

DEPARTMENT OF LABOR**Employment Standards Administration****Office of Federal Contract Compliance Programs; Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination**

AGENCY: Office of Federal Contract Compliance Programs, Employment Standards Administration, Department of Labor.

ACTION: Notice of final voluntary guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination.

SUMMARY: The Office of Federal Contract Compliance Programs is publishing final voluntary guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246, as amended, with respect to systemic compensation discrimination. This document sets forth the final voluntary guidelines and discusses comments that OFCCP received in response to proposed voluntary guidelines published in the **Federal Register** on November 16, 2004.

DATES: *Effective Date:* June 16, 2006.

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

SUPPLEMENTARY INFORMATION: In this preamble, OFCCP summarizes the proposed voluntary self-evaluation guidelines, discusses the comments received in response to publication of the proposed voluntary guidelines, and provides a substantive discussion of the final voluntary self-evaluation guidelines. The substantive discussion of the final voluntary self-evaluation guidelines substantially restates the preamble of the proposed voluntary guidelines, except that modifications or clarifications were added in response to the comments.

I. Summary of the Proposed Voluntary Self-Evaluation Guidelines

On November 16, 2004, OFCCP published a Notice in the **Federal Register** in which the agency proposed voluntary guidelines for self-evaluation of compensation practices for

compliance with Executive Order 11246 with respect to systemic compensation discrimination. 69 FR 67252 (November 16, 2004). The proposed voluntary self-evaluation guidelines had four principal components, which are summarized below.

First, the proposed voluntary self-evaluation guidelines proposed that contractors may continue to choose whatever form of self-evaluation they deem appropriate in order to comply with OFCCP regulations requiring contractors to perform a self-evaluation of their compensation practices. 69 FR 67253.

Second, the proposed voluntary self-evaluation guidelines provided that contractors have the option, at their discretion, of conducting a self-evaluation that conforms to the proposed voluntary guidelines. 69 FR 67253. As an incentive for contractors to voluntarily choose this option, the proposed voluntary guidelines provided that OFCCP would conform its compliance monitoring activities with the contractor's self-evaluation program. *Id.* That is, if the contractor in good faith implemented a self-evaluation program that reasonably comports with the voluntary guidelines, OFCCP would not conduct an independent evaluation of the contractor's compensation practices during a compliance review. *Id.* The proposed voluntary guidelines made clear that contractors who choose this option must retain certain records so that OFCCP can determine whether the contractor in fact implemented a self-evaluation program that reasonably adhered to the voluntary guidelines. 69 FR 67254. The proposed voluntary guidelines also permitted OFCCP to recommend in writing that the contractor make changes to its self-evaluation program, if the program is only marginally reasonable under the voluntary guidelines. *Id.*

Third, the proposed voluntary self-evaluation guidelines outlined general principles to which a self-evaluation system must reasonably adhere in order to comport with the proposed voluntary guidelines:

(1) The self-evaluation must be based on "similarly-situated employee groupings" or "SSEGs." SSEGs were defined as groupings of employees who perform similar work, and occupy positions with similar responsibility levels and involving similar skills and qualifications. 69 FR 67253-67254. The SSEGs must contain at least 30 employees and at least 5 employees from each comparison group (i.e., females/males, minorities/non-minorities). 69 FR 67254. The proposed voluntary guidelines noted that there

may be certain employees who occupy unique positions that are not similar to any other position. *Id.* The contractor must use non-statistical methods to evaluate the compensation of such unique employees. *Id.* However, OFCCP would carefully scrutinize the statistical and non-statistical analysis if the statistical analysis does not encompass at least 80% of the employees in the workplace or affirmative action program. *Id.* (2) The self-evaluation must use some form of statistical analysis that permits assessment of SSEGs, while accounting for the legitimate factors that influence compensation, such as experience, education, performance, productivity, location, etc. 69 FR 67254. The self-evaluation must also permit tests of statistical significance. *Id.* For contractors with 250 or more employees, the statistical analysis must be multiple regression analyses. *Id.* (3) The self-evaluation must be conducted on an annual basis. 69 FR 67253. The contractor must investigate any statistically-significant compensation disparities disclosed by the self-evaluation and provide appropriate remedies if the disparities cannot be explained by legitimate factors. *Id.*

Fourth, the proposed voluntary self-evaluation guidelines provided a "Compliance Certification Alternative," under which OFCCP would not seek a contractor's self-evaluation analysis if the contractor certified in writing that it believes that the self-evaluation is subject to protection from disclosure under the attorney-client privilege and/or the attorney work product doctrine. 69 FR 67255. The proposed voluntary guidelines made clear that a contractor that chooses this option would not receive the benefit of compliance coordination because OFCCP would be unable to assess whether the contractor's self-evaluation program comported with the voluntary guidelines. *Id.*

II. Discussion of the Comments Received

OFCCP received 26 comments on the Notice of proposed voluntary guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination. In response to the comments, OFCCP made several modifications to the proposed voluntary self-evaluation guidelines, discussed below. In addition, many of the commenters asked for clarification of OFCCP's intent with respect to various aspects of the voluntary self-evaluation guidelines, which OFCCP provides as appropriate below.

For the following discussion, OFCCP has grouped the comments around the following major subjects: (A) Similarly Situated Employee Groupings (SSEGs); (B) Statistical Analysis, Including Multiple Regression Analysis; (C) Factors included in the Statistical Analysis; (D) Appropriate Remedies; (E) Relationship with Item 11 of the Scheduling Letter; (F) Confidentiality of Compensation and Personnel Information; (G) Discoverability and the Alternative Compliance Certification; and (H) Adverse Inference.

A. Similarly Situated Employee Groupings (SSEGs)

Several commenters, including HR Analytical Services and National Industry Liaison Group (NILG), requested that OFCCP provide more guidance on how contractors should develop SSEGs. OFCCP agrees that further clarification of this issue will be helpful to interested parties. Contractors must form SSEGs based on the facts about the jobs performed by the particular employees who will be encompassed in the self-evaluation program. Contractors should form SSEGs by determining which employees are similarly situated based on their job duties, responsibility levels, and skills and qualifications involved in the positions, and other pertinent factors (as discussed directly below). The most important aspect of this process is ensuring accurate information about employees' job duties, the responsibility level, skills, and qualifications involved in their positions, and the other pertinent factors. It may also be helpful for contractors to retain counsel for assessment of applicable caselaw as an aid to making such determinations. This review of caselaw typically will involve research for cases that discuss positions that are factually similar to the positions at issue in the contractor's workforce.¹

Several commenters, such as Equal Employment Advisory Council (EEAC), agreed that similarity in work performed, and in responsibility level, skills, and qualifications involved in the positions, is a necessary condition for employees to be similarly situated, but also argued that similarity in these factors is not a sufficient condition for employees to be similarly situated in all cases. These commenters argued that there may be other factors in particular cases that may make individuals

dissimilar who would otherwise meet the proposed standard for similarly situated. For example, these commenters noted that otherwise similarly-situated employees may be paid differently for a variety of reasons: they work in different departments or other functional divisions of the organization with different budgets or different levels of importance to the business; they fall under different pay plans, such as team-based pay plans or incentive pay plans; they are paid on a different basis, such as hourly, salary or through sales commissions; some are covered by wage scales set through collective bargaining, while others are not; they have different employment statuses, such as full-time or part-time; etc. OFCCP agrees with these commenters that such factors may be important to whether employees are similarly situated. *See, e.g., EEOC Compliance Manual on "Compensation Discrimination," EEOC Directive No. 915.003 (December 5, 2000), at 10-6 ("the fact that employees work in different departments or other organizational units may be relevant, but is not controlling."); see also Cooper v. Southern Co., 390 F.3d 695, 717 (11th Cir. 2004)(noting that plaintiffs' expert "did not tailor her analysis to the specific positions, job locations, or departmental or organizational structures in question; however, the wide-ranging and highly diversified nature of the defendants' operations requires that employee comparisons take these distinctions into account in order to ensure that the black and white employees being compared are similarly situated"); Goodwin v. General Motors Corp., 275 F.3d 1005, 1012 n.8 (10th Cir. 2002)(holding employees similarly situated for compensation discrimination claim under Title VII because "[a]ll four representatives had the same supervisor, performed identical job duties and were subject to the same company standards and policies"); Webb v. Merck & Co., Inc., 206 F.R.D. 399, 408 (E.D. Pa. 2002) ("We agree with defendant that [the plaintiffs' expert's] analysis of hourly (union) workers is unreliable and irrelevant because it fails to control for the mandated wage rate set by collective bargaining agreements for an employee's position * * *"). OFCCP has added a provision in the final voluntary self-evaluation guidelines to make clear that contractors should consider the applicability of such factors in developing SSEGs, in addition to similarity in work performed and in responsibility level, skills, and qualifications involved in the positions.*

Several commenters were concerned that the proposed voluntary guidelines would force contractors to group employees who were not similarly situated or otherwise that many employers could not meet the SSEG standards.² In particular, these commenters took issue with the provision that OFCCP would carefully scrutinize the self-evaluation analyses of a contractor that could not encompass 80% of the workforce or AAP within the statistical analyses. These commenters argued that 80% was far too high of a percentage of the workforce or AAP for which appropriate grouping under the voluntary guidelines could be expected. Several commenters also believed that the 30/5 size requirements for SSEGs (SSEGs must include at least 30 employees, and five employees from each comparator group (females/males; minorities/non-minorities)) were also unrealistic in light of the diversity of occupations in many workplaces. Several commenters questioned whether OFCCP would permit contractors to develop self-evaluation programs that encompassed several AAPs or establishments, which would help address some of these concerns.

OFCCP agrees with these commenters that it may be expected that certain employees cannot be included in an SSEG because they are not similarly situated to any other employee in the organization, workplace, or AAP. Under no circumstances should a contractor attempt to group employees into an SSEG who do not meet the standards for similarly situated under these final voluntary self-evaluation guidelines.³ OFCCP added a provision to the final voluntary guidelines to clarify its intent on this issue.

OFCCP does not have any expectation that a certain proportion of employees in every workforce or AAP could be appropriately grouped into an SSEG. The proposed 80% threshold was simply a way to allocate agency resources based on OFCCP's judgment that exclusion of a small percentage of employees from the SSEGs did not warrant further OFCCP scrutiny. In

² See, e.g. American Bankers Association, American Society of Employers, Association of Corporate Counsel, Equal Employment Advisory Council, Gayle B. Ashton, Glenn Barlett Consulting Services, HR Analytical Services, Maly Consulting LLP, National Industry Liaison Group, Northeast Region Corporate Industry Liaison Group, ORC Worldwide, Silicon Valley Industry Liaison Group, Society for Human Resource Management, Sonalysts, and TOC Management Services.

³ This should not be read as a limitation or criticism of any type of self-evaluation technique or analysis that contractors choose to implement at their discretion. This limitation only applies to the self-evaluation methods outlined in the final voluntary self-evaluation guidelines.

¹ In the preamble of the final interpretive standards, OFCCP has cited cases that discuss whether specific positions are similarly situated. There are hundreds of other Federal court cases that discuss whether other positions are similarly situated based on facts about the specific positions involved in each of those cases.

response to the commenters' concerns that 80% is unrealistic because of the occupational diversity in many workplaces, OFCCP has slightly lowered this threshold to 70% in the final voluntary guidelines.

OFCCP also agrees that some of these concerns may be addressed by self-evaluation programs that encompass a group of employees larger than a particular AAP or establishment.⁴ Therefore, in the final voluntary self-evaluation guidelines, OFCCP provides that the self-evaluation program must at least encompass employees within an AAP or establishment. However, a self-evaluation program which encompasses larger groups of employees (e.g., by including several (or many) establishments or AAPs) will also comport with the voluntary self-evaluation guidelines, if the other conditions of these voluntary guidelines are satisfied. Contractors have the discretion of selecting the grouping of employees to be included in each self-evaluation program, although no grouping can be smaller than the AAP or establishment level.

Several commenters, such as Berkshire Associates, Tyson Foods, Inc., and Maly Consulting LLC, requested clarification about the types of non-statistical analysis that should be used to evaluate compensation practices involving employees who cannot be combined into an SSEG. OFCCP affords the contractor discretion in determining the type of non-statistical analysis which would be reasonable to use in a particular case. This could include comparison of the employee's compensation to that of other employees who are similarly situated to the employee, if any, or assessment of the decisions which determined the employee's compensation, with a goal of assessing whether legitimate, nondiscriminatory reasons explain each decision. As later explained in part I, Voluntary Guidelines, section E, contractors are obligated to keep the data and documents resulting from these non-statistical methods.

B. Statistical Analysis, Including Multiple Regression Analysis

Several commenters, including Berkshire Associates and DCI Consulting, requested that OFCCP provide more guidance on the types of

⁴ In this paragraph, OFCCP's use of the terms "encompass," "groups," and "groupings" relates only to the employees included in the overall self-evaluation program, and should not be confused with SSEGs or units for conducting regression analyses (i.e., by SSEG, or by combining several SSEGs into a pooled regression that includes particular SSEG membership variables).

statistical analysis that the agency would find acceptable under the proposed voluntary guidelines, where a multiple regression analysis is not required. OFCCP affords contractors flexibility in determining the type of statistical analyses which would be reasonable to use in a particular case. However, the statistical analysis must compare compensation within SSEGs and it must take into account legitimate factors that affect compensation of employees in each SSEG. The statistical analysis must also permit tests of statistical significance that are generally accepted in the statistics profession.

Many commenters expressed concern about the proposed voluntary guidelines' requirement that contractors with 250 or more employees must use multiple regression analysis as the method of self-evaluation.⁵ These commenters noted that multiple regression analysis is complex and that the requirement would force contractors to hire costly experts to develop and maintain such self-evaluation programs. These commenters also noted that multiple regression analysis requires significant personnel information in electronic format, which contractors do not normally collect and include in their HRIS databases. In order to develop a self-evaluation program that comports with the proposed voluntary guidelines, these commenters argued, contractors would have to expend significant resources attempting to collect relevant personnel information and entering such information into a database. Many of the commenters who expressed these concerns argued that the burdens involved with multiple regression analysis were simply too great for many contractors and that the 250-employee threshold was far too low. In order to address these concerns, several commenters recommended increasing the threshold significantly. Other commenters recommended that OFCCP allow contractors to use a tiered approach in the self-evaluation, much as OFCCP does in its compliance review process. Under the tiered approach, the contractor would be required to conduct a multiple regression analysis only after a less-sophisticated analysis indicated that there was a possible compensation disparity. Several commenters noted

⁵ See, e.g., American Bankers Association, American Society of Employers, Association of Corporate Counsel, Berkshire Associates, DCI Consulting, Equal Employment Advisory Council, Gayle B. Ashton, Glenn Barlett Consulting Services, HR Analytical Services, Maly Consulting LLC, National Industry Liaison Group, ORC Worldwide, Silicon Valley Industry Liaison Group, Society for Human Resource Management, Sonalysts, TOC Management Services, and Tyson Foods, Inc.

that the requirement to conduct the self-evaluation on an annual basis added to the burden of the multiple regression analysis and suggested that OFCCP could reduce this burden by requiring the self-evaluation be conducted less frequently.

OFCCP is cognizant of the complexity involved in performing a multiple regression analysis, and the burden of gathering information entailed therein. In response to the comments, the final Voluntary Self-Evaluation Guidelines only require a multiple regression analysis for those establishments or AAPs that have 500 or more employees. Moreover, OFCCP emphasizes that a multiple regression analysis is not required under 41 CFR 60-2.17(b)(3); rather, a contractor can opt to perform a multiple regression if it desires to obtain the compliance coordination incentive provided by these Voluntary Guidelines. Specifically, if a contractor performs a multiple regression analysis, which reasonably meets the standards outlined in the voluntary guidelines and the analysis finds no discrimination, OFCCP will consider the contractor's compensation practices to be in compliance with Executive Order 11246; in other words, OFCCP will not further investigate the contractor's compensation practices. If a contractor decides that performing a multiple regression is too burdensome or otherwise undesirable, it can choose another self-evaluation technique without any adverse consequences from OFCCP. By choosing not to perform a multiple regression analysis, the contractor is merely choosing not to take advantage of the compliance coordination incentive.

In the final voluntary guidelines OFCCP does not accept a tiered approach to self evaluation as suggested by several commenters. Although OFCCP will use the tiered approach in its analysis of a compensation system pursuant to the Final Interpretive Standards for Systemic Compensation Discrimination the use of a tiered approach in the Systemic Standards is for purposes of OFCCP's allocation of resources. OFCCP is unable to conduct a full-scale compensation review of all of the approximately 100,000 contractor establishments within its jurisdiction. Therefore, OFCCP unavoidably will fail to detect existing discrimination in those establishments that cannot be reviewed. However, OFCCP can maximize the number of establishments subject to some form of compensation review by using a tiered approach to target OFCCP investigations toward establishments with a higher likelihood of a potential discrimination problem.

But in using a tiered approach, OFCCP inevitably will miss discrimination in certain cases. OFCCP accepts this risk of “false negatives.” However, a contractor is not required to perform a multiple regression for its self-evaluation. If a contractor chooses to do so, and performs a multiple regression that reasonably meets the general standards outlined in the voluntary guidelines, the contractor will be found in compliance on compensation. In OFCCP’s view, because a contractor is incurring a substantial gain if it does a reasonable multiple regression analysis, a contractor should have to conduct a rigorous analysis. A less-sophisticated analysis may miss a potential discrimination problem that would be revealed by the more accurate multiple regression analysis, and a contractor who seeks to avoid OFCCP review should insure against potentially missing discrimination by performing a multiple regression analysis.

OFCCP also believes that it is important for contractors to conduct the self-evaluation analysis on an annual basis. Annual self-evaluation will prevent patterns of discrimination from emerging and will allow the contractor to correct any potential discrimination problems in a timely manner.

Several commenters argued that contractors should have the ability to investigate whether statistically-significant disparities revealed by the regression model were caused by legitimate factors or unique circumstances. OFCCP agrees with these comments. In the final voluntary self-evaluation guidelines, OFCCP retained the provision of the proposed voluntary guidelines that “[t]he contractor must adequately determine whether such statistical disparities are explained by legitimate factors or otherwise are not the product of unlawful discrimination.” Thus, contractors must investigate any statistically-significant disparities, determine whether there are legitimate, non-discriminatory explanations for the disparities, and correct the disparities where appropriate.

Several commenters requested that OFCCP provide, post online, or otherwise make available to contractors, the statistical software that contractors can use to evaluate their compensation systems and to discern if discrimination exists. OFCCP uses SAS software to evaluate contractors’ compensation systems, and such software was purchased through the normal procurement process. Other software may be available to perform these types of evaluations. This listing does not constitute any endorsement of SAS

software, but rather is provided pursuant to several commenters’ requests.

Several commenters also requested that OFCCP provide a grace period or a pilot stage before full implementation of the final voluntary guidelines. As OFCCP has explained, the agency does not require the contractor to perform a multiple regression analysis. Rather, a contractor can opt to perform a multiple regression if it desires to obtain the compliance coordination incentive provided by the voluntary guidelines. If a contractor decides that performing a multiple regression is too burdensome or otherwise undesirable, it can choose another self-evaluation technique without any adverse consequences from OFCCP. Because OFCCP is not requiring contractors to engage in any activity to implement these final voluntary guidelines, OFCCP disagrees that a grace or pilot period are appropriate.

C. Factors Included in the Statistical Analysis (Including Multiple Regression Analysis)

Several commenters, such as HR Analytical Services, requested that OFCCP provide more guidance on the factors that contractors should include in the statistical analysis in order to comport with the voluntary guidelines. OFCCP cannot provide additional guidance to contractors on the factors to include in the statistical analysis because those factors must be determined based on the facts of the particular case. Contractors should assess the factors that influence employees’ compensation in their workforce. These factors may not be the same for all employees, and even where they are the same, their influence may be significantly different by class of employee. OFCCP listed several of the typical factors to provide some general idea of the types of factors that may be used, not to identify an exhaustive list that is presumed applicable in every case.

Several commenters argued that OFCCP should defer to the contractor’s choice of factors used in the multiple regression model and should not require contractors to include every conceivable factor that might have a bearing on compensation. These commenters also asked whether OFCCP would allow contractors to use proxies instead of actual information on a factor where that information is not readily available to the contractor. OFCCP will not simply defer to the contractor in its determination of the appropriate factors. However, if the contractor has made reasonable judgments about the appropriate factors to include in the

statistical analyses, based on facts about the factors that influence compensation for the employees encompassed within the analyses, then OFCCP will find that the contractor’s self-evaluation program comports with these voluntary guidelines, if the other conditions of the voluntary guidelines are reasonably satisfied. OFCCP does not expect contractors to include all conceivable factors in the analyses. Nor does OFCCP prohibit the use of proxies, but cautions contractors to use proxies with great care. In a particular case, proxies may be reasonable, in light of the availability of actual data, the burden involved with obtaining actual data, and the expected relationship between the proxy and the actual data (i.e., the proxy “tracks” the actual data reasonably well). OFCCP suggests that contractors may test how closely a particular proxy “tracks” the actual data by comparing the proxy to a sample of the actual data. This test may reveal that the proxy tracks the data reasonably well or can be weighted or otherwise modified to reasonably track the actual data.

D. Appropriate Remedies

Several commenters, such as Association of Corporate Counsel, Morgan, Lewis & Bockius, and ORC Worldwide, requested that OFCCP provide more guidance on the circumstances in which a remedy is required under the voluntary guidelines and how the remedy should be determined. OFCCP agrees that general guidance on these issues will be helpful to interested parties. Under the final voluntary self-evaluation guidelines, the contractor must take appropriate remedial action to correct statistically-significant compensation disparities between employees in an SSEG where such disparities are not explained by legitimate, non-discriminatory factors.⁶ The remedial action that is appropriate will depend on the facts of the case but should include back pay and other make whole relief. See *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). OFCCP recommends that contractors tailor the remedy for each employee as to whom compensation disparities cannot be explained by legitimate factors. See *Rudebusch v. Hughes*, 313 F.3d 506, 523–24 (9th Cir. 2002) (“Thus, the real question is not whether Rudebusch should have been brought up to the mean, but whether using the predicted salary of similarly situated white male faculty for the minority and

⁶ Not all of the legitimate factors need be included in the statistical analyses, as analyses of individual disparities may reveal legitimate factors that are qualitative, unquantifiable, or unique to a particular employee.

female adjustments somehow overcompensated these minority and women faculty members, i.e., whether the adjustments were more than remedial.”). As in all questions of whether the contractor’s self-evaluation program comports with the voluntary guidelines, OFCCP will assess whether the contractor’s actions were reasonable in light of the particular facts.

E. Relationship With Item 11 of the Scheduling Letter

Several commenters, such as DCI Consulting and Glenn Barlett Consulting Services, requested that OFCCP explain how the voluntary self-evaluation guidelines will be coordinated with OFCCP’s compliance review process. In particular, these commenters questioned how the proposed voluntary guidelines would be coordinated with Item 11 of the OFCCP Scheduling Letter. In response to these commenters, OFCCP added a provision in the final voluntary self-evaluation guidelines to clarify this issue. The first step of the compliance review process is that OFCCP sends a Scheduling Letter to the contractor. The Scheduling Letter contains an itemized listing of documents and information that the contractor must submit to OFCCP. Item 11 of the itemized listing requests “annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender.” Under the final voluntary self-evaluation guidelines, a contractor that desires the compliance coordination incentive—and, therefore, has attempted to develop and implement a self-evaluation program that reasonably comports with the voluntary guidelines—will not be required to submit compensation data in response to Item 11. Instead, the contractor should respond to the Item 11 request by noting that the contractor “seeks compliance coordination under the OFCCP voluntary compensation self-evaluation guidelines.” OFCCP staff will then call the contractor to discuss the contractor’s self-evaluation program and, based on that initial discussion, OFCCP will determine what documents and information it will review in the particular case.

F. Confidentiality of Compensation and Personnel Information

Several commenters, such as Association of Corporate Counsel, NILG, and U.S. Chamber of Commerce, expressed concern about the confidentiality of compensation and personnel information that contractors

must maintain and make available to OFCCP to take advantage of the compliance coordination offered in the proposed voluntary self-evaluation guidelines. These commenters requested that OFCCP provide express assurances that the agency would not disclose such information to third-parties or other enforcement agencies. In response to these comments, OFCCP has added a provision to the final voluntary self-evaluation guidelines under which “OFCCP will treat compensation and other personnel information provided by the contractor to OFCCP under these voluntary guidelines as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.” OFCCP borrowed this text from its regulations at 41 CFR 60-2.18(d).

G. Discoverability and the Alternative Compliance Certification

The Alternative Compliance Certification (ACC) is a method by which a contractor is permitted under certain circumstances to certify its compliance with 41 CFR 60-2.17(b)(3) in lieu of producing the methodology or results of the compensation self-evaluation to OFCCP during a compliance review. Several commenters, such as EEAC and Berkshire Associates Inc. expressed confusion about the ACC provision in the proposed voluntary guidelines. For example, several commenters questioned whether the discussion of the ACC implied that contractors were afforded only two ways to comply with the compensation self-evaluation requirement contained in OFCCP’s regulations at 41 CFR 60-2.17(b)(3), i.e., either (1) conduct a self-evaluation analysis that comports with the voluntary guidelines, or (2) certify compliance through the ACC. EEAC appeared to favor this interpretation and argued that contractors in reality have a third option: Conduct any form of self-evaluation they deem appropriate. Several commenters, such as Maly Consulting LLC, were concerned that the proposed voluntary guidelines’ use of mandatory language in describing self-evaluation methods appeared to contradict provisions which indicated that the voluntary guidelines are indeed voluntary. In response to these comments, OFCCP has clarified this provision in the final voluntary guidelines to make clearer the agency’s intent regarding the ACC. The ACC was designed to address only the issue of disclosure of the self-evaluation, not the methods of self-evaluation contractors might use to comply with the self-

evaluation requirement in OFCCP’s regulations. As to the latter issue, the first sentence of the proposed voluntary guidelines provided that “OFCCP will continue to permit contractors to choose any form of compensation self-evaluation techniques to comply with 41 CFR 60-2.17(b)(3).” 69 FR 67253. The purpose of the ACC was to provide contractors with a way to comply with 41 CFR 60-2.17(b)(3) without engaging OFCCP’s scrutiny of their self-evaluation method. However, if a contractor chooses to do an ACC, the contractor would not be eligible for the compliance coordination incentive under the voluntary guidelines. OFCCP has also clarified several other provisions in the final voluntary self-evaluation guidelines to reinforce OFCCP’s intent that the voluntary guidelines are indeed strictly voluntary.

Several commenters, such as Association of Corporate Counsel and Morgan, Lewis & Bockius LLP argued that contractors who opt for the ACC should still be eligible for the compliance coordination incentive if they certify that they have implemented a compensation self-evaluation program that complies with the voluntary guidelines. Recognizing that OFCCP would be unable to review the contractor’s self-evaluation program if the contractor were permitted to certify, the Association of Corporate Counsel suggested that OFCCP could address this problem by conducting compensation evaluations of a random sample of the contractors that certified. OFCCP does not agree that this approach would be a reasonable enforcement policy. OFCCP expects that many contractors would opt to certify under the suggested approach, because they would obtain the benefit of the compliance coordination incentive without any direct scrutiny of their self-evaluation program. If large numbers of contractors certified, OFCCP would have to divert a rather sizeable portion of its investigation resources toward random compensation reviews. This would defeat the purpose of the voluntary self-evaluation guidelines, which was to afford contractors a compliance coordination incentive for conducting a self-evaluation that comports with the voluntary guidelines.

Several commenters requested additional clarification as to the terms “reasonably meet” the general standards and “marginally reasonable,” as used in Section II. Procedure, Paragraph B. However, each self-evaluation involves a contractor’s response to a variety of factual issues, such as the composition of SSEGs, the factors to include in a regression, and how to follow-up on

statistical disparities. The wide variety of possible responses to the myriad of possible fact patterns makes greater specificity in this terminology impossible.

Morgan, Lewis & Bockius argued that the ACC should not require the contractor to certify that it conducted any self-evaluation "analysis," which implies that the contractor's chosen self-evaluation technique involved a quantitative or statistical method. OFCCP agrees that the contractor need not have relied on quantitative or statistical techniques to comply with 41 CFR 60-2.17(b)(3), as OFCCP has repeatedly noted that the contractor has the discretion to comply by using any self-evaluation technique it deems appropriate. To ensure that the ACC does not appear to conflict with this intent, OFCCP has removed the term "analyses" in the ACC of the final voluntary guidelines.

Several commenters were concerned that the ACC would not be effective in protecting compensation self-evaluation analyses from disclosure during third-party litigation. Some commenters argued that the ACC could even jeopardize the contractor's privilege claims in such litigation. The U.S. Chamber of Commerce, for example, argued that the existence of the self-evaluation voluntary guidelines might support an argument that the contractor conducted the self-evaluation for reasons other than for obtaining legal advice or in preparation for potential litigation. The fact that the self-evaluation at issue in such a case looked like the self-evaluation outlined in the voluntary guidelines might support the argument that the employer conducted the self-evaluation to take advantage of the voluntary guidelines, not for reasons which would support a recognized protection from disclosure.

OFCCP did not intend the voluntary guidelines to be a basis for employers to lose applicable protections from disclosure. OFCCP included the ACC in the voluntary guidelines to avoid protracted litigation with contractors over the applicability of claimed protections and as a clear statement to contractors that they would not obtain the benefit of the compliance coordination incentive offered under the voluntary guidelines if they did not disclose their self-evaluation analyses to OFCCP. The voluntary guidelines provide only general parameters for a self-evaluation, involving a few high-level concepts, such as SSEGs and multiple regression analysis. Thus, the argument that a self-evaluation which conformed to these general principles must have been conducted under the

OFCCP voluntary self-evaluation guidelines is unreasonable. In addition, there are many alternative sources upon which an employer (or the employer's counsel) could draw to develop a self-evaluation method that looks similar to the methods outlined in the voluntary self-evaluation guidelines. After all, OFCCP looked to Title VII caselaw to define SSEGs and to determine that multiple regression analysis is an appropriate statistical method for assessing compensation.

Several commenters requested that OFCCP return the compensation and personnel data after OFCCP concludes its evaluation. The Records Disposal Act, 44 U.S.C. 3301 *et seq.* forbids us from doing so, as the Act provides the exclusive means for disposal of such records. 44 U.S.C. 3314. Records received by an agency of the government under Federal Law constitute "records" for purposes of the Records Disposal Act, see Section 3301, and "once a document achieves the status of a "record" as defined by the Act, it may not be alienated or disposed of without the consent of the Administrator of General Services, who has delegated his authority in such matters to the Archivist of the United States." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 147 (1980). See also, 36 CFR part 1220. Be assured, however, that the records will ultimately be disposed of, as provided by the Records Disposal Act.

The Chamber requested that OFCCP recognize a "self-critical privilege" which would protect compensation self-evaluation analysis from disclosure during third-party litigation. OFCCP believes that employers are to be encouraged to implement robust compensation self-evaluation programs, to prevent and timely correct potential compensation discrimination problems. Based on the comments OFCCP received, it is apparent that many employers perceive the possibility of disclosure of compensation self-evaluations in litigation as a compelling disincentive to conducting such analyses. However, OFCCP has no authority to establish privileges applicable in litigation in federal or state court.

H. Adverse Inference

Several commenters, including Gaucher Associates and the Chamber, were concerned that the proposed voluntary self-evaluation guidelines would create a standard for conducting self-evaluations against which employers would be judged in third-party litigation or by OFCCP. These

commenters acknowledged that OFCCP has made compliance with the voluntary guidelines entirely voluntary. Nonetheless, these commenters worried that a judge, jury, or OFCCP compliance officer may draw an adverse or negative inference if the employer chooses not to conduct a self-evaluation in the form outlined in the voluntary guidelines. These commenters asked that OFCCP provide in the final voluntary guidelines that the self-evaluation methods outlined in the voluntary guidelines are not the only acceptable methods that an employer could use to conduct a self-evaluation. OFCCP does not intend the voluntary self-evaluation guidelines to provide the basis for any adverse or negative inference against a contractor who decides not to take advantage of the voluntary guidelines. OFCCP has added a provision in the final voluntary self-evaluation guidelines to make clear that the guidelines are entirely voluntary and to express OFCCP's formal policy that the contractor's declining to adopt the methods outlined in the voluntary guidelines will not be used as a basis for any negative or adverse inference about the contractor's compliance status. However, if a contractor fails to adopt any self-evaluation method, such failure will be the basis for a finding of noncompliance with 41 CFR 60-2.17(b)(3). OFCCP agrees with these commenters that there are many methods of conducting a compensation self-evaluation; that application of general self-evaluation methods, such as those outlined in the final voluntary self-evaluation guidelines, will entail significant variability based on the unique facts of each workplace and workforce; and that whether a particular method is more appropriate than another method must be based on a significant understanding of the facts of the particular case.

III. Substantive Discussion Regarding the Final Voluntary Self-Evaluation Guidelines

On May 4, 2000, OFCCP proposed substantial revisions to affirmative action program requirements. 65 FR 26089 (May 4, 2000). As OFCCP explained in the preamble to these May 4, 2000 proposed revisions:

More recently, an additional objective of the proposed revision has been to advance the Department of Labor's goal of pay equity; that is, ensuring that employees are compensated equally for performing equal work* * *. This NPRM encourages contractors to analyze their own compensation packages to ensure that all their employees are being paid fairly.

On November 13, 2000, OFCCP published a Final Rule revising the regulatory requirements for written affirmative action programs. 65 FR 68022 (November 13, 2000). OFCCP adopted a requirement that covered contractors evaluate their “[c]ompensation system(s) to determine whether there are gender-, race- or ethnicity-based disparities.” 65 FR 68046 (November 13, 2000) (referencing 41 CFR 60-2.17(b)(3)).

OFCCP received many comments in response to the Proposed Rule on this compensation self-evaluation requirement. As explained in the Preamble to the November 13, 2000 Final Rule:

Many of the comments focused on the requirement to review compensation systems, with several commenters asserting that OFCCP does not have authority to enforce equal pay concerns, that analysis of compensation systems is not required by the current regulations, that compensation analyses impose an additional burden, or that OFCCP did not specify the types of analyses it would find acceptable. Commenters also expressed confusion about how the information gained from [the compensation analysis] should be used by contractors, and how the contractor's actions will be evaluated by OFCCP.

65 FR 68036 (November 13, 2000).

OFCCP responded to these commenters in the Preamble to the November 13, 2000 Final Rule:

“[C]ontractors have the ability to choose a type of compensation analyses that will determine whether there are gender-, race-, or ethnicity-based disparities.” 65 FR 68036 (November 13, 2000).

OFCCP has not, however, provided guidance to contractors or to OFCCP personnel on suggested techniques for compliance with this compensation self-evaluation requirement. These voluntary guidelines are intended to provide suggested techniques for complying with the compensation self-evaluation requirement, although these voluntary guidelines are entirely voluntary. Thus, compliance with these voluntary guidelines is not required for compliance with section 60-2.17(b)(3). OFCCP has included an incentive for contractors to adopt voluntarily the general methods outlined in these voluntary guidelines. Specifically, if a contractor, in good faith, reasonably implements the general methods outlined herein, OFCCP will coordinate its compliance monitoring activities with the contractor's self-evaluation approach. However, compliance with these voluntary guidelines is not the only way to comply with section 60-2.17(b)(3).

While developing these voluntary guidelines for conducting compensation self-evaluations, OFCCP recognizes the risk of liability that an employer faces when making corrective compensation adjustments under a self-evaluation process. For example, female or minority employees may bring claims based on the theory that the employer's own self-evaluation study established that the employer engaged in discrimination or that the employer did not make sufficient compensation adjustments to remedy the discrimination. *See, e.g., Cullen v. Indiana Univ.*, 338 F.3d 693, 701-04 (7th Cir. 2003)(female professor sued university alleging compensation discrimination and basing her claim, in part, on university's pay equity study). Similarly, male or non-minority employees may sue the employer alleging violation of Title VII because the employer gave salary adjustments to female or minority employees under the compensation self-evaluation. *See, e.g., Rudebusch v. Hughes*, 313 F.3d 506, 515-16 (9th Cir. 2002)(employer's self-audit, regression analysis was not technically sufficient to foreclose male professor's discrimination claim against the employer); *Maitland v. Univ. of Minn.*, 155 F.3d 1013, 1016-18 (8th Cir. 1998)(same); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676-77 (4th Cir. 1996)(same). OFCCP has attempted to provide voluntary guidelines that are technically sufficient to withstand judicial scrutiny, so that contractors do not face potential liability for implementing a robust and effective self-evaluation program. Accordingly, these voluntary guidelines are as follows:

Final Voluntary Guidelines—Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Executive Order 11246 With Respect to Systemic Compensation Discrimination (“Voluntary Guidelines”)

These Voluntary Guidelines consist of two sections: I. Voluntary Guidelines and II. Procedures.

I. Voluntary Guidelines

OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques to comply with 41 CFR 60-2.17(b)(3). However, as an incentive for contractors to implement a compensation self-evaluation system that conforms to these Voluntary Guidelines, OFCCP will deem a contractor in compliance with section 60-2.17(b)(3) and will coordinate its compliance monitoring activities as

explained in Section II of these Voluntary Guidelines, if the contractor's compensation self-evaluation program meets the standards outlined below. These guidelines are strictly voluntary. A contractor's decision not to implement a self-evaluation program that comports with these Voluntary Guidelines shall not be a consideration in OFCCP's assessment of a contractor's compliance with Executive Order 11246 or OFCCP's regulations. However, failure to adopt any self evaluation method will be a basis for a finding of non-compliance with 41 CFR 60-2.17(b)(3). The mandatory language used to describe methods of compensation self-evaluation under these Voluntary Guidelines means that these methods are required if the contractor wishes to obtain the compliance coordination incentive offered under these Voluntary Guidelines. Use of such mandatory terms in these Voluntary Guidelines shall not be construed to imply that the methods outlined in these Voluntary Guidelines are mandatory or to imply any limit on a contractor's discretion to use any self-evaluation technique it deems appropriate to comply with 41 CFR 60-2.17(b)(3). However, OFCCP will deem a contractor in compliance with 41 CFR 60-2.17(b)(3), and will coordinate its compliance monitoring activities as explained in Section II of these Voluntary Guidelines, if the contractor's self-evaluation program meets the following general standards :

A. The self-evaluation is performed by groupings of employees that are similarly situated, referenced hereinafter as “Similarly Situated Employee Groupings,” or “SSEGs.” Employees may be placed into the same SSEG if they are “similarly situated”; that is, if they perform similar work and occupy positions which are similar in responsibility level, and similar in the skills and qualifications involved in the positions. Employees may not be grouped in an SSEG for purposes of these Voluntary Guidelines unless the work performed, responsibility level, and requisite skills and qualifications involved in their positions are actually similar, regardless of any employer-created designation, such as job title, job classification, pay grade or range, etc. The fact that an employer has grouped employees into a particular pay grade or range does not necessarily mean that these employees are similarly situated; the determining factors are whether the employees are performing similar work, have similar responsibility level, and occupy positions involving similar skills and qualifications. In addition to

work performed, responsibility level, and skills/qualifications involved in the positions, other factors may have a significant bearing on whether employees are similarly situated. Such additional factors may include, for example, department or other functional unit of the employer, employment status (e.g., full-time versus part-time), compensation status (e.g., union versus non-union, hourly versus salaried versus commissions), etc. Contractors should consider the applicability of such factors in developing SSEGs, in addition to similarity in work performed and in responsibility level, skills, and qualifications involved in the positions.

B. The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis. However, the SSEGs must in all events conform to Section IA of these Voluntary Guidelines. In general, SSEGs should contain at least 30 employees overall, and contain five or more incumbents who are members of either of the following pairs: male/female or minority/non-minority. Some employees will not be sufficiently similarly situated to other employees to permit them to be grouped in an SSEG. Such employees may be eliminated from the statistical evaluation process; however, the contractor is expected to conduct a self-evaluation of pay decisions related to such employees using non-statistical methods. Further, the contractor should attempt to develop statistical analyses that encompass a significant majority of the employees in the particular affirmative action program (AAP) or establishment. Where the statistical analyses do not encompass at least 70% of the employees in the AAP or establishment, OFCCP will carefully scrutinize the statistical analyses and associated non-statistical self-evaluations. Contractors are afforded discretion to develop self-evaluation programs that encompass various groupings of employees other than AAPs or establishments, subject to the requirements outlined in these Voluntary Guidelines.

C. On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs (as defined in Section IA of these Voluntary Guidelines) and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc. For establishments or AAPs with 500 or more employees, the type of statistical analysis must be multiple regression analysis. The contractor must ensure that any factor within the contractor's

control that is included in the analysis is not itself subject to discrimination, although such a factor may be included unless there is evidence that the factor actually was subject to discrimination. Correlation between such a factor and a protected characteristic does not automatically disqualify the factor, if the employer has implemented formal standards to constrain subjective decisionmaking. The analyses must include tests of statistical significance that are generally recognized as appropriate in the statistics profession.

D. The contractor must investigate any statistically-significant compensation disparities identified by the self-evaluation analyses that it has developed. OFCCP considers an identified disparity to be statistically significant if the significance level of the disparity is two or more standard deviations from a zero disparity level.⁷ The contractor must adequately determine whether such statistical disparities are explained by legitimate factors or otherwise are not the product of unlawful discrimination. If the statistical disparities cannot be explained, the contractor must provide appropriate remedies. The remedies that are appropriate will depend on the time period in which the disparities emerged. For the initial implementation of the compensation self-evaluation program, the contractor may have to make adjustments based on both current disparities and prior disparities. OFCCP uses a two-year window for back pay corrections. For periodic iterations of the self-evaluation program after the initial implementation, the remedy would involve correcting current disparities. Through the sources of information available to OFCCP under Section IE of these Voluntary Guidelines, OFCCP will carefully evaluate whether the contractor has properly investigated such disparities and has adequately corrected any disparities that are not explained by legitimate factors.

E. The contractor must contemporaneously create and retain the following documents and data:

⁷ This significance level roughly translates to a measured absolute disparity that is more than two times the standard error of the estimated value. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in Federal Judicial Center, Reference Manual on Scientific Evidence, at 124 n. 138 (2d ed. 2000). Using a two-tailed test, a statistically significant disparity is a disparity with a significance level of 0.05 or less (subject to the consideration of what is a meaningful difference). This criterion means that, e.g., a disparity in the pay between males and females being either positive or negative, would have a less than a 1-in-20 chance of occurrence unrelated to potential discrimination.

(1) Documents necessary to explain and justify its decisions with respect to SSEGs, exclusion of certain employees, factors included in the statistical analyses, and the form of the statistical analyses. Such documents must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in compliance with Executive Order 11246, as described in Section IIB of these Voluntary Guidelines;

(2) The data used in the statistical analyses and the results of the statistical analyses for two years from the date that the statistical analyses are performed;

(3) The data and documents explaining the results of the non-statistical methods that the contractor used to evaluate pay decisions of those employees who were eliminated from the statistical evaluation process, which must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in compliance with Executive Order 11246, as described in Section IIB of these Voluntary Guidelines;

(4) Documentation as to any follow-up investigation into statistically-significant disparities, the conclusions of such investigation, and any pay adjustments made to remedy such disparities. These documents must be retained for a period of two years from the date that the follow-up investigation is performed.

F. The contractor must make all of the documents and data referenced in Section IE of these Voluntary Guidelines available to OFCCP during a compliance review. OFCCP may also review any personnel records and conduct any employee interviews necessary to determine the accuracy of any representation made by the contractor in such documentation or data.

II. Procedure

If the contractor's compensation self-evaluation program meets the general standards set forth in Section I of these Voluntary Guidelines, OFCCP will coordinate its compliance monitoring activities as follows:

A. During a compliance review, OFCCP will assess whether the contractor's compensation self-evaluation program comports with the general standards outlined in Section I of these Voluntary Guidelines. A contractor that seeks the compliance coordination incentive under these Voluntary Guidelines should respond to the Item 11 request in OFCCP's Scheduling Letter by noting that the contractor "seeks compliance coordination under the voluntary

OFCCP compensation self-evaluation voluntary guidelines.”

B. If the contractor’s compensation self-evaluation system reasonably meets the general standards outlined in Section I of these Voluntary Guidelines, OFCCP will consider the contractor’s compensation practices to be in compliance with Executive Order 11246. However, OFCCP may suggest in a written letter that the contractor make prospective modifications to improve the self-evaluation program’s conformity with the general standards outlined in Section I of these Voluntary Guidelines, where OFCCP concludes that the self-evaluation program is only marginally reasonable under these Voluntary Guidelines; thereafter, during future compliance reviews, OFCCP will assess whether the contractor made the suggested changes in determining the contractor’s prospective compliance with these Voluntary Guidelines. If, during a future compliance review, OFCCP determines that the contractor has not made the changes that OFCCP suggested during the prior compliance review, the contractor’s self-evaluation program will no longer be deemed to comport with the general standards outlined in Section I of these Voluntary Guidelines.

C. OFCCP may review the documents and data set forth in Section IE to determine whether the contractor’s compensation self-evaluation program reasonably meets the general standards outlined in these Voluntary Guidelines and, if applicable, whether the contractor reasonably made the changes that OFCCP suggested during a prior compliance review.

D. OFCCP personnel will direct technical issues about whether a contractor’s self-evaluation program meets the general standards outlined in Section I of these Voluntary Guidelines

to OFCCP’s Director of Statistical Analysis in the National Office, or his or her designee.

E. *Confidentiality of Compensation and Personnel Information:* OFCCP will treat compensation and other personnel information provided by the contractor to OFCCP under these Voluntary Guidelines as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

F. *Alternative Compliance Certification:* OFCCP understands that some contractors may take the position, based on advice of counsel, that their compensation self-evaluation is subject to certain protections from disclosure, such as the attorney client privilege or attorney work product doctrine, and that these protections would be waived if the contractor disclosed the self-evaluation. OFCCP does not take any position as to the applicability of these protections in the context of a compensation self-evaluation. However, to avoid protracted legal disputes over the applicability of such protections, OFCCP will permit the contractor to certify its compliance with 41 CFR 60-2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation to OFCCP during a compliance review. The certification must be in writing, signed by a duly authorized officer of the contractor under penalty of perjury, and the certification must state that the contractor has performed a

compensation self-evaluation with respect to the affirmative action program or establishment at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation and results are subject to the attorney-client privilege and/or the attorney work product doctrine. Because in such an instance OFCCP cannot evaluate the contractor’s compliance with the general standards outlined in Section I of these Voluntary Guidelines, a contractor that opts for this compliance certification alternative will not be entitled to the compliance coordination incentive outlined in Section IIB of these Voluntary Guidelines. That is, contractors that opt for this alternative compliance certification do not receive the benefit of OFCCP coordination of agency compliance monitoring activities. Thus, for contractors that elect only to certify compliance with section 60-2.17(b)(3), OFCCP will evaluate their compensation practices without regard to their compensation self-evaluation. This Alternative Compliance Certification is an alternative to the contractor disclosing the self-evaluation and results to OFCCP. It is not to be construed as a limit on contractors’ discretion to implement any self-evaluation technique it deems appropriate in order to comply with 41 CFR 60-2.17(b)(3).

Signed at Washington, DC this 12th day of June, 2006.

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[FR Doc. 06-5457 Filed 6-15-06; 8:45 am]
BILLING CODE 4510-CM-P