years after the last day of the year in which that Statement or amended Statement was filed with the Office and, in the event that such Statement or amended Statement is the subject of an audit conducted pursuant to this section, shall continue to maintain those records until three years after the auditor delivers the final report to the participating copyright owners and the licensee pursuant to paragraph (i)(3) of this section.

§ 201.17 [Amended]

■ 3. Amend § 201.17 as follows:
■ a. In paragraphs (m)(2) and (m)(4)(i) by removing ''(m)(3)'' and adding in its place ''(m)(4)''.
■ b. In paragraphs (m)(2)(ii), (m)(4)(iii)(C), and (m)(4)(iv)(A) by removing ''(m)(1)(iii)'' and adding in its place ''(m)(2)(iii)''.
■ c. In paragraph (m)(4) by removing ''(m)(1)'' and adding in its place ''(m)(2)''.
■ d. In paragraph (m)(4)(iii)(A) by removing ''(m)(1)(i)'' and adding in its place ''(m)(2)(i)''.
■ e. In paragraph (m)(4)(iii)(B) by removing ''(m)(1)(ii)'' and adding in its place ''(m)(2)(ii)''.
■ f. In paragraph (m)(4)(vi) by removing ''(m)(3)(i)'' and adding in its place ''(m)(4)(i)''.

Dated: September 10, 2014.

Jacqueline C. Charlesworth,

General Counsel and Associate Register of Copyrights.

[FR Doc. 2014–21944 Filed 9–16–14; 8:45 am]

BILLING CODE 1410–30–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2011–0968; FRL–9916–46–Region 5]

Approval and Promulgation of Air Quality Implementation Plans; Indiana; Open Burning Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a November 14, 2011, request by Indiana to revise the state implementation plan open burning provisions in Title 326 of the Indiana Administrative Code (IAC), Article 4, Rule 1 (326 IAC 4–1), Open Burning Rule. EPA is proposing to approve this rule for attainment counties and take no action on the rule for Clark, Floyd, Lake and Porter counties which are nonattainment or maintenance areas for ozone or particulate matter.

DATES: Comments must be received on or before October 17, 2014.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2011–0968 by one of the following methods:

1. *www.regulations.gov:* Follow the on-line instructions for submitting comments.
2. *Email: blakley.pamela@epa.gov.*
3. *Fax:* (312) 692–2450.
4. *Mail:* Pamela Blakley, Chief, Control Strategies Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
5. *Hand Delivery:* Pamela Blakley, Chief, Control Strategies Section (AR–18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Charles Hatten, Environmental Engineer, Control Strategies Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–6031, *hatten.charles@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Final Rules section of this **Federal Register**, EPA is approving the State's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule, and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register**.

Dated: September 2, 2014.

Susan Hedman,

Regional Administrator, Region 5.

[FR Doc. 2014–22047 Filed 9–16–14; 8:45 am]

BILLING CODE 6560–50–P

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: Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) proposes amending the regulations implementing Executive Order 11246 that set forth the basic equal employment opportunity requirements that apply to Federal contractors and subcontractors. This Notice of Proposed Rulemaking (NPRM) proposes including definitions for key words or terms used in Executive Order 13665. The NPRM also proposes amending the mandatory equal opportunity clauses that are included in Federal contracts and subcontracts and federally assisted construction contracts. The NPRM would delete the outdated reference to the ''Deputy Assistant Secretary'' and replace it with the ''Director of OFCCP.'' The NPRM also proposes to change the title of a section regarding the inclusion of the equal opportunity clause by reference and making conforming changes in the text. In addition, the NPRM would establish contractor defenses to allegations of violations of the nondiscrimination provision. The proposed rule also adds a section requiring Federal contractors to notify employees and job applicants of the nondiscrimination protection created by Executive Order 13665 using existing methods of communicating to applicants and employees.

DATES: To be assured of consideration, comments must be received on or before December 16, 2014.

ADDRESSES: You may submit comments, identified by RIN number 1250–AA06, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Fax: (202) 693–1304 (for comments of six pages or less).
- Mail: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210.

Please submit your comments by only one method. Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission was received by telephoning OFCCP at (202) 693–0103 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at *www.regulations.gov.* Upon request, individuals who require assistance viewing comments are provided appropriate aids such as readers or print magnifiers. Copies of this NPRM are made available in the following formats: large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

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.[2] They must also engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, prohibits employment discrimination against certain protected veterans. Section 503 of the Rehabilitation Act of 1973 (section 503), as amended, prohibits employment discrimination against individuals with disabilities. Executive Order 11246, as amended, prohibits employment discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin.[3] Compensation discrimination is one form of discrimination prohibited by the Executive Order.

On April 8, 2014, President Obama issued Executive Order 13665 entitled ''Non-Retaliation for Disclosure of Compensation Information.'' This Executive Order amends section 202 of Executive Order 11246 to prohibit 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. This NPRM proposes new regulations implementing Executive Order 13665, which would apply to covered contracts and federally assisted construction contracts. The provisions of this proposed rule and the Executive Order apply to covered contracts entered into or modified on or after the effective date of the Final Rule. Modified contracts are contracts with any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions. See 41 CFR 60–1.3 (definition of ''Government contractor'').

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. A comparison of average annual wage data reveals that women make 77 cents for every dollar that men make.[4] Recent data on average weekly wages from the Bureau of Labor Statistics (BLS) show a similar gap, with women making 82 cents for every dollar that men make.[5] The gap in wages is even greater for some women of color. BLS data show that African American women earn 68 cents and Latina women earn 59 cents for every dollar earned by a non-Hispanic white man.[6] Census data show 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.[7] While research has found that many factors contribute to the wage gap, such as occupational preferences, pay discrimination remains a significant problem, especially for the working poor and the middle class.

For example, according to a 2011 report, a typical 25 year-old woman working full-time, year-round will have already earned $5,000 less than a typical 25 year-old man.[8] If this woman faced the same wage gaps at each age that existed in 2011, then by age 35, she would have earned $33,600 less than a typical 35 year-old man.[9] Moreover, by

[1] Executive Order 11246, Sept. 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964–1965, 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] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. Executive Order 13672 requires the Secretary of DOL to prepare regulations within 90 days of the date of the Order. Though Executive Order 13672 is effective immediately, its protections apply to contracts entered into on or after the effective date of the new DOL regulations.

[3] *Id.*

[4] U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), *available at http://www.census.gov/prod/2012pubs/p60–243.pdf.* 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.

[5] Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, Median Weekly Earnings of Full-Time Wage and Salary Workers by Selected Characteristics, *available at http://www.bls.gov/cps/cpsaat37.htm*; Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013, *available at http://www.bls.gov/news.release/wkyeng.t01.htm.*

[6] Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics.*

[7] 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, *available at https://www.census.gov/hhes/www/cpstables/032013/perinc/pinc10_000.htm* (comparison of median wage for workers working 50 or more weeks).

[8] White House Council on Women and Girls, The Key to an Economy Built to Last (April 2012), *available at http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.*

[9] *Id.* at 4.

age 65, this earnings gap would have ballooned to $389,300.[10] At the current rate of progress, researchers estimate it will take until 2057 to close the gender pay gap.[11]

Research also reveals a wage gap amongst various racial groups. At the end of 2013, median weekly earnings for African American men working at full-time jobs were $646 per week, only 72.1 percent of the median for white men ($896).[12] The median weekly earnings for African American women was $621 per week, or 69.3% of the median for white men.[13] Further, a study based on the hiring pattern of male and female workers in the state of New Jersey found that African Americans, when re-entering the job market after periods of unemployment, are offered lower wages when compared to their white counterparts.[14] The study showed that the pay gap between these groups is typically 30 percent.[15] 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.[16] 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.[17]

Many of the studies analyzing pay disparities for the Hispanic populations focus on differences in education and age as compared to white workers.[18] 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.[19]

Research conducted by The Institute for Women's Policy Research (IWPR) finds that the poverty rate for working women would be cut in half if women were paid the same as men who were similar in terms of their education and hours of work. The poverty rate for all working women would be cut in half, falling to 3.9 percent from 8.1 percent.[20] The high poverty rate for working single mothers would fall by nearly half, from 28.7 percent to 15 percent.[21] For the 14.3 million single women living on their own, equal pay would mean a significant drop in poverty from 11.0 percent to 4.6 percent.[22] Nearly 60 percent (59.3 percent) of women would earn more if working women were paid the same as men of the same age with similar education and hours of work.[23] This would go a long way toward closing the pay gap and reducing the poverty rate for working women. These statistics are intended to provide general information about the potential impacts of eliminating pay differentials among men and women, including 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 proposed rule would apply 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.

Potentially nondiscriminatory factors can explain some of the gender wage differences, but accounting for them does not eliminate the pay gap.[24] 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.[25] Catalyst, a nonprofit research organization, reviewed 2011 government data showing a gender pay gap for women lawyers,[26] and that data confirms that the gap exists for a range of professional and technical occupations.[27] In fact, according to a study by IWPR that used information from BLS, women frequently earn less than men within the same occupations.[28] 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.

Among the possible contributing factors to the enduring pay gap is the prevalence of workplace prohibitions against discussing compensation. Whether communicated through a written employment policy or through more informal means, strictures against revealing compensation can conceal compensation disparities among employees. This makes it impossible for an employee to know he or she is being underpaid compared to his or her peers. If compensation remains hidden, employees who are being unfairly paid less because of their gender or race will remain unaware of the problem and will be unable to exercise their rights by filing a complaint pursuant to the Executive Order.

Although very little 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

[10] *Id.*

[11] Institute for Women's Policy Research, At Current Pace of Progress, Wage Gap for Women Expected to Close in 2057 (April 2013), *available at http://www.iwpr.org/publications/pubs/at-current-pace-of-progress-wage-gap-for-women-expected-to-close-in-2057.*

[12] Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers,* Fourth Quarter 2013, *available at http://www.bls.gov/news.release/archives/wkyeng_01222014.pdf,* January 22, 2014 (last accessed March 28, 2014).

[13] *Id. at Table 2: Median usual weekly earnings of full-time wage and salary workers by selected characteristics, quarterly averages, not seasonally adjusted.*

[14] 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).

[15] *Id.* at 29.

[16] *Id.*

[17] Sergio Urzua, Racial Labor Market Gaps: The Role of Abilities and Schooling Choices, 43.4 J. Hum. Resources, 919, 919–971.

[18] Richard Fry & B. Lindsay Lowell, The *Wage Structure of Latino-Origin Groups across Generations,* 45 Indus. Relations 2 (2006); Abelardo Rodriguez & Stephen Devadoss, *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) .

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] Hartman, Heidi, Ph.D., Hayes, Jeffrey, Ph.D., and Clark, Jennifer, ''How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy,'' Briefing Paper IWPR #C411, Institute for Women's Policy Research, January 2014.

[24] A March 2011 White House report entitled Women in America: Indicators of Social and Economic Well-Being, 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. Explaining Trends in the Gender Wage Gap, A Report by the Council of Economic Advisers (June 1998). 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 Economics of Gender* 44 (2007); Francine D. Blau & Lawrence M. Kahn, The U.S. gender pay gap in the 1990s: Slowing convergence, 60 Industrial and Labor Relations Review 45 (2006).

[25] 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*).

[26] *http://www.catalyst.org/knowledge/women-law-us.*

[27] Bureau of Labor Statistics, Median weekly earnings of full-time wage and salary workers by detailed occupation and sex (2013), *available at http://www.bls.gov/cps/cpsaat39.pdf.*

[28] 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/.*

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.[29] Further, the study found that these institutional barriers to discussing compensation were much more common among private employers than among public employers.[30] 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.[31]

OFCCP enforces the prohibition against compensation discrimination by investigating class complaints of compensation discrimination and conducting compliance evaluations under Executive Order 11246.[32] 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 under Executive Order 11246.[33] An unwarranted difference in compensation 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 neutrally scheduled compliance evaluations of Federal contractors.[34] 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 employees for 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 Lilly 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. Lilly 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.[35] Ledbetter only discovered how much her male co-workers were earning when 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.'' [36] The Supreme Court, in 2007, issued its ruling in *Ledbetter* v. *Goodyear Tire & Rubber Co.* holding that Ledbetter's claim was untimely.[37]

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. This rule would eliminate the barrier of pay secrecy policies and ensure that Federal contractor employees are compensated based on merit.

Pay secrecy policies may decrease 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.[38] For example, one study has shown that workers without access to compensation information are less satisfied and less productive.[39] 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. Because of pay secrecy 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. This takes a unique form 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. 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

[29] Institute for Women's Policy Research, Quick Figures: Pay Secrecy and Wage Discrimination (January 2014).

[30] *Id. See also* Rafael Gely & 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); Matthew A. Edwards, ''The Law and Social Norms of Pay Secrecy,'' 26 Berkeley J. Emp. & Lab. L. 41 (2005) (*rebutting* Gely & Bierman's conclusions about the prevalence and causes of pay secrecy).

[31] Institute for Women's Policy Research, Quick Figures: Pay Secrecy and Wage Discrimination (January 2014).

[32] Pursuant to a Memorandum of Understanding between OFCCP and the Equal Employment Opportunity Commission (EEOC), OFCCP 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. 64 FR 17664–02 (April 12, 1999).

[33] References to ''contractors'' throughout the NPRM are intended to include both contractors and subcontractors unless stated to the contrary.

[34] OFCCP reviews approximately 4,000 federal contractors annually.

[35] White House National Pay Task Force, ''Fifty Years After the Equal Pay Act: Assessing the Past, Taking Stock of the Future,'' June 2013, *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 May 15, 2014).

[36] *Id.* at 22.

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

[38] Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi & Michael J. Wesson, *Exposing Pay Secrecy,* 32 ACAD. of MANAGEMENT REV. 55, 58 (2007).

[39] Peter Bamberger & Elena Belogolovsky, *The Impact of Pay Secrecy on Individual Task Performance,* 63 PERSONNEL PSYCHOL. 965, 967 (2010).

compensation information may make more 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. 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.[40] 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.[41]

Worker distrust of corporate management is another potential cause of the lag in productivity for workers subject to pay secrecy policies. The restrictions on sharing compensation information may create a sense that the company has something to hide with respect to compensating employees. Younger employees value openness in general, and are more suspicious of companies instituting pay secrecy rules.[42] Workers who believe that they have been discriminated against may be empowered by the knowledge of their compensation relative to similarly situated employees. These workers may seek assistance from Federal civil rights enforcement agencies to rectify the discriminatory treatment, benefitting themselves and future employees. Further, feelings of institutional unfairness may have an additional negative impact on workers' productivity.[43]

Federal contractors, as a result of Executive Order 13665 and the proposed implementing regulations, may also see a decrease in employee turnover and a related decrease in their training and onboarding cost. Some employees with knowledge of the benefits of increased production and advancement through the corporate hierarchy will work harder to achieve goals and secure advancement. The contractor benefits directly from these goal-oriented employees through better quality and more efficient work product. When these employees receive meritorious awards for their efforts, they may be more satisfied and more likely to remain with the company. Better retention of productive employees leads to less time lost to training new workers.[44] Less employee turnover may also allow Federal contractors to hold onto their highest performing employees and continue to benefit from the quality of their work product, job experience, and organizational knowledge.

Under the NPRM proposals, contractors could also be less burdened by investigation of baseless claims of compensation discrimination. As shown above, workers with knowledge of compensation relative to other employees can make more accurate determinations about the presence or absence of discriminatory practices.[45] 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 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 proposed 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 NPRM 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.

To help ensure that fear of discrimination does not inhibit the employees of Federal contractors from sharing information with one another about their compensation, and to promote economy and efficiency in Federal Government procurement, this NPRM proposes new regulations. This new rule would apply to all Federal contractors with contracts entered into or modified on or after the effective date of the rules that exceed $10,000 in value.[46] The proposals would require Federal contracting agencies to add a specific nondiscrimination provision regarding compensation disclosure to the mandatory equal opportunity clauses. Contracting agencies may either incorporate the equal opportunity clauses by reference or expressly include it in government contracts, and modifications thereof if not included in the original contract.[47] This provision would prohibit contractors from terminating or otherwise discriminating against employees and applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. This prohibition in no way compels employees to share compensation information with others; it simply protects those who choose to do so from discrimination by their employer. The proposed amendment to the equal opportunity clauses would generally protect employees who reveal compensation information but would

[40] *Id.* at 969.

[41] Weber, Lauren 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%2FSB10001424127887324345804578426744168583824.html* (last accessed Sept. 10, 2014).

[42] *Id.*

[43] See Bamberger & Belogolovsky *supra* note 29.

[44] Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees,* CENTER FOR AMERICAN PROGRESS, Nov. 16, 2012, *http://www.americanprogress.org/issues/labor/report/2012/11/16/44464/there-are-significant-business-costs-to-replacing-employees/.*

[45] See Weber & Silverman *supra* note 31.

[46] The Federal Acquisition Regulation Council (FARC), pursuant to an inflation-adjustment statute, 41 U.S.C. 1908, enacted a final rule that raises the dollar threshold amount in the Federal Acquisition Regulation (FAR) sections related to Section 503 of the Rehabilitation Act (Section 503) from in excess of $10,000 to $15,000. These inflationary adjustments also apply to VEVRAA's $100,000 statutory minimum threshold but they do not apply to Executive Order 11246 and its dollar threshold of more than $10,000. The procurement adjustments are made every five years.

[47] The FARC, in a separate process, is responsible for amending the FAR provisions to incorporate the change in the Equal Opportunity Clause text. OFCCP will engage the FARC representatives as early as possible to coordinate FAR changes as the Executive Order applies to ''contracts entered into on or after the effective date of rules promulgated by the Department of Labor . . .'' The FAR at 1.108(d), FAR Conventions, provides that FAR changes apply to contracts issued on or after the date of the FAR change but that contracting agencies are allowed to include a FAR change in solicitations issued before the effective date, provided award of the resulting contract occurs on or after the effective date. Contracting agencies, at their discretion, may include a FAR change in any existing contract with appropriate consideration.

not protect employees who disclose compensation information that they had access to as part of their essential job functions. This exception allows contractors to take adverse action against employees who have access to compensation information pursuant to their work duties (e.g., human resources professionals) and disclose that information to other individuals who do not otherwise have access to such information, unless the 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.

In addition to the proposal amending the existing equal opportunity clauses in § 60–1.4 to include the nondiscrimination provision in Executive Order 13665, the NPRM also proposes to define key terms used in Executive Order 13665 that are incorporated into the proposed rule. Finally, in § 60–1.35, contractors would be provided defenses to allegations of violations of the nondiscrimination provision. The proposed defenses provisions allow contractors to pursue a defense as long as that 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 that of other employees consistent with the provisions in the equal opportunity clauses in § 60–1.4. Section 1.35 of the NPRM also proposes requiring the dissemination of the nondiscrimination provision in handbooks and manuals, and through electronic or physical postings. For those contractors that provide manager training or meetings, OFCCP is considering making it a requirement that they include nondiscrimination based on pay in their existing manager training programs or meetings. As for other contractors, OFCCP would encourage them to adopt this as a best practice for minimizing the likelihood of workplace discrimination. Consequently, OFCCP seeks comment on the feasibility of requiring contractors with manager training programs or meetings to include a regular review of the nondiscrimination provision. The language of the provision will be prescribed by the Director of OFCCP to ensure consistency of message and clarity of purpose. We are particularly interested in the cost associated with including a review of the provision in existing manager training programs or meetings.

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.[48] Second, it requires covered Federal contractors and subcontractors to take affirmative action to ensure that equal opportunity is provided 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 202 of this Executive Order requires every contractor to agree to comply with all provisions of the Executive Order 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.[49]

II. Major Proposed Revisions in the NPRM

The current regulations at § 60–1.4 enumerate the basic equal employment obligations of Federal contractors in a clause required to be included in all Federal contracts. The current § 60–1.3 includes relevant definitions. The NPRM proposes the following changes to the regulations:

- Amending § 60–1.3, Definitions, to insert definitions for each of these words or terms: Compensation, compensation information, and essential job functions.
- Amending § 60–1.4(a), Equal opportunity clause, *Government contracts,* to include the requirement that Federal contractors refrain from discharging or otherwise discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants, except where the disclosure was carried out by an employee who obtained the information in the course of performing his or her essential job functions. This new requirement would be inserted as § 60–1.4(a)(3).
- Amending § 60–1.4(b), Equal opportunity clause, *federally assisted construction contracts,* to include the requirement that construction contractors must refrain from discharging or otherwise discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or the compensation of other employees or applicants, except where the disclosure was carried out by an employee who obtained the information in the course of performing his or her essential job functions. This new requirement would be inserted as § 60–1.4(b)(3).
- The NPRM would delete the outdated reference to the ''Deputy Assistant Secretary'' in § 60–1.4(d), Equal opportunity clause, *Incorporation by reference,* and replace it with the ''Director of OFCCP.'' The proposal also includes changing the title of § 60–1.4(d) to *Inclusion of the equal opportunity clause by reference* and making a conforming change in the text.
- Creating a new provision at § 60–1.35 entitled Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures. Proposed § 60–1.35(a) and (b), respectively, would 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. Proposed § 60–1.35(c) would also require Federal contractors to incorporate the nondiscrimination provision, as prescribed by the Director of OFCCP and made available on the OFCCP Web site, into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and to job applicants. The prescribed

[48] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. Executive Order 13672 requires that the Secretary of DOL prepare regulations within 90 days of the date of the Order. Though Executive Order 13672 is effective immediately, its protections apply to contracts entered into on or after the effective date of the new DOL regulation.

[49] Executive Order 11246, Section 209(5); 41 CFR 60–1.27.

nondiscrimination provision is based on the language in section 2(b) of Executive Order 13665. This dissemination can be executed electronically or by posting the prescribed provision in conspicuous places available to employees and job applicants.

Section-by-Section Analysis

Part 60–1—Obligations of Contractors and Subcontractors SUBPART A—Preliminary Matters; Equal Opportunity Clause; Compliance Reports

Section 60–1.3 Definitions

The NPRM proposes definitions for three words or terms used in Executive Order 13665 and incorporated into the NPRM. The term ''compensation'' would be included and defined in § 60–1.3. The definition would 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 contributions to retirement. This definition aligns with the definition OFCCP uses in the context of compensation discrimination investigations.[50]

Next, the proposed rule adds the term ''compensation information'' to the definitions section at § 60–1.3. We propose to define ''compensation information'' by adopting the definition used by OFCP in existing guidance. As such the definition would cover any information related to all aspects 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. This proposed definition is meant to be broad enough to cover any information directly related to employee compensation, as well as the process or steps that led to a decision to award a particular amount or type of compensation.

Lastly, the proposed rule adds the term ''essential job functions'' to the definitions section. The proposed definition of ''essential job functions'' would include the fundamental job duties of the employment position held by an individual. The term does not include the marginal functions of the position. A job function may be considered essential for any of several reasons, including but not limited to the following:

- The function may be essential because the reason the position exists is to perform that function;
- 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
- 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.

In the Americans with Disabilities Act Amendments Act (ADAAA) and OFCCP's regulations implementing section 503 of the Rehabilitation Act, the ''essential job function'' analysis and evidence relate to issues of reasonable accommodation and qualification.[51] The goal in the disability context is to provide equal opportunity to individuals with disabilities, and to provide reasonable accommodation that is sufficient to allow an employee to perform the essential functions of the job and a job applicant to participate in the application process. However, in the context of Executive Order 13665, the goal is to determine whether an employee, by virtue of the job or position held, had access to employee and applicant compensation information as an essential job function and improperly disclosed that information. Such an employee could properly be subject to adverse action by the employer for making that disclosure under Executive Order 13665 and its implementing regulations as proposed in this NPRM.

OFCCP is proposing to adopt the section 503 and ADAAA definition and the broad factors that determine whether a job function may be considered essential, because contractors are familiar with them and they also apply in this context. We are not certain of the applicability of the existing list of types of evidence contractors could look to when determining if a particular function is essential. Not all of these section 503 factors, as listed below, may be particularly applicable in this context.

- The contractor's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.

The NPRM utilizes definitions and concepts from analysis of claims under the ADAAA and Title VII of the Civil Rights Act of 1964 (Title VII). However, any application or interpretation of the definitions and concepts under this proposed regulation is limited to pay disclosure discrimination claims governed by Executive Order 13665. As such, this NPRM is not intended to influence the analyses by the Equal Employment Opportunity Commission (EEOC) or the courts with respect to adjudication of claims under the ADA, as amended, and Title VII.

Therefore, OFCCP is specifically seeking public comment on the applicability of these factors, and possibly other factors, when making the determination of ''essential job function'' under Executive Order 13665, section 2(b). The factors would be considered when determining whether a disclosure by an employee of another employee's or job applicant's compensation was protected under section 2(b) of the Executive Order 13665 and the proposed amendments to § 60–1.4 implementing this section of Executive Order 13665. If the disclosure is not protected by the nondiscrimination provisions because the employee had access to the compensation information by virtue of the employee's essential job functions, the employee making the disclosure could be subjected to disciplinary or other adverse action by the employer without the employer violating Executive Order 13665 or its implementing regulations, unless that disclosure meets the exceptions provided for in section 2(b).

Section 60–1.4 Equal Opportunity Clause

The proposed rule adds a clause to § 60–1.4(a), *Governments contracts,* and to § 60–1.4 (b), *Federally assisted construction contracts.* In the existing regulations, § 60–1.4(a) requires contracting agencies to include the equal opportunity clause in section 202 of Executive Order 11246 in governments contracts and modifications thereof if the clause was

[50] *See* Notice of Final Rescission, ''Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination'' (February 28, 2013); OFCCP Directive (DIR) 2013–03 (formerly DIR 307): Procedures for Reviewing Contractor Compensation Systems and Practices (February 28, 2013).

[51] 41 CFR 60–741.2(i).

not included in the original contract. By accepting the Federal contracts, contractors accept the nondiscrimination and affirmative action requirements contained in the equal opportunity clause and agree to include the requirements in existing paragraph 1 through 7 of 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.

Executive Order 13665, issued on April 8, 2014, amends section 202 of Executive Order 11246 so that it includes a new provision prohibiting discrimination against employees who have disclosed their compensation or the compensation of others, with limited exceptions. Contracting agencies must incorporate the new provision into the existing equal opportunity clause in their contracts, and contractors are held to comply with the revised clause and to include it in their subcontracts and purchase orders for new and modified contracts after the effective date of this Rule.

The proposed rule would revise § 60–1.4 (a) 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. Under the terms of the provision, contractors will not be allowed 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 in EO 13665 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.

In the existing regulations, § 60–1.4(b), Equal opportunity clause, *federally assisted construction contracts,* a similar change is proposed. Section 60–1.4(b)(1) requires that administering agencies involved in federally assisted construction through grants, loans, insurance, or guarantee include in their contracts for construction work text 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. The section further provides the exact language for the equal opportunity clause that lists the contractor's obligations. As with § 60–1.4(a), by accepting the funding the contractor is agreeing to assume the nondiscrimination and affirmative action obligations of Executive Order 11246, including incorporating existing paragraph 1 through 7 of 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 proposed rule revises § 60–1.4(b)(1) 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 as reprinted above.

These proposed changes to § 60–1.4 are intended 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 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 NPRM.[52] Studies have shown that these pay secrecy policies are common among contractors and foster negative consequences for some employees and applicants for employment.[53] The proposed rule does not require employees to share information about compensation with other employees.

The NPRM proposes deleting the outdated reference to the ''Deputy Assistant Secretary'' in § 60–1.4(d), Equal opportunity clause, *Incorporation by reference,* and replacing it with the ''Director of OFCCP.'' The proposal also includes changing the title of § 60–1.4(d) to *Inclusion of the equal opportunity clause by reference* and changing the first sentence of § 60–1.4(d) by deleting ''incorporated by reference'' and inserting to ''included by reference.''

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

Proposed Section 60–1.35, Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation Disclosures, would add a new section to part 60–1 that would implement the requirements of section 2(b), as well as the contractor defenses set forth in the Executive Order.

Analytical Framework

To provide an analytical framework, OFCCP views Executive Order 13665 as establishing a new prohibition against discrimination against any employee or applicant who inquires about, discusses, or discloses her own or someone else's compensation. The equal opportunity clause paragraph set out in section 2(b) of the Executive Order is framed in terms of discrimination. Thus, OFCCP believes that the burdens and standards of proof applicable to Title VII discrimination cases are appropriately applied to violations of section 2(a). OFCCP notes that the new prohibition here diverges from the traditional retaliation framework in that the adverse action would not flow from filing a complaint; assisting or participating in an investigation, evaluation or hearing; or otherwise opposing an act or practice made unlawful by Executive Order 11246.[54] That traditional retaliation framework is designed to protect the integrity of the administrative and legal processes by which workers assert their rights to be free from discrimination. The prohibition at issue here serves a very different purpose—to protect workers from pay discrimination itself.

As supported by administrative case law, the nondiscrimination standards developed under Title VII of the Civil Rights Act of 1964 apply to cases

[52] Cappelli, Peter, and Kevin Chauvin, ''An Interplant Test of the Efficiency Wage Hypothesis,'' Quarterly Journal of Economics, 106, 769–787, *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).

[53] See Bamberger & Belogolovsky *supra* note 31, and Adrienne Colella, Ramona L. Paetzold, Asghar Zardkoohi & Michael J. Wesson, *Exposing Pay Secrecy,* 32 ACAD. of MANAGEMENT REV. 55, 58 (2007).

[54] See 41 CFR 60–1.32.

brought under Executive Order 11246.[55] Both the Executive Order and Title VII have as one of their goals the identification and elimination of employment discrimination; therefore, Title VII standards for determining the existence of discrimination may properly be applied to discrimination cases under Executive Order 11246.[56] Thus, OFCCP expects that it will evaluate contractor defenses pursuant to 60–1.35 under a Title VII discrimination framework.[57]

Under Title VII, the applicable analytical framework is found in 42 U.S.C. 2000e–2(m), which provides that ''an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.'' Under this framework, where the contractor has set forth a lawful reason for its action, i.e., the violation of its legitimate workplace rule, OFCCP would have to demonstrate that the improper reason, i.e., disclosure or discussion of compensation by the applicant or employee, was a motivating factor for the adverse action even if the lawful reason also motivated the adverse action. Under Title VII, therefore, the employer cannot defeat liability once the plaintiff proves the existence of an impermissible motivating factor.

The employer can, however, limit the scope of an adverse remedial order under Title VII if it can prove that it would have taken the same employment action in the absence of the impermissible motivating factor, i.e., based on violation of the legitimate workplace rule. The court in that situation may grant declaratory relief, injunctive relief and limited attorney's fees and costs, where appropriate. The employer would not be liable for monetary damages or a reinstatement order.[58]

The Department recognizes that the National Labor Relations Act (NLRA), like the Executive Order, prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants.[59] Therefore, a significant portion of the contractor's workforce may be subject to the protections of both the NLRA and the Executive Order. The Department believes that the prohibitions under Executive Order 13665 are compatible with the existing prohibitions under the NLRA, although the Executive Order affords protection to a broader group of employees than under the NLRA. The Executive Order also covers supervisors, managers, agricultural workers, employees of rail and air carriers and covers activity that may not be ''concerted'' under the NLRA.

It is well settled that the NLRB applies a motivating factor analysis, thus protecting an employee's right to engage in wage discussions with other employees, unless the employer can demonstrate, as an affirmative defense, that the adverse action taken against the employee would have occurred in any event.[60] OFCCP notes that the ''motivating factor'' causation standard applicable under the NLRA is consistent with the standard applicable to Title VII discrimination cases.[61] Accordingly, OFCCP proposes applying the ''motivating factor'' causation standard in assessing liability for violations of the new prohibition established in the Executive Order as a matter of consistency with Title VII and NLRA principles.

The Department is of the opinion that the Supreme Court's recent decision in *University of Texas Southeastern Medical Center* v. *Nassar* does not dictate otherwise.[62] The Court held in *Nassar* that Title VII's anti-retaliation provision requires ''but for'' causation, and that the standards and burdens of proof in the 1991 amendments to the Civil Rights Act at 42 U.S.C. 2000e–2(m) apply only to claims for discrimination based on race, color, religion, sex, or national origin under section 2000e–2, not retaliation discrimination referenced in 42 U.S.C. 2000e–3. Thus, under *Nassar,* the ''motivating factor'' standard applicable in discrimination cases no longer applies in retaliation cases. As noted above, though, OFCCP does not believe that the burdens and standards applicable to retaliation cases are applicable here, but invites comments on this issue. Furthermore, the Department notes that the EEOC has taken the position that *Nassar* does not apply to retaliation claims by Federal sector employees and applicants, due to different controlling statutory language in Section 717 of Title VII.[63] No conflicts exist between the EEOC's position on *Nassar* and the Department's interpretation of *Nassar* as described above.

Finally, the Department is aware of the District of Columbia Circuit Court decision, *Chamber of Commerce* v. *Reich*,[64] holding that Executive Order 12954, which authorized the Secretary of Labor to disqualify from certain Federal contracts employers who hire permanent replacement workers during a lawful strike, was in conflict with the NLRA and ''pre-empted by the NLRA which guarantees the right to hire permanent replacements.'' [65] No such conflict exists here, as Executive Order 13665 is compatible with the existing prohibitions under the NLRA.

Contractor Defenses

The text of paragraph 60–1.35(a) incorporates the text in section 5(a) of Executive Order 13665. The text of paragraph § 1.35(a) sets out the general contours of a permissible contractor defense—that any such defense can be based on a legitimate workplace rule that does not violate the prohibition in paragraph (3) of the equal opportunity clause. For example, the contractor may have a rule that prohibits employees from being disruptive in the workplace. An employee may violate that rule by

[55] *OFCCP* v. *Greenwood Mills,* 89–OFC–39, Final Decision and Order (ARB) December 20, 2002, at 5.

[56] *OFCCP* v. *Illinois Institute of Technology,* 80–OFCCP–11, December 23, 1982, Secretary's Final Order at 5.

[57] Any claim of discrimination under the Executive Order and its implementing regulations does not preclude the filing or adjudication of claims arising under Title VII, the ADA, Section 503 of the Rehabilitation Act of 1973, the Age Discrimination in Employment Act of 1967, or the Genetic Information Nondiscrimination Act.

[58] 42 U.S.C. 2000e–5(g)(2).

[59] The National Labor Relations Board (NLRB) recently stated in *Parexel International LLC,* 356 NLRB No. 82, slip op. at 3 (2011):

The Board has long held that Section 7 ''encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.''[59] In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, ''probably the most critical element in employment,'' are ''the grist on which concerted activity feeds.''

[60] *NLRB* v. *Transportation Management Corp.,* 462 U.S. 393 (1983) (''It is fair that [the employer] bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.''); *Flex Frac Logistics, LLC,* 360 NLRB No. 120 (May 30, 2014) (NLRB found that employer lawfully discharged employee for disclosing confidential information, not for violating rule prohibiting wage discussions).

[61] OFCCP recognizes that under the NLRA, unlike under Title VII, an employer can escape liability altogether if it establishes that it would have taken the adverse action against the employee in any event and that in this regard the Executive Order affords greater protection to employees than presently exists under the NLRA. OFFCP invites comments on this issue.

[62] *University of Texas Southeastern Medical Center* v. *Nassar,* 133 S.Ct. 978 (2013). See also *Gross* v. *FBL Financial Services, Inc.,* 557 U.S. 167 (2009).

[63] *See Complainant* v. *Dep't of Interior,* E.E.O.C. Pet. No. 032011050, 2014 WL 3788011, at *10, n.6 (July 16, 2014).

[64] *Chamber of Commerce* v. *Reich,* 74 F.3d 1322 (D.C. Cir. 1996).

[65] *Id.* at 1339.

standing on her desk and repeatedly shouting out her pay. If the contractor terminates her for those actions, the contractor may have a defense to a charge of discrimination if it can demonstrate that she was terminated for being disruptive, not for disclosing her pay. Similarly, an employee may violate that same rule if she constantly asks other employees on working time unwelcome questions about their compensation after they request that she stop asking them. These examples are provided simply to illustrate that paragraph 1.35(a) permits contractors to enforce rules against disruptive behavior in the workplace, even if the applicant or employee is discussing his/her compensation or that of other applicants or employees while being disruptive. As with implementation of any legitimate workplace rule, though, the rule must be uniformly and consistently applied, and all defenses under this section will be evaluated based on the specific facts and circumstances. OFCCP is concerned that contractors' legitimate workplace rules, policies and practices such as those related to maintaining discipline in their workplaces and protecting their businesses be consistently and uniformly applied and narrowly defined to ensure they do not unnecessarily prohibit, or tend to prohibit, employees or applicants from inquiring about, discussing or disclosing their compensation or the compensation of other employees or applicants.[66] Accordingly, OFCCP invites 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.

The text of paragraph § 1.35(b) is identical to the text in section 2(b) of Executive Order 13665. This paragraph in effect incorporates a specific, legitimate workplace rule: In general, a contractor will not violate proposed equal opportunity clause paragraph 3 if it takes adverse action against an employee, who is entrusted with confidential 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.

This defense acknowledges that an employee who has access to sensitive 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. If, however, such an employee discloses or discusses the compensation of other applicants or employees based on information that the employee received through means other than essential job functions access, e.g., through a conversation with a colleague, 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 contractor manager. Without this distinction, employees with essential job functions access, who primarily work in human resources departments and who are predominantly women,[67] would receive less protection than other employees who learn of possible compensation disparities in a similar manner.

The Executive Order and OFCCP recognize that disclosure by someone with essential job functions access to compensation information may also be appropriate in other limited circumstances. To the extent that an employee with access to compensation information as part of his or her essential job functions discloses compensation information of others in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, § 60–1.35(b) and § 60–1.32 prohibit the contractor from taking adverse action against that employee. As paragraph § 1.32(a) provides, contractors are not allowed to harass, intimidate, threaten, coerce, or discriminate against individuals who have engaged in protected activities, which include assisting in an investigation, review or hearing. Paragraph § 1.35(b) reinforces that the same protection and remedies apply to employees with access to compensation information, who disclose compensation information pursuant to a formal complaint or charge, investigation, proceeding hearing, or action, including an investigation conducted by the contractor, or consistent with the contractor's legal duty to furnish information. As with any defense, OFCCP will evaluate the availability of a paragraph 1.35(b) defense based on the specific facts and circumstances of each case.

Proposed § 60–1.35(c) would require Federal contractors to incorporate the nondiscrimination provision, as prescribed by the Director of OFCCP and made available on the OFCCP Web site, into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and job applicants. The prescribed nondiscrimination provision is based on the language in section 2(b) of Executive Order 13665. This dissemination can be executed electronically or by posting a copy of the provision in conspicuous places available to employees and job applicants. 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.

For contractors that provide manager trainings or meetings, OFCCP is considering making it a requirement that they include a review of the prohibition on discriminating based on an employee or applicant inquiring about, discussing, or disclosing compensation information in their existing manager trainings or meetings. As for other contractors, OFCCP would encourage them to adopt this approach as a best practice for minimizing the likelihood of workplace discrimination. Consequently, OFCCP seeks comment on the feasibility of requiring contractors with manager trainings or meetings to include a regular review of the nondiscrimination provision. The language of the provision will be prescribed by the Director of OFCCP to ensure consistency of message and clarity of purpose. We are particularly interested in the cost associated with including a review of the provision in existing manager training programs or meetings.

Regulatory Procedures

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

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the

[66] See *Flex Frac Logistics, LLC,* 360 NLRB No. 120 (May 30, 2014) (NLRB found that employer lawfully discharged employee for disclosing confidential business information, even though disclosure also included wage information).

[67] In 2013, at least 71.9 percent of human resources professionals in three occupational categories were women. According to Bureau of Labor Statistics figures, women made up 72.4 percent of human resource workers in business and financial operations positions, 71.9 percent of those employed in human resource positions in management occupations, and 82 percent of those employed as human resources assistants who do not perform payroll or timekeeping work in office and administrative support occupations. *See* Dep't of Labor, Bureau of Labor Statistics, Household Data, Annual Averages: 11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity, *available at http://www.bls.gov/cps/cpsaat11.htm.*

least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. 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.

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

The Need for the Regulation

The proposed regulatory changes are needed to ensure that employees of Federal contractors and subcontractors are able to discuss their compensation without fear of adverse action. It is also needed to enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices. The NPRM is designed to contribute to a more efficient market in Federal contracting, and 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. The proposals in this NPRM benefit 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.[68] By including the provision in the equal opportunity clauses OFCCP is clearly defining such actions as discriminatory and enhancing OFCCP's ability to take action when it finds pay secrecy policies or practices during compliance evaluations and complaint investigations. In developing its NPRM, OFCCP worked with several other Federal agencies on the National Equal Pay Task Force to identify the persistent challenges to equal pay enforcement and develop an action plan to implement recommendations to resolve those challenges. OFCCP also consulted a number of sources in order to assess the need for the proposed rulemaking. 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.[69] 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 preferences, work schedules or other similar factors.[70] Thus, some of the remaining unexplained portion of the pay gap may be attributable to discrimination.

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 was among one of the most prevalent employer policies and practices that made discrimination much more difficult to discover and remediate.[71] OFCCP's work led to the determination that there is a substantial need for the proposed regulatory action.

Research conducted by the IWPR concluded that the poverty rate for working women could be reduced by half if women were paid the same as comparable men. The paper determined that nearly 60 percent (59.3 percent) of women could earn more if working women were paid the same as men of the same age with similar education and hours of work.[72] The poverty rate for all working women could be cut in half, falling to 3.9 percent from 8.1 percent.[73] The high poverty rate for working single mothers could fall by nearly half, from 28.7 percent to 15 percent.[74] For the 14.3 million single women living on their own, equal pay could mean a significant drop in poverty from 11.0 percent to 4.6 percent.[75] These statistics are intended to provide general information about the potential impacts of eliminating pay differentials among men and women, including pay differentials not attributed to discrimination. In addition, the IWPR statistics include all employers and all employees in the U.S., whereas this proposed 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.[76] This research also suggests that persistent pay discrimination for women translates into lower wages and family income in families with a working woman. The gender pay gap may also affect the economy as a whole.

[68] The proposed 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.

[69] According to the latest Bureau of Labor Statistics (BLS) data, the weekly median earnings of women are about 82 percent of that for men. Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics;* Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013 *available at http://www.bls.gov/news.release/wkyeng.t01.htm.* Looking at annual earnings reveals even larger gaps—women working full time earn approximately 77 cents on the dollar compared with men. U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), *available at http://www.census.gov/prod/2012pubs/p60-243.pdf.* BLS data reveals that African American women make approximately 68 cents, Latinas make approximately 59 cents, and Asian-American women make approximately 87 cents for every dollar earned by a non-Hispanic white man. OFCCP acknowledges that these statistics do not account for nondiscriminatory factors that may explain some of the differential.

[70] *Women in America: Indicators of Social and Economic Well-Being* (2011) (male-female pay gap persists at all levels of education for those working 35 or more hours per week), according to 2009 BLS wage data.

[71] 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.*

[72] Heidi Hartman, Ph.D., Jeffrey Hayes, Ph.D., & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy, Briefing Paper IWPR #C411,* Institute for Women's Policy Research, January 2014.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 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).

Discussion of Impacts

In this section, OFCCP presents a summary of the costs associated with the proposed requirements in §§ 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 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 proposed new provisions.[77] 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.[78] Comments are welcome on all aspects of the cost and burden calculations, including the number of affected contractors and the amount of time contractors would spend complying with the proposals in this NPRM.

[77] Legacy CCR Extracts Public (''FOIA'') Data Package, May 2014, *https://www.sam.gov/portal/public/SAM/;* last accessed June 14, 2014. 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.

[78] The FAR Council (FARC), pursuant to an inflation-adjustment statute, 41 U.S.C. 1908, enacted a final rule that raises the dollar threshold amount in the Federal Acquisition Regulation (FAR) sections related to Section 503 of the Rehabilitation Act (Section 503) from in excess of $10,000 to $15,000. These inflationary adjustments also apply to VEVRAA's $100,000 statutory minimum threshold but they do not apply to Executive Order 11246 and its dollar threshold of more than $10,000. The procurement adjustments are made every five years.

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 face, when complying with the requirements.

OFCCP believes that human resources or personnel managers at each contractor company or firm will be responsible for understanding or becoming familiar with the new requirements. OFCCP estimates that it will take a minimum of 60 minutes or 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. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication ''Employer Costs for Employee Compensation'' (December 2013) which lists total compensation for the Management, Professional, and Related Occupations group at $51.58. 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 NPRM proposes prohibiting 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 NPRM proposes amending § 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. There is no additional burden associated with adding these terms to the definitions section.

In § 60–1.4(a)(3), the NPRM proposes to mandate 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 paragraph § 60–1.4(a)(4); existing § 60–1.4(a)(4) would be placed in paragraph § 60–1.4(a)(5); existing § 60–1.4(a)(5) would be placed in paragraph § 60–1.4(a)(6); existing § 60–1.4(a)(6) would be placed in paragraph § 60–1.4(a)(7); and existing § 60–1.4(a)(7) would be placed in new paragraph § 60–1.4(a)(8). The equal opportunity clause may be incorporated by reference into Federal contracts and subcontracts.

In proposed § 60–1.4(b)(3), the NPRM mandates that each administering agency incorporate the prohibition into the equal opportunity clause of an 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 paragraph § 60–1.4(b)(4); existing § 60–1.4(b)(4) would be placed in paragraph § 60–1.4(b)(5); existing § 60–1.4(b)(5) would be placed in paragraph § 60–1.4(b)(6); existing § 60–1.4(b)(6) would be placed in paragraph § 60–1.4(b)(7); and existing § 60–1.4(b)(7) would be placed in new paragraph § 60–1.4(b)(8). The equal opportunity clause may be incorporated by reference into federally assisted contracts and subcontracts. OFCCP estimates 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 NPRM proposes adding § 60–1.35(a) and (b) discussing contractor defenses to an allegation of violation of proposed § 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 NPRM proposes requiring 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 NPRM contemplates that contractors would adopt the nondiscrimination language provided by OFCCP into contractors' existing employee manuals or handbooks and otherwise make it available to employees and applicants.

Paragraph 60–1.35(c)(i) proposes to require contractors to include the nondiscrimination provision in existing employee manuals or handbooks. OFCCP assumes that most contractors (99 percent) maintain these documents electronically. 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. Additionally, for those contractors that do not maintain their handbooks electronically, OFCCP believes those contractors (1 percent) will 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)).[79]

In § 60–1.35(c)(ii) the NPRM proposes requiring 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))).[80]

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 proposed regulations 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.

Paragraph 60–1.35(c)(i)

OFCCP estimates that 1 percent of contractors (5,000 contractors) will incorporate the proposed nondiscrimination provision into their existing hardcopy handbook or manual. OFCCP estimates that these 5,000 contractors will incorporate into an existing handbook or manual a single one-page errata sheet that includes the proposed 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).

Paragraph 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 × 1% × 10 pages × $0.08 = $4,000).

The estimated total first year cost of this proposed 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 PROPOSED NEW 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

[79] OFCCP assumes that administrative support will identify the appropriate clause, and insert it into the handbook (75 percent) with management oversight (25 percent).

[80] OFCCP 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 PROPOSED NEW REQUIREMENTS—Continued

[Estimated First-Year Burden Hours and Costs]

Section	Burden hours	Costs
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
Total First-Year Burden Hours and Costs	1,045,000	42,721,788

TABLE 1—CONTRACTOR PROPOSED NEW REQUIREMENTS

[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 Proposed 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

Analysis of Rulemaking Alternatives

In addition to the approach proposed in the NPRM, OFCCP considered an alternative approach. OFCCP considered solely inserting the nondiscrimination requirement as to applicants and employees who disclose or discuss compensation into the equal opportunity clause. The primary benefit of this approach would be that it would have negligible burden on contractors. Yet, the impact of inserting the prohibition into the equal opportunity clause without informing employees and managers of the change in practice would be of limited use. In the absence of knowledge about the prohibition on discriminating based on compensation inquiries, discussions, or disclosures this worker protect provision would not change behaviors and would not be an effective or efficient way to enforce Executive Order 11246, as amended by Executive Order 13665. From years of experience, OFCCP realizes that contractors are better able to comply with its requirements when its managers and employees understand the prohibitions and are informed about their rights and obligations. Thus, although this alternative involves negligible change in the burden to contractors, it does not promote efficient enforcement of Executive Order 11246, as amended. OFCCP seeks comments from small contractors on possible alternatives that would minimize the impact of this NPRM while still accomplishing the goals of this rule.

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 has equity and fairness benefits, which are explicitly recognized in Executive Order 13563. Enabling Federal contractor employees 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. The NPRM is designed 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.

If the proposed rule decreases pay secrecy-facilitated compensation discrimination, this impact most likely represents a transfer of value to female or minority employees from employers (if additional wages are paid out of profits) or taxpayers (if contractor fees increase due to the need to pay higher wages to employees). There is also some potential that some employees could experience decreases in pay (or slowing of increases) as employers adjust compensation practices.

Social Benefits of Improved Antidiscrimination 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.[81] 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.[82]

[81] 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).

[82] Kenneth J. Arrow, ''What Has Economics to Say about Racial Discrimination?'' 12 The Journal of Economic Perspectives 91 (1998).

For this reason, effective anti-discrimination 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.[83] One recent study estimated that improved workforce participation by women and minorities, including through adoption of civil rights laws and changing social norms, accounts for 15–20 percent of aggregate wage growth between 1960 and 2008.[84] Positive impacts of this proposed rule, which only applies to Federal contractors and only affects discrimination that is facilitated by pay secrecy practices, would necessarily be smaller than the impacts of major society-wide phenomena such as the civil rights movement.

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

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that principle, the Act requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis (IRFA) and to develop alternatives whenever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The Act requires the consideration for the impact of a proposed regulation on a wide-range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposal or final rule would have a significant economic impact on a substantial number of small entities.[85] If the determination is that it would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.[86]

However if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. See 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

OFCCP is publishing this initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. OFCCP invites interested persons to submit comments on the following estimates, 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.

Why OFCCP is Considering Action: OFCCP is publishing this proposed regulation to implement the requirements of Executive Order 13665, ''Non-Retaliation for Disclosure of Compensation Information.'' The Executive Order amends Executive Order 11246 by including a prohibition on discriminating against employees and job applicants for inquiring about, discussing or disclosing the compensation of the employee or job applicant or another employee or job applicant. Executive Order 11246 grants responsibility for enforcement to the Secretary of Labor.

Objectives of and Legal Basis for Rule: This proposed rule will provide guidance on how to comply with the nondiscrimination requirements of Executive Order 13665. Section 2(b) of Executive Order 36651 directs the Secretary to issue regulations to implement the requirements of the Order. Section 5(a) sets out the general contours of permissible contractor defenses, specifically that any such defense can be based on a legitimate workplace rule that does not violate the prohibition of the Executive Order.

Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping: As explained in this proposed rule, Executive Order 13665 amends Executive Order 11246 and its Equal Opportunity Clause by incorporating discriminating against employees and job applicants who inquire about, discuss or disclose the compensation of the employee or applicant or another employee or applicant as a covered prohibition. 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.

This NPRM contains several provisions that could be considered to impose compliance requirements on contractors. The general requirements with which contractors must comply are set forth in Subpart B of this part. Contractors are obligated by Executive Order 13665 and this proposed rule to abide by the terms of the Equal Opportunity Clause. Among other requirements set forth in the contract clause, contractors must not discriminate against an employee or applicant because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.

In implementing this prohibition, the proposed rule requires contractors to incorporate the nondiscrimination provision into existing employee manuals and handbooks; and disseminate the provision to employees and job applicants either electronically or by posting a copy of the provision in conspicuous places. Documents (i.e., employee manuals, handbooks, employee notifications and meeting notes) created as a result of the proposed rule would fall under the general recordkeeping provisions of the existing regulations and will not impose any additional obligations to which the contractor is not already subject under Executive Order 11246. The proposed rule does not impose any reporting requirements on contractors.

All small entities subject to Executive Order 11246 would be required to comply with all of the provisions of the NPRM. 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.

Calculating Impact of the Proposed Rule on Small Business Firms: OFCCP must determine the compliance cost of this proposed rule on small contractor

[83] 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).

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

[85] See 5 U.S.C. 603.

[86] *Id.*

firms, and whether these costs will be significant for a substantial number of small contractor firms (i.e. small business firms that enter into contracts with the Federal Government), and whether these costs will be significant for a substantial number of small contractor firms. If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, OFCCP considers it appropriate to conclude that this proposed rule will not have a significant economic impact on the small contractor firms covered by Executive Order 13665. OFCCP has chosen three percent as our 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 proposed rule. The benefits, which may include improved employee productivity and decreased employee turnover, are discussed more fully in the preamble of this NPRM.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards,[87] the Current Population Survey (CPS), and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[88] Since Federal contractors are not limited to specific industries, OFCCP assessed the impact of this NPRM across the 19 industrial classifications.[89] 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 proposed 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 the summary tables below (*see Tables 3–21).*

In sum, the increase 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 three 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 in no instance is the effect of the NPRM greater than three percent of total receipts.

Although OFCCP estimates the compliance costs are less than three percent of the average revenue per small contractor firm for each of the 19 industries, OFCCP seeks data and feedback from small firms on the factors and assumptions used in this analysis, such as the data sources, small business industries, NAICS codes and size standards, and the annual costs per firm as a percent of receipts. OFCCP seeks information about which data sources should be used to estimate the number of Federal small subcontractors. OFCCP also seeks information about the potential compliance cost estimates, such as any differences in compliance costs for small businesses as compared to larger businesses and any compliance costs that may not have been included in this analysis.

Estimating the Number of Small Businesses Affected by the Rulemaking: OFCCP now sets forth its estimate of 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. OFCCP believes that this NPRM will not have a significant economic effect on a substantial number of small businesses.

Based on the most current SAM data available, if OFCCP defined small as fewer than 500 employees, then there are 328,552 small contractor firms. If the Department defined 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 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. OFCCP does not have more precise estimates of the number of contractor firms with such policies or practices. OFCCP invites the public to provide information related to this data limitation, and any data on small contractors.

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

Relevant Federal Rules Duplicating, Overlapping, or Conflicting with the Rule: As discussed in the preamble above, OFCCP recognizes that the National Labor Relations Act (NLRA),

[87] *http://www.sba.gov/advocacy/849/12162#susb,* last visited June 9, 2014.

[88] *http://www.census.gov/econ/susb/,* last accessed June 9, 2014.

[89] 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.

like the Executive Order, prohibits employers from discriminating against employees and job applicants who discuss or disclose their own compensation or the compensation of other employees or applicants [90] and that therefore a significant portion of the contractor's workforce may be subject to the protections of both the NLRA and the Executive Order. The Department believes that Executive Order 13665 is compatible with the existing prohibitions under the NLRA, although it affords protection to a broader group of employees than under the NLRA. The Executive Order also covers supervisors, managers, agricultural workers, employees of rail and air carriers and covers activity that may not be ''concerted'' under the NLRA.[91]

[90] The National Labor Relations Board (NLRB) recently stated in *Parexel International LLC,* 356 NLRB No. 82, slip op. at 3 (2011):

The Board has long held that Section 7 ''encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment.'' [90] In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, ''probably the most critical element in employment,'' are ''the grist on which concerted activity feeds.''

[91] As noted above, OFCCP recognizes that under the NLRA, unlike under Title VII, an employer can escape liability altogether if it establishes that it would have taken the adverse action against the employee in any event and that in this regard the Executive Order affords greater protection to employees than presently exists under the NLRA.

Alternatives to the Proposed Rule: As described above, OFCCP considered one alternative, solely incorporating the provision into the Equal Opportunity Clause as a prohibition. This alternative would not be an effective or efficient way to enforce Executive Order 11246, as amended by Executive Order 13665.

Differing Compliance and Reporting Requirements for Small Entities: This NPRM provides for no differing compliance requirements for small entities. OFCCP strives to have this proposal implement the requirements of Executive Order 13665 with the least possible burden for small entities. The NPRM provides a number of efficiencies including the incorporation of the provision into existing employee manuals. This inclusion reduces burden associated with developing a policy statement and creating new materials.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities: This NPRM was drafted to clearly state the compliance requirements for all contractors subject to Executive Order 11246, as amended by Executive Order 13665. The proposed rule does not contain any reporting requirements. The recordkeeping requirements imposed by this proposed rule are necessary for contractors to determine their compliance with the rule as well as for OFCCP to determine the contractor's compliance with the law. The recordkeeping provisions apply generally to all businesses covered by Executive Order 11246, as amended by Executive Order 13665; no rational basis exists for creating an exemption from compliance and recordkeeping requirements for small businesses. OFCCP makes available a variety of resources to employers for understanding their obligations and achieving compliance.

Use of Performance Rather Than Design Standards: This NPRM was written to provide clear guidelines to ensure compliance with the Executive Order requirements. Under the proposed rule, contractors may achieve compliance through a variety of means. OFCCP makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption from Coverage of the Rule for Small Entities: Executive Order 11246, as amended by Executive Order 13665 establishes its own coverage and exemption requirements; therefore, OFCCP has no authority to exempt small businesses from the requirements of the Executive Order.

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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]
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-$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	$874,841,000	$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 firm 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]
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 0-4 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 0-4 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 firm ($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**
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 standard 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**
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%
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-$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
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%
Firms with 20-99 employees	55,603	2,288,585	41.2	$85	$440,739,564,000	$7,926,543	0.00%
Firms with 100-499 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
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**
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%
Firms with sales/receipts/revenue of $7,500,000-$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**
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	151,019	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%
Firms with sales/receipts/revenue of $7,500,000-$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
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%
Firms with sales/receipts/revenue of $7,500,000-$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
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%
Firms with sales/receipts/revenue of $7,500,000-$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	58,481	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
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%
Firms with sales/receipts/revenue of $7,500,000-$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
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%
Firms with sales/receipts/revenue of $7,500,000-$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
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%
Firms with sales/receipts/revenue of $7,500,000-$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
Firms with sales/receipts/revenue below $100,000	99,021	139,832	1.4	$85	$4,500,981,000	$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-$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%
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
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-$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%
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
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-$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%
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
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-$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%
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
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-$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%
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
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	756,186	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	$84,065,314,000	$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-$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%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	$85	$11,076,548,000	$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%

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Paperwork Reduction Act

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 rules otherwise takes effect, whichever is later.

As part of its continuing effort to reduce paperwork burdens, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to a collection of information until they are approved by OMB under the PRA.

Purpose and use: 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. The order became effective with the signing of Executive Order 13655 and shall apply to contracts entered into on or after the effective date of the proposed rules.

This NPRM which implements the provisions of Executive Order 13665 contains several provisions that could be considered a ''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) require the incorporation of the new provision verbatim into existing handbooks and manuals, and notification given to applications and employees. 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 has determined that proposed §§ 60–1.35(c)(i) and (ii) do not meet the PRA's definition of ''collection of information'' and therefore these provisions are not subject to the PRA's requirements. However, OFCCP has determined that the proposed changes to §§ 60–1.4 could be considered information collections, thus an information collection request (ICR), has been submitted to the OMB for approval.

Public Comments

OFCCP seeks comments on this NPRM's proposed information collection requirements. Commenters may send their views to OFCCP in the same way as all other comments (e.g., through the *www.regulations.gov* Web site). While much of the information provided to OMB in support of the ICR appears in the preamble, a copy of the

ICR, with applicable supporting documentation—including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=* [INSERT ICR REFERENCE NUMBER] (this link will only become active on the day following publication of this document) or by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. In addition to having an opportunity to file comments with the OFCCP, comments about the proposed rule's information collection requirements may be addressed to the OMB. 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). You can submit comments 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 proposed rule. As previously indicated, written comments directed to the Department may be submitted within 90 days of publication of this notice.

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 non-exempt Federal contractors with contracts, subcontracts, federally assisted construction contracts or subcontracts in excess of $10,000 are required to comply with the proposed 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 total estimated annual burden for contractor companies to comply with the proposed revised regulations is listed in Table 22, below. It 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 its contractor universe will be new contractors and required to modify their equal opportunity clauses.

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–XXXX.

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: $1,320,369.

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 proposed 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 proposed 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 proposed rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The proposed 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 proposed 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 proposed rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this proposed 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 proposed 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 proposed 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 proposed 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 proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed 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, and 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 proposed to be 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.

■ 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 contributions to retirement.

Compensation information means information pertaining 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.

* * * * *

Essential job functions—(1) *In general.* The term *essential job functions* means fundamental job duties of the employment position an individual holds. The term *essential job functions* does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) 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

(iii) 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.

(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, 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, 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, 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, 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, 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 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 subpart B 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. Actions taken by a contractor which adversely affect an employee or applicant will not be deemed to be discrimination if the contractor would have taken the same adverse action in the absence of the employee's or applicant's protected activity, for example, by proving that the contractor 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, 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 discrimination 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 to job applicants. Dissemination of the provision can 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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BILLING CODE 4510–45–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MB Docket No. 05–162; Report No. 2954]

Petition for Reconsideration of Action in Rulemaking Proceeding

AGENCY: Federal Communications Commission.

ACTION: Petition for reconsideration.

SUMMARY: In this document, a Petition for Reconsideration (Petition) has been