

DEPARTMENT OF LABOR**Employment Standards Administration****Office of Federal Contract Compliance Programs; Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, Notice**

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

ACTION: Notice of proposed standards for systemic compensation discrimination under Executive Order 11246; request for comments.

SUMMARY: The Office of Federal Contract Compliance Programs requests comments on proposed standards for systemic compensation discrimination under Executive Order 11246.

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be postmarked by December 16, 2004.

Facsimile: Your comments must be sent by December 16, 2004.

ADDRESSES: Comments should be submitted to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP. Electronic mail is the preferred method for submittal of comments. Comments by electronic mail must be clearly identified as pertaining to the notice interpreting nondiscrimination requirements of Executive Order 11246 with respect to systemic compensation discrimination, and sent to *ofccp-public@dol.gov*. As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Where necessary, hard copies of comments, clearly identified as pertaining to the notice of proposed standards and methodologies for evaluating contractors' and subcontractors' compensation practices, may also be delivered to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Because of delays in mail delivery, OFCCP suggests that commenters planning to submit comments via U.S. Mail place those comments in the mail well before the deadline by which comments must be received. Receipt of submissions will not be acknowledged,

except that the sender may request confirmation of receipt by calling OFCCP at (202) 693-0102 (voice), or (202) 693-1308 (TTY).

FOR FURTHER INFORMATION CONTACT:

Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone (202) 693-0102 (voice), or (202) 693-1308 (TTY). Copies of this notice in alternative formats may be obtained by calling (202) 693-0102 (voice), or (202) 693-1308 (TTY). The alternative formats available are large print, electronic file on computer disk, and audiotape. The Notice is available on the Internet at <http://www.dol.gov/esa>.

SUPPLEMENTARY INFORMATION:**I. Introduction***A. OFCCP Compliance Reviews Focus on Systemic Compensation Discrimination*

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246, which prohibits covered federal contractors and subcontractors from making employment decisions on the basis of race, color, national origin, religion, or sex.¹

OFCCP conducts compliance reviews to determine whether covered contractors have been engaging in workplace discrimination prohibited by E.O. 11246. As part of its compliance review process, OFCCP investigates whether contractors' pay practices are discriminatory.

OFCCP compliance reviews typically produce cases that involve allegations of systemic discrimination, not discrimination against a particular individual employee. OFCCP systemic compensation discrimination cases typically are proven under a disparate

treatment, pattern or practice theory of discrimination.² The burdens of persuasion necessary to succeed on a discrimination claim differ depending on whether the case involves allegations of a pattern or practice of discrimination or allegations that a particular individual was subjected to discrimination. In a case involving alleged discrimination against a particular individual, the plaintiff must establish by a preponderance of the evidence that the employer made the challenged employment decision because of the individual's race, color, religion, sex, or national origin. *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983). In a pattern or practice case, "plaintiffs must 'establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice.'" *Teamsters v. United States*, 431 U.S. 324, 336 (1977). *Bazemore v. Friday*, 478 U.S. 385, 398 (1986).

In addition to differences in the burdens of persuasion as between cases involving alleged discrimination against a particular individual and an alleged pattern or practice of discrimination, the burdens of production necessary to survive a motion for summary disposition are different between the two types of cases. In both types of cases, a plaintiff bears the initial burden of presenting a prima facie case of discrimination. There is no precise set of requirements for a plaintiff's prima facie case. "The facts necessarily will vary in title VII cases, and the specification * * * of the prima facie proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual circumstances." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (quoting *McDonnell Douglas*, 411 U.S. at 802 n. 13). "The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of the proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under [Title VII]." *Teamsters*, 431 U.S. at 358.

In an individual case, the plaintiff typically must rely on evidence pertaining to his or her own circumstances to establish a prima facie

¹ The Administrative Review Board, and, before its creation, the Secretary of Labor, have turned to Title VII standards for determining compliance with the nondiscrimination requirements of E.O. 11246. See, e.g., *OFCCP v. Greenwood Mills, Inc.*, 89-OFC-039, ARB Final Decision and Order, December 20, 2002, at 5; *OFCCP v. Honeywell*, 77-OFC-3, Secretary of Labor Decision and Order on Mediation, June 2, 1993, at 14 and 16, Secretary of Labor Decision and Remand Order, March 2, 1994. The EEOC has issued guidance on compensation discrimination in the form of a chapter in the EEOC Compliance Manual on "Compensation Discrimination." EEOC Directive No. 915.003 (Dec. 5, 2000). EEOC is the agency with primary enforcement responsibility for Title VII and its reasonable interpretations of Title VII are given some deference by the courts. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976). E.O. 11246 has been amended several times since its original promulgation. For ease of reference, "E.O. 11246" or "Executive Order 11246" as used hereinafter refers to Executive Order 11246, as amended.

² The term "systemic compensation discrimination" used hereinafter references compensation discrimination under a disparate treatment, pattern or practice theory of discrimination.

case of discrimination. The prima facie case creates a presumption of discrimination that the employer may rebut by articulating a legitimate nondiscriminatory reason for the alleged discriminatory employment decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The employer must produce admissible evidence of a legitimate, nondiscriminatory reason for the challenged employment decision. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). "Th[e] [employer's] burden is one of production, not persuasion; 'it can involve no credibility assessment.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142 (2000) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993)). Once the employer articulates a legitimate nondiscriminatory reason for the challenged employment decision, the plaintiff is afforded the opportunity to prove that the employer's articulated reason is a pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804; *Reeves*, 530 U.S. at 142. "Proof that the [employer's] explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination. * * * *Reeves*, 530 U.S. at 147. "Other evidence that may be relevant to any showing of pretext includes * * * [the employer's] general policy and practice with respect to minority employment. * * * On the latter point, statistics as to [the employer's] employment policy and practice may be helpful to a determination of whether [the employer's actions] * * * conformed to a general pattern of discrimination * * * *McDonnell Douglas*, 411 U.S. at 804–05.

In a pattern or practice case, the plaintiffs' "initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer. * * * *Teamsters*, 431 U.S. at 360. "The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the [plaintiffs'] proof is either inaccurate or insignificant." *Id.* "The employer's defense must, of course, be designed to meet the prima facie case of the [plaintiffs] * * * which typically focuses on "a pattern of discriminatory decisionmaking." *Id.*, at 360 n. 46. However, there are no "particular limits on the type of evidence an employer may use." *Id.*

Despite these differences in the burdens of persuasion and production, however, once the plaintiff has offered evidence that is sufficient to establish a prima facie case, and the employer has

produced evidence that is sufficient to rebut the prima facie case, then the factfinder must decide whether plaintiffs have demonstrated discrimination by a preponderance of the evidence. "[O]ur decision in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983), although not decided in the context of a pattern-and-practice case, makes clear that if the defendants have not succeeded in having a case dismissed on the ground that plaintiffs have failed to establish a prima facie case, and have responded to the plaintiffs' proof by offering evidence of their own, the factfinder then must decide whether the plaintiffs have demonstrated a pattern or practice of discrimination by a preponderance of the evidence. This is because the only issue to be decided at that point is whether the plaintiffs have actually proved discrimination. *Id.*, at 715." *Bazemore*, 478 U.S. at 398.

B. OFCCP Has Not Issued Significant Interpretive Guidance on Systemic Compensation Discrimination Under Executive Order 11246

In 1970, the Department of Labor published "Sex Discrimination Guidelines," codified at 41 CFR Part 60–20, which included a section (60–20.5) on "[d]iscriminatory wages." 35 FR 8888 (June 9, 1970). The Sex Discrimination Guidelines (SDG) do not provide specific standards for determining systemic compensation discrimination for OFCCP or a contractor.³ Rather, the SDG provide that "[t]he employer's wages (sic) schedules must not be related to or based on the sex of the employees," and contains a short "note" that references the "more obvious cases of discrimination * * * where employees of different sexes are paid different wages on jobs which require substantially equal skill, effort and responsibility and are performed under similar working conditions." 41 CFR 60–20.5(a) (2004). OFCCP has not promulgated any definitive interpretation of the SDG, nor has a

³ By contrast to sex-based compensation discrimination, OFCCP has published regulations providing specific guidance with respect to hiring discrimination. Thus, OFCCP is a signatory to the Uniform Guidelines on Employee Selection Procedures (UGESP), which provide formal guidance as to how OFCCP evaluates contractors' selection procedures to determine compliance with E.O. 11246. See 41 CFR Part 60–3. Before being published as a final rule, 43 Fed. Reg. 38290 (August 25, 1978), UGESP was published in the *Federal Register* as a proposed rule and subject to public comment. See 42 Fed. Reg. 65542 (December 30, 1977).

definitive interpretation arisen through longstanding agency practice.⁴

Instead, OFCCP has provided only a general policy statement about compensation discrimination in the preamble to a May 4, 2000 Notice of Proposed Rulemaking (NPRM). In the May 4, 2000 NPRM, OFCCP formally expressed the Department of Labor's policy regarding compensation analysis:

More recently, an additional objective of the proposed revision has been to advance the Department of Labor's goal of pay equity; that is, ensuring that employees are compensated equally for performing equal work.

65 FR 26089 (May 4, 2000).

This stated policy was reflected in several significant settlements in systemic compensation discrimination cases in which OFCCP relied on sophisticated multiple regression analyses to remedy an alleged violation of E.O. 11246. OFCCP has not, however, published formal guidance providing any interpretation of E.O. 11246 with respect to systemic compensation discrimination.

C. OFCCP's Informal Approaches to Systemic Compensation Discrimination in the Late 1990s Involved the Controversial "Pay Grade Theory"

In the late-1990s several OFCCP regions began to use a controversial "grade theory" approach to compensation discrimination analysis.⁵

The basic unit of analysis under the grade theory is the pay grade or pay range. Under this theory, it is assumed that employees are similarly situated with respect to evaluating compensation decisions regarding such employees if the contractor has placed their jobs in the same pay grade:

By the very act of creating a grade level system, where each employee has approximately the same potential to move from the minimum to the maximum of his/her grade range dependent upon performance, the employer has recognized that certain jobs are essentially similar in terms of skill, effort and responsibility.

"Systemic Compensation Analysis: An Investigatory Approach" (hereinafter "SCA"), at 5. A later paper, "Update on Systemic Compensation Analysis" (hereinafter, "Update"), also described this pay grade assumption:

⁴ The proposed standards contained in this Notice are intended to provide definitive interpretations of both the SDG and E.O. 11246 with respect to systemic compensation discrimination, regardless of the specific basis (e.g., sex, race, national origin, etc.) of the discrimination.

⁵ Although used in practice by several OFCCP regions for several years, the grade theory was never formally adopted by OFCCP.

Where we determine that each employee in a salary grade system has the same opportunity, subject to performance, to move to the maximum rate of the salary grade range without a change in job title, we believe the employer * * * has already identified certain jobs as having similar value to the organization.

Update, at 6.⁶

After identifying employees in the same pay grade, one version of the grade theory method called for a comparison of the median compensation of males versus females, and minorities versus non-minorities in each pay grade. SCA, at 6; Update, at 7. If there was a "significant" difference (although "significant" was not defined) in median compensation between males/females or minorities/non-minorities within a given pay grade, then the next step was to assess whether this disparity is explained by median or average differences in other factors, such as time in grade, prior experience, education, and performance. SCA, at 7; Update, at 11. However, this method did not use tests of statistical significance in determining whether a pattern of compensation discrimination exists. If a "pattern" of pay disparities (although "pattern" was not defined) emerged not explicable by analysis of median or average differences in time in grade, prior experience, or other factors, OFCCP alleged that the contractor violated the nondiscrimination requirements of E.O. 11246. Update, at 15.

In another version of the grade theory method used by some OFCCP regions in the late 1990s,⁷ the pay grade was included as a factor in a regression model that typically covered all exempt employees in the workplace within a single, "pooled" regression. The regression typically included factors such as time in grade, experience, and education. This method did rely on tests of statistical significance, although rarely did OFCCP develop anecdotal evidence to support the statistical analysis under this method.

D. The Pay Grade Theory Is Inconsistent With Title VII Standards

OFCCP has discontinued using these pay grade methods because the agency has determined that the methods' principal assumptions related to pay

grade or pay range do not comport with Title VII standards as to whether employees are similarly situated. OFCCP recognizes that, with respect to compensation discrimination, similarity in job content, skills and qualifications involved in the job, and responsibility level are crucial determinants of whether employees are similarly situated under Title VII. See, e.g., EEOC Compliance Manual on "Compensation Discrimination," EEOC Directive No. 915.003 (Dec. 5, 2000), at 10–5 to 10–8 [hereinafter referenced as "CMCD"]⁸; *Block v. Kwal-Howells, Inc.*, No. 03–1101, 2004 WL 296976, at *2–*4 (10th Cir. Feb. 17, 2004); *Williams v. Galveston Ind. Sch. Dist.*, No. 03–40436, 78 Fed. Appx. 946, 949–50, 2003 WL 22426852 (5th Cir. Oct. 23, 2003); *Verwey v. Illinois Coll. of Optometry*, 43 Fed. Appx. 996, 2002 WL 1836507, at *4 (7th Cir. Aug. 9, 2002); *Lang v. Kohl's Food Stores, Inc.*, 219 F.3d 919, 922–23 (7th Cir. 2002); *Rodriguez v. SmithKline Beecham*, 224 F.3d 1, 8 (1st Cir. 2000); *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 274 (D.C. Cir. 1998); *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1078, 1087 (3d Cir. 1996); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1362 (10th Cir. 1997); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310–11 (2d Cir. 1995), abrogated on other grounds by *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 598 (11th Cir. 1994); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 343 (4th Cir. 1994); *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526–31 (11th Cir. 1992); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 243–53 (7th Cir. 1988); *Marcoux v. State of Maine*, 797 F.2d 1100, 1107 (1st Cir. 1986); *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 624–25 (11th Cir. 1983); *Woodward v. United Parcel Serv., Inc.*, 306 F. Supp.2d 567, 574–75 (D. S.C. 2004); *Lawton v. Sunoco, Inc.*, No. 01–2784, 2002 WL 1585582, at *7 (E.D. Pa. Jul 17, 2002); *Stroup v. J.L. Clark, No. 99C50029*, 2001 WL 114404, at *6 (N.D. Ill. Feb. 2, 2001); *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 563 (W.D. Wash. 2001); *Dobbs-Weinstein v. Vanderbilt Univ.*, 1 F. Supp.2d 783, 803–04 (M.D. Tenn. 1998); *Beard v. Whitley Co. REMC*, 656 F. Supp. 1461, 1471–72 (N.D. Ind. 1987); *Dalley v. Michigan Blue Cross/Blue Shield, Inc.*, 612 F. Supp. 1444, 1451–52 (E.D. Mich. 1985); *EEOC v. Kendall of Dallas, Inc.*, No. TY–

80–441–CA, 1984 WL 978, at *9–*12 (E.D. Tex. Mar. 8, 1984); *Presseisen v. Swarthmore Coll.*, 442 F. Supp. 593, 615–19 (E.D. Pa. 1977), aff'd 582 F.2d 1275 (3d Cir. 1978)(Table).

Contrary to these standards, the grade theory assumed that employers' pre-existing job-groupings, such as pay grades or pay ranges, are absolute indicia of similarity in employees' job content, skills and qualifications involved in the job, and responsibility level. While all of the courts in the above string cite have implicitly rejected the grade theory by emphasizing the importance of facts about the work employees actually perform, several of these courts have expressly rejected the proposition that a pay grade offers absolute indicia of similarity in job content, qualifications and skills involved in the job, and responsibility level. See *Williams*, 78 Fed. Appx. at 949 n. 9; *Cort Furniture*, 85 F.3d at 1087; *Woodward*, 306 F. Supp.2d at 574–75. The facts about employees' actual work activities, the skills and qualifications involved in the job, and responsibility levels in a particular case may, of course, happen to coincide with the employer's pay grade or pay range, but the crucial determinant of whether the employees are similarly situated is their actual work activities, not the fact that the employees have been placed in the same pay grade or range.

In practice, utilization of the grade theory (as defined by the discussion above) resulted in groupings of employees performing dissimilar work. Indeed, as noted above, this approach was described by some as "identify[ing] certain jobs as having similar value to the organization." Update at 6. To evaluate discrimination based on the "value" or "worth" of work to the employer constitutes the comparable worth theory of compensation discrimination which has been widely discredited by the courts. See *American Federation of State, County, and Municipal Employees v. State of Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985)("The comparable worth theory, as developed in the case before us, postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar."); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1125–26 (7th Cir. 1987)(describing comparable worth theory as "bas[ing] liability on the fact that the[] employer paid higher wages to workers in job classifications predominantly occupied by men than to

⁶ OFCCP officials informally distributed the SCA and the Update in the late 1990's. They were not published by OFCCP nor did they bear any indication of formal agency approval, e.g., they were not printed on OFCCP letterhead.

⁷ This method was not described in materials made available to the general public. The method was used primarily in OFCCP's Southeast Region.

⁸ As noted in footnote 1, *supra.*, the EEOC is the agency with primary enforcement responsibility for Title VII, and its reasonable interpretations of Title VII are given some deference by the courts. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141–42 (1976).

workers in job classifications predominantly occupied by women, though it paid the same wages to men and women within each classification"); *American Nurses Association v. Illinois*, 783 F.2d 716, 720–22 (7th Cir. 1986)(considering plaintiffs "charge that the state pays workers in predominantly male job classifications a higher wage not justified by any difference in the relative worth of the predominantly male and the predominantly female jobs in the state's roster."); *Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th Cir. 1980)("In summary, the suit is based on the proposition that nurses are underpaid in City positions, and in the community, in comparison with other and different jobs which they assert are of equal worth to the employer."); *Christensen v. Iowa*, 563 F.2d 353, 354–56 (8th Cir. 1977)("Appellants, who are clerical employees at UNI, argue that UNI's practice of paying male plant workers more than female clerical workers of similar seniority, where the jobs are of equal value to UNI, constitutes sex discrimination and violates Title VII"); see also *County of Washington v. Gunther*, 452 U.S. 161, 165 (1981)("Respondents' claim is not based on the controversial concept of 'comparable worth' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." [footnotes omitted]); *Gunther*, 452 U.S. at 203 (Rehnquist, J., dissenting)("The opinion does not endorse the so-called 'comparable worth' theory: though the Court does not indicate how a plaintiff might establish a prima facie case under Title VII, the Court does suggest that allegations of unequal pay for unequal, but comparable, work will not state a claim on which relief may be granted. The Court, for example, repeatedly emphasizes that this is not a case where plaintiffs ask the court to compare the value of dissimilar jobs or to quantify the effect of sex discrimination on wage rates."); *Judith Olans Brown et al., Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 Harv. C.R.—C.L. Rev. 127, 129 (1986)("'Comparable worth' means that workers, regardless of their sex, should earn equal pay for work of comparable value to their common employer. . . . The basic premise of comparable worth theory is that women should be able to substantiate a claim for equal wages by showing that their jobs and those of male workers are of equal value to their

common employer."); Hydee R. Feldstein, Comment, *Sex-Based Wage Discrimination Claims After County of Washington v. Gunther*, 81 Colum. L. Rev. 1333, 1333 (1981)(noting comparable worth "theory holds that employees performing work of equal value, even if the work they do is different, should receive the same wages.").

Based on these considerations, the Department interprets E.O. 11246 and the SDG as not permitting the grade theory approach to systemic compensation discrimination. Instead, the Department interprets E.O. 11246 and the SDG as prohibiting systemic compensation discrimination involving dissimilar treatment of individuals who are similarly situated, based on similarity in work performed, skills and qualifications involved in the job, and responsibility levels.

E. The Department Has Decided To Promulgate Interpretive Guidance on Systemic Compensation Discrimination To Guide Agency Officials and Covered Contractors and Subcontractors

The Department of Labor has decided to formally propose detailed standards interpreting E.O. 11246 and the SDG with respect to systemic compensation discrimination and to solicit public comment on the proposed standards. This interpretive guidance also will provide standards and methods for OFCCP evaluations of contractors' compensation practices during compliance reviews. This will ensure that agency personnel and covered federal contractors and subcontractors understand the substantive standards for systemic compensation discrimination under E.O. 11246. The Department believes that contractors and subcontractors are more likely to comply with E.O. 11246 if they understand the substantive standards which determine whether there is systemic compensation discrimination prohibited by E.O. 11246. Further, agency officials will have a stronger basis for pursuing investigations of possible systemic compensation discrimination because of the transparency and uniformity provided by these standards. Finally, the Department will have the benefit of commentary from all interested parties in developing final guidelines.

These proposed standards are intended to govern OFCCP's analysis of contractors' compensation practices, and in particular, OFCCP's determination of whether a contractor has engaged in systemic compensation discrimination. In addition, these proposed standards are intended to

constitute a definitive interpretation of the SDG and E.O. 11246 with respect to systemic compensation discrimination.

II. Discussion of the Proposed Standards

OFCCP proposes to adopt standards for interpreting E.O. 11246 and the SDG with respect to systemic compensation discrimination. The systemic compensation discrimination analysis as set forth in these proposed standards has two major characteristics: (1) the determination of employees who are "similarly situated" for purposes of comparing contractor pay decisions will focus on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions; and (2) the analysis will rely on a statistical technique known as multiple regression.

Under OFCCP's proposed standard, employees are similarly situated with respect to pay decisions where the employees perform similar work, have similar responsibility levels, and occupy positions involving similar qualifications and skills. See discussion and cases cited under Section ID, *supra*.⁹

The determination of whether employees are similarly situated must be based on the actual facts about the work performed, the responsibility level of the employees, and whether the positions involve similar skills and qualifications. The employer's preexisting groupings developed and maintained for other purposes, such as job families or affirmative action program job groups, may provide some indication of similarity in work, responsibility level, and skills and qualifications. However, these preexisting groupings are not dispositive, and OFCCP will not assume that these groupings involve groupings of similarly situated employees. For example, it cannot be assumed that employees are similarly situated merely because they share the same pay grade

⁹ Federal courts disagree on whether the Equal Pay Act's standard of "substantial equality" applies to gender-based pay discrimination claims under Title VII, absent direct evidence of discrimination. See, e.g., *Conti v. Universal Enter., Inc.*, 50 Fed. Appx. 690, 2002 WL 31108827, at *7 (6th Cir. Sept. 20, 2002); *Clark v. Johnson & Higgins*, 181 F.3d 100, 1999 WL 357804, at *3–*4 (6th Cir. May 28, 1999)(Text in Westlaw); *Loyd v. Phillips Bros., Inc.*, 25 F.3d 518, 525 (7th Cir. 1994); *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 243–53 (7th Cir. 1988); *Merrill v. S. Methodist Univ.*, 806 F.2d 600, 606 (5th Cir. 1986); *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014, 1019 (8th Cir. 1986); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133–34 (5th Cir. 1983); see also CMCD, at 10–6 n.18. Because an OFCCP enforcement action may be subject to APA review in a federal court that does not adopt the "similarly situated" standard, OFCCP will consult with the Office of the Solicitor to address this issue on a case by case basis.

or range, or because their pay can progress to the top of a pay grade or range without changing jobs.¹⁰ Thus, OFCCP will investigate whether such preexisting groupings do in fact group employees who perform similar work, and whose positions involve similar skills, qualifications, and responsibility levels, by looking at job descriptions and conducting employee interviews. Based on sufficient empirical data (e.g., job descriptions and employee interviews), OFCCP will determine which employees are in fact similarly situated.

In addition to similarity in work performed, skills and qualifications, and responsibility levels, systemic compensation discrimination under E.O. 11246 requires that the comparison take into account legitimate factors that affect compensation. In order to account for the influence of such legitimate factors on compensation, a statistical analysis known as “multiple regression,” must be used. Multiple regression is explained as follows:

Multiple regression analysis is a statistical tool for understanding the relationship between two or more variables. Multiple regression involves a variable to be explained—called the dependent variable—and additional explanatory variables that are thought to produce or be associated with changes in the dependent variable. For example, a multiple regression analysis might estimate the effect of the number of years of work on salary. Salary would be the dependent variable to be explained; years of experience would be the explanatory variable. Multiple regression analysis is sometimes well suited to the analysis of data about competing theories in which there are several possible explanations for the relationship among a number of explanatory variables. Multiple regression typically uses a single dependent variable and several explanatory variables to assess the statistical data pertinent to these theories. In a case alleging sex discrimination in salaries, for example, a multiple regression analysis would examine not only sex, but also other explanatory variables of interest, such as education and experience. The employer—defendant might use multiple regression to argue that salary is a function of the employee's education and experience, and the employee—plaintiff might argue that salary is also a function of the individual's sex.

Daniel L. Rubinfeld, Reference Guide on Multiple Regression, in Federal Judicial Center, Reference Manual on Scientific Evidence, at 181 (2d ed. 2000).

The multiple regression model must include those factors that are important to how the contractor in practice makes

pay decisions. “Such factors could include the employees’ education, work experience with previous employers, seniority in the job, time in a particular salary grade, performance ratings, and others.” CMCD, at 10–18. OFCCP generally will attempt to build the regression model in such a way that controls for the factors that the investigation reveals are important to the employer's pay decisions, but also allows the agency to assess how the employers’ pay decisions affect most employees. One factor that must be controlled for in the regression model is categories or groupings of jobs that are similarly situated based on the analysis of job similarity noted above (i.e., similarity in the content of the work employees perform, and similarity in the skills, qualifications, and responsibility levels of the positions the employees occupy). This will ensure that the analysis compares the treatment of employees who are in fact similarly situated.

In addition, OFCCP will investigate the facts of each particular case to ensure that factors included in the regression are legitimate and are not themselves influenced by unlawful discrimination, which is often discussed in case law as a factor “tainted” by discrimination. However, OFCCP will not automatically presume that a factor is tainted without initially investigating the facts of the particular case. OFCCP will determine whether a factor is tainted by evaluating proof of discrimination with respect to that factor, but not based on the fact that the factor has an influence on the outcome of a regression model that includes the factor. See, e.g., *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459, 470 (8th Cir. 2004) (“Plaintiffs” only evidence of discrimination in past pay is the apparent correlation between race and center-manager base pay during the class period. But that correlation is what Plaintiffs have evidence of only by omitting past pay. They have no evidence, statistical or otherwise, that past pay disparities were racially discriminatory. This sort of bootstrapping cannot create an inference of discrimination with regard to either class-period base pay or past pay.”); *Smith v. Xerox Corp.*, 196 F.3d 358, 371 n. 11 (2d Cir. 1999) (“Absent evidence tending to show that the CAF scores were tainted they should have been included in a multiple regression analysis in an effort to eliminate a relatively poor performance compared to coworkers as a cause of each plaintiff's termination. Certainly, performance is a factor Xerox was

permitted to consider in deciding whom to retain.”); *Ottaviani v. State Univ. of New York*, 875 F.2d 365, 325 (2d Cir. 1988) (“The question to be resolved, then, in cases involving the use of academic rank factors, is whether rank is tainted by discrimination at the particular institution charged with violating Title VII. Although appellants reiterate on appeal their claim that rank at New Paltz was tainted, it is clear that the district judge accepted and considered evidence from the parties on both sides of this issue, and that she rejected the plaintiffs’ contentions on this point. At trial, the plaintiffs failed to adduce any significant statistical evidence of discrimination as to rank. As the district court stated in its opinion, the plaintiffs’ studies of rank, rank at hire, and waiting time for promotion ‘were mere compilations of data’ which neither accounted for important factors relevant to assignment of rank and promotion, ‘nor demonstrated that observed differences were statistically significant.’ *Ottaviani*, 679 F.Supp. at 306. The defendants, on the other hand, offered persuasive objective evidence to demonstrate that there was no discrimination in either placement into initial rank or promotion at New Paltz between 1973 and 1984, and the district court chose to credit the defendants’ evidence. Upon review of the record, we cannot state that the court’s rulings in this regard were clearly erroneous.”); CMCD, at 10–18 (discussing use of performance rating in multiple regression analysis for assessing systemic compensation discrimination).

The factors that influence pay decisions may not bear the same relationship to compensation for all categories of jobs in the employer's workforce. For example, performance may have a more significant influence on compensation for a high-level executive, than for technicians or service workers. This issue must be addressed through either of two methods. One method is to perform separate regressions for each category of jobs in which the relationship between the factors and compensation is similar (while including category factors in each regression that control for groupings of employees who are similarly situated based on work performed, responsibility level, and skills and qualifications). If separate regressions by categories of jobs would not permit OFCCP to assess the way the contractor's compensation practices impact on a significant number of employees, OFCCP may perform a “pooled” regression, which combines

¹⁰ In this respect, OFCCP will not rely on the grade theory assumptions discussed *supra*, at Sections IC and ID.

these categories of jobs into a single regression (while including an OFCCP-developed category factor in the “pooled” regression that controls for groupings of employees who are similarly situated based on work performed, responsibility level, and skills and qualifications). However, if a pooled regression is used, the regression must include appropriate “interaction terms”¹¹ in the pooled regression to account for differences in the effects of certain factors by job category. OFCCP will run statistical tests generally accepted in the statistics profession (e.g., the “Chow test”), to determine which interaction terms should be included in the pooled regression analysis.

Systemic compensation discrimination under E.O. 11246 must be based on disparities that are “statistically significant,” i.e., those that could not be expected to have occurred by chance. “While not intending to suggest that ‘precise calculations of statistical significance are necessary in employing statistical proof,’ the Supreme Court has stated that ‘a fluctuation of more than two or three standard deviations would undercut the hypothesis that decisions were being made randomly with respect to [a protected trait].’” *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977).” CMCD, at 10–14 n.32. To ensure uniformity and predictability, OFCCP will conclude that a compensation disparity is statistically significant under these standards if it is significant at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

OFCCP will seldom make a finding of systemic discrimination based on statistical analysis alone, but will obtain anecdotal evidence to support the statistical evidence. See, e.g., *Teamsters*, 431 U.S. at 338–39 (“The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. * * * The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.”); *Bazemore*, 478 U.S. at 473 (noting that statistics were supported by “evidence consisting of individual comparisons

between salaries of blacks and whites similarly situated”); *Morgan*, 380 F.3d at 471 (“One of the most important flaws in Plaintiffs’ case is that they adduced no individual testimony regarding intentional discrimination. As mentioned above, Plaintiffs’ purported anecdotal evidence was insufficient for the working-conditions claim, and we see none with regard to pay. Although such evidence is not required, the failure to adduce it ‘‘reinforces the doubt arising from the questions about validity of the statistical evidence.’” *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7th Cir. 1988) (quoting *Griffin v. Board of Regents*, 795 F.2d 1281, 1292 (7th Cir. 1986))”); *Dukes v. Wal-Mart Stores, Inc.*, 22 F.R.D. 137, 165–66 (N.D. Cal. 2004) (“[P]laintiffs have submitted * * * 114 declarations from class members around the country * * *. [who will] testify to being paid less than similarly situated men, * * *, and being subjected to various individual sexist acts.”); *Bakewell v. Stephen F. Austin Univ.*, 975 F. Supp. 858, 905–06 (E.D. Tex. 1996) (“The paucity of anecdotal evidence of discrimination severely diminishes plaintiffs’ contention that a pattern or practice of salary discrimination against female faculty members prevails at SFA.”); see also CMCD, at 10–13 n.30 (“A cause finding of systemic discrimination should rarely be based on statistics alone.”).

In order to equip OFCCP to conduct statistical analysis necessary for evaluating whether there is systemic compensation discrimination, the agency has created a Division of Statistical Analysis and hired expert-level statisticians to staff this new unit.

III. Proposed Standards

Standards for Systemic Compensation Discrimination Under Executive Order 11246

1. As used herein, “systemic compensation discrimination” is discrimination under a pattern or practice theory of disparate treatment.

2. Employees are similarly situated under these standards if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions. In determining whether employees are similarly situated under these standards, actual facts regarding employees’ work activities, responsibility, and skills and qualifications are determinative. Preexisting groupings, such as pay grades or AAP job groups, are not controlling; rather, such groupings may be relevant only to the extent that they

do in fact group employees with similar work, skills and qualifications and responsibility levels. To determine whether such preexisting groups are relevant one must evaluate and compare information obtained from job descriptions and from employee interviews. The determination that employees are similarly situated may not be based on the fact that the contractor or subcontractor has grouped employees into a particular grouping, such as a pay grade or pay range, or that employees’ pay can progress to the top of the pay grade or range based on performance or without changing jobs. Rather, such preexisting groupings must in fact group employees who perform similar work, and who occupy positions involving similar skills, qualifications, and responsibility levels, which may be determined only by understanding employees’ actual work activities.

3. Systemic compensation discrimination exists where there are statistically significant compensation disparities between similarly situated employees (as defined in Paragraph 2, above), after taking into account legitimate factors which influence compensation. Such legitimate factors may include education, experience, performance, productivity, location, etc. The determination of whether there are statistically significant compensation disparities between similarly situated employees after taking into account such legitimate factors must be based on a multiple regression analysis.

4. A compensation disparity is statistically significant under these standards if it is significant at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

5. If a pooled regression model is used, this must be accompanied by statistical tests generally accepted in the statistics profession (e.g., the “Chow test”), to determine which interaction terms should be included in the pooled regression model.

Standards for OFCCP Evaluation of Contractors’ Compensation Practices

1. OFCCP will investigate contractors’ and subcontractors’ compensation practices to determine whether the contractor or subcontractor has engaged in systemic compensation discrimination under these standards. OFCCP will issue a Notice of Violations alleging systemic discrimination with respect to compensation practices based only on these standards.

2. OFCCP will make a finding of systemic compensation discrimination in those cases where there is anecdotal

¹¹ An “interaction term” is a factor used in the regression model whose value is the result of a combination of subfactors, which allows the factor to vary based on the combined effect of the subfactors. For example, a performance by job level interaction term would allow performance to have a different impact on compensation depending on the job level.

evidence of discrimination (as discussed in Paragraph 6, below, which notes that, except in unusual cases, OFCCP will not issue a Notice of Violation (NOV) alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis) and where there exists a statistically significant (as defined in Paragraph 4, below) compensation disparity based on a multiple regression analysis that compares similarly situated employees (as defined in Paragraph 3, below) and controls for factors that OFCCP's investigation reveal were used in making pay decisions. OFCCP may reject inclusion of such a factor upon proof that the factor was actually tainted by the employer's discrimination. OFCCP will attach the results of the regression analysis to, and summarize the anecdotal evidence in, the Notice of Violations issued to the contractor or subcontractor.

3. Employees are similarly situated under these standards if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions. In determining whether employees are similarly situated under these standards, OFCCP will collect and rely on actual facts regarding employees' work activities, responsibility, and skills and qualifications. In addition, OFCCP will investigate whether preexisting groupings, such as pay grades or AAP job groups, do in fact group employees with similar work, skills and qualifications and responsibility levels, by evaluating and comparing information obtained from job descriptions and from employee interviews. OFCCP will not base its determination that employees are similarly situated on the fact that the contractor or subcontractor has grouped employees into a particular grouping, such as a pay grade or pay range, or that employees' pay can progress to the top of the pay grade or range based on performance or without changing jobs. Rather, OFCCP will investigate whether such preexisting groupings do in fact group employees who perform similar work, and who occupy positions involving similar skills, qualifications, and responsibility levels, by looking at job descriptions and conducting employee interviews.

4. A compensation disparity is statistically significant under these standards if it is significant at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

5. OFCCP will determine whether a pooled regression model is appropriate based on two factors: (a) The objective to include at least 80% of the employees (in the workforce subject to OFCCP's compliance review) in some regression analysis; and (b) whether there are enough incumbent employees in a particular regression to produce statistically meaningful results. If a pooled regression is required, OFCCP will conduct statistical tests generally accepted in the statistics profession (e.g., the "Chow test"), to determine which interaction terms should be included in the pooled regression model.

6. In determining whether a violation has occurred, OFCCP will consider whether there is anecdotal evidence of compensation discrimination, in addition to statistically significant compensation disparities. Except in unusual cases, OFCCP will not issue a Notice of Violation (NOV) alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis. In unusual cases, OFCCP may assert a systemic discrimination violation based only on anecdotal evidence, if such evidence presents a pattern or practice of compensation discrimination.

7. OFCCP will also assert a compensation discrimination violation if the contractor establishes compensation rates for jobs (not for particular employees) that are occupied predominantly by women or minorities that are significantly lower than rates established for jobs occupied predominantly by men or non-minorities, where the evidence establishes that the contractor made the job wage-rate decisions based on the sex, race or ethnicity of the incumbent employees that predominate in each job. Such evidence of discriminatory intent may consist of the fact that the contractor adopted a market survey to determine the wage rate for the jobs, but established the wage rate for the predominantly female or minority job lower than what that market survey specified for that job, while establishing for the predominantly male or non-minority job the full market rate specified under the same market survey.

Signed at Washington, DC this 10th day of November, 2004.

Victoria A. Lipnic,

Assistant Secretary for the Employment Standards Administration.

Charles E. James, Sr.,

Deputy Assistant Secretary for Federal Contract Compliance.

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DEPARTMENT OF LABOR

Employment Standards Administration

Office of Federal Contract Compliance Programs; Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, Notice

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

ACTION: Notice of proposed guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination; request for comments.

SUMMARY: The Office of Federal Contract Compliance Programs requests comments on proposed guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 with respect to systemic compensation discrimination.

DATES: Comments must be submitted by the following dates:

Hard Copy: Your comments must be postmarked by December 16, 2004.

Facsimile: Your comments must be sent by December 16, 2004.

ADDRESSES: Comments should be submitted to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP. Electronic mail is the preferred method for submittal of comments. Comments by electronic mail must be clearly identified as pertaining to the notice of guidelines for self-evaluation of compensation practices for compliance with nondiscrimination requirements of Executive Order 11246 with respect to systemic compensation discrimination, and sent to ofccp-public@dol.gov. As a convenience to commenters, public comments transmitted by facsimile (FAX) machine will be accepted. The telephone number of the FAX receiver is (202) 693-1304. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Where necessary, hard copies of comments, clearly identified as pertaining to the notice of proposed standards and methodologies for evaluating contractors' and subcontractors' compensation practices, may also be delivered to Joseph DuBray, Jr., Director, Division of Policy, Planning and Program Development, OFCCP, Room C-3325, 200 Constitution Avenue, NW.,