Dated: October 10, 2020.

John Busterud,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

■ 2. In 52.120(e), amend Table 1 under the heading ''Part D Elements and Plans (Other than for the Metropolitan Phoenix and Tucson Areas)'' by adding an entry for ''Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS'' after the entry for ''SIP Revision: Hayden Lead Nonattainment Area, excluding Appendix C.''

§ 52.120 Identification of plan.

* * * * *

(e) * * *

TABLE 1—EPA-APPROVED NON-REGULATORY AND QUASI-REGULATORY MEASURES

[Excluding certain resolutions and statutes, which are listed in tables 2 and 3, respectively][1]

Name of SIP provision	Applicable geographic or nonattainment area or title/subject	State submittal date	EPA approval date	Explanation
*	*	*	*	*
Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas)				
*	*	*	*	*
Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS. Chapter 3, Chapter 8, Appendix A, and Appendix B.	Hayden, AZ Sulfur Dioxide Nonattainment Area.	March 9, 2017	[INSERT **FEDERAL REGISTER** CITATION], November 10, 2020.	Adopted by the Arizona Department of Environmental Quality and submitted to the EPA as an attachment to letter dated March 8, 2017. The EPA approved the emissions inventory element and affirmed that the State had met the new source review requirements for the area. The EPA disapproved the attainment demonstration, RACM/RACT, enforceable emission limitations, RFP, and contingency measure elements.
*	*	*	*	*

[1] Table 1 is divided into three parts: Clean Air Act Section 110(a)(2) State Implementation Plan Elements (excluding Part D Elements and Plans), Part D Elements and Plans (other than for the Metropolitan Phoenix or Tucson Areas), and Part D Elements and Plans for the Metropolitan Phoenix and Tucson Areas.

* * * * *

■ 3. Section 52.124 is amended by revising paragraph (c) to read as follows:

§ 52.124 Part D disapproval.

* * * * *

(c) The following portions of the ''Arizona State Implementation Plan Revision: Hayden Sulfur Dioxide Nonattainment Area for the 2010 SO_2 NAAQS'' are disapproved because they do not meet the requirements of Part D of the Clean Air Act:

(1) Attainment demonstration,

(2) Reasonably available control measures/reasonably available control technology,

(3) Enforceable emission limitations,

(4) Reasonable further progress, and

(5) Contingency measures.

[FR Doc. 2020–23030 Filed 11–9–20; 8:45 am]

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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1, 60–2, 60–300, and 60–741

[OFCCP–2019–0007–0001]

RIN 1250–AA10

Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

SUMMARY: The U.S. Department of Labor (''the Department'') publishes this final rule to codify procedures that the Office of Federal Contract Compliance Programs (''OFCCP'' or ''the agency'') uses to resolve potential discrimination and other material violations of the laws and regulations administered by OFCCP applicable to Federal contractors and subcontractors, add clarifying definitions to specify the types of evidence OFCCP uses to support its discrimination findings, and correct the title of OFCCP's agency head.

DATES: These regulations are effective December 10, 2020.

FOR FURTHER INFORMATION CONTACT: Tina Williams, Director, Division of Policy 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:

Background

A. Legal Authority

OFCCP administers and enforces Executive Order 11246, as amended

(E.O. 11246); section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA); and their implementing regulations.[1] Collectively, these laws require Federal contractors and subcontractors [2] to take affirmative action to ensure equal employment opportunity, and not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. Additionally, E.O. 11246 prohibits a contractor from discharging or otherwise discriminating against applicants or employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

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

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

Enacted in 1973, and amended since, the purpose of section 503 is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal contractors. Second, it requires each covered Federal contractor to take affirmative action to employ and advance in employment qualified individuals with disabilities. The requirements in section 503 generally apply to any business or organization that holds a single Federal contract or subcontract in excess of $15,000.[3] Contractors with 50 or more employees and a single Federal contract or subcontract of $50,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–741, subpart C.

Enacted in 1974 and amended in the intervening years, VEVRAA prohibits Federal contractors and subcontractors from discriminating against employees and applicants because of status as a protected veteran (defined by the statute to include disabled veterans, recently separated veterans, Armed Forces Service Medal Veterans, and active duty wartime or campaign badge veterans). It also requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans. The requirements in VEVRAA generally apply to any business or organization that holds a single Federal contract or subcontract in excess of $150,000.[4] Contractors with 50 or more employees and a single Federal contract or subcontract of $150,000 or more also must develop and maintain an affirmative action program that complies with 41 CFR part 60–300, subpart C.

Pursuant to these laws, receiving a Federal contract comes with a number of responsibilities. Contractors are required to comply with all provisions of these laws as well as the rules, regulations, and relevant orders of the Secretary of Labor. Where OFCCP finds noncompliance under any of the three laws or their implementing regulations, it utilizes established procedures to either facilitate resolution [5] or proceed to administrative enforcement as necessary to secure compliance.[6] A contractor found in violation who fails to correct violations of OFCCP's regulations may, after the opportunity for a hearing, have its contracts canceled, terminated, or suspended and/or may be subject to debarment.[7]

B. Overview of Rule

The Department publishes this final rule to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal employment opportunity laws. The rule will help OFCCP to increase the number of contractors that the agency evaluates and focus on resolving stronger cases through the strategic allocation of limited agency resources. The procedures codified in the final rule aim to achieve that end by increasing the transparency of OFCCP's operations so that contractors and OFCCP can resolve potential violations through a clear, mutual understanding of the issues. The final rule also enables OFCCP to pursue resolution of stronger cases efficiently and as early in the compliance evaluation process as possible, through the Predetermination Notice (PDN) procedures and the early resolution conciliation option. Critically, the final rule establishes consistent parameters for findings and preliminary findings of discrimination, and provides contractors with more certainty as to OFCCP's operative standards for compliance evaluations, and provides guardrails on the agency's issuance of pre-enforcement notices. The Department issues this rule as an exercise of its enforcement discretion to focus OFCCP's resources on those cases with the strongest evidence. This approach is neither compelled nor prohibited by Title VII and OFCCP case law.

On December 30, 2019 (84 FR 71875), the Department published a notice of proposed rulemaking (NPRM) to codify provisions that provide contractors with greater certainty about the procedures that OFCCP follows during compliance evaluations to resolve employment discrimination and other material violations of the laws it enforces. Specifically, the Department proposed

[1] OFCCP will also begin enforcing Section 4 of Executive Order 13950, ''Combating Race and Sex Stereotyping'' for Federal contracts or subcontracts entered on or after November 21, 2020. OFCCP is currently implementing this Executive order.

[2] Hereinafter, the terms ''contractor'' and ''Federal contractor'' are used to refer collectively to contractors and subcontractors that fall under OFCCP's authority, unless otherwise expressly stated.

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

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

[5] 41 CFR 60–1.28, 60–1.33, 60–300.62, 60–300.64, 60–741.62, and 60–741.64; Federal Contract Compliance Manual Chapter 8 (Dec. 2019); Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018); Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018).

[6] 41 CFR 60–1.26, 60–300.65, and 60–741.65.

[7] 41 CFR 60–1.27, 60–300.66, and 60–741.66.

to codify two formal notices that the agency uses when it finds potential violations: The PDN and the Notice of Violation (NOV). Since 1988, these procedures have been embedded in the Federal Contract Compliance Manual (FCCM), the primary document used by agency staff as the procedural framework for the execution of quality and timely compliance evaluations and complaint investigations. The Department proposed to clarify the different types of evidence that it uses to support a PDN or NOV through the addition of definitions for ''statistical evidence'' and ''nonstatistical evidence.'' To increase efficiency, the Department also proposed to codify an option that allows contractors to expedite the conclusion of a compliance evaluation by entering directly into a conciliation agreement prior to issuance of a PDN or NOV. Finally, the Department proposed to update outdated references to the official title of OFCCP's agency head from ''Deputy Assistant Secretary'' to ''Director.''

After careful consideration of the comments received in response to its proposal, the Department has decided to finalize the rule with several key changes. First, the final rule clarifies that the evidentiary standards OFCCP must meet in order to issue a PDN in a discrimination case must also be met before issuing NOVs. Second, OFCCP changed the terms that the final rule defines from ''statistical evidence'' and ''nonstatistical evidence'' to ''quantitative evidence'' and ''qualitative evidence,'' to provide greater clarity as to the types of evidence that OFCCP collects and how it uses the different types of evidence to support the issuance of pre-enforcement notices. Third, the final rule differentiates the procedures followed for disparate treatment and disparate impact theories of discrimination, which have separate, although similar, elements, and provides clarity on the evidentiary standards OFCCP will have to meet to issue pre-enforcement notices under each legal theory. Fourth, the final rule requires OFCCP to provide qualitative evidence supporting a finding of discriminatory intent for all cases proceeding under a disparate treatment theory, subject to certain enumerated exceptions. Fifth, in order to issue a PDN or NOV in cases involving a disparate impact theory of discrimination, the final rule requires OFCCP to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect. Sixth, the final rule clarifies that OFCCP must explain in detail the basis for its findings in pre-enforcement notices, obtain approval from the OFCCP Director or acting agency head, and, upon the contractor's request, provide the model and variables used in the agency's statistical analysis and an explanation for any variable that was excluded from the statistical analysis. Seventh, in the final rule OFCCP extends the amount of time contractors have to respond to a PDN to 30 days with the possibility of extension, as opposed to the 15 days proposed in the NPRM, in response to comments requesting more time to respond. These changes are fully explained below. In addition, in response to several commenters, OFCCP provides additional guidance in this preamble on how it will measure practical significance.

This final rule is an Executive Order (E.O.) 13771 regulatory action. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2). Details on the estimated costs of this rule can be found in the economic analysis below.

C. Need for Rulemaking

As stated above, the Department believes this rule is needed to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhances the efficient enforcement of equal employment opportunity laws, but one commenter, a compliance consulting firm, specifically questioned the need for rulemaking. The commenter objected to codification of OFCCP's resolution procedures, asserting that it would be better for OFCCP to update the FCCM or the agency's directives system. OFCCP is guided by four central principles: Certainty, efficiency, recognition, and transparency. This focus is informed at least in part by criticisms the agency received in previous years that OFCCP has at times lacked sufficient transparency, clarity, certainty, and timeliness in its dealings with contractors, and criticisms stating that the agency has brought cases without an adequate evidentiary foundation.[8] While many of these criticisms have been addressed by directives and other guidance in the intervening years, this final rule further addresses such concerns by codifying procedures that already exist in the FCCM and agency guidance with some additional modifications to improve clarity and transparency. The FCCM and agency directives are not legally binding and have not gone through formal notice and public comment. Therefore, they do not provide the same level of certainty that this final rule does. *See, e.g., Promoting Regulatory Openness Through Good Guidance (PRO Good Guidance),* 85 FR 53163 (Aug. 28, 2020); *see also* E.O. 13924, Sec. 6(e), 85 FR 31353, 31355 (May 22, 2020) (''All rules of evidence and procedure should be public, clear, and effective.''); *id.* Sec. 6(i) (''Administrative enforcement should be free of unfair surprise.'').[9] A notice-and-comment rulemaking process also ensures that the public's views are heard and that the agency gains the benefit of public input that can improve the content of the final rule. Codifying the use of PDNs, NOVs, and an early conciliation option promotes predictability, efficiency, and timeliness. Additionally, the final rule establishes guardrails on the agency's issuance of pre-enforcement notices and the allocation of agency resources by providing clear evidentiary standards that OFCCP must meet to pursue preliminary findings and findings. The Department will continue to examine means of furthering both these goals through other rulemakings and guidance documents, as appropriate.

Section by Section Analysis

A. Definitions

To provide greater clarity and certainty to Federal contractors, the rule defines ''qualitative evidence'' and ''quantitative evidence,'' which OFCCP uses to support a finding or preliminary finding of discrimination in a PDN or NOV. In the NPRM, OFCCP proposed to add definitions for ''nonstatistical evidence'' and ''statistical evidence.'' In response to comments on the proposed definitions, the Department revises the terms to ''qualitative evidence'' and ''quantitative evidence,'' respectively, and provides additional clarifying language in the final rule to address issues raised by commenters.

The term ''qualitative evidence'' is defined in the final rule to include the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination, and clarifies the purposes for which it will be used.

[8] *See, e.g.,* U.S. Chamber of Commerce, *OFCCP: Right Mission, Wrong Tactics—Recommendations for Reform* (Sept. 21, 2017), *www.uschamber.com/report/ofccp-right-mission-wrong-tactics-recommendations-reform.*

[9] OFCCP will update the FCCM in light of this final rule and revise or repeal any directives as needed.

The term ''quantitative evidence'' is included to clarify the support needed for OFCCP to determine that there is a statistically significant disparity in a contractor's employment selection or compensation outcomes affecting a group protected under OFCCP's laws. The definition of ''quantitative evidence'' in the final rule also includes quantitative analyses, such as cohort analyses, which are comparisons of similarly situated individuals or small groups of applicants or employees that are numerical in nature but do not use hypothesis testing techniques. Both terms are germane to the resolution procedures that this rule codifies.

The change in terminology helps better capture the distinction between these types of evidence. The term ''qualitative evidence'' gives an affirmative, descriptive label to the types of evidence that fall into that category. The term ''quantitative evidence'' better encapsulates OFCCP's analytical evidence given the agency's use of descriptive statistics and non-parametric and cohort analyses, in addition to a variety of statistical tests based on hypothesis testing. Quantitative analysis involves numerical comparisons, but it is not limited to the sort of hypothesis testing that OFCCP typically performs in systemic assessments of pay or selection outcomes, which might be more clearly thought of as ''statistical evidence.'' By contrast, the term ''quantitative evidence'' comfortably describes all these types of numerical analyses.

The change in terminology also allows a clear delineation of the rules governing the sufficiency of the evidence required for OFCCP to issue a PDN or NOV. As explained more fully below, the Department has decided that, subject to certain exceptions, OFCCP will issue a PDN or NOV only if there is quantitative (*i.e.,* statistical or other numerical) evidence, practical significance, and qualitative evidence. The broader definition of *quantitative evidence* means that OFCCP does not necessarily need *statistical* evidence; and the Department similarly changed the title of *nonstatistical evidence* to *qualitative evidence.* The exceptions to the general rule also use these modified definitions, as discussed below.

1. Qualitative Evidence

The definition of ''qualitative evidence'' provides a nonexhaustive list of types of anecdotal and other evidence that OFCCP considers before and relies upon in issuing a PDN. Such evidence is not the result of statistical analysis or other quantitative comparisons, and may be probative of a contractor's discriminatory or non-discriminatory intent. In response to comments received, and in order to provide greater clarity, the definition in the final rule has been revised to further clarify the meaning of qualitative evidence, and to provide additional explanation regarding how OFCCP uses it during its compliance evaluations.

Before issuing a PDN, OFCCP assesses qualitative evidence obtained during the course of its compliance evaluations. In order to proceed under a disparate treatment theory of liability, OFCCP must generally provide qualitative evidence that justifies a finding of discriminatory intent, whether on its own or in combination with quantitative evidence. Qualitative evidence in such cases may include factual testimony, interview statements, written communications, documentation, internal company policies, or other evidence that supports an inference of intentional discrimination towards members of a protected class, particularly when made by a decision maker involved in the action under investigation, or evidence that weighs against such an inference. Importantly, OFCCP may proceed with issuing a PDN where the qualitative evidence is particularly strong, such as when the agency encounters a facially discriminatory policy or a contractor has admitted to discriminatory conduct.

Examples of qualitative evidence from previous OFCCP compliance reviews help illustrate the meaning of the term. For example, consider a company president who sent an email to managers stating his concern that women were unable to lift heavy objects and that, if women were hired for stockroom positions, there would be a higher risk of on-the-job injuries, which would impact the company's profitability. If this rationale was used to exclude women from stockroom positions due to their sex, rather than basing selection on applicants' physical ability to perform the required tasks, the president's email would be an example of qualitative evidence supporting an inference of discriminatory intent. Often the evidence is less direct: In a hiring case involving management trainee positions for which prior sales and customer service experience were stated criteria, OFCCP gathered qualitative evidence regarding individual rejected applicants who had much stronger experience in those areas than certain hires.

Qualitative evidence may include information obtained through testimony or other documentation of individuals who were denied information or who were provided misleading or contradictory information about the contractor's employment or compensation practices in circumstances that suggest discriminatory treatment based on a protected characteristic. OFCCP may also consider interview statements or other documentary evidence concerning a contractor using broad discretion or subjectivity in hiring, promotion, or compensation decisions in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic, although the final rule clarifies that the mere fact broad discretion or subjectivity exists does not, in and of itself, demonstrate that an employment action is discriminatory.[10] Testimony or interview statements that OFCCP relies upon in issuing a PDN may not consist wholly of mere assumptions or purely speculative reasoning about the contractor's actions, but must include some objective factual basis from which to infer discriminatory intent. For example, a witness's statement merely conveying his or her subjective belief that the contractor discriminated would not be sufficient. However, a witness's statement that a particular manager discriminated against him or her that was backed by specific examples of problematic or unequal treatment would be evidence of discriminatory intent.

OFCCP may also use qualitative evidence to rebut a contractor's explanation for statistical disparities or its critique of OFCCP's statistical analysis. For example, in one recent case a contractor argued that OFCCP should have included in its statistical analysis a variable to account for applicants who held an asbestos removal license, which was a requirement for employment. OFCCP presented qualitative evidence consisting of a hiring official's testimony that he hired workers without an asbestos removal license, testimony from an individual who attended a

[10] *See, e.g., OFCCP* v. *Analogic Corp.,* 2017–OFC–00001, at 41 n.60 (Rec. Dec. & Order Mar. 22, 2019) (''[t]he fact that hiring criteria or practices are subjective, and are thus susceptible to discriminatory application, is only marginally relevant to the question of discriminatory intent in the absence of proof that the criteria were, in fact, applied in a discriminatory manner.'') (quoting *Gay* v. *Waiters' & Dairy Lunchmen's Union, Local No. 30,* 694 F.2d 531, 554 (9th Cir. 1982)); *see generally Wal-Mart Stores Inc.* v. *Dukes,* 564 U.S. 338, 355 (2011) (holding policy of allowing supervisory discretion over employment matters showed ''the opposite of a uniform employment practice that would provide commonality needed for a class action'' claiming disparate treatment of female workers); *cf. White* v. *Rice,* 46 F.3d 1130 (4th Cir. 1995) (''such a subjective belief [of gender discrimination] cannot serve as the basis for judicial relief'').

recruiting session where the contractor stated that it provided a 4-day training course for new hires on asbestos removal, and testimony from the owner who started the asbestos training school onsite.[11]

One comment requested that the final rule require anecdotal evidence as a condition of issuing a PDN, and that anecdotal evidence should be defined consistent with established authority as evidence that leads to an inference of disparate treatment. OFCCP has amended the final rule to require qualitative evidence, along with sufficient quantitative evidence and practical significance (as specified below), for all PDNs issued under a disparate treatment theory of liability, with clearly delineated exceptions. OFCCP has also revised the definition of *qualitative evidence* as described in the preceding paragraphs to clarify that anecdotal evidence includes facts that are relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations.[12]

Other comments on OFCCP's proposed definition of ''nonstatistical evidence'' (now ''qualitative evidence'' in this final rule) sought to have testimony on the extent of ''subjectivity involved in making employment decisions'' removed as an example, or to provide further explanation as to how and when subjectivity could be used to support findings of discrimination. OFCCP declines to remove this example altogether because first-hand testimony about the level of subjectivity involved in a decision may, in certain cases, bolster other evidence of disparity.[13] For example, in one case,[14] OFCCP gathered qualitative evidence to investigate a hiring issue where African-American applicants were disproportionately screened out based on two disposition codes, one of which related to a subjectively applied credit check. In that case, OFCCP gathered statements from rejected applicants in the disfavored group who met all qualification requirements but, according to the contractor's disposition codes, were rejected because of a ''bad'' credit check without being given the opportunity to address the results. Additionally, OFCCP determined based on evidence obtained from the recruiters who evaluated the credit checks that the recruiters were unable to provide any objective standards that were used to screen out applicants. Such evidence demonstrating the level of subjectivity involved in employment decisions, in connection with other evidence, may be helpful to OFCCP in making a preliminary finding that the contractor then has an opportunity to rebut. However, as stated above, the Department agrees that the mere fact that a contractor has supervisory discretion in its employment decisions is not by itself probative of discriminatory intent. OFCCP has qualified the appropriate use of such evidence in the final rule, explaining in the regulatory text that documents about the extent of discretion or subjectivity involved in making employment decisions may be used as qualitative evidence, but only in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic.

The Department notes that qualitative evidence may also weigh against a finding of discrimination, depending on the surrounding facts and circumstances. Although mere compliance with basic legal obligations will not be considered by the agency as dispositive evidence weighing against a finding of discrimination, OFCCP may consider testimony and other documentation that includes indicia that a contractor has made good faith efforts to comply with its equal employment opportunity obligations. For instance, a contractor may provide evidence that it has taken specific actions to advance equal employment opportunity as evidence that it did not discriminate intentionally. A contractor may also show evidence of actions taken to correct discrimination issues that a contractor may have identified during annual reviews of its selection and compensation systems. For disparate treatment cases, OFCCP will consider such evidence in conjunction with other qualitative and quantitative evidence to inform a decision on whether to issue a PDN alleging a pattern and practice of intentional discrimination.

2. Quantitative Evidence

As discussed above, the final rule uses a definition of *quantitative evidence* rather than *statistical evidence* as in the proposed rule. The most important difference is that the definition of *quantitative evidence* is broader than statistical evidence. OFCCP uses a number of quantitative measures to determine whether a particular disparity in employment selection or compensation is sufficiently robust to support a finding of discrimination. The final rule thus clarifies that quantitative comparisons, such as ''cohort analyses,'' and summary data that reflect a contractor's differential selections and/or compensation between similarly situated individuals are included within the definition of ''quantitative evidence.'' OFCCP did not receive any comments suggesting that OFCCP reclassify this type of evidence, likely because the proposed definition of *statistical evidence* was specific to hypothesis-testing techniques. However, OFCCP believes the more exacting distinction in the final rule between quantitatively driven evidence and anecdotal evidence provides greater clarity to stakeholders. Comparative analyses, such as cohort analysis, while quantitative in nature, are distinct from hypothesis-based statistical measures. In some cases, statistical regression analysis cannot be reliably performed due to small sample sizes or the lack of meaningful, quantifiable variables by which to conduct the analysis. OFCCP may use numerical cohort analysis or small group assessment techniques in possible combination with a global test for these cases. The relevant employee group used for the small group analyses will generally align with how the contractor establishes specific positions and job groups, provided the job functions and responsibilities of particular positions are similar. In other circumstances, a general comparison of outcomes shown through simple numeric ratios may demonstrate disparities between the number of individuals hired in comparison to the available pool of qualified applicants in a protected membership class. For example, OFCCP can generally infer hiring discrimination when a contractor's workforce for a particular position is comprised of 95% from one racial group and 5% from all other racial groups combined, yet qualified applicants for that position comprised

[11] *See OFCCP* v. *WMS Solutions, Inc.,* 2015–OFC–09, (Rec. Dec. & Order May 12, 2020).

[12] To be clear, evidence demonstrating that the challenged selection procedure is consistent with business necessity does not need to be provided by OFCCP, but rather by the contractor. Once provided, however, such evidence may be relevant when the agency is determining whether to issue an NOV or SCN.

[13] *Watson* v. *Fort Worth Bank & Trust,* 487 U.S. 977, 990–91 (1988) (''If an employer's undisciplined system of subjective decision-making has precisely the same effect as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply in both. . . . We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach. . . .'').

[14] *OFCCP* v. *Bank of America,* 1997–OFC–16, at 14 (Final Dec. & Order Apr. 21, 2016).

50% for the first racial group and 50% for the other racial groups.

OFCCP also uses statistical measures.[15] As described in the NPRM, the most familiar statistical measure is the standard deviation, which represents a standardized measure of the difference between selection rates or compensation between groups. The U.S. Supreme Court has described a disparity as ''suspect to a social scientist'' when a statistic from ''large samples'' falls more than ''two or three standard deviations'' from its expected value under a null hypothesis.[16] In general, the null hypothesis employed by OFCCP for purposes of its regression analyses assumes that the contractor's employment decisions are non-discriminatory and that there are no relevant differences between racial groups or genders in the relevant employee or applicant population after the agency controls for the major, measurable variables used by the contractor in its decision-making.[17] The greater the number of standard deviations, the less likely such a statistical disparity would be produced by chance were the null hypothesis correct, and the more likely the null hypothesis may reasonably be rejected.[18]

To estimate the probability of selection and compensation disparities occurring by chance, OFCCP has historically conducted regression analyses of selection and compensation outcomes, which seek to control for the major, measurable variables used by the contractor in its decision-making. The final rule provides, as did the NPRM, that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements: (1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more); (2) the Z statistic has a value greater than two; or (3) the probability value is less than 0.05.

OFCCP requests information from the contractor regarding the qualifications it seeks in hiring after identifying an initial disparity in selections. Likewise it requests additional information from contractors regarding pay variables after identifying initial indicators. OFCCP uses the information provided by the contractor to perform its regression analyses in an effort to tailor the analyses to each contractor's specific compensation or personnel practices pertaining to groupings of similarly situated individuals. In circumstances where the contractor does not provide such variables, OFCCP will utilize measurable variables generally used by employers in selection and compensation decisions in conducting the regression analysis.

OFCCP may exclude a variable as tainted only when OFCCP determines that the variable reflects underlying discrimination or is being used as pretext. For example, if a contractor's compensation system depends heavily on the amount of revenue an employee brings in, but there is evidence that the contractor directs more lucrative sales prospects to men because they are men, it may be appropriate to exclude a revenue-generation variable in the regression analysis to that extent. Another example may be where there is evidence that a contractor does not apply the variable in a uniform fashion, such as considering or weighing the variable differently for individuals belonging to different demographic groups. OFCCP will disclose any exclusions to the contractor at the time it provides its quantitative analysis and provide the contractor with an opportunity to rebut exclusion of the variable at issue.

For OFCCP to consider the major, measurable parameters and variables that the contractor uses in its selection or compensation practices, the contractor must provide the preferred qualifications that it uses along with sufficient data for OFCCP to include such variables in its regression analysis. OFCCP will assess all of the variables that a contractor provides, including preferred qualifications. If OFCCP concludes that a variable should not be included in its analysis, it will explain why and allow the contractor an opportunity to rebut, as provided in the previous paragraph.

The Department received a few comments specific to the proposed definition of ''statistical evidence'' (now ''quantitative evidence'' in the final rule). The comments suggest that OFCCP should ensure that the definition accounts for all factors impacting an employment or compensation decision, allows OFCCP to tailor models to contractor practices, and groups only similarly situated employees. OFCCP's definition of *quantitative evidence* provides a list of parameters and variables generally used by employers that OFCCP will use in its hypothesis testing. It does not list every conceivable variable, nor is that necessary.[19] With that said, the list included in the definition is not exhaustive, and OFCCP has left the final definition flexible enough to include variables used by contractors in their employment practices. The definition will allow OFCCP to tailor statistical models based on contractor practices and form groups that meet the relevant ''similarly situated'' standard in the context of a potential systemic discrimination case.

Another commenter requested clarification as to whether OFCCP's treatment of statistical evidence applies to only claims of disparate treatment, or also to disparate impact claims. OFCCP applies quantitative evidence, as defined in the final rule, in the same manner for disparate treatment and disparate impact class claims, as both claims require evidence of a disparity between favored and disfavored groups. In addition, for disparate treatment claims, quantitative evidence may support an inference of intentional discrimination, while for disparate impact claims, quantitative evidence may support an inference that a specific policy or practice is causing a disparate impact.

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[15] Some examples of the statistical measures that OFCCP may use are the Chi square, Fisher's exact, Z-test, and regression analyses that measure disparities in terms of standard deviations. As discussed further below, OFCCP considers statistical evidence in combination with qualitative evidence and the practical significance of a disparity as part of a comprehensive approach to decision-making about the issuance of pre-enforcement notices.

[16] *See Castaneda* v. *Partida,* 430 U.S. 482, 496 n.17 (1977) (''As a general rule for large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist.''); *see also Hazelwood Sch. Dist.* v. *United States,* 433 U.S. 299, 311 n.17 (1977) (providing that ''a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to race'').

[17] To be more precise, the null hypothesis for the statistical regression analyses that OFCCP conducts during its compliance reviews comprises the following three assumptions: (1) The contractor's decisions were made using non-biased criteria, (2) the skills and competencies evaluated by the contractor's non-biased criteria are normally distributed throughout the relevant employee or applicant population without regard to race or gender, and (3) the agency's statistical modeling is able to accurately capture the non-biased criteria used by the contractor in its selection and/or compensation decisions.

[18] *See* David H. Kaye & David A. Freedman, ''Reference Guide on Statistics,'' National Academy of Sciences (2011), *www.fjc.gov/sites/default/files/2012/SciMan3D07.pdf,* at 250–51.

[19] OFCCP need not account for every conceivable variable, *See, e.g., Bazemore* v. *Friday,* 478 U.S. 385, 400 (1986) (''[I]t is clear that a regression analysis that includes less than 'all measurable variables' may serve to prove a plaintiff's case.''); *McClain* v. *Lufkin Indus., Inc.,* 519 F.3d 264, 280 (5th Cir. 2008) (''However, in selecting an appropriate pool and performing regression analysis in Title VII cases, the Supreme Court has taught that a plaintiff's regression analysis need not include 'all measurable variables.'''') (citing *Bazemore,* 478 U.S. at 400); *Mozee* v. *Am. Commercial Marine Serv. Co.,* 940 F.2d 1036, 1045 (7th Cir. 1991) (same).

The Department is aware that its statistical methods have been criticized, including by commenters in this rulemaking.[20] OFCCP uses established statistical methods in its analyses, but nonetheless the Department is considering whether to further examine, either in a rulemaking or in subregulatory guidance, the agency's methodologies, including issues such as variables used, as it did in a 2018 directive on analyzing compensation.[21] However, such a project is outside the scope of this rulemaking.

3. Practical Significance

Practical significance within the framework of equal employment opportunity enforcement refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group.[22] The concept focuses on the contextual impact or importance of the disparity, rather than its likelihood of occurring by chance as in measures of statistical significance. OFCCP uses measures of practical significance as a tool of enforcement discretion to ensure it is targeting the strongest cases in its compliance reviews with the most compelling evidence, as well as a safeguard against the limitations of statistical modeling when attempting to explain complex human phenomena. Modeling need not and cannot capture every facet of human interaction in the workplace, or of contractors' evaluations of employees and applicants; but when outcomes among what appear to be similarly situated individuals differ greatly, OFCCP can be more confident that discrimination at work. Given OFCCP's limited resources, considering practical significance helps the agency ensure that it is directing its efforts effectively. Weighing practical significance as one of the thresholds for issuing pre-enforcement notices is thus an important part of OFCCP's comprehensive approach to compliance evaluations.

Five comments addressed the issue of ''practical significance'' in OFCCP's compliance reviews. One comment recommended against such a definition due to variance among the measures of practical significance used in different employment scenarios, while another comment recommended against requiring practical significance prior to issuing a PDN as it would create an unnecessary barrier to investigating discrimination. Three commenters asked the Department to add a definition to the final rule. Two commenters sought clarity and greater certainty so that contractors would know how the term, as used in the regulation, would be applied. One comment added that a significant shortcoming of the proposed regulation was that it did not require an assessment of practical significance before issuing adverse findings. Another comment specifically requested a definition with express standards that OFCCP would apply in assessing practical significance so that OFCCP's use of practical significance could be part of negotiations with the contractor.

The Department declines to add a specific definition for the term in the final rule because there is not a settled definition in the relevant academic literature and a variety of measures may be appropriate to use in any given case. The Department will continue to evaluate that position and propose a new rulemaking if it determines that such thresholds should be codified. However, in order to provide more clarity for contractors, the Department describes below common types of practical-significance measures and explains the metrics that OFCCP will customarily use moving forward. The Department believes that providing these guidelines for both its compliance officers and contractors will help make OFCCP's compliance reviews more transparent and efficient. These guidelines are particularly useful given that the final rule generally requires that OFCCP find any disparity that forms the basis for an allegation of discrimination to be practically significant before issuing a PDN or NOV.

There is no single, specific measurement of practical significance appropriate to all compensation, hiring, promotion, and termination decisions. There are several common measures of practical significance discussed in scholarly literature from the labor economics field.[23] Some of the measures of practical significance that have been used by OFCCP include size-of-selection shortfall; ''four-fifths rule'' (or ''80 percent rule''); odds ratio; percentage of pay disparity; and the Type II squared semi-partial correlation coefficient. For example, with regard to using the size of shortfall, one practical significance threshold is a shortfall of at least two[24] in a hiring analysis where, based on the number of applicants and hires, the expectation would be for a contractor to have hired at least two additional members of the disfavored group in a neutral selection process. The ''four-fifths rule'' or ''80 percent rule'' is a measure of practical significance that relies on the ''impact ratio''—if the selection rate for a disfavored group is less than 80 percent of the selection rate for the favored group, it is generally considered evidence of adverse impact.[25] Odds ratios can also be used, which refer to the ratio of the odds of one group being selected compared to the odds of another group. Odds ratio takes into account both the selection and rejection rates of the disfavored group and can bolster the statistically significant findings.[26]

In the employment selection context, OFCCP will ordinarily use the impact ratio as its measure of practical significance, which is the ratio of employee selection rates between the disfavored and favored group. The impact ratio is a common measurement of practical significance that has been used since the 1970s.[27] This statistical measure has the advantages of simplicity and clarity.

OFCCP utilizes a sliding scale to assess whether the impact ratio in a particular matter indicates that a disparity is practically significant. OFCCP's determination to issue a pre-enforcement notice depends on the strength of the relevant qualitative and quantitative evidence, as well as whether the disparity is practically significant. OFCCP uses the following thresholds to assess practical significance in the selection context to determine whether to issue pre-enforcement notices:

[20] *See supra* note 8.

[21] Directive 2018–05, ''Analysis of Contractor Compensation Practices During a Compliance Evaluation'' (Aug. 24, 2018).

[22] *See* Practical Significance in EEO Analysis Frequently Asked Questions, Question #5, *www.dol.gov/agencies/ofccp/faqs/practical-significance.*

[23] For an overview of the most common measures of practical significance, see Frederick Oswald, Eric Dunleavy & Amy Shaw, ''Measuring Practical Significance in Adverse Impact Analysis'' in *Adverse Impact Analysis: Understanding Data, Statistics, and Risk,* Scott B. Morris & Eric Dunleavy (Eds.) (2017), *www.researchgate.net/publication/314245607_Measuring_practical_significance_in_adverse_impact_analysis;* and Joseph Gastwirth, ''Some Recurrent Problems in Interpreting Statistical Evidence in Equal Employment Cases,'' *Law, Probability & Risk* (2017).

[24] *OFCCP* v. *TNT Crust,* 2004–OFC–3, at 21 (Order on Liability Sept. 10, 2007) (''Generally, it is inappropriate to require validity evidence or to take enforcement action where the number of persons and the difference in selection rates are so small that the selection of one different person for one job would shift the result from adverse impact against one group to a situation in which that group has a higher selection rate than the other group.'').

[25] 41 CFR 60–3.4(D).

[26] *But see* Kaye & Freedman, *supra* note 18 at 235 (observing that ''[a]lthough the odds ratio has desirable mathematical properties, its meaning may be less clear than that of the selection ratio or the simple difference'').

[27] *See* 41 CFR 60–3.4(D).

Impact Ratio of Selection Rates

> 0.9 Very Unlikely
0.8–0.9 Unlikely
0.7–0.8 Likely
< 0.7 Very Likely

An impact ratio of 0.8 is a frequently cited benchmark in the equal employment opportunity literature for determining whether the impact ratio of a selection disparity is practically significant, as described above, which is why OFCCP adopts it as the hinge point between a likely and unlikely finding of practical significance for selection decisions.[28] For impact ratios below 0.9, OFCCP will apply its discretion in determining whether to issue a pre-enforcement notice according to the strength or weakness of the evidence in particular cases, but the agency will require strong additional supporting evidence when the impact ratio is between 0.8 and 0.9. In addition, because the impact ratio is a less effective statistical measure when selection rates are very small, OFCCP utilizes a 3% disparity between the selection rates of disfavored and favored groups as a general minimum threshold for a finding of practical significance, although there may be situations with very low selection rates, such as a 4% selection rate for the favored group and a 1% selection rate for the disfavored group, where the odds ratio and other evidence would still support a finding of practical significance.[29]

In the compensation context, OFCCP's standard measure of practical significance will be the percentage difference in compensation, which refers to the percentage difference between the mean compensation of employees within the disfavored group in proportion to the mean compensation of employees within the favored group. As with selection rates, OFCCP's determination of whether to issue a pre-enforcement notice depends on the practical significance of the compensation disparity in combination with the strength of the relevant qualitative and quantitative evidence. OFCCP will use the following thresholds to assess practical significance in the compensation context:

Size of Compensation Disparity

< 1% Very Unlikely
1–2% Unlikely
2–5% Likely
> 5% Very Likely

OFCCP has used a 1% compensation disparity as a threshold in some previous interactions with contractors, such that the agency did not proceed with issuing pre-enforcement notices if compensation disparities were below that level. This guidance formalizes that threshold as a clear benchmark for the issuance of pre-enforcement notices. For compensation disparities above 1%, the agency has discretion in determining whether to issue a pre-enforcement notice according to the facts and circumstances of individual cases, but OFCCP will be unlikely to determine that a compensation disparity below 2% is practically significant unless there is additional strong supporting evidence. When compensation disparities are greater than 5%, OFCCP will nearly always find that a compensation disparity is practically significant if the agency also determines that its statistical model is sound. In rare cases, OFCCP may also apply more rigorous practical significance tests to measure the import of compensation disparities, such as the standardized difference between disfavored and favored groups or the Type II squared semi-partial correlation, which help ensure the agency is applying its practical significance standard relatively uniformly across administrative cases.

OFCCP will use the measures above to make an informed decision on the potential strength of the case and whether, in light of the quantitative and qualitative evidence, the size of an observed disparity justifies moving forward with enforcement procedures.

B. Resolution Procedures

This final rule codifies many of OFCCP's currently used procedures with adjustments to provide greater clarity, certainty, and transparency to contractors, to ensure that OFCCP appropriately allocates its resources by proceeding with cases that have solid evidentiary support and meaningful impact, to establish guidelines and guardrails on the agency's issuance of pre-enforcement notices, and to encourage appropriate early resolution with contractors.

OFCCP's Existing Compliance Evaluation and Resolution Procedures

OFCCP determines whether a Federal contractor has met the legal obligations of E.O. 11246, section 503, VEVRAA, and their implementing regulations during a compliance evaluation.[30] The agency uses a neutral selection process to schedule contractors for compliance evaluations.[31] A compliance evaluation consists of one or any combination of the following investigative procedures, as set forth in OFCCP's implementing regulations: A compliance review, an offsite review of records, a compliance check, or a focused review.[32] With the exception of the compliance check, the purpose of which is to determine whether the contractor maintains required records and to provide related compliance assistance, the other types of compliance evaluations that OFCCP undertakes may result in the agency making a preliminary determination, through its collection and analysis of information provided by the contractor, that the information reviewed indicates the contractor has discriminated against members of a protected class in hiring, promotion, termination, compensation, or other employment practices. Because OFCCP evaluates all of a contractor establishment's employment processes, the agency has focused on identifying and resolving systemic discrimination. Findings often are supported by

[28] *See* 41 CFR 60–3.4; Uniform Guidelines on Employee Selection Procedures Section 4D (''A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.'').

[29] For example, if the selection rate of a favored group is 10%, OFCCP will generally not find practical significance unless the selection rate for the disfavored group is 7% or less, even though the impact ratio would be 0.7 (or less). *See, e.g.,* Oswald, Dunleavy, & Shaw, ''Measuring Practical Significance in Adverse Impact Analysis,'' *supra* note 23, at 104 (''The spirit of the [4/5ths] rule [*i.e.* that a selection disparity is not practically significant unless the impact ratio is less than 0.8] can . . . be violated when very small disparities do not satisfy the 4/5ths rule [and thus would be found practically significant]. For example, hiring 3.5% of disadvantaged applicants versus 5% of advantaged applicants is a mere 1.5% difference in selection rates, but is an impact ratio of [0.7] . . . .'').

[30] OFCCP also ensures compliance with these laws by investigating complaints filed by applicants and employees who believe that a Federal contractor discriminated against them. However, the resolution procedures for complaints differ from compliance evaluations and would not be altered by this rule. For complaint resolution procedures, see FCCM Chapter 6 and 41 CFR 60–1.24, 60–300.61, and 60–741.61. The FCCM is available at *www.dol.gov/agencies/ofccp/manual/fccm.*

[31] The majority of OFCCP's compliance evaluations are for supply and service contractors. OFCCP increased the number of contractors on its supply and service scheduling list over the past three fiscal years, from 801 in FY 2017 to 3,500 in FY 2019. The FY 2020 scheduling list is comprised of 2,250 establishments. A description of OFCCP's current scheduling methodology for supply and service contractors is available on the agency's website at *www.dol.gov/sites/dolgov/files/ofccp/scheduling/files/SL20R1_SupplyService_Methodology_FinalFEDQA508c.pdf.* The 2020 scheduling list for construction consists of 200 establishments. A description of OFCCP's current scheduling methodology for construction contractors is available at *www.dol.gov/sites/dolgov/files/ofccp/scheduling/files/SL20R1_Construction_Methodology_FinalFEDQA508c.pdf.*

[32] *See* 41 CFR 60–1.20(a), 60–300.60(a), and 60–741.60(a). The resolution procedures described in this rule do not apply to compliance checks.

statistical evidence, particularly in compliance reviews.

Preliminary findings of discrimination in a compliance evaluation trigger OFCCP's resolution procedures. At the beginning of this process, the agency discusses its preliminary findings with the contractor. This discussion also serves to familiarize the contractor with OFCCP's resolution procedures, including the agency's current options for early resolution.[33] If the preliminary findings are not resolved at that stage, OFCCP formalizes the preliminary findings in a PDN, a letter that is sent to the contractor following review and approval by the Director or acting agency head.[34] To determine whether the evidence of discrimination is sufficient to warrant a PDN, OFCCP considers whether a disparity identified during the compliance evaluation is practically significant and whether quantitative evidence and qualitative evidence supports the preliminary finding. OFCCP will always seek out qualitative evidence during compliance evaluations, regardless of the strength of the quantitative evidence. As discussed more fully below, there may be factors applicable in a particular case that explain why OFCCP could not obtain either quantitative or qualitative evidence during its evaluation.

OFCCP issues the PDN to encourage communication with contractors and provide them an opportunity to respond to preliminary findings prior to the issuance of a more formal NOV. If a contractor does not sufficiently rebut the preliminary findings identified in the PDN that evidence of unlawful discrimination exists, OFCCP issues the NOV following approval by the Director or acting agency head to notify the contractor that the agency found discrimination violations of one or more of the laws it enforces. Under this final rule, the PDN will explain the basis for the agency's preliminary findings, *i.e.,* by identifying the statistically significant disparity or other quantitative evidence, describing the practical significance of that disparity, and describing how the relevant qualitative evidence supports the particular theory of discrimination. Upon request, OFCCP will also provide contractors with information sufficient to recreate the agency's quantitative findings and in some cases may be able to do so even before the PDN has been issued. Contractors are invited to respond to the PDN, and the agency must consider the response in determining whether to issue an NOV.

The NOV lists the corrective actions that are required to resolve those violations, and invites conciliation. OFCCP responds in the NOV (or in a simultaneously provided reply) to any new arguments or information raised by the contractor in its PDN response.[35] After issuing the NOV, OFCCP generally pursues a written conciliation agreement with any contractor willing to correct the violation or deficiency identified in the NOV.[36] A conciliation agreement is a binding written agreement between a contractor and OFCCP that details specific contractor commitments, actions, or both that it will undertake in order to resolve the violations set forth in the agreement. Conciliation agreements were codified in OFCCP's regulations in 1979. OFCCP is committed to active engagement with the contractor to conciliate a matter, and has issued directives detailing how the agency will prioritize the efficient resolution of violations it finds in its compliance evaluations.[37] If the contractor is unwilling to enter into a conciliation agreement to correct the violations, OFCCP issues a Show Cause Notice (SCN) requiring the contractor to provide reasons demonstrating why formal enforcement proceedings by the Solicitor of Labor or other appropriate action should not be instituted.

Material violations that are not discriminatory in nature also trigger OFCCP's resolution procedures for compliance evaluations. Rather than initiating resolution with a PDN for violations that do not involve discrimination, OFCCP generally begins the process with an NOV before proceeding to a conciliation agreement,[38] or the SCN as a last resort. For cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters, OFCCP issues the SCN without first issuing an NOV for material violations that are non-discriminatory in nature; as discussed more fully later in this preamble, this practice will continue under this final rule.[39]

Recently, OFCCP has promoted the efficient resolution of material violations for multi-establishment Federal contractors with early resolution procedures laid out in an agency directive.[40] These procedures allow OFCCP and contractors to work together to resolve violations or indications of violations without resorting to formal process, including litigation before an administrative law judge.

In addition, OFCCP has recently prioritized alternative dispute resolution to help resolve cases at the conciliation or pre-litigation phase, which ensures prompt remedies and avoids the delay, expense, and uncertainty of litigation. OFCCP has established an Ombuds Service that can help facilitate settlement discussions at the conciliation stage, as well as a Pre-Referral Mediation Program that provides for a full pre-litigation administrative mediation following an SCN and prior to referral to the Solicitor of Labor. Although the rule text does not directly address the Ombuds Service or Pre-Referral Mediation Program, these programs are compatible and consistent with the goals and procedures established by the rule, and the agency intends to continue providing both programs in conjunction with these procedures.

[33] OFCCP prioritizes the early and efficient resolution of potential discrimination. *See* Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018), *www.dol.gov/agencies/ofccp/directives/2019–02.* The rule does not codify OFCCP's early resolution procedures themselves. It does, however, provide a framework for OFCCP and contractors to explore expedited conciliation options, such as the early resolution procedures set forth in Directive 2019–02.

[34] *See* Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018). OFCCP issued this directive to ensure that PDNs be used in all compliance evaluations with preliminary discrimination findings, both individual and systemic. Directive 2018–01 is available at *www.dol.gov/agencies/ofccp/directives/2018–01.* Prior to the directive, use of PDNs was discretionary and reserved for systemic discrimination findings. *See* FCCM, Chapter 8 (detailing the procedures that OFCCP follows for issuing PDNs).

[35] *See* FCCM, Chapter 8; *see also* FCCM, Key Terms and Phrases.

[36] In rare circumstances, OFCCP may determine that settlement is not appropriate and refer a matter at this stage directly to the Office of the Solicitor of Labor to pursue formal enforcement proceedings rather than pursuing a conciliation agreement. *See* 41 CFR 60–1.26(b), 60–300.62, 60–300.65(a), 60–741.62(a), 60–741.65(a). OFCCP strongly disfavors this route.

[37] *See* Directive 2020–02, ''Efficiency in Compliance Evaluations'' (Apr. 17, 2020), *www.dol.gov/agencies/ofccp/directives/2020-02;* Directive 2020–03, ''Pre-Referral Mediation Program'' (Apr. 17, 2020), *www.dol.gov/agencies/ofccp/directives/2020-03.*

[38] FCCM, Chapter 8F00; FCCM, Chapter 8H00. For example, OFCCP may issue an NOV and enter into a conciliation agreement for failure to maintain records in accordance with 41 CFR 60–1.12, 60–300.80, and 60–741.80, or for failure to maintain affirmative action programs as required by 41 CFR part 60–2, 41 CFR part 60–300, subpart C, and 41 CFR part 60–741, subpart C.

[39] *See* FCCM, Chapter 8D01 (explaining that OFCCP issues the SCN without first issuing an NOV when a contractor fails to provide the records, information, or data requested in the scheduling letter and when the contractor refuses to provide access to its premises for an onsite review).

[40] *See* Directive 2019–02, ''Early Resolution Procedures'' (Nov. 30, 2018), *www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm.*

Resolution Procedures Provisions of the Final Rule

The Department proposed in the NPRM to codify many of OFCCP's resolution procedures in its E.O. 11246, section 503, and VEVRAA regulations at 41 CFR parts 60–1, 60–300, and 60–741, respectively. The proposed regulatory text was the same in each part, except that one subparagraph of the section 503 regulations, at 41 CFR 60–741.62(b), retains an existing provision concerning remedial benchmarks specific to the section 503 regulatory scheme that is not present in the other parts.

Specifically, the Department proposed to codify the procedures that OFCCP follows when determining whether to issue a PDN or NOV for discrimination and other material violations. As a matter of enforcement discretion and prioritization of resources, the Department proposed issuing a PDN only after considering statistical evidence, practical significance, and nonstatistical evidence. Additionally, under the proposed rule, OFCCP would have only issued a PDN without nonstatistical evidence when OFCCP's statistical evidence indicates a confidence level of 99% or higher, which equates to three or more standard deviations or a p value of 0.01 or less. Furthermore, the Department proposed to codify the availability of an expedited conciliation option.[41]

The Department has decided to finalize the early conciliation option and the codification of its PDN and NOV procedures with changes from the proposed rule, as noted above. To repeat, the significant changes are that the final rule clarifies that issuance of NOVs is governed by the same evidentiary standards as issuance of PDNs; clarifies the standards OFCCP uses when determining whether to issue a pre-enforcement notice under a disparate treatment and/or disparate impact theory of discrimination; requires OFCCP to provide qualitative evidence supporting a finding of discriminatory intent to proceed under a disparate treatment theory, subject to certain enumerated exceptions; requires OFCCP to identify the policy or practice of the contractor causing the adverse impact with factual support demonstrating why such policy or practice has a discriminatory effect to issue a PDN or NOV under a disparate impact theory; explains that OFCCP must explain in detail the basis for its finding (including, if applicable and as described further below, the reasons for any lack of qualitative evidence) and obtain the Director's (or acting agency head's) approval to issue a PDN or NOV; and provides that, upon the contractor's request, OFCCP will provide the model and variables used in its statistical analysis and an explanation for any variable that was excluded from the statistical analysis.

In the rest of this section, the Department describes the final rule's resolution procedures, including the changes from the NPRM, and responds to relevant comments. The Department refers to the section and paragraph numbers in 41 CFR 60–1.33, which concerns E.O. 11246. As described below, the Department adopts the same provisions in the regulations for VEVRAA (41 CFR part 60–300) and section 503 (41 CFR part 60–741).

1. Predetermination Notice

Section 60–1.33(a) of the final rule allows OFCCP to issue a PDN if a compliance evaluation indicates evidence sufficient to support a preliminary finding of disparate treatment or disparate impact,[42] subject to certain parameters, which are discussed below.[43] Multiple commenters sought clarity on what thresholds OFCCP would use in evaluating evidence supporting an allegation of disparate impact discrimination. The final rule provides clarity by providing distinct provisions for disparate treatment and disparate impact claims. It also requires the OFCCP Director or acting agency head to approve issuance of a PDN.

(a) Disparate Treatment Theory of Liability

Subject to certain exceptions discussed below, paragraph (a)(1) provides that OFCCP may issue a PDN under a disparate treatment theory of liability if the agency (i) provides quantitative evidence; (ii) demonstrates that the unexplained disparity is practically significant; and (iii) provides qualitative evidence that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

The NPRM would have required nonstatistical evidence if OFCCP's statistical evidence indicated a disparity of less than three standard deviations and, conversely, would have allowed claims to proceed without nonstatistical evidence if OFCCP's statistical evidence indicated a disparity of three standard deviations or greater. The Department has decided to require qualitative evidence in all disparate treatment cases as the general default. Qualitative evidence is very important to support a preliminary finding of intentional discrimination, which is a fundamental element of disparate treatment claims. Indeed, in some instances qualitative evidence is direct, powerful, and on its own can prove disparate treatment. Quantitative evidence of statistical significance alone, by contrast, can only provide an inference of intent because at base it is able to prove only that, if the null hypothesis is correct, then the observed outcome is highly unlikely to have occurred by chance. It thus remains possible that the observed statistical disparities were the result of something other than unlawful discrimination.[44] Nevertheless, statistical evidence can be important evidence because it assesses actions taken by the company over a course of time and across multiple employees, which may be indicative of discriminatory intent.[45] The final rule thus clarifies that there is no set quantum of qualitative evidence; rather,

[41] The Department did not propose to codify OFCCP's early resolution procedures per se. Rather, the NPRM acknowledged the early resolution option, which is governed by agency directives.

[42] Here and elsewhere in this final rule, references to evidence sufficient to support a preliminary finding or finding of disparate treatment or disparate impact refer to the amount of evidence OFCCP requires to continue forward with its review. Whether the evidence is sufficient to pursue formal enforcement proceedings is a separate and later determination made by the Solicitor of Labor.

[43] One commenter recommended that OFCCP make PDNs mandatory rather than discretionary in cases involving discrimination. OFCCP made this policy change in 2018 with Directive 2018–01, the stated purpose of which is to ''establish the consistent use of PDNs for discrimination cases, both individual and systemic.'' Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018), *www.dol.gov/agencies/ofccp/directives/2018-01.* Since then, the change has been embedded in the FCCM and now this final rule.

[44] *See supra* note 16. It is important to remember that a rejection of the null hypothesis due to the magnitude of a statistical disparity does not by itself mean that an alternative hypothesis—for example, that a contractor discriminated against its applicants or employees—is true. Instead, other assumptions underlying the null hypothesis (*see supra* note 17) could be flawed, and/or there may be alternative hypotheses that explain the data. *See, e.g.,* Kaye & Freedman, *supra* note 18, at 257; *see also Coleman* v. *Quaker Oats Co.,* 232 F.3d 1271, 1283 (9th Cir. 2000) (finding a disparity with a p-value of ''3 in 100 billion'' did not demonstrate age discrimination because the defendant ''never contend[ed] that the disparity occurred by chance, just that it did not occur for discriminatory reasons. When other pertinent variables were factored in, the statistical disparity diminished and finally disappeared''). Nevertheless, if there is a plausible alternative explanation, the factual basis for such explanation should be identified by the contractor during its audit so that the alternative may be included in OFCCP's model.

[45] Of course, in cases where there have been findings of discrimination, quantitative evidence may also demonstrate the harm suffered by the affected class.

the required strength of the qualitative evidence depends on the strength of the quantitative evidence and the extent of the practical significance.

As discussed above, the Department's definition of *quantitative evidence* includes nonstatistical, but quantitative, analysis such as cohort analyses. Subject to the enumerated exceptions in the final rule, qualitative evidence must also be present for OFCCP to issue a pre-enforcement notice in cases where OFCCP is relying on nonstatistical quantitative evidence for the same reason that qualitative evidence is required where OFCCP is relying on statistical evidence. Nonstatistical quantitative comparisons can also be used by OFCCP to support other statistical evidence that shows statistically significant disparities; however, OFCCP must also have qualitative evidence to proceed with the issuance of pre-enforcement notices in such cases unless one of the final rule's enumerated exceptions applies.

Paragraph (a)(2) provides three exceptions to paragraph (a)(1)'s general criteria that OFCCP must satisfy when it alleges findings or preliminary findings of disparate treatment discrimination. The three exceptions encompass situations where the Department believes it is a worthwhile use of OFCCP's resources to proceed with a case despite not satisfying all three requirements of paragraph (a)(1). For the reasons stated above relating to the importance of qualitative evidence, the Department has not adopted the NPRM's proposal to allow PDNs to be issued on the basis of statistical evidence alone when the disparity shown was three standard deviations or more. However, as discussed more fully below, one of the exceptions allows OFCCP to proceed with a case if the agency finds an extraordinarily compelling disparity. In that situation, the reasons for requiring qualitative evidence have less force, and OFCCP deems it appropriate to continue without qualitative evidence.

Paragraph (a)(2)(i) ensures that OFCCP can move forward with issuing a PDN when the qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment, regardless of quantitative evidence.[46] For example, during a compliance review or focused review OFCCP could uncover direct evidence that a contractor took adverse employment action against a protected group of employees, or circumstantial evidence that, *e.g.,* members of a protected group with superior qualifications were denied selections that were awarded to similarly situated members of another group with inferior qualifications. If this evidence were sufficiently strong, OFCCP should be able to move forward with a PDN without findings of statistical and practical significance, and paragraph (a)(2)(i) makes sure the agency has that flexibility.

Paragraph (a)(2)(ii) is designed to capture the ''inexorable zero'' concept from Title VII case law and other rare situations where the numerical disparities are so overwhelming that, in OFCCP's judgment, additional evidence of discriminatory intent is unnecessary to support a preliminary finding.[47] In the context of an OFCCP compliance evaluation, this could occur, *e.g.,* when the disparity in selections for a given job between a favored and disfavored group is so extraordinarily compelling that by itself the evidence strongly supports a preliminary finding of disparate treatment. For example, a court in a famous Title VII case found the ''inexorable zero'' standard satisfied by a trucking company that had hired 57 white truckers in Atlanta but no black truckers—even though at the time Atlanta was 22% African-American—and in Los Angeles had hired 372 white truckers but only two black truckers.[48]

The Department believes this safety valve for overwhelming quantitative evidence is appropriate for OFCCP's enforcement strategy. Nevertheless, the Department declines to lift the requirement for qualitative evidence in other cases. The Department acknowledges that the requirement for qualitative evidence in all other cases is neither compelled nor prohibited by Title VII case law. This is by design and central to the purpose of this rule. The Department is sensitive to past criticisms that OFCCP over-relied on statistical modeling or used models that did not properly account for contractors' legitimate, nondiscriminatory employment practices. The Department also wants to direct OFCCP's resources to the most compelling cases and those most likely to have a practical impact. Requiring qualitative evidence responds to those criticisms and better directs OFCCP's efforts. This requirement helps ensure that OFCCP's cases are well-grounded in fact, that its presentations are likely to be persuasive in resolution efforts, that its referrals for litigation are credible, and that it is using its resources effectively. This is also consistent with the view of commenters who argued that solely relying on statistical evidence is rarely appropriate in disparate treatment cases (where discriminatory intent must be established as the cause of the disparate treatment), and thus should be reserved for only egregious cases.[49] As stated previously, OFCCP will seek to develop supporting qualitative evidence in all of its cases, including those with gross numerical or statistical disparities. In those rare circumstances where OFCCP issues a PDN based on evidence of extraordinary numerical or statistical disparities and no supporting qualitative evidence, OFCCP will provide an explanation for the lack of qualitative evidence and justification for the agency's decision to proceed with resolution procedures in the PDN, allowing the contractor an opportunity to respond.

Finally, paragraph (a)(2)(iii) is an exception clarifying that OFCCP may issue a PDN in the absence of qualitative evidence if the contractor has prevented OFCCP from compiling qualitative evidence. For example, OFCCP may proceed without qualitative evidence if the contractor has prevented OFCCP from interviewing employees who may have knowledge of facts relevant to a preliminary indicator of discrimination during compliance evaluations, or has destroyed or failed to produce personnel or employment records that similarly may have contained information relevant to a preliminary indicator of discrimination.[50] The Department

[46] *See supra* note 42. This is how individual discrimination cases are traditionally proven. *See McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973) (describing traditional burden-shifting analysis under Title VII); *see also Desert Palace Inc.* v. *Costa,* 539 U.S. 90 (2003) (describing the burden of proof in mixed-motive cases under Title VII).

[47] *Cf. Int'l Bhd. of Teamsters* v. *United States,* 431 U.S. 324, 342 n.23 (1977) (''[The] fine tuning of the statistics could not have obscured the glaring absence of minority line drivers. As the Court of Appeals remarked, the company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero.' '') (citing *United States* v. *T.I.M.E.-D.C. Inc.,* 517 F.2d 299, 315 (5th Cir. 1975)); *Valentino* v. *U.S. Postal Serv.,* 674 F.2d 56, 72–73 (D.C. Cir. 1982) (''small numbers are not per se useless, especially if the disparity shown is egregious. The 'inexorable zero' can raise an inference of discrimination even if the subgroup analyzed is relatively small.''); *cf. also Hazelwood Sch. Dist.,* 433 U.S. at 307–08 (''Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.'') (citing *Int'l Bhd. of Teamsters,* 431 U.S. at 339)); *Analogic Corp.,* 2017–OFC–00001, at 39 (''Courts have held evidence of gross statistical disparity alone may be sufficient to establish a pattern and practice case of intentional discrimination.'').

[48] See *T.I.M.E.-D.C., Inc.,* 517 F.2d at 315 n.29, *vacated on other grounds,* 431 U.S. 324 (1977) (vacating judgment with respect to individual relief but otherwise upholding the 5th Circuit's finding regarding the ''inexorable zero'' standard).

[49] *Supra* note 47.

[50] *See* 41 CFR 60–1.12(e), 60–1.43, 60–3.15, 60–300.80–81, and 60–741.80–81.

believes this exception is necessary to avoid creating an incentive for contractors not to comply with OFCCP compliance evaluations.

(b) Disparate Impact Theory of Liability

Paragraph (a)(3) sets out OFCCP's evidentiary standard for findings or preliminary findings of discrimination premised on a disparate impact theory. Title VII's statutory text, as well as interpretive case law, requires not only that the plaintiff must demonstrate the existence of an adverse impact on a protected group, but that it must identify the particular employment practice causing that impact, unless the elements of the employer's decision-making process cannot be separated for analysis.[51] For findings of discrimination premised on a disparate impact theory, paragraph (a)(3) therefore requires OFCCP to first demonstrate that a disparity has both sufficient quantitative evidence and is practically significant (paragraphs (a)(3)(i) and (ii)), and second to identify the policy or practice of the contractor causing the disparate impact (paragraph (a)(3)(iii)).[52] As the Supreme Court has said, disparate-impact liability is concerned not with statistical imbalances alone but on the eradication of policies that form ''artificial, arbitrary, and unnecessary barriers'' to disfavored groups.[53]

OFCCP received a few comments seeking clarity on whether the evidentiary thresholds for issuance of a PDN apply to disparate impact findings or just disparate treatment findings and stating that statistical evidence is only relevant to disparate treatment because the NPRM suggested that statistical evidence can support an inference of discriminatory intent. The quantitative evidence and practical significance requirements apply to findings and preliminary findings of disparate impact. The Department here requires the same level of quantitative evidence as it does for disparate treatment claims—in both kinds of cases, typically a two-standard-deviation showing of disparate results after accounting for relevant variables to establish a statistically significant disparity. OFCCP also requires practical significance for the same reasons it requires it for disparate treatment claims: to prioritize agency resources, to be especially confident in its statistical findings, and to ensure it is bringing compelling cases.[54]

For disparate impact cases, the PDN must also specifically identify the policy or practice that is causing an adverse impact,[55] and provide factual support to explain how the particular policy or practice is causing the discriminatory effect. This is typically accomplished using statistical evidence to demonstrate that the identified policy or practice specifically is causing the disparity. However, consistent with the Title VII statute and relevant case law, if the elements of the decision-making process cannot be separated for analysis, OFCCP may issue the PDN without identifying the exact step causing disparate impact.[56] This could include, for instance, if a contractor has destroyed or failed to maintain records of its employment policies or processes preventing OFCCP from analyzing specific steps of the process. OFCCP expects to invoke this exception rarely.

(c) Disclosure to Contractors

Multiple comments asked OFCCP to provide more descriptive detail on the evidence that supports preliminary findings in the PDN, to include the type of employment action resulting in a preliminary finding, and to provide enough information so the contractor can investigate the preliminary findings and respond. The agency has taken significant steps in recent years to be more transparent and believes that the level of specificity that contractors seek is already required by the FCCM and recent directives.[57] To provide greater certainty, the agency recommits specifically to be transparent in disclosing the quantitative evidence, the determination of potential significance, and a summary of the relevant qualitative evidence OFCCP has accumulated, where applicable. Paragraph (a)(4) requires that the PDN disclose the quantitative and qualitative evidence relied upon by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. The PDN also must contain an explanation for the agency's finding of practical significance. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or if providing that information would otherwise violate confidentiality or privacy protections afforded by law. As stated previously, when the exception

[51] 42 U.S.C. 2000e(k)(1). *See generally Ricci* v. *DeStefano,* 557 U.S. 557, 577–78 (2009).

[52] Consistent with note42, *supra,* the final rule does not require OFCCP, at the PDN stage, to provide evidence that would rebut the contractor's burden of demonstrating that the selection procedure in question has been properly validated. This is in part because, under OFCCP's regulations, a contractor is not required to validate selection procedures until it is aware of an adverse impact, *see* 41 CFR 60–3.4(C), which it may not be until OFCCP issues the PDN.

[53] *Texas Dep't of Hous. & Cmty. Affairs* v. *Inclusive Communities Project, Inc.,* 576 U.S. 519, 543 (2015) (quoting *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 431 (1971)); *see also id.* at 542 (''[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity. A robust causality requirement ensures that '[r]acial imbalance . . . does not, without more, establish a prima facie case of disparate impact' and thus protects defendants from being held liable for racial disparities they did not create.'') (quoting *Wards Cove Packing Co.* v. *Atonio,* 490 U.S. 642, 653 (1989)). Although *Inclusive Communities* involved a disparate impact claim under the federal Fair Housing Act, courts have applied the case in the Title VII context as well. *See, e.g., Davis* v. *District of Columbia,* 925 F.3d 1240, 1251 (D.C. Cir. 2019); *Gagliano* v. *Mabus,* No. 15–cv–2299, 2019 WL 3306293, at *2 (S.D. Cal. July 23, 2019); *see also Inclusive Communities,* 576 U.S. at 539–40 (describing the analysis required under the FHA as analogous to the disparate impact standard under Title VII).

[54] Of course, quantitative evidence also demonstrates that a disparity exists.

[55] 41 CFR 60–3.3A; *see also Analogic Corp.,* 2017–OFC–00001, at 31 (''In order to establish a disparate impact violation, OFCCP must demonstrate Analogic 'uses a particular employment practice that causes a disparate impact on the basis of [a protected characteristic.]'') (citing 42 U.S.C. 2000e–2(k)(1)(A)(i); *Wal-Mart Stores Inc.* v. *Dukes,* 564 U.S. 338 (2011); *Wards Cove Packaging Co.,* 490 U.S. at 657; *Connecticut* v. *Teal,* 457 U.S. 440, 446 (1982); *Robinson* v. *Metro-North Commuter R.R. Co.,* 267 F.3d 147, 160 (2d Cir. 2001)); *see also Griggs,* 401 U.S. at 431 (''[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.''); *see also TNT Crust,* 2004–OFC–3, at 35 (finding employer discriminated against Hispanic applicants by requiring that laborers possess basic English skills, which resulted in an adverse impact and was not demonstrably related to legitimate business necessities) (citing *Griggs,* 401 U.S. at 431–32)).

[56] 42 U.S.C. 2000e–(k)(1)(B)(i); *see also Analogic Corp.,* 2017–OFC–00001, at 33 (''Courts have determined the Title VII exception to the general rule requiring a plaintiff to identify a specific employment practice caused the disparity is applicable only when the plaintiff has demonstrated the elements of the decision-making process cannot be separated for analysis.'') (citing *Davis* v. *Cintas Corp.,* 717 F.3d 476, 496 (6th Cir. 2013); *Bennett* v. *Nucor Corp.,* 656 F.3d 892, 817–18 (8th Cir. 2011)); *Lufkin Indus., Inc.,* 519 F.3d at 278 (collecting cases in which courts found employment practices were ''not capable of separation for analysis'').

[57] Chapter 8E01 of the FCCM states, ''[The PDN] description will include identification of the discrimination victim(s), *e.g.,* the affected class or individual(s); the employment action(s) giving rise to the preliminary findings; and the basis for the liability determination (*e.g.,* disparate treatment in the selection of minority technicians). The PDN should also include facts and the results of analyses that support the preliminary determination and recommended remedies. Typically, the PDN includes the magnitude of the impact in terms of shortfalls or pay disparities and the measure of statistical certainty (*e.g.,* standard deviation).'' *See also* FCCM, Letter L–35. OFCCP also provides guidance on what to communicate to contractors in Directive 2018–08, ''Transparency in OFCCP Compliance Activities'' (Sept. 2018), *www.dol.gov/agencies/ofccp/directives/2018-08,* and Directive 2018–05, *see supra* note 21.

in paragraph (a)(2)(ii) applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the PDN based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in its statistical analysis and an explanation for why any variable proposed by the contractor was excluded from the statistical analysis.

One commenter sought clarity on how OFCCP weighs evidence provided by the contractor to rebut preliminary findings. However, further guidance on the weighing of that kind of evidence is not well-suited to regulatory text, as how OFCCP evaluates a contractor's response depends on the particular facts under review in each case. That same commenter expressed concern regarding the amount of qualitative evidence required before issuing a PDN and asked OFCCP to include language in the final rule to quantify how much nonstatistical evidence is needed for OFCCP to make a preliminary finding. As discussed previously, the amount of evidence available—as well as its quality, credibility, and content, which may range from innocuous to very concerning—will depend on the facts of each compliance evaluation, and it is impracticable for OFCCP to prescribe a set volume or specific characteristics of qualitative evidence that would be sufficient in every conceivable evaluation. The evidence OFCCP examines and chooses to reject or rely upon will be based on the overall facts and circumstances of each particular case. The PDN will provide sufficient information to contractors to be able to understand OFCCP's finding and to meaningfully respond.

Similarly, the Department received comments seeking a definition for ''material'' violation and clarity on what the agency considers ''preliminary findings.'' The Department did not propose these definitions in the NPRM and declines to add definitions for these terms to the final rule. Definitions for the terms are not needed. The final rule provides significant clarity regarding, and guardrails for issuing, pre-enforcement notices. To the extent commenters were concerned with material but non-discriminatory violations, (*e.g.,* recordkeeping, failure to implement audit and reporting systems), those also trigger OFCCP's resolution procedures for compliance evaluations.[58] Rather than sending a PDN for potential violations that do not involve discrimination, OFCCP generally sends an NOV before proceeding to a conciliation agreement, or the SCN as a last resort.[59] This final rule codifies use of the NOV for all material violations, with the exception of cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters. For those cases, OFCCP will continue its current practice of proceeding directly to issuing an SCN to expedite resolution of those issues.

(d) Response Deadline

In response to several comments, paragraph (a)(5) of the final rule increases the time for contractors to respond to a PDN from 15 to 30 days with the possibility of an extension. OFCCP believes that with all of the information being provided to a contractor in the PDN, including the summary of evidence, and the option to request additional information about the statistical analysis, that a contractor will likely need 30 days to respond, with the possibility of an extension for good cause shown.

2. Notice of Violation

Section 60–1.33(b) of the final rule governs NOVs. The Department did not receive any comments solely concerning the NOV, with some commenters generally addressing both the PDN and NOV thresholds. Nevertheless, the Department has decided to revise § 60–1.33(b) to make it clear that NOVs alleging discrimination findings are subject to the same requirements as PDNs, and that OFCCP will fully consider the arguments raised and information provided by contractors in response to PDNs.

Section 60–1.33(b)(1) explains that OFCCP may issue an NOV if, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5), the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination,[60] or that the contractor has committed other material violations of the equal opportunity clause. The NOV informs the contractor that corrective action is required and invites conciliation through a written agreement. This section also requires the OFCCP Director or acting agency head to approve an NOV before it is issued.

Paragraph (b)(1) codifies use of the NOV for all material violations. An NOV is the first formal notification a contractor receives for a material violation that does not involve discrimination. However, consistent with current OFCCP policy and practice, the final rule allows OFCCP to proceed straight to a SCN if the asserted violation is that the contractor has denied OFCCP access to individuals or documents or otherwise failed to submit information requested in OFCCP's OMB-approved scheduling letters. These types of violations require expedited treatment because they directly inhibit OFCCP's compliance evaluations and cause delays in resolution of those evaluations. The Department did not intend for the NPRM to require an NOV for these types of violations and makes the exception explicit in the final rule.

Paragraphs (b)(2) through (4) govern specifically NOVs that allege a finding of discrimination. Paragraph (b)(2) provides that OFCCP will only issue an NOV alleging a finding of discrimination if the contractor has not sufficiently rebutted the preliminary findings identified in the PDN or if the contractor failed to respond. Paragraph (b)(3) clarifies that the requirements for issuing a PDN also apply to an NOV alleging a discrimination violation. Finally, paragraph (b)(4) clarifies that OFCCP must reasonably address all concerns and defenses raised by the contractor in response to the PDN.

3. Show Cause Notice

SCNs are governed by existing sections in the Code of Federal Regulations.[61] The Department did not propose to revise those sections and does not now adopt any revisions.

OFCCP may issue SCNs when the OFCCP Director has reasonable cause to believe that a contractor has violated an equal opportunity clause. As noted above, the final rule retains OFCCP's ability, consistent with current practice, to proceed directly to issuing a SCN for cases in which the contractor either denies access or otherwise fails to submit information requested in OFCCP's OMB-approved scheduling letters. In discrimination cases, SCNs generally follow issuance of an NOV

[58] FCCM, Chapter 8F00; FCCM, Chapter 8H00. For example, OFCCP may issue an NOV and enter into a conciliation agreement for failure to maintain records in accordance with 41 CFR 60–1.12, 60–300.80, and 60–741.80, or for failure to maintain affirmative action programs as required by 41 CFR part 60–2, 41 CFR part 60–300, subpart C, and 41 CFR part 60–741, subpart C.

[59] In some instances, OFCCP issues the SCN without first issuing an NOV for material violations that are non-discriminatory in nature. *See* FCCM, Chapter 8D01 (explaining that OFCCP issues the SCN without first issuing an NOV when a contractor fails to provide the records, information, or data requested in the scheduling letter and when the contractor refuses to provide access to its premises for an onsite review).

[60] *See* note 42, *supra.*

[61] 41 CFR 60–1.28, 60–300.64, and 60–741.64.

and the contractor's rejection of OFCCP's offer to conciliate or a failure of conciliation. Notwithstanding a rejection or failure of conciliation, pre-referral mediation remains a viable option for contractors who have received a SCN. If a contractor raises new or different information or arguments in response to an NOV, the agency's policy is to address those issues before or coincident with issuing a SCN. The Department notes the evidentiary standards that must be met in order to issue PDNs and NOVs in discrimination cases must also be met in order to issue a SCN in such cases; this is the most reasonable reading of the regulation's current requirement that the Director must have ''reasonable cause'' to believe a violation has occurred in order to issue a SCN, so no change to the regulatory text is needed. The Department also notes that meeting the evidentiary standards for issuing PDNs and NOVs does not necessarily mean that a case is legally sufficient to initiate litigation. The Solicitor of Labor retains authority to pursue formal enforcement proceedings and will do so only after determining that the required legal elements of a disparate treatment and/or disparate impact claim, as relevant, are satisfied.

4. Conciliation Agreements

Before this rule, § 60–1.33 provided for conciliation agreements. The Department has retained this provision without substantive change as § 60–1.33(c) of the final rule.[62]

5. Expedited Conciliation Option

This rule clarifies in § 60–1.33(d) that Federal contractors have the option to bypass the PDN and NOV procedures to enter directly into a conciliation agreement when there are preliminary findings of material violations, regardless of whether those violations involve discrimination. This option for conciliation may suit contractors who wish to expedite the resolution of discrimination or other material violations. Recently, OFCCP has sought to promote the efficient resolution of material violations for multi-establishment Federal contractors with early resolution procedures.[63] The final rule furthers the agency's efforts to improve efficiency and prioritize early resolution of cases by codifying an expedited option for resolution that would apply to compliance reviews in their early stages.

The Department received six comments relevant to the expedited conciliation option. One contractor organization specifically asked OFCCP to endorse use of the Early Resolution Procedures (ERP) and Early Resolution Conciliation Agreements (ERCAs) in its final rule and codify the process. While the Department fully endorses use of ERP and ERCAs as an expedited conciliation option, and the agency intends to continue using this option where a contractor is interested, it declines to codify the procedures at this time. OFCCP only recently began using ERP and ERCAs to promote corporate-wide compliance, and the procedures are still evolving as the program matures. Under the current procedures, OFCCP may alert contractors of their option to conciliate even before the agency issues a PDN, and the contractor has the option to initiate the resolution procedures. If material violations exist, the contractor may agree to participate in ERP, ultimately resulting in an ERCA. The agency will continue to provide subregulatory guidance on these procedures as the program develops.

One commenter requested establishment of a pre-PDN conference between the contractor and the agency to discuss the issues that OFCCP intends to identify in the PDN. OFCCP's current practice is to engage in the equivalent of a pre-PDN conference through regular contact with the contractor, and the agency is committed to continuing to do so.[64] Likewise, the ERP process requires a pre-PDN conference to discuss the potential ERCA if a contractor expresses interest in pursuing one. However, the Department believes it is premature to require a pre-PDN conference in all matters. Between the PDN, NOV, and SCN, there already are three mandatory notices that provide the contractor information about OFCCP's findings (or preliminary findings) of discrimination, as well as opportunities for the contractor to respond to each one, before a matter is referred for enforcement. Adding another step would likely add unnecessary delay. Moreover, OFCCP already offers early conciliation as well as its Ombuds Service for assistance with complaints about the agency's conduct. The agency will continue to evaluate whether a mandatory formal pre-PDN conference would be helpful, but declines to adopt that procedure at this time.

Other comments expressed concern that the early resolution option would coerce contractors into conciliation by combining data from multiple establishments and that OFCCP would use the early resolution option as a way, in the words of one commenter, ''to circumvent legal standards by OFCCP personnel through initiation of discussions about resolution of merely 'potential' employment discrimination that does not meet legal standards.'' OFCCP does not and will not use early resolution procedures to coerce contractors or to circumvent legal standards, and the Department has revised § 60–1.33(d) to make it clear that contractors' participation must be voluntary. This language should not be interpreted to be coercive. It is intended to be permissive. One commenter further suggested that the Department should not allow OFCCP staff to initiate discussions about expedited conciliation options. While the Department appreciates the commenter's concern, the Department believes that allowing OFCCP staff to inform contractors that expedited conciliation is an available option is important to ensure that contractors are aware of that option. However, the final rule clarifies that OFCCP staff may not require or insist that the contractor avail itself of the expedited conciliation option. OFCCP's headquarters office also provides oversight of early resolution conciliations to ensure a degree of consistency in their content. Finally, OFCCP declines to change the label of this section, as suggested by one comment.

6. Severability

The Department has decided to include a severability provision as part of this final rule. To the extent that any provision of this final rule is declared invalid by a court of competent jurisdiction, the Department intends for all other provisions that are capable of operating in the absence of the specific provision that has been invalidated to remain in effect.

C. Miscellaneous Comments

A number of comments are not addressed above because they are not directly germane to the provisions of the final rule. Eight comments were not posted to *Regulations.gov* either because of lack of relevance to the proposed rule or because they were exact duplicates of an already posted comment. One comment was withdrawn after posting because the submitter subsequently provided a revised version that was posted instead.

[62] The Department added a comma between ''complaint investigation'' and ''or other review'' in the first sentence of this provision.

[63] *See supra* note 40.

[64] Chapter 2O00 of the FCCM states, ''After advising the contractor of its compliance evaluation findings, the [compliance officer] must provide formal notification through a PDN . . . when there are preliminary indicators of discrimination.''

One commenter noted that age discrimination is not mentioned in the proposed rule. That is because none of the laws that OFCCP enforces protect applicants or employees from discrimination on the basis of age. The Age Discrimination in Employment Act, the primary Federal law prohibiting age discrimination in employment, is enforced and administered by the Equal Employment Opportunity Commission.

Three comments pertained to previously issued OFCCP guidance about how the agency analyzes compensation discrimination.[65] The comments asked for clarification regarding how OFCCP groups employees for pay analysis and which neutrality tests OFCCP uses to determine whether pay variables are neutral. One of the comments suggested that the Department should rescind the OFCCP policy directive that provides guidance on how the agency analyzes compensation to determine whether discrimination may be present.[66] The Department declines at this time to expand the scope of this rule to include further guidance concerning pay analysis groupings specifically or to rescind its compensation directive. The Department appreciates the input received and is considering addressing its methods of compensation analysis in a future rulemaking or in new guidance documents.

Finally, five comments specifically requested that the comment period be extended. After considering those requests, the Department determined that the original 30-day comment period provided adequate time for the public to comment on the proposed rule. Notably, the Administrative Procedure Act (APA) does not set forth a mandatory minimum time for public comments, but rather more generally requires an ''opportunity to participate in the rule making through submission of written data, views, or arguments.'' [67] OFCCP posted its declination letter on *Regulations.gov* as a supplement to the proposed rule on January 27, 2020.

D. Changes in 41 CFR Parts 60–300 and 60–741

OFCCP has separate regulations concerning E.O. 11246, VEVRAA, and section 503. No commenter suggested that OFCCP's resolution procedures or the proposed definitions should be applied differently depending on the law the agency is enforcing. The Department thus adopts the same definitions and provisions on resolution procedures in 41 CFR part 60–300 (VEVRAA) and 41 CFR part 60–741 (section 503) that are described above for 41 CFR part 60–1 (E.O. 11246).

E. Agency Head Title

The final rule replaces outdated references to the official title of OFCCP's agency head in E.O. 11246 regulations, from ''Deputy Assistant Secretary'' to ''Director,'' throughout the entirety of 41 CFR parts 60–1 and 60–2. The Department made the same change to the regulations implementing VEVRAA and section 503 through final rules in 2013.[68] The Department made the change after the Department of Labor abolished the Employment Standards Administration in November 2009. This restructuring resulted in the change of title for OFCCP's agency head, from ''Deputy Assistant Secretary'' (reporting to the head of the Employment Standards Administration) to ''Director'' reporting directly to the Secretary of Labor. The Department received no comments on this change and adopts it in the final rule.

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

Under E.O. 12866, OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of E.O. 12866 and OMB review. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866. OMB has determined that this rule is a significant regulatory action under E.O. 12866 and has reviewed the final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA designated that this rule is not a ''major rule,'' as defined by 5 U.S.C. 804(2).

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

A. Need for Rulemaking

The final rule addresses stakeholder concerns by codifying the use of PDNs, NOVs, and an early conciliation option that already exist in the FCCM and agency guidance, such as directives. The FCCM and agency directives are not legally binding and have not gone through formal notice and public comment. They thus do not provide the same level of clarity, transparency, and certainty that this final rule does. The final rule also modifies those procedures to improve clarity and transparency, establish guardrails on the agency's issuance of pre-enforcement notices, and further the strategic allocation of limited agency resources.

B. Discussion of Impacts

In this section, the Department presents a summary of the costs associated with the codified procedures and modifications in this rulemaking. In the NPRM, the Department utilized the General Services Administration's System for Award Management (SAM) database to identify the number of contractors who may be impacted by the

[65] *See* Directive 2018–01, ''Use of Predetermination Notices (PDN)'' (Feb. 27, 2018), *www.dol.gov/agencies/ofccp/directives/2018-01.* OFCCP issued this directive to ensure that PDNs be used in all compliance evaluations with preliminary discrimination findings, both individual and systemic. Prior to the directive, use of PDNs was discretionary and reserved for systemic discrimination findings. *See* FCCM, Chapter 8 (detailing the procedures that OFCCP follows for issuing PDNs).

[66] *Id.*

[67] 5 U.S.C. 553(c). Thirty-day public comment periods are broadly viewed as permissible under the APA, particularly where, as here, the proposal is fairly straightforward and is not detailed or highly technical in nature. *See, e.g., Conn. Light & Power Co.* v. *Nuclear Regulatory Comm'n.,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a thirty-day comment period even though the ''technical complexity'' of the regulation was ''such that a somewhat longer comment period might have been helpful''); *Conference of State Bank Supervisors* v. *Office of Thrift Supervision,* 792 F. Supp. 837, 844 (D.D.C. 1992) (upholding the sufficiency of a thirty-day comment period).

[68] *See* 41 CFR 60–300.2(h) and 60–741.2(f); *see also* 78 FR 58613 (Sept. 24, 2013); 78 FR 58681 (Sept. 24, 2013).

rule.[69] Those registered in the SAM database consist of contractor firms, and other entities such as state and local governments and other organizations that are interested in Federal contracting opportunities, and other forms of Federal financial assistance. In the NPRM, the Department acknowledged that the SAM number likely resulted in an overestimation because the system captures firms that do not meet the jurisdictional dollar thresholds for the three laws that OFCCP enforces, and it captures contractor firms for work performed outside the United States by individuals hired outside the United States, over which OFCCP does not have authority.

The Department received no comments on using the SAM database to determine the affected contractor universe in the NPRM. However, in the final rule, the Department reevaluated the contractors likely to be affected and decided to utilize the Employment Information Report (EEO–1) data, which identifies the number of contractors that could be scheduled for a compliance evaluation. By using the EEO–1 Report data, the Department mitigates the problems identified with the SAM data that resulted in the overestimation of the contractor universe. The EEO–1 Report must be filed by covered Federal contractors who: (1) Have 50 or more employees; (2) are prime contractors or first-tier subcontractors; and (3) have a contract, subcontract, or purchase order amounting to $50,000 or more. OFCCP schedules only contractors who meet those thresholds for compliance evaluations. While the Department acknowledges that all Federal contractors may learn their EEO requirements in order to comply with the laws that OFCCP enforces, only those contractors scheduled for a compliance evaluation are likely to have a need to learn the resolution procedures because only those contractors may need to interact with OFCCP through these new resolution procedures. Further, because this rule stipulates procedures OFCCP must follow if it desires to issue a PDN or NOV, unless and until a contractor is scheduled for a compliance evaluation, the contractor need not familiarize itself with these changes. This change significantly alters the number of contractors possibly impacted by the final rule, reducing the number to 26,514.[70] The Department believes the updated number of contractors is a more accurate estimation of those entities possibly impacted by the final rule and still likely overstates the number of entities that will take time to familiarize themselves.

1. Cost of Rule Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis the estimated time it takes for contractors to review and understand the instructions for compliance. To minimize the burden, OFCCP will publish compliance assistance materials such as a fact sheet and answers to frequently asked questions.

In line with recent assessments in other rulemakings, the agency has determined that either a Human Resources Manager (SOC 11–3121) or a Lawyer (SOC 23–1011) would review the rule. OFCCP estimates that 50 percent of the reviewers would be human resources managers and 50 percent would be in-house counsel. Thus, the mean hourly wage rate reflects a 50/50 split between human resources managers and lawyers. The mean hourly wage of a human resources manager is $62.29 and the mean hourly wage of a lawyer is $69.86.[71] Therefore, the average hourly wage rate is $66.08 (($62.29 + $69.86)/2). OFCCP adjusted this wage rate to reflect fringe benefits such as health insurance and retirement benefits, as well as overhead costs such as rent, utilities, and office equipment. The agency used a fringe benefits rate of 46 percent[72] and an overhead rate of 17 percent,[73] resulting in a fully loaded hourly compensation rate of $107.71 ($66.08 + ($66.08 × 46 percent) + ($66.08 × 17 percent)). The estimated labor cost to contractors is reflected in Table 1, below.

TABLE 1—LABOR COST

Major occupational groups	Average hourly wage rate	Fringe benefit rate	Overhead rate	Fully loaded hourly compensation
Human Resources Managers and Lawyers	$66.08	46%	17%	$107.71

The agency estimates that it will take a minimum of 30 minutes (½ hour) for a human resources manager or lawyer at each contractor firm to either read the rule or read the compliance assistance materials provided by OFCCP to learn more about the codified procedures. One commenter, a contractor organization, asserted that the agency underestimated the time needed to become familiar with the proposed rule. The commenter provided an alternate estimate of two to three hours. OFCCP acknowledges that the precise amount of time each company will take to become familiar with understanding the new regulations is difficult to estimate. The elements that the agency uses in its calculation take into account the length and complexity of the rule. Thus, OFCCP has decided to retain its initial estimate of one-half hour for rule familiarization. The one-half hour estimate is an average across all contractors and accounts for the time needed to read the rule or read the compliance assistance materials provided by OFCCP to learn more about the codified procedures.

Another contractor organization asserted that the agency's calculations did not account for the use of outside third parties that are used by Federal contractors and subcontractors to fully understand a contractor's obligations under the proposed regulations. The commenter surveyed its constituents and provided an estimate between $1,000 and $5,000 for outside assistance. The commenter did not provide specific data on the

[69] U.S. General Services Administration, System for Award Management, data released in monthly files, *www.sam.gov.* In the NPRM, OFCCP used August 2019 data and identified 420,000 contractors that may be impacted by the proposed rule.

[70] OFCCP obtained the total number of contractors from the most recent EEO–1 Report data available, which is from FY 2018.

[71] BLS, Occupational Employment Statistics, Occupational Employment and Wages, May 2019, *www.bls.gov/oes/current/oes_nat.htm.*

[72] BLS, Employer Costs for Employee Compensation, *www.bls.gov/ncs/data.htm.* Wages and salaries averaged $24.26 per hour worked in 2017, while benefit costs averaged $11.26, which is a benefits rate of 46 percent.

[73] Cody Rice, U.S. Environmental Protection Agency, ''Wage Rates for Economic Analyses of the Toxics Release Inventory Program,'' (June 10, 2002), *www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

characteristics of the contractors surveyed. The Department notes that some companies may decide to outsource familiarization with the new procedures, just as some companies may wait until OFCCP initiates an investigation before familiarizing themselves with the new procedures, but OFCCP does not anticipate that companies will incur both in-house and third party familiarization costs. The Department thus declines to add these third-party costs to its estimate in addition to the costs already calculated.

Consequently, the estimated burden for rule familiarization is 13,257 hours (26,514 contractor firms × ½ hour). The Department calculates the total estimated cost of rule familiarization as $1,427,911 (13,257 hours × $107.71/hour) in the first year, which amounts to a 10-year annualized cost of $162,519 at a discount rate of 3 percent (which is $6.13 per contractor firm) or $190,002 at a discount rate of 7 percent (which is $7.17 per contractor firm). Table 2, below, reflects the estimated regulatory familiarization costs for the final rule.

TABLE 2—REGULATORY FAMILIARIZATION COST

Total number of contractors	26,514
Time to review rule	30 minutes
Human Resources Managers fully loaded hourly compensation	$107.71
Regulatory familiarization cost in the first year	$1,427,911
Annualized cost with 3 percent discounting	$162,519
Annualized cost per contractor with 3 percent discounting	$6.13
Annualized cost with 7 percent discounting	$190,002
Annualized cost per contractor with 7 percent discounting	$7.17

The rule does not include any additional costs because it adds no new requirements or burdens on contractors. When the Department uses a perpetual time horizon to allow for cost comparisons under E.O. 13771, the perpetual annualized cost is $81,215 at a 7 percent discount rate in 2016 dollars.[74]

[74] To comply with E.O. 13771 accounting, the Department multiplied the rule familiarization cost for Year 1 ($1,427,911) by the GDP deflator (0.9582) to convert the cost to 2016 dollars ($1,368,224). The Department used this result to determine the perpetual annualized cost ($106,456) at a discount rate of 7 percent in 2016 dollars. Assuming the rule takes effect in 2020, the Department divided $106,456 by 1.07[4], which equals $81,215.

2. Cost Savings

OFCCP expects contractors impacted by the rule will experience cost savings. Specifically, the clarity provided in the new definitions, as well as the clarity of OFCCP's procedures related to resolution of material violations, provides certainty to contractors of what is required as well as an option for contractors to more expeditiously resolve the violations.

If the rule increases clarity for Federal contractors, this impact most likely will yield cost savings to taxpayers (if contractor fees decrease because they do not need to engage third party representatives to interpret OFCCP's procedures and requirements). In addition, by increasing clarity for both contractors and for OFCCP, the rule may reduce costs associated with resolving preliminary findings and violations through conciliation by making it clearer to both sides at the outset what is required by the regulation.

3. Benefits

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

- Supporting more effective enforcement of prohibitions against certain types of employment discrimination;
- Increasing fairness for contractors by providing more transparency and certainty on the agency's resolution procedures;
- Establishing guardrails on the agency's issuance of pre-enforcement notices;
- Providing more efficient remedies to workers victimized by employment discrimination by effectuating corporate-wide corrective actions in conciliation agreements that may reach more victims than standard establishment-based conciliation agreements;
- Facilitating a more efficient option for contractors to resolve potential discrimination by providing notice of OFCCP's preliminary findings earlier in the compliance review process; and
- Furthering the strategic allocation of limited agency resources.

C. Alternatives

In addition to the approach proposed in the rule, the Department considered alternative approaches. The Department considered leaving OFCCP's resolution procedures described only in agency subregulatory guidance. Though OFCCP codified ''conciliation agreements'' in 1979, the agency's other resolution procedures, namely the PDN and NOV, have only been explained in subregulatory guidance. Maintaining the status quo has led to OFCCP's inconsistent use of the PDN across agency offices, creating inefficiencies and leading to greater uncertainty for Federal contractors. Though the agency has taken recent subregulatory measures to increase consistency and certainty, codifying these agency resolution procedures will have a stronger impact and promote more efficient enforcement of E.O. 11246, section 503, and VEVRAA than the status quo alternative.

The Department also considered different types of evidentiary standards for OFCCP to issue PDNs and NOVs. For example, the Department considered mandating a higher threshold for statistical significance, such as the three-standard-deviation threshold proposed in the NPRM, and not mandating qualitative evidence. The Department ultimately determined that requiring statistical evidence with two standard deviations or other quantitative evidence, a finding of practical significance, and appropriate qualitative evidence best balances all the equities involved and promotes efficient and effective allocation of resources.

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

The agency did not receive any public comments on the Regulatory Flexibility Analysis.

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. The RFA requires agencies to consider the impact of a regulation on a wide range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must review whether a rule would have a significant economic impact on a substantial number of small entities. *See 5* U.S.C. 603. If the rule would, then the agency must prepare a regulatory flexibility analysis as

described in the RFA.[75] However if an agency determines that the rule would not be expected to have a significant economic impact on a substantial number of small entities, then the head of the agency may so certify and the RFA does not require a regulatory flexibility analysis. *See* 5 U.S.C. 605. The certification must include a statement providing the factual basis for this determination and the reasoning should be clear.

The Department does not believe that this rule will have a significant economic impact on a substantial number of small entities. The final rule will most likely affect small firms in the construction industry (NAICS Sector 23) and small firms in the management of companies and enterprises industry (NAICS Sector 55). The annualized cost for both industries at a discount rate of 7 percent for rule familiarization is $7.17 per entity ($50.33 in the first year) which is far less than 1 percent of the annual revenue of the smallest of the small entities affected by the final rule (0.01% for construction and 0.02% for management of companies and enterprises). Accordingly, the Department certifies that the final rule will not have a significant economic impact on a substantial number of small entities. That is consistent with the Department's analysis in the NPRM.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 requires that OFCCP consider the impact of paperwork and other information collection burdens imposed on the public. *See* 44 U.S.C. 3507(d). An agency may not collect or sponsor the collection of information or impose an information collection requirement unless the information collection instrument displays a currently valid OMB control number. *See* 5 CFR 1320.5(b)(1).

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

Executive Order 13132 (Federalism)

The Department has reviewed the rule in accordance with E.O. 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)

The rule does not have tribal implications under E.O. 13175 that requires a tribal summary impact statement. The rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

List of Subjects

41 CFR Parts 60–1 and 60–2

Administrative practice and procedure, Civil rights, Discrimination, Employment, Equal employment opportunity, Government contracts, Government procurement, Labor.

41 CFR Parts 60–300 and 60–741

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

Craig E. Leen,

Director, Office of Federal Contract Compliance Programs.

For the reasons stated in the preamble, the Office of Federal Contract Compliance Programs amends 41 CFR parts 60–1, 60–2, 60–300, and 60–741 as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

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

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

■ 2. In part 60–1, except for § 60–1.3, revise all references to ''Deputy Assistant Secretary'' to read ''Director''.

■ 3. Amend § 60–1.3 by removing the definition for ''Deputy Assistant Secretary'' and adding definitions for ''Director'', ''Qualitative evidence'', and ''Quantitative evidence'' in alphabetical order to read as follows:

§ 60–1.3 Definitions.

* * * * *

Director means the Director, Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, or his or her designee.

* * * * *

Qualitative evidence includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

Quantitative evidence includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor

[75] *Id.*

(including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

■ 4. Revise § 60–1.33 to read as follows:

§ 60–1.33 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

(c) *Conciliation agreement.* If a compliance review, complaint investigation, or other review by OFCCP or its representative indicates a material

violation of the equal opportunity clause, and:

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

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

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

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

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

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

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

§ 60–2.1, 60–2.2, and 60–2.31 [Amended]

■ 6. In §§ 60–2.1, 60–2.2, and 60–2.31, remove ''Deputy Assistant Secretary'' everywhere it appears and add ''Director'' in its place.

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

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

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

■ 8. Amend § 60–300.2 by redesignating paragraphs (t) through (cc) as paragraphs (v) through (ee) and adding new paragraphs (t) and (u) to read as follows:

§ 60–300.2 Definitions.

* * * * *

(t) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(u) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

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

§ 60–300.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

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

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

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

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

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

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

■ 10. The authority citation for part 60–741 continues to read as follows:

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

■ 11. Amend § 60–741.2 by redesignating paragraphs (s) through (bb) as paragraphs (u) through (dd) and adding new paragraphs (s) and (t) to read as follows:

§ 60–741.2 Definitions.

* * * * *

(s) *Qualitative evidence* includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment

decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

(t) *Quantitative evidence* includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.,* a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

* * * * *

■ 12. Revise § 60–741.62 to read as follows:

§ 60–741.62 Resolution procedures.

(a) *Predetermination Notice.* If a compliance review or other review by OFCCP indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination, OFCCP may issue a Predetermination Notice, subject to the following parameters and the approval of the Director or acting agency head:

(1) For allegations included in a Predetermination Notice involving a disparate treatment theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate that the unexplained disparity is practically significant; and

(iii) Provide qualitative evidence as defined in this part that, in combination with other evidence, supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate treatment.

(2) OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability without satisfying all three components listed in paragraph (a)(1) of this section only if:

(i) The qualitative evidence by itself is sufficient to support a preliminary finding of disparate treatment;

(ii) The evidence of disparity between a favored and disfavored group is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment; or

(iii) Paragraphs (a)(1)(i) and (ii) of this section are satisfied and the contractor denied OFCCP access to sources of evidence that may be relevant to a preliminary finding of discriminatory intent. This may include denying access to its employees during a compliance evaluation or destroying or failing to produce records the contractor is legally required to create and maintain.

(3) For allegations included in a Predetermination Notice involving a disparate impact theory of liability, OFCCP must:

(i) Provide quantitative evidence as defined in this part;

(ii) Demonstrate the unexplained disparity is practically significant; and

(iii) Identify the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor's selection procedures are incapable of separation for analysis.

(4) The Predetermination Notice must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Predetermination Notice; however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Predetermination Notice based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(5) Any response to a Predetermination Notice must be submitted by the contractor within 30 calendar days of receipt of the Notice, which deadline OFCCP may extend for good cause.

(b) *Notice of Violation.* (1) If, following OFCCP's review of any response by the contractor pursuant to paragraph (a)(5) of this section, the agency has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination, as established in the parameters and exceptions in paragraph (a) of this section, or that the contractor has committed other material violations of the equal opportunity clause (with the exception of violations for denying access or failing to submit records in response to OFCCP's Office of Management and Budget (OMB)-approved Scheduling Letters, for which OFCCP may proceed directly to issuing a Show Cause Notice), OFCCP may issue a Notice of Violation to the contractor requiring corrective action and inviting conciliation through a written agreement, subject to approval by the Director or acting agency head.

(2) OFCCP may issue a Notice of Violation alleging a finding of discrimination following issuance of a Predetermination Notice if the contractor does not respond or provide a sufficient response within 30 calendar days of receipt of the Predetermination Notice, subject to approval by the Director or acting agency head, unless OFCCP has extended the Predetermination Notice response time for good cause shown.

(3) The Notice of Violation must disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond. OFCCP will seek to obtain qualitative evidence in all cases in which it issues a Notice of Violation, however, if the exception in paragraph (a)(2)(ii) of this section applies, OFCCP will disclose why, in the absence of qualitative evidence, the agency is issuing the Notice of Violation based on evidence of an extraordinarily compelling disparity alone. In addition, upon the contractor's request, OFCCP must also provide the model and variables used in any statistical analysis and an explanation why any variable proposed by the contractor was excluded from that analysis. However, OFCCP may withhold personal identifying information from the description of the qualitative evidence if the information is protected from

disclosure under recognized governmental privileges, or otherwise if providing that information would violate confidentiality or privacy protections afforded by law.

(4) The Notice of Violation must address all relevant concerns and defenses raised by the contractor in response to the Predetermination Notice.

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

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

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

(d) *Remedial benchmarks.* The remedial action referenced in paragraph (c) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

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

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

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201103–0287]

RIN 0648–BI15

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: This rule announces the approval of, and regulations to implement, an action to require commercially permitted vessels in both the New England and Mid-Atlantic Fishery Management Council regions to submit vessel trip reports electronically within 48 hours of the end of a trip. This action will also require for-hire vessels with permits for species managed by the New England Fishery Management Council to submit vessel trip reports electronically within 48 hours of the end of a trip. Document retention requirements will be removed with this action. This action is intended to increase data quality and timeliness of vessel trip reports.

DATES: This rule is effective November 10, 2021.

ADDRESSES: Copies of the Joint Omnibus Electronic Vessel Trip Reporting Framework Adjustment prepared by the Mid-Atlantic and New England Fishery Management Council in support of this action are available from Dr. Christopher Moore, Executive Director, Mid-Atlantic Fishery Management Council, 800 North Street, Suite 201, Dover, DE 19901. The supporting documents are also accessible via the internet at: *https://www.mafmc.org/actions/commercial-evtr-framework, https://www.nefmc.org/library/omnibus-commercial-evtr-framework,* or *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Senior Fishery Program Specialist, phone: 978–281–9218; email: *Moira.Kelly@noaa.gov.*

SUPPLEMENTARY INFORMATION: Currently, commercial vessels are required to submit vessel trip reports (VTR) either on paper or electronically following each trip. Several fishery management plans require weekly submission of commercial vessel trip reports; others require monthly submission. Vessels issued a for-hire permit for a Mid-Atlantic Council fishery are required to submit vessel trip reports electronically within 48 hours of the end of a fishing trip (September 11, 2017; 82 FR 42610). Vessels issued a for-hire permit for a New England Council fishery are subject to the same requirements as that FMP's commercial permit.

A detailed summary of the development of this action can be found in the supporting documentation (see **ADDRESSES**) and the proposed rule (July 17, 2020; 85 FR 43528).

Approved Measures

With this action, vessels issued a commercial or for-hire permit for all Mid-Atlantic and New England Council-managed fisheries will be required to submit vessel trip reports electronically within 48 hours of the end of a fishing trip. This action is applicable to all commercial and for-hire permits issued pursuant to the following Fishery Management Plans: Atlantic Herring; Atlantic Mackerel, Squid, Butterfish; Northeast Multispecies; Surfclam and Ocean Quahog; Atlantic Bluefish; Atlantic Deep-Sea Red Crab; Atlantic Sea Scallop; Summer Flounder, Scup, Black Sea Bass; Monkfish; Northeast Skate Complex; Spiny Dogfish; and Tilefish. This requirement does not apply to vessels issued *only* a Federal lobster permit or to federally permitted private recreational tilefish vessels (July 16, 2020; 85 FR 43149).

In addition to the method and submission timeframe changes, document retention requirements that are no longer necessary with electronic reporting will be removed. Specifically, the requirement to retain copies of the previously submitted vessel trip reports on board the vessel will no longer be applicable. Owners will have access to trip reports submitted electronically on the device from which they were submitted and on the Fish Online website.

There are no other changes to the vessel trip reporting requirements, including the requirement that vessel operators are obligated to fill out the vessel trip report with all information ascertainable prior to entering port.

Implementation

Electronic Vessel Trip Reporting Systems

There are several applications available to vessel owners for electronic vessel trip reporting. Information about approved application platforms are available on our website (*https://www.fisheries.noaa.gov/new-england-*