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Government Contractors, Prohibitions Against Pay Secrecy Policies and
Actions; Final Rule

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60–1**

RIN 1250-AA06

Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions**AGENCY:** Office of Federal Contract Compliance Programs (OFCCP), Labor.**ACTION:** Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) publishes this final rule to implement Executive Order 13665 (also referred to as “the Order,” *infra*) issued on April 8, 2014 to prohibit Federal contractors from discriminating against, in any manner, employees and job applicants who inquire about, discuss, or disclose their own compensation or the compensation of other employees or applicants. Executive Order 13665 amends Executive Order 11246, which prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin, by revising the mandatory equal opportunity clauses that are included in Federal contracts and subcontracts, and federally assisted construction contracts, and creating contractor defenses. This final rule defines key terms used in Executive Order 13665 and adopts other key provisions in the notice of proposed rulemaking (NPRM). The final rule also adds a section to the implementing regulations for Executive Order 11246. This section not only describes potential defenses for contractors but also requires contractors to notify employees and job applicants of the nondiscrimination protection created by section 2(b) of Executive Order 13665 using existing methods of communicating to applicants and employees.

The implementing regulations for Executive Order 11246 set forth the basic equal employment opportunity requirements that apply to Federal contractors and subcontractors.

DATES: *Effective Date:* These regulations are effective January 11, 2016.

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of this rule in alternative formats may be obtained by calling (202) 693–0104 (voice) or (202) 693–1337 (TTY). The rule also is available on the Regulations.gov Web site at <http://www.regulations.gov> or on the OFCCP Web site at <http://www.dol.gov/ofccp>.

SUPPLEMENTARY INFORMATION:**Executive Summary**

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights and worker protection agency. OFCCP enforces an Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.¹ Specifically, Federal contractors must not discriminate because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. They must also engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. OFCCP evaluates the employment practices of nearly 4,000 Federal contractors and subcontractors² annually, and investigates individual complaints. OFCCP also engages in outreach to employees of Federal contractors to educate them about their rights, and provides technical assistance to contractors on their nondiscrimination and affirmative action obligations.

These compliance evaluations and complaint investigations determine contractor compliance with VEVRAA, which prohibits employment discrimination against certain protected veterans. OFCCP also determines compliance with Section 503, which prohibits employment discrimination against qualified individuals with disabilities. Finally, OFCCP assesses compliance with Executive Order 11246, as amended, which prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin. Compensation discrimination is one form of discrimination prohibited by Executive Order 11246.

On April 8, 2014, President Obama issued Executive Order 13665, entitled

¹ Executive Order 11246, Sept. 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964–1965, Comp., p. 339, as amended; 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).

² References to “contractors” throughout the Final Rule are intended to include both contractors and subcontractors unless stated to the contrary.

“Non-Retaliation for Disclosure of Compensation Information,” amending section 202 of Executive Order 11246 to prohibit Federal contractors from discharging or discriminating in any way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant.³ This final rule adopts key provisions in the NPRM⁴ to promulgate new regulations implementing Executive Order 13665, which apply to covered federal contracts and federally assisted construction contracts. The provisions of this final rule and Executive Order 11246, as amended by Executive Order 13665, apply to covered contracts entered into or modified on or after the rule’s effective date. Modified contracts are contracts with any alteration in their terms and conditions, including supplemental agreements, amendments, and extensions. See 41 CFR 60–1.3 Definitions (definition of “Government contract”).

Despite the existence of laws protecting workers from gender-based compensation discrimination for more than five decades, a pay gap between men and women persists today. Among the possible contributing factors to the enduring pay gap is the prevalence of workplace prohibitions on discussing compensation.

A comparison of average annual wage data from 2013 reveals that women make 78 cents for every dollar that men make.⁵ Data on average weekly wages from the Bureau of Labor Statistics (BLS) for the same year shows a similar gap, with women making 82 cents for every dollar that men make.⁶ The wage

³ Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, 79 FR 20749 (April 11, 2014).

⁴ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 FR 55712 (Sept. 17, 2014).

⁵ U.S. Bureau of the Census, Income and Poverty in the United States: 2013 (Sept. 2014), available at <https://www.census.gov/library/publications/2014/demo/p60-249.html> (last accessed Feb. 10, 2015). Calculation of the pay gap using average weekly wages has the advantage of accounting for differences in hours worked, which is not captured in calculations using annual wage data. However, calculations using weekly wage data do not account for forms of compensation other than those paid as weekly wages, unlike annual wage calculations. While neither method is perfect, analyses that account for factors like occupation and qualifications further support the existence of a significant gender-based pay disparity.

⁶ Bureau of Labor Statistics, U.S. Department of Labor, Highlights of Women’s Earnings (Dec. 2014) (averaging annual data collected from the Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers), available at <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2013.pdf> (last accessed Feb. 10, 2015).

gap is wider for some women of color when compared to non-Hispanic white men. On average in 2014, BLS median weekly earnings data shows that African-American women earn 68 cents and Latina women earn 61 cents, and Asian women earn 94 cents for every dollar earned by a non-Hispanic white man.⁷ Census data shows similar disparities, with African-American women making 64 cents, Latina women making 56 cents, and Asian women making 86 cents per dollar earned by a non-Hispanic white man.⁸ Research has found that many factors contribute to the wage gap, including discrimination and occupational differences.

The impact of the wage gap remains a significant problem, especially for the working poor. While the gap may not be larger for poor women when compared to more affluent women, the economic impact of the disparity is greater for poor women who are already in financial jeopardy. U.S. Census data show that more than 15.2 million family households in the United States are headed by women.⁹ Nearly 31 percent of these families, or nearly 4,700,000 family households, have incomes that fall below the poverty level.¹⁰ Eliminating the wage gap could go a long way toward closing the overall

income gap and reducing the poverty rate for working women. A 2014 report by Maria Shriver and the Center for American Progress found that a third of all American women are living at or near a space called “the brink of poverty.”¹¹ According to the report, this equals to 42 million women plus the 28 million children who depend on them.

Generally, it is true that men and women tend to work in different industries and occupations. Women are much more likely than men to be clustered in a limited number of occupations, with slightly less than half or 44 percent of all working women employed in the 20 most common occupations for women. These occupations include secretaries and administrative assistants, registered nurses, and school teachers.¹² Only about 35 percent of men are employed in the 20 most common occupations for male workers, including truck drivers, managers, and supervisors.¹³ According to some studies, these differences in occupations result in occupational segregation that significantly contributes to the wage gap. Occupational segregation contributes to the suppression of earnings for women as research shows that women-dominated industries pay lower wages than male-dominated industries requiring similar skill levels,¹⁴ and the effect is more pronounced in jobs requiring higher

levels of education.¹⁵ Women are more likely to be concentrated in low-wage work, and they make up the majority of minimum-wage workers in the United States.

Although some of the wage gap is due to occupational segregation, that does not mean that the wage difference can be overcome by women making different career or work choices. In part, the gap is due to factors such as sex discrimination, including gender stereotyping.¹⁶ By age 65, the typical woman will have lost \$420,000 over her working lifetime because of the earnings gap. This is based on median annual earnings for full-time, year-round workers at age 25 and above in 2013 and assumes that the woman works every year between ages 25 and 65.¹⁷

In every racial group, women earn less than their male counterparts, according to U.S. Census Bureau data analyzed by the Institute for Women's Policy Research (IWPR).¹⁸ In addition to demonstrating a wage gap between men and women, the research also reveals a wage gap amongst various racial groups. Moreover, at the beginning of 2015, median weekly earnings for African-American men working at full-time jobs totaled \$680 per week, only 76 percent of the median for white men (\$897), according to BLS data, and the median weekly earnings for African-American women equaled \$611 per week, only 68 percent of the median for white men.¹⁹

⁷ Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Median usual weekly earnings of full-time wage and salary workers by selected characteristics, annual averages, available at <http://www.bls.gov/news.release/wkyeng.t07.htm> (last accessed Feb. 10, 2015).

⁸ U.S. Census, Current Population Survey, 2012 Person Income, “Table PINC-10: Wage and Salary Workers—People 15 Years Old and Over, by Total Wage and Salary Income in 2012, Work Experience in 2012, Race, Hispanic Origin, and Sex,” (comparing median wage for people working 50 or more weeks), available at https://www.census.gov/hhes/www/cpstables/032013/perinc/pinc10_000.htm (last accessed Feb. 10, 2015).

⁹ U.S. Census Bureau, American Community Survey, “1-Year Estimates 2013, Table DP02: Selected Social Characteristics in the United States,” available at <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last accessed Aug. 4, 2015). The calculation uses family households headed by females living in a household with family and no husband. A family household includes a householder, one or more people living in the same household who are related to the householder, and anyone else living in the same household.

¹⁰ U.S. Census Bureau, American Community Survey, “1-Year Estimates 2013, Geographies: United States, Table DP03: Selected Economic Characteristics,” available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_DP03&prodType=table (last accessed Aug. 4, 2015). To determine whether a household falls below the poverty level, the U.S. Census Bureau considers the income of the householder, size of family, number of related children, and, for 1- and 2-person families, age of householder. The poverty threshold in 2013 was \$18,769 for a single householder and two children under 18.

¹¹ Maria Shriver, “The Shriver Report A Women’s Nation Pushes Back from the Brink,” Executive Summary (Jan. 2014). The “brink” is defined in the report as less than 200 percent of the federal poverty line, or about \$47,000 per year for a family of four.

¹² Sarah Jane Glynn, Center for American Progress, “Explaining the Gender Wage Gap,” (May 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/05/19/90039/explaining-the-gender-wage-gap/> (last accessed Aug. 3, 2015). See also Jane Farrell and Sarah Jane Glynn, “What Causes the Gender Wage Gap?,” (Apr. 10, 2013). This report concluded that more than 40 percent of the gender wage gap is “unexplained,” meaning that there is no obvious measurable reason for a difference in pay. This leaves us with possible explanations that range from overt sexism to unintentional gender-based discrimination to reluctance among women to negotiate for higher pay.

¹³ Sarah Jane Glynn, Center for American Progress, “Explaining the Gender Wage Gap,” (May 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/05/19/90039/explaining-the-gender-wage-gap/> (last accessed Aug. 3, 2015).

¹⁴ Sarah Jane Glynn, Center for American Progress, “Explaining the Gender Wage Gap,” (May 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/05/19/90039/explaining-the-gender-wage-gap/> (last accessed Aug. 3, 2015). See also National Women’s Law Center, “The 10 Largest Jobs Paying Under \$10.10/Hour Are Majority Women” (Apr. 2013), available at <http://www.nwlc.org/sites/default/files/pdfs/womendominatedminwageoccupations.pdf>.

¹⁵ Sarah Jane Glynn, Center for American Progress, “Explaining the Gender Wage Gap,” (May 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/05/19/90039/explaining-the-gender-wage-gap/> (last accessed Aug. 3, 2015).

¹⁶ Shelley J. Correll, Stephan Benard, and In Paik, “Getting a Job: Is There a Motherhood Penalty?” American Journal of Sociology, (Mar. 2007): 1297–1339, available at http://gender.stanford.edu/sites/default/files/motherhoodpenalty_0.pdf. This study found that, when comparing equally qualified women job candidates, women who were mothers were recommended for significantly lower starting salaries, perceived as less competent, and less likely to be recommended for hire than non-mothers.

¹⁷ Calculation is based on U.S. Census Table P-24: Historical Income Tables: People. See Alex Wall, “Why It’s Time for Equal Pay,” available at <https://www.whitehouse.gov/blog/2015/04/15/tens-thousands-people-have-shared-why-its-time-equal-pay> (last accessed Aug. 21, 2015).

¹⁸ *Id.* at 2. This study shows that Hispanic men and women, grouped together, had the smallest within-group gap yet earned the least when compared to the other major racial and ethnic groups including white, Asian American, and African-American. Asian Americans earned the most as a group yet had the largest within-group gap.

¹⁹ Bureau of Labor Statistics, U.S. Department of Labor, “Current Population Survey, Median usual weekly earnings of full-time wage and salary workers by selected characteristics, annual averages,” available at <http://www.bls.gov/news.release/wkyeng.t07.htm> (last accessed Feb. 12, 2015).

A study based on the hiring pattern of male and female workers in the state of New Jersey found that employers offered African-Americans lower wages, compared to their white counterparts, when re-entering the job market after periods of unemployment.²⁰ The study showed that the pay gap between these two groups is typically 30 percent.²¹ Controlling for various factors such as skills and previous earnings, the study found that up to a third of this pay gap could be attributed to racial discrimination in the labor market.²² Similarly, a study based on National Longitudinal Survey data found that the pay gap between African-Americans and whites continues to exist, even after controlling for abilities and schooling choices.²³

Many of the studies analyzing pay disparities for Hispanic populations focus on differences in education and age as compared to white workers.²⁴ However, even after analyzing the effect of these factors, these studies showed that these factors do not account for the entire pay gap for Hispanics.²⁵

Potentially nondiscriminatory factors can explain some of the gender wage differences, but accounting for them does not account for the full pay gap.²⁶

²⁰ Roland G. Fryer Jr. et al., *Racial Disparities in Job Finding and Offered Wages* (2013), at 27, available at, http://scholar.harvard.edu/files/fryer/files/racial_disparities_in_job_finding_and_offered_wages.pdf (last accessed April 29, 2014).

²¹ *Id.* at 29.

²² *Id.*

²³ Sergio Urzua, "Racial Labor Market Gaps: The Role of Abilities and Schooling Choices," 43.4 *J. Hum. Resources*, 919, 919-971.

²⁴ Richard Fry & B. Lindsay Lowell, "The Wage Structure of Latino-Origin Groups across Generations," 45 *Indus. Relations* 2 (2006); Abelardo Rodriguez and Stephen Devados, "Wage Gap between White Non-Latinos and Latinos by Nativity and Gender in the Pacific Northwest," U.S.A., 4 *Journal of Management and Sustainability* 1 (2014).

²⁵ *Id.*

²⁶ U.S. Department of Commerce Economics and Statistics Administration and the Office of Management and Budget, "Women in America: Indicators of Social and Economic Well-Being," (March 2011), available at http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf (last accessed March 7, 2015). This report found that while earnings for women and men typically increase with higher levels of education, male-female pay gap persists at all levels of education for full-time workers (35 or more hours per week), according to 2009 BLS wage data. See, e.g., June Elliot O'Neill, "The Gender Gap in Wages, Circa 2000," *American Economic Review* (May 2003). Even so, after controlling for differences in skills and job characteristics, women still earn less than men. Council of Economic Advisers, "Explaining Trends in the Gender Wage Gap," (June 1998), <http://clinton4.nara.gov/WH/EOP/CEA/html/gendergap.html> (last accessed March 6, 2015). Ultimately, the research literature still finds an unexplained gap exists even after accounting for potential explanations, and finds that the narrowing of the pay gap for women has slowed since the 1980's. Joyce P. Jacobsen, *The*

Additionally, women earn less even within occupations. In a recent study of newly trained doctors, after considering the effects of specialty, practice setting, work hours and other factors, the gender pay gap was nearly \$17,000 in 2008.²⁷ Catalyst, a nonprofit research organization, reviewed 2011 government data showing a gender pay gap for women lawyers,²⁸ and that data confirms that the gap exists for a range of professional and technical occupations.²⁹ In fact, according to a study by IWPR that used 2011 information from BLS, women frequently earn less than men within the same occupations.³⁰ Despite differences in the types of jobs women and men typically perform, women earn less than men in male dominated occupations such as managers, software developers and CEO's and even in those jobs commonly filled by women such as teachers, nurses and receptionists.³¹

These statistics provide an overview of the full societal impact of the pay gap, which will not be fully addressed by this rule. For example, such general information about pay differentials among men and women includes pay differentials that may not be attributed to discrimination. In addition, these statistics include all employers and all employees in the U.S., whereas this final rule applies only to Federal contractors and their employees. Therefore, the potential impact of this rule in reducing the pay gap would be much smaller than the impact of eliminating the pay gap among all working men and women.

Whether communicated through a written employment policy or through informal means, restrictions on revealing compensation can conceal compensation disparities that exist among employees. Although very little

Economics of Gender 44 (2007); Francine D. Blau and Lawrence M. Kahn, "The U.S. Gender Pay Gap in the 1990s: Slowing Convergence," 60 *Industrial and Labor Relations Review* 45 (2006).

²⁷ Anthony T. LoSasso, et al., "The \$16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women," 30 *Health Affairs* 193 (2011) available at <http://content.healthaffairs.org/content/30/2/193.abstract> (last accessed Feb.13, 2015).

²⁸ Catalyst, "Catalyst Quick Take: Women in Law in Canada and the U.S.," (2015) <http://www.catalyst.org/knowledge/women-law-us> (last accessed Feb.13, 2015).

²⁹ Bureau of Labor Statistics, "Median weekly earnings of full-time wage and salary workers by detailed occupation and sex," 2014, available at <http://www.bls.gov/cps/cpsaat39.pdf> (last accessed Feb.13, 2015).

³⁰ Ariane Hegewisch, Claudia Williams, Vanessa Harbin, "The Gender Wage Gap by Occupation," (2012), available at <http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-1/> (last accessed Feb.13, 2015).

³¹ *Id.*

research has been conducted about pay secrecy policies and their effects, a recent survey by IWPR provides some insight into the prevalence of workplace rules against discussing compensation. The survey found that 51 percent of female respondents and 47 percent of male respondents reported that the discussion of wage and salary information is either discouraged or prohibited and/or could lead to punishment.³² Further, the IWPR study found that institutional barriers to discussing compensation were much more common among private employers than among public employers.³³ Sixty-two percent (62 percent) of women and 60 percent of men working for private employers reported that discussion of wage and salary information is discouraged or prohibited, compared to only 18 percent of women and 11 percent of men working in the public sector.³⁴

In a different survey of private sector employers, 49 percent of the employers surveyed admitted having a specific policy regarding pay secrecy or confidentiality issues,³⁵ and most managers agreed with the use of pay secrecy policies.³⁶ This survey also found that only 1 in 14 employers

³² Institute for Women's Policy Research, "Quick Figures: Pay Secrecy and Wage Discrimination," IWPR #Q016, January 2014, available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1> (last checked Feb.13, 2015).

³³ *Id.* See also Rafael Gely and Leonard Bierman, "Love, Sex and Politics? Sure. Salary? No Way": Workplace Social Norms and the Law," 25 *Berkeley J. Emp. & Lab. L.* 167, 171 (2004) (arguing that pay-secrecy policies are the prevalent workplace norm); cf. Matthew A. Edwards, "The Law and Social Norms of Pay Secrecy," 26 *Berkeley J. Emp. & Lab. L.* 41 (2005) (rebutting Gely and Bierman's conclusions about the prevalence and causes of pay secrecy).

³⁴ Institute for Women's Policy Research, "Quick Figures: Pay Secrecy and Wage Discrimination," IWPR #Q016, January 2014, available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1> (last accessed Feb.13, 2015).

³⁵ Rafael Gely and Leonard Bierman, "Pay Secrecy/Confidentiality Rules and The National Labor Relations Act," (citing HRnext, "More Employers Ducking Pay Confidentiality Issue: HRnext Survey Shows Many View it As Hot Potato," <http://www2.hrnext.com/Vabout/pr/pay-survey.cfm> (Apr. 4, 2001)), 6 U. Pa. Journal of Labor and Employment Law 125 (2003), available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1162&context=jbl> (last accessed March 6, 2015).

³⁶ *Id.* at 122-123, 125 (citing Charles M. Futrell and Omer C. Jenkins, "Pay Secrecy Versus Pay Disclosure for Salesmen: A Longitudinal Study," 15 *J. Marketing Res.* 214 (1978) ("Most sales managers contend that peer pay information should not be disclosed to their salesmen."); and Mary Williams Walsh, "Workers Challenge Employer Policies on Pay Confidentiality," *New York Times*, July 28, 2000, available at <http://www.nytimes.com/library/financial/O72800discuss-pay.html> (discussing wrongful termination actions brought by employees who violated employer wage confidentiality policies).

actively adopted “pay openness” policies.³⁷

Prohibitions on discussing pay prevent employees from knowing whether they are underpaid in comparison to their peers. Underpaid employees, who may be paid less because of their gender or race, will remain unaware of the disparity if compensation remains hidden. Thus, they are precluded from exercising their rights through OFCCP’s complaint procedures. OFCCP enforces the prohibition against compensation discrimination by investigating class complaints of compensation discrimination and conducting compliance evaluations under Executive Order 11246.³⁸ If a contractor’s employees are unaware of how their compensation compares to that of employees with similar jobs because the risk of punitive action inhibits discussions about compensation, employees will not have the information they need to assert their rights. An unwarranted difference in rates of pay, or other forms of compensation, that is based on a protected status like sex or race will likely continue and potentially grow more severe over time. Simply allowing employees to discuss compensation may help bring illegal compensation practices to light and allow employees to obtain appropriate legal redress.

Policies prohibiting employee conversations about compensation can also serve as a significant barrier to Federal enforcement of the laws against compensation discrimination. OFCCP primarily enforces prohibitions in Executive Order 11246 against pay and other forms of compensation discrimination by conducting compliance evaluations of Federal contractors.³⁹ While OFCCP typically develops statistical analyses to establish systemic compensation discrimination, interviewing managers, human resources professionals, and employees

potentially impacted by discriminatory compensation is also an invaluable way for the agency to determine whether compensation discrimination in violation of Executive Order 11246 has occurred and to support its statistical findings. Therefore, the accuracy of OFCCP’s investigative findings depends in part on the willingness of a contractor’s employees to speak openly with OFCCP investigators about a contractor’s compensation practices. If a contractor has a policy or practice of punishing or discouraging employees from discussing their pay, the employees may be fearful and less forthcoming during interviews with OFCCP staff. Prohibiting discrimination against workers who discuss, inquire about, or disclose compensation will help dispel an atmosphere of secrecy around the topic of compensation and promote the agency’s ability to uncover illegal compensation discrimination.

The experience of Lilly Ledbetter demonstrates how pay secrecy enables illegal compensation discrimination. For Ledbetter, her employer’s insistence on pay secrecy likely cost her the ability to seek justice for the compensation discrimination she suffered throughout her career. Ledbetter was employed at the Gadsden, Alabama plant of Goodyear Tire and Rubber Company. While there, she filed a charge with the EEOC alleging that she was paid a discriminatorily low salary as an area manager because of her sex in violation of Title VII of the Civil Rights Act of 1964.⁴⁰ Ledbetter discovered how much her male co-workers were earning years after she began working at the plant and only after she found an anonymous note in her mailbox disclosing her pay and the pay of three males who were doing the same job. In an interview, she said that her employer told her, “You do not discuss wages with anyone in this factory.”⁴¹ The Supreme Court, in 2007, issued its ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* holding that Ledbetter’s claim was untimely.⁴² The Court held that Ledbetter was required to have filed her claim within 180 days of when Goodyear initially made its discriminatory pay decision, regardless of whether Ledbetter’s

paycheck continued to reflect the discriminatory pay policy and regardless of when she discovered that Goodyear was discriminating against her. Congress addressed the timing issues in the Lilly Ledbetter Fair Pay Act of 2009,⁴³ which states that each discriminatory paycheck is a separate violation and resets the 180-day limitations period. It remains necessary, however, to end pay secrecy policies so that workers can more easily discover if they are victims of discriminatory pay policies.

Pay secrecy policies interfere with the Federal Government’s interest in efficiency in procurement. Economy and efficiency in Federal procurement require that contractors compensate employees under merit-based practices, without any barriers to success. As set out in Executive Order 13665, the Federal contractors with pay secrecy practices are subject to enforcement actions and, as a result, may face a higher risk of disruption, delay and expense associated with contract performance. Allowing discussions of pay by employees of these contractors will contribute to minimizing these risks. This final rule eliminates some of the barriers created by pay secrecy policies and helps ensure that Federal contractors compensate employees based on merit.

In addition to disruptions and delays, Federal contractors with pay secrecy policies may also experience a decrease in worker productivity. Workers, due to a lack of compensation information, may experience a reduction in performance motivation and are likely to perceive their employer as unfair or untrustworthy. Both reduce work productivity.⁴⁴ For example, one study has shown that workers without access to compensation information are less satisfied and less productive.⁴⁵ The precise reasons for this drop in productivity have not been investigated; however, a number of theories can be drawn from the empirical evidence gathered in this field. Two such theories on the loss of productivity are that employees are unable to link their performance or their worth to the organization, and that employer secrecy policies foster distrust of management.

The first of these theories is based on the idea that because of pay secrecy

³⁷ *Id.* at 125 (citing HRnext Survey).

³⁸ Pursuant to a Memorandum of Understanding between OFCCP and the Equal Employment Opportunity Commission (EEOC), OFCCP generally refers individual discrimination complaints subject to both Executive Order 11246 and Title VII of the Civil Rights Act of 1964 to the EEOC for investigation, but keeps systemic discrimination complaints, 76 FR 71029 (Nov. 16, 2011).

³⁹ OFCCP reviews approximately 4,000 Federal contractors annually. These contractors are scheduled for compliance evaluations based on various sources of information, including federal procurement databases, Employer Information Reports (EEO-1 reports), Dun & Bradstreet (D&B) data, U.S. Census data, and statistical thresholds such as industry type and employee counts of federal contractor establishments. The scheduling process is “neutral” rather than “random” because it is based on a methodology that includes specific criteria. OFCCP does not target specific contractors.

⁴⁰ White House National Pay Task Force, “Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future,” June 2013, available at http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf, citing TAP Talks with Lilly Ledbetter. The American Prospect, April 23, 2008, http://www.prospect.org/cs/articles?article=tap_talks_with_lilly_ledbetter (last accessed Feb. 13, 2015).

⁴¹ *Id.* at 22.

⁴² *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

⁴³ Public Law 111–2, 123 Stat. 5 (Jan. 29, 2009).

⁴⁴ Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoobi, and Michael J. Wesson, “Exposing Pay Secrecy,” 32 Acad. of Management Rev. 55, 58 (2007).

⁴⁵ Peter Bamberger and Elena Belogolovsky, “The Impact of Pay Secrecy on Individual Task Performance,” 63 Personnel Psychol. 965, 967 (2010).

policies, some workers do not know whether their own wages are reflective of job performance. This information gap makes it more difficult for workers to make informed choices about their own compensation and creates unnecessary barriers to enforcing laws against compensation discrimination. Information asymmetries provide an advantage and market power to the party with more information. When workers have access to more information about colleagues' compensation, salaries may be likely to be more closely linked to productivity on the job and compensation may be much less likely to be influenced by factors unrelated to job performance such as sex and race. As a result, workers with the ability to inquire about, discuss, and disclose compensation information may make informed decisions about their careers. These workers may become aware of their current value to the organization, but also of their potential value, based on information they receive about the salaries of longer tenured employees or employees in higher wage positions.

This phenomenon has a unique consequence in labor markets where those involved in the transaction are people who, unlike machines, are likely to be affected by the information in terms of motivation and effort. In companies with pay secrecy policies, negative influences on productivity may stem from workers overestimating the lower limits of pay for others in similar positions leading to an inaccurate compression of the pay range, and causing a perception that increased work will not result in a corresponding reward.⁴⁶ Workers with knowledge of compensation information are given accurate aspirational goals because they are aware of the salaries of the best-compensated employees, and can make rational decisions about the cost of increased effort at work in relation to the benefit of increased compensation resulting from success in the job.⁴⁷

The second theory is that worker distrust of corporate management may be another potential cause of the lag in productivity for workers subject to pay secrecy policies. Restrictions on sharing compensation information may create a sense that the company has something

to hide with respect to compensating employees. Feelings of institutional unfairness may have a negative impact on workers' productivity.⁴⁸

Eliminating pay secrecy policies may have benefits beyond improving the productivity of Federal contractors and their employees. Generally, employers seek to provide opportunities for employees to advance within the corporate hierarchy because these employees will work harder to achieve goals and secure advancement. The result of this may be not only higher productivity and better quality, but also lower turnover, retention of organizational knowledge, and lower training and onboarding expenses.⁴⁹ Employers, including Federal contractors, may encounter more difficulty achieving these benefits if they have pay secrecy policies. Another benefit of eliminating these policies is that younger employees and jobseekers view employers without these policies more favorably. A report found that younger employees value openness in general and are more suspicious of companies instituting pay secrecy rules.⁵⁰

Under the final rule, contractors could also realize a reduction in the cost and burden associated with investigating baseless claims of compensation discrimination. Workers with knowledge of compensation relative to other employees can make more accurate determinations about the presence or absence of discriminatory practices.⁵¹ When workers' suspicions of discriminatory practices are discredited by information about other employees' compensation, the company avoids the costs and time associated with defending against discrimination lawsuits filed by employees.

Transparency about compensation also allows companies and their employees to identify and resolve unwarranted disparities in compensation prior to the employee filing a formal complaint or pursuing litigation. This additional openness about compensation could decrease discrimination complaints and investigations, saving both the contractor and the government time and money. Moreover, the employees may

receive a faster remedy through internal resolution than would be possible through a complaint process or subsequent litigation.

The preceding paragraphs present several reasons why the final rule could yield productivity benefits or cost savings for covered Federal contractors. However, OFCCP notes that, in addition to these benefits, and in order to achieve its goal of ensuring employees receive fair wages, this final rule is expected to result in increased wage payments to employees. This may be the result of employees using the information that they receive about the compensation paid to others to pursue increased wage payments. Employers may either voluntarily increase wages or be required to do so through actions taken by employees. These higher wage payments may, in some instances, result in net costs to covered contractors.

I. Statement of Legal Authority

Issued in 1965, and amended several times in the intervening years, Executive Order 11246 has two 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, or national origin.⁵² Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure that they provide equal opportunity in all aspects of employment. The nondiscrimination and affirmative action obligations of Federal contractors and subcontractors cover all aspects of employment, including rates of pay and other compensation.

The requirements in Executive Order 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.

Pursuant to Executive Order 11246, receiving a Federal contract comes with a number of responsibilities. Section

⁴⁶ See Bamberger and Belogolovsky *supra* note 44.

⁴⁹ Heather Boushey and Sarah Jane Glynn, "There Are Significant Business Costs to Replacing Employees," Center for American Progress, Nov. 16, 2012, available at <https://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/> (last accessed Feb. 13, 2015).

⁵⁰ *Id.*

⁵¹ See Weber and Silverman *supra* note 46.

⁵² OFCCP generally interprets Executive Order 11246 consistently with Title VII principles. To the extent that this rule uses terms or concepts borrowed from Title VII or other EEO statutes, however, their usage here is limited to claims brought pursuant to Executive Order 13665 and this final rule. OFCCP's interpretation of Executive Order 13665 does not in any way limit the enforcement of Title VII or other EEO statutes.

⁴⁶ *Id.* at 969.

⁴⁷ Lauren Weber and Rachel Emma Silverman, "Workers Share Their Salary Secrets," *Wall St. J.* (April 16, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887324345804578426744168583824?mg=reno64-wsj&url=http%3A%2F%2Fonline.wsj.com%2Farticle%2F%2FSB10001424127887324345804578426744168583824.html> (last accessed Feb. 13, 2015).

202 of Executive Order 11246 requires every contractor to agree to comply with all provisions of Executive Order 11246 and the rules, regulations, and relevant orders of the Secretary of Labor. A contractor in violation of the Executive Order 11246 may have its contracts canceled, terminated, or suspended or may be subject to debarment after the opportunity for a hearing.⁵³

II. Major Proposed Revisions in the Final Rule

The final rule protects employees' inquiries, discussions, and disclosures of their own pay and benefits, and similar employee activities related to the pay and benefits of others, if they obtained that information through ordinary means such as conversations with co-workers. What the Order, and in turn this final rule, does not protect is the disclosure of others' pay information that an employee obtained as part of the employee's essential job functions. So, for example, if the employee making the disclosure to others had access to the information as a part of carrying out the essential job functions of the position of payroll administrator or benefits administrator, the contractor may be justified in taking adverse action based on that disclosure. This is because the employee, as payroll or benefits administrator, had access to the information as an essential part of the job and shared that information with others who do not otherwise have access to such information, which could undermine a contractor's ability to maintain necessary confidentiality concerning compensation. The nondiscrimination provision of the final rule may not protect this employee. The final rule specifically allows a contractor to take adverse action when an employee, with access to compensation information as part of an essential job function, discloses that information to others and the disclosure does not fall into one of the exemptions. The exemptions are disclosures made in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing or action, including an investigation by the contractor, or disclosures consistent with the contractor's legal duty to furnish the information.

Nothing in the final rule prohibits contractors from proactively promoting what they view as good about their pay policies and practices. As a best practice, contractors are encouraged to remove barriers to employees knowing

that the contractor's pay and benefit practices are competitive with other companies within the same industry, and to promote their company's practices regarding advancement opportunities, merit increases in pay, and other factors that affect their employees' pay. The more a contractor's employees know about where they stand in terms of their pay within the company, the more the employees should feel that they have a stake in the company and its financial success.

The final rule applies to all Federal contractors with contracts entered into or modified on or after the effective date of the rule that exceed \$10,000 in value. The major provisions in the final rule:

- Revise the equal opportunity clause that is currently included in qualifying Federal Government contracts, federally assisted construction contracts, subcontracts, and purchase orders. The revised clause includes a provision prohibiting contractors from discharging, or in any manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

- Define "compensation" in a manner consistent with the definition used by OFCCP in other existing guidance. Compensation is defined for these purposes as any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

- Define "compensation information" as the amount and type of compensation provided to employees or offered to applicants, including but not limited to the desire of the contractor to attract and retain a particular employee for the value they are perceived to add to the contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor decisions, statements, and policies related to setting or altering employee compensation.

- Define "essential job function" to provide clarity about the positions covered by minimizing the degree of subjectivity involved in the determination. A job function may be considered essential if: (1) The access to compensation information is necessary in order to perform that function or other routinely assigned business task; or (2) the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

- Establish a *General defenses* provision and an *Essential job functions defense* provision. Both provide contractor defenses to alleged violations of the nondiscrimination obligation for employees who inquired about, disclosed or discussed compensation. The nature of the defenses differs, however. The essential job functions defense, per the text of the Order, is a complete defense, such that if an employee discloses compensation information accessed or received through performance of an essential job function, *unless* the disclosure falls into one or more exemptions, the protections of the Order shall not apply and a contractor is allowed to take adverse action on those grounds. Contractors may also pursue a general defense if the discipline it imposes is for violation of a consistently and uniformly applied rule, policy, practice, agreement, or other instrument that does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. Given the difference in structure and function of this defense, this rule clarifies that it is not a complete defense, but rather is to be employed within the analytical framework discussed herein.

- Require contractors to disseminate a nondiscrimination provision, as prescribed by the Director of OFCCP and made available on the OFCCP Web site. Contractors must disseminate the provision to employees and applicants using their existing employee manuals or handbooks, and either electronically or by posting the prescribed provision in conspicuous places available to employees and job applicants.

III. Cost and Benefits

This is not economically significant under section 3(f) of Executive Order 12866, though it is a "significant regulatory action." The total cost of the final rule is \$42,726,188.

⁵³E.O. 11246, sec. 209(5); 41 CFR 60-1.27.

TABLE 1—TOTAL ESTIMATED COST SUMMARY

	Hours	Costs	Total cost per company
First Year Costs	1,045,000	\$42,726,188	\$85
Recurring Costs	0	0	0

The final rule provisions primarily require contractors to refrain from discriminatory activity, and notify employees, job applicants, and subcontractors of the nondiscrimination obligation using existing or common methods of communication. Notice to subcontractors is provided by amending the existing equal opportunity clause that contractors are currently required to include in their subcontracts and purchase orders. Contractors are not required to develop and deliver new staff or management training on the new nondiscrimination obligation in the final rule; however, providing such training is considered a best practice. The final rule also includes a defenses provision that allow contractors to pursue a defense to a claim of discrimination under certain circumstances.

At an estimated cost of \$85 per company, the final rule should result in benefits to workers who have historically experienced pay discrimination, and also transfers between groups of employees and from contractors, employers, or taxpayers to workers. The provisions in the final rule should help to ensure that fear of discrimination does not inhibit the employees of Federal contractors from sharing information with one another about their compensation. The final rule’s provisions, as discussed earlier in the preamble, also promote economy and efficiency in Federal Government procurement, potentially contribute to the economic security of working women and their families, and support enforcement of nondiscrimination and equal employment opportunity protections.

Overview of the Final Rule

Prior to issuing an NPRM, OFCCP conducted listening sessions with individuals from the contractor community, civil rights groups, and other interested parties to understand their perspectives on the scope and intent of Executive Order 13665 amending Executive Order 11246. After reviewing all of the comments on the NPRM, OFCCP’s final rule incorporates many of the provisions in the NPRM. However, in order to clarify and focus the scope of one or more provisions in the final rule, while not increasing the

estimated burden, the final rule revises some of the NPRM’s provisions.

OFCCP received 6,524 comments on the NPRM, of which 6,443 were the result of organized efforts using form letters generally in support of the NPRM. The remaining group of 81 unique or non-form letter comments represented diverse perspectives including one contractor, three law firms, four contractor associations, 13 civil rights organizations, four employee associations and unions, and 56 individuals. The commenters raised a range of issues, including concerns about the definitions of “compensation,” “compensation information,” and “essential job functions.” A few commenters urged OFCCP to make the definition of “compensation” consistent with existing OFCCP Directive 2013–03, *Procedures for Reviewing Contractor Compensation Systems and Practices*. The final rule adopts this definition.

Another commenter was concerned that the proposed definition of “compensation information” would include information covered by the attorney-client privilege or the attorney work product doctrine. As discussed in the section-by-section analysis, the final rule modifies the definition of compensation information. It provides more specificity as to the type of information covered but the final rule does not adopt other suggested changes related to concerns about attorney-client privilege or the attorney work product doctrine. The information that OFCCP could request would not involve legal opinions or advice, but would include factual data that informed the contractor’s compensation decisions. The information sought is not significantly different in nature from what OFCCP could request during a compliance evaluation or complaint investigation.

A definition for “essential job functions” that was proposed in the NPRM was based on the approach used in the Americans with Disabilities Act (ADA), as amended, and OFCCP’s regulations implementing Section 503. The “essential job function” analysis and evidence in these instances relate to issues of reasonable accommodation and qualification. However, in the context of Executive Order 13665, the

purpose or goal of the “essential job functions” analysis is different. Most of the commenters stated that the definition proposed in the NPRM for “essential job functions” is too broad. They proposed narrowing it to employees whose jobs are to maintain and protect the privacy of employee personnel records, and minimizing the amount of subjectivity available to contractors when determining what constitutes essential job functions. Others commented that the proposed definition of essential job functions was too narrow. Some commenters believed that the definition of essential job functions is inconsistent with the National Labor Relations Act (NLRA), and that the proposals in the NPRM are unnecessary because the NLRA covers pay secrecy issues under the right to discuss “terms and conditions of employment.” The final rule rejects the ADA, as amended, definition of essential job functions as proposed in the NPRM. The final rule also rejects the comparison made by some commenters with the NLRA. Instead, the final rule identifies two types or categories of essential job functions to minimize subjectivity and provide specificity for the types of job functions that would be covered as essential.

Some commenters sought to expand the defenses provisions in the NPRM to allow contractors to take action when employees or applicants access information without the contractor’s authorization, or violate contractor policies or other limitations created pursuant to applicable laws protecting private or confidential information. The final rule does not expand the defenses to include these recommendations, nor does it limit the ability of contractors to take disciplinary actions for violations of security policies and applicable privacy laws.

A significant number of commenters raised issues about the legal framework that would apply to analyzing an alleged violation. Commenters were concerned that the NPRM proposed prohibiting “discrimination” for conduct that is more appropriately considered “retaliation.” The commenters noted that the proposed prohibition is not based on the employees’ or applicants’ membership in one of the protected categories under

Title VII. Similarly, several commenters wrote that it is unclear whether a violation would be analyzed under the “motivating factor” standard or “but for” standard under Title VII—the “but for” standard being applicable to retaliation claims while “motivating factor” applies to discrimination claims. Other commenters viewed the NPRM’s prohibition as a nondiscrimination provision and asserted that the motivating factor standard would be appropriate. One commenter requested that OFCCP expressly state that it could use all Title VII discrimination remedies once a violation is established, including declaratory and injunctive relief, and attorneys’ fees and costs. This final rule, as discussed in the section-by-section analysis, clarifies that adverse action taken by a contractor against an employee or applicant that violates the provisions of Executive Order 13665 and these regulations is appropriately viewed as discrimination and analyzed as such under that legal framework.

Other commenters proposed that OFCCP require contractors to take additional measures to disseminate the equal opportunity clause such as requiring mandatory training to ensure that managers and employees understand the proposed protections. The commenters considered this training especially necessary where a contractor has longstanding pay secrecy policies or a culture of secrecy surrounding pay disclosures. One commenter would require training for departmental leadership responsible for handling compensation-related matters. Several commenters opposed mandatory training but encouraged it as a best practice, including one noting that training is no guarantee of effectiveness and that compliance is best achieved through clear guidance to contractors. Another commenter believed that training on the proposed new protections described in the NPRM could result in confusion, and encourage frivolous claims because employees are already aware that compensation discrimination is unlawful. The minority of the comments included one that proposed eliminating the equal opportunity clause altogether and focusing on collecting data. The final rule declines to require mandatory staff and management training.

There were also comments associated with the cost and burden of the proposed rule, and the authority of OFCCP to undertake this rulemaking. Other comments on the NPRM addressed access to technical assistance and training, alternatives to the proposals in the NPRM, and the absence

of a provision obligating the government to intervene and pay costs and attorneys’ fees should a prime contractor terminate a subcontractor under a government mandate. OFCCP carefully considered all comments in the development of this final rule.

Section-By-Section Analysis

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 proposed rule provided definitions for three terms used in Executive Order 13665. The NPRM defined the term “compensation” to include payments made to an employee, or on behalf of an employee, or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement. This definition of “compensation” aligns with the definition OFCCP uses in the context of compensation discrimination investigations. OFCCP received three comments regarding the definition of “compensation.” One commenter generally supported the proposed definition. Another commenter supported the definition, but suggested expanding it to include “sick time” and “paid leave.” The third commenter stated that the definition of “compensation” in the NPRM differed from the definition of that term in OFCCP’s Directive 2013–03, and further suggested that both the final rule and the Directive contain the same definition.

After consideration, OFCCP does not believe it would be appropriate to include “sick time” and “paid leave” expressly in the definition of compensation. The NPRM’s definition of “compensation” includes a general list of compensation types, but was not meant to be exhaustive. As a matter of consistency OFCCP will use the definition as stated in the NPRM, which aligns with the definition used in the context of its compensation discrimination investigations. OFCCP also notes the comment regarding the differing definitions in Directive 2013–03 and the NPRM, which advocates for making them consistent. However, OFCCP’s guidance and regulations have historically included salary, wages, overtime pay, shift differentials,

bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options, profit sharing and retirement. Though the definition of compensation in Directive 2013–03 and the final rule are not identical, Directive 2013–03 should be interpreted in a manner consistent with the final rule.

The proposed definition in the NPRM for the term “compensation information” is consistent with the approach described in OFCCP’s existing compensation guidance.⁵⁴ The definition covers information related to any aspect of compensation, including but not limited to information about the amount and type of compensation as well as decisions, statements, or actions related to setting or altering employees’ compensation. OFCCP intended the proposed definition of “compensation information” to be broad enough to encompass any information directly related to employee compensation, as well as the process or steps that led to a decision to award a particular type or amount of compensation. OFCCP received one comment on the definition of “compensation information.” The commenter was critical of the proposed definition, stating that it was “vaguely defined and may be deemed broad enough to encompass information related to compensation that is subject to the attorney-client privilege.” OFCCP does not believe that the definition of “compensation information” would interfere with the operation of the attorney-client privilege. The attorney-client privilege only protects disclosure of communication; it does not protect the disclosure of the factual bases underlying the communication between a client and his or her attorney. Therefore, the privilege generally would not cover “compensation information” data. However, in reviewing the proposed definition, the final rule slightly modifies the definition so that it would mean the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, factual information about the desire of the contractor to attract and retain a particular employee for the value they are perceived to add to the contractor’s profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor

⁵⁴ Directive 2013–03, Procedures for Reviewing Contractor Compensation Systems and Practices, Feb. 28, 2013.

decisions, statements and policies related to setting or altering employee compensation. This modification in the final rule, by way of including several examples, provides contractors with additional guidance.

Lastly, the NPRM also proposed a definition for the term “essential job functions.” OFCCP had proposed to use the ADA, as amended, definition of essential job functions. Under that definition, a job function may be considered essential for any of several reasons, including: (1) The function may be essential because the reason the position exists is to perform that function; (2) the function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (3) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

OFCCP received a number of comments, some indicating that the ADA, as amended, definition was too narrow, and others indicating that it was too broad or needed further specificity. In response to these comments, the final rule modifies the proposal in the NPRM by eliminating the use of the ADA, as amended, definition of essential job functions in favor of identifying two categories or types of essential job functions. In the final rule, a job function may be considered an essential job function if: (1) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or (2) the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

Generally, those commenters who favored broadening the definition of “essential job functions,” and therefore the exception to the rule’s protections, suggested that OFCCP adopt a definition that relies more on whether employees required access to confidential compensation information in the performance of their job duties, rather than on whether the employee’s position description related to handling compensation information. One commenter noted that the complexity of large enterprises made it unrealistic that such employers could effectively operate through only selected employees whose “fundamental” job duties involved access to pay information or whose job exists only to perform those functions or who have specialized expertise or ability somehow related to pay information.

Another commenter suggested that the test for what constitutes an essential job function should rely on whether access to compensation information was granted as necessary to the performance of a legitimate, assigned business task. Another commenter suggested that the definition of “essential job functions” should include all employees who have authorized access to an employer’s compensation information, whether or not that access falls within the employee’s primary job responsibilities.

OFCCP agrees with many of these comments and has determined that a definition of “essential job functions” that is driven by the employee’s position description, rather than the assigned tasks, could create confusion among employers in determining which employees are covered by the definition. Instead, the revised definition makes clear that employees performing job functions or routinely assigned tasks that require them to have access to confidential compensation information will be covered. Additionally, job functions that require protecting or maintaining the privacy of employee personnel records will be covered by the revised definition.

Some commenters identified specific occupations that they thought should be covered by the definition, such as IT employees and program staffers who prepare bids for government contracts that regularly require access to compensation information, even if the position was not created for the purpose of handling compensation data. The determination of whether any particular employee received compensation information in the course of their “essential job functions” will be determined on a case-by-case basis by OFCCP. OFCCP agrees, however, that a position where the functions of that position require access to compensation information, or protecting and maintaining the privacy of employee personnel records, should generally fall within the definition of “essential job functions.”

Some commenters, on the other hand, were concerned that the exception could be construed too broadly, such that groups of employees with access to compensation information, such as human resource employees, could be denied protection under the regulations. Many of these commenters suggested that the employer’s ability to assert “essential job functions” as an affirmative defense must be limited to only a very narrow subset of employees whose job is to maintain and protect the privacy of employee personnel records. One commenter also suggested that the definition should focus on whether

employees used compensation information as part of their essential job functions, rather than whether they have access to such information.

The revised definition includes “protecting and maintaining the privacy of employee personnel records” as one category of “essential job functions.” However, it also includes functions and routinely assigned business tasks for which accessing compensation information is necessary to their performance. This definition provides adequate protection to employers in preserving the confidentiality of compensation and personnel data but limits the scope of the exception to those positions that require access to the information to perform their job functions and tasks. Furthermore, as discussed below, the application of the “essential job functions” defense is narrowed by the fact that even employees in positions covered by the definition are protected if they discuss compensation information that they obtained from a source outside of their essential job functions, or if they discuss information relating to their own possible claim of compensation discrimination, or if they discuss compensation information of others accessed within their essential job functions so long as the discussion takes place internally with a management official of the contractor or while using the contractor’s internal complaint process.

Some of the commenters favoring a narrow interpretation also wanted the definition of “essential job functions” to rely less on subjective factors. They suggested that an employer’s judgment should not be given conclusive weight on the question of what constitutes an essential job function. The revised definition replaces the more subjective factors under the ADA, as amended, definition with two categories that more clearly identify which classes of job functions should be deemed essential for purposes of these regulations. As noted in paragraph 3 of the regulatory definition, this definition of “essential job functions” is limited to the discrimination claims governed by Executive Order 13665 and its implementing regulations, and does not apply to claims brought pursuant to other EEO laws.

Section 60–1.4 Equal Opportunity Clause

As proposed in the NPRM, the final rule revises the equal opportunity clause in § 60–1.4(a) and § 60–1.4(b) to include the new nondiscrimination provision. Section 60–1.4 requires contracting agencies to include this

equal opportunity clause in government contracts and modifications to government contracts if the clause was not included in the original contract. By accepting Federal contracts, contractors accept the discrimination and affirmative action requirements contained in the equal opportunity clause and agree to include the requirements contained in the clause in their subcontracts and purchase orders unless exempted by law, regulations, or order of the Secretary of the U.S. Department of Labor.

The final rule revises § 60–1.4(a) by inserting a new paragraph 3 into the equal opportunity clause and by renumbering the subsequent paragraphs in the clause. The text of the new paragraph in § 60–1.4(a) is identical to the text in section 2(b) of Executive Order 13665. Under the terms of this new provision, it is unlawful for contractors to discharge or discriminate in any other manner against any employee or job applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision does not apply when an employee with access to the compensation information of other employees or job applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in support of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

Under the equal opportunity clause in § 60–1.4(b), administering agencies involved in federally assisted construction through grants, loans, insurance, or guarantee must include text in their contracts for construction work informing the funding applicant that the equal opportunity clause must be incorporated into the contracts and contract modifications if they are funded in whole or in part by Federal money. This section further provides the exact language for the equal opportunity clause. As with § 60–1.4(a), by accepting funding the contractor agrees to assume the nondiscrimination and affirmative action obligations of Executive Order 11246, including incorporating the equal opportunity clause into their subcontracts and purchase orders unless exempted by law, regulations, or order of the Secretary of the U.S. Department of

Labor. The final rule revises § 60–1.4(b) by inserting a new paragraph 3 into the equal opportunity clause, and renumbering the subsequent paragraphs in the clause. The text of the new paragraph is identical to the text in section 2(b) of Executive Order 13665.

OFCCP made changes to § 60–1.4 with the intent to eliminate the secrecy and fear surrounding a discussion or disclosure of compensation information. When employees lack access to compensation information it is more difficult for them to make informed choices about their own compensation, and it creates unnecessary barriers to filing complaints with civil rights agencies such as OFCCP. Secrecy may also have a detrimental impact on business productivity, employee morale and retention, and could drive increased cost related to human resources management as discussed earlier in the preamble to the final rule.⁵⁵ Studies have shown that these pay secrecy policies are common among contractors and foster negative consequences for some employees and applicants for employment.⁵⁶ The final rule does not require employees to share information about compensation with other employees.

OFCCP received three comments on the proposed revisions to § 60–1.4. One commenter suggested that OFCCP eliminate the proposed equal opportunity clause provisions and focus instead on establishing “thorough but undemanding reporting requirements” to detect compensation discrimination. With respect to that comment, OFCCP proposed an NPRM on August 8, 2014, entitled “Government Contractors, Requirement To Report Summary Data on Employee Compensation.”⁵⁷ OFCCP

⁵⁵ Cappelli, Peter, and Kevin Chauvin, “An Interplant Test of the Efficiency Wage Hypothesis,” *Quarterly Journal of Economics*, 106, 769–787, available at <http://dx.doi.org/10.2307/2937926>(1991); Reich, Michael, Dube, Arindrajit, and Naidu, Suresh, “Economics of Citywide Minimum Wages,” Institute for Industrial Relations, University of California, Berkeley Policy Brief (2005); Cowherd, D.M. and Levine, D.I., “Product Quality and Pay Equity Between Lower-level Employees and Top Management: An Investigation of Distributive Justice Theory,” *Administrative Science Quarterly* 37: 302–320 (1992).

⁵⁶ See Bamberger and Belogolovsky *supra* note 44; Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi and Michael J. Wesson, “*Exposing Pay Secrecy*,” 32 *Acad. of Management Rev.* 55, 58 (2007).

⁵⁷ *Government Contractors, Requirement To Report Summary Data on Employee Compensation*, 79 FR 46562 (Aug. 8, 2014). This notice of proposed rulemaking (NPRM) would amend the regulation by adding a requirement that certain Federal contractors and subcontractors supplement their Employer Information Report (EEO–1 Report) with summary information on compensation paid to employees, as contained in the Form W–2 Wage and Tax Statement (W–2) forms, by sex, race,

will address any changes to compensation reporting requirements through this separate rulemaking. Further, eliminating the proposed equal opportunity clause provisions would be contrary to the express requirements of Executive Order 13665. OFCCP, therefore, adopts the revised equal opportunity clause provisions into the final rule.

Another commenter suggested that the final rule modify the equal opportunity clause by adding language from Sections 7 and 8 of the National Labor Relations Act (NLRA).⁵⁸ Although the language may not be identical to the NLRA, the revised equal opportunity clause language includes language detailing employees' right to engage in wage discussions and employers' nondiscrimination obligations related to this right. Consequently, OFCCP believes that inclusion of the suggested NLRA language is unnecessary. Furthermore, the language inserted into the equal opportunity clause mirrors language contained in the Order giving OFCCP the authority and responsibility to ensure Federal contractors do not discriminate against any employee or job applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

The other comment regarding revisions to § 60–1.4 asserted that it is not necessary for OFCCP to alter the heading for § 60–1.4(d) from “Incorporation of the equal opportunity clause by reference” to “Inclusion of the equal opportunity clause by reference;” or to alter the first sentence of § 60–1.4(d) by deleting “incorporated by reference” and inserting “included by reference.” OFCCP does not agree that this change is unnecessary and will change the current regulatory language of the heading and first sentence of § 60–1.4(d). Making the change to “inclusion” is consistent with the

ethnicity, and specified job categories, as well as other relevant data points such as hours worked, and the number of employees.

⁵⁸ Section 7 of the NLRA examines the right of employees to “self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities” for the purpose of collective bargaining or other “mutual aid or protection.” Section 8 of the NLRA describes unfair employer and labor organization practices that interfere with the rights granted employees in section 7. See 29 U.S.C. 157–158 (1935). OFCCP recognizes that the National Labor Relations Board (NLRB) interprets Section 7 to protect employees and applicants from discrimination based on discussion or disclosure of their own compensation or the compensation of other employees or applicants. *Paraxel International LLC*, 356 NLRB No. 82, slip op. at 3 (2011).

language used in other recent OFCCP rulemakings, including regulations for section 503 of the Rehabilitation Act of 1973, as amended. As proposed in the NPRM, the final rule removes the outdated reference to the “Deputy Assistant Secretary” in § 60–1.4(d), and replaces it with the “Director of OFCCP.”

SUBPART B—General Enforcement; Compliance Review and Complaint Procedure

Section 60–1.35 Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures

As proposed in the NPRM, § 60–1.35 becomes a new section to part 60–1 in this final rule, to implement the requirements of section 2(b), as well as the contractor defenses set forth in the Executive Order.

Analytical Framework

In the NPRM, OFCCP stated that it viewed Executive Order 13665 “as establishing a new prohibition against discrimination against any employee or applicant” and announced its intent to use the burdens and standards of proof applicable to Title VII discrimination claims—including the use of a motivating factor framework for analyzing causation. OFCCP provided three broad reasons for adopting this approach in the NPRM: (1) the equal opportunity clause paragraph set out in section 2(b) of Executive Order 13665 is framed in terms of discrimination; (2) the prohibitions set forth in Executive Order 13665 diverged from the traditional Title VII retaliation framework, to which the different “but-for” standard of review applies; and (3) the application of the motivating factor framework would maintain consistency with the review of similar claims under the National Labor Relations Act (NLRA), which also utilizes the motivating factor approach.

OFCCP received seven comments on the proposed analytical framework. Five of these comments, largely from organizations representing employers, opposed the proposal, and urged instead that OFCCP adopt a “but-for” causation standard, citing the recent *Univ. of Texas Southwestern Med. Ctr. v. Nassar* Supreme Court case.⁵⁹ Two commenters, both civil rights advocacy organizations, strongly supported the proposed motivating factor framework and urged its inclusion in the Final Rule. As discussed below, OFCCP adopts the framework as proposed in the NPRM with some further

clarification. A discussion of the various issues raised in the comments follows.

The most frequent comments on the proposed analytical framework concerned the applicability of the *Nassar* decision to Executive Order 13665. In *Nassar*, the Court analyzed the retaliation statute under Title VII, codified at 42 U.S.C. 2000e–3, which prohibits adverse employment action against an employee for opposing a practice made unlawful by Title VII, or for filing a charge, testifying, or otherwise participating in an investigation, proceeding, or hearing under Title VII.⁶⁰ The Court held that but-for causation, rather than a motivating factor review, applied to retaliation claims under Title VII.⁶¹

The comments from the organizations representing employers all stated that the holding in *Nassar* dictated the analytical framework that must be utilized under Executive Order 13665, as the protections under the Order are akin to Title VII retaliation claims as opposed to Title VII discrimination claims for which the motivating factor analysis is reserved. Some of these commenters also pointed to the text of the Order—such as the lack of specific “motivating factor” language—to buttress their conclusions. Comments from civil rights advocacy groups disagreed. These commenters stated that pay secrecy policies are inextricably intertwined with compensation discrimination. They further asserted that because the adverse action in the pay secrecy context often occurs before an employee engages in activity that would be protected under Title VII, the protections in the Order are fundamentally different in kind from anti-retaliation protections under Title VII.

Historically, OFCCP has followed Title VII principles in cases brought under Executive Order 11246.⁶² While that approach continues, we agree with the commenters echoing our position in the NPRM that the protection afforded by Executive Order 13665 “diverges from the traditional Title VII retaliation framework” at issue in *Nassar*. Title VII retaliation claims require, as an initial matter, that the plaintiff oppose an unlawful employment practice, file a charge of discrimination, or participate in an “investigation, proceeding, or hearing” related to Title VII claims. 42 U.S.C. 2000e–3. Executive Order 13665 is different, as it protects *any*

compensation inquiries, discussions, or disclosures and requires neither opposition to an alleged violation of the underlying law nor participation in an investigation, proceeding, hearing, or litigation asserting rights protected by the underlying law.⁶³ A benign question from co-worker to co-worker about the annual bonus she received or an employee’s inadvertent disclosure of a difference in pay between herself and a colleague are conceivable predicates for a claim under the Order.

This difference in scope underpinned OFCCP’s position in the NPRM that the Order is “framed in terms of discrimination” and that its protections are uniquely directed toward “protecting workers from pay discrimination itself,” thus supporting a discrimination analysis. While two of the commenters took issue with this latter statement, asserting that Title VII’s retaliation statute serves the same purpose, we believe there is an important difference—the Order’s protections are geared not only to safeguard the integrity of existing pay discrimination laws, but to also allow workers to *discover discrimination* that would otherwise be hidden. This purpose is explicitly referenced multiple times in the text of Executive Order 13665.⁶⁴ This also dovetails with OFCCP’s existing regulations, as the Order’s protection of open communication regarding compensation is interrelated with contractors’ existing and ongoing affirmative action obligations to evaluate and report on their compensation systems for the existence of potentially discriminatory disparities. See 41 CFR 60–2.17(b)(3).

While OFCCP recognizes the lack of specific “motivating factor” language in the Order and the other textual arguments raised by commenters,⁶⁵ the policy language embedded in the Order, the differences between the Order’s protections and current case law

⁵⁹ E.O. 13665, sec. 2(b).

⁶⁰ *Id.* at sec. 1 (“When employees are prohibited from inquiring about, disclosing, or discussing their compensation with fellow workers, compensation discrimination is much more difficult to discover and remediate, and more likely to persist. . . . Ensuring that employees of Federal contractors may discuss their compensation without fear of adverse action will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices. . . .”).

⁶¹ While the title of the Order uses the term “non-retaliation,” this is not dispositive and must be read in the context of the rest of the Order. See *Lawson v. FMR, LLC*, 134 S. Ct. 1158, 1169 (2014) (“[H]eadings and titles can do no more than indicate the provisions in a most general manner,” and they are “not meant to take the place of the detailed provisions of the text.”) (citing *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947)).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See *OFCCP v. Greenwood Mills, Inc.*, No. 00–044, 2002 WL 31932547, at *4 (Admin. Rev. Bd. Dec. 20, 2002).

⁵⁹ 133 S.Ct. 978 (2013).

interpretations of the Title VII retaliation provision, and related affirmative action and nondiscrimination obligations under the existing regulations provide important text and context for determining the appropriate analytical framework to employ. Accordingly, OFCCP does not believe that *Nassar* dictates that a “but-for” analytical framework must be used to analyze pay secrecy claims under Executive Order 13665.

The NPRM also included the motivating factor framework in part because of the overlap in legal protections offered by the Order and the National Labor Relations Act, which also uses a motivating factor analysis. Two commenters took issue with this rationale. One stated simply that the NLRA was “not applicable” to claims under the Order, while another asserted that there are differences in the scope and remedial schemes of the NLRA and the Order that necessitated differing analytical frameworks.

Regarding the first of these commenters, OFCCP respectfully disagrees that the NLRA is simply “not applicable” to the discussion of how claims under Executive Order 13665 should be analyzed. As we stated in the NPRM, there is a close relationship in the type of activity each law protects. Section 7 of the NLRA guarantees the right to engage in “concerted activities for the purpose of . . . mutual aid or protection,” 29 U.S.C. 157, and the National Labor Relations Board has long held that this includes the right “to ascertain what wages are paid by their employer, as wages are . . . probably the most critical element in employment.”⁶⁶ This makes the NLRA the federal law that most closely mirrors the types of pay secrecy policies that the Order addresses. Given that millions of workers, employed by thousands of employers, will be affected by pay secrecy policies under both the NLRA and the Order, reference to the NLRA in an attempt to provide, to the extent possible, a uniform framework of analysis and reduce confusion over the appropriate legal standard is appropriate.

The second commenter raised two broad issues. First, it stated that the analytical framework under the NLRA was different from that proposed under the Executive Order 13665, in that under the NLRA an employer can escape all liability if it can establish that it would have taken the adverse action against the employee in any event. As stated in the NPRM, the reasoning

behind the proposed motivating factor framework was “consistency with Title VII and NLRA principles.” 79 FR 55720 (emphasis added). The initial motivating factor analysis under both laws is essentially the same: the complainant must demonstrate that discrimination was a motivating factor in the employer’s action, and then the employer has a defense provided that it demonstrates that it would have taken the same action even in the absence of protected conduct. Were OFCCP to abandon a motivating factor framework, the analyses under the Order and the NLRA would then be out of alignment despite the existence of substantially identical claims under each.

The NLRA and Title VII then diverge in the remedial structure following a successful articulation of the defense: under the NLRA, the employer can escape all liability, whereas under Title VII, the court may still grant injunctive and declaratory relief, as well as attorneys’ fees. While the final rule follows Title VII rather than NLRA principles in this regard, the enforcement mechanisms in the Order significantly lessen the distinction with the NLRA in two ways. First, the Order does not permit OFCCP to recover attorneys’ fees and costs, thus, as with the NLRA, monetary remedies are not available if an employer establishes a defense in a case proceeding under the motivating factor framework. Second, the inclusion of a specific, complete “essential job functions” defense in the Order, discussed elsewhere in the preamble, provides a mechanism for contractors to avoid liability in certain circumstances consistent with the NLRA.

The commenter also noted that the interpretation of the Order in the NPRM covers more people and more types of activity than does the NLRA and that this will lead to an “exponential increase” in claims, and that applying a motivating factor analysis will further result in an increase in the number of frivolous claims, thus raising costs for the contractor community. As to any potential increase in claims, it is true that one specific purpose of the Order is to expand protections against pay secrecy policies to individuals and types of activities beyond that protected by the NLRA; otherwise, there would be no need for the Order. As discussed at length in the NPRM and in the preamble here, pay discrimination, as well as the existence of pay secrecy policies, remains widespread despite the protections in the NLRA. To the extent there is an increase in meritorious claims, this would indicate the Order’s success at addressing these widespread

problems. As to the assertion that there would be an untenable increase in the number of frivolous claims solely because of the availability of a motivating factor framework, we respectfully disagree. Significantly, there is no private right of action under Executive Orders 11246 or 13665; OFCCP is responsible for investigating complaints filed and bringing enforcement actions, which it has discretion to do only if there is a violation and it has attempted to resolve such violations through informal means. See 41 CFR 60–1.24. Simply put, OFCCP will not pursue frivolous claims, which substantially addresses the concerns raised by the commenter.

For the foregoing reasons, OFCCP concludes that the motivating factor framework is a permissible approach for claims brought under the Executive Order 13665. However, the fact that it is a permissible approach should not be interpreted to say that it is *the only* approach OFCCP may use to prove discrimination. For instance, numerous circuit courts examining Title VII discrimination claims since the Civil Rights Act of 1991, which codified the motivating factor framework, have held that, despite the availability of the motivating factor analysis, plaintiffs may also proceed under the more traditional burden shifting framework first set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).⁶⁷ Under this approach, often referred to as the “determinative factor” approach, the plaintiff must first make a *prima facie* showing of discrimination, which includes evidence that he or she is a member of a protected class and was subjected to an adverse action. The employer then has the opportunity to articulate a legitimate nondiscriminatory reason for the adverse employment action it has taken, which the plaintiff must then demonstrate was a pretext for discrimination in order to succeed. Which approach OFCCP uses will be heavily influenced by the facts of the case as they are developed in its investigation and in discovery. In true “mixed motive” cases—where, for instance, the employer can show that it fired an employee in part for taking excessive breaks, but where there is also evidence that the employer fired the employee in part for discussing compensation—the motivating factor approach would be appropriate. Conversely, where the evidence appears

⁶⁶ *Parexel International LLC*, 356 NLRB No. 82, slip op. at 3 (2011).

⁶⁷ See, e.g., *Makky v. Chertoff*, 541 F.3d 205, 213–15 (3d Cir. 2008); *Fogg v. Gonzales*, 492 F.3d 447, 451 (D.C. Cir. 2007); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004).

clear that there was only a single motive—where, for instance, the employer claims that it fired an employee for taking excessive breaks but the evidence shows that this is demonstrably false or otherwise unworthy of credence—OFCCP may opt to proceed under the more traditional pretext approach. OFCCP may also opt to prove its case via both frameworks, arguing, for instance, that discrimination was the determinative factor in an employer's adverse action but, in the alternative, that it was at least a motivating factor. The Supreme Court and multiple circuit courts have recognized this approach as consistent with the way in which many Title VII cases are litigated.⁶⁸ In sum, while the motivating factor analytical framework is permissible under this Final Rule, OFCCP may use other approaches, based on the evidence available in a particular case, to demonstrate that unlawful discrimination occurred.

Consistency and Compatibility With NLRA

A number of comments concerned the compatibility or consistency of the Order with the NLRA beyond those comments addressed in the analytical framework section above. Some commenters noted that the NLRA already provides some protection for disclosure of compensation information and, therefore, believe this rule is unnecessary. As an initial matter, the Order plainly requires OFCCP to draft implementing regulations. *See* E.O. 13665, sec. 3. Further, as discussed at length in the NPRM and above in this final rule, pay secrecy policies continue to be prevalent despite the existence of the NLRA, preventing workers from discovering and remedying potential discrimination. Finally, also discussed above, the scope of the Order is broader, covering a broader range of workers, including supervisors, and a broader scope of protected activity than that covered under the NLRA.

One commenter took issue with this last point, stating that the Department has not presented sufficient data to

justify coverage of supervisors. Another commenter noted, conversely, that coverage of supervisors is important specifically because they are not covered by the NLRA.

We decline the recommendation to limit coverage of the Order solely to employees who are not supervisors. Neither the Order nor any of the comments provide a basis for doing so. The plain text of the Order extends protections to “any employee or applicant for employment,” providing no language in any way limiting the scope of workers who should be covered by the rule.⁶⁹ Significantly, as discussed in the proposed rule, one of the catalysts for the signing of the Order is the case of *Ledbetter v. Goodyear Tire & Rubber Co.*⁷⁰ That case concerned a supervisor who discovered that her wages were less than that of male supervisors and who was warned by company management not to disclose or otherwise discuss this information. Ms. Ledbetter's experience, by no means unique, exemplifies the fact that pay secrecy policies and pay discrimination negatively affect workers on all rungs of the company ladder, and demonstrates the necessity for the broad protections in this rule. We also note that the NLRA concerns the rights of employees to organize and bargain and, therefore, excludes supervisors from its protections for reasons unrelated to this rule. This rule concerns a different policy purpose, that is, the promotion of pay transparency to ensure equitable pay for all of a contractor's employees. Therefore, it is appropriate that this rule covers a wider class of employees.

One commenter raised an issue about having the opportunity to comment on coordination it believes is necessary between the Department and the NLRB in terms of having a consistent standard and a consistent class of covered employees for pay transparency cases. Because sufficient notice about the standard to be applied as well as the covered class was provided during this comment period, there was sufficient opportunity for input on these issues. The Department enforces statutes with overlapping jurisdiction with other agencies and coordinates when necessary. There is no justification for not covering all employees who are covered generally by the protections provided under Executive Order 11246.

Contractor Defenses

As was proposed in the NPRM, and as was established in Executive Order 13665, the final rule contains contractor defenses to alleged violations. First, the

contractor may pursue a defense if its adverse action against an employee or applicant is not based on a rule, policy, practice, agreement or other instrument that prohibits employees and applicants from disclosing compensation. Second, the protections of the Order do not apply, and thus a contractor is allowed to take adverse action against an employee or applicant, if the employee discloses compensation information accessed or received based on performing an essential job function unless the disclosure falls into one or more exemptions.

The structure and function of these defenses are notably different from each other in the text of Executive Order 13665 and, accordingly, are so under these regulations. The “essential job functions” defense is set forth in the same paragraph as the prohibition on discrimination, and states that the prohibition “shall not apply” in instances in which employees disclose compensation data that they have access to as part of their essential job functions.⁷¹ This prohibition, and the defense, are incorporated into the text of Executive Order 11246, as amended.⁷² The second type of defense is phrased quite differently. It is not listed alongside the complete “essential job functions” defense in the text of the Order, nor is it incorporated into the amended Executive Order 11246; rather, it is listed separately in a “General Provisions” section.⁷³ Further, it is described as a defense that the Order does not prohibit a contractor from pursuing, rather than one that completely excises the application of the Executive Order.⁷⁴ We believe these differences are intentional and important, and frame how the defenses are to be employed in actions brought under the Order. A discussion of the function of these defenses, and a response to the comments we received, follows.

Section 60–1.35(a) General Defenses

The NPRM proposed to include a general contractor defense to an alleged violation of paragraph (3) of the equal opportunity clauses listed in § 60–1.4(a) and (b) under which a contractor's actions would not be deemed to be discrimination if the contractor could show that it disciplined the employee for violation of a consistently and uniformly applied rule, policy, practice, agreement, or other instrument that does not prohibit, or tend to prohibit,

⁶⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989) (plurality op.) (“Nothing in this opinion should be taken to suggest that a case must be correctly labeled as either a “pretext” case or a “mixed-motives” case from the beginning . . . indeed, we expect that plaintiffs often will allege, in the alternative, that their cases are both.

Discovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her.”); *see also Ponce v. Billington*, 679 F.3d 840, 845 (D.C. Cir. 2012) (citing *Price Waterhouse*, and noting that “a plaintiff may ultimately decide to proceed under both theories of liability.”); *Rapold v. Baxter Int'l*, 718 F.3d 602, 611–12 (7th Cir. 2013) (citing *Price Waterhouse*).

⁶⁹ E.O. 13665, sec. 2.

⁷⁰ 550 U.S. 618 (2007).

⁷¹ E.O. 13665, sec. 2.

⁷² E.O. 11246, sec. 202(3).

⁷³ E.O. 13665, sec. 5(a).

⁷⁴ *Id.*

employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. OFCCP invited comments on how to harmonize contractors' enforcement of legitimate workplace rules with the rights of applicants and employees to discuss, disclose, or inquire about compensation.

OFCCP received several comments on this proposed defense. Some commenters were concerned that the defense was so broad that it could be used as pretext for discrimination and that it allowed for excessive employer subjectivity. These commenters explained that the example cited in the NPRM, where a contractor disciplines an employee for standing on her desk and repeatedly shouting out her pay in violation of a workplace rule prohibiting disruptive behavior, illustrated that contractors could apply such workplace rules in a subjective and discriminatory manner because contractors could define "disruptive" to include all conversations about compensation. These commenters suggested that OFCCP should provide specific definitions and examples of legitimate workplace rules. One commenter also suggested that OFCCP should identify sources that employers could draw from when citing a legitimate workplace rule, such as employee handbooks or collective bargaining agreements.

One other commenter suggested that OFCCP delete "and uniformly" from the phrase "by proving that the contractor disciplined the employee for violation of a consistently and uniformly applied rule . . ." because "uniformly" was superfluous and because contractors should not be required to apply a rule "uniformly" in situations when circumstances warrant a different approach.

OFCCP believes that the defense, as proposed in the NPRM, adequately prevents contractors from using a legitimate workplace rule as a way to avoid liability in the event that it discriminated against an employee or applicant for discussing compensation. The defense requires the contractor to show that it applied a legitimate workplace rule to the employee or applicant in a consistent and uniform manner. If the contractor cannot demonstrate a track record of consistent and uniform application of the workplace rule, then the contractor will not be able to successfully use this defense. Although a contractor need not discipline all employees in an identical way under the workplace rule, it must show that it did not discipline the employee or applicant in question more severely under the rule because of the

employee's or applicant's protected activity.

In response to the concern that contractors could use workplace rules, such as those that prohibit disruptive employee behavior, to target discussions of compensation, OFCCP notes that contractors may only rely on workplace rules that do not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants. A rule that treated all discussions of pay as "disruptive" would violate these regulations.

OFCCP declines to articulate specific workplace rules that contractors may assert pursuant to this defense. There are many legitimate workplace rules that contractors may be entitled to enforce; OFCCP cannot predict the content or the source of any particular rule that a contractor may rely upon in asserting this defense. Regardless of the type of workplace rule relied upon, however, every contractor must show that the identified workplace rule does not prohibit, or tend to prohibit, employees or applicants from discussing their compensation and that any such rule has been consistently and uniformly applied. For example, if a contractor disciplined an employee or applicant, who was also discussing pay, pursuant to an allegedly legitimate workplace rule, but, for example, had never promulgated or enforced that rule before, the contractor may not be able to show that the workplace rule qualified as a legitimate workplace rule under this defense.

Finally, OFCCP will retain the word "uniformly" in the final rule. OFCCP recognizes that different circumstances may warrant different forms of discipline under the same workplace rule; the fact that an employee or applicant was also discussing compensation, however, should not justify applying the workplace rule in a non-uniform manner. For example, it may be a consistent application for a contractor to suspend all employees who exceed their allotted break time by an hour, even if the contractor only provides a verbal warning to employees who exceed their allotted break time one time by five minutes. For the contractor to act in a uniform manner, it should apply the same corrective action—here, a verbal warning—to employees who exceed their allotted break time once by five minutes, including any employees who may have been discussing compensation. As mentioned above, an employee's or applicant's protected activity should not affect the severity of the discipline they

receive pursuant to a workplace rule. Requiring that contractors uniformly apply workplace rules to similarly situated employees, regardless of their protected activity, prevents contractors from using the rule as a way to avoid liability for discrimination. Therefore, OFCCP believes that the use of the word "uniformly" is not superfluous and will remain in the final rule.

Two commenters proposed adding more specific defenses to the regulation. One commenter suggested that OFCCP add a defense for contractors who limit discussion or disclosure of compensation information pursuant to laws enacted to protect private and/or confidential information. Another commenter recommended that the rule include a specific defense against hacking, such that if an employee obtained salary information through unauthorized access, then the employer should be able to discipline the employee for doing so.

As previously mentioned, the final rule does not expand the defenses to include these recommendations; however, it does not limit the ability of contractors to take disciplinary actions for violations of security policies and applicable privacy laws. Furthermore, as noted in the preamble to the proposed rule, the general defense provision is intended to permit employers to have personnel policies that are uniformly applied to maintain discipline in the workplace and to protect their business. We note generally that a policy that would have the effect of broadly prohibiting employee communication about compensation would be unlawful under this rule. However, a company policy that is narrowly tailored to prohibit disclosure of specific proprietary business information or trade secrets, or that is otherwise designed to be consistent with federal or state privacy laws, if violated, could fall within the general defenses already set forth in the rule. Similarly, if a contractor consistently and uniformly applies a rule prohibiting employees from accessing information without authorization, then this too could potentially fall within the general defense provision. Whether a company policy concerning confidentiality or unauthorized access would be deemed unlawful would be a highly fact-specific inquiry. However, because the general defense set forth could potentially be invoked for these purposes, OFCCP declines to adopt the recommendations to include these specific defenses.

Accordingly, OFCCP declines to make the suggested changes and adopts the defense requirements outlined in the

NPRM into the final rule. OFCCP is, however, rewording the defense to make clear that relying on a workplace rule will not serve as a complete defense, but rather is subject to the analytical framework as discussed above. Consistent with Title VII principles, and the language of Executive Order 13665, a contractor cannot escape all liability within the “motivating factor” framework if the agency can show that discrimination motivated the contractor, even in part, to discipline an employee or applicant. The focus of the Executive Order is on “[e]nsuring that employees of Federal contractors may discuss their compensation without fear of adverse action” so that contractors and their employees can “detect and remediate unlawful discriminatory practices.” E.O. 13665, sec. 1. This policy will not be truly effectuated until all forms of discriminatory actions, even if they are combined with some lawful motivations, are rooted out of the workplace. To the extent that a desire to perpetuate unlawful pay secrecy policies motivated a contractor’s actions, OFCCP will seek to enjoin such practices in the future. A contractor may, however, limit the scope of an adverse remedial order if it can show that it would have taken the same action against the employee or applicant in the absence of any discriminatory motive.⁷⁵

Section 60–1.35(b) Essential Job Functions

As proposed in the NPRM, § 1.35(b) contains a second contractor defense to a claim of discrimination under these regulations. Pursuant to this defense, a contractor will not violate these regulations if it takes adverse action against an employee, who has access to the compensation information of other employees or applicants as part of his or her essential job functions, for disclosing the compensation of other employees or applicants, unless the disclosure occurs in certain limited circumstances. These limited circumstances include disclosures in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing or action, including an investigation conducted by the contractors, or consistent with the contractor’s legal duty to provide information. A formal complaint or charge would include, for

⁷⁵ As discussed *supra*, if the facts of the case dictate that proceeding under the *McDonnell Douglas* determinative factor model is appropriate in a given case, the contractor could use its workplace rule as its asserted legitimate nondiscriminatory reason, which OFCCP would then have the opportunity to demonstrate was a pretext for discrimination.

example, written and oral complaints submitted by the employee, or someone on behalf of the employee, to the contractor’s human resources or other appropriate office or official, and to a Federal, state or local government entity, including courts and administrative boards and councils. Under § 1.35(b), the employee would typically be making the disclosure within, related to, or pursuant to some sort of official action, process, policy, or procedure if the conduct is to be protected from adverse action by the contractor.

As discussed above, OFCCP has revised the definition of “essential job functions” to identify two specific categories of job functions: (1) the access to compensation information is necessary in order to perform that function or other routinely assigned business task; or (2) the function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information. Many of the comments that OFCCP received on this topic related to the definition of “essential job functions” and have been previously addressed. To reiterate, some commenters felt that the definition of essential job functions, and therefore the accompanying defense, should be broadened, while others felt it should be narrowed.

As stated in the NPRM, this defense acknowledges that an employee who has access to compensation information of others within an organization as part of his or her essential job functions has a duty to protect such information from disclosure. The revised definition of “essential job functions” reflects these concerns, while also limiting an employer’s subjectivity in deciding what functions constitute essential job functions. As was stated in the NPRM, however, if an employee discloses or discusses the compensation of other applicants or employees based on information that the employee receives through means other than essential job functions access, the defense would not apply. Similarly, the defense would not apply where such an employee pursues her own possible compensation discrimination claim or raises possible disparities involving the compensation of other employees to a management official with the contractor or while using the contractor’s internal complaint process. This balance protects employers’ confidential information, but does not inhibit those workers with access to such information from pursuing their own claims of compensation discrimination or raising possible disparities to the contractor’s

own management to consider and address if necessary to comply with the law. Without this distinction, employees with essential job functions access, who primarily work in human resources departments and who are predominantly women,⁷⁶ would receive less protection than other employees who learn of possible compensation disparities in a similar manner.

As with any defense, OFCCP will evaluate the availability of a defense under section 1.35(b) based on the specific facts and circumstances of each case. As discussed above, this defense may serve as a complete bar to liability under these regulations. The “motivating factor” framework will not limit the application of the essential job functions defense because releasing compensation information obtained during the course of an employee’s essential job functions is not protected by Executive Order 13665 or this final rule. The policy underlying Executive Order 13665 recognizes that contractors are entitled to prohibit some of their employees from releasing sensitive and confidential information relating to compensation; accordingly, such prohibitions will not give rise to impermissible “motivating factors” under these regulations, and therefore will not implicate the remedial structure under the “motivating factor” framework.

Section 60–1.35(c) Dissemination of nondiscrimination provision

The NPRM proposed to require that Federal contractors incorporate the nondiscrimination provision described in section 2(b) of Executive Order 13665 into existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and job applicants. The NPRM proposed that the Director of OFCCP would prescribe the language in the nondiscrimination provision, and that OFCCP would make the language available on the OFCCP Web site. The NPRM stated that contractors would disseminate the provision either electronically or by posting a copy of the provision in conspicuous places available to employees and job applicants. The NPRM did not require or recommend in-person or face-to-face communication of the provision, however, the proposed rule stated that contractors might use this method if they typically communicate information

⁷⁶ As was mentioned in the NPRM, in 2013 at least 71.9 percent of human resources professionals in three occupational categories were women. For further discussion, please refer to the NPRM at 79 FR 55721 (September 17, 2014).

to all employees or applicants in this manner.

OFCCP received six comments on this proposed requirement. One commenter encouraged OFCCP to create a new “pay transparency” poster and add a requirement for contractors to post it in the workplace. Two commenters recommended that OFCCP revise the current “EEO is the Law” poster to include language describing the prohibition against discrimination based on compensation inquiries, discussions, or disclosures, instead of requiring publication of the prescribed nondiscrimination provision in employee manuals and handbooks. Another commenter challenged the use of prescribed language by the OFCCP’s Director. The commenter stated that contractors would be best suited to develop language that articulates both employee and employer rights and obligations.

OFCCP believes that contractors can accomplish the goal of providing notice of the nondiscrimination provision to applicants and employees through existing structures, such as handbooks and manuals. Moreover, OFCCP is mindful of the additional burden that a new posting requirement would impose on contractors, as explained in the below Regulatory Procedures section of this preamble. OFCCP also considered the suggestion that individual contractors develop the language they would use to describe the nondiscrimination provision in their employee handbooks and manuals. However, OFCCP believes that uniformity of such language is necessary to ensure consistency and clarity in the information provided to applicants and employees. Of course, nothing in this rule limits contractors’ ability to provide additional information to their employees about employer and employee rights and obligations. Further, OFCCP seeks to lessen the costs and burden associated with dissemination of the nondiscrimination provision by prescribing the language to describe it. Accordingly, OFCCP declines to make the suggested changes and adopts the dissemination requirements proposed in the NPRM into the final rule.

OFCCP agrees with the suggested inclusion of language describing the prohibition against discrimination based on compensation inquiries, discussions, or disclosures on the “EEO is the Law” poster that contractors are currently required to post. OFCCP will take necessary steps toward producing a poster with this new language. However, posting the “EEO is the Law” poster will not eliminate the obligation

to publish the prescribed nondiscrimination provisions in employee manuals and handbooks.

In the proposed rule, OFCCP sought comments on the feasibility of a proposition that would require contractors with existing manager trainings or meetings to include in them a review of the prohibition on discrimination based on an employee or applicant inquiring about, discussing, or disclosing compensation information. The training requirement, as proposed, would have applied only to contractors that provide manager trainings or meetings; OFCCP would have encouraged other contractors to adopt such training as a best practice for minimizing the likelihood of workplace discrimination. OFCCP received five comments in support and three comments in opposition of this proposed requirement.

Generally, commenters supporting the training proposal asserted that requiring manager training should be required for all contractors. Such a requirement would ensure effective implementation of the new provision, particularly for those contractors with longstanding policies that prohibit wage discussions. Some of these commenters asserted further that contractors with existing training could incorporate required new training into already existing training sessions, as proposed. One commenter suggested extending the training requirement to require contractors to provide employees with individual notice at staff meetings, performance reviews, and other channels.

However, commenters in opposition to the training requirement generally asserted that the proposed training provision would not guarantee effectiveness, would create confusion, would involve significant expense, and would be unnecessary given that contractors are likely already subject to similar Federal and state provisions. One commenter specifically asserted that requiring training for some contractors while only encouraging it for other contractors would create confusion amongst the regulated community with regard to what is required for compliance. Another commenter stated that contractors would achieve increased compliance with the new nondiscrimination provision through clearer guidance from OFCCP as opposed to mandated contractor training. Yet another commenter opposed the requirement because the expense for contractors to update existing training programs would be significant. Such an update would require several levels of internal company review, in addition to costs to

re-deploy training modules. Rather than impose a training requirement on some contractors, some of the comments in opposition suggested that OFCCP only encourage providing this training as a best practice for all contractors.

After consideration of the foregoing comments, the final rule does not require any contractors to modify their existing trainings or meetings to include a review of the prohibition on discriminating based on an employee or applicant inquiring about, discussing, or disclosing compensation information. In making this determination, OFCCP considered the added burden to contractors resulting from them modifying their training materials, as well as the potential for contractors to become confused about which of them would be covered by the training requirement. Although this final rule does not require training, OFCCP encourages all contractors to incorporate personnel training on this new nondiscrimination provision as a best practice.

Alternatives or Additions to Proposed Regulations

In the NPRM, OFCCP requested comments from small contractors on possible alternatives that would minimize the impact of the proposed rule while still accomplishing its goals. Specifically, OFCCP invited interested persons to submit comments on NPRM estimates, including the number of small entities affected by the Order’s prohibition on Federal contractors discriminating against employees and job applicants, the compliance cost estimates, and whether alternatives exist that would reduce burden on small entities while still remaining consistent with the objectives of Executive Order 13665.

OFCCP received two comments proposing alternative approaches. The commenters suggested that the final rule require Federal contractors to create and maintain publicly available employee pay scales, similar to the pay scales maintained for Federal employees. The commenters’ proposal is beyond the scope of Executive Order 13665 and, even if within its scope, such an alternative would be more burdensome than what was proposed in the NPRM. OFCCP further finds that the proposed requirement to disseminate the nondiscrimination provision is the least burdensome means of fostering discussion among employees about pay and allowing for openness among employees to discuss compensation practices.

Regulatory Procedures

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

OFCCP is issuing this final rule in conformity with Executive Orders 13563 and 12866, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 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.

Under Executive Order 12866, OFCCP must determine whether a regulatory action is significant and therefore subject to the requirements of the Executive Order and to review by OMB.⁷⁷ Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule that: (1) has an annual effect 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 Presidents priorities, or the principles set forth in Executive Order 12866.⁷⁸

This rule has been designated a “significant regulatory action” although not economically significant under section 3(f) of Executive Order 12866. The rule is not economically significant because it will not have an annual effect on the economy of \$100 million or more. Accordingly, the rule has been reviewed by the Office of Management and Budget.

The Need for the Regulation

On April 8, 2014, President Barack Obama signed Executive Order 13665,

Non-Retaliation for Disclosure of Compensation Information. 79 FR 20749 (April 11, 2014). This Executive Order prohibits Federal contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. Executive Order 13665 necessitates the regulatory changes in this rule to ensure that employees of Federal contractors and subcontractors are able to discuss their compensation without fear of adverse action. Federal contractors also need the regulatory changes to enhance their ability to detect and remediate unlawful discriminatory practices. OFCCP designed the rule to contribute to a more efficient market in Federal contracting, and to ensure that the most qualified and productive workers receive fair wages. The existence of pay secrecy practices means some workers can be fired for even disclosing their compensation or asking their co-workers how much they earn. Even employers who do not specifically restrict employee communications about compensation take great care to guard individual compensation information. This final rule benefits OFCCP’s enforcement by incorporating into the equal opportunity clauses the prohibition against pay secrecy policies, specifically that an employer cannot discriminate against an employee or applicant who has inquired about, discussed, or disclosed compensation information.⁷⁹ By including the provision in the equal opportunity clauses OFCCP clearly defines such actions as discriminatory and enhances its ability to take action when it finds pay secrecy policies or practices during compliance evaluations and investigations.

Currently, OFCCP lacks sufficient, reliable data to assess the gender- or race-based pay gap experienced by employees of Federal contractors or subcontractors, including how much of the potential pay gap is attributable to pay discrimination instead of nondiscriminatory factors, and how many contractors are violating the pay discrimination laws OFCCP enforces. Pay secrecy ranks among one of the most prevalent employer policies and practices that makes discrimination

more difficult to discover and remediate.⁸⁰ OFCCP’s work led to the determination that there is a substantial need for regulatory action.

U.S. Census data show that more than 15.2 million family households in the United States are headed by women.⁸¹ Nearly 31 percent of these families, or nearly 4,700,000 family households, have incomes that fall below the poverty level.⁸² These and other data provide general information about the potential impact of eliminating pay differentials among men and women, including pay differentials not attributed to discrimination, on the poverty rate of women and their families.⁸³ The data on earnings and the pay gap includes all

⁸⁰ National Equal Pay Task Force, “Fifty Years After the Equal Pay Act,” (June 2013), available at http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf (last accessed Mar. 8, 2015).

⁸¹ U.S. Census Bureau, American Community Survey “1-Year Estimates 2013, Table DP02: Selected Social Characteristics in the United States,” available at <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last accessed Aug. 4, 2015). The calculation uses family households headed by females living in a household with family and no husband. A family household includes a householder, one or more people living in the same household who are related to the householder, and anyone else living in the same household.

⁸² U.S. Census Bureau, American Community Survey, “1-Year Estimates 2013, Geographies: United States, Table DP03: Selected Economic Characteristics,” available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_DP03&prodType=table (last accessed Aug. 4, 2015). To determine whether a household falls below the poverty level, the U.S. Census Bureau considers the income of the householder, size of family, number of related children, and, for 1- and 2-person families, age of householder. The poverty threshold in 2013 was \$18,769 for a single householder and two children under 18.

⁸³ National Women’s Law Center, “Closing the Wage Gap is Crucial for Women of Color and Their Families,” (Nov. 2013), available at http://www.nwlc.org/sites/default/files/pdfs/2013.11.13_closing_the_wage_gap_is_crucial_for_woc_and_their_families.pdf (last accessed Aug. 20, 2015). Unequal wages exacerbate poverty rates for many women of color and their families, even among lower-wage earners. The wage gap also makes it difficult to women of color to move upward into the middle class; National Women’s Law Center, “Insecure and Unequal: Poverty and Income Among Women and Families, 2000–2012,” (Sept. 26, 2013), available at <http://www.nwlc.org/resource/insecure-unequal-poverty-among-women-and-families-2000-2012>. Compares poverty rates for adults 18 and older for women and men, for white, non-Hispanics, Asians and Native Americans. Only Native American women have higher poverty rates than Hispanic and African-American women; Lauren Howard, “Wage Disparity Still a Concern?,” available at <http://www.state.tn.us/sos/ecw/Wage%20Disparity%20Article.pdf> citing the Institute for Women’s Policy Research, “Still a Man’s Labor Market: The Long-Term Earnings Gap.” Vulnerability resulting from the damaging effects of lifelong pay inequity is evident in the 20 percent poverty rate shared by senior citizen women who are widowed or divorced or have never married.

⁷⁹ The final rule includes an exception for employees (e.g., payroll personnel) who have access to the compensation information of other employees or applicants as a part of such employee’s essential job functions. In certain instances, employers may take adverse action against these employees for making compensation disclosures.

⁷⁷ 58 FR 51735.

⁷⁸ *Id.*

employers and all employees in the U.S., whereas this rule would apply to only a subset of such employers and employees. Therefore, the potential impact of this rule would be much smaller than the impact of eliminating pay differentials among all working men and women.

Discrimination, occupational segregation, and other factors contribute to creating and maintaining a gap in earnings and keeping a significant percentage of women in poverty. It is worth noting, however, that some research has established that women earn less than men regardless of the field or occupation.⁸⁴ According to some studies, differences in occupations result in occupational segregation which contributes to the wage gap⁸⁵ and the effect is more pronounced in jobs requiring higher levels of education.⁸⁶ The gender pay gap may also affect the economy as a whole as it exists for both women and men of color when compared to white, non-Hispanic men. At the beginning of 2015, median weekly earnings for African-American men working at full-time jobs totaled \$680 per week, only 76 percent of the median for white men (\$897).⁸⁷ According to BLS data, the median weekly earnings for African-American women equaled \$611 per week, only 68 percent of the median for white men.

⁸⁴ Ariane Hegewisch et al., "Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap," Briefing Paper IWPR #C377, Institute for Women's Policy Research (2010).

⁸⁵ Ariane Hegewisch and Heidi Hartmann, Ph.D., *Occupational Segregation and the Gender Wage Gap: A Job Half Done*, (Jan. 2014), sponsored by the U.S. Department of Labor Women's Bureau, available at <http://www.iwpr.org/publications/pubs/occupational-segregation-and-the-gender-wage-gap-a-job-half-done> (last accessed Aug. 20, 2015); U.S. Department of Labor, Women's Bureau, "The Economic Status of Women of Color: A Snapshot," available at http://www.dol.gov/wb/media/reports/WB_WomenColorFactSheet.pdf (last accessed Aug. 20, 2015). Ongoing occupational segregation is a persistent contributor to the wage gap for all women, but particularly so for Black and Hispanic women. See also National Women's Law Center, "The 10 Largest Jobs Paying Under \$10.10/Hour Are Majority Women" (Apr. 2013), available at <http://www.nwlc.org/sites/default/files/pdfs/womendominatedminwageoccupations.pdf> (last accessed Aug. 4, 2015).

⁸⁶ Sarah Jane Glynn, Center for American Progress, "Explaining the Gender Wage Gap," (May 2014), available at <https://www.americanprogress.org/issues/economy/report/2014/05/19/90039/explaining-the-gender-wage-gap/> (last accessed Aug. 3, 2015).

⁸⁷ Bureau of Labor Statistics, U.S. Department of Labor, "Current Population Survey, Median usual weekly earnings of full-time wage and salary workers by selected characteristics, annual averages," available at <http://www.bls.gov/news.release/wkyeng.t07.htm> (last accessed Feb. 12, 2015).

Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the requirements in the final rule at §§ 60–1.3, 60–1.4 and 60–1.35. The estimated labor cost to contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" issued in December 2013, which lists total compensation for management, professional, and related occupations as \$51.58 per hour and for administrative support as \$24.23 per hour. Unless specified otherwise, OFCCP estimates that 25 percent of the time burden for complying with this rule will be spent by persons in management, professional and related occupations and 75 percent will be spent by persons in administrative support occupations.

There are approximately 500,000 contractor companies or firms registered in the General Service Administration's System for Award Management (SAM). Therefore, OFCCP estimates that 500,000 contractor companies or firms may be affected by the final rule.⁸⁸ This may be an overestimate because SAM captures firms that do not meet OFCCP's jurisdictional dollar threshold. OFCCP's jurisdiction covers active contracts with a value in excess of \$10,000.

Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials including, but not limited to, fact sheets and "Frequently Asked Questions." OFCCP will also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may

⁸⁸ Legacy CCR Extracts Public ("FOIA") Data Package, May 2014, available at <https://www.sam.gov/portal/public/SAM/> (last accessed February 12, 2015). There is at least one reason to believe the SAM data yield an underestimate of the number of entities affected by this rule and other reasons to believe the data yield an overestimate. SAM does not necessarily include all subcontractors, thus potentially leading to an underestimate, but this limitation of the data is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus be included in the SAM data. The SAM data may produce an overestimate of the entities affected by this rule because the data set includes: inactive contractors, contracts below this proposed rule's \$10,000 threshold, and recipients of Federal grants and Federal financial assistance.

face, when complying with the requirements.

OFCCP believes that Federal contractors' human resources or personnel managers will be responsible for understanding or becoming familiar with the new requirements. OFCCP estimates that it will take one hour for a management professional at each contractor company to either read the compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn more about the new requirements. One commenter asserted that one hour was an underestimation of the time needed for familiarization. The commenter asserted that multiple individuals at each contractor company would be required to become familiar with the requirements. OFCCP acknowledges that the precise amount of time each company will take to engage in certain activities will be difficult to estimate. However, the estimate used does take into account the fact that many contractors are smaller and may not have the same staff or human resources capabilities. Therefore, OFCCP retains its original estimate that it will take 60 minutes for regulatory familiarization. The estimated cost of this burden is assumed to be entirely at the Management, Professional, and Related Occupations level. Consequently, the estimated time burden for rule familiarization is 500,000 hours (500,000 contractor companies × 1 hour = 500,000 hours). The estimated cost is \$25,790,000 (500,000 hours × \$51.58/hour = \$25,790,000).

Cost of New Provisions

The final rule prohibits discrimination based on employees and applicants inquiring about, discussing, or disclosing their compensation or the compensation of others unless the employee has access to compensation information of other employees or applicants as a part of such employee's essential job functions. The prohibition against discrimination would apply to all Federal contractors and subcontractors and federally assisted construction contractors and subcontractors with contracts or subcontracts in excess of \$10,000. The new requirements are located at §§ 60–1.3, 60–1.4 and 60–1.35.

The final rule amends § 60–1.3 to include definitions for compensation, compensation information, and essential job functions as it relates to employees who have access to compensation information. Some commenters indicated that OFCCP should be required to assess additional burden because of the compensation

definition. The commenter asserted that the definition would require contractors to change their analysis of employment processes. Another commenter suggested that OFCCP assess the burden for additional data requests that are made during compliance evaluations. OFCCP declines to adopt either of these two positions. The final rule does not change the requirement to conduct an in-depth analysis of employment practices. Contractors are required by existing regulations to analyze their personnel activity data annually, including compensation, to determine whether and where impediments to equal employment opportunity exist. The final rule establishes a definition of compensation, but does not change the existing regulatory requirement at 41 CFR 60–2.17(b)(3). OFCCP's guidance and regulations have historically included salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options, profit sharing and retirement.⁸⁹ Thus, OFCCP found no need to change the assessed burden for this requirement. The provision of a definition for compensation does not increase the costs of compliance with this rule. In response to the comment related to requests made during compliance evaluations, the addition of a definition of compensation does not change the manner by which OFCCP conducts its compliance evaluations, nor does it require the compliance officers to collect more data. The Federal Contract Compliance Manual and OFCCP's Directive 2013–03 instruct compliance officers to analyze all aspects of pay. Thus, the requests for additional data are not a new cost or burden to contractors.

In § 60–1.4(a)(3), the final rule mandates that each contracting agency incorporate the prohibition into the equal opportunity clause of Federal contracts and contract modifications, if the provision was not included in the original contract. More specifically, existing § 60–1.4(a)(3) provisions on notices sent to each labor union or representative of workers would be placed in § 60–1.4(a)(4); existing § 60–1.4(a)(4) would be placed in § 60–1.4(a)(5); existing § 60–1.4(a)(5) would be placed in § 60–1.4(a)(6); existing § 60–1.4(a)(6) would be placed in § 60–1.4(a)(7); and existing § 60–1.4(a)(7) would be placed in new § 60–1.4(a)(8). The equal opportunity clause may be

incorporated by reference into Federal contracts and subcontracts.

In § 60–1.4(b)(3), the final rule mandates that each administering agency incorporate the prohibition into the equal opportunity clause of a grant, contract, loan, insurance, or guarantee involving federally assisted construction that is not exempted from the equal opportunity clause. More specifically, existing § 60–1.4(b)(3) provisions on notices sent to each labor union or representative of workers would be placed in § 60–1.4(b)(4); existing § 60–1.4(b)(4) would be placed in § 60–1.4(b)(5); existing § 60–1.4(b)(5) would be placed in § 60–1.4(b)(6); existing § 60–1.4(b)(6) would be placed in § 60–1.4(b)(7); and existing § 60–1.4(b)(7) would be placed in new § 60–1.4(b)(8). The equal opportunity clause may be incorporated by reference into federally assisted contracts and subcontracts.

To comply with this requirement, contractors may incorporate the equal opportunity clause into their nonexempt subcontracts either in its entirety or by including it by reference. While some contractors may need to locate the revised equal opportunity clause and incorporate it into existing contract templates, other contractors that include the clause by reference will make no change to existing subcontract language. One commenter asserted that it would take at least ten hours to comply with the new requirement. The commenter asserted that it would involve attorneys, procurement, logistics, and vendor services. However, the commenter did not provide any specificity that would explain or support this estimate. OFCCP disagrees with this assessment as the activity simply involves finding the new clause, provided by either OFCCP or the procurement officer, and incorporating that new wording into a contract template. OFCCP's estimate takes into account the fact that many contractors are smaller and may not have staffing or departments devoted to procurement, logistics, or vendor services. Therefore, OFCCP retains its original estimate that contractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is included. The estimated time burden for this provision is 125,000 hours (500,000 contractors × 0.25 hours = 125,000 hours). The estimated cost of this provision is \$3,883,438 ((125,000 hours × 0.25 × \$51.58) + (125,000 × 0.75 × \$24.23) = \$3,883,438).

The final rule adds § 60–1.35(a) and (b) discussing contractor defenses to an allegation of violation of § 60–1.4(a)(3) and (b)(3). The text of paragraph (a) incorporates the text in section 5(a) of

Executive Order 13665. The text of paragraph (b) is drawn from the text in section 2(b) of the same Executive Order. There is no burden associated with the inclusion of these new paragraphs.

Section 60–1.35(c) of the final rule requires contractors to disseminate the nondiscrimination provision by incorporating it into existing employee manuals or handbooks, and disseminating it to employees and to job applicants. This dissemination can be executed electronically or by posting a copy of the provision in conspicuous places available to employees and applicants for employment. In person or face-to-face communication of the provision is not required or recommended, however, contractors may use this method if they typically communicate information to all employees or applicants in this manner. In order to reduce the burden to contractors associated with disseminating the provision, the final rule requires contractors to adopt the nondiscrimination language provided by OFCCP into contractors' existing employee manuals or handbooks and otherwise make it available to employees and applicants. One commenter indicated that disseminating the policy to employees and applicants would take considerably more time as it would not only be necessary to incorporate the provision into handbooks and post the policy, but it would also require additional personnel to communicate and approve the changes to handbooks and postings. The provisions of this rule apply to all Federal contractors and subcontractors, thus when estimating the cost, it is necessary to factor in that many Federal contractors are small and do not have the same staff or human resources capabilities. Thus, OFCCP retains its original calculation, as it is more reflective of the range of Federal contractors and their respective practices. A second commenter indicated that contractors should be allowed to develop their own statements for incorporation into handbooks. OFCCP disagrees with both of these commenters. By providing the required language, OFCCP significantly reduces the burden of this requirement. The statement as written in the regulations must be included verbatim into existing handbooks. Allowing contractors to develop their own statements would be more burdensome for contractors, requiring additional resources for the development and review of the statement. Moreover, using a uniform statement eliminates confusion about

⁸⁹ Federal Contract Compliance Manual Chapter 2, Section 2L03 and Chapter 3, section 3H03 (Oct. 2014).

the appropriateness of the statement, and minimizes possible confusion by employees and applicants about the nature and purpose of the statement. Thus, OFCCP has selected the least burdensome alternative.

Section 60–1.35(c)(i) requires contractors to include the nondiscrimination provision in existing employee manuals or handbooks. OFCCP assumes that most contractors (98 percent) maintain these documents electronically.⁹⁰ For those contractors that maintain the documents electronically, we are not requiring contractors to physically reproduce their manuals to include the provision if they do not maintain hardcopies of manuals and handbooks. However, for those contractors that do not maintain their handbooks electronically, OFCCP believes those contractors (2 percent) will prepare and print a single errata sheet to update their hardcopy manual. OFCCP estimates it will take 20 minutes for contractors to locate, review, and reproduce the provision as provided by OFCCP and 15 minutes to incorporate it into existing employee manuals or handbooks; the total time required is 35 minutes (or 0.58 hours) to comply with this provision. Therefore, OFCCP estimates the time burden of this provision is 290,000 hours (500,000 contractor companies × 0.58 hours = 290,000 hours). The estimated cost of this provision is \$9,009,575 ((290,000 hours × 0.25 × \$51.58) + (290,000 hours × 0.75 × \$24.23)).⁹¹ OFCCP believes that this estimation may overstate the burden as it assumes that all 500,000 contractors have a handbook including contractors with fewer than 10 employees. The smaller contractors, those with 10 or fewer employers, represent 58 percent of the contractors in the SAM database and are the less

likely to have formal employee handbooks.

Section 60–1.35(c)(ii) requires contractors to disseminate the nondiscrimination provision to employees and to job applicants. This dissemination can be executed by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment. OFCCP believes that 99 percent of contractors will post the information electronically while 1 percent will post the provision on employee bulletin boards. OFCCP’s estimate is that it will take 15 minutes (or 0.25 hours) for contractors posting the provision electronically to prepare and post the provision. Additionally, OFCCP estimates it will take 75 minutes (or 1.25 hours) for contractors posting the provision manually to prepare the provision and post it in conspicuous places available to employees and applicants for employment. Therefore, OFCCP estimates that the time burden of this provision is 130,000 hours ((500,000 contractor companies × 99% × 0.25 hours) + (500,000 contractor companies × 1% × 1.25 hours) = 130,000 hours). The estimated cost of this provision is \$4,038,775 ((123,750 hours × 0.25 × \$51.58 + 123,750 hours × 0.75 × \$24.23) + (6,250 hours × 0.25 × \$51.58) + (6,250 hours × 0.75 × \$24.23)).⁹²

Contractors are required to maintain documentation of other notices; the regulations implementing Executive Order 11246, VEVRAA and Section 503 currently require recordkeeping related to personnel and employment activity. See 41 CFR 60–1.12; 60–4.3(a)(7); 60–300.80; 60–741.80. Consequently, there is no new time burden or cost for retaining copies of the notices to employees.

OFCCP estimates that the combined time burden for becoming familiar with

and complying with the final rule is 1,045,000 hours (500,000 hours + 125,000 hours + 290,000 hours + 130,000 hours = 1,045,000 hours).

Operations and Maintenance Costs

In addition to the time burden calculated above, OFCCP estimates that contractors will incur operations and maintenance costs, mostly in the form of materials.

Section 60–1.35(c)(i)

OFCCP estimates that 1 percent of contractors (5,000 contractor companies) will incorporate the nondiscrimination provision into their existing hardcopy handbook or manual. OFCCP estimates that these 5,000 contractor companies will incorporate into an existing handbook or manual a single one-page errata sheet that includes the nondiscrimination provision. OFCCP estimates the one-time operations and maintenance cost of this provision is \$400 (500,000 contractors × 1% × 1 page × \$0.08 = \$400).

Section 60–1.35(c)(ii)

OFCCP estimates that 1 percent of contractors will inform employees by posting the provision on existing employee bulletin boards. OFCCP assumes that on average these contractors will post the policy on 10 bulletin boards. Therefore OFCCP estimates the operations and maintenance cost of this provision is \$4,000 (500,000 contractor companies × 1% × 10 pages × \$0.08 = \$4,000).

The estimated total first year cost of the final rule is \$42,726,188 or \$85 per contractor company. Below, in Table 1, is a summary of the burden hours and costs; Table 2 shows the total cost summary for the first year and recurring years.

TABLE 1—CONTRACTOR REQUIREMENTS

Estimated First-Year Burden Hours and Costs		
Section	Burden hours	Costs
Regulatory Familiarization	500,000	\$25,790,000
60–1.3 Definitions	0	0
60–1.4(a) and (b) Contracting agencies amend the equal opportunity clause	125,000	3,883,438
60–1.4(d) Change “Deputy Assistant Secretary” to “Director of OFCCP”	0	0
60–1.35(c)(i) Incorporation into manuals or handbooks	290,000	9,009,575
60–1.35(c)(ii) Making the provision available to employees and applicants via electronic posting or manually posting a copy	130,000	4,038,775

⁹⁰This is based on the Equal Employment Opportunity Commission representation that 98 percent of the employers submitting the EEO–1 report file their submissions electronically through a Web based online filing system. See Supporting Statement for Recordkeeping and Reporting Requirements for Employer Information Report

(EEO–1), p. 1, OMB Control 3046–0007 Employer Information Report (EEO–1), available at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201412-3046-001 (last accessed May 5, 2015).

⁹¹OFCCP assumes that administrative support will identify the appropriate clause, and insert it

into the handbook (75 percent) with management oversight (25 percent).

⁹²OFCCP assumes that administrative support will copy and paste the clause into a notice and either post or send it electronically (75 percent) with management oversight (25 percent).

TABLE 1—CONTRACTOR REQUIREMENTS—Continued

Estimated First-Year Burden Hours and Costs		
Section	Burden hours	Costs
Total First-Year Burden Hours and Costs	1,045,000	42,721,788
Estimated Recurring Burden Hours and Costs		
Section	Burden hours	Costs
60–1.35(a) and (b) Defenses	0	0
Total Annual Recurring Burden Hours and Costs	0	0
Total Operations and Maintenance Costs	0	4,400
Total Burden Hours and Cost of the Final Rule	1,045,000	\$42,726,188

TABLE 2—TOTAL COST SUMMARY

	Hours	Costs	Per contractor company
First Year Hours/Costs	1,045,000	\$42,726,188	\$85
Annual Recurring Hours/Cost	0	0	0

Summary of Benefits and Transfers

Executive Order 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 rule, to the extent that it is effective, has equity and fairness benefits, which are explicitly recognized in Executive Order 13563. Enabling the employees and applicants of Federal contractors to discuss their compensation without fear of adverse action can contribute to reducing pay discrimination and ensuring that qualified and productive employees receive fair compensation. OFCCP designed the final rule to achieve these benefits by:

- Supporting more effective enforcement of the prohibition against compensation discrimination.
- Providing better remedies to workers victimized by compensation discrimination.
- Increasing employees' and applicants' understanding of the value of their skills in the labor market.
- Enhancing the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices.

Social Benefits of Improved Nondiscrimination Enforcement

Social science research suggests antidiscrimination law can have broad social benefits, not only to those workers who are explicitly able to mobilize their rights and obtain redress,

but also to the workforce and the economy as a whole. In general, discrimination is incompatible with an efficient labor market. Discrimination interferes with the ability of workers to find jobs that match their skills and abilities and to obtain wages consistent with a well-functioning marketplace.⁹³ Discrimination may reflect market failure, where collusion or other anti-discriminatory practices allow majority group members to shift the costs of discrimination to minority group members.⁹⁴

For this reason, effective nondiscrimination enforcement can promote economic efficiency and growth. For example, a number of scholars have documented the benefits of the civil rights movement and the adoption of Title VII of the Civil Rights Act of 1964 on the economic prospects of workers and the larger economy.⁹⁵ One recent study estimated that improved workforce participation by women and minorities, including

⁹³ Shelley J. Lundberg and Richard Starz, "Private Discrimination and Social Intervention in Competitive Labor Markets," 73 *American Economic Review* 340 (1983); Dennis J. Aigner and Glen G. Cain, "Statistical Theories of Discrimination in Labor Markets," 30 *Industrial and Labor Relations Review*, 175 (1977).

⁹⁴ Kenneth J. Arrow, "What Has Economics to Say about Racial Discrimination?," 12 *The Journal of Economic Perspectives* 91 (1998).

⁹⁵ J. Hoult Verkerke, "Free to Search," 105 *Harvard Law Review* 2080 (1992); James J. Heckman and Brook S. Payner, "Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina," 79 *American Economic Review* 138 (1989).

through adoption of civil rights laws and changing social norms, accounts for 15–20 percent of aggregate wage growth between 1960 and 2008.⁹⁶ On a smaller scale, the benefits of this rule have the potential to make an economic impact by providing employees of Federal contractors with a tool that allows them to identify potential compensation discrimination that undermines their financial security.

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.*, as amended requires agencies to prepare regulatory flexibility analyses and make them available for public comment, when proposing regulations that will have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 603. If the rule is not expected to have a significant economic impact on a substantial number of small entities the RFA allows an agency to certify such, in lieu of preparing an analysis. See 5 U.S.C. 605. As explained in the initial Regulatory Flexibility Act and Executive Order 13272 section of the proposed rule, OFCCP did not expect the proposed rule to have a significant economic impact on a substantial number of small entities. 79 FR 55712 (September 17, 2014). However in the interest of transparency and to provide

⁹⁶ Hsieh, C., Hurst, E. Jones, C. I., Klenow, P. J. "The Allocation of Talent and U.S. Economic Growth," *NBER Working Paper* (2013).

an opportunity for public comment, OFCCP prepared an initial regulatory flexibility analysis rather than certifying that the proposed rule was not expected to have a significant economic impact on a substantial number of small entities. In the NPRM, OFCCP specifically requested comments on the initial regulatory flexibility analysis, including the number of small entities affected by the Executive Order's prohibition on Federal contractors from discriminating against employees and job applicants, the compliance cost estimates, and whether alternatives exist that will reduce burden on small entities while still remaining consistent with the objective of Executive Order 13665. See 79 FR 55726 (September 17, 2014). While OFCCP received eleven comments that addressed the costs and burdens of the proposed rule, none commented on the initial regulatory flexibility analysis. Thus, as explained below, OFCCP is adopting the proposed rule's economic analysis for purposes of the final rule.

In the NPRM, OFCCP estimated the impact on small entities that are covered contractors of complying with the requirements contained in this final rule. OFCCP certifies that this rule will not have a significant economic impact on a substantial number of small entities. In making this certification, OFCCP determined that all small entities subject to Executive Order 11246 would be required to comply with all of the provisions of the final rule and that the compliance cost would be approximately \$85 per contractor. Such compliance requirements are more fully described above in other portions of this preamble. The following section analyzes the cost of complying with Executive Order 13665.

In estimating the annual economic impact of this rule on the economy, OFCCP determined the compliance cost of the rule and whether the costs would be significant for a substantial number of small contractor firms (*i.e.* small business firms that enter into contracts with the Federal Government). If the estimated compliance costs for affected small contractor firms are less than 3 percent of small contractor firms' revenues, OFCCP considered it appropriate to conclude that this rule will not have a significant economic impact on the small contractor firms covered by Executive Order 13665. OFCCP has chosen 3 percent as the significance criteria; however, using this benchmark as an indicator of significant impact may overstate the significance of such an impact, since the costs associated with prohibiting discrimination against employees and

job applicants who inquire about or discuss their own compensation or the compensation of other employees or applicants are expected to be mitigated to some degree by the benefits of the rule. The benefits, which may include improved employee productivity and decreased employee turnover, are discussed more fully in the preamble of this final rule.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards,⁹⁷ the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).⁹⁸ Since Federal contractors are not limited to specific industries, OFCCP assessed the impact of the proposed rule across the 19 industrial classifications.⁹⁹ Because data limitations do not allow OFCCP to determine which of the small firms within these industries are Federal contractors, OFCCP assumes that these small firms are not significantly different from the small Federal contractors that will be directly affected by the rule.

OFCCP used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of the total annual receipts. First, OFCCP used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. OFCCP applied the SBA small business size standards to the SUSB data to determine the number of small firms in the affected industries. Then OFCCP used receipts data from the SUSB to calculate the cost per firm as a percent of total receipts by dividing the estimated

annual cost per firm by the average annual receipts per firm. This methodology was applied to each of the industries and the results by industry are presented in Tables 3–21 below.

In sum, the increased cost of compliance resulting from the proposed rule is *de minimis* relative to revenue at small contractor firms no matter their size. All of the industries had an annual cost per firm as a percent of receipts of 3 percent or less. For instance, the manufacturing industry cost is estimated to range from 0.00 percent for firms that have average annual receipts of approximately \$985 million to 0.02 percent for firms that have average annual receipts of under \$500,000. Management of companies and enterprises is the industry with the highest relative costs, with a range of 0.00 percent for firms that have average annual receipts of approximately \$2 million to 0.36 percent for firms that have average annual receipts of under \$24,000. Therefore, OFCCP determined that in no instance was the effect of the proposed rule greater than 3 percent of total receipts.

OFCCP then determined the number of small contractor firms actually affected by the proposed rule. This information is not readily available. The best source for the number of small contractor firms that are affected by this proposed rule is GSA's System for Award Management (SAM). OFCCP used SAM data to estimate the number of affected small contractor firms since SAM data allow us to directly estimate the number of small contractor firms. Federal contractor status cannot be discerned from the SBA firm size data. It can only be used to estimate the number of small firms, not the number of small contractor firms. OFCCP used the SBA data to estimate the impact of the proposed regulation on a "typical" or "average" small firm in each of the 19 industries. OFCCP then assumed that a typical small firm is similar to a small contractor firm. Thus, based on its analysis, OFCCP believes that this rule will not have a significant economic effect on a substantial number of small businesses.

Based on the most current SAM data available, if OFCCP defines small as fewer than 500 employees, then there are 328,552 small contractor firms. If OFCCP defines small as firms with less than \$35.5 million in revenues, then there are 315,902 small contractor firms. Thus, OFCCP established the range from 315,902 to 328,552 as the total number of small contractor firms. Of course, not all of these contractor firms will be impacted by the proposed rule; only those contractor firms that have policies

⁹⁷ U.S. Small Business Administration, Office of Advocacy, "Firm Size Data, Statistics of U.S. Businesses, Business Dynamics Statistics, Business Employment Dynamics, and Nonemployer Statistics," available at <http://www.sba.gov/advocacy/849/12162#susb> (last accessed June 9, 2014).

⁹⁸ U.S. Census Bureau, Statistics of U.S. Businesses, "Latest SUSB Annual Data," available at <http://www.census.gov/econ/susb/> (last accessed June 9, 2014).

⁹⁹ Agriculture, Forestry, Fishing, and Hunting Industry (North American Industry Classification System (NAICS) 11, Mining NAICS 21, Utilities NAICS 22, Construction NAICS 23, Manufacturing, NAICS 31–33, Wholesale Trade NAICS 42, Retail Trade NAICS 44–45, Transportation and Warehousing NAICS 48–49, Information NAICS 51, Finance and Insurance NAICS 52, Real Estate and Rental and Leasing NAICS 53, Professional, Scientific, and Technical Services NAICS 54, Management of Companies and Enterprises NAICS 55, Administrative and Support and Waste Management and Remediation Services NAICS 56, Educational Services NAICS 61, Healthcare and Social Assistance NAICS 62, Arts, Entertainment, and Recreation NAICS 71, Accommodation and Food Services NAICS 72, Other Services NAICS 81.

that prohibit employees and job applicants from inquiring about, discussing or disclosing their own compensation or the compensation of other employees or job applicants. Thus, this range is an overestimate of the number of firms affected by the proposed rule because some of those small contractor firms do not have such a policy or practice. As the proposed

regulation applies to contractors covered by Executive Order 11246, OFCCP estimates that the range of small firms impacted ranges from 315,902 to 328,552 or all covered Federal contractor companies.

OFCCP has closely reviewed the economic analysis it utilized in the proposed rule and carefully considered all the comments received. Based on its

review and consideration, OFCCP has concluded that the method used to conduct the economic analysis in the proposed rule reasonably estimated the annual effect of the rule, based on the data sources available to OFCCP. OFCCP is accordingly adopting the proposed rule's economic analysis for purposes of the final rule.

TABLE 3—COST PER SMALL FIRM IN THE AGRICULTURE, FORESTRY, FISHING, AND HUNTING INDUSTRY, THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$0.75 MILLION–\$27.5 MILLION

Agriculture, forestry, fishing, and hunting industry							
	Number of firms	Total number of employees	Average number of employees per firm ¹	Annual cost per firm ²	Annual receipts	Average receipts per firm ³	Annual cost per firm as percent of receipts ⁴ (percent)
Firms with sales/receipts/revenue below \$100,000	5,086	N/A	N/A	\$85	\$247,056,000	\$48,576	0.17
Firms with sales/receipts/revenue of \$100,000 to \$499,999	8,939	21,523	2.4	85	2,231,355,000	249,620	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	3,670	19,631	5.3	85	2,620,344,000	713,990	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	3,230	30,944	9.6	85	4,975,078,000	1,540,272	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	1,117	20,049	17.9	85	3,811,000,000	3,411,817	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	289	8,997	31.1	85	1,730,128,000	5,986,602	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	165	7,588	46.0	85	1,340,763,000	8,125,836	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	112	6,130	54.7	85	1,288,588,000	11,505,250	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	55	4,042	73.5	85	874,841,00	15,906,200	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	44	5,325	121.0	85	858,761,000	19,517,295	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	26	2,800	107.7	85	595,387,000	22,899,500	0.00

N/A = not available, not disclosed

¹ In the case of agriculture, forestry, fishing, and hunting firms with receipts of \$100,000 to \$499,999, the average number of employees per firm (2.4) was derived by dividing the total number of employees (21,523) by the number of firms (8,939).

² The annual cost per firm (\$85) accounts for regulatory familiarization, including the policy in existing handbooks, including it in existing manager meetings, and informing employees of the prohibition.

³ In the case of agriculture, forestry, fishing, and hunting firms with receipts of \$100,000 to \$499,999, the average receipts per firm (\$249,620) was derived by dividing the total annual receipts (\$2,231,355,000) by the number of firms (8,939).

⁴ In the case of agriculture, forestry, fishing and hunting firms with receipts of \$100,000 to \$499,999, the annual cost per firms as a percent of receipts (0.03 percent) was derived by dividing the annual cost per firm (\$119) by the average receipts per firm (\$249,620).

TABLE 4—COST PER SMALL FIRM IN THE MINING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS 500 EMPLOYEES

Mining industry							
	Number of firms	Total number of employees	Average number of employees per firm ¹	Annual cost per firm ²	Annual receipts	Average receipts per firm ³	Annual cost per firm as percent of receipts ⁴ (percent)
Firms with 0–4 employees	11,223	17,874	1.6	\$85	\$6,809,517,000	\$606,747	0.01
Firms with 5–9 employees	3,186	21,314	6.7	85	6,304,810,000	1,978,911	0.00
Firms with 10–19 employees	2,451	33,344	13.6	85	9,092,457,000	3,709,693	0.00
Firms with 20–99 employees	2,775	107,447	38.7	85	32,035,288,000	11,544,248	0.00
Firms with 100–499 employees	690	102,299	148.3	85	38,463,690,000	55,744,478	0.00

¹ In the case of mining firms with 0–4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (17,874) by the number of firms (11,223).

² The annual cost per firm (\$85) accounts for regulatory familiarization, including the policy in existing handbooks, including it in existing manager meetings, and informing employees of the prohibition.

³ In the case of mining firms with 04 employees, the average receipts per firm (\$606,747) was derived by dividing the total annual receipts (\$6,809,517,000) by the number of firms (11,223).

⁴ In the case of mining firms with 04 employees, the annual cost per firm as a percent of receipts (0.01 percent) was derived by dividing the annual cost per firm (\$119) by the average receipts per firms (\$606,747).

TABLE 5—COST PER SMALL FIRM IN THE UTILITIES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS 250–1,000 EMPLOYEES

Utilities industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with 0–4 employees	3,212	6,181	1.9	\$85	\$7,238,519,000	\$2,253,586	0.00
Firms with 5–9 employees	1,020	6,546	6.4	85	4,373,888,000	4,288,125	0.00
Firms with 10–19 employees	513	6,722	13.1	85	5,657,251,000	11,027,780	0.00
Firms with 20–99 employees	870	38,602	44.4	85	27,513,924,000	31,625,200	0.00
Firms with 100–499 employees	309	52,294	169.2	85	53,091,123,000	171,815,932	0.00
Firms with 500+ employees ¹	199	512,412	2,574.9	85	475,894,489,000	2,391,429,593	0.00

¹ The small business size for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.

TABLE 6—COST PER SMALL FIRM IN THE CONSTRUCTION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$15 MILLION–\$36.5 MILLION.

Construction industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	151,986	N/A	N/A	\$85	\$7,636,718,000	\$50,246	0.17
Firms with sales/receipts/revenue of \$100,000 to \$499,999	316,475	776,806	2.5	85	81,110,428,000	256,293	0.03

TABLE 6—COST PER SMALL FIRM IN THE CONSTRUCTION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$15 MILLION–\$36.5 MILLION.—Continued

Construction industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$500,000 to \$999,999	124,214	642,823	5.2	85	88,028,843,000	708,687	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	110,546	1,049,670	9.5	85	173,054,634,000	1,565,454	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	47,962	864,701	18.0	85	167,758,626,000	3,497,740	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	16,992	492,370	29.0	85	102,502,053,000	6,032,371	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	7,801	308,512	39.5	85	66,977,650,000	8,585,777	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	8,259	427,159	51.7	85	99,174,146,000	12,008,009	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	4,354	289,441	66.5	85	73,881,089,000	16,968,555	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	2,611	209,081	80.1	85	56,928,754,000	21,803,429	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	1,621	150,754	93.0	85	43,119,720,000	26,600,691	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	1,171	121,928	104.1	85	36,848,837,000	31,467,837	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	831	94,903	114.2	85	30,307,198,000	36,470,756	0.00

N/A = not available, not disclosed

TABLE 7—COST PER SMALL FIRM IN THE MANUFACTURING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS 500–1,500 EMPLOYEES

Manufacturing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with 0–4 employees	114,635	213,123	1.9	\$85	\$46,236,636,000	\$403,338	0.02
Firms with 5–9 employees	53,500	358,110	6.7	85	53,036,608,000	991,338	0.01
Firms with 10–19 employees	44,939	612,113	13.6	85	97,897,887,000	2,178,462	0.00

TABLE 7—COST PER SMALL FIRM IN THE MANUFACTURING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS 500–1,500 EMPLOYEES—Continued

Manufacturing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with 20–99 employees	55,603	2,288,585	41.2	85	440,739,564,000	7,926,543	0.00
Firms with 100–199 employees	13,945	2,445,779	175.4	85	634,737,830,000	45,517,234	0.00
Firms with 500+ employees ¹	4,079	7,402,462	1,814.8	85	4,019,587,050,000	985,434,432	0.00

¹ The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.

TABLE 8—COST PER SMALL FIRM IN THE WHOLESALE TRADE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS 100 EMPLOYEES

Wholesale trade industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with 0–4 employees	190,153	325,412	1.7	\$85	\$297,267,502,000	\$1,563,307	0.01
Firms with 5–9 employees	57,366	377,841	6.6	85	249,842,292,000	4,355,233	0.00
Firms with 10–19 employees	39,354	525,216	13.3	85	325,243,478,000	8,264,560	0.00
Firms with 20–99 employees	36,783	1,365,914	37.1	85	899,443,843,000	24,452,705	0.00

TABLE 9—COST PER SMALL FIRM IN THE RETAIL TRADE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION

Retail trade industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	98,659	N/A	N/A	\$85	\$5,008,702,000	\$50,768	0.17
Firms with sales/receipts/revenue of \$100,000 to \$499,999	251,705	727,585	2.9	85	67,380,242,000	267,695	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	122,575	634,006	5.2	85	87,491,736,000	713,781	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	120,985	1,019,672	8.4	85	190,373,341,000	1,573,528	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	55,634	774,581	13.9	85	193,186,239,000	3,472,449	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	19,594	418,263	21.3	85	117,223,823,000	5,982,639	0.00

TABLE 9—COST PER SMALL FIRM IN THE RETAIL TRADE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION—Continued

Retail trade industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	9,582	272,697	28.5	85	80,790,141,000	8,431,449	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	9,824	366,889	37.3	85	115,236,313,000	11,730,081	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	5,310	256,826	48.4	85	86,999,536,000	16,384,093	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	3,498	201,289	57.5	85	72,964,681,000	20,858,971	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	2,438	167,596	68.7	85	61,987,531,000	25,425,566	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	1,835	144,987	79.0	85	55,162,317,000	30,061,208	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	1,491	122,188	82.0	85	50,711,404,000	34,011,673	0.00

N/A = not available, not disclosed.

TABLE 10—COST PER SMALL FIRM IN THE TRANSPORTATION AND WAREHOUSING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION

Transportation and warehousing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	40,510	N/A	N/A	\$85	\$1,939,749,000	\$47,883	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	67,987	181,924	2.7	85	16,284,066,000	239,517	0.04
Firms with sales/receipts/revenue of \$500,000 to \$999,999	22,377	151,091	6.7	85	15,756,895,000	704,156	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	20,915	271,012	13.0	85	32,305,484,000	1,544,608	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	9,183	223,156	24.3	85	31,359,227,000	3,414,922	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	3,550	136,436	38.4	85	20,463,648,000	5,764,408	0.00

TABLE 10—COST PER SMALL FIRM IN THE TRANSPORTATION AND WAREHOUSING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Transportation and warehousing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,800	91,408	50.8	85	14,261,554,000	7,923,086	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,840	123,966	67.4	85	19,933,921,000	10,833,653	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	988	85,367	86.4	85	14,057,603,000	14,228,343	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	621	68,836	110.8	85	11,060,118,000	17,810,174	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	429	51,989	121.2	85	8,257,805,000	19,248,963	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	311	45,274	145.6	85	7,184,425,000	23,101,045	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	235	32,922	140.1	85	5,902,588,000	25,117,396	0.00

N/A = not available, not disclosed.

TABLE 11—COST PER SMALL FIRM IN THE INFORMATION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION

Information industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	15,960	N/A	N/A	\$85	\$767,642,000	\$48,098	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	27,678	80,336	2.9	85	6,876,130,000	248,433	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	10,311	67,954	6.6	85	7,260,927,000	704,192	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	9,808	120,499	12.3	85	15,248,992,000	1,554,750	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	4,508	100,331	22.3	85	15,472,313,000	3,432,190	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,837	65,601	35.7	85	10,856,893,000	5,910,121	0.00

TABLE 11—COST PER SMALL FIRM IN THE INFORMATION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION—Continued

Information industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,018	46,846	46.0	85	8,447,070,000	8,297,711	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,092	68,058	62.3	85	12,300,328,000	11,264,037	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	601	49,812	82.9	85	9,293,544,000	15,463,468	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	389	37,522	96.5	85	7,616,666,000	19,580,118	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	270	30,523	113.0	85	6,512,265,000	24,119,500	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	175	25,649	146.6	85	4,971,718,000	28,409,817	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	136	21,553	158.5	85	4,082,897,000	30,021,301	0.00

N/A = not available, not disclosed.

TABLE 12—COST PER SMALL FIRM IN THE FINANCE AND INSURANCE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION

Finance and insurance industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	61,548	N/A	N/A	\$85	\$2,931,522,000	\$47,630	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	118,169	308,539	2.6	85	29,379,598,000	248,624	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	33,703	177,822	5.3	85	23,302,679,000	691,413	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	23,023	222,822	9.7	85	35,135,972,000	1,526,125	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	9,728	185,783	19.1	85	33,574,070,000	3,451,282	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	4,108	118,100	28.7	85	24,483,200,000	5,959,883	0.00

TABLE 12—COST PER SMALL FIRM IN THE FINANCE AND INSURANCE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION—Continued

Finance and insurance industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	2,405	90,442	37.6	85	20,088,983,000	8,353,007	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	2,820	148,252	52.6	85	33,267,079,000	11,796,837	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	1,564	106,896	68.3	85	25,663,650,000	16,408,983	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,028	87,611	85.2	85	21,843,640,000	21,248,677	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	685	65,621	95.8	85	17,478,694,000	25,516,342	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	515	58,841	113.6	85	15,619,023,000	30,328,200	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	418	51,263	122.6	85	14,150,222,000	33,852,206	0.00

N/A = not available, not disclosed.

TABLE 13—COST PER SMALL FIRM IN THE REAL ESTATE AND RENTAL AND LEASING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION

Real estate and rental and leasing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	86,219	N/A	N/A	\$85	\$4,165,673,000	\$48,315	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	124,930	299,041	2.4	85	30,501,166,000	244,146	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	39,747	191,958	4.8	85	27,836,936,000	700,353	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	29,717	269,366	9.1	85	45,164,417,000	1,519,818	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	10,013	181,600	18.1	85	33,652,743,000	3,360,905	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	3,288	95,418	29.0	85	18,788,566,000	5,714,284	0.00

TABLE 13—COST PER SMALL FIRM IN THE REAL ESTATE AND RENTAL AND LEASING INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Real estate and rental and leasing industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,553	62,482	40.2	85	12,221,244,000	7,869,442	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,518	81,675	53.8	85	16,329,830,000	10,757,464	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	771	48,442	62.8	85	11,037,708,000	14,316,093	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	464	36,318	78.3	85	8,012,159,000	17,267,584	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	365	32,555	89.2	85	7,621,190,000	20,879,973	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	228	25,638	112.4	85	5,610,499,000	24,607,452	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	161	17,743	110.2	85	4,144,542,000	25,742,497	0.00

N/A = not available, not disclosed.

TABLE 14—COST PER SMALL FIRM IN THE PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION

Professional, scientific and technical services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	207,967	N/A	N/A	\$85	\$9,968,674,000	\$47,934	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	339,834	814,116	2.4	85	82,241,004,000	242,003	0.04
Firms with sales/receipts/revenue of \$500,000 to \$999,999	102,144	584,473	5.7	85	71,850,790,000	703,426	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	78,520	870,369	11.1	85	120,442,007,000	1,533,902	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	28,337	631,182	22.3	85	97,339,397,000	3,435,064	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	9,714	355,210	36.6	85	57,721,674,000	5,942,112	0.00

TABLE 14—COST PER SMALL FIRM IN THE PROFESSIONAL, SCIENTIFIC, AND TECHNICAL SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Professional, scientific and technical services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	4,863	245,206	50.4	85	40,592,738,000	8,347,263	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	4,658	313,530	67.3	85	53,578,044,000	11,502,371	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	2,338	211,940	90.7	85	36,728,134,000	15,709,210	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,381	147,737	107.0	85	27,448,191,000	19,875,591	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	954	122,039	127.9	85	22,622,723,000	23,713,546	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	603	91,258	151.3	85	15,961,413,000	26,470,005	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	511	83,414	163.2	85	15,941,272,000	31,196,227	0.00

N/A = not available, not disclosed.

TABLE 15—COST PER SMALL FIRM IN THE MANAGEMENT OF COMPANIES AND ENTERPRISES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$20.5 MILLION

Management of companies and enterprises industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	1,895	11,318	6.0	\$85	\$44,606,000	\$23,539	0.36
Firms with sales/receipts/revenue of \$100,000 to \$499,999	1,387	4,529	3.3	85	293,971,000	211,947	0.04
Firms with sales/receipts/revenue of \$500,000 to \$999,999	964	5,082	5.3	85	373,917,000	387,881	0.02
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	2,039	18,829	9.2	85	1,087,692,000	533,444	0.02
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	2,242	26,723	11.9	85	1,698,014,000	757,366	0.01
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,717	28,312	16.5	85	1,855,703,000	1,080,782	0.01

TABLE 15—COST PER SMALL FIRM IN THE MANAGEMENT OF COMPANIES AND ENTERPRISES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$20.5 MILLION—Continued

Management of companies and enterprises industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,258	22,469	17.9	85	1,711,464,000	1,360,464	0.01
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,942	41,651	21.4	85	3,120,558,000	1,606,878	0.01
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	1,423	34,363	24.1	85	2,997,064,000	2,106,159	0.00
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,075	30,583	28.4	85	2,508,188,000	2,333,198	0.00

TABLE 16—COST PER SMALL FIRM IN THE ADMINISTRATIVE AND SUPPORT AND WASTE MANAGEMENT AND REMEDIATION SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$5.5 MILLION—\$38.5 MILLION

Administrative and support, waste management and remediation services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	99,021	139,832	1.4	\$85	\$4,500,981,00	\$45,455	0.19
Firms with sales/receipts/revenue of \$100,000 to \$499,999	129,948	513,457	4.0	85	31,661,803,000	243,650	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	40,405	409,563	10.1	85	28,444,220,000	703,978	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	31,127	725,649	23.3	85	47,963,623,000	1,540,901	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	12,294	678,340	55.2	85	42,093,718,000	3,423,924	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	4,589	434,622	94.7	85	26,428,877,000	5,759,180	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	2,411	311,321	129.1	85	19,304,673,000	8,006,915	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	2,309	424,912	184.0	85	24,412,659,000	10,572,828	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	1,266	292,501	231.0	85	17,408,483,000	13,750,776	0.00

TABLE 16—COST PER SMALL FIRM IN THE ADMINISTRATIVE AND SUPPORT AND WASTE MANAGEMENT AND REMEDIATION SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$5.5 MILLION—\$38.5 MILLION—Continued

Administrative and support, waste management and remediation services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	724	208,939	288.6	85	12,542,375,000	17,323,722	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	528	174,359	330.2	85	10,341,768,000	19,586,682	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	402	173,953	432.7	85	9,015,658,000	22,427,010	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	267	122,013	457.0	85	6,382,657,000	23,905,082	0.00

TABLE 17—COST PER SMALL FIRM IN THE EDUCATIONAL SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION

Educational services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	21,831	50,906	2.3	\$85	\$1,003,931,000	\$45,986	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	27,938	158,913	5.7	85	6,788,475,000	242,984	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	8,504	112,142	13.2	85	5,984,604,000	703,740	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	8,465	213,786	25.3	85	13,376,338,000	1,580,194	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	4,302	209,778	48.8	85	14,792,101,000	3,438,424	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,588	117,648	74.1	85	9,314,307,000	5,865,433	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	888	83,741	94.3	85	7,129,969,000	8,029,244	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,003	127,781	127.4	85	11,306,008,000	11,272,191	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	461	79,059	171.5	85	6,983,007,000	15,147,521	0.00

TABLE 17—COST PER SMALL FIRM IN THE EDUCATIONAL SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Educational services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	355	73,045	205.8	85	6,992,060,000	19,695,944	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	268	70,191	261.9	85	6,343,422,000	23,669,485	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	172	60,202	350.0	85	5,119,182,000	29,762,686	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	138	55,753	404.0	85	4,536,897,000	32,876,065	0.00

TABLE 18—COST PER SMALL FIRM IN THE HEALTH CARE AND SOCIAL ASSISTANCE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION

Health care and social assistance industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	107,112	162,265	1.5	\$85	\$5,064,756,000	\$47,285	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	242,566	1,027,234	4.2	85	66,168,531,000	272,786	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	125,095	1,054,985	8.4	85	88,227,442,000	705,284	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	84,361	1,466,391	17.4	85	126,989,626,000	1,505,312	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	26,466	1,107,445	41.8	85	91,034,690,000	3,439,685	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	9,453	712,840	75.4	85	56,541,818,000	5,981,362	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	4,867	501,258	103.0	85	41,063,966,000	8,437,223	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	5,198	760,603	146.3	85	61,116,459,000	11,757,687	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	2,468	497,184	201.5	85	40,851,963,000	16,552,659	0.00

TABLE 18—COST PER SMALL FIRM IN THE HEALTH CARE AND SOCIAL ASSISTANCE INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Health care and social assistance industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	1,374	347,358	252.8	85	29,140,498,000	21,208,514	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	978	284,827	291.2	85	25,026,728,000	25,589,701	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	665	230,360	346.4	85	20,167,268,000	30,326,719	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	485	185,982	383.5	85	16,744,181,000	34,524,085	0.00

TABLE 19—COST PER SMALL FIRM IN THE ARTS, ENTERTAINMENT, AND RECREATION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION

Arts, entertainment, and recreation industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	33,186	53,994	1.6	\$85	\$1,569,733,000	\$47,301	0.18
Firms with sales/receipts/revenue of \$100,000 to \$499,999	46,210	199,647	4.3	85	11,295,277,000	244,434	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	15,493	162,642	10.5	85	10,894,947,000	703,217	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	12,148	259,480	21.4	85	18,531,141,000	1,525,448	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	4,674	209,762	44.9	85	16,040,448,000	3,431,846	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	1,718	120,586	70.2	85	9,983,571,000	5,811,159	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	806	74,628	92.6	85	6,466,756,000	8,023,270	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	660	77,131	116.9	85	7,102,423,000	10,761,247	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	344	49,061	142.6	85	4,965,644,000	14,435,012	0.00

TABLE 19—COST PER SMALL FIRM IN THE ARTS, ENTERTAINMENT, AND RECREATION INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION—Continued

Arts, entertainment, and recreation industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	224	40,309	180.0	85	4,136,002,000	18,464,295	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	155	33,220	214.3	85	3,428,904,000	22,121,961	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	115	28,855	250.9	85	2,873,044,000	24,982,991	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	84	25,163	299.6	85	2,569,574,000	30,590,167	0.00

TABLE 20—COST PER SMALL FIRM IN THE ACCOMMODATION AND FOOD SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION—\$38.5 MILLION

Accommodation and food services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue below \$100,000	99,592	207,093	2.1	\$85	\$4,845,922,000	\$48,658	0.17
Firms with sales/receipts/revenue of \$100,000 to \$499,999	216,446	1,349,187	6.2	85	55,536,558,000	256,584	0.03
Firms with sales/receipts/revenue of \$500,000 to \$999,999	79,875	1,260,097	15.8	85	55,913,962,000	700,018	0.01
Firms with sales/receipts/revenue of \$1,000,000 to \$2,499,999	56,476	1,777,649	31.5	85	84,117,236,000	1,489,433	0.01
Firms with sales/receipts/revenue of \$2,500,000 to \$4,999,999	14,095	896,373	63.6	85	46,231,300,000	3,279,979	0.00
Firms with sales/receipts/revenue of \$5,000,000 to \$7,499,999	3,720	403,866	108.6	85	21,249,810,000	5,712,315	0.00
Firms with sales/receipts/revenue of \$7,500,000 to \$9,999,999	1,621	244,772	151.0	85	12,835,230,000	7,918,094	0.00
Firms with sales/receipts/revenue of \$10,000,000 to \$14,999,999	1,628	340,741	209.3	85	17,984,834,000	11,047,195	0.00
Firms with sales/receipts/revenue of \$15,000,000 to \$19,999,999	859	252,279	293.7	85	13,054,878,000	15,197,763	0.00

TABLE 20—COST PER SMALL FIRM IN THE ACCOMMODATION AND FOOD SERVICES INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$7.5 MILLION–\$38.5 MILLION—Continued

Accommodation and food services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales/receipts/revenue of \$20,000,000 to \$24,999,999	446	170,201	381.6	85	8,420,579,000	18,880,222	0.00
Firms with sales/receipts/revenue of \$25,000,000 to \$29,999,999	363	153,594	423.1	85	7,987,110,000	22,003,058	0.00
Firms with sales/receipts/revenue of \$30,000,000 to \$34,999,999	241	115,452	479.1	85	6,405,041,000	26,576,934	0.00
Firms with sales/receipts/revenue of \$35,000,000 to \$39,999,999	170	90,301	531.2	85	4,832,335,000	28,425,500	0.00

TABLE 21—COST PER SMALL FIRM IN THE OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION) INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$5.5 MILLION–\$38.5 MILLION

Other services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales receipts/revenue below \$100,000	195,234	322,002	1.6	\$85	\$9,308,948,000	\$47,681	0.18
Firms with sales receipts/revenue of \$100,000 to \$499,999	307,613	1,225,144	4.0	85	75,113,021,000	244,180	0.03
Firms with sales receipts/revenue of \$500,000 to \$999,999	87,833	756,786	8.6	85	61,131,552,000	695,998	0.01
Firms with sales receipts/revenue of \$1,000,000 to \$2,499,999	55,883	926,035	16.6	85	4,065,314,000	1,504,309	0.01
Firms with sales receipts/revenue of \$2,500,000 to \$4,999,999	16,522	531,104	32.1	85	55,620,907,000	3,366,475	0.00
Firms with sales receipts/revenue of \$5,000,000 to \$7,499,999	4,967	252,838	50.9	85	28,838,406,000	5,806,001	0.00
Firms with sales receipts/revenue of \$7,500,000 to \$9,999,999	2,326	151,376	65.1	85	18,502,407,000	7,954,603	0.00
Firms with sales receipts/revenue of \$10,000,000 to \$14,999,999	2,114	173,393	82.0	85	23,140,184,000	10,946,161	0.00
Firms with sales receipts/revenue of \$15,000,000 to \$19,999,999	1,005	104,997	104.5	85	14,696,909,000	14,623,790	0.00

TABLE 21—COST PER SMALL FIRM IN THE OTHER SERVICES (EXCEPT PUBLIC ADMINISTRATION) INDUSTRY THE SBA SMALL BUSINESS SIZE STANDARD FOR THIS INDUSTRY IS \$5.5 MILLION–\$38.5 MILLION—Continued

Other services industry							
	Number of firms	Total number of employees	Average number of employees per firm	Annual cost per firm	Annual receipts	Average receipts per firm	Annual cost per firm as percent of receipts (percent)
Firms with sales receipts/revenue of \$20,000,000 to \$24,999,999	620	73,209	118.1	85	11,076,548,400	17,865,400	0.00
Firms with sales receipts/revenue of \$25,000,000 to \$29,999,999	405	50,974	125.9	85	8,159,095,000	20,145,914	0.00
Firms with sales receipts/revenue of \$30,000,000 to \$34,999,999	274	42,041	153.4	85	6,643,223,000	24,245,339	0.00
Firms with sales receipts/revenue of \$35,000,000 to \$39,999,999	227	37,259	164.1	85	5,392,740,000	23,756,564	0.00

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. Under the PRA an agency may not collect or sponsor the collection of information, nor may impose an information collection requirement unless it displays a currently valid Office of Management and Budget (OMB) control number. *See* 5 CFR 1320.8(b)(3)(vi). The OMB has assigned control number 1250–0008 to the third party disclosure of the equal opportunity clause provisions to subcontractors. The OMB has assigned control numbers 1250–0001 and 1250–0003 to the general recordkeeping provisions of the laws administered by OFCCP. In accordance with the PRA, OFCCP solicited public comments on the proposed changes to the information collection proposed in the NPRM, as discussed below. *See* 79 FR 55712 (September 17, 2014). OFCCP also submitted a contemporaneous request for OMB review of the proposed information collection in accordance with 44 U.S.C. 3507(d). On December 5, 2014, the OMB issued a notice that instructed the agency to resubmit the information collection request upon promulgation of the final rule and after consideration of public comments received.

Compliance Date

Affected parties do not have to comply with the new information

collection requirements under § 60–1.35 until the Department publishes a Notice in the **Federal Register** stating that OMB has approved the information collections under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.*, or until this rule otherwise takes effect, whichever is later.

Circumstances Necessitating Collection

Executive Order 13665 amends the equal opportunity clause provided in Executive Order 11246 by adding the prohibition that Federal contractors may not discriminate against employees and job applicants who inquire about, discuss or disclose their own compensation or the compensation of other employees or applicants. Federal contractors are required to amend the equal opportunity clauses incorporated into their subcontracts, and notify job applicants and employees of the requirement. Executive Order 13665 became effective at signing and applies to contracts entered into on or after the effective date of this final rule.

The final rule contains several provisions that could be considered “collections of information” as defined by the PRA: The amendment to the equal opportunity clause incorporated into contracts and subcontracts, and the notification given to employees and job applicants.

Proposed § 60–1.35(c)(i) and (ii) required the incorporation of the new provision verbatim into existing handbooks and manuals, and the dissemination of a notification to employees and applications. The disclosure of information originally

supplied by the Federal government to the recipient for the purpose of disclosure is not included within the PRA’s definition of “collection of information.” *See* 5 CFR 1320.3(c)(2). OFCCP determined that proposed § 60–1.35(c)(i) and (ii) did not meet the PRA’s definition of “collection of information” and therefore these provisions are not subject to the PRA’s requirements. However, OFCCP determined that the proposed changes to § 60–1.4 could be considered information collections, therefore an information collection request (ICR) was submitted to OMB for PRA authorization.

Information and Technology

Each contractor determines its own methods for developing and maintaining information, including creating electronic templates. Contractors may meet the requirements of this rule using paper or electronic means.

Public Comments

OFCCP sought public comments regarding the potential burdens imposed by information collections contained in the NPRM which reflected burden related to the amendment to the equal opportunity clause incorporated into contracts and subcontracts.

OFCCP received 11 comments regarding costs and burdens from employer groups, women’s groups, employers and individuals. Of the 11 comments, one stated that the new rule should not incur any significant cost as the language will be prescribed by OFCCP and that the rule eliminates a

policy of taking adverse action against employees.

Some of the commenters indicated that the rule was unduly burdensome or unnecessary because it had no clear effect on addressing the pay gap. Some of these commenters indicated that the pay gap could be explained by other nondiscriminatory explanations. OFCCP disagrees that the rule is unnecessary and unduly burdensome. OFCCP worked with several other Federal agencies on the National Equal Pay Task Force to identify the persistent challenges to equal pay enforcement and to develop an action plan for implementing recommendations to resolve those challenges. OFCCP also consulted a number of sources in order to assess the need for the rule. For instance, OFCCP reviewed national statistics on earnings by gender produced by BLS and the U.S. Census Bureau. Those statistics show persistent pay gaps for female and minority workers. These well-documented earnings differences based on race and sex have not been fully explained by nondiscriminatory factors including differences in worker qualifications such as education and experience, occupational differences, work schedules or other similar factors. Thus, some of the remaining unexplained portion of the pay gap may be attributable to discrimination. In addition, prohibiting pay secrecy policies will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices. Thus, the rule improves the efficacy of Executive Order 11246 and the efficiency of the market in Federal contracting. In order to reduce the burden of implementing Executive Order 13665, OFCCP allows contractors to incorporate the equal opportunity clause by reference into its subcontracts. In addition, OFCCP is providing specific language for incorporation into handbooks and the notice for applicants and employees. Thus, OFCCP has proposed the most efficient manner to implement the amendments.

Other commenters asserted that OFCCP underestimated the burdens created by the new rule. In this area, one commenter proposed alternative calculations related to the implementation of the rule. In considering the alternative calculations of burden, OFCCP took into consideration that although the commenter represents a segment of the contractor universe, it is not reflective of the entire SAM contractor universe. OFCCP expects the costs to vary by contractor. While some contractors may

incur more costs, others will likely incur less. Thus, the estimates of burden reflect an average estimate for all covered contractors in the SAM contractor universe. Therefore, OFCCP has retained its calculation of the burden as proposed in the NPRM. Another commenter indicated that OFCCP did not include burdens associated with the definition of compensation and the impact that the definition proposed in the NPRM may have on Federal contractors. The commenter indicated that OFCCP should take the burden that the compensation definition “will impose on annual evaluations under contractors’ identification of problem areas section of their affirmative action programs.” OFCCP disagrees with this commenter’s assertion. Contractors are required to perform an in-depth analysis of its total employment process to determine whether and where impediments to equal employment opportunity exist. *See* 41 CFR 60–2.17(b). The evaluation includes an analysis of each contractor’s compensation system. OFCCP’s guidance and regulations have historically included salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options, profit sharing and retirement.¹⁰⁰ Thus, OFCCP did not assess additional burden as this obligation has not changed. Another commenter asserted that OFCCP did not assess the additional burden associated with data requests received during compliance evaluations. The collection of information during an investigation or the conduct of a civil action is an exception within the PRA’s definition of collection of information. *See* 5 CFR 1320.4(a)(2).

One commenter suggested that OFCCP allow contractors discretion regarding the wording of the notice for incorporation in the handbook and posting. In order to reduce burden, OFCCP provides the wording for the notification. As the majority of comments received related to burden were opposed to increasing burden, OFCCP declines to increase burden and instead will provide the exact wording for the notice and language to incorporate into existing employee handbooks.

OFCCP has resubmitted the revised information collection (1250–0008) to OMB for approval, and OFCCP intends to publish a notice announcing OMB’s

¹⁰⁰ Federal Contract Compliance Manual, Chapter 2, Section 2L03 and Chapter 3, section 3H03 (Oct. 2014).

decision regarding this information collection request. A copy of the information collection request can be obtained by contacting OFCCP as shown in the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Office of Federal Contract Compliance, Office of Management and Budget, Room 10235, Washington, DC 20503; Telephone: 202–395–7316 (these are not toll-free numbers). Comments can be submitted to OMB by email at OIRA_submission@omb.eop.gov. The OMB will consider all written comments it receives within 30 days of publication of this final rule. The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of IT (e.g., permitting electronic submission of responses).

Number of Respondents

All nonexempt Federal contractors with contracts, subcontracts, federally assisted construction contracts or subcontracts in excess of \$10,000 are required to comply with this final rule. There are approximately 500,000 contractor firms registered in the General Service Administration’s SAM. Therefore, OFCCP estimates there are 500,000 contractor firms.

Summary of Paperwork Burdens

The estimated total annual burden for complying with the new regulatory requirement is listed in Table 22, below. The burden is calculated as an annual burden based on a three-year approval of this information collection request. OFCCP believes that in the first year of implementation contractors will modify their equal opportunity clauses. Additionally, OFCCP estimates that in subsequent years 1 percent of the contractors will be required to modify

their equal opportunity clauses, as they will be new contractors.

TABLE 22—ESTIMATED ANNUAL BURDEN FOR CONTRACTOR COMPANIES

New requirement	Estimated annual burden hours	Monetization
\$ 60–1.4	42,500	\$ 1,320,369
Total Cost	42,500	\$ 1,320,369

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Prohibitions Against Pay Secrecy Policies and Actions.

OMB ICR Reference Number: 1250–0008.

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 500,000.

Frequency of Response: On occasion.

Estimated Total Annual Burden

Hours: 42,500.

Estimated Total Annual PRA Costs: \$0.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this rule does 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 rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule will 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 rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The rule does 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.

Effects on Families

The undersigned hereby certifies that the rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045 (Protection of Children)

This rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR part 1500 *et seq.*; and DOL NEPA procedures, 29 CFR part 11, indicates the rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The rule was: (1) reviewed

to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Part 60–1

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

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

Accordingly, part 60–1 of title 41 of the Code of Federal Regulations is amended as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 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, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258, E.O. 13665, 79 FR 20749 and E.O. 13672, 79 FR 42971.

■ 2. Section 60–1.3 is amended by adding definitions in alphabetical order for “Compensation,” “Compensation information,” and “Essential job functions” to read as follows:

§ 60–1.3 Definitions.

* * * * *

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the contractor to attract and retain a particular employee for the value the employee is perceived to add to the contractor’s profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor decisions, statements and

policies related to setting or altering employee compensation.

* * * * *

Essential job functions—(1) *In general.* The term *essential job functions* means the fundamental job duties of the employment position an individual holds.

(2) A job function may be considered essential if:

(i) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(ii) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

(3) The application or interpretation of the “essential job functions” definition in this part is limited to the discrimination claims governed by Executive Order 13665 and its implementing regulations.

* * * * *

■ 3. Section 60–1.4 is revised to read as follows:

§ 60–1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for

employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee’s essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor’s legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers’ representative of the contractor’s commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor’s non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance

with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: *Provided*, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their

race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following:

Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representatives of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by rules, regulations, and orders of the Secretary of Labor, or

pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the portion of the sentence immediately preceding paragraph (1) and the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance:

Provided, however, that in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the administering agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the administering agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules,

regulations, and relevant orders of the Secretary of Labor, that it will furnish the administering agency and the Secretary of Labor such information as they may require for the supervision of such compliance, and that it will otherwise assist the administering agency in the discharge of the agency's primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to Executive Order 11246 of September 24, 1965, with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the administering agency or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(2) [Reserved]

(c) *Subcontracts*. Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Inclusion of the equal opportunity clause by reference*. The equal opportunity clause may be included by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director of OFCCP may designate.

(e) *Incorporation by operation of the order*. By operation of the order, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

■ 4. Section 60–1.35 is added to read as follows:

§ 60–1.35 Contractor obligations and defenses to violation of the nondiscrimination requirement for compensation disclosures.

(a) *General defenses.* A contractor may pursue a defense to an alleged violation of paragraph (3) of the equal opportunity clauses listed in § 60–1.4(a) and (b) as long as the defense is not based on a rule, policy, practice, agreement, or other instrument that prohibits employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants, subject to paragraph (3) of the equal opportunity clause. Contractors may

pursue this defense by demonstrating, for example, that it disciplined the employee for violation of a consistently and uniformly applied company policy, and that this policy does not prohibit, or tend to prohibit, employees or applicants from discussing or disclosing their compensation or the compensation of other employees or applicants.

(b) *Essential job functions defense.* Actions taken by a contractor which adversely affect an employee will not be deemed to be discriminatory if the employee has access to the compensation information of other employees or applicants as part of such employee's essential job functions and disclosed the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, and the disclosure was not in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action,

including an investigation conducted by the contractor, or is consistent with the contractor's legal duty to furnish information.

(c) *Dissemination of nondiscrimination provision.* The contractor or subcontractor shall disseminate the nondiscrimination provision, using the language as prescribed by the Director of OFCCP, to employees and applicants:

(1) The nondiscrimination provision shall be incorporated into existing employee manuals or handbooks; and

(2) The nondiscrimination provision shall be disseminated to employees and applicants. Dissemination of the provision shall be executed by electronic posting or by posting a copy of the provision in conspicuous places available to employees and applicants for employment.

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