractors to be reviewed each year—at the time the *Bendick Report* was completed, less than 4 percent of contractors each year."<sup>32</sup> Thus, it is critical to OFCCP's enforcement strategy

that these resources be used efficiently to protect workers actually harmed by discrimination, remedy that discrimination, and bring violators into compliance.

#### 4. Conclusion

After careful consideration of these comments, OFCCP continues to believe that the Abt Report is statistically sound and supports its conclusion that the EO Survey data does not, in any meaningful way, improve OFCCP's ability to target for review those contractors engaging in systemic discrimination.

#### *B. Comments on the Alleged Intrinsic Value of the EO Survey*

The second major area discussed by commenters is the alleged intrinsic value of the EO Survey. This view, as articulated by the Leadership Conference on Civil Rights is that "Even if the data collected [on the EO Survey] does not automatically prove discrimination, it provides a picture of a contractor's workforce that otherwise would not be available. It is the potential for this increased level of scrutiny that provides the incentive for contractor self-examination."<sup>33</sup> By contrast, the National Association of Manufacturers "heartily endorses elimination of the EO Survey as an overly burdensome, expensive, and wholly ineffective regulatory requirement that unnecessarily duplicates other equal employment opportunity ("EEO") and affirmative action reporting obligations."<sup>34</sup>

The main points raised by supporters of the EO Survey about its alleged intrinsic value are:

1. The EO Survey is the only reliable method to collect compensation data.
2. The EO Survey enhances the tiered review process.
3. The EO Survey facilitates effective self-evaluations by federal contractors.

#### 1. The EO Survey Is the Only Reliable Method to Collect Compensation Data

The concern that the EO Survey is the only reliable method to collect compensation data was expressed by numerous commenters, including the National Employment Lawyers Association, which stated:

The Notice indicates that if the EO Survey is discontinued, OFCCP will use the EEO-1 data to predict the likelihood of whether a contractor will be found out of compliance. Although EEO-1 counts are useful, the data from the EO Survey are even more useful.

\* \* \* The EO Survey also contains compensation data that EEO-1 counts do not provide. Eliminating the EO Survey would jettison an extremely useful tool for identifying discrimination.<sup>35</sup>

The Unitarian Universalist Association of Congregations suggested that the compensation data on the EO Survey is useful to OFCCP for targeting purposes:

The EO Survey is a particularly important tool because it, for the first time, would provide OFCCP with pay data from all federal contractors every two years. That information could be used by OFCCP to help identify unequal pay practices, and better target its limited enforcement resources.<sup>36</sup>

While the EO Survey collects data on compensation by EEO-1 category, the Abt Report indicates that the data have no relation to the determination of systemic discrimination and contrary to these assertions is not a useful tool for enforcement purposes. The proponents of the EO Survey apparently believe that the mere collection of this data will have some beneficial effect. However, there is no evidence that the specific compensation data collected by the EO Survey can be used to predict compensation discrimination. Rather, the data is collected in such a raw and aggregate form that it cannot be used to compare similarly situated employees, and thus has negligible value in predicting compensation discrimination. The U.S. Chamber of Commerce agreed with OFCCP's assessment of the predictive value of the compensation data collected by the EO Survey:

[T]he compensation data required by the Survey, submitted on an EEO-1 category basis, fails to provide any information useful to OFCCP in identifying contractors appropriate for audit. Because the data is reported on a broad EEO-1 category basis, the OFCCP cannot use the data to assess the compensation of similarly-situated employees. The data likewise cannot be subjected to a valid statistical analysis, and the Survey ignores the myriad non-discriminatory factors that may impact compensation. Indeed, any methodology that could be employed with respect to compensation data generated by the Survey would be wholly at odds with the draft guidance issued by OFCCP in November 2004 regarding systemic analyses of compensation.<sup>37</sup>

Even if there were some small marginal utility to EO Survey compensation data, the minimal benefit of the data would be outweighed by the

<sup>30</sup> Schaeffer and Schaeffer LLC March 28, 2006 letter at 4-5.

<sup>31</sup> National Employment Lawyers Association March 20, 2006 letter at 2.

<sup>32</sup> Bendick Comment at 5.

<sup>33</sup> Leadership Conference on Civil Rights March 20, 2006 letter at 3.

<sup>34</sup> Fortney & Scott March 27, 2006 letter at 2 (representing the National Association of Manufacturers).

<sup>35</sup> National Employment Lawyers Association March 20, 2006 letter at 3.

<sup>36</sup> Unitarian Universalist Association of Congregations March 20, 2006 letter.

<sup>37</sup> Crowell & Moring LLP March 28, 2006 letter at 3 (representing the U.S. Chamber of Commerce).

burden on the contractor to complete the EO Survey, and on OFCCP to process and use the EO Survey. Moreover, the obligation to expend resources to complete the EO Survey could discourage contractors from conducting a more thorough and useful evaluation of their personnel data. The necessity to collect and process EO Survey data could divert scarce OFCCP resources from more vigorously enforcing equal employment laws in a more effective manner.

OFCCP believes that remedying compensation discrimination is important to its mission. But the EO Survey fails as a means of targeting it. As previously discussed, the Abt Report demonstrated that using the EO Survey for targeting would direct compliance officers away from contractors who are discriminating. In addition, the EO Survey would direct them—93% of the time—to contractors who are not discriminating.

Further, the EO Survey is not the only source of compensation data available to OFCCP. First, OFCCP collects compensation data pursuant to Item 11 of the Scheduling Letter sent out to contractors selected for a compliance evaluation. The compensation data collected at initial desk audit stage is vastly superior to EO Survey compensation data. The data collected at the desk audit is more refined than the EO Survey data and is also specifically tailored to the contractor's job groups. In contrast, the EO Survey data is collected by EEO-1 category, which are likely too aggregate and result in the grouping of dissimilar jobs. As demonstrated by the Abt Report, studying the differences in pay averages for aggregate-level employee groups, which is the only type of compensation analysis the EO Survey data permits, is not even predictive of compensation discrimination. Finally, the desk audit data is likely to be more current and accurate, due to the interaction between the compliance officer and the contractor. In contrast to the computer program-based EO Survey, during a desk audit, a compliance officer reviews the compensation data, and can inquire about issues with the data, thus providing the contractor with the opportunity to correct any erroneous data submissions.

In addition to the compensation data produced at the desk audit, other tools are available for pay assessments. Each Federal contractor is required by regulation to conduct a compensation self-analysis as part of its mandated affirmative action plan. See 41 CFR 60-2.17(b)(3). Certain covered contractors are required, pursuant to 41 CFR 60-2.1

to create and annually update an Affirmative Action Program evaluating the impact of all of their employment practices, including compensation, on women and minorities and to correct any problems identified.

In sum, the EO Survey is not reliable and it is not the only means available for collecting such data. OFCCP collects compensation data as part of the desk audit process, and contractors are required to collect such data as part of its affirmative action obligations. The Paperwork Reduction Act specifically requires that the data collected have utility. 44 U.S.C. 3506(c)(3)(A). It does not appear that the EO Survey meets this threshold. It is unnecessary to maintain the EO Survey to collect compensation data, as other tools accomplish the same purpose, with better results for the agency.

## 2. The EO Survey Enhances the Tiered Review Process

Some commenters assert that the EO Survey enhances OFCCP's tiered review process. For example, the AFL-CIO stated:

The EO Survey enhances the effectiveness of the tiered-review system by enabling OFCCP to more accurately determine which level or type of compliance review is appropriate for a particular contractor. \* \* \* [T]he tiered-review program is designed to ensure that the agency bases its level of review of a contractor on the likelihood of uncovering substantive violations, as determined at the early stages of review. Thus, is it [sic] essential that those early-stage targeting determinations are as accurate as possible, and the initial data collected by the EO Survey helps ensure that accuracy by providing essential information about each contractor in a format intended for such targeting. Based on that information, the agency can then more accurately decide what level of review would be a most effective expenditure of its resources, be it an off-site review of contractor records, targeted on-site reviews at a contractor's facility that focus on specific issues, or full-scale on-site reviews that concentrate on multiple issues. Without the EO Survey, the agency is less able to decide what level of review is most appropriate, and risks expending resources on a level of review inappropriate for that contractor.

\* \* \* \* \*

OFCCP contends that it can better build upon the tiered-review process through use of new procedures such as Active Case Management (used in connection with desk audit reviews) and proposed standards for identifying systemic compensation discrimination \* \* \* [H]owever, these procedures would seem to factor into the tiered-review process only *after* the initial selection stages. The EO Survey would accordingly surpass these procedures in terms of its capacity to build upon the tiered-review process by identifying contractors

with systemic pay discrimination issues before deciding what level of review to conduct. \* \* \* Thus, not only is the EO Survey an effective tool for research management, but the alternatives proposed by [OFCCP] are wholly inadequate.<sup>38</sup>

As discussed above, the EO Survey data is not useful in the selection process. And it is precisely at those early-stage targeting determinations that the AFL-CIO deemed "essential" that the EO Survey fails. Nor is its data useful in the tiered review process.<sup>39</sup>

The desk audit data is collected at the initial stages of the compliance review process and can be used to determine the appropriate level or type of review, as it is presented in a more timely, accurate, detailed, and less-aggregated form than the EO Survey data. Under its Active Case Management (ACM) procedures, OFCCP opens a larger number of reviews than in the past, uses automated statistical methods, and ranks and prioritizes establishments for a full review based on the probability that discrimination would be uncovered during a more in-depth review. OFCCP closes cases during the desk audit if no statistical indicators are found that imply the presence of discrimination and thereby warrant further attention. More resources are then focused on full scale compliance evaluations of establishments where statistical indicators of systemic discrimination are found. In other words, using the ACM procedures and desk audit data is far superior in the tiered review process than using the EO Survey data.

Furthermore, as discussed in the EO Survey NPRM, the findings of the Abt Report support OFCCP's conclusion that the EO Survey does not enhance the tiered-review process: "[B]ecause the EO Survey has limited utility in predicting which contractors are engaged in systemic discrimination, it follows that EO Survey data would have limited utility in predicting whether and how the selected contractors are discriminating." 71 FR 3377. In sum, the aggregate nature of the data collected in the EO Survey, along with OFCCP's review of the Abt Report, demonstrate that the EO Survey does not enhance the tiered review process.

## 3. The EO Survey Facilitates Effective Self-Evaluations by Federal Contractors

Some of the commenters opposed to the proposed rule assert that the very process of responding to the EO Survey can cause federal contractors to perform

<sup>38</sup> AFL-CIO March 28, 2006 letter at 7-9 (emphasis in original).

<sup>39</sup> Assuming even minimal utility, such utility is outweighed by the cost to OFCCP to send out, process, input, and use the EO Survey data.

self-evaluations, which will reduce discrimination without the need of a direct action by OFCCP. For example, the Leadership Conference on Civil Rights stated:

By requiring contractors to report information they already are obligated to maintain, the EO Survey aims to give contractors greater incentive to undertake regular self-analysis—or self-audits—without placing a heavy resource burden on OFCCP. Encouraging such proactive self-audits helps promote contractor compliance with existing legal obligations without adding on new responsibilities. \* \* \*<sup>40</sup>

Similarly, the American-Arab Anti-Discrimination Committee stated:

Particularly with respect to pay inequities based on race or gender, the EO Survey created documentation of pay data that allowed employees complaining of pay inequities to precisely pinpoint such inequities, while also allowing employers to point to their EO Survey responses to counter allegations of pay inequities. Without the EO Survey, the task of identifying problem employers becomes more difficult, and discrimination problems can only be addressed retroactively, after the harm has been done and via an often prohibitively expensive and time-consuming process.<sup>41</sup>

The effectiveness of the EO Survey in promoting self-evaluations, however, is undermined by EO Survey data itself, which is presented in such an aggregate form that it cannot be used to identify discrimination. As previously explained, the data gathered by the EO Survey include information, in summary form, about personnel activities, compensation and tenure data, and information about the contractor's affirmative action program. None of this information alone is sufficient to indicate discrimination or the lack thereof in any contractor establishment. The data is aggregated, which makes it virtually impossible to determine whether similarly situated employees or applicants are treated equally.

Commenters noted the lack of utility of EO Survey data in performing self-evaluations. Morgan, Lewis & Bockius LLP stated:

Because the EO Survey does not group similarly situated employees and includes no data regarding employees' qualifications or the qualifications of any position, no analysis of EO Survey data will satisfy the referenced legal standards for assessing unlawful discrimination. With respect to grouping of employees, the EO Survey aggregates positions into general EEO-1 occupational categories such as Officials and Managers and Professionals. The EEO-1 occupational

categories do not only contain employees who are similarly situated in terms of hiring, promotions, compensation, and termination decisions, but countless other non-similarly situated categories \* \* \*. In addition to comparing dissimilar employees, the EO Survey does not capture any data on applicants' or employees' qualifications. Because the EO Survey data does not group similarly situated employees and fails to address qualifications, it does not serve as a useful basis for conducting a self-evaluation of personnel practices to ensure nondiscrimination. \* \* \*<sup>42</sup>

Specifically referencing compensation self-analyses, the U.S. Chamber of Commerce, as described previously, noted that the data is reported on a broad EEO-1 category basis, which OFCCP cannot use to assess the compensation of similarly-situated employees and that the data cannot be subjected to a valid statistical analysis. The U.S. Chamber of Commerce also stated that the EO Survey ignores the myriad non-discriminatory factors which may affect compensation.<sup>43</sup> Indeed, the EO Survey compensation data cannot be used to comply with OFCCP's new voluntary guidelines for performing compensation self-evaluations. See *Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination*, 71 FR 35114 (June 16, 2006) ("Voluntary Guidelines"). Specifically, EO Survey compensation data is reported in EEO-1 category groupings, whereas the Voluntary Guidelines require contractors to group employees who are similarly situated, which means they perform similar work and occupy positions which are similar in responsibility level, and similar in the skills and qualifications involved in the positions. 71 FR 35120. The compensation data, as reported on the EO Survey, cannot satisfy the standards of the Voluntary Guidelines.<sup>44</sup>

The "similarly situated" standard is also used in the recently published *Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination*, 71 FR 35124 (June 16,

2006) ("Systemic Standards"). The Systemic Standards are standards OFCCP uses in investigating potential systemic compensation discrimination. These Systemic Standards will make OFCCP more effective at rooting out systemic pay discrimination.

Some commenters who support the proposed rulemaking stated that the EO Survey is not an effective self-evaluation tool or that there are more effective means to induce contractors to perform self-evaluations. For example, the Equal Employment Advisory Council (EEAC) asserts that based on its own survey: "[T]he EO Survey simply does not 'provide contractors with a useful tool for self-evaluation,' evidenced by the fact that 96% of all establishments responding to a survey conducted by EEAC reported that 'completing the Survey was not useful in monitoring company EEO and affirmative action compliance.'" <sup>45</sup> Morgan, Lewis & Bockius LLP states that Title VII, and its potential to result in punitive damages liability, is a more effective incentive for self-evaluation than the EO Survey.<sup>46</sup>

Other commenters point to OFCCP's recent initiatives as more effective inducements for self-evaluation. For example, the American Bakers Association stated:

ABA supports the premise of the EO Survey as it requires baking companies who have federal contracts to take affirmative steps to identify and eliminate impediments to equal employment opportunity. However, the Survey imposes a significant administrative burden on ABA members who are required to complete the EO Survey. \* \* \* Any beneficial role that the EO Survey was intended to provide through reinforcement of contractor obligations has, in recent years, been accomplished through other agency initiatives. For example, outreach seminars and workshops, recommendations as to self-evaluation methods, and enhanced reference (and instructional) material on the OFCCP Web site all have contributed greatly to the awareness of contractors and their ability to access the important information relevant to their programs.<sup>47</sup>

Likewise, the National Association of Manufacturers stated, "[We] support OFCCP's continuing efforts to provide accessible compliance resources, particularly through its website, which are far more effective in assisting federal contractors in mastering their

<sup>40</sup> Leadership Conference on Civil Rights March 20, 2006 letter at 3.

<sup>41</sup> American-Arab Anti-Discrimination Committee March 20, 2006 letter at 1-2.

<sup>42</sup> Morgan, Lewis & Bockius LLP March 27, 2006 letter at 4-5. Morgan, Lewis further claims that remedying perceived disparities resulting from an analysis of the EO Survey data may cause contractors to inadvertently violate Title VII. *Id.* at 5-6.

<sup>43</sup> Crowell & Moring LLP March 28, 2006 at 3 (representing the U.S. Chamber of Commerce).

<sup>44</sup> The broad EEO-1 category groupings under the EO Survey will also not be useful for OFCCP when it investigates compensation discrimination, as the groupings are too aggregate to satisfy the "similarly situated" standard.

<sup>45</sup> EEAC March 21, 2006 letter at 7 (emphasis in original).

<sup>46</sup> Morgan, Lewis & Bockius, LLP March 27, 2006 letter at 6.

<sup>47</sup> American Bakers Association March 13, 2006 letter at 1-2. It also stated that numbers of false positives and false negatives generated by the EO Survey demonstrate that the EO Survey has minimal benefit in improving contractor self-awareness and encouraging self-awareness. *Id.*



compliance obligations than expending time and resources on completing a non-useful EO Survey.”<sup>48</sup>

Indeed, as detailed in the NPRM, OFCCP has significantly increased its compliance assistance efforts in recent years to heighten contractors' awareness of their equal opportunity obligations and to encourage self-evaluations through methods other than the EO Survey. OFCCP's compliance assistance includes over 1,000 regular compliance assistance seminars and workshops conducted throughout the country every year, and an extensive amount of compliance assistance material has been updated and added to OFCCP's Web page since 2001.<sup>49</sup>

OFCCP compliance assistance materials include guidance about performing contractor self-analyses. For example, OFCCP has made available a sample affirmative action program on its Web page, as well as a link to Census data that provides contractors with easy access to statistical data on the availability of women and minorities in particular occupational categories and geographic areas. This Census data helps contractors to develop required availability analyses.

Furthermore, as previously described, OFCCP has recently developed and published the Voluntary Guidelines that contractors can use to evaluate their compensation practices. 71 FR 35114. Pursuant to OFCCP regulations (41 CFR 60-2.17(b)(3)), covered contractors must evaluate their compensation system(s) to determine whether there are disparities based on gender, race or ethnicity. The Voluntary Guidelines are intended to provide suggested techniques for complying with this compensation self-evaluation requirement.

In sum, the EO Survey is an ineffective method of promoting self-evaluations, as the data on the EO Survey is too aggregated to permit meaningful self-analyses. Further, in recent years OFCCP has implemented more effective program initiatives for

encouraging thorough and meaningful self-analyses by contractors.

#### 4. Conclusion

OFCCP has concluded that the value of the EO Survey alleged by many commenters does not justify its continued use. The EO Survey data is not reliable or useful in targeting enforcement resources. Other more effective methods for collecting and analyzing compensation data exist. The EO Survey does not enhance the tiered review process. More meaningful self-analyses by contractors are being encouraged through other means. OFCCP has initiated more promising compliance assistance and enforcement programs that have resulted in more vigorous and efficient enforcement of equal employment opportunity laws.

#### *C. Rescinding the EO Survey Sends a Negative Message and Indicates That the Department of Labor Is Not Serious in Opposing Discrimination*

Many commenters supporting the retention of the EO Survey assert that rescinding the EO Survey sends a negative message and indicates that the Department of Labor is not serious about enforcement of equal employment opportunity laws.<sup>50</sup>

Rescission of the EO Survey requirement should not be viewed in any way as demonstrating a lack of commitment to equal employment opportunity. To the contrary, OFCCP is deeply committed to improving the enforcement of equal employment opportunity laws by developing and implementing the most effective enforcement tools to identify and remedy discrimination.<sup>51</sup> It is precisely because of this commitment to effective enforcement that OFCCP is discontinuing the use of the EO Survey, a tool that failed to meet its objectives and often misidentified violators.

As previously described, in FY 2005, OFCCP recovered a record \$45.2 million for 14,761 American workers who had been subjected to illegal employment discrimination—a 56 percent increase over recoveries in FY 2001. In two recent hiring discrimination cases

against a major manufacturing plant and a dairy, OFCCP obtained substantial relief, including \$1.17 million back pay and 69 jobs. OFCCP remains vigilant, and within recent months, sued another major manufacturing facility, alleging hiring discrimination against women. In the area of compensation discrimination, in September 2004, OFCCP secured \$5.5 million in salary adjustments and other financial remedies for 2,021 current and former female employees of a major financial institution who had been subjected to illegal compensation discrimination. This was the first systemic compensation discrimination case filed in a quarter century.

In addition, OFCCP has instituted many initiatives, demonstrating its commitment to equal employment opportunity. As previously described, OFCCP recently published in the **Federal Register** two final documents regarding compensation discrimination, the Systemic Standards and the Voluntary Guidelines. The Systemic Standards establish, for the first time, a uniform OFCCP procedure for investigating systemic compensation discrimination. 71 FR 35124. The Voluntary Guidelines provide contractors, for the first time, with suggested techniques for complying with 41 CFR 60-2.17(b)(3), which requires contractors to analyze their compensation systems to determine if there are race-, gender- or ethnicity-based disparities. 71 FR 35114. Furthermore, OFCCP has, for the first time, established an Office of Statistical Analysis, staffed by Ph.D. statisticians in the national office and in several of the regions, that has facilitated the investigation and resolution of compensation and other types of discrimination cases.

OFCCP has been and continues to be committed to ensuring the vigorous enforcement of equal employment opportunity laws. OFCCP is demonstrating that commitment by developing the most effective enforcement tools and abandoning ineffective tools to focus agency resources on the most effective and efficient methods to ensure equal opportunity for all.

#### *D. Conclusion*

As discussed previously, the EO Survey had three major objectives:

- (1) To improve the deployment of scarce federal government resources toward contractors most likely to be out of compliance;
- (2) To increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's

<sup>48</sup> Fortney & Scott, LLC March 26, 2006 letter at 6 (representing the National Association of Manufacturers).

<sup>49</sup> In FY2005, OFCCP developed and made available to contractors on its Web page an *elaws* advisory. The *elaws* advisory is an interactive electronic tool that permits contractors to determine whether they are covered by the laws enforced by OFCCP and, if so, identifies their specific obligations. The OFCCP Web page contains extensive guidance about complying with OFCCP's laws, including a copy of the OFCCP compliance manual, OFCCP directives, compliance guides, and responses to frequently asked questions. OFCCP has established a National Office telephone help desk and an e-mail mailbox contractors can use to obtain specific compliance information tailored to their individual needs.

<sup>50</sup> See, e.g., American Federation of State, County and Municipal Employees March 28, 2006 letter at 1; National Organization for Women March 21, 2006 letter at 1.

<sup>51</sup> Numerous Asian-American groups and individuals requested that OFCCP perform "an Asian-specific analysis on the collected data to understand the strongly perceived and statistically proven discrimination against Asian American[s]." See, e.g., Michelle Chen March 16, 2006 letter. As previously described, the EO Survey data is not useful for performing meaningful comparisons between similarly-situated individuals, and thus would not permit an accurate Asian-specific analysis.

regulatory reform efforts, thereby allowing better resource allocation; and

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

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

OFCCP has carefully analyzed to what extent the EO Survey has achieved these objectives. Based on the results of two studies, and careful review and consideration of the public comments, and the development of other OFCCP initiatives to accomplish the EO Survey's objectives, OFCCP has concluded that maintaining the EO Survey has no utility to OFCCP or to contractors.<sup>52</sup> In fact, valuable enforcement resources are misdirected through the use of the EO Survey. Further, the lack of utility of the EO Survey, the contractors' burden of completing the EO Survey, and the burden to OFCCP to collect and process EO Survey data that will yield such a poor targeting system are too significant to justify its continued use.

### III. Overview of the Rule

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

<sup>52</sup> Numerous commenters, including the National Women's Law Center, claim that the estimated 21 hours necessary to complete the EO Survey is not burdensome. National Women's Law Center March 28, 2006 letter at 6. Conversely, other commenters contend that OFCCP greatly underestimated the amount of time necessary to complete the EO Survey. See, e.g., Fortney & Scott LLC March 27, 2006 letter at 5 (representing National Association of Manufacturers). Given the lack of utility in the EO Survey, any hours spent on the EO Survey would be burdensome.

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

### IV. Authority

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

### V. Regulatory Procedures

#### A. Paperwork Reduction Act

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

In the NPRM, OFCCP estimated the annual cost reduction to the respondents based on Bureau of Labor Statistics' 2004 National Compensation Survey, which listed the hourly average wages for executive, administrative, and managerial as \$36.22 and the hourly average wages for administrative support as \$14.21. For the burden estimates provided in the final rule, OFCCP estimated the annual cost reduction based on the Bureau of Labor Statistics' 2006 National Compensation Survey, which lists the hourly average wages for executive, administrative, and managerial as \$31.58 and the hourly wages for administrative support as \$14.62. OFCCP then multiplied these figures by 1.4 to account for fringe benefits to arrive at an annual hourly cost of \$44.21 for executive, administrative, and managerial and the hourly average wages for administrative support as \$20.47. As for the 2000 final rule, OFCCP estimates that for the EO Survey, 25% of the burden hours will be executive, administrative, and managerial and 75% will be administrative support.

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

- Executive, Administrative, and Managerial:  $210,000 \times 0.25 \times \$44.21 = \$2,321,130$ .
- Administrative Support:  $210,000 \times 0.75 \times \$20.47 \times \$3,224,025$ .
- Total Estimated Annual Reduction in Respondent Costs  $\times \$5,545,155$ .

Thus, OFCCP estimates that the elimination of the EO Survey will reduce the costs for the respondents by almost \$5.5 million each year.

In addition, the distribution, collection, and processing of the EO Survey has cost an average of \$356,000 per year and this does not account for the cost of validating the data, nor any of the time spent by OFCCP personnel working on the EO Survey.

#### B. Executive Order 12866

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

#### C. Small Business Regulatory Enforcement Fairness Act

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

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

#### D. Executive Order 13132

OFCCP has reviewed the 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."

#### E. Unfunded Mandates Reform

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

Unfunded Mandates Reform Act of 1995—This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

#### List of Subjects in 41 CFR Part 60–2

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

Signed at Washington, DC, this 1st day of September, 2006.

**Victoria A. Lipnic,**

*Assistant Secretary for Employment Standards.*

**Charles E. James, Sr.,**

*Deputy Assistant Secretary for Federal Contract Compliance.*

#### Text of Rule

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

#### PART 60–2—AFFIRMATIVE ACTION PROGRAMS

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

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

#### § 60–2.18 [Removed and Reserved]

■ 2. Remove and reserve § 60–2.18.

[FR Doc. E6–14922 Filed 9–7–06; 8:45 am]

**BILLING CODE 4510–CM–P**

## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Parts 202, 210, 213, 215, and 219

**RIN 0750–AF36**

#### Defense Federal Acquisition Regulation Supplement; Limitations on Tiered Evaluation of Offers (DFARS Case 2006–D009)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006. Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts.

**DATES:** *Effective date:* September 8, 2006.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before November 7, 2006, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2006–D009, using any of the following methods:

○ *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

○ *E-mail:* [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2006–D009 in the subject line of the message.

○ *Fax:* (703) 602–0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Deborah Tronic, OUSD(AT&L)DPAP(DARS), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062.

○ *Hand Delivery/Courier:* Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

[www.regulations.gov](http://www.regulations.gov), including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deborah Tronic, (703) 602–0289.

#### SUPPLEMENTARY INFORMATION:

#### A. Background

This interim rule adds DFARS policy to implement Section 816 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109–163). Section 816 requires DoD to prescribe guidance on the use of tiered evaluation of offers for contracts and for task or delivery orders under contracts. The guidance must include a prohibition on the use of tiered evaluation of offers unless the contracting officer (1) has conducted market research in accordance with Part 10 of the Federal Acquisition Regulation; (2) is unable, after conducting market research, to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the contract or order; and (3) includes in the contract file a written explanation of why the contracting officer was unable to make the determination.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

#### B. Regulatory Flexibility Act

DoD does not expect this rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule relates to market research and documentation requirements performed by the Government. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2006–D009.

#### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

#### D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist