

TABLE 2

Site name	Full site deletion (full) or media/parcels/ description for partial deletion	Email address for public comments
McKin Co .....	Full .....	<i>bryant.john@epa.gov.</i>
Tybouts Corner Landfill .....	2 parcels soil and groundwater approx. 78 acres.	<i>hinkle.chris@epa.gov, vallone.chris@epa.gov.</i>
C&R Battery Co., Inc .....	Full .....	<i>guerroero.karla@epa.gov.</i>
Chem-Solv, Inc .....	Full .....	<i>hinkle.chris@epa.gov, vallone.chris@epa.gov.</i>
Koppers Co., Inc (Charleston Plant) .....	98 acres of soils, sediments and tidal marsh ..	<i>zellar.craig@epa.gov.</i>
Brantley Landfill .....	Full .....	<i>jackson.brad@epa.gov.</i>
Summit National .....	Land/soil portion of landfill, adjacent removal areas, and 45 down gradient parcels.	<i>Deletions@usepa.onmicrosoft.com.</i>
Himco Dump .....	11.5-acre land/soil portion of the site plus adjacent soils.	<i>Deletions@usepa.onmicrosoft.com.</i>
Bee Cee Manufacturing Co .....	Full .....	<i>wennerstrom.david@epa.gov.</i>
Omaha Lead .....	23 residential parcels .....	<i>wennerstrom.david@epa.gov.</i>
Libby Asbestos .....	OU 6 including 42 miles of railroad right of way between and in the towns of Libby and Troy, MT.	<i>zinner.dania@epa.gov.</i>

EPA maintains the NPL as the list of sites that appear to present a significant risk to public health, welfare, or the environment. Deletion from the NPL does not preclude further remedial action. Whenever there is a significant release from a site deleted from the NPL, the deleted site may be restored to the NPL without application of the hazard ranking system. Deletion of a site from the NPL does not affect responsible party liability in the unlikely event that future conditions warrant further actions.

**List of Subjects in 40 CFR Part 300**

Environmental protection, Air pollution control, Chemicals, Hazardous substances, Hazardous waste, Intergovernmental relations, Natural resources, Oil pollution, Penalties, Reporting and recordkeeping requirements, Superfund, Water pollution control, Water supply.

**Authority:** 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 9601–9657; E.O. 13626, 77 FR 56749, 3 CFR, 2013 Comp., p. 306; E.O. 12777, 56 FR 54757, 3 CFR, 1991 Comp., p. 351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p. 193.

Dated: March 10, 2022.

**Dana Stalcup,**

*Acting Office Director, Office of Superfund Remediation and Technology Innovation.*

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**BILLING CODE 6560–50–P**

**DEPARTMENT OF LABOR**

**Office of Federal Contract Compliance Programs**

**41 CFR Parts 60–1, 60–2, 60–4, 60–20, 60–30, 60–40, 60–50, 60–300, and 60–741**

**RIN 1250–AA14**

**Pre-Enforcement Notice and Conciliation Procedures**

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

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** To promote the efficient and effective enforcement of laws and regulations applicable to Federal contractors and subcontractors, the Office of Federal Contract Compliance Programs (OFCCP) proposes to modify regulations that delineate procedures and standards the agency follows when issuing pre-enforcement notices and securing compliance through conciliation. This proposal would support OFCCP in fulfilling its mission to ensure equal employment opportunity.

**DATES:** To be assured of consideration, comments must be received on or before April 21, 2022.

**ADDRESSES:** You may submit comments, identified by Regulation Identifier Number (RIN) 1250–AA14, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Fax:* (202) 693–1304 (for comments of six pages or less).
- *Mail:* Tina T. Williams, Director, Division of Policy and Program Development, OFCCP, Room C–3325,

200 Constitution Avenue NW, Washington, DC 20210.

*Instructions:* Please submit only one copy of your comments by only one method. Commenters submitting file attachments on <http://www.regulations.gov> are advised that uploading text-recognized documents, *i.e.*, documents in a native file format or documents that have undergone optical character recognition (OCR), enable staff at the Department to more easily search and retrieve specific content included in your comment for consideration. Please be advised that comments received will become a matter of public record and will be posted without change to <http://www.regulations.gov>, including any personal information provided. Commenters submitting comments by mail should transmit comments early to ensure timely receipt prior to the close of the comment period, as the Department continues to experience delays in the receipt of mail.

*Docket:* For access to the docket to read background documents or comments, go to the Federal eRulemaking Portal at <http://www.regulations.gov>. Copies of this notice of proposed rulemaking will be made available, upon request, in the following formats: Large print, Braille, audiotape, and disc. To obtain this notice of proposed rulemaking in an alternate format, contact OFCCP at the telephone numbers or address listed below.

**FOR FURTHER INFORMATION CONTACT:** Tina T. Williams, Director, Division of Policy and Program Development, OFCCP, 200 Constitution Avenue NW, Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103.

**SUPPLEMENTARY INFORMATION:**

## Overview

OFCCP administers and enforces Executive Order 11246, as amended (E.O. 11246); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA); and their implementing regulations, 41 CFR chapter 60. Collectively, these laws require Federal contractors and subcontractors<sup>1</sup> to take affirmative action to ensure equal employment opportunity, and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, E.O. 11246 prohibits a contractor from discharging or otherwise discriminating against applicants or employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

In November 2020, OFCCP published a final rule, "Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination" (the "2020 rule"),<sup>2</sup> amending its regulations to codify the required use of two notification procedures, the Predetermination Notice and the Notice of Violation. The 2020 rule requires OFCCP to issue a Predetermination Notice that provides contractors with an initial written notice of preliminary indicators of discrimination and requests that contractors respond. If after providing contractors an opportunity to respond, OFCCP finds a violation of an equal opportunity clause,<sup>3</sup> OFCCP will issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement. The contractor then has an additional opportunity to respond and resolve the matter. Where OFCCP and the contractor have been unable to resolve these findings, and OFCCP has

reasonable cause to believe that a contractor has violated an equal opportunity clause, the Director may issue a Show Cause Notice requiring the contractor to show cause for why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. The 2020 rule also provided for an early conciliation option for contractors that wish to bypass these notice procedures and resolve preliminary indicators of discrimination directly through a conciliation agreement.

In addition to requiring the use of the Predetermination Notice and Notice of Violation, the 2020 rule established enforcement standards that, as explained in the preamble to the final rule, were not "compelled. . . by [Title VII of the Civil Rights Act of 1964] and OFCCP case law" but rather were promulgated "as an exercise of [OFCCP's] enforcement discretion to focus OFCCP's resources on those cases with the strongest evidence," "increase the number of contractors the agency evaluates," and to provide "guardrails on the agency's issuance of pre-enforcement notices."<sup>4</sup>

Upon further review and assessment of the impact of the 2020 rule on OFCCP enforcement, OFCCP believes that the 2020 rule's inflexible evidentiary requirements mandate overly particularized and confusing evidentiary definitions that impede OFCCP's ability to tailor the pre-enforcement process to the specific facts and circumstances of each case, delay information exchange with contractors, and create obstacles to remedying discrimination. The 2020 rule's rigid requirements for issuing a Predetermination Notice and Notice of Violation in some instances exceed what courts have required for proof at trial and run counter to the general principle that the evidentiary standard pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") is a flexible one dependent on the unique facts at issue. These heightened and overly formulaic evidentiary standards are particularly unsuitable at the Predetermination Notice stage of a compliance evaluation, where OFCCP provides contractors with *preliminary* notice of indicators of discrimination so that contractors may provide a response to clarify and resolve areas of dispute.

In addition, mandating the same heightened and inflexible evidentiary requirements for both the Predetermination Notice and the Notice of Violation creates inefficient and duplicative processes, which hinders

OFCCP's ability to provide contractors with early notification of indicators of discrimination found by the agency. Moreover, the 2020 rule attempted to codify complex evidentiary issues, many of which are inherently open to debate, thus encouraging contractors to raise collateral challenges to OFCCP's pre-enforcement notice procedures, rather than providing a substantive response to the indicators and findings of discrimination.

Further, the 2020 rule requires that OFCCP disclose to the contractor at the pre-enforcement stage the quantitative and qualitative evidence relied upon by OFCCP to support indicators or findings of discriminatory intent "in sufficient detail to allow contractors to investigate allegations and meaningfully respond."<sup>5</sup> While the 2020 rule provided that OFCCP may withhold personally identifiable information in certain circumstances, the disclosure of qualitative evidence creates a risk that an employer will uncover identities of those who experience or report discrimination at this investigatory stage of the proceeding, which may have a chilling effect on the willingness of victims and witnesses to participate in OFCCP's investigation and also potentially lead to retaliation against those who report discrimination. Upon careful consideration, OFCCP believes that the 2020 regulations negatively impact America's workers by delaying the resolution of discrimination findings and constraining OFCCP's ability to effectively enforce the full scope of the protections that the President and Congress have entrusted to the agency.

In this rulemaking, OFCCP proposes to modify the 2020 rule to rescind the rigid evidentiary standards and definitions, while retaining and refining the required pre-enforcement procedures for issuing the Predetermination Notice and the Notice of Violation. OFCCP's regulations have included use of the Show Cause Notice since the agency's inception.<sup>6</sup> This proposal will clarify OFCCP's use of the Predetermination Notice and the Notice of Violation as pre-enforcement procedures, similar to the Show Cause Notice regulation, which has never

<sup>1</sup> Hereinafter, the term "contractor" is used to refer collectively to Federal contractors and subcontractors that fall under OFCCP's authority, unless otherwise expressly stated. This approach is consistent with OFCCP's regulations, which define "contract" to include subcontracts and "contractor" to include subcontractors.

<sup>2</sup> *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination*, 85 FR 71553 (Nov. 10, 2020). The final rule, which took effect on December 10, 2020, was published after OFCCP considered comments it received on a notice of proposed rulemaking, *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination*, 84 FR 71875 (Dec. 30, 2019).

<sup>3</sup> See 41 CFR 60-1.4, 60-4.3, 60-300.5, 60-741.5.

<sup>4</sup> 45 FR 71553, 71554.

<sup>5</sup> The 2020 rule also requires OFCCP to demonstrate that the unexplained disparity is practically significant and, for disparate impact cases, OFCCP must identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis. See 41 CFR 60-1.33.

<sup>6</sup> 41 CFR 60-1.28; see also *Compliance Responsibility for Equal Employment Opportunity*, 43 FR 49240, 49247 (Oct. 20, 1978); *Revision of Chapter*, 33 FR 7804, 7810 (May 28, 1968).

included the specific type of evidentiary standards the 2020 rule introduced. The proposed modifications would allow OFCCP to tailor the pre-enforcement process to the specific facts and circumstances of each case, consistent with judicial interpretations of the applicable legal authorities, which will in turn allow OFCCP to more effectively redress unlawful discrimination.

In addition, to promote greater efficiency in resolving cases, OFCCP proposes to modify the 2020 rule's provision that required a contractor to provide a response within 30 calendar days of receiving a Predetermination Notice.<sup>7</sup> The proposal returns the Predetermination Notice response period to the 15 calendar day period in effect prior to the 2020 rule (which OFCCP may extend for good cause).<sup>8</sup> In the proposal, OFCCP also clarifies this provision to state that any response must be received by OFCCP within 15 calendar days (absent a deadline extension).

OFCCP also proposes to retain the regulatory language regarding early resolution, which provides that contractors may waive these notice procedures if they enter directly into a conciliation agreement. Finally, the proposal would delete the severability clause that applied just to certain sections of OFCCP's regulations and replace it with severability clauses covering the entirety of each part of OFCCP's regulatory scheme.

The 2020 final rule was the first time OFCCP sought to codify the specific forms of evidence that the agency must rely upon during its pre-enforcement process. Through this proposal, OFCCP would promote consistency by codifying the required use of the Predetermination Notice and Notice of Violation when the agency identifies preliminary indicators or findings of discrimination, while allowing the agency the flexibility to issue appropriate guidance to field staff on the use of the procedures. OFCCP would continue to ensure transparency by sharing this guidance with the public.

This proposed rulemaking aims to create a streamlined, efficient, and flexible pre-enforcement and conciliation process to ensure OFCCP utilizes its resources strategically to advance the agency's mission through effective enforcement. OFCCP remains committed to providing contractors notice when the agency sees

preliminary indicators of discrimination during a compliance evaluation, as such notice is mutually beneficial for OFCCP and the contractor under review because it provides the contractor an opportunity to respond and work to resolve the issues.

#### *Purpose of the 2020 Rule*

In its 2020 final rule, OFCCP stated an intent to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP enforcement proceedings, and enhance the efficient enforcement of the law. The 2020 rule identified two primary objectives: (1) Increase the number of contractors the agency evaluates and (2) focus on resolving stronger cases through the strategic allocation of limited agency resources.<sup>9</sup> As detailed further below in this proposed rulemaking, OFCCP reconsidered the 2020 rule and assessed its impact on OFCCP enforcement processes and has found that the 2020 rule's formulaic and inflexible evidentiary standards for pre-enforcement notices neither assist the agency in strategically allocating its limited resources nor enable the agency to evaluate more contractors. Instead, the 2020 rule's evidentiary mandates diminish OFCCP's ability to provide contractors with early notification of indicators of discrimination and unnecessarily divert agency and contractor resources away from addressing discrimination by spawning time-consuming collateral disputes about the implementation of these heightened evidentiary standards. This decreases rather than increases the number of contractors that OFCCP can evaluate for compliance with equal opportunity laws. OFCCP thus proposes to modify the 2020 rule to ensure that OFCCP utilizes its resources strategically to provide contractors with an early opportunity to understand and resolve indicators or findings of discrimination and to enable the agency to protect America's workers by enforcing the full scope of the equal opportunity authorities with which it has been entrusted.

#### *Pre-Enforcement Notices*

Historically, OFCCP has issued pre-enforcement notices in compliance evaluations (*i.e.*, the Predetermination Notice, Notice of Violation, and Show Cause Notice) when the agency is seeking to remedy findings of discrimination.<sup>10</sup> Prior to 2018, the use

of the Predetermination Notice varied by region and by the type of case. In 2018, OFCCP issued a directive, requiring the consistent issuance of Predetermination Notices for preliminary discrimination findings identified during the course of compliance evaluations.<sup>11</sup>

A stated goal of the 2020 rule was to provide contractors with greater certainty by codifying the historical, then-existing procedures for issuing the Predetermination Notice and the Notice of Violation.<sup>12</sup> The preamble to the 2020 rule stated that the Predetermination Notice is intended to encourage communication with contractors and provide them an opportunity to respond to preliminary indicators of discrimination prior to OFCCP deciding to issue a Notice of Violation. As set forth in the 2020 rule, if the contractor did not respond to the Predetermination Notice or sufficiently rebut the preliminary indicators in the Predetermination Notice, OFCCP would issue the Notice of Violation to inform the contractor that the agency found violations of one or more of the laws it enforces. The Notice of Violation also informed the contractor that corrective action would be required and invited conciliation through a written agreement.<sup>13</sup>

Rather than simply codify OFCCP's then-existing procedures for issuing the Predetermination Notice and Notice of Violation, the 2020 rule instead exercised the agency's enforcement discretion to adopt rigid standards that the agency had not historically followed for issuing these two notices, necessitating that OFCCP alter the content of the Predetermination Notice and Notice of Violation from what had previously been included in the notices. As detailed further below, this rulemaking proposes to retain the

2021), available at <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-8-resolution-noncompliance> (last accessed Dec. 3, 2021). OFCCP also uses the Notice of Violation and Show Cause Notice to identify other types of potential violations of law, such as denial of access or other types of nondiscrimination violations like recordkeeping deficiencies.

<sup>11</sup> See Directive 2018–01, Use of Predetermination Notices (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 5, 2021).

<sup>12</sup> See 84 FR 71875. Show Cause Notices were already codified in OFCCP's regulations prior to the 2020 rule, at 41 CFR 60–1.28, 60–300.64, 60–741.64.

<sup>13</sup> Conciliation agreements were also already codified in OFCCP's regulations prior to the 2020 rule, at 41 CFR 60–1.33, 60–300.62, and 60–741.62—the same sections that the 2020 rule amended to include the Predetermination Notice, the Notice of Violation, the early conciliation option, and a severability clause specific only to that section.

<sup>7</sup> 85 FR 71553, 71571–71574, codified at 41 CFR 60–1.33(a)(5), 60–300.62(a)(5), 60–741.62(a)(5).

<sup>8</sup> See Directive 2018–01, Use of Predetermination Notices (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 5, 2021).

<sup>9</sup> 85 FR 71553, 71554.

<sup>10</sup> The notices are used at different pre-enforcement stages. See FCCM, Chapter 8, Resolution of Noncompliance (last updated Jan. 7,

agency's consistent use of the two pre-enforcement notices while rescinding the 2020 rule's rigid evidentiary mandates.

Prior to the issuance of the 2020 final rule, OFCCP had issued subregulatory guidance and internal procedures on the use of the Predetermination Notice, as well as the Notice of Violation, through the Federal Contract Compliance Manual (FCCM) and agency directives. The agency has utilized this guidance to promote transparency and consistency, while ensuring the agency has the flexibility to update these guidance documents to improve procedures and align with OFCCP's strategic enforcement measures. The 2020 rule also codified a new pre-enforcement procedure available for OFCCP and contractors to expedite conciliation by bypassing the Predetermination Notice and Notice of Violation procedures and entering directly into a conciliation agreement. In this rulemaking, OFCCP retains this expedited conciliation process and only proposes changes to that subsection of the 2020 rule to clarify the agency's role in pursuing the expedited conciliation option.

#### *Evidentiary Standards*

The 2020 rule codified evidentiary standards that OFCCP must meet in order to issue a Predetermination Notice and a Notice of Violation. Under the 2020 rule, OFCCP's authority to issue a Predetermination Notice or Notice of Violation for discrimination cases is limited to those situations where OFCCP demonstrates that it has specific forms of evidence conforming to the regulatory thresholds requiring quantitative (*i.e.*, statistical or other numerical) evidence, practical significance, and qualitative evidence of discrimination.<sup>14</sup> The 2020 rule differentiates the procedures followed for disparate treatment and disparate impact theories of discrimination and provides the evidentiary standards OFCCP must meet to issue pre-enforcement notices under each legal theory.<sup>15</sup> The 2020 rule mandates that, upon the contractor's request, OFCCP must provide the model and variables used in the agency's statistical analysis and an explanation for any variable that

was excluded from the statistical analysis. The 2020 rule also requires OFCCP to explain in detail the basis for its findings in pre-enforcement notices.<sup>16</sup> For the reasons discussed below, this rulemaking proposes to rescind these formal evidentiary standards and disclosure requirements in the 2020 rule.

#### *Definitions*

Finally, the 2020 rule added definitions for "quantitative evidence" and "qualitative evidence" to OFCCP's regulations purporting to add greater clarity and certainty as to the types of evidence the agency uses to support the issuance of pre-enforcement notices.<sup>17</sup> The term "qualitative evidence" is defined to include the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination, and clarified the purposes for which it will be used. The term "quantitative evidence" establishes the support needed for OFCCP to determine that there is a statistically significant disparity in a contractor's employment selection or compensation outcomes affecting a group protected under OFCCP's laws. The definition sets a standard for what OFCCP considers statistically significant.<sup>18</sup> The definition also includes quantitative analyses, such as cohort analyses, which are comparisons of similarly situated individuals or small groups of applicants or employees that are numerical in nature but do not use hypothesis testing techniques. Pursuant to the 2020 rule, the term "qualitative evidence" gives an affirmative, descriptive label to the types of evidence that fall into that category while the term "quantitative evidence" better encapsulates OFCCP's analytical evidence given the agency's use of descriptive statistics and non-parametric and cohort analyses, in addition to a variety of statistical tests

based on hypothesis testing.<sup>19</sup> OFCCP declined to add a specific definition for practical significance in the 2020 rule because it concluded there is not a settled definition in relevant academic literature and a variety of measures may be appropriate to use in any given case, instead describing the common types of practical significance measures and explaining the metrics the agency would customarily use.<sup>20</sup> In this proposed rulemaking, OFCCP proposes to eliminate the definitions for the reasons discussed below.

#### **Modifications To Promote Effective Enforcement**

##### *Rescinding Evidentiary Standards Codified by the 2020 Rule*

The 2020 rule codifies specific evidentiary standards that OFCCP must meet in order to issue a Predetermination Notice and a Notice of Violation. The preamble to the 2020 rule concedes, however, that these standards, applicable to both the Predetermination Notice and the Notice of Violation, are not compelled by Title VII or OFCCP case law. Indeed, as discussed below, the 2020 rule places certain obligations on OFCCP that go beyond what is required by E.O. 11246 to state or prove a claim of discrimination or by Title VII for proof of discrimination after the completion of the discovery process upon a full evidentiary record in litigation.

The pre-enforcement notice process is intended to place the employer on notice of OFCCP's concerns of discrimination. The information available to OFCCP during the pre-enforcement notice stage of a compliance evaluation is necessarily limited compared to a full evidentiary record available to support proof of a violation at trial. Thus, imposing proof standards for the agency's initial pre-enforcement proceedings that essentially require the agency to be trial ready—and, as discussed in more detail below, are even more onerous than are required in court to prove a violation under Title VII—is incompatible with the investigatory stage of a compliance evaluation.<sup>21</sup> As set forth in OFCCP's

<sup>16</sup> 85 FR 71553, 71562.

<sup>17</sup> 85 FR 71553, 71555. The definitions are now codified at 41 CFR 60–1.3, 60–300.2(t)–(u), and 60–741.2(s)–(t).

<sup>18</sup> The definition of quantitative evidence includes this standard for statistical significance: ". . . a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements: (1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more); (2) The Z statistic has a value greater than two; or (3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used." 41 CFR 60–1.3, 60–300.2(t)–(u), 60–741.2(s)–(t); *see also* 85 FR 71553, 71571–71574.

<sup>19</sup> 85 FR 71553, 71556.

<sup>20</sup> *Id.* at 71559–71560.

<sup>21</sup> *See OFCCP v. Oracle*, 2017–OFC–00006, 19 (Order Denying Cross Motions for Summary Judgment Granting in Part Defendant's Alternative Motion for Partial Summary Judgment & Order for Additional Briefing on Show Cause Notice & Conciliation, Nov. 25, 2019) ("Reasonable cause" is something that the [Director of OFCCP] is given the discretion to determine[.]"); *see also OFCCP v. Oracle*, 2017–OFC–00006, 8 (Order Granting OFCCP Summary Judgment as to Oracle's Affirmative Defenses Related to the Show Cause

<sup>14</sup> 85 FR 71553, 71562–71565.

<sup>15</sup> For all cases proceeding under a disparate treatment theory, subject to certain enumerated exceptions, the 2020 rule establishes that OFCCP is required to provide qualitative evidence supporting a finding of discriminatory intent. For all cases proceeding under a disparate impact theory, the 2020 rule requires OFCCP to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect. 85 FR 71553, 71562–71565.

longstanding regulations in effect since OFCCP's inception, the agency will issue a Show Cause Notice to proceed with an enforcement action where it has *reasonable cause* to believe discrimination occurred based on the information available through its investigation.<sup>22</sup> This means that, based upon the evidence obtained in the investigation, the agency believes discrimination did occur.<sup>23</sup> This does not require developing a full evidentiary record to support proof at trial, but rather providing notice of the agency's findings supporting its belief that violations occurred and giving the contractor the opportunity to show why agency action to ensure compliance should not be instituted.<sup>24</sup> Thus, even this final stage in the pre-enforcement process does not impose specific evidentiary regulations or trial-level proof prior to the institution of an enforcement action.

The Predetermination Notice is the initial written notice in a multi-stage notification and information exchange process provided to contractors to promote a mutual understanding of the issues and facilitate voluntary resolution. Prior to the 2020 regulation, the Predetermination Notice served to foster communication with contractors about *preliminary* indicators of discrimination, providing the contractor with an early opportunity to understand and respond to OFCCP's preliminary findings. This process enables the sharing of additional information that may assist OFCCP in resolving the preliminary findings or conducting a more refined analysis of the data before determining whether to issue a Notice of Violation.

Notice & Conciliation, Dec. 3, 2019) (denying Oracle's argument that if OFCCP did not meet the reasonable cause standard for issuing the show cause notice, then all of the evidence gathered was gathered in violation of the Fourth Amendment stating "[this argument] presumes that the Show Cause Notice has a much more important place than can be fairly read into the regulatory scheme").

<sup>22</sup> 41 CFR 60-1.28, 60-300.64, 60-741.64.

<sup>23</sup> See, e.g., 42 U.S.C. 2000e-5(b); cf. *OFCCP v. Honeywell*, 77-OF-3, 8-9 (Sec'y of Labor Dec. & Order on Mediation, June 2, 1993) (comparing the show cause procedure to the reasonable cause determination made by the Equal Employment Opportunity Commission (EEOC), the ALJ found that the government letter explaining the deficiencies found and recommended remedial actions was comparable to a reasonable cause determination); U.S. Equal Employment Opportunity Commission, "Definition of Terms," available at <https://www.eeoc.gov/statistics/definitions-terms> (last visited Nov. 8, 2021).

<sup>24</sup> 41 CFR 60-1.28, 60-300.64, 60-741.64; cf. *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984) (EEOC's cause determination "does not adjudicate rights and liabilities; it merely places the defendant on notice of the charges") (citing *EEOC v. E.I. Dupont de Nemours & Co.*, 373 F. Supp. 1321, 1338 (D. Del. 1974)).

In order to issue a Predetermination Notice under the 2020 rule, OFCCP must meet the same evidentiary standards as required to issue a Notice of Violation. As a result, the 2020 rule has created inefficiencies and delay in OFCCP's pre-enforcement process. In addition, the 2020 rule has in certain respects created higher evidentiary requirements for E.O. 11246 matters than Title VII matters, which unduly circumscribes OFCCP's ability to prosecute discriminatory practices and is contrary to the approach generally followed by OFCCP and recognized in relevant case law.<sup>25</sup>

While the 2020 rule purported to "focus OFCCP's resources on those cases with the strongest evidence,"<sup>26</sup> upon further reconsideration OFCCP believes the rule hindered the agency's ability to focus on those cases with the strongest evidence by adopting a formulaic approach to evidentiary standards rather than viewing the strength of the evidence in light of the particular facts and circumstances at issue in each case. OFCCP has concluded that rigid evidentiary standards are unnecessary and unduly constrain the agency's broad enforcement discretion as to the cases it decides to litigate and those it does not.<sup>27</sup> OFCCP has been diligent in managing its limited resources for decades to focus on the strongest cases without the need for blanket evidentiary standards. To promote more effective enforcement, OFCCP proposes to return to its long-standing practice of focusing agency resources without imposing blanket evidentiary standards, pursuing those cases supported by strong evidence tailored to the facts of each case. Further, OFCCP believes that the 2020 rule has failed to meet its objectives of providing clarity and promoting efficiency. As described in more detail below, these strict evidentiary standards have instead led to delays in resolutions by increasing disagreements between OFCCP and contractors about the requirements for Predetermination Notices.

With this proposal, OFCCP would apply Title VII standards to the facts

<sup>25</sup> Cf. *OFCCP v. Greenwood Mills, Inc.*, Nos. 00-044, 01-089, 2002 WL 31932547, at \*4 (ARB Final Decision & Order Dec. 20, 2002) ("The legal standards developed under Title VII of the Civil Rights Act of 1964 apply to cases brought under [E.O. 11246].").

<sup>26</sup> 85 FR 71553, 7155.

<sup>27</sup> See generally *Heckler v. Chaney*, 470 U.S. 821 (1985); *Andrews v. Consolidated Rail Corporation*, 831 F.2d 678, 684 (3rd Cir. 1987) (applying *Chaney* to OFCCP decision to decline enforcement under Section 503); *Clementson v. Brock*, 806 F.2d 1402, 1404 (9th Cir. 1986) (applying *Chaney* to OFCCP decision to decline enforcement under VEVRAA).

and circumstances of each compliance evaluation to provide contractors with notice of the nature of OFCCP's concerns.<sup>28</sup> OFCCP proposes to adopt this approach to advance a policy of promoting consistency between Title VII and E.O. 11246 and to remove unnecessary constraints on the agency's ability to pursue meritorious cases. Taking this approach will help OFCCP advance the overriding policy goal of promoting nondiscrimination by strengthening the enforcement of federal protections under E.O. 11246. OFCCP also would promote transparency and consistency by continuing to codify the required use of the Predetermination Notice when the agency identifies preliminary indicators of discrimination.

#### 1. "Quantitative" and "Qualitative" Evidence

The 2020 rule requires that OFCCP, with only narrow exceptions, provide both "quantitative" and "qualitative" evidence before issuing a Predetermination Notice or a Notice of Violation, and provides definitions for what constitutes "quantitative" and "qualitative" evidence.<sup>29</sup> These provisions of the 2020 rule depart from traditional Title VII standards in two respects. First, Title VII does not prescribe the different and specific forms of evidence described in the 2020 rule in order to establish a *prima facie* case of discrimination, much less investigatory findings of violation.<sup>30</sup> Interpretive Title VII case law demonstrates that there are multiple ways to establish a *prima facie* case of discrimination, including through statistical evidence alone, as long as the

<sup>28</sup> Similarly, for claims related to disability discrimination, OFCCP would continue to apply the nondiscrimination standards of the Americans with Disabilities Act of 1990 (ADA), as amended, to compliance evaluations pertaining to Section 503. See, e.g., 41 CFR 60-741.1(c)(1), 60-742.4.

<sup>29</sup> The 2020 rule definitions are codified at 41 CFR 60-1.3, 60-300.2(t)-(u), 60-741.2(s)-(t).

<sup>30</sup> See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) ("[T]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations." (alterations omitted) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n. 13(1973)); *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 425 (7th Cir. 2000) ("No one piece of evidence has to prove every element of the plaintiff's case[.]") (internal citations omitted); *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1285 (5th Cir. 1994) ("If statistical evidence is insufficient to establish discriminatory intent, the plaintiffs may bolster their case by introducing historical, individual, or circumstantial evidence.") (citing *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 568 (5th Cir. 1988)).

plaintiff ultimately satisfies its burden of proof.<sup>31</sup>

As the U.S. Supreme Court and lower courts have long recognized, Title VII requires a case-by-case evaluation of the facts and circumstances.<sup>32</sup> There is no one-size-fits-all blanket formula for establishing discrimination. Yet, the 2020 rule circumscribes OFCCP's authority to pursue only those cases that meet bright line statistical thresholds or rely on specific types of evidence. To be sure, OFCCP recognizes the utility of anecdotal evidence in support of discrimination cases generally and will continue to make efforts to gather such evidence during its compliance evaluations.<sup>33</sup> However, to require as a baseline rule that the agency proffer evidence falling within multiple and different categories regardless of the factual circumstances of a case—especially at the investigative stage—goes beyond well-established Title VII principles. In addition, a number of the regulatory requirements impose a standard that is inherently fact specific, open to dispute, and ultimately unnecessary to adjudicate at this initial stage of the proceeding, including the requirement that OFCCP provide “qualitative evidence supporting a finding of discriminatory intent for all cases proceeding under a disparate

treatment theory” (emphasis added), subject to certain enumerated exceptions. Such disputes created protracted delays in remedying violations of the law. Moreover, the 2020 rule requires that OFCCP disclose to the contractor at this preliminary stage the quantitative and qualitative evidence relied upon by OFCCP to support findings of discriminatory intent “in sufficient detail to allow contractors to investigate allegations and meaningfully respond.”<sup>34</sup> Mandating the disclosure of anecdotal evidence at this pre-determination stage may have a chilling effect on the willingness of victims and witnesses to participate in OFCCP's investigation due to concerns that an employer may uncover their identities, which could lead to retaliation. The preamble to the 2020 rule acknowledges that OFCCP may withhold “personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or if providing that information would otherwise violate confidentiality or privacy protections afforded by law;” yet, even in those circumstances where OFCCP may withhold an individual's identity, witnesses may remain concerned about the employer's ability to ascertain their identity from the anecdotal information provided at this pre-determination stage.

As such, OFCCP proposes to rescind the 2020 rule requirement to provide both “quantitative” and “qualitative” evidence before issuing a Predetermination Notice or Notice of Violation. As described above, disputes over this requirement resulted in protracted delays for remedying violations. Eliminating this unnecessary, rigid requirement allows the agency more flexibility, better ensures prompt resolutions, and strengthens its ability to protect workers and enforce the law. Eliminating this requirement also allows OFCCP to better align its enforcement with Title VII evidentiary standards.

Because OFCCP is proposing to rescind this requirement, the definitions of “quantitative evidence” and “qualitative evidence” included in the 2020 rule to support the evidentiary scheme would no longer be necessary. Even when evaluated outside of the 2020 rule's evidentiary framework, upon further consideration, OFCCP now believes these definitions, and particularly the definition for “qualitative evidence,” to be confusing, overly particularized, and inconsistent

with the general principle that the Title VII evidentiary standard is a flexible one dependent on the unique facts at issue.<sup>35</sup> First, the 2020 rule's definition of “qualitative evidence” begins with a series of lengthy, highly specific examples that may not be present in many systemic discrimination cases. Although the 2020 rule stated that qualitative evidence “includes but is not limited to” these examples, some contractors now assert that OFCCP must present evidence of these highly specific examples in its cases, creating delays to OFCCP's pre-enforcement conciliation procedures. However, the 2020 rule's first example—“biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation”—includes the sort of direct, “smoking gun” evidence that, while certainly probative of discrimination, is “rarely found in today's sophisticated employment world.”<sup>36</sup> The next example—evidence about “misleading or contradictory information” given by an employer to an employee or applicant “in circumstances suggesting discriminatory treatment”—also describes narrow factual scenarios that may not be present in many cases, substantially limiting the utility of the definition. The “qualitative evidence” definition is also overly focused on evidence of discriminatory intent in disparate treatment cases. Even though it includes one example related to disparate impact cases—evidence related to “the business necessity (or lack thereof) of a challenged policy or practice”—that example is problematic because it is: (1) A category of evidence that is the employer's burden to demonstrate, after the agency establishes a *prima facie* case;<sup>37</sup> and (2) not the only sort of “qualitative” evidence that plaintiffs typically introduce or rely upon in the course of a disparate impact case.<sup>38</sup>

<sup>35</sup> *Int'l Bhd. of Teamsters*, 431 U.S. at 358.

<sup>36</sup> *Thomas v. Eastman Kodak Co.*, 183 F. 3d 38, 58 n.12 (1st Cir. 1999) (citing *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 171 n. 13 (1st Cir. 1998)).

<sup>37</sup> 42 U.S.C. 2000e–2(k)(1)(A)(i); see also *Ricci v. DeStefano*, 557 U.S. 557, 578 (2009) (“An employer may defend against liability [for disparate impact discrimination] by demonstrating that the practice is ‘job-related for the position in question and consistent with business necessity.’”); *Wards Cove Packing Co.*, 490 U.S. at 659 (“[T]he employer carries the burden of producing evidence of a business justification for his employment practice.”).

<sup>38</sup> By way of example, because a plaintiff in disparate impact cases must, where possible, identify the particular employment practice that is causing the adverse impact, see 42 U.S.C. 2000e–

<sup>31</sup> See *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (“Whether . . . [statistics] . . . carry the plaintiffs' ultimate burden will depend in a given case on the factual context of each case in light of all the evidence presented by both the plaintiff and the defendant.”); *Int'l Bhd. of Teamsters*, 431 U.S. at 339 (finding that statistics may be used to establish a *prima facie* case, but cautioning that the “usefulness [of statistics] depends on all of the surrounding facts and circumstances”) (internal citations omitted); see also *Isabel v. City of Memphis*, 404 F.3d 404, 412 (6th Cir. 2005) (“[W]hen the Supreme Court stated that a plaintiff may rely solely on statistical evidence to establish a *prima facie* case of disparate impact . . . it did not say what kind of statistical evidence should be relied on. Neither the Supreme Court nor this Court has ever limited a plaintiff's choices in Title VII cases involving statistical analysis in any way.”) (citing *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656–57 (1989)).

<sup>32</sup> See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (noting that the Supreme Court has “not suggested that any particular number of ‘standard deviations’ can determine whether a plaintiff has made out a *prima facie* case in the complex area of employment discrimination”); *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 551 (9th Cir. 1982) (“It would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law.”).

<sup>33</sup> See FCCM, Chapter 2E00, Types of Evidence, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/2e-collecting-information-analysis/2e00-types-of-evidence> (last accessed Dec. 3, 2021) (explaining that during its compliance evaluations, OFCCP seeks a variety of other types of nonstatistical evidence, including anecdotal evidence).

<sup>34</sup> 85 FR 71564.

Finally, the definition includes “whether the contractor has otherwise complied with its non-discrimination obligations” as a type of permissible qualitative evidence. Upon reconsideration, OFCCP has concerns that this provision could easily be misinterpreted to mean that when a contractor complies with *some* of its nondiscrimination obligations, it somehow lessens the weight of evidence of noncompliance with *other* nondiscrimination obligations. Accordingly, OFCCP proposes to remove the two definitions added in the 2020 rule. OFCCP will continue to evaluate its cases in line with well-established Title VII evidentiary standards and will continue to provide compliance assistance and other guidance materials on these standards as appropriate.<sup>39</sup>

## 2. Practical Significance

Practical significance refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group, focusing on the contextual impact or importance of the disparity rather than its likelihood of occurring by chance.<sup>40</sup> For allegations included in a Predetermination Notice and Notice of Violation, the 2020 rule requires that OFCCP demonstrate practical significance, and the preamble includes quantitative ranges for various measures indicating whether it is “likely” or “unlikely” that practical significance is present.<sup>41</sup>

Whether Title VII specifically requires a finding of practical significance is an unsettled question. The text of Title VII contains no specific requirement that practical significance must be demonstrated.<sup>42</sup> Of the circuit courts

2(k)(1)(B)(i), it is commonplace for a plaintiff to introduce testimony or interview statements from expert witnesses or company officials regarding its selection or compensation system that would provide necessary context and help to identify the particular employment practice at issue. Similarly, evidence regarding less discriminatory alternative employment practices is a common feature in disparate impact cases. 42 U.S.C. 2000e–2(k)(1)(A)(ii).

<sup>39</sup> OFCCP applies ADA standards to compliance evaluations pertaining to Section 503. See *supra* at n. 28.

<sup>40</sup> Practical Significance in EEO Analysis Frequently Asked Questions, Question #1 (last updated Jan. 15, 2021), available at [www.dol.gov/agencies/ofccp/faqs/practicalsignificance](http://www.dol.gov/agencies/ofccp/faqs/practicalsignificance) (last accessed Dec. 5, 2021). See also 85 FR 71553, 71559.

<sup>41</sup> 85 FR 71556.

<sup>42</sup> See Elliot Ko, Big Enough to Matter: Whether Statistical Significance or Practical Significance Should Be the Test for Title VII Disparate Impact Claims, 101 Minn. L.R. 869, 889 (2016) (“Title VII does not require plaintiffs to prove that an employment practice had a ‘large’ impact on a

that have expressly addressed the issue, three have concluded that Title VII does not require a showing of practical significance.<sup>43</sup> For example, in *Jones v. City of Boston*, the First Circuit explicitly held that a plaintiff’s failure to demonstrate practical significance could not preclude that plaintiff from relying on evidence of statistical significance to establish a *prima facie* case of disparate impact.<sup>44</sup> In doing so, the Court noted that the requirements a plaintiff must otherwise meet under Title VII “secure most of the advantages that might be gained” from a test of practical significance.<sup>45</sup> First, the “need to show statistical significance will eliminate small impacts as fodder for litigation . . . because proving that a small impact is statistically significant generally requires large samples sizes, which are often unavailable.”<sup>46</sup> Second, the subsequent steps required for a plaintiff to successfully recover under Title VII provide an additional safeguard in that the employer may rebut the *prima facie* case.<sup>47</sup> Similarly, in *Stagi v. National Railroad Passenger Corp.*, the Third Circuit explicitly declined to require a showing of practical significance, and instead required only that the plaintiffs meet the well-established thresholds for statistical significance in order to meet their *prima facie* case.<sup>48</sup>

Other circuit courts have considered measures of practical significance in determining whether a plaintiff in a disparate impact case has satisfied a *prima facie* case.<sup>49</sup> These cases have generally adopted a holistic approach to the evidence required in a given case depending on the facts at issue.<sup>50</sup>

protected class. Title VII just requires plaintiffs to prove that ‘a particular employment practice’ had a disparate impact on a protected class.... Title VII only requires proof of a ‘disparate impact,’ not proof of a ‘very’ disparate impact that is large enough to warrant societal or moral condemnation.’”

<sup>43</sup> *Jones v. City of Boston*, 752 F.3d 38 (1st Cir. 2014); *Apsley v. Boeing Co.*, 691 F.3d 1184 (10th Cir. 2012); *Stagi v. Nat’l R.R. Passenger Corp.*, 2010 WL 3273173 (3d Cir. Aug. 16, 2010).

<sup>44</sup> *Jones*, 752 F.3d at 53.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (internal citations omitted).

<sup>47</sup> *Id.* (internal citations omitted).

<sup>48</sup> *Stagi*, 2010 WL 3273173 at \*5 (citing *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977)); see also *Meditz v. City of Newark*, 658 F.3d 364, 372 (3d Cir. 2011) (using only a measure of statistical significance to determine whether plaintiff established a *prima facie* case of disparate impact).

<sup>49</sup> *Brown v. Nucor Corp.*, 785 F.3d 895, 908, 935 (4th Cir. 2015); *Isabel v. City of Memphis*, 404 F.3d 404, 412, 418 (6th Cir. 2005); *Enslley Branch of NAACP v. Seibels*, 31 F.3d 1548, 1555 (11th Cir. 1994); *Waisome v. Port Auth. of N.Y. & N.J.*, 948 F.2d 1370, 1376 (2d Cir. 1991); *Clady v. County of Los Angeles*, 770 F.2d 1421, 1428–29 (9th Cir. 1985); *Fisher v. Procter & Gamble Mfg. Co.*, 613 F.2d 527, 545 (5th Cir. 1980).

<sup>50</sup> Ko, *supra* n. 42, at 881–84.

However, unlike with statistical significance, courts have not similarly coalesced around uniform quantitative measures for what constitutes sufficient practical significance. Consequently, the 2020 rule did not specify which measure of many available options OFCCP should utilize as a threshold for practical significance during its compliance evaluations of selection and compensation procedures. As OFCCP has stated in its Frequently Asked Questions published even prior to the 2020 rule, the agency utilizes a variety of measures for evaluating practical significance as appropriate to the employment issue under review and the specific facts of each case.<sup>51</sup>

As part of its enforcement discretion, OFCCP has historically utilized practical significance measures where appropriate in compliance evaluations based on the specific facts of the case without the need for regulations. In addition, the particular ranges that were discussed in the preamble of the 2020 rule may not be appropriate in all cases depending on the other evidence that exists. It also remains unsettled whether Title VII requires a finding of practical significance, and, if so, what level of practical significance is sufficient and appropriate to the process under review. Accordingly, OFCCP believes it is not advisable to attempt to regulate the standards for practical significance, and proposes to remove the requirement to demonstrate practical significance before issuing a Predetermination Notice or Notice of Violation. Moving forward, however, OFCCP would still consider practical significance measures where appropriate as part of a holistic evaluation of the cases it investigates along with statistical significance and all other evidence gathered in the course of the investigation.

## Addressing Barriers to Enforcement Created by the 2020 Rule

OFCCP believes that rescinding the inflexible evidentiary standards would also advance OFCCP’s policy goal of alleviating duplicative and inefficient processes created by the 2020 rule that undermine effective enforcement of equal employment opportunity laws. For instance, the Predetermination Notice originally served to foster communication with contractors about preliminary indicators of discrimination. However, at the preliminary stage, these rigid evidentiary standards also invite

<sup>51</sup> See Practical Significance in EEO Analysis Frequently Asked Questions (last updated Jan. 15, 2021), at <https://www.dol.gov/agencies/ofccp/faqs/practical-significance> (last accessed Dec. 5, 2021).

additional delay by engendering disputes about the scope of evidence contractors must provide and whether OFCCP has satisfied the rule's heightened requirements. The 2020 rule's regulatory standards thus serve to prevent OFCCP from providing early communication of preliminary indicators of discrimination and delays the prompt resolution of these preliminary indicators and the exchange of more information to perform additional analysis. Pursuant to the 2020 rule, to issue the Predetermination Notice, OFCCP must meet the same evidentiary standards that the agency must meet to issue a Notice of Violation. As a result, the 2020 rule conflates a notice that is intended to convey preliminary indicators of discrimination (the Predetermination Notice) with a notice intended to inform the contractor that corrective action is *required* and to invite conciliation through a written agreement (the Notice of Violation). OFCCP believes that conflating these two notices by requiring duplicative evidentiary standards unnecessarily consumes resources and delays OFCCP's ability to timely raise preliminary indicators of discrimination. As the two notices were originally meant to serve separate, unique purposes, this rulemaking proposes to restore the function of the Predetermination Notice to convey *preliminary* indicators of discrimination and foster the exchange of information and communication toward efficient resolution.

To retain the Predetermination Notice and distinguish it from the Notice of Violation, OFCCP proposes to modify the 2020 rule to enable the agency to streamline the compliance evaluation process and issue the Predetermination Notice earlier where appropriate. OFCCP will issue a Predetermination Notice describing the preliminary indicators of discrimination and any other potential violations OFCCP has identified, asking the contractor to respond. In some circumstances, this may be after the agency has completed the desk audit and prior to the on-site review,<sup>52</sup> while in other cases, depending on the facts and circumstances, the agency will issue the Predetermination Notice after OFCCP has begun an on-site review and obtained the information necessary to identify preliminary indicators of discrimination.

To promote greater efficiency in resolving cases, OFCCP proposes to modify the 2020 rule's provision which required a contractor to provide a response within 30 calendar days of receiving a Predetermination Notice. The proposal will return the Predetermination Notice response period to the 15-calendar-day period in effect prior to the 2020 rule (which OFCCP may extend for good cause).<sup>53</sup> In the proposal, OFCCP also clarifies this provision to state that any response must be *received by* OFCCP within 15 calendar days (absent a deadline extension).

After OFCCP issues a Predetermination Notice, where the contractor does not sufficiently rebut the preliminary indicators of discrimination, and OFCCP finds a violation of one or more of its equal opportunity clauses,<sup>54</sup> OFCCP will issue a Notice of Violation to the contractor identifying the violations, describing the recommended corrective actions, and inviting conciliation through a written agreement. OFCCP proposes changes to the Notice of Violation regulation similar to the changes proposed for the Predetermination Notice, to remove barriers to resolution. For the Notice of Violation regulatory provision, the proposed changes make clear that OFCCP can include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation to prevent enforcement delays. The proposed changes to the Notice of Violation regulation also clearly state that OFCCP will provide contractors an opportunity to conciliate additional violations identified in the Show Cause Notice. The proposal contains similar changes in the Predetermination Notice provision, allowing OFCCP to add additional violations in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. The proposed changes provide that OFCCP may issue a Show Cause Notice where OFCCP has reasonable cause to believe that a contractor has violated the equal opportunity clause. The proposed changes also clarify that the agency may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review, or

refuses to provide access to witnesses, records, or other information.

These proposed changes stem from OFCCP's experience implementing the 2020 rule as well as its policy judgment on how OFCCP can strengthen enforcement of its requirements and promote consistency with Title VII. The 2020 rule stated that key objectives included promoting more effective enforcement, increasing the number of contractors that the agency evaluates, and increasing fairness for contractors by providing more transparency and certainty on the agency's resolution procedures.<sup>55</sup> However, the 2020 rule has not met these objectives. The 2020 rule instead resulted in time-consuming disputes with contractors over the application of the new requirements. For example, upon receipt of the Predetermination Notice, contractors have disputed the application of the 2020 rule's evidentiary requirements, causing additional delay that diverts resources from the central issue of resolving indicators and findings of discrimination. Additionally, several contractors have argued that the anecdotal evidence that OFCCP shared to support its case failed to meet the "qualitative evidence" definition included in the 2020 rule. Other contractors have argued that the qualitative evidence that OFCCP provided was insufficient because the agency failed to disclose the identity of the interviewees who provided relevant statements at the Predetermination Notice stage. Contractors have also disputed whether OFCCP met the required threshold for practical significance under the 2020 rule, arguing that the agency has failed to meet the threshold or even disagreeing with the 2020 rule's standard altogether. In each of these cases, the disputes raised by contractors have delayed OFCCP's completion of compliance evaluations. These delays would not have occurred but for the 2020 rule and its rigid evidentiary requirements for a Predetermination Notice that are prone to dispute and in some respects go beyond what is required for proof of discrimination under Title VII. OFCCP proposes modifications to these pre-enforcement notice and conciliation procedures to streamline the issuance of these notices by removing inefficiency and delay caused by the 2020 rule.

#### *Restoring Flexibility to OFCCP's Procedures*

This proposed rulemaking also seeks to restore flexibility to OFCCP's pre-enforcement notice and conciliation

<sup>52</sup> OFCCP compliance reviews proceed in three stages: Desk audit, on-site review, and off-site analysis. See 41 CFR 60-1.20(a)(1), 60-300.60(a), 60-741.60(a).

<sup>53</sup> See Directive 2018-01, Use of Predetermination Notices (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 5, 2021).

<sup>54</sup> 41 CFR 60-1.4, 60-4.3, 60-300.5, 60-741.5.

<sup>55</sup> 85 FR 71553, 71554-71569.

procedures. OFCCP needs flexibility in its investigatory and conciliation procedures to effectively resolve employment discrimination. In January of 2021, the Equal Employment Opportunity Commission (EEOC) published a final rule concerning its conciliation procedures.<sup>56</sup> The U.S. Congress subsequently passed a law<sup>57</sup> to disapprove and annul the EEOC rule, based on concerns similar to those underlying this proposed rulemaking, such as the increase in employer litigation about the process, the delay of resolution of discrimination claims, and mandated disclosures unfairly weighting the process in favor of employers and subjecting workers to heightened risk of retaliation, as reflected in the Congressional Record.<sup>58</sup> The Congressional Record also includes a statement from President Biden's administration<sup>59</sup> and a letter submitted by the Leadership Conference on Civil and Human Rights signed by 24 civil rights organizations.<sup>60</sup> The supportive

<sup>56</sup> *Update of Commission's Conciliation Procedures*, 86 FR 2974 (Jan. 14, 2021), *annulled*. Before it was annulled, the rule amended the EEOC's procedures governing its conciliation process for charges alleging violations of Title VII, the ADA, the Genetic Information Nondiscrimination Act, and/or the Age Discrimination in Employment Act. The EEOC rule implemented requirements regarding the information EEOC must provide in preparation for and during conciliation about the factual and legal bases for the Commission's position and findings for charges where it has found reasonable cause.

<sup>57</sup> President Biden signed the joint resolution of Congress into law on June 30, 2021. *See* Commission's Conciliation Procedures, Public Law 117–22, June 30, 2021, 135 Stat 294.

<sup>58</sup> *See* 167 Cong. Rec. H3110–H3111 (daily ed. June 24, 2021). (“[T]he rule incentivizes employers to focus litigation on whether the EEOC failed to satisfy the rule's new requirements instead of whether the employer engaged in unlawful discrimination” (statement of Rep. Scott); also, the “. . . [EEOC rule] threatens to delay or potentially deny justice for individuals who face workplace discrimination” (statement of Rep. Bonamici).

<sup>59</sup> 167 Cong. Rec. H3110, 3111 (daily ed. June 24, 2021) (noting that repealing the conciliation rule would, *inter alia*, remove “onerous and rigid new procedures;” nullify “unnecessary and burdensome standards that would likely result in increased charge backlogs, and lengthier charge investigation, resolution and litigation times;” give EEOC “the flexibility to tailor settlements to the facts and circumstances of each case;” and “ensure that justice for workers subject to discrimination is not delayed, or potentially denied, due to costly and time-consuming collateral litigation”) (Statement of Administration Policy).

<sup>60</sup> 167 Cong. Rec. H3110, 3112 (daily ed. June 24, 2021) (“Instead of ensuring that discrimination charges are resolved fairly, the EEOC's final rule imposes several new obligations and disclosures that: significantly weight the conciliation process in favor of employers; delay justice and increase the likelihood of harm to working people; divert scarce EEOC staff time and resources away from investigating discrimination; and contravene controlling U.S. Supreme Court precedent.”) (Letter from the Leadership Conference on Civil and Human Rights).

statements and letter all cited to a unanimous decision by the Supreme Court in *Mach Mining, LLC v. EEOC* that described the wide latitude that Title VII gives EEOC to conciliate in pursuit of voluntary compliance with the law.<sup>61</sup> EEOC's experience with the conciliation process is instructive. Before the Court's decision in *Mach Mining*, employers routinely raised time-consuming challenges to whether EEOC satisfied its discretionary conciliation requirements. For example, the workers in *Mach Mining*—women alleged to have been excluded from coal mining jobs on the basis of sex—were forced to wait nine years after the first charge was filed for relief after years of litigation over procedural challenges to the conciliation process. EEOC's now-rescinded January 2021 conciliation rulemaking sought to codify rigid standards that would enable employers to shift the focus away from the core issue of whether discrimination occurred and instead attempt to avoid liability by pursuing resource intensive satellite proceedings over whether discretionary conciliation processes had been satisfied. As stated by Representative Scott in support of overturning this EEOC rule, EEOC “must have discretion to use whatever informal means of settlement are appropriate” instead of applying a rigid conciliation process “across the board, one-size-fits-all, in every case of workplace discrimination.”<sup>62</sup> This authority to have administrative discretion in conciliation was directly granted to EEOC by Congress,<sup>63</sup> confirmed by a unanimous opinion from the U.S. Supreme Court,<sup>64</sup> re-affirmed by Congress through the annulment of EEOC's conciliation procedures rule,<sup>65</sup>

<sup>61</sup> *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 492 (2015) (“Every aspect of Title VII's conciliation provision smacks of flexibility. To begin with, the EEOC need only ‘endeavor’ to conciliate a claim, without having to devote a set amount of time or resources to that project. [42 U.S.C.] § 2000e–5(b). Further, the attempt need not involve any specific steps or measures; rather, the Commission may use in each case whatever ‘informal’ means of ‘conference, conciliation, and persuasion’ it deems appropriate.”).

<sup>62</sup> *See* 167 Cong. Rec. H3110–H3111 (daily ed. June 24, 2021) (statement of Rep. Scott).

<sup>63</sup> 42 U.S.C. 2000e-5(b) (“If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”).

<sup>64</sup> *Mach Mining, LLC*, 575 U.S. at 480.

<sup>65</sup> Joint Resolution Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Equal Employment Opportunity Commission relating to “Update of Commission's Conciliation Procedures”, COMMISSION'S CONCILIATION PROCEDURES, PL 117–22, June 30, 2021, 135 Stat 294.

and recognized by the current President of the United States.<sup>66</sup>

OFCCP has similar discretion to conciliate compliance under E.O. 11246, Section 503, and VEVRAA<sup>67</sup>—to right the wrong of employment discrimination. When OFCCP determines that a Federal contractor is deficient in its compliance with E.O. 11246, Section 503, or VEVRAA, OFCCP must make “reasonable efforts” to secure compliance through conciliation and persuasion,<sup>68</sup> under the procedures set forth in Chapter 60 of the U.S. Code of Federal Regulations,<sup>69</sup> the FCCM,<sup>70</sup> and subregulatory guidance.<sup>71</sup> OFCCP views the Title VII flexibility principle cited by Congress as similarly vital to OFCCP's work in securing compliance with E.O. 11246, Section 503, and VEVRAA. As such, OFCCP proposes to clarify that the “reasonable efforts” standard it must satisfy when attempting to secure compliance with its laws should be interpreted consistently with the Title VII language requiring EEOC to “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion,” to ensure OFCCP has the same flexibility in the administration of its laws as that recognized under Title VII by Congress and the U.S. Supreme Court for EEOC.

The 2020 rule's codification of OFCCP's resolution procedures<sup>72</sup> imposes hurdles to the effective exercise of OFCCP's enforcement discretion. With this proposed rule, OFCCP seeks to restore the flexibility it had prior to December 10, 2020, applying Title VII standards to the facts and circumstances of each compliance evaluation, while preserving certainty and transparency for Federal contractors by requiring the

<sup>66</sup> 167 Cong. Rec. H3110, 3111 (daily ed. June 24, 2021) (Statement of Administration Policy).

<sup>67</sup> 41 CFR 60–1.20(b) (noting that if “deficiencies are found to exist, OFCCP shall make reasonable efforts to secure compliance through conciliation and persuasion”). OFCCP has identical discretion under VEVRAA and Section 503. *See* 41 CFR 60–300.60(b), 60–741.60(b).

<sup>68</sup> *See* 41 CFR 60–1.20(b), 60–300.60(b), 60–741.60(b).

<sup>69</sup> 41 CFR 60–1.33, 60–300.62, 60–741.62.

<sup>70</sup> *See* FCCM, Chapter 8, Resolution of Noncompliance, available at <https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-8-resolution-noncompliance> (last accessed Dec. 3, 2021).

<sup>71</sup> *See, e.g.*, Directive 2018–01, Use of Predetermination Notices, (Feb. 27, 2018), available at <https://www.dol.gov/agencies/ofccp/directives/2018-01> (last accessed Dec. 5, 2021); “Practical Significance in EEO Analysis Frequently Asked Questions” (last updated Jan. 15, 2021), available at <https://www.dol.gov/agencies/ofccp/faqs/practical-significance> (last accessed Dec. 5, 2021).

<sup>72</sup> 41 CFR 60–1.33, 60–300.62, 60–741.62.

use of a Predetermination Notice and Notice of Violation.<sup>73</sup>

### Statement of Legal Authority

Issued in 1965, and amended several times in the intervening years, E.O. 11246 has two principal purposes. First, it prohibits covered Federal contractors and subcontractors from discriminating against employees and applicants because of race, color, religion, sex, sexual orientation, gender identity, national origin, or because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity.

The requirements in E.O. 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or federally assisted construction contract in excess of \$10,000; (2) has Federal contracts or subcontracts that combined total in excess of \$10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount. Supply and service contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–2. Construction contractors have different affirmative action requirements under E.O. 11246 at 41 CFR part 60–4.

Enacted in 1973, and amended since, the purpose of Section 503 of the Rehabilitation Act of 1973 is twofold. First, Section 503 prohibits employment discrimination on the basis of disability by Federal contractors. Second, it requires each covered Federal contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities. The requirements in Section 503 generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$15,000.<sup>74</sup> Contractors with 50 or more employees and a single Federal contract or subcontract of \$50,000 or more also must develop and maintain an

affirmative action program that complies with 41 CFR part 60–741, subpart C.

Enacted in 1974 and amended in the intervening years, VEVRAA prohibits Federal contractors and subcontractors from discriminating against employees and applicants because of status as a protected veteran (defined by the statute to include disabled veterans, recently separated veterans, Armed Forces Service Medal Veterans, and active duty wartime or campaign badge veterans). It also requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans. The requirements in VEVRAA generally apply to any business or organization that holds a single Federal contract or subcontract in excess of \$150,000.<sup>75</sup> Contractors with 50 or more employees and a single Federal contract or subcontract of \$150,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–300, subpart C.

Pursuant to these laws, receiving a Federal contract comes with a number of responsibilities. Contractors are required to comply with all provisions of these laws as well as the rules, regulations, and relevant orders of the Secretary of Labor. Where OFCCP finds noncompliance under any of the three laws or their implementing regulations, it utilizes established procedures to either facilitate resolution or proceed to administrative enforcement as necessary to secure compliance. A contractor found in violation who fails to correct violations of OFCCP's regulations may, after the opportunity for a hearing, have its contracts canceled, terminated, or suspended and/or may be subject to debarment.

### Proposed Revisions

This rulemaking proposes to amend 41 CFR parts 60–1, 60–300, and 60–741 by removing unnecessary and confusing evidentiary standards and definitions that the 2020 rule requires, while retaining and refining the pre-enforcement procedures for issuing the Predetermination Notice and the Notice of Violation. The proposed revisions would enable OFCCP to apply Title VII standards to the facts and circumstances of each compliance evaluation and clarify that OFCCP's conciliation

standards align with the flexibility and enforcement discretion afforded under Title VII for endeavoring to secure compliance through conciliation. The rulemaking would also amend each part's regulatory provision on Show Cause Notices, relocating the provision to the same section as the other codified pre-enforcement notices and codifying when OFCCP will amend the Show Cause Notice consistent with current practice.

The rulemaking further proposes to amend 41 CFR parts 60–1, 60–2, 60–4, 60–20, 60–30, 60–40, 60–50, 60–300, and 60–741. The 2020 rule added the first severability clause to OFCCP's regulations, but it only applies to the resolution procedures sections for each of OFCCP's legal authorities (*i.e.*, 41 CFR 60–1.33, 60–300.62, and 60–741.42).<sup>76</sup> OFCCP has determined that, if there is a severability clause in any part of its regulations, it should apply to all of its regulations, rather than just certain specific sections. Thus, OFCCP proposes to include a severability clause in each part of its regulations, such that if a court of competent jurisdiction found any provision(s) of the part to be invalid, it would not affect any other provision of the part or chapter. The severability clauses currently only applicable to 41 CFR 60–1.33, 60–300.62, and 60–741.42 would be removed.

### Revised Sections

#### 41 CFR PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

##### *Subpart A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports*

##### Section 60–1.3 Definitions

The NPRM proposes to amend § 60–1.3 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.” These definitions operate in tandem with the evidentiary standards that are currently creating hurdles to the effective enforcement of OFCCP laws and would be rendered unnecessary by other proposed changes to this part.

<sup>73</sup> As noted previously, *supra* at n. 28, OFCCP would continue to apply ADA standards to compliance evaluations pertaining to Section 503.

<sup>74</sup> Effective October 1, 2010, the coverage threshold under Section 503 increased from \$10,000 to \$15,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. See *Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds*, 75 FR 53129 (Aug. 30, 2010).

<sup>75</sup> Effective October 1, 2015, the coverage threshold under VEVRAA increased from \$100,000 to \$150,000, in accordance with the inflationary adjustment requirements in 41 U.S.C. 1908. See *Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds*, 80 FR 38293 (July 2, 2015).

<sup>76</sup> In addition, OFCCP's 2020 final rule relating to the E.O. 11246 religious exemption included a severability clause that applied only to provisions within 41 CFR 60–1.5. *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 85 FR 79324, 79372 (Dec. 9, 2020), codified at 41 CFR 60–1.5(f). OFCCP has proposed to rescind that rule, including the severability clause. 86 FR 62115 (Nov. 9, 2021).

*Subpart B—General Enforcement; Compliance Review and Complaint Procedure*

Section 1.20 Compliance Evaluations

The NPRM proposes to clarify the “reasonable efforts” standard in § 60–1.20(b) that OFCCP must satisfy when attempting to secure compliance through conciliation, to make clear that OFCCP’s conciliation standards align with Title VII.

Section 1.28 Show Cause Notices

The NPRM proposes to remove and reserve § 60–1.28, to relocate “Show cause notices” to § 60–1.33 with the other pre-enforcement notices in this part.

Section 60–1.33 Resolution Procedures

The NPRM proposes to revise § 60–1.33 by changing the title to “Pre-enforcement notice and conciliation procedures”; removing unnecessary regulatory standards impeding OFCCP’s ability to resolve preliminary indicators and findings of discrimination; incorporating a relocated subsection on Show Cause Notices to improve regulatory organization; clarifying OFCCP’s use of the Show Cause Notice including when a contractor denies access to its premises, to witnesses, or to records; making general clarifying edits to improve procedural efficacy including OFCCP’s role in the early conciliation option; and removing the severability clause specific to this section.

*Subpart C—Ancillary Matters*

Section 60–1.48 Severability

The NPRM proposes to add § 60–1.48, a severability clause.

**41 CFR PART 60–2—AFFIRMATIVE ACTION PROGRAMS**

*Subpart C—Miscellaneous*

Section 60–2.36 Severability

The NPRM proposes to add § 60–2.36, a severability clause.

**41 CFR PART 60–4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS**

Section 60–4.10 Severability

The NPRM proposes to add § 60–4.10, a severability clause.

**41 CFR PART 60–20—DISCRIMINATION ON THE BASIS OF SEX**

Section 60–20.9 Severability

The NPRM proposes to add § 60–20.9, a severability clause.

**41 CFR PART 60–30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246**

*GENERAL PROVISIONS*

Section 60–30.38 Severability

The NPRM proposes to add § 60–30.38, a severability clause.

**41 CFR PART 60–40—EXAMINATION AND COPYING OF OFCCP DOCUMENTS**

*Subpart A—General*

Section 60–40.9 Severability

The NPRM proposes to add § 60–40.9, a severability clause.

**41 CFR PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN**

Section 60–50.6 Severability

The NPRM proposes to add § 60–50.6, a severability clause.

**41 CFR PART 60–300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS**

*Subpart A—Preliminary Matters; Equal Opportunity Clause*

Section 60–300.2 Definitions

The NPRM proposes to amend § 60–300.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.” These definitions would be rendered unnecessary by other proposed changes to this part.

*Subpart D—General Enforcement and Complaint Procedures*

Section 60–300.60 Compliance Evaluations

The NPRM proposes to clarify the “reasonable efforts” standard in § 60–300.60 (b) that OFCCP must satisfy when attempting to secure compliance through conciliation, to make clear that OFCCP’s conciliation standards align with Title VII.

Section 60–300.62 Resolution Procedures

The NPRM proposes to revise § 60–300.62 by changing the title to “Pre-enforcement notice and conciliation procedures”; removing unnecessary regulatory standards impeding OFCCP’s

ability to resolve preliminary indicators and findings of discrimination; incorporating a relocated subsection on Show Cause Notices to improve regulatory organization; clarifying OFCCP’s use of the Show Cause Notice including when a contractor denies access to its premises, to witnesses, or to records; making general clarifying edits to improve procedural efficacy including OFCCP’s role in the early conciliation option; and removing the severability clause specific to this section.

Section 60–300.64 Show Cause Notices

The NPRM proposes to remove and reserve § 60–300.64, to relocate “Show cause notices” to § 60–300.62 with the other pre-enforcement notices in this part.

*Subpart E—Ancillary Matters*

Section 60–300.85 Severability

The NPRM proposes to add § 60–300.85, a severability clause.

**41 CFR PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES**

*Subpart A—Preliminary Matters; Equal Opportunity Clause*

Section 60–741.2 Definitions

The NPRM proposes to amend § 60–741.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.” These definitions would be rendered unnecessary by other proposed changes to this part.

*Subpart D—General Enforcement and Complaint Procedures*

Section 60–741.60 Compliance Evaluations

The NPRM proposes to clarify the “reasonable efforts” standard in § 60–741.60 (b) that OFCCP must satisfy when attempting to secure compliance through conciliation, to make clear that OFCCP’s conciliation standards align with Title VII.

Section 60–741.62 Resolution Procedures

The NPRM proposes to revise § 60–741.62 by changing the title to “Pre-enforcement notice and conciliation procedures”; removing unnecessary regulatory standards impeding OFCCP’s ability to resolve preliminary indicators and findings of discrimination; incorporating a relocated subsection on

Show Cause Notices to improve regulatory organization; clarifying OFCCP's use of the Show Cause Notice including when a contractor denies access to its premises, to witnesses, or to records; making general clarifying edits to improve procedural efficacy including OFCCP's role in the early conciliation option; and removing the severability clause specific to this section.

#### Section 60–741.64 Show Cause Notices

The NPRM proposes to remove and reserve § 60–741.64, to relocate “Show cause notices” to § 60–741.62 with the other pre-enforcement notices in this part.

#### *Subpart E—Ancillary Matters*

#### Section 60–741.84 Severability

The NPRM proposes to add § 60–741.84, a severability clause.

### Regulatory Procedures

#### **Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)**

Under Executive Order 12866 (E.O. 12866), the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of \$100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. This proposed rulemaking has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of E.O. 12866. OMB has reviewed this proposal.

Executive Order 13563 (E.O. 13563) directs agencies to adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor

the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

#### *A. Need for Rulemaking*

OFCCP believes that the 2020 rule created rigid constraints that are not required by Title VII and/or impede the agency's effective enforcement of E.O. 11246, Section 503, and VEVRAA. This has delayed information exchange with contractors and created obstacles to a timely resolution of preliminary indicators and findings of discrimination and greater compliance. The 2020 rule has also resulted in time-consuming collateral disputes over the implementation of the rule's regulatory standards—diverting limited agency and contractor resources away from resolving concerns of discrimination. This diversion of resources and delay in the pre-enforcement process will reduce rather than increase the number of contractors that OFCCP is able to evaluate for compliance.

This NPRM aims to create a streamlined, efficient, and flexible process to ensure OFCCP utilizes its limited resources as strategically as possible to advance the agency's mission. In a return to prior agency policy, OFCCP will apply Title VII standards to the facts and circumstances of each compliance evaluation, including during the pre-enforcement notice and conciliation stages. Doing so will remove unnecessary constraints that impede effective enforcement by limiting the agency's enforcement discretion, and prevent delays in case resolutions due to the 2020 rule. Removing the blanket regulatory requirements will also allow OFCCP to pursue enforcement in cases that, albeit actionable under Title VII, are more difficult to pursue under the 2020 rule. OFCCP remains committed to providing contractors early notice when the agency identifies preliminary indicators of systemic discrimination during a compliance evaluation. Such notice is mutually beneficial for OFCCP and the contractor under review because it provides the contractor with an earlier opportunity to respond to potential issues before OFCCP makes a

determination on violations. Providing earlier notice to contractors can result in the prompt and mutually satisfactory resolution of cases, which minimizes unnecessary burdens on contractors and agency staff. Going forward, OFCCP would provide updated guidance to its compliance officers on the pre-enforcement procedures. This guidance would reflect current case law, provide OFCCP needed flexibility, and be available to the public to promote transparency.

#### *B. Discussion of Impacts*

In this section, OFCCP presents a summary of the costs associated with the modifications in this proposed rulemaking. OFCCP utilizes the Employment Information Report (EEO–1) data, which identifies the number of supply and service contractors that could be scheduled for a compliance evaluation and thus impacted by the proposed modification. The EEO–1 Report must be filed by covered Federal contractors who: (1) Have 50 or more employees; (2) are prime contractors or first-tier subcontractors; and (3) have a contract, subcontract, or purchase order amounting to \$50,000 or more. OFCCP schedules only contractors who meet those thresholds for compliance evaluations. The number of supply and service contractors possibly impacted by the proposed modification is 24,251.<sup>77</sup>

OFCCP also utilizes USASpending data, which identifies the number of construction contractors that could be scheduled for a compliance evaluation and thus impacted by the proposed modification. The USASpending data accounts for all construction contractors with contracts greater than \$10,000 who meet the thresholds for compliance evaluations. The number of construction contractors possibly impacted by the proposed modification is 12,362.<sup>78</sup>

While OFCCP acknowledges that all Federal contractors may learn their EEO requirements in order to comply with the laws that OFCCP enforces, only those contractors scheduled for a compliance evaluation are directly impacted by the proposed modification.

<sup>77</sup> OFCCP obtained the total number of supply and service contractors from the most recent EEO–1 Report data available, which is from fiscal year (FY) 2018.

<sup>78</sup> OFCCP obtained the total number of construction establishments (12,609) from FY 2019 USASpending data, available at [https://www.usaspending.gov/#/download\\_center/award\\_data\\_archive](https://www.usaspending.gov/#/download_center/award_data_archive) (last accessed Dec. 8, 2021). The agency then used the ratio of contractor establishments to contractor firms (1.02) from US Census Bureau data, available at <https://www.census.gov/data/tables/2017/econ/economic-census/naics-sector-23.html> (last accessed Dec. 8, 2021). 12,609/1.02 = 12,362 construction contractors.

Scheduled contractors are likely to have a need to know the pre-enforcement procedures because they may need to interact with OFCCP. The total number of contractors possibly impacted by the proposed modification is 36,613.<sup>79</sup>

OFCCP has determined that either a Human Resources Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the proposed modification. OFCCP estimates that 50 percent of the reviewers would be human resources

managers and 50 percent would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resources managers and lawyers. The mean hourly wage of a human resources manager is \$64.70 and the mean hourly wage of a lawyer is \$71.59.<sup>80</sup> Therefore, the average hourly wage rate is \$68.15  $((\$64.70 + \$71.59) / 2)$ . OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as

well as overhead costs such as rent, utilities, and office equipment. OFCCP uses a fringe benefits rate of 46 percent<sup>81</sup> and an overhead rate of 17 percent,<sup>82</sup> resulting in a fully loaded hourly compensation rate of \$111.08  $(\$68.15 + (\$68.15 \times 46 \text{ percent}) + (\$68.15 \times 17 \text{ percent}))$ . The estimated labor cost to contractors is reflected in Table 1, below.

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate	Overhead rate	Fully loaded hourly compensation
Human Resources Managers and Lawyers .....	\$68.15	46%	17%	\$111.08

**1. Cost of Rule Familiarization**

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for a proposed rulemaking the estimated time it takes for contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials regarding the proposed rule, once final.

OFCCP believes that a human resources manager or lawyer will take a minimum of 30 minutes (½ hour) to read the proposed rule or read the compliance assistance materials provided by OFCCP. Consequently, the estimated burden for rule familiarization is 18,307 hours  $(36,613 \text{ contractor firms} \times \frac{1}{2} \text{ hour})$ . OFCCP calculates the total estimated cost of rule familiarization as \$2,033,542

$(18,307 \text{ hours} \times \$111.08/\text{hour})$  in the first year, which amounts to a 10-year annualized cost of \$231,450 at a discount rate of 3 percent (which is \$6.32 per contractor firm) or \$270,589 at a discount rate of 7 percent (which is \$7.39 per contractor firm). Table 2, below, reflects the estimated regulatory familiarization costs for the proposed rule.

TABLE 2—REGULATORY FAMILIARIZATION COST

Total number of contractors .....	36,613.
Time to review rule .....	30 minutes.
Human Resources Managers fully loaded hourly compensation .....	\$111.08.
Regulatory familiarization cost in the first year .....	\$2,033,542.
Annualized cost with 3 percent discounting .....	\$231,450.
Annualized cost per contractor with 3 percent discounting .....	\$6.32.
Annualized cost with 7 percent discounting .....	\$270,589.
Annualized cost per contractor with 7 percent discounting .....	\$7.39.

**2. Benefits**

E.O. 13563 recognizes that some rules have benefits that are difficult to quantify or monetize but are nevertheless important and states that agencies may consider such benefits. This proposed rule has equity and fairness benefits, which are explicitly recognized in E.O. 13563. The proposal is designed to achieve these benefits by:

- Supporting more effective enforcement of OFCCP’s equal opportunity laws by eliminating procedural inefficiencies and heightened evidentiary standards created by the 2020 rule;

- Facilitating earlier and more efficient resolutions;
- Ensuring greater certainty and consistency in case resolutions by maintaining adherence to Title VII and OFCCP case law standards;
- Promoting transparency by codifying the required use of the Predetermination Notice when the agency identifies preliminary indicators of discrimination;
- Allowing OFCCP to tailor the pre-enforcement process to the specific facts and circumstances of each case, consistent with judicial interpretations of the applicable legal authorities,

which will in turn allow OFCCP to more effectively redress unlawful discrimination;

- Advancing a policy of promoting consistency between Title VII and E.O. 11246 and removing unnecessary constraints on the agency’s ability to pursue meritorious cases. This approach will help OFCCP advance the overriding policy goal of promoting nondiscrimination by strengthening the enforcement of federal protections under E.O. 11246;

<sup>79</sup> 24,251 supply and service contractors + 12,362 construction contractors = 36,613 contractors.

<sup>80</sup> BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2020, available at [www.bls.gov/oes/current/oes\\_nat.htm](http://www.bls.gov/oes/current/oes_nat.htm) (last accessed Dec. 8, 2021).

<sup>81</sup> BLS, Employer Costs for Employee Compensation, available at [www.bls.gov/ncs/data.htm](http://www.bls.gov/ncs/data.htm) (last accessed Dec. 8, 2021). Wages and salaries averaged \$26.53 per hour worked in December 2020, while benefit costs averaged \$12.07, which is a benefits rate of 46 percent.

<sup>82</sup> Cody Rice, U.S. Environmental Protection Agency, “Wage Rates for Economic Analyses of the Toxics Release Inventory Program,” (June 10, 2002), available at [www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005](http://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005) (last accessed Dec. 8, 2021).

- Reducing time-consuming disputes over unnecessary standards; and
- Furthering the strategic allocation of agency resources.

### C. Alternatives

In addition to the approach proposed, OFCCP also considered alternative approaches. OFCCP considered modifying the 2020 rule to rescind the entirety of the rule except the correction to OFCCP's agency head title. OFCCP also considered modifying the 2020 rule by eliminating the Predetermination Notice entirely since it currently functions as a procedural redundancy. However, OFCCP determined that retaining both pre-enforcement notices in the regulatory text while rescinding the inflexible evidentiary requirements for the Predetermination Notice and Notice of Violation allows the contractor and OFCCP to engage in earlier discussions that can lead to more efficient resolutions.

OFCCP also considered maintaining the current regulations established in the 2020 rule. However, as discussed earlier in this preamble, OFCCP determined that creating a rigid regulatory process to govern its pre-enforcement compliance evaluation process is incompatible with the flexibility needed for effective enforcement. Moreover, the 2020 rule places certain obligations on OFCCP at this preliminary stage that go beyond the substantive legal requirements that E.O. 11246, Title VII, and interpretive case law require to state a claim and prove discrimination at a much later stage, upon a full evidentiary record. OFCCP has determined that imposing such rigid and heightened standards early in its pre-enforcement proceedings unduly constrains its ability to pursue claims of discrimination. The 2020 rule also created an inefficient process where OFCCP's Predetermination Notice (intended to convey preliminary indicators of discrimination) and the Notice of Violation (intended to inform the contractor that corrective action is required and to invite conciliation through a written agreement) were largely duplicative. Further, the mandating of regulatory requirements for making inherently fact specific determinations, invites time-consuming disputes over the application of the rule's requirements. Modifying the 2020 regulations would help restore the enforcement discretion and flexibility OFCCP needs to facilitate compliance through conciliation by providing pre-enforcement notice of preliminary discrimination indicators and findings, and applying Title VII to the facts and circumstances of each compliance

evaluation. OFCCP is proposing modification of the regulatory text to create a more streamlined and effective process for the agency to communicate preliminary indicators to contractors, provide contractors an opportunity to respond, notify contractors of violations, and ultimately facilitate greater understanding to obtain resolution through conciliation.

### Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, establishes "as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the businesses, organizations, and governmental jurisdictions subject to regulation." Public Law 96-354, 2(b). The RFA requires agencies to consider the impact of a regulatory action on a wide range of small entities, including small businesses, nonprofit organizations, and small governmental jurisdictions.

Agencies must review whether a regulatory action would have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603. If the regulatory action would, then the agency must prepare a regulatory flexibility analysis as described in the RFA. *See id.* However, if the agency determines that the regulatory action would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must provide the factual basis for this determination.

The proposed rule will not have a significant economic impact on a substantial number of small entities. The first year cost for small entities at a discount rate of 7 percent for rule familiarization is \$51.91 per entity which is far less than 1 percent of the annual revenue of the smallest of the small entities affected by the proposal. Accordingly, OFCCP certifies that the proposed modification will not have a significant economic impact on a substantial number of small entities.

### Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the

collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

OFCCP has determined that there would be no new requirement for information collection associated with this proposed rulemaking. The information collections contained in the existing E.O. 11246, Section 503, and VEVRAA regulations are currently approved under OMB Control Number 1250-0001 (Construction Recordkeeping and Reporting Requirements), OMB Control Number 1250-0003 (Recordkeeping and Reporting Requirements—Supply and Service), OMB Control Number 1250-0004 (Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as Amended), and OMB Control Number 1250-0005 (Office of Federal Contract Compliance Programs Recordkeeping and Reporting Requirements Under Rehabilitation Act of 1973, as Amended Section 503). Consequently, this proposal does not require review by OMB under the authority of the Paperwork Reduction Act.

### Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule would not include any federal mandate that may result in excess of \$100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

### Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding federalism and has determined that it would not have "federalism implications." The proposed regulatory action would 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 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule would not have tribal implications under Executive Order 13175 that would require a tribal summary impact statement. The proposal would not "have substantial direct effects on one or more Indian

tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

#### List of Subjects

##### 41 CFR Part 60–1

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

##### 41 CFR Part 60–2

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

##### 41 CFR Part 60–4

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

##### 41 CFR Part 60–20

Civil rights, Equal employment opportunity, Government procurement, Labor, Sex discrimination, Women.

##### 41 CFR Part 60–30

Administrative practice and procedure, Civil rights, Equal employment opportunity, Government contracts, Government procurement, Government property management, Individuals with Disabilities, Reporting and recordkeeping requirements, Veterans.

##### 41 CFR Part 60–40

Freedom of information, Reporting and recordkeeping requirements.

##### 41 CFR Part 60–50

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

##### 41 CFR Parts 60–300 and 60–741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Labor, Reporting and recordkeeping requirements, Veterans.

#### Jenny R. Yang,

Director, Office of Federal Contract Compliance Programs.

For the reasons stated in the preamble, the OFCCP proposes to amend 41 CFR parts 60–1, 60–2, 60–4,

60–20, 60–30, 60–40, 60–50, 60–300, and 60–741 as follows:

### PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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

**Authority:** Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

#### § 60–1.3 [Amended]

- 2. Amend § 60–1.3 by removing the definitions for “Qualitative evidence” and “Quantitative evidence”.
- 3. Amend § 60–1.20 by revising paragraph (b) to read as follows:

#### § 60–1.20 Compliance evaluations.

\* \* \* \* \*

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60–1.33. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.” Before the contractor can be found to be in compliance with the order, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

\* \* \* \* \*

#### § 60–1.28 [Removed and Reserved]

- 4. Remove and reserve § 60–1.28.
- 5. Revise § 60–1.33 to read as follows:

#### § 60–1.33 Pre-enforcement notice and conciliation procedures.

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary indicators of discrimination, OFCCP will issue a

Predetermination Notice describing the indicators and providing the contractor an opportunity to respond. The Predetermination Notice may also include other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor’s response did not resolve the indicators of discrimination in the Predetermination Notice, OFCCP will proceed with the review.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement. The Notice of Violation will identify the violations and describe the recommended corrective actions. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

(1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and

(2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Show cause notices.* When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may

issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(e) *Expedited conciliation option.* OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

■ 6. Add § 60–1.48 to read as follows:

**§ 60–1.48 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

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

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

**Authority:** Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971.

■ 8. Add § 60–2.36 to read as follows:

**§ 60–2.36 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

**PART 60–4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS**

■ 9. The authority citation for part 60–4 continues to read as follows:

**Authority:** Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

■ 10. Add § 60–4.10 to read as follows:

**§ 60–4.10 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

**PART 60–20—DISCRIMINATION ON THE BASIS OF SEX**

■ 11. The authority citation for part 60–20 continues to read as follows:

**Authority:** Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 339 as amended by E.O. 11375, 32 FR 14303, 3 CFR 1966–1970 Comp., p. 684; E.O. 12086, 43 FR 46501, 3 CFR 1978 Comp., p. 230; E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258; and E.O. 13672, 79 FR 42971.

■ 12. Add § 60–20.9 to read as follows:

**§ 60–20.9 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

**PART 60–30—RULES OF PRACTICE FOR ADMINISTRATIVE PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246**

■ 13. The authority citation for part 60–30 continues to read as follows:

**Authority:** Executive Order 11246, as amended, 30 FR 12319, 32 FR 14303, as amended by E.O. 12086; 29 U.S.C. 793, as amended, and 38 U.S.C. 4212, as amended.

■ 14. Add § 60–30.38 to read as follows:

**§ 60–30.38 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

**PART 60–40—EXAMINATION AND COPYING OF OFCCP DOCUMENTS**

■ 15. The authority citation for part 60–40 continues to read as follows:

**Authority:** E.O. 11246, as amended by E.O. 11375, and as amended by E.O. 12086; 5 U.S.C. 552.

■ 16. Add § 60–40.9 to read as follows:

**§ 60–40.9 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part or chapter.

**PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN**

■ 17. The authority citation for part 60–50 continues to read as follows:

**Authority:** Sec. 201 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

■ 18. Add § 60–50.6 to read as follows:

**§ 60–50.6 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this

part to be invalid, such action will not affect any other provision of this part.

**PART 60–300—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, ACTIVE DUTY WARTIME OR CAMPAIGN BADGE VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS**

■ 19. The authority citation for part 60–300 continues to read as follows:

**Authority:** 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

**§ 60–300.2 [Amended]**

■ 20. Amend § 60–300.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.”

■ 21. Amend § 60–300.60 by revising paragraph (b) to read as follows:

**§ 60–300.60 Compliance evaluations.**

\* \* \* \* \*

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60–300.62. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”

\* \* \* \* \*

■ 22. Revise § 60–300.62 to read as follows:

**§ 60–300.6 2 Pre-enforcement notice and conciliation procedures.**

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary indicators of discrimination, OFCCP will issue a Predetermination Notice describing the indicators and providing the contractor an opportunity to respond. The Predetermination Notice may also include other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice

must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor's response did not resolve the indicators of discrimination in the Predetermination Notice, OFCCP will proceed with the review.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement. The Notice of Violation will identify the violations and describe the recommended corrective actions. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

- (1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and
- (2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Show cause notices.* When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a

Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(e) *Expedited conciliation option.* OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

#### **§ 60–300.64 [Removed and Reserved]**

- 23. Remove and reserve § 60–300.64.
- 24. Add § 60–300.85 to read as follows:

#### **§ 60–300.85 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

### **PART 60–741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES**

- 25. The authority citation for part 60–741 continues to read as follows:

**Authority:** 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971–1975 Comp., p. 841).

#### **§ 60–741.2 April 20, 2022 [Amended]**

- 26. Amend § 60–741.2 by removing the definitions for “Qualitative evidence” and “Quantitative evidence.”
- 27. Amend § 60–741.60 by revising paragraph (b) to read as follows:

#### **§ 60–741.6 0 Compliance evaluations.**

\* \* \* \* \*

(b) Where deficiencies are found to exist, OFCCP will make reasonable efforts to secure compliance through conciliation and persuasion, pursuant to § 60–741.62. The “reasonable efforts” standard shall be interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.”

\* \* \* \* \*

- 28. Revise § 60–741.62 to read as follows:

#### **§ 60–741.62 Pre-enforcement notice and conciliation procedures.**

(a) *Predetermination Notice.* If a compliance evaluation by OFCCP indicates preliminary indicators of discrimination, OFCCP will issue a Predetermination Notice describing the

indicators and providing the contractor an opportunity to respond. The Predetermination Notice may also include other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Notice of Violation or Show Cause Notice. Any response to a Predetermination Notice must be received by OFCCP within 15 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause. If the contractor does not respond or OFCCP determines that the contractor's response did not resolve the indicators of discrimination in the Predetermination Notice, OFCCP will proceed with the review.

(b) *Notice of Violation.* If a compliance evaluation by OFCCP indicates a violation of the equal opportunity clause, OFCCP will issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement. The Notice of Violation will identify the violations and describe the recommended corrective actions. After the Notice of Violation is issued, OFCCP may include additional violations in a subsequent Show Cause Notice without amendment to the Notice of Violation. OFCCP will provide the contractor an opportunity to conciliate additional violations identified in the Show Cause Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material violation of the equal opportunity clause, and:

- (1) If the contractor, subcontractor, or bidder is willing to correct the violations and/or deficiencies; and
- (2) If OFCCP or its representative determines that settlement (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies identified, including, where appropriate (but not limited to), remedies such as back pay, salary adjustments, and retroactive seniority.

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment,

hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

(e) *Show cause notices.* When the Director has reasonable cause to believe that a contractor has violated the equal opportunity clause the Director may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. OFCCP may issue a Show Cause Notice without first issuing a Predetermination Notice or Notice of Violation when the contractor has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information. The Show Cause Notice will include each violation that OFCCP has identified at the time of issuance. Where OFCCP identifies additional violations after issuing a Show Cause Notice, OFCCP will modify or amend the Show Cause Notice.

(f) *Expedited conciliation option.* OFCCP may agree to waive the procedures set forth in paragraphs (a) and/or (b) of this section to enter directly into a conciliation agreement with a contractor. OFCCP may offer the contractor this expedited conciliation option, but may not require or insist that the contractor avail itself of the expedited conciliation option.

**§ 60–741.64 [Removed and Reserved]**

- 29. Remove and reserve § 60–741.64.
- 30. Add § 60–741.84 to read as follows:

**§ 60–741.84 Severability.**

Should a court of competent jurisdiction hold any provision(s) of this part to be invalid, such action will not affect any other provision of this part.

[FR Doc. 2022–05696 Filed 3–21–22; 8:45 am]

BILLING CODE 4510–CM–P

**FEDERAL COMMUNICATIONS COMMISSION**

**47 CFR Part 73**

[MB Docket No. 22–112; RM–11919; DA 22–240; FRS 77494]

**Television Broadcasting Services  
Weston, West Virginia**

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commission has before it a petition for rulemaking filed by Gray

Television Licensee, LLC (Petitioner), the licensee of WDTV (CBS), channel 5, Weston, West Virginia. The Petitioner requests the substitution of channel 33 for channel 5 at Weston in the Table of Allotments.

**DATES:** Comments must be filed on or before April 21, 2022 and reply comments on or before May 6, 2022.

**ADDRESSES:** Federal Communications Commission, Office of the Secretary, 45 L Street NE, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for the Petitioner as follows: Joan Stewart, Esq., Wiley Rein LLP, 2050 M Street NW, Washington, DC 20036.

**FOR FURTHER INFORMATION CONTACT:**

Joyce Bernstein, Media Bureau, at (202) 418–1647 or [Joyce.Bernstein@fcc.gov](mailto:Joyce.Bernstein@fcc.gov).

**SUPPLEMENTARY INFORMATION:** In support, the Petitioner states the proposed channel substitution serves the public interest because it will resolve significant over-the-air reception problems in WDTV's existing service area. The Petitioner further states that the Commission has recognized the deleterious effects manmade noise has on the reception of digital VHF signals, and that the propagation characteristics of these channels allow undesired signals and noise to be receivable at relatively farther distances compared to UHF channels and nearby electrical devices can cause interference. A total of 388,223 persons are predicted to lose service using a contour analysis if the Bureau grants the channel 33 proposal. In evaluating the loss areas, Gray first considered to what extent the loss areas were served by other CBS affiliates, and concluded that all but 4,142 persons would continue to receive CBS service from other stations in the region, as well as continue to be well served by five or more television services.

According to the Petitioner, a terrain-limited analysis using the Commission's *TVStudy* software demonstrates that only 498 persons would no longer receive CBS network programming, or receive service from five or more full power television services. Gray also took into account its licensed sister station WVFX, which is co-located with WDTV and carries CBS network programming on a multicast channel. In addition, Gray relies on CBS programming carried on commonly owned and operated station WIYE–LD, Parkersburg, West Virginia. We note that while low power television stations are secondary and can be displaced by full power television stations, we believe it is unlikely that WIYE–LD will be displaced, and determined that there are

multiple displacement channels available if it was displaced.

This is a synopsis of the Commission's *Notice of Proposed Rulemaking*, MB Docket No. 22–112; RM–11919; DA 22–240, adopted March 9, 2022, and released March 9, 2022. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats (braille, large print, computer diskettes, or audio recordings), please send an email to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or call the Consumer & Government Affairs Bureau at (202) 418–0530 (VOICE), (202) 418–0432 (TTY).

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104–13. In addition, therefore, it does not contain any proposed information collection burden “for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, do not apply to this proceeding.

Members of the public should note that all *ex parte* contacts are prohibited from the time a notice of proposed rulemaking is issued to the time the matter is no longer subject to Commission consideration or court review, see 47 CFR 1.1208. There are, however, exceptions to this prohibition, which can be found in § 1.1204(a) of the Commission's rules, 47 CFR 1.1204(a).

See §§ 1.415 and 1.420 of the Commission's rules for information regarding the proper filing procedures for comments, 47 CFR 1.415 and 1.420.

**List of Subjects in 47 CFR Part 73**

Television.

Federal Communications Commission.

**Thomas Horan,**

*Chief of Staff, Media Bureau.*

**Proposed Rule**

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 73 as follows:

**PART 73—RADIO BROADCAST SERVICES**

- 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

- 2. In § 73.622(j), amend the Post-Transition Table of DTV Allotments under West Virginia by revising the entry for Weston to read as follows: