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Part II

Department of Labor

Employment Standards Administration,
Office of Federal Contract Compliance
Programs

41 CFR Parts 60–1, 60–6
Government Contractors, Affirmative
Action Requirements, Executive Order
11246; Final Rule

DEPARTMENT OF LABOR**Employment Standards
Administration, Office of Federal
Contract Compliance Programs**

41 CFR Parts 60-1, 60-60

RIN 1215-AA01

**Government Contractors, Affirmative
Action Requirements, Executive Order
11246**

AGENCY: Office of Federal Contract Compliance Programs (OFCCP), ESA, Labor.

ACTION: Final rule.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is revising a limited number of the regulations to implement Executive Order 11246, as amended, which prohibits employment discrimination and establishes affirmative action requirements for nonexempt Federal contractors and subcontractors. The final rule revises the regulations relating to record retention, compliance monitoring, maintenance of non-segregated facilities, and other aspects of enforcement. The revisions to the Executive Order implementing regulations effected by this final rule are expected to reduce the compliance burdens of covered contractors, and improve the efficiency of OFCCP in administering and enforcing the Executive Order.

EFFECTIVE DATE: September 18, 1997.

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, NW., Washington, DC 20210. Telephone 202-219-9475 (voice), 1-800-326-2577 (TDD). Copies of this final rule, including copies in alternate formats, may be obtained by calling 202-219-9430 (voice), 1-800-326-2577 (TDD). The alternate formats available are large print, an electronic file on computer disk and audiotape. The rule also is available on the Internet at <http://www.dol.gov/dol/esa>.

SUPPLEMENTARY INFORMATION:**I. Current Regulations and Rulemaking History**

Executive Order 11246, as amended, prohibits all nonexempt Government contractors and subcontractors, and federally assisted construction contractors and subcontractors, from discriminating in employment. The Executive Order also requires these contractors to take affirmative action to ensure that employees and applicants

are treated without regard to race, color, religion, sex and national origin. OFCCP has been assigned responsibility for administering Executive Order 11246, and has published regulations implementing the Order at 41 CFR Ch. 60.

The Executive Order regulations have not undergone substantive revision since the 1970s. A final rule was published on December 30, 1980 (45 FR 86215; corrected at 46 FR 7332, January 23, 1981), but was stayed in accordance with Executive Order 12291 on January 28, 1981 (46 FR 9084). This rule later was stayed indefinitely on August 25, 1981 (46 FR 42865), pending action on a notice of proposed rulemaking (NPRM) published on that same date (46 FR 42968; supplemented at 47 FR 17770, April 23, 1982). Both the 1980 final rule and the 1981 NPRM addressed the regulations contained in 41 CFR parts 60-1 and 60-60. No further action has been taken on the August 25, 1981, proposal, or on the 1980 stayed final rule.

On May 21, 1996, OFCCP published a proposed rule, 61 FR 25516, to revise specific regulations found at 41 CFR parts 60-1 and 60-60. The comment period closed on July 22, 1996. A total of 32 comments was received from six contractors, six contractor associations, one consulting firm, one law firm, 13 civil rights and women's rights organizations, two Federal agencies, one local government agency, and one individual. All the comments were reviewed and carefully considered in the development of this final rule.

II. Overview of the Final Rule

The final rule, for the most part, adopts the revisions that were proposed in the May 21 NPRM. However, some of the proposed provisions have been modified in response to the public comments. The changes between the NPRM and the final rule are explained in detail in the Section-by-Section Analysis.

The final rule revises the regulations in 41 CFR part 60-1 in four areas: Record retention, compliance monitoring, maintenance of non-segregated facilities, and enforcement procedures. In addition, to ensure consistency in the administration and enforcement of the Federal contract compliance laws, the final rule conforms several provisions in part 60-1 to parallel provisions in the regulations found at 41 CFR part 60-741. The latter regulations implement section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which also is administered by OFCCP. A final rule published on May 1, 1996,

made comprehensive revisions to the Section 503 regulations (61 FR 19936). The conforming changes made by the final rule published today affect several definitions and some aspects of enforcement.

Further, the final rule deletes most of the existing provisions in 41 CFR part 60-60, which describe the procedures for conducting compliance reviews of nonconstruction (*i.e.*, supply and service) contractors. A few substantive provisions in part 60-60, which are not contained elsewhere in the regulations, are being transferred to part 60-1. The transferred provisions primarily relate to the procedures for protecting confidential data, the time frames within which a contractor must submit its written affirmative action program (AAP) and supporting documentation, and authorization for nationwide AAP formats.

Finally, in order to avoid conflict, the final rule withdraws part 60-1 of the final rule which was published on December 30, 1980, and subsequently suspended.

The discussion which follows identifies the significant comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed revisions.

**Section-by-Section Analysis of
Comments and Revisions***Section 60-1.3 Definitions*

OFCCP proposed in the NPRM to add a definition for the new term "compliance evaluation." Additionally, OFCCP proposed to revise several definitions in the current regulations to make them consistent with definitions contained in the Section 503 implementing regulations. The Section 503 final rule published on May 1, 1996, made changes to several terms and phrases that are common to both Executive Order 11246 and Section 503 of the Rehabilitation Act. Specifically, the Section 503 final rule revised the regulatory definitions of "contract," "Government contract," "subcontract," and "United States," and replaced the title "Director" with the new title, "Deputy Assistant Secretary for Federal Contract Compliance." In order to maintain consistency in its administration and enforcement of the Federal contract compliance laws, OFCCP proposed to make conforming changes to the definitions of those terms found in existing § 60-1.3.

"Compliance Evaluation." Under the existing regulations, the "compliance review" is the primary method utilized to investigate contractor compliance

with the requirements of the Executive Order. The current regulations prescribe a three-phase process for conducting compliance reviews: (1) An off-site or desk audit review of the contractor's written AAP and supporting documentation; (2) an on-site review of the contractor's employment policies and activities and investigation of any problem areas identified during the desk audit; and (3) where needed, an off-site analysis of data obtained during the on-site review. Under the current regulations, an on-site review is conducted at nearly every establishment selected for review, regardless of the results of the desk audit.

The existing "all or nothing" approach to compliance reviews is, in the view of OFCCP, too restrictive. OFCCP believes that more focused and streamlined procedures can be used to determine a contractor's compliance status, and that a flexible approach to monitoring compliance would enable the agency to target its enforcement resources more efficiently.

The NPRM proposed to revise the compliance review provisions found in § 60-1.20 to authorize the agency to utilize "compliance evaluations" to determine the compliance status of a contractor. The NPRM proposed to define the term "compliance evaluation" used in § 60-1.20(a) of the proposal as "any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the Executive Order 11246 requirements."

Two contractor associations mentioned the proposed definition of "compliance evaluation" in their comments. They asserted that the proposal was vague; that OFCCP had not adequately described how the compliance evaluation procedure would be implemented. These commenters also questioned whether the proposed review process for contractors would be streamlined, because the proposed definition indicated that OFCCP could take "any one or combination of actions" to determine whether a contractor maintained nondiscriminatory employment practices and fulfilled its affirmative action obligations.

The concerns raised by these commenters actually are more properly directed at proposed § 60-1.20(a), which describes four examination procedures encompassed by the term "compliance evaluation," rather than to the language of the proposed definition. Accordingly, a response to these comments is provided below in the preamble discussion concerning § 60-1.20 of the final rule.

The proposed definition of "compliance evaluation" is carried forward in this final rule without substantive change, although the wording has been revised slightly for clarity. OFCCP expects that the flexible approach to compliance monitoring that is reflected in the term "compliance evaluation" will reduce compliance burdens for the contractors that satisfy their Executive Order obligations. OFCCP also believes this new approach will increase the efficiency of its enforcement program by allowing the agency to use its most comprehensive evaluation procedure—the compliance review—selectively. Further, a range of methods for evaluating contractor compliance will enable the agency to reach a greater percentage of its contractor universe than is reviewed currently.

"Contract." The term "contract" is defined in the current regulations as "any Government contract or any federally assisted construction contract." The NPRM proposed to amend this definition to subsume the term "subcontractor." As was explained in the preamble to the NPRM, the revision would obviate the need to make a separate reference to "subcontract," each time "contract" is referenced, to demonstrate that a particular provision applies to both contracts and subcontracts.

One contractor association objected to the proposed definition of "contract." This commenter believed that the amended definition would expand the scope of the Executive Order's coverage and impose obligations upon subcontractors that currently do not exist. This commenter's concerns are unfounded. The Executive Order always has been applicable to agreements which fall within the regulatory definition of subcontractors. No substantive changes in the Executive Order's coverage were intended nor effected by the proposed change to the regulatory definition of contract.

Another commenter urged OFCCP to amend the definition to include "all federally assisted contracts and subcontracts," not just "federally assisted construction contracts and subcontracts." However, Section 301 of Executive Order 11246 expressly limits coverage of federally assisted contracts to agreements involving federally assisted construction.

The final rule amends the definition of "contract" to include "subcontract," as proposed in the NPRM. The term "subcontract" is referenced in the rule only when necessary to the context.

"Deputy Assistant Secretary." The NPRM proposed to substitute the new

title of "Deputy Assistant Secretary for Federal Contract Compliance Programs" for the title of "Director" in the current regulations, and to make the title change throughout the proposed rule. No comments were received on this proposal. The final rule adopts this title change as proposed, except that the word "Programs" has been dropped in order to more accurately reflect the title.

"Government Contract." The regulations define "Government contract" as an agreement "for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements." The NPRM proposed to revise this definition to clarify that contracts covered under Executive Order 11246 include those under which the Government is a seller of goods or services, as well as those in which it is a purchaser. The proposal substituted a reference to the contracts for the "purchase, sale or use of personal property or nonpersonal services" and a definition of the term "personal services" for the existing reference to the "furnishing" of goods or services, or for the use of real or personal property, including lease arrangements. Thus, the proposal provided, in relevant part, that a "Government contract" is "any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services."

Two commenters—a contractor association that represents small agricultural firms and a national law firm that counsels Government contractors on the requirements of the Executive Order and its implementing regulations—objected to the proposed clarification of the term "Government contract." Both argued that the proposed definition was too broad; that defining Government contract to include sales by the Government would extend the Executive Order's reach to activities that were not intended to be covered. The law firm was concerned that the revised definition of contract would expand the Executive Order's coverage to concessionaires and licensees that operate on Government lands under nonappropriated fund contracts. Specifically, this commenter was referring to those entities that contract with units of the Department of Defense called nonappropriated fund instrumentalities or "NAFIs" to operate a wide range of food, retail, and recreational concessions at military installations. The commenter noted that concession contracts with NAFIs typically do not involve appropriated

funds, and do not impose costs to the Government.

The law firm argued that Executive Order 11246 and its implementing regulations contemplated coverage of traditional procurement contracts and Government leasing of property, *i.e.*, agreements that require the Government to expend appropriated funds. Thus, the law firm contended that OFCCP did not have the authority to define "Government contracts" so as to include the contracts of nonappropriated fund instrumentalities. Further, this commenter argued alternatively that no-cost concession agreements with NAFIs should not be covered under Executive Order 11246 because OFCCP would experience difficulty computing their dollar value for the purpose of determining whether the contract satisfied the dollar thresholds for basic coverage and for the written affirmative action program requirement. This commenter requested that OFCCP either modify the definition of "Government contract" or include an express exemption for concession contracts with nonappropriated fund instrumentalities.

The assertions of this commenter ignore the longstanding policy and practice of the agency to cover concession contracts with nonappropriated fund instrumentalities or NAFIs. OFCCP consistently has taken the position that contracts with nonappropriated fund instrumentalities of the Government, such as the Army and Air Force Exchange Service, are covered by Executive Order 11246, assuming the dollar volume thresholds are met. As instrumentalities of the United States, NAFIs meet the definition of contracting agency under the regulation at 41 CFR 60-1.3. The fact that these contracts involve nonappropriated funds, rather than appropriated funds, is inconsequential. The Executive Order and implementing regulations do not distinguish between the source of the funds used to pay for the contract to determine coverage. Coverage under the Executive Order turns on the status of the parties and the nature of the agreement in issue.

OFCCP also disagrees with the commenter's contention that the decision cited in the NPRM's preamble, *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D. Md. 1976), was limited to lease coverage issues, and therefore, does not support the agency's position that "Government contract" covers sales by the Government. The plaintiff in *Kleppe*, the holder of an oil and gas lease from the Interior Department, argued that it did not have a Government contract because the financial benefit (cash flow)

was toward the Government. In deciding that a lessee of an oil and gas lease was a "Government contractor," the court rejected the argument that the provisions of the Executive Order were limited to those situations in which the Government is the consumer of goods. Significantly, the court in *Kleppe* concluded that it would be an inconsistent application of the national policy to eliminate discrimination in employment to impose the Executive Order requirements on employers which had contracted to supply goods, services and leased property for use of the Government, but not to impose the requirements of the Order on employers which had contracted with the Government to receive from it goods, services and leased property to be used by the employer.

The commenter's alternative argument for exempting concession contracts with nonappropriated fund entities from the Executive Order is also unpersuasive. The regulatory provisions concerning contracts and subcontracts for indefinite quantities found in the current regulations at § 60-1.5 would govern whether dollar thresholds are satisfied for coverage purposes.

The contractor association cited recipients of disaster relief insurance proceeds as an example of a situation that would be newly covered under the Executive Order as a result of the proposed amendment to the definition of "Government contract." Disaster relief programs such as crop insurance and flood insurance usually involve federal financial assistance. The only federally assisted contracts covered by the Executive Order are federally assisted construction contracts. This does not mean, of course, that the agency is taking a position here that all transactions involving Federal disaster relief are excluded from coverage. Rather, questions relating to coverage under the Executive Order necessarily are decided case by case, based on the particulars of the program and the nature of the agreement at issue.

"*Rules, regulations and relevant orders of the Secretary of Labor.*" A final rule published on May 3, 1996 (61 FR 19982), relating to the establishment of the Administrative Review Board, amended the definition of "Secretary" to include a "designee" of the Secretary of Labor. Consequently, the definition of "rules, regulations and relevant orders of the Secretary of Labor" in the current regulations, which makes reference to the designee of the Secretary, is no longer necessary, and has been omitted in this final rule.

"*Subcontract.*" The definition of "subcontract" in the current regulations

refers to agreements "for the furnishing of goods or services." The NPRM contained a proposal to revise this definition so that it would conform to the NPRM's definition of "Government contract." Accordingly, the proposal included a definition of "subcontract" that referenced agreements "for the purchase, sale, or use of personal property or nonpersonal services."

The contractor association which represents small agricultural firms objected to the proposal, contending that it would expand the scope of the Executive Order's coverage. The commenter said the proposed definition of "subcontract" would be particularly burdensome for companies in the agricultural industry, as the subcontracts for a producer of fruit products necessarily include growers, pickers, haulers, as well as fertilizers and pesticide applicators. This commenter raised a similar objection to the proposed definition of "contract." It appears that these comments were directed primarily at the "necessary to the performance" part of the existing regulatory definition of "subcontract," rather than the proposed "purchase, sale or use" language. As has been explained previously, the scope of coverage under the Executive Order has not been expanded. The existing definition of "subcontract" under the Executive Order regulations applies to agreements which are necessary to the performance of a Government contract, or under which part of the performance of the Government contract is assumed or undertaken.

The final rule adopts, without change, the definition of "subcontract" that was published in the NPRM.

"*United States.*" The NPRM proposed to revise the definition of "United States," by deleting the references to Panama Canal Zone (which was ceded back to Panama under the terms of the Panama Canal Treaty), and by specifying the possessions and territories of the United States as: The Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island. No comments were received on this proposed revision. The proposed definition of "United States" is adopted.

Section 60-1.8 Segregated Facilities

Section 60-1.8 of the current regulations prohibits the maintenance of segregated facilities (paragraph (a)) and requires contractors to certify that they are in compliance with that obligation (paragraph (b)). OFCCP proposed in the NPRM to conform paragraph (a) of § 60-1.8 with the Executive Order's general

nondiscrimination requirements by expanding the list of prohibited practices to include gender-based segregation, with the proviso that separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes. Several stylistic changes to existing paragraph (a) also were proposed. In addition, the NPRM proposed to eliminate the written certification requirement in paragraph (b).

Nearly half of the commenters addressed the proposed changes concerning segregated facilities. Commenters representing the constituencies most directly affected by the regulations—minorities, women and Government contractors—all supported the proposed prohibition against gender-based segregated employee facilities. The women's rights groups, in particular, applauded the proposal. In their view, the proposed amendment recognizes that sex-segregation remains a problem in traditionally male workplaces.

The comment of the Equal Employment Opportunity Commission (EEOC) concerned the requirement that "separate or single-user restrooms, dressing or sleeping areas shall be provided to assure privacy between the sexes." EEOC suggested that we alert contractors that, under Title VII of the Civil Rights Act of 1964, as amended, it would be an unlawful employment practice for an employer to deny employment or to otherwise adversely affect the employment opportunities of an applicant or employee in order to avoid the cost of providing separate or single restroom or dressing facilities. Likewise, contractors are advised that the costs of providing such separate facilities would not be a defense to a charge of sex-based employment discrimination brought under the Executive Order.

Further, all but two comments expressed support for the elimination of the written certification requirement in paragraph (b). A women's rights organization and a local government entity objected to the proposal. The women's rights organization argued that retention of the written certification requirement would serve as a useful reminder of the new prohibition against sex-segregated employee facilities. This commenter suggested that the benefits of the notice-serving function of the certification outweighed any time-savings that would be realized by elimination of the requirement. The governmental entity similarly commented that requiring a contractor to certify that it maintains non-

segregated facilities reflected the essence of the Executive Order, but imposed only a minimal burden on contractors.

OFCCP agrees that contractors should be apprised of their obligation under the Executive Order regulations to ensure that employee facilities are not segregated on the basis of sex, except where it is necessary to safeguard privacy between men and women. The agency, however, is of the view that the prohibition against segregated facilities can be effectively enforced without the benefit of the written certification. Eliminating the certification will not, for example, affect the contractor's obligation to maintain facilities on a non-segregated basis. In short, the written certification is a paperwork requirement that does not produce commensurate benefit, and its repeal is consistent with the Administration's regulatory reform initiative.

Another commenter asked that OFCCP clarify in the final rule that repeal of the written certification will not expose prime contractors to liability for the violations of the Executive Order committed by their subcontractors. OFCCP accepts the point that the repeal will not expose prime contractors to liability for violations committed by their subcontractors. However, it is not necessary to codify the point in the regulations. Under the existing regulations, prime contractors are not responsible for the compliance of their subcontractors with the requirements of the Order and regulations. Consequently, the certification of non-segregated facilities has not, as the comment seems to suggest, served to shield prime contractors from liability for the noncompliance of their subcontractors. The certification merely has provided notice to the prime contractors of whether their subcontractors (in the latter's view at least) are complying with the nondiscrimination requirements of the order.

The final rule amends paragraph (a) and deletes paragraph (b) of § 60-1.8 as was proposed in the NPRM.

Section 60-1.12 Record Retention

Section 60-1.12(a) General Requirements

The obligation to retain relevant employment records is implicit in some of the current regulatory requirements (e.g., those relating to maintaining data on applicants, hiring, transfers and promotions, and developing and updating written affirmative action programs). However, the regulations, with one exception, do not prescribe a

record retention period. That exception is the requirement under the Uniform Guidelines on Employee Selection Procedures published at 41 CFR part 60-3 (hereinafter UGESP) to keep certain adverse impact data for two years after the adverse impact has been eliminated.

Paragraph (a) of the proposal would amend the record retention obligation in several ways. First, proposed paragraph (a) would make the record retention obligation applicable to any personnel or employment record made or maintained by the contractor and lists examples of the types of records that must be retained. Second, proposed paragraph (a) would establish the required record retention period as two years. The proposal would establish a one-year record retention period for contractors that employ fewer than 150 employees or that do not have a Government contract of at least \$150,000. Third, proposed paragraph (a) would provide that when a contractor has been notified that a complaint has been filed, a compliance evaluation has been initiated or an enforcement action has been commenced, the contractor shall preserve all relevant personnel records until the final disposition of the action.

Several of the commenters expressed views on proposed paragraph (a). The civil rights and women's rights organizations commended the proposal to make record retention requirements explicit. They viewed the addition of a record retention regulation as essential to effective enforcement and said it would ensure consistency with the regulations under Title VII and Section 503.

The contractor community opposed the record retention proposal. Two contractor associations asserted that proposed paragraph (a) was too broad. They claimed that the proposal would expand the scope of records subject to the retention requirement; that is, the examples of records listed suggest that any document related to an employee or employment decision must be retained for two years. These commenters contended further that the proposed regulation would impose a considerable burden, particularly on the larger contractors that have employment related activities which might generate millions of records.

The concern that the proposal would oblige contractors to maintain records beyond current requirements is unfounded. The NPRM explained that the proposed record retention requirement (paragraph (a)) comports with the analogous record retention requirements under Title VII and the

Americans with Disabilities Act (ADA). In addition, proposed paragraph (a) is consistent with the provisions adopted in the Section 503 final rule. The types of employment records covered by the record retention requirement, listed in proposed paragraph (a), include items not listed in the corresponding Title VII and ADA regulations. But, as EEOC noted in its comment, those additional items—the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes—are examples of “any personnel or employment record made or kept,” and, therefore, clearly fall within the coverage of the existing Title VII and ADA record retention rule.

Another contractor association contended that the proposed regulatory language was inadequate because it failed to answer contractors’ recurrent questions embraced by record retention obligations under Executive Order 11246. This commenter argued that the regulations should include guidance on: (1) Who is an “applicant” for the purposes of the record retention requirement; and (2) whether and to what extent the record retention requirement applied when a contractor used electronic bulletin boards and the Internet as recruitment sources.

OFCCP has issued the following guidance on the meaning of the term “applicant”:

The precise definition of the term ‘applicant’ depends upon [a contractor’s] recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the [contractor’s] practice. Question and Answer No. 15, Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures (44 FR 11996, 11998 (March 2, 1979)).

Accordingly, whether an individual will be considered an applicant turns on the employee selection procedures designed and utilized by the contractor. OFCCP is studying the range of ways contractors are utilizing electronic media in their employee selection processes and intends to issue guidance responding to questions most frequently asked by contractors regarding this issue.

Commenters from the contractor community criticized the two-year record retention period proposed for larger contractors. These commenters argued that it was inconsistent for OFCCP to impose a two-year retention

period, when the retention period under Title VII is one-year. They argued that, because OFCCP follows the principles developed under Title VII case law to enforce the Executive Order, the agency should adopt the EEOC rule. These same commenters said that OFCCP had underestimated the administrative and storage costs associated with maintaining an additional year of records.

These comments ignore the differences in the enforcement schemes of EEOC and OFCCP. Reviews of contractors’ compliance with the Executive Order and regulations cover a two-year period. The policy and practice are to examine the contractor’s personnel policies and activities for the two years preceding the initiation of the review, and to assess liability for discriminatory practices dating back two years. The two-year record retention period provides greater assurance that relevant records will be available during OFCCP compliance evaluations. In contrast, EEOC’s enforcement of Title VII is triggered exclusively by charges, which must be filed within 180 days (or, in deferral jurisdictions, 300 days) of an alleged violation. EEOC’s one-year retention period is designed to ensure that relevant records are not discarded before the expiration of the complaint filing period.

Turning to the concern about the burdens on contractors, OFCCP believes that requiring larger contractors to retain records for an additional year will result in only a minimal increase in burden. As was noted in the preamble to the NPRM, many large employers and some smaller employers as well, are increasingly maintaining records electronically. In such instances, compliance with the record retention requirement will impose little or no additional burden. Moreover, the decision to establish a one-year record retention period for smaller contractors—the same period required by EEOC—is part of the agency’s effort to maintain burdens associated with record keeping at a minimal level. The one-year rule also will accommodate those smaller contractors that are less likely to maintain electronic records.

Two contractor associations commented on the separate record retention requirements for larger and smaller contractors. One association questioned whether OFCCP had authority under the U.S. Constitution and Federal procurement laws to tie the record retention requirement to workforce and contract size. This comment overlooks the fact that size distinctions are common in regulatory schemes. Indeed, the existing Executive

Order regulations provide different requirements for smaller contractors (e.g., those that employ fewer than 50 employees or do not have a contract of at least \$50,000). Such contractors, for example, are exempted from the regulatory requirement to develop and maintain a written AAP.

The other contractor representative raised questions regarding the record retention obligations of contractors who are at or near the thresholds that trigger the different retention periods. Specifically, the commenter questioned what would happen if the employment levels or contract values exceed or fall below the 150 employees, \$150,000 thresholds during the course of the contract. A change in status relating to either threshold would affect the record retention obligation. If the number of employees should fall below 150 or if the contractor no longer has a contract of at least \$150,000, the contractor would not be required to retain employment records for two years. The requirement to keep records for two years would become effective again on the date that the contractor met the thresholds of 150 employees and a contract of \$150,000. The record retention requirement, however, would not be applied retroactively, *i.e.*, the change from one year to two years would be phased in day-by-day. But see the discussion regarding the obligation to maintain records once a compliance evaluation has commenced, which follows.

One commenter expressed disapproval of the requirement in proposed paragraph (a) that contractors retain all relevant records once a compliance evaluation has been initiated. This commenter contended that the requirement was burdensome and unfair to contractors, particularly because of the proposal to eliminate the provision in § 60–60.7, which allows the agency 60 days to complete a compliance review.

The purpose of this record retention requirement is to ensure that OFCCP can obtain all relevant documents during a compliance investigation or enforcement action. OFCCP appreciates the contractor’s concerns about the timely completion of compliance evaluations, but disagrees with the assertion that the schedule has to be codified in the regulations. In the preamble discussion concerning § 60–1.20 of the final rule, and again in the discussion regarding part 60–60 of the regulations, OFCCP explains that the agency’s standards for timeliness and work schedules are not derived solely from the regulations. Therefore, there would be set time frames for completing

compliance evaluations even if the regulatory provisions were eliminated.

The final rule adopts the record retention provisions proposed in the NPRM without change.

Section 60-1.12(b) Affirmative Action Programs

Paragraph (b) of the proposal provides that a contractor establishment required to develop a written affirmative action program (AAP) shall maintain the AAP for the current year and preserve the AAP from the preceding year, together with the supporting documentation, including good faith efforts undertaken. Three commenters from the contractor community objected to proposed paragraph (b). They questioned the relevance of information contained in an expired AAP and expressed concern that OFCCP would examine the AAP for deficiencies. One of the commenters contended that the only possible reason OFCCP could have for requesting an AAP from the preceding year is to see if one exists. This commenter urged OFCCP to include a statement to that effect in the final regulation.

The written AAP serves dual purposes. The AAP is developed primarily to assist the contractor in monitoring its employment practices to ensure that they are nondiscriminatory and that affirmative action is taken to ensure equal employment opportunity. OFCCP also reviews and relies upon the AAP to determine whether the contractor is complying with the Executive Order and regulations. The contractor's affirmative action performance (e.g., personnel activity, goals progress and good faith efforts to meet goals) is examined for at least the last full AAP year. However, a compliance evaluation may be scheduled at any time during the year. If, at the time of the review, the contractor is six months or more into its current AAP year, OFCCP examines performance under both the current year and the prior year AAP. Accordingly, the requirement in proposed paragraph (b) that the contractor preserve the AAP for the previous year would ensure the availability of an AAP covering a full AAP year.

In addition, under the current regulations the AAP for the current year must contain a progress report on goals for the previous AAP year. Whether progress or little or no improvement was made in the goal areas, the AAP for the previous year should provide an explanation of the efforts undertaken and the results achieved. For example, the AAP and documentation of good faith efforts may describe the contractor's outreach and recruitment

activities designed to increase its pool of female or minority applicants, or training programs instituted to enhance the skills and talents of incumbent employees with an eye to increasing the pool of those eligible for promotion. In other words the AAP from the previous year may contain information that would allow an evaluation of those commitments that are directly related to the performance of the contractor in the current year. In addition the affirmative action obligation is not a one year requirement. Rather, it is a continuing obligation and maintaining the AAPs in the fashion proposed in paragraph (b) enables OFCCP to assess the quality and effectiveness of the contractor's affirmative action commitments on a multi-year basis.

The regulation in proposed paragraph (b) is adopted without change.

Section 60-1.12(c) Failure To Preserve Records

Paragraph (c) of the proposed rule provides that the failure to maintain and preserve the records as proposed in paragraphs (a) and (b) is a violation of Executive Order 11246. Additionally, paragraph (c) proposes that a contractor's failure to preserve required records or destruction of such records, may raise a presumption that the records, if available, would have been unfavorable to the contractor. Paragraph (c) of the proposed rule includes a proviso that the presumption shall not apply if the contractor demonstrates that the destruction or failure to preserve records resulted from circumstances beyond the contractor's control.

EEOC commented that its Compliance Manual limited application of the "adverse inference rule" to situations in which an employer acted with the intent to defeat the purposes of Title VII. The view of EEOC is that the proposal does not limit the adverse inference to instances of deliberate destruction with an intent to frustrate the purposes of the Executive Order.

OFCCP believes that clarification would be helpful. The adverse inference presumption in proposed paragraph (c) is not limited to situations in which the destruction or failure to preserve records may be attributed to the willful conduct of the contractor. The agency intends to invoke the presumption on a case-by-case basis as the circumstances warrant. The proposed rule, in recognition of this discretionary approach, states that a presumption may arise if the contractor destroyed or failed to preserve records.

One commenter suggested that we amend the proposal to expressly provide a procedure that would permit

the contractor to rebut the presumption that the records destroyed or not maintained were unfavorable. The suggested amendment is unnecessary. The presumption is rebuttable, and contractors will have a full opportunity to submit evidence to refute the inference.

Another commenter recommended that the final rule set forth the sanctions that may be imposed for violations of the record retention requirements. The sanctions described in § 60-1.27 may be imposed for any violation of Executive Order 11246 or the implementing regulations, including § 60-1.12. A separate sanction provision for violations of the record retention regulations, accordingly, is unnecessary.

The final rule adopts paragraph (c) of the proposal without change.

Section 60-1.12(d) Effective Date

Paragraph (d) of the proposal provides that the contractor is obligated to preserve only those records which are created or kept on or after the effective date of this rule. No comments were received on this provision. The final rule adopts paragraph (d) as proposed.

Section 60-1.20 Compliance Evaluations

The compliance review is the primary method of evaluating a contractor's compliance with the Executive Order and regulations Paragraph (a) of the current § 60-1.20 describes the purpose of the compliance review and provides that the review shall consist of a comprehensive analysis of each aspect of a contractor's employment practices, and where appropriate, include recommendations for appropriate sanctions.

The NPRM would amend paragraph (a) to authorize OFCCP to use a range of methods to reevaluate a contractor's compliance with the regulations. Specifically, paragraph (a) would provide that a compliance evaluation may consist of any one or a combination of the following: (1) A compliance review, (2) of off-site review of records, (3) a compliance check, and (4) a focused review.

Nearly all commenters addressed the proposed compliance evaluation regulation. The commenters from the women's rights and civil rights communities supported the proposal. They opined that the flexible approach of the proposal would improve the efficiency of OFCCP and permit the agency to target resources better. A contractor also supported proposed paragraph (a) and offered that it was a thoughtful proposal to streamline the compliance review process.

Some of the contractor associations favored the concept of having a range of evaluation methods to determine compliance with Executive Order 11246 and the regulations, but expressed reservations about various aspects of the proposed regulation. For example, one commenter questioned the off-site review of records, especially confidential data. Another questioned whether the "compliance check" would entail an on-site visit, off-site review of records, or both. Another commenter requested that the rule be clarified as to whether the additional options for evaluating compliance—the off-site review of records of records, the compliance check and the focused review—would constitute a complete evaluation. Specifically, this commenter wanted to know whether the current practice of reviewing a contractor no more frequently than once every 24 months would continue under the expanded system.

Three commenters from the contractor community objected outright to the proposed compliance evaluation regulation. One of the contractor associations contended that the proposed rule would give OFCCP unbridled authority to evaluate contractor compliance, and that contractors would be subjected to endless requests for information, data, and records if the rule were finalized. In addition, this commenter contended that contractors needed regulatory notice of how each type of compliance evaluation would be implemented. Similarly, another commenter argued that the procedures for each of the evaluation methods needed to be spelled out in the regulations with the same level of detail provided in the current regulations concerning the compliance review process. These commenters believed they should have the opportunity to comment upon a proposed regulation that specified, among other things, the number of evaluation methods the contractor could expect, the frequency of such evaluations, and the time frames for completing each method of evaluation.

OFCCP has made revisions in the final rule to provide more detail about the methods for evaluating contractor compliance. The revisions are explained below. Further, OFCCP agrees that contractors should be apprised of how the agency intends to implement the proposed compliance evaluation procedures. The agency disagrees, however, with the notion that the particulars of implementation must be included in the regulations.

The Federal Contract Compliance Manual (FCCM) contains the policy

guidance interpreting the Executive Order and regulations, as well as agency instructions for implementing the regulatory provisions. OFCCP's Compliance Manual currently describes the procedures for conducting compliance reviews. The aspects of implementation addressed in the Manual include the time frames for conducting the review, how to open and close a review, and how frequently reviews should be conducted. The FCCM is the appropriate medium to specify the procedures for conducting the different types of compliance evaluations. The agency, therefore, declines to adopt the changes suggested by some of the commenters. The final rule adopts the compliance evaluation provisions of proposed paragraph (a). However, paragraph (a) of the final rule differs from the proposal by including expanded descriptions of the activities contemplated under each evaluation method. The final rule for example, clarifies that a compliance review is the same comprehensive examination of the contractor's employment practices that is prescribed by the current regulations. In addition, the description of the off-site review of records is revised in the final rule to explain that the scope of the examination would be substantially similar to the desk audit phase of the compliance review. Further, the final rule provides that the compliance check involves an on-site visit to an establishment to review the contractor's books and records for the purpose of determining whether: (1) Data and other information previously submitted by the contractor are accurate and complete; (2) the contractor has maintained records consistent with the requirements of § 60-1.12; and/or (3) the contractor has developed an AAP consistent with the requirements of § 60-1.40.

Contractor fears of repeated and unending evaluations are unfounded. OFCCP always has been sensitive to contractor concerns about the amount of time, money and personnel resources consumed by compliance reviews. Thus, the agency's practice normally has been to conduct a compliance review of a contractor no more frequently than once every two years. Additionally, the agency's Compliance Manual instructs the compliance officer to complete the compliance review within 60 days from the date the AAP is received. (See FCCM C204). The compliance officer must request an extension of time whenever it becomes apparent that the compliance review cannot be completed within the allotted time. (*Id.*)

OFCCP intends to continue to follow the currently prescribed time frames whenever the compliance review is the method used to evaluate a contractor's performance. The agency also intends to establish similar standards regarding the frequency and duration of the off-site review of records, the compliance check, and the focused review, to ensure that the compliance evaluations authorized by § 60-1.20 are not overly intrusive. Finally, OFCCP will develop other policies and procedures for compliance officers to follow when implementing these new evaluation methods. That policy and procedural guidance will be incorporated in the Compliance Manual, and thereby made available to the public, before any of the new methods for evaluating contractor compliance are utilized.

Section 60-1.20(d) Preaward Compliance Evaluations

Section 60-1.20(d) in the current regulations requires contracting agencies to obtain clearance from OFCCP prior to awarding Federal supply and service contracts of \$1 million or more. The current regulations require OFCCP to conduct a preaward compliance review if the facility at which the contract will be performed has not undergone a compliance review within the preceding 12 months, and to provide its report of compliance within 30 days of receipt of the request from the contracting agency.

The NPRM would revise paragraph (d) of the current regulation to make the preaward compliance evaluation optional. Under paragraph (d) of the proposed rule, OFCCP would have 15 days to inform an awarding agency of its intentions to conduct a preaward compliance evaluation. The proposed rule would allow OFCCP an additional 20 days from the date of the notice of intention to conduct the preaward evaluation to provide the conclusions regarding compliance to the contracting agency. The proposed rule further provides that clearance shall be presumed if OFCCP does not give notice of its intention to conduct a preaward compliance evaluation or does not report its conclusions within the prescribed time periods.

Several comments urged that the proposal be revised. Women's rights and civil rights groups unanimously opposed the proposal to make preaward compliance evaluations optional. They contended that changing the preaward review from a mandatory function to a discretionary function would seriously diminish the effectiveness of a compliance procedure they viewed as an important enforcement tool. A few

expressed the fear that preawards would be discontinued entirely if they were left to the discretion of the agency. As an alternative to making all preaward compliance evaluations optional, some commenters suggested that OFCCP could target its enforcement resources more efficiently by: (1) Raising the \$1 million minimum threshold to reflect inflation over the last 25 years; and (2) expanding the 30-day time allowed to conduct preaward compliance evaluations.

Most of the comments from the contractor community on proposed paragraph (d) were supportive of the proposal to make preaward compliance evaluations optional. However, one contractor and the Department of Defense recommended that the agency eliminate preawards entirely, and adopt a post-award notification and post-award review procedure. Another contractor questioned the feasibility of the proposed time frames for conducting preaward compliance evaluations, noting that proposed paragraph (d) requires OFCCP to report its conclusions about compliance within 20 days, while proposed paragraph (e) would allow the contractor 15 days to submit an AAP.

The NPRM discusses the problems associated with the current preaward process at length, so that discussion will not be recounted here. (See 61 FR 25516, 25519.) The NPRM explained that several models for modifying the preaward provisions were considered during the development of the proposal, including an increase in the dollar amount of the preaward contract threshold.

Upon reconsideration and in response to the comments, OFCCP has decided to maintain the current mandatory nature of preaward evaluations, but to raise the threshold trigger for the conduct of the preaward evaluation. Accordingly, the final rule requires that a preaward compliance evaluation of a prospective contractor be conducted when the amount of the contract is \$10 million or more, and that a preaward evaluation of known prospective subcontractors be conducted when the amount of the subcontract is \$10 million or more, unless OFCCP has conducted an evaluation and found them to be in compliance with the Order within the preceding 24 months. These increases in contract amount and compliance history thresholds will reduce the number of preaward compliance evaluations OFCCP will need to conduct. A reduction in the number of preaward evaluations will permit OFCCP greater flexibility in targeting its enforcement resources. Continuing the requirement

that the agency conduct preawards, albeit of a smaller universe, addresses the concerns of the civil rights and women's rights groups that a discretionary preaward evaluation process would seriously undermine the utility of preaward compliance evaluations as an enforcement tool. Under the final rule, the preaward evaluation process will remain a significant component of the Executive Order enforcement program by targeting those contractors who benefit most from taxpayers-funded Government contracts.

OFCCP also studied the option of eliminating the preaward provisions, and considered replacing preawards with post-award compliance evaluations. In OFCCP's view, however, the preaward evaluation still has value as an enforcement tool. The final rule will retain the preaward clearance time frames contained in the proposal to ensure that the preaward evaluation process is conducted expeditiously. The reduction of the number of preaward evaluations which will be conducted under the final rule and the regulatory time frames for completing the evaluations, coupled with the administrative changes OFCCP is making to streamline the preaward clearance process, will significantly decrease the burden on contracting agencies of processing Executive Order preaward clearance requests during the procurement process.

As for the question regarding the compatibility of the time frames in paragraphs (d) and (e) of the proposal, the deadline for the submission of documents in proposed paragraph (e) would not apply to preaward compliance evaluations. Under the existing preaward procedures, the contractor is not asked to submit its AAP and support data for review. Currently, OFCCP either conducts an abbreviated desk audit or review of the AAP and support data on-site, or dispenses with review and analysis of the AAP and support data altogether. Contractors can expect that OFCCP will continue to adjust its compliance evaluation procedures to meet the preaward clearance time frames in paragraph (d).

The final rule revises paragraph (d) of § 60-1.20 by requiring that a preaward compliance evaluation of a prospective contractor be conducted when the amount of the contract is \$10 million or more and a preaward evaluation of its known first-tier prospective subcontractors be conducted when the amount of the subcontract is \$10 million or more, unless OFCCP has conducted an evaluation and found them to be in compliance in the preceding 24 months.

The final rule establishes time frames for OFCCP to inform the awarding agency of the necessity for conducting a preaward evaluation and for OFCCP to provide its conclusions about the contractor's compliance status.

Section 60-1.20(e) Submission of Documents; Standard Affirmative Action Formats

Under § 60-60.2, a contractor must submit its AAP and supporting documents to OFCCP within 30 days of a request. If the contractor fails to submit the documents within the prescribed time period, the enforcement procedures specified in § 60-1.26 are applicable. The NPRM proposed to incorporate the provisions of § 60-60.2 as a new paragraph (e) of § 60-1.20, with one modification. Under proposed paragraph (e), the time for submission of an AAP and supporting documentation would be reduced from 30 days to 15 days.

Several comments on the proposed change in time frames were received. The commenters from the civil rights and women's rights communities supported the proposal. They viewed 15 days as more than adequate time to submit an AAP because, they argued, contractors are required to have an AAP in place as a condition of doing business with the Federal Government. These commenters believed the 15-day deadline would address the unacceptable (and unlawful) practice of contractors waiting until a compliance review has been scheduled before they develop an AAP.

The commenters from the contractor community objected to the proposal and strongly urged retention of the 30-day time frame for submission of the AAP and supporting data. One commenter observed that the 15-day requirement assumes that a contractor could simply pull the AAP out of a file, copy it, and send it to OFCCP. But, according to this commenter and others, an AAP is a fluid, evolutionary document rather than a static piece of paper. They asserted that the 15-day deadline ignored other realities of compliance reviews and how AAPs are developed and updated.

The commenters said that even where a detailed AAP has been developed contractors frequently use the 30 days provided under the current regulations to update the support data. They pointed out that a request for an AAP may require that the contractor submit data on personnel activity for the current goal year, which normally would be compiled and analyzed during the 30-day period. Further, the commenters identified several situations

which might make it difficult for a contractor to meet the 15-day deadline. The request for the AAP might come when the company officials responsible for updating or reviewing the AAP are unavailable, or at the expiration of the AAP year and before the contractor has had an opportunity to review and analyze the current labor force statistics in order to update its AAP.

In recognition of the concerns of the contractors, OFCCP has decided not to adopt the 15-day deadline in the final regulation. The final rule retains the existing 30-day time frame for the submission of the AAP and support data.

The current regulation at § 60–60.3(a) states, in relevant part, that “Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.” OFCCP proposed also to incorporate this provision, without any changes, in new paragraph (e).

Two contractor associations and one contractor commented on this provision. All favored the inclusion of the provision in the final rule and viewed it as a change in agency policy on nationwide AAPs, which also are called standardized affirmative action formats or “SAAFs.” Some officials in OFCCP had been critical of the nationwide AAP formats that had previously been negotiated and viewed them as impediments to effective enforcement of the Executive Order. In response to these agency concerns, a moratorium on new SAAF agreements was issued on December 16, 1994. That moratorium remains in effect today. Thus, the inclusion of the provision regarding nationwide AAP formats does not represent a change in agency policy. Rather, it preserves the status quo until OFCCP completes its evaluation of the concept.

The final rule adopts all the provisions proposed in paragraph (e) except the change proposed in the time frame for the submission of documents. The existing 30-day time frame for submitting the AAP and supporting documents is retained in the final regulation.

Section 60–1.20(f) Confidentiality

The regulation at § 60–60.3 provides that information made available during the on-site review may be taken off-site if the compliance officer finds that further analysis is required to make a determination of compliance. Section 60–60.4 contains procedures under which contractors may seek rulings on the relevancy of data requested for off-site analysis. The regulation also prescribes procedures for preserving the

confidentiality of contractor data removed off-site for analysis.

Under the current regulations, a contractor concerned about the confidentiality of information such as employee names and compensation data may submit alphabetic and coded data for desk audit purposes. However, the contractor must provide the compliance officer with full access to all relevant data on-site, as is directed by § 60–1.43. The information to be removed for off-site analysis may be coded, but only if the key to the code is made available to the compliance officer. The contractor also may seek a ruling from the District Director as to the relevance of documents requested for off-site analysis. The District Director is allowed 10 days to issue a ruling, the contractor 10 days to appeal the District Director’s ruling to the Regional Director, and the Regional Director 10 days to issue a final ruling. The current regulations provide that, during the pendency of the relevancy determination, the contractor must allow the compliance officer to remove the disputed information off-site.

The NPRM would delete part 60–60 of the regulations and transfer the provisions found in § 60–60.3(c) and § 60–60.4 to a new § 60–1.20(f). The new paragraph (f) would incorporate the substantive provisions of the current regulations, but would revise the procedures for rulings on relevancy. The proposed rule would eliminate the provision concerning the removal of disputed data off-site pending the ruling on relevancy. In addition, paragraph (f) of the proposed rule would replace the existing 10-day time frames for issuing rulings on relevancy with the requirement that the District Director and Regional Director issue their rulings “promptly.”

The provisions concerning confidentiality and removal of data for off-site analysis generated extensive comments from the contractor community. All the commenters contended that the proposed rule did not ensure protection of confidential or proprietary information during compliance evaluations. Some commenters claimed that the provision requiring the contractor to make the key to coded data available to a compliance officer posed a threat to confidentiality. They recommended amending the proposed rule to provide that the key to coded data may never be taken off-site.

In fact, no changes to the provisions regarding the coding of confidential data were proposed. The proposed rule would continue the current regulatory requirement that the contractor make the key to coded data available to the

compliance officer. If the key to coded data is needed for off-site analysis, contractors can be assured that confidentiality will be protected, as it has been under the current regulations. Where the contractor codes data that are submitted for desk audit purposes, the current practice is that the key to the code is retained by the contractor and made available to the compliance officer during the on-site review. (See FCCM at 2GO1). That practice would continue also under the proposed regulation.

Other commenters expressed concern about the provisions regarding rulings on the relevancy of data requested for off-site analysis. They argued that the determination of relevancy should be made prior to the removal of any confidential data off-site. The commenters asserted also that the regulations should contain definite time frames for the District Director and Regional Director to issue rulings on relevancy.

Although the NPRM proposed modifications to the procedures for obtaining rulings regarding the relevance of data requested for off-site analysis, OFCCP has decided not to adopt those changes in the final regulation. The final rule retains the provision that the contractor must allow removal of the disputed data off-site pending a final ruling on relevancy. Upon further consideration, OFCCP believes that eliminating the provision regarding off-site availability pending a relevance determination would prolong the compliance evaluation process and adversely impact efficiency and effectiveness. The resumption of an interrupted compliance evaluation might be delayed well beyond the date the final ruling regarding relevancy is issued because the compliance officer may have initiated another compliance evaluation in the interim. The current regulation and practice allows the compliance officer to proceed with the investigation while the trail is still fresh and close the compliance evaluation within a reasonable amount of time.

Further, in response to contractors’ criticism concerning the proposed removal of the definite time frames for issuing relevancy determinations, OFCCP has decided not to adopt that provision of the proposal. Instead, the final rule provides that the District Director shall issue a ruling within 10 days, and that if the contractor appeals the District Director’s ruling to the Regional Director, the Regional Director shall issue a final ruling within 10 days.

The comments concerning proposed paragraph (f) reveal that the contractors’ overriding concern is that confidential or proprietary information obtained by

OFCCP for off-site analysis may be disclosed pursuant to the Freedom of Information Act (FOIA). Several commenters recommended that the rule be amended to require that all confidential data be returned at the conclusion of the complaint investigation or compliance evaluation. One commenter further suggested that the amendment state expressly that contractor data are not subject to disclosure under FOIA while the investigation or compliance evaluation is open, and that the compliance review or investigation is not considered closed until all data are returned to the contractor.

OFCCP follows the Department's regulations implementing the Freedom of Information Act and Executive Order 12600 when processing FOIA requests. The Department's FOIA regulations are found at 29 CFR Part 70. Data obtained from contractors that are contained in files connected with open compliance evaluations, complaint investigations or administrative enforcement actions are not disclosed. The agency considers such information to be part of an investigatory file compiled for law enforcement purposes within the meaning of 5 U.S.C. 552(b)(7), and therefore exempt from mandatory disclosure under FOIA. The exemption in FOIA for information compiled for law enforcement purposes, however, is not a permanent one. Once the compliance evaluation, complaint investigation, or enforcement action has been concluded and the investigatory files exemption no longer is in effect, another exemption would need to apply in order to protect the information in the files from disclosure in response to a FOIA request. For example, information obtained from contractors arguably might be protected from disclosure under the exemption for trade secrets or commercial or financial information that is privileged or confidential (5 U.S.C. 552(b)(4)).

The Department's FOIA regulations set forth procedures for processing requests for the disclosure of information and material provided by business submitters. Those regulations permit the contractor to designate specific information as confidential commercial information at the time of submission to the Department. 29 CFR 70.26(b). In addition, the Department's FOIA regulations require OFCCP to give the contractor written notice of any request encompassing confidential commercial information, and to provide the contractor an opportunity to object to disclosure. 29 CFR 70.26 (d) and (e).

OFCCP previously has considered the question of whether assertedly

confidential data may be returned to the contractor upon completion of the investigation or compliance evaluation. The position of OFCCP is that the Federal records retention requirements do not permit the agency to return data obtained from the contractor during a compliance review or complaint investigation upon completion of the action. The information and records received from the contractors in connection with enforcement activities constitute Government records. As such, their disposition is strictly prescribed by statute and regulation and must be made in accordance with the agency's records management program, with the approval of the Archivist of the United States. The documents may be disposed of only by the methods defined by the statute, which do not include returning them to the originating source, *i.e.*, the contractor, but instead call for disposal by sale or salvage, donation for preservation and use, or destruction.

Paragraph (f) of the proposal is adopted in the final rule with the changes regarding the procedures for issuing relevancy determinations described herein. In addition, at the suggestion of one commenter, the final rule substitutes "key to coded data" for the reference to "the code" to the data. Thus, the final rule provides, in relevant part, "Such data may only be coded if the contractor makes the key to the code available to the compliance officer."

Section 60-1.20(f) Access to Information

Section 60-60.4(d), concerning public access to information, describes outdated procedures under which requests received from the public for information obtained from the contractor previously were processed. OFCCP proposed to substitute provisions in the current rule with a statement of the agency's current practices. Accordingly, paragraph (g) of the proposal provides that "the disclosure of information obtained from a contractor will be evaluated pursuant to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR Part 70."

No comments were received on paragraph (g) of the proposal. The provision is adopted in the final rule as proposed.

Section 60-1.26 Enforcement Proceedings

The NPRM would revise and restructure, for clarity, § 60-1.26, which specifies the Executive Order enforcement procedures. With the

exception of the provisions relating to the calculation of interest, the proposal would not make substantive changes to this section. Subsection (a) of the proposal would apply to both administrative and judicial enforcement. Proposed subsection (b) would address administrative enforcement procedures. Subsections (c) and (d) of the proposed regulation would cover judicial enforcement proceedings initiated by the Department of Justice.

Several of the proposed changes are consistent with provisions included in the Section 503 implementing regulations at 41 CFR 60-741.65(a)(1). Subsection (a)(2) of the proposed regulation, clarifies that OFCCP may seek relief for victims of discrimination identified either during a compliance evaluation or a complaint investigation whether or not such individuals have filed a complaint with OFCCP. Subsection (a)(2) of the proposal would require that interest on back pay be compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

The proposal would provide, in subsection (b)(1), that administrative enforcement proceedings may be instituted where OFCCP determines that referral for formal enforcement (rather than settlement) is appropriate. Subsection (b)(1) of the proposed regulation would specify that the litigation referral will be made to the Solicitor of Labor. Further, consistent with a requirement included in the Section 503 regulations, the proposal would require that the Department's Final Administrative Order in an Executive Order case be issued within one year from the date of the Administrative Law Judge's recommended decision, or the submission of the parties' exceptions and responses to exceptions to such decision (if any), whichever is later.

The commenters from the civil rights and women's rights communities welcomed the clarification in subsection (a)(2) that OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation, regardless of whether such individuals have filed a complaint with the agency. One contractor suggested that contractors be given the opportunity to correct a discriminatory practice or situation identified for the first time during a compliance review before liability is imposed. However, simply changing the offending employment practice only addresses part of the problem. In most instances, the discriminatory practice cannot be

considered "corrected" unless and until remedial relief is provided for those victimized by the practice.

Two commenters from the contractor community objected to the proposal concerning the compounding of interest on back pay awards. One commenter suggested that compound interest provided a "windfall" to the victim. OFCCP disagrees. Compounded interest is necessary to make the victim whole. OFCCP has a longstanding policy of requiring that interest on back pay awards under the Executive Order be compounded. That policy is consistent with the policy and practice of the Department to request compounded, pre-judgment interest whenever back pay is sought in cases arising under the Fair Labor Standards Act. See e.g., *Brock v. The Claridge Hotel and Casino*, 644 F.Supp. 899, 908 (D.N.J. 1986), *aff'd*, 846 F.2d 180 (3d Cir. 1988), *cert. denied*, 488 U.S. 925 (1988); and *Brennan v. Bd. of Ed., Jersey City*, 374 F.Supp. 817, 833 (D.N.J. 1974). Moreover, as noted in the NPRM, compounding interest on awards of back pay is consistent with the case law under Title VII of Civil Rights Act of 1964 and other Federal employment discrimination laws. See e.g., *Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134, 144 (2d Cir. 1993), *cert. denied*, 510 U.S. 1164 (1994); *EEOC v. Gurnee Inn Corp.*, 914 F.2d 815, 820 (7th Cir. 1990), and *Mennen v. Easter Stores*, 951 F.Supp. 838, 863 n. 28 (N.D. Iowa 1997). The proposal would reinstate this policy to ensure that victims of discrimination obtain complete relief.

A contractor association objected to the provision in subsection (a)(1)(ix) of the proposal, which provides that violations of the Executive Order may be based upon the "alteration or falsification" of records. This commenter argued that the term "alteration" should be deleted because it implied that contractors could not alter records to correct errors without violating the Order. OFCCP, however, believes that it is clear from the context that the term "alteration" refers to changes or modifications in records which misrepresent the facts. Accordingly, the agency declines to make that modification to the proposed rule.

Further, a commenter from the contractor community objected to the provision in proposed subsection (b), which would provide that OFCCP may refer matters to the Solicitor of Labor with the recommendation for the institution of administrative enforcement proceedings "when OFCCP determines that referral for

consideration of formal enforcement (rather than settlement) is appropriate." The commenter said the provision appeared to eliminate the duty to conciliate and considered it to be a substantive change to the existing regulations. The commenter is incorrect. The proposed regulation does not change the existing regulations; OFCCP is still required to make reasonable efforts to secure compliance through conciliation. Proposed paragraph (b), however, recognizes, that some violations, such as denial of OFCCP access, are not always amenable to conciliation, and therefore, warrant OFCCP initiating immediate administrative enforcement.

Section 60-1.26 of the proposal is adopted in the final rule. However, some modifications have been made in the final regulation. Subsection (a)(1)(ii) of the proposal, which provides that violations may be based upon the results of a compliance review, has been deleted from the final regulation as redundant. The final rule specifies that violations may be based on the results of a compliance evaluation, which includes compliance reviews. In addition, the final rule adds a new subsection which states that violations may be based on a contractor's refusal to provide data for off-site review or analysis as required in the regulations. Although subsection (a)(1)(viii) of the final rule references the refusal to furnish records, OFCCP believes the amendment is necessary to clarify that violations may be based upon the contractor's refusal to furnish records requested for off-site review or analysis.

Section 60-1.27 Sanctions

The current sanction regulation provides only that the sanctions authorized by Section 209 of the Executive Order may be exercised by or with the approval of the Director of OFCCP. The NPRM would add a new paragraph specifically to address the sanction of debarment. Paragraph (b) of the proposal would provide that the contractor may be debarred, subject to reinstatement pursuant to the provisions in § 60-1.31. The proposal also would provide that debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

Several comments were received on the proposed sanction provision. The comments from the women's rights and civil rights communities supported the proposal to make the debarment sanction explicit in the regulations. Commenters from the contractor community, however, objected to the proposed sanction regulation. It appeared from a few comments that the

indefinite debarment sanction needed further explication.

The duration of an indefinite term of debarment is not indeterminable, as some commenters suggested. Under the current regulations, and the proposed reinstatement regulation as well, a contractor debarred for an indefinite term may request reinstatement at any time. Thus, as OFCCP noted in the preamble discussion concerning sanctions, a contractor debarred for an indefinite term can be reinstated immediately without incurring any economic loss.

Several commenters from the contractor community thought that fixed term debarments were too harsh a sanction. Two commenters questioned whether fixed term debarments were authorized under the Executive Order. A contractor association argued that the Secretary does not have authority to continue a debarment beyond the time the contractor demonstrates its willingness and ability to comply. A contractor, in an extensive comment on this proposal, contended that fixed term debarments were not authorized under the Order because they were punitive in nature.

Under Section 209(a)(6) of the Order, a debarred contractor remains ineligible for future Government contracts "until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order." The Executive Order does not, as the contractor association's comment suggests, require the Secretary to reinstate a contractor merely because it promises to implement revised policies. Rather, the Order states that the Secretary must be "satisfied" that the contractor will carry out the revised policies. In some cases, a contractor will have to demonstrate its commitment to changed employment policies over a period of time, before an affirmative determination can be made about the contractor's willingness and ability to comply with the Executive Order's requirements.

The debarment for a fixed period is not intended as a "punishment." The purpose of the sanction is to provide a trial period during which a contractor can demonstrate its commitment and ability to establish employment practices that will ensure continued compliance with its Executive Order obligations. OFCCP believes that the prospect of a fixed period of ineligibility for government contracts will deter contractors from engaging in violations. Contrary to the contentions of one commenter, sanctions can discourage

certain conduct without being retributive.

Other commenters from the contractor community objected to the proposal because it would authorize the Secretary to impose a fixed term debarment for "any" violation. They said that, while the Secretary had imposed the fixed term debarment in very limited circumstances in the past, paragraph (b) of the proposal was not tailored to address these limited and unusual circumstances. A few commenters recommended that we amend the proposed regulation to specify the instances that would warrant the imposition of a fixed term debarment.

It is neither practicable nor necessary precisely to define the types of violations for which it would be appropriate to impose a fixed term debarment. Where a fixed term debarment is ordered, in contrast to an indefinite term debarment, the length of the debarment period will be determined case-by-case, and will depend upon factors such as the nature and severity of the violations. The sanction regulation is adopted in the final rule as proposed.

Section 60-1.30 Notification of Agencies

Currently, the regulations require the OFCCP distribute a list of debarred contractors to all executive departments and agencies. OFCCP proposed to eliminate this requirement because the General Services Administration now publishes a listing of debarred contractors. The proposal substitutes in its place a provision requiring the Deputy Assistant Secretary ensure that the heads of agencies are notified of debarments. The proposal also renames the section "Notification of Agencies" instead of "Contract ineligibility list."

No comments were received on proposed § 60-1.30. The regulation is adopted in the final rule as proposed.

Section 60-1.31 Reinstatement of Ineligible Contractors

The current regulation provides that a contractor declared ineligible for future contracts may request reinstatement in a letter directed to the Director. The regulations state that the contractor must show that it has established and will carry out employment policies in compliance with the equal opportunity clause in any reinstatement proceedings. The NPRM would revise the current provisions regarding reinstatement to conform them to proposed § 60-1.27(b), which authorizes debarment either for an indefinite term or for a fixed term of not less than six months. Under the proposal, a

contractor debarred for an indefinite period could request reinstatement at any time. A contractor debarred for a fixed period could request reinstatement after the expiration of the fixed period. The proposal would authorize a compliance evaluation of the contractor's employment practices before a final disposition of the reinstatement request.

Commenters from the contractor community objected to the reinstatement procedures proposed for contractors debarred for a fixed term. They contended that reinstatement should occur automatically at the conclusion of the fixed term. According to these commenters, the absence of definite time frames in the reinstatement procedures outlined in the proposal would mean that the fixed term debarment could drag on indefinitely.

OFCCP submits that the reinstatement process set forth in the proposed regulation is fair to debarred contractors. The argument that reinstatement should be automatic at the end of the fixed period misses a critical point. A debarred contractor is required to demonstrate that its employment policies and practices comply with the Order, and that showing usually is made in the context of a compliance evaluation.

Nevertheless, in response to concerns that proposed § 60-1.31 would effectively extend a debarment well beyond the original fixed-term, OFCCP has modified the reinstatement process in the final rule. Under the final rule, a contractor debarred for a fixed period may file a request for reinstatement 30 days prior to the expiration of the fixed debarment period, or at any time thereafter. However, filing a reinstatement request 30 days before the end of the debarment period will not result in early reinstatement; a contractor debarred for a fixed period may be reinstated and declared eligible for future Government contracts only upon or after the fixed debarment period expires.

OFCCP intends to process reinstatement requests in a timely manner upon receipt. In many instances the compliance evaluation or other activity necessary to ensure that the contractor is in compliance and will remain in compliance may be completed during the 30-day "window" prior to the expiration of the debarment. In other instances that activity may extend beyond the 30-days, in which case the contractor will be reinstated (or notified of a decision not to reinstate) promptly upon completion of OFCCP's

examination of the contractor's compliance status.

Section 60-1.32 Intimidation and Interference

The current regulation states that sanctions and penalties may be imposed against the contractor who fails to ensure that no one intimidates, threatens, coerces or discriminates against any individual who files a complaint or otherwise participates in a compliance activity under the Executive Order or a similar Federal, state or local law. The proposal would include a similar prohibition, but would specify that the contractor itself shall not engage in such activities and shall ensure that all persons under its control do not do so, and would add that the prohibition applies to harassment. The proposed regulation would apply the prohibition to an individual's opposition to any practice that is unlawful under the Order or similar Federal, state, or local law.

The women's rights and civil rights organizations supported the proposal, and commented that the protections outlined in the proposed provisions are needed to ensure the integrity of the enforcement process. A contractor, however, was critical of the proposal. This commenter suggested that the proposed regulation be revised to clarify that the protections extended only to "persons who were known to the contractor to have participated in an investigation" or "persons who were known to the contractor to have opposed unlawful practices." The burden of proof standards applicable to disparate treatment discrimination cases are applied to retaliation cases, and thus, there must be direct or circumstantial evidence that the contractor had knowledge of the protected conduct in order to prove the violation. Accordingly, the suggested clarification is not necessary.

The provision is carried forward in the final rule as proposed.

Section 60-1.34 Violation of a Conciliation Agreement or Letter of Commitment

The current regulation sets forth the procedures that apply when a contractor violates a conciliation agreement. The proposal would add a new subsection which would provide that, in any proceedings related to an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement and shall not be required to present proof of the underlying violations resolved by the agreement.

Two comments from the contractor community objected to the proposal. A

contractor association argued that OFCCP should be required to prove the underlying violations resolved by a conciliation agreement in order to protect contractors from being coerced into signing unreasonable or impracticable agreements. Similarly, a law firm, whose clients include Government contractors, contended that contractors frequently enter into conciliation agreements in order to terminate the compliance review, and not because they have actually committed violations of the Executive Order. Thus, the law firm's argument continues, OFCCP should have the burden of proving the truth of its findings of violation, and the contractor should not be precluded from demonstrating that it did not violate the Order, in the event the contractor is unable to honor the commitments it made.

The proposal is consistent with the well-settled principle under Title VII case law that a conciliation agreement entered to resolve employment discrimination claims is specifically enforceable independent of a finding that the employer did, in fact, engage in discriminatory practices, so long as regular contract rules are satisfied and enforcement does not conflict with the purposes of Title VII. *See, e.g., EEOC v. Safeway Stores, Inc.*, 714 F.2d 567 (5th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). The courts have concluded that conciliation agreements would be rendered worthless as a means of securing voluntary compliance with Title VII, if a finding on the merits were required before any voluntary agreement to resolve discrimination claims could be enforced.

Likewise, contractors that enter into conciliation agreements to resolve findings of discrimination or other substantive violations of the Executive Order do so voluntarily and knowingly. Contractors are under no compulsion to execute conciliation agreements; they are free to reject the terms of settlement and have the matter resolved through the contested litigation. However, if a contractor voluntarily and knowingly accepts an offer to conciliate a matter, both parties, including the Government, are entitled to rely on the representations contained in the conciliation agreement. The conciliation contract binds both parties, and no useful purpose would be served here by outlining the litany of equities and inequities that would result if one or the other party were allowed to ignore its agreement and return to ground "zero."

The final rule adopts the proposed amendment to § 60-1.34 without change.

Section 60-1.42 Notices To Be Posted

This section sets forth the language that must be included in the equal opportunity notices Government contractors must post in conspicuous places. OFCCP proposed technical corrections to the wording of the poster concerning the jurisdictional coverage of Title VII and the address of the EEOC. No comments were received on this proposal. The provision is adopted in the final rule as proposed.

Section 60-1.43 Access to Records and Site of Employment

Under the current regulations, each contractor is required to permit access to its premises for the purpose of conducting on-site compliance reviews and inspecting and copying such books, records, accounts and other material as may be relevant to the matter under investigation or pertinent to compliance with the Order. The current regulations allow the information to be used only in connection with the administration and enforcement of the Executive Order and the Civil Rights Act of 1964.

The proposed amendment would add computerized records to those which the contractor must produce for inspection and copying. The proposal would continue the requirement that the contractor permit access to its premises for the purpose of conducting compliance evaluations and complaint investigations. In addition, the proposal would allow the information to be used in connection with the administration of other laws that are enforced in whole, or in part, by OFCCP.

Several commenters from the contractor community objected to the proposal regarding access to computerized records. They contended that the proposal would allow unlimited access to sensitive information in the contractors' human resource files, regardless of its relevancy to a determination of compliance with the Order. The commenters requested that OFCCP revise the proposal to clarify that access would be limited to existing files and that contractors would not be required to reprogram their computers to comply with an OFCCP request.

The proposed rule does not expand the scope of records that would be made available; contractors must give OFCCP access to data in computer files under the current regulations. Rather, the proposed regulation simply would clarify that records include those maintained in computerized form.

The concern that the provision would permit, if not encourage, unfettered access to confidential commercial proprietary data or irrelevant

information is unjustified in OFCCP's view. Under the proposed rule, as under current regulation, access is limited to records that may be relevant to the matter under investigation and pertinent to compliance with the Order. Further, the contractor is not required to reprogram its computers in order to generate data responsive to OFCCP's request; access is limited to the records and data that already exists in computerized form. Moreover, requests to take computerized records off-site for further analysis would be subject to the relevancy determinations prescribed by § 60-1.20(f) of the final rule.

The regulation is adopted in the final rule as proposed in the NPRM.

Part 60-60 Contractor Evaluation Procedures for Contractors for Supplies and Services

Part 60-60 of the current regulations concerns the conduct of compliance reviews. The NPRM proposed to delete a sizable portion of part 60-60. Most of part 60-60 properly is characterized as internal operating procedures. The NPRM explained that the agency's internal procedures are incorporated in the Federal Contract Compliance Manual (FCCM). Consequently, the regulations in which the procedures are published no longer are needed. However, those portions of part 60-60 that are regulatory in nature were proposed to be transferred to part 60-1. Thus, as previously has been discussed, § 60-1.20 of the final rule incorporates the substantive provisions in the current part 60-60 concerning submission of the AAP and support data (§ 60-60.2(a)), nationwide AAP formats (§ 60-60.3(a)(3)), off-site analysis of contractor data (§ 60-60.3(d)), and confidentiality and relevancy of information (§ 60-60.4 (a) through (d)).

One commenter from the contractor community objected to the elimination of part 60-60. This commenter argued that the entire provision should be retained and expanded to include detailed descriptions of the procedures that will be used to implement the new compliance evaluation provisions in § 60-1.20. According to this commenter, a regulatory provision devoted to evaluation procedures would ensure consistency in operations across OFCCP offices.

Other commenters from the contractor community objected to the removal of particular provisions in Part 60-60. One contractor was concerned that the elimination of § 60-60.3(c) would result in a change of the current agency practice of reviewing a contractor establishment no more frequently than once every 24 months. Section 60-60.3

currently provides that an on-site review need not be conducted where the AAP is determined to be acceptable at desk audit, an on-site review has been conducted within the preceding 24 months, and the circumstances of the previous onsite review have not substantially changed. This regulatory provision, however, is not the basis for the current practice regarding the scheduling of compliance reviews.

Detailed procedures for implementing the regulatory provisions should be treated in agency guidance, not in the regulations. OFCCP already has issued guidance on the procedures for selecting and scheduling supply and service contractors for compliance reviews. That guidance provides that contractor establishments which have been reviewed in the last two years are not to be reviewed again unless certain very specific criteria are met and the Regional Director approves the scheduling of the review (OFCCP Order No. ADM 92-1/SEL). No plans are under consideration to change current scheduling practices; contractors may continue to expect that a compliance review usually will occur no more frequently than once every two years.

Other commenters objected to the proposed elimination of § 60-60-7, which prescribes a 60-day time frame for the completion of a compliance review. Again, the time frame for completing a compliance evaluation is an appropriate subject for agency guidance, not the regulations. The Compliance Manual currently states that substantial effort will be made to complete a compliance review within 60 days, although completion within that period is not a procedural prerequisite to an enforcement action (See FCCM 2C04). Contractors should not be concerned that the elimination of the regulatory provision in § 60-60.7 will mean an end to established schedules for completing evaluations of contractor compliance. OFCCP's subregulatory guidance will continue to reference the 60-day time frames even after the final rule is effective.

The final rule deletes the provisions of part 60-60 in accordance with the proposal.

Regulatory Procedures

Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866. This rule has been determined to be significant for purposes of Executive Order 12866 and therefore has been reviewed by OMB. This rule does not meet the criteria of section 3(f)(1) of Executive Order 12866

and therefore the information enumerated in section 6(a)(3)(C) of that Order is not required.

In accordance with section 6 of Executive Order 12866, an assessment of the potential costs and benefits of this rule has been made. Although difficult to quantify, OFCCP believes that the economic impact of this rule will be positive. The compliance evaluation regulation adopted in this rule will streamline procedures for assessing contractor performance, and thereby reduce compliance costs and paperwork burdens on contractors, particularly when there are no indicators of noncompliance. In addition, the changes made by this rule to the provisions concerning preaward compliance evaluations will significantly decrease the administrative burdens and costs incurred by contracting agencies in processing requests for preaward clearance during the procurement process. Further, the compliance evaluation and preaward clearance regulations will reduce administrative costs and burdens on OFCCP, permit the agency greater flexibility in deploying its enforcement resources, and improve the agency's overall efficiency in administering the Federal contract compliance program.

As discussed below in the sections concerning the Regulatory Flexibility Act and the Paperwork Reduction Act, the record retention provisions adopted in this rule will promote efficiency in OFCCP's enforcement of the Executive Order by ensuring the availability of information needed to evaluate the compliance status of Government contractors. Further, the final rule will eliminate confusion about record retention requirements under Executive Order 11246 and ensure consistency with the record retention requirements under section 503 of the Rehabilitation Act, while imposing only a *de minimis* increase in burden on contractors. OFCCP believes the benefits provided by express record retention requirements to the agency's enforcement of the Executive Order will outweigh the minimal increase in contractor burdens. Finally, the elimination of the requirement for a written certification regarding the maintenance of non-segregated facilities will result in a reduction in contractor paperwork burdens.

In the NPRM, OFCCP stated that its goal in proposing regulatory changes is to make both contractor compliance and agency enforcement more efficient and cost effective. OFCCP invited comments on additional ways to reduce compliance burdens such as simplified compliance procedures for small

contractors. However, no comments were received in response to this request.

Regulatory Flexibility Act

All entities, regardless of size, will benefit from the repeal of the written certification regarding the maintenance of non-segregated facilities in this final rule. The record retention requirements adopted in this final rule might result in a minimal increase in the burden associated with storage of records for some small entities. However, in the agency's estimation, any increase in the corresponding storage costs would be negligible. Consequently, under the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the Secretary of Labor certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

The changes to the Executive Order regulations made by the final rule published today impact the information collection requirements currently approved by OMB under the Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*). The record retention provisions adopted in § 60-1.12 of the final rule affect the approved record retention requirements for both supply and service (OMB Control No. 1215-0072) and construction contractors (OMB Control No. 1215-0163).

The new record retention requirements contained in this final rule have been submitted to OMB for clearance under the Paperwork Reduction Act. The new record retention requirements are not effective until OFCCP displays currently valid OMB control numbers. When OMB completes its review, OFCCP will publish a notice in the **Federal Register** regarding the control numbers.

The elimination of the certification regarding non-segregated facilities does not affect OFCCP's existing information collection requirements. Although the certification imposed paperwork burdens on contractors, such certifications were exempt under the Paperwork Reduction Act of 1980.

OFCCP predicted in the NPRM that the adoption of a two-year record retention requirement for larger contractors—those with 150 or more employees and a Government contract of at 150,000—would result in only a minimal increase in burden. OFCCP asserted that the one-year record retention period prescribed for smaller contractors (those that have fewer than 150 employees or that do not have a Government contract of \$150,000) would not increase the existing burden

on these contractors because they already are subject to this obligation under Title VII. Although the obligation to retain employment records for a year would be new for the small number of Government contractors that are not subject to Title VII (*i.e.*, those with fewer than 15 employees), OFCCP opined that any increase in burden associated with filing and storing employment records would be negligible for this group.

OFCCP invited the public to comment on the accuracy of the agency's estimates regarding the burdens posed by the proposed revisions to the information collection requirements, and to suggest ways of minimizing the burden and enhancing the quality and utility of the information collected. Two commenters—a consultant to Government contractors and a contractor association which represents small agricultural firms—responded to this request for comments. Several commenters from the contractor community, however, expressed opinions about the burdens associated with the record retention requirements in their comments on the regulatory provision.

Both the consultant and the contractor association contended that the proposed regulations would cause an overall increase in paperwork. According to the consultant, the two-year record retention period would be particularly burdensome for larger employers that routinely receive thousands of pages of applicant materials over the course of the year. The consultant asserted that retention of these materials for an additional year would require substantial time and effort from personnel and material handling staffs, and significant amounts of storage space as well. Comments received from two contractor associations in response to proposed § 60–1.12 expressed similar opinions about the increased storage burden for larger contractors. The contractor association contended that the proposed regulatory revisions would generate substantially more paperwork for the small agricultural companies it represents.

OFCCP recognizes that the volume of records subject to the retention requirement and the storage burdens will vary among contractors. However, OFCCP still maintains that, on average, the increase in burdens associated with the two-year retention period will be minimal.

OFCCP stated in the NPRM that the elimination of the written certification regarding non-segregated facilities would reduce compliance burdens by roughly 850,000 hours. Accordingly to the consultant, the time and expense

involved in preparing certifications have been reduced significantly by technological advances in personnel and purchasing offices, and as a result, elimination of the certification would save at most one-half of the hours that OFCCP had estimated. Even if the consultant is correct and certifications do not involve the amount of time the agency's estimate assumes, OFCCP believes the elimination of the requirement will yield a significant reduction in contractor burdens.

Unfunded Mandates Reform Act

This final rule does not include any Federal mandate that may result in the expenditures by state, local and tribal governments in the aggregate, or by the private sector, of \$100,000,000 or more in any one year.

List of Subjects

41 CFR Part 60–1

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

41 CFR Part 60–60

Equal employment opportunity, Government procurement, Reporting and recordkeeping requirements.

Signed at Washington, DC, this 12th day of August 1997.

Alexis M. Herman,
Secretary of Labor.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, Part 60–1 of the rule amending 41 CFR Chapter 60 published on December 30, 1980 (45 FR 86216), which was delayed indefinitely at 46 FR 42865, and under the authority of Executive Order 11246, as amended, Title 41 of the Code of Federal Regulations, Chapter 60, is amended as follows:

PART 60–1—[AMENDED]

1. The authority citation for Part 60–1 is revised to read as follows:

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

2. Section 60–1.3 is amended by removing the definition of *Director*, by revising the definitions of *Contract*, *Government contract*, *Subcontract* and *United States*, and by adding, in alphabetical order, the definitions of

Compliance evaluation and *Deputy Assistant Secretary* to read as follows:

§ 60–1.3 Definitions.

* * * * *

Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the requirements of Executive Order 11246.

* * * * *

Contract means any Government contract or subcontract or any federally assisted construction contract or subcontract.

* * * * *

Deputy Assistant Secretary means the Deputy Assistant Secretary for Federal Contract Compliance, United States Department of Labor, or his or her designee.

* * * * *

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term "personal property," as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term "nonpersonal services" as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federally assisted construction contracts.

* * * * *

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one of more contracts is performed, undertaken or assumed.

* * * * *

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of

the Northern Mariana Islands, and Wake Island.

3. Section 60-1.8 is revised to read as follows:

§ 60-1.8 Segregated facilities.

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities," as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; *Provided*, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

4. A new § 60-1.12 is added to Subpart A to read as follows:

§ 60-1.12 Record retention.

(a) *General requirements.* Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, and other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes. In the case of involuntary termination of an

employee, the personnel records of the individual terminated shall be kept for a period of not less than two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of not less than one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or enforcement action until final disposition of the complaint, compliance evaluation or enforcement action. The term "personnel records relevant to the complaint," for example, would include personnel or employment records relating to the complainant and to all other employees holding positions similar to that held or sought by the complainant and application forms or test papers submitted by unsuccessful applicants and by all other candidates for the same position as that for which the complainant unsuccessfully applied. Where a compliance evaluation has been initiated, all personnel and employment records described above are relevant until OFCCP makes a final disposition of the evaluation.

(b) *Affirmative action programs.* A contractor establishment required under § 60-1.40 to develop a written affirmative action program (AAP) shall maintain its current AAP and documentation of good faith effort, and shall preserve its AAP and documentation of good faith effort for the immediately preceding AAP year, unless it was not then covered by the written AAP requirement.

(c) *Failure to preserve records.* Failure to preserve complete and accurate records as required by paragraphs (a) and (b) of this section constitutes noncompliance with the contractor's obligations under the Executive Order and this Part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor; *Provided*, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from the circumstances that are outside of the contractor's control.

(d) *Effective date.* The requirements of this section shall apply only to records

made or kept on or after September 18, 1997.

5. In § 60-1.20, the section heading and paragraphs (a) and (d) are revised and paragraphs (e), (f) and (g) are added to read as follows:

§ 60-1.20 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) *Compliance review.* A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the AAP meets agency standards of reasonableness, and whether the AAP and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices, except in the case of preaward reviews. In a preaward review, the desk audit normally is conducted at the contractor's establishment.

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.

(2) *Off-site review of records.* An analysis and evaluation of the AAP (or any part thereof) and supporting

documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) *Compliance check.* A visit to the establishment to ascertain whether data and other information previously submitted by the contractor are complete and accurate; whether the contractor has maintained records consistent with § 60-1.12; and/or whether the contractor has developed an AAP consistent with § 60-1.40; or

(4) *Focused review.* An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

* * * * *

(d) *Preaward compliance evaluations.* Each agency shall include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more shall be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with the Order within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice OFCCP will inform the awarding agency of its intention to conduct a preaward compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward compliance evaluation, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.

(e) *Submission of Documents; Standard Affirmative Action Formats.* Each prime contractor or subcontractor with 50 or more employees and a contract of \$50,000 or more is required to develop a written affirmative action

program for each of its establishments (§ 60-1.40). If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in § 60-1.26(b) shall be applicable. Contractors may reach agreement with OFCCP on nationwide AAP formats or on frequency of updating statistics.

(f) *Confidentiality and relevancy of information.* If the contractor is concerned with the confidentiality of such information as lists of employee names, reasons for termination, or pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for purposes of the compliance evaluation. The contractor must provide full access to all relevant data on-site as required by § 60-1.43. Where necessary, the compliance officer may take information made available during the on-site evaluation off-site for further analysis. An off-site analysis should be conducted where issues have arisen concerning deficiencies or an apparent violation which, in the judgment of the compliance officer, should be more thoroughly analyzed off-site before a determination of compliance is made. The contractor must provide all data determined by the compliance officer to be necessary for off-site analysis. Such data may only be coded if the contractor makes the key to the code available to the compliance officer. If the contractor believes that particular information which is to be taken off-site is not relevant to compliance with the Executive Order, the contractor may request a ruling by the OFCCP District/Area Director. The OFCCP District/Area Director shall issue a ruling within 10 days. The contractor may appeal that ruling to the OFCCP Regional Director within 10 days. The Regional Director shall issue a final ruling within 10 days. Pending a final ruling, the information in question must be made available to the compliance officer off-site, but shall be considered a part of the investigatory file and subject to the provisions of paragraph (g) of this section. The agency shall take all necessary precautions to safeguard the confidentiality of such information until a final determination is made. Such information may not be copied by OFCCP and access to the information shall be limited to the compliance officer and personnel involved in the determination of relevancy. Data determined to be not relevant to the

investigation will be returned to the contractor immediately.

(g) *Public access to information.* The disclosure of information obtained from a contractor will be evaluated pursuant to the public inspection and copying provisions of the Freedom of Information Act, 5 U.S.C. 552, and the Department of Labor's implementing regulations at 29 CFR Part 70.

6. Section 60-1.26 is revised to read as follows:

§ 60-1.26 Enforcement proceedings.

(a) *General.* (1) Violations of the Order, the equal opportunity clause, the regulations in this chapter, or applicable construction industry equal employment opportunity requirements, may result in the institution of administrative or judicial enforcement proceedings. Violations may be found based upon, *inter alia*, any of the following:

- (i) The results of a complaint investigation;
 - (ii) The results of a compliance evaluation;
 - (iii) Analysis of an affirmative action program;
 - (iv) The results of an on-site review of the contractor's compliance with the Order and its implementing regulations;
 - (v) A contractor's refusal to submit an affirmative action program;
 - (vi) A contractor's refusal to allow an on-site compliance evaluation to be conducted;
 - (vii) A contractor's refusal to provide data for off-site review or analysis as required by the regulations in this Chapter;
 - (viii) A contractor's refusal to establish, maintain and supply records or other information as required by the regulations in this chapter or applicable construction industry requirements;
 - (ix) A contractor's alteration or falsification of records and information required to be maintained by the regulations in this chapter; or
 - (x) Any substantial or material violation or the threat of a substantial or material violation of the contractual provisions of the Order, or of the rules or regulations in this chapter.
- (2) OFCCP may seek back pay and other make whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the under-payment of taxes.
- (b) *Administrative enforcement.* (1) OFCCP may refer matters to the

Solicitor of Labor with a recommendation for the institution of administrative enforcement proceedings, which may be brought to enjoin violations, to seek appropriate relief, and to impose appropriate sanctions. The referral may be made when violations have not been corrected in accordance with the conciliation procedures in this chapter, or when OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate. However, if a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review, and if conciliation efforts under this chapter are unsuccessful, OFCCP may immediately refer the matter to the Solicitor, notwithstanding other requirements of this chapter.

(2) Administrative enforcement proceedings shall be conducted under the control and supervision of the Solicitor of Labor and under the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity under Executive Order 11246 contained in part 60-30 of this chapter and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: *Provided*, That a Final Administrative Order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any), whichever is later.

(c) *Referrals to the Department of Justice.* (1) The Deputy Assistant Secretary may refer matters to the Department of Justice with a recommendation for the institution of judicial enforcement proceedings. There are no procedural prerequisites to a referral to the Department of Justice. Such referrals may be accomplished without proceeding through the conciliation procedures in this Chapter, and a referral may be made at any stage in the procedures under this Chapter.

(2) Whenever a matter has been referred to the Department of Justice for consideration of judicial enforcement, the Attorney General may bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction (including relief against noncontractors, including labor unions, who seek to thwart the

implementation of the Order and regulations), and an order for such additional sanctions or relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order, or any of the above in this paragraph (c)(2).

(3) The Attorney General is authorized to conduct such investigation of the facts as he/she deems necessary or appropriate to carry out his/her responsibilities under the regulations in this Chapter.

(4) Prior to the institution of any judicial proceedings, the Attorney General, on behalf of the Deputy Assistant Secretary, is authorized to make reasonable efforts to secure compliance with the contract provisions of the Order. The Attorney General may do so by providing the contractor and any other respondent with reasonable notice of his/her findings, his/her intent to file suit, and the actions he/she believes necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation, in an effort to obtain such compliance without contested litigation.

(5) As used in the regulations in this Part, the Attorney General shall mean the Attorney General, the Assistant Attorney General for Civil Rights, or any other person authorized by regulations or practice to act for the Attorney General with respect to the enforcement of equal employment opportunity laws, orders and regulations generally, or in a particular matter or case.

(6) The Deputy Assistant Secretary or his/her designee, and representatives of the Attorney General may consult from time to time to determine what investigations should be conducted to determine whether contractors or groups of contractors or other persons may be engaged in patterns or practices in violation of the Executive Order or these regulations, or of resistance to or interference with the full enjoyment of any of the rights secured by them, warranting judicial proceedings.

(d) *Initiation of lawsuits by the Attorney General without referral from the Deputy Assistant Secretary.* In addition to initiating lawsuits upon referral under this section, the Attorney General may, subject to approval by the Deputy Assistant Secretary, initiate independent investigations of contractors which he/she has reason to believe may be in violation of the Order or the rules and regulations issued pursuant thereto. If, upon completion of such an investigation, the Attorney General determines that the contractor

has in fact violated the Order or the rules and regulations issued thereunder, he/she shall make reasonable efforts to secure compliance with the contract provisions of the Order. He/she may do so by providing the contractor and any other respondent with reasonable notice of the Department of Justice's findings, its intent to file suit, and the actions that the Attorney General believes are necessary to obtain compliance with the contract provisions of the Order without contested litigation, and by offering the contractor and any other respondent a reasonable opportunity for conference and conciliation in an effort to obtain such compliance without contested litigation. If these efforts are unsuccessful, the Attorney General may, upon approval by the Deputy Assistant Secretary, bring a civil action in the appropriate district court of the United States requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional sanctions or equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by the Order or any of the above in this paragraph (d).

(e) To the extent applicable, this section and part 60-30 of this chapter shall govern proceedings resulting from any Deputy Assistant Secretary's determinations under § 60-2.2(b) of this chapter.

7. Section 60-1.27 is revised to read as follows:

§ 60-1.27 Sanctions.

(a) *General.* The sanctions described in subsections (1), (5), and (6) of section 209(a) of the Order may be exercised only by or with the approval of the Deputy Assistant Secretary. Referral of any matter arising under the Order to the Department of Justice or to the Equal Employment Opportunity Commission shall be made by the Deputy Assistant Secretary.

(b) *Debarment.* A contractor may be debarred from receiving future contracts or modifications or extensions of existing contracts, subject to reinstatement pursuant to § 60-1.31, for any violation of Executive Order 11246 or the implementing rules, regulations and orders of the Secretary of Labor. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

8. Section 60-1.30 is revised to read as follows:

§ 60-1.30 Notification of agencies.

The Deputy Assistant Secretary shall ensure that the heads of all agencies are

notified of any debarment taken against any contractor.

9. Section 60-1.31 is revised to read as follows:

§ 60-1.31 Reinstatement of ineligible contractors.

A contractor debarred from further contracts for an indefinite period under the Order may request reinstatement in a letter filed with the Deputy Assistant Secretary at any time after the effective date of the debarment. A contractor debarred for a fixed period may request reinstatement in a letter filed with the Deputy Assistant Secretary 30 days prior to the expiration of the fixed debarment period, or at any time thereafter. The filing of a reinstatement request 30 days before a fixed debarment period ends will not result in early reinstatement. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Order and implementing regulations. Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Deputy Assistant Secretary shall issue a written decision on the request.

10. Section 60-1.32 is revised to read as follows:

§ 60-1.32 Intimidation and interference.

(a) The contractor, subcontractor or applicant shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
- (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Order or any other Federal, state or local law requiring equal opportunity;
- (3) Opposing any act or practice made unlawful by the Order or any other Federal, state or local law requiring equal opportunity; or
- (4) Exercising any other right protected by the Order.

(b) The contractor, subcontractor or applicant shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by OFCCP against any contractor, subcontractor or applicant who violates this obligation.

11. In § 60-1.34, paragraph (a)(4) is added to read as follows:

§ 60-1.34 Violation of a conciliation agreement or letter of commitment.

(a) * * *

(4) In any proceeding involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

* * * * *

12. Section 60-1.42 is amended by revising paragraph (a) to read as follows:

§ 60-1.42 Notices to be posted.

(a) Unless alternative notices are prescribed by the Deputy Assistant Secretary, the notices which contractors are required to post by paragraphs (1) and (3) of the equal opportunity clause in § 60-1.4 will contain the following language and be provided by the contracting or administering agencies:

Equal Employment Opportunity is the Law—Discrimination is Prohibited by the Civil Rights Act of 1964 and by Executive Order No. 11246

Title VII of the Civil Rights Act of 1964—
Administered by:

The Equal Employment Opportunity Commission

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by Employers with 15 or more employees, by Labor Organizations, by Employment Agencies, and by Apprenticeship or Training Programs

Any person

Who believes he or she has been discriminated against

Should Contact

The Equal Employment Opportunity Commission

1801 L Street NW., Washington, DC 20507, Executive Order No. 11246—*Administered by:*

The Office of Federal Contract Compliance Programs

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

Any person

Who believes he or she has been discriminated against

Should Contact

The Office of Federal Contract Compliance Programs

U.S. Department of Labor, Washington, DC 20210

* * * * *

13. Section 60-1.43 is revised to read as follows:

§ 60-1.43 Access to records and site of employment.

Each contractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance evaluations and complaint investigations. Each contractor shall permit the inspecting and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary. Information obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP.

PART 60-60—[REMOVED]

14. Part 60-60 is removed.

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