

RECENT DEVELOPMENTS IN OFCCP COMPLIANCE

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I. INTRODUCTION

Over the past year, the Office of Federal Contract Compliance Programs (“OFCCP”) has completed or announced a series of major regulatory initiatives. Just three weeks ago, on October 7, 2005, OFCCP published a final rule adding a new “Internet Applicant” definition to the compliance landscape. In November 2004, it proposed standards for investigating systemic compensation discrimination and guidelines on conducting self audits of compensation practices. DOL leadership has indicated its commitment to this project and we expect to see final compensation standards and guidelines in the near future. Looking to the future, OFCCP officials have announced plans to introduce “Corporate Scorecards” that grade contractors on their overall compliance status at an organizational level.

For OFCCP junkies (like some Morgan Lewis attorneys who will go unnamed) these are heady times. For contractors who have to comply with these new regulatory initiatives, this may appear to be the “perfect storm.” In the materials that follow, we provide some practical guidance on how to navigate this swirling vortex of new regulations so that you can come out with your hair intact.

An area in which the trend is the opposite – the “perfect storm” is caused by the contractor but OFCCP actually provides some relief – is that of mergers and acquisitions. OFCCP has recently exhibited a willingness to be quite reasonable in helping contractors mitigate compliance burdens during exigent circumstances, such as a major corporate restructuring. We outline some of the options that contractors may explore when trying to comply with OFCCP requirements during major corporate transactions.

II. OFCCP’S NEW “INTERNET APPLICANT” DEFINITION

A. **Summary of the New Regulations**

1. The Applicable Definition Depends on the Recruiting Process for Each Position

The definition of “Internet Applicant” applies to both Internet expressions of interest, and traditional paper expressions of interest, so long as the contractor considers both types as expressions of interest for a particular position. If the contractor considers only paper expressions of interest for a position, then the Internet Applicant definition does not apply. Only one definition applies for each position – either the “Internet Applicant” definition or the prior “Applicant” definition.

2. The Four-Part Definition of “Internet Applicant”:

The new definition of Internet Applicant involves four parts, and the OFCCP has offered additional guidance to contractors to explain the intent behind parts (2), (3) and (4) of the definition:

An individual is an Internet Applicant if:

- (1) He or she submits an expression of interest in employment;**
- (2) The contractor considers the individual for employment in a particular position;**

The contractor can implement a protocol under which it does not consider expressions of interest that are not submitted in accordance with standard procedures the employer establishes. Individuals who submit such expressions of interest do not qualify as Internet Applicants so long as the contractor does not actually consider the expression of interest and does not consider other expressions of interest in the same form by other similarly situated individuals. A contractor considers an expression of interest by reviewing the content of the expression of interest.

Contractors can use random sampling or absolute numerical limits to control the number of expressions of interest to be considered, “provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.”

- (3) The expression of interest indicates that the individual possesses the “basic qualifications of the position”; and**

“Basic qualifications” means qualifications that are either “advertised” or “established.”

Advertised: telling potential applicants that they must possess the qualification in order to be considered for the position.

Established: making a record of the qualifications before considering any expression of interest for that particular position.

The qualifications must be objective, noncomparative, and “relevant to performance of the particular position, and [must] enable the contractor to accomplish business-related goals.”

Tests are not basic qualifications.

(4) At no point in the selection process prior to receiving an offer of employment has the individual removed himself or herself from consideration or otherwise indicated that he or she is no longer interested in the position.

Contractors can use random sampling or absolute numerical limits to control the number of potential applicants to be contacted to determine whether the individuals remain interested in the particular position, “provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.”

Contractors can rely on information contained in the expression of interest, such as salary requirements or preferences as to type or location of work, to determine whether the individuals remain interested in a particular position, as long as the contractor has “a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.”

3. Recordkeeping

Contractors must retain:

- All expressions of interest in a particular position received through the Internet or related electronic data technologies;
- For internal resume databases: a record of each resume added to the database, the date each record was added, the position for which each search of the database was made, and for each search, the search criteria and the date of the search; and
- For external resume databases: a record of the position for which each search was made, the date of each search, the search criteria, and all resumes of individuals who met the basic qualifications of the position.

4. Adverse Impact Analysis

OFCCP will require adverse impact analysis only of hiring procedures relating to Internet Applicants. Contractors will not be required to conduct adverse impact analyses on basic qualifications searches. However, OFCCP may assess the impact of basic qualifications searches by comparing the percentage of women and minorities who meet the basic qualifications with percentages obtained from “appropriate Census and other labor market data.”

B. Practical Implications for Contractors

Under the new regulations, contractors using external databases, like Monster.com, need only obtain race and gender information on individuals who meet the “basic qualifications” of the position. When a large number of individuals meet the basic qualifications, contractors can limit their burden through “data management” techniques such as random sampling or establishing absolute numerical limits. Lastly, contractors can determine that some individuals who meet the basic qualifications would not be interested in the position because of stated preferences as to location, type of work and/or salary requirements.

As with external resume databases, contractors can take advantage of the reduced recordkeeping obligations by using internal resume databases as a means of organizing expressions of interest. Internal databases can be populated with expressions of interest that arrive through a variety of sources, including searches of external databases, on-line profiles, emailed submissions, and paper submissions that are scanned into the internal database. Under the new regulations, the definitions of “basic qualifications” and “data management,” and most other provisions applicable to external databases, afford contractors an opportunity to reduce recordkeeping burdens in the context of internal resume databases as well.

Although the new applicant regulations offer contractors the opportunity to reduce recordkeeping burdens in comparison to the enforcement policies OFCCP has adopted in the past, this flexibility carries with it some additional responsibilities. For example, under the new regulations, contractors that choose to rely on basic qualifications and data management techniques will face several new responsibilities:

- o **New Administrative Burdens:** If the contractor advertises for the position (which includes announcing position openings through the contractor’s website), it must include the basic qualifications for the position in the advertisement.

How basic is “basic”? In the preamble to the new regulations, OFCCP explains that “[t]he term ‘basic’ is not intended to provide any substantive limit on the type or range of qualifications that could meet this definition.” Thus, the term “basic” was not meant to enlarge the pool of candidates by understating the qualifications necessary to fill the position for which the employer seeks candidates. If the job qualifications are complicated and sophisticated, list them “up front.” Do not add them later in the process.

It is acceptable to describe a position “generally” in an initial announcement, like a confined print ad, and refer the candidate to a website link where the candidate will find a more complete and thorough description of the basic qualifications.

- o **New Recordkeeping Burdens:** If the contractor does not advertise for the position, it must document the basic qualifications for the position before it reviews any resume or uses the qualifications as criteria for searching an internal or external resume database.

For example, if the contractor has an internal database that it wishes to query, and does not wish to advertise or “readvertise” for a position for which it suspects it has qualified candidates, the job description or requisition form for the position must be prepared in advance of the query, not after the employer has seen the resume of the candidate it wishes to hire.

Other recordkeeping burdens include the obligation to retain each successively narrower word search the contractor uses to refine the initial query results, and the results of the query. If the first word search query identifies 200 candidates, and a modified query identifies 50 candidates, the contractor must retain the keyword search for the 200, the results of the first query, the keyword search for the 50, and the results of the second query.

- o **New Liability Exposure:** Contractors will have to establish that the basic qualifications are job related and consistent with business necessity if the qualifications have an adverse impact on women or minorities. Contractors do not have to conduct adverse impact analyses of basic qualifications, but OFCCP will use labor force and Census data to determine whether basic qualifications have an adverse impact on women or minorities.

Contractors that solicit race and gender at the point of entry onto an Internet site, and not after having determined that the candidate met all four components of the definition, are required to retain that initial solicitation of race and gender information. OFCCP can ask for it in an audit. If statistically significant proportions of women and minorities are being eliminated through the use of “basic qualifications,” the employer may be called upon to justify its use of the criteria.

- o **New Technical Requirements:** Contractors must record the specific absolute numerical limits (e.g., reviewing the first 50 applications based on some neutral ordering, such as alphabetically or by submission date) prior to implementing them for a particular position and/or ensure that any random sample drawn is “appropriate in terms of the pool of those submitting expressions of interest,” which means that the random sample is drawn from the entire pool and is of sufficient size to constitute a representative sample.
- o **New Process Requirements:** If the contractor relies on information in the expression of interest (such as salary requirements or preferences as to type or location of work) to determine if the potential applicant remains interested in

the particular position for which he or she meets the basic qualifications, then the contractor must establish a “uniformly and consistently applied policy or procedure of not [further] considering similarly situated job seekers” for the particular position. Likewise, the contractor must adopt a uniform procedure for determining whether candidates will be considered for a type of position, and that procedure must treat candidates the same if they are “similarly situated” with respect to the manner in which they submitted an expression of interest.

These new responsibilities may present challenges for some current recruiting practices.

- o **Obtaining Potential Applicants From a Variety of Different Sources**

Many employers use recruiting systems that obtain potential applicants from a variety of internal and external sources, but these employers have no standard procedure for determining which sources will be used for which types of positions and no procedures for tracking which potential applicants obtained from particular sources constituted the pool for any particular position.

For example, a contractor may search an external database using qualifications that might be necessary for several types of positions. The collected resumes are downloaded into an internal resume database, perhaps with some designation for each type of position. In addition to those resumes, the contractor may accept submissions on its website, which are then added to the internal resume database with similar designations. However, the contractor may decide to load all emailed or faxed resumes into the internal database as well, but with no designations as to the types of positions.

When a particular position opens, the contractor’s recruiter runs a variety of searches on different segments of the database to obtain candidates for the position. Under the new applicant regulations, the contractor may limit the potential applicants it considers (in this example, by having designated subsets within its internal resume database), but it must do so through a uniformly and consistently applied policy that treats all potential candidates for the position the same, if they are “similarly situated” with regard to the manner in which the contractor obtained their resumes. In addition, the contractor must be able to identify the actual pool of potential applicants from which the contractor identified the potential applicants who met the basic qualifications for the particular position. This will require many contractors to implement standard protocols for determining sources of potential applicants for each position, as well as protocols for tracking the potential applicants who constitute the pool for assessing basic qualifications.

- o **Using “Recruiter’s Intelligence” to Determine Which Candidates Should Be Sent On for Further Consideration:**

Many employers rely on internal recruiters to “mine” a variety of internal and external sources to determine which candidates should be referred to hiring officials for further consideration for a particular position. Under the new regulations, the basic qualifications must be assessed on a noncomparative basis, which means that a contractor cannot determine basic qualifications by comparing the relative qualifications of potential applicants. But these comparative judgments are precisely what makes “recruiter’s intelligence” so valuable to the contractor’s recruiting and hiring process.

o **Obtaining Race and Gender Information from Potential Applicants When They Complete On-Line Profiles on the Contractor’s Website.**

Many contractors invite potential applicants to complete on-line profiles on the contractor’s website. Contractors often find that these on-line profiles offer a convenient opportunity to solicit race and gender information. All of the profiles are then assembled into an internal database and a contractor’s recruiters run searches on the database or pertinent segments of the database to identify potential applicants for a particular open position. Under the new regulations, the contractor would be permitted to solicit race and gender information *only* from individuals who qualify as Internet Applicants for the particular position. If, for convenience, the contractor solicits the information from anyone who completes the on-line profile, it should use the potential applicants’ race and gender information in conducting impact analyses of basic qualifications. While not required to conduct the analyses, the contractor risks unknown exposure if it does not conduct them and it has collected race and gender information. OFCCP will certainly ask for this data and run these analyses during a compliance review. In addition, many contractors also consider unsolicited emails or paper expressions of interest, which are loaded into an internal resume database. These contractors typically choose to solicit race and gender information only from Internet Applicants drawn from searches of the internal database. But because these contractors have obtained race and gender information at different times based on the submission of the expressions of interest (i.e., solicited from all individuals who completed on-line profiles, but only solicited from those individuals who emailed, faxed or mailed their resumes if they met the basic qualifications of the job), the records available to OFCCP during a compliance review may present a misleading picture of the impact of the contractor’s recruiting and hiring processes.

C. What Should Contractors Do?

Contractors have until February 6, 2006 to consider their options. This is not a lot of time, especially if changes need to be made in data systems or software. Therefore, contractors will do well to immediately conduct a systematic assessment of their current recruiting practices against the new regulations, identify areas where their current practices might be problematic under the new regulations, and explore options for addressing those areas. In determining how

to comply with these new regulations, contractors must evaluate the responsibilities accompanying the new flexibility the regulations afford, as well as the exposure risks of different compliance options under the new regulations. Following is a preliminary checklist of items to consider:

1. Identify the Positions for Which the Contractor Does Not Consider Individuals Who Submit An Expression of Interest Through the Internet or Related Electronic Data Technologies.

Under the new regulations, there are two different recordkeeping standards, depending on whether the contractor considers expressions of interest from the Internet or related electronic data technologies as part of the recruiting process for the position. If the contractor does not consider expressions of interest through the Internet or related electronic data technologies for a position, the “old” definition of applicant applies to the position. To avoid having to comply with two different applicant definitions, a contractor should identify those positions for which it does not consider expressions of interest through the Internet or related electronic data technologies and should revise its recruiting procedures for such positions to take advantage of the new regulations.

2. Map Out a Recruiting Process That Meets the Contractor’s Operational Needs. If This Varies by Position, List the Processes that Are Suitable for Each Position.

Contractors will benefit from outlining the steps in their current recruiting and hiring processes. This may point out discrepancies in the processes and variations in procedures that are used for similar positions. Contractors should also determine whether the current recruiting practices are efficient and effective from an operational perspective. If changes must be made in response to the new regulations, it may be an opportune time to explore changes that would improve the processes.

3. Identify the Points in the Recruiting Processes Where Contractors Have Recordkeeping or Data Analysis Obligations Under the New Regulations.

Contractors should compare their current recruiting practices with the requirements of the new regulations. They should identify the point in the current processes where individuals will qualify as Internet Applicants under the new regulations. Contractors should also assess the extent to which their current practices treat otherwise similarly situated expressions of interest differently. As noted above, the new regulations require that contractors have uniformly and consistently applied policies or procedures for treating similarly situated expressions of interest alike, as a condition of taking advantage of reduced recordkeeping obligations. Finally, contractors should identify steps in the recruiting and hiring processes

where the contractors may benefit from data management techniques to reduce the effort required to process large numbers of expressions of interest.

4. Consider Options for Meeting Operational Objectives While Complying with the New Regulations.

Contractors should identify options for complying with the new regulations in a way that still accomplishes operational objectives. Contractors should explore the pros and cons of each option. This should include an assessment of how the option will position the contractor during an OFCCP compliance review. In making these assessments, contractors should keep in mind that “OFCCP uses applicant data broadly to deter all contractors under its jurisdiction from engaging in systemic hiring discrimination, either in the form of disparate impact or disparate treatment discrimination.” 70 Fed. Reg. 58955 (Oct. 7, 2005). Therefore, contractors should carefully consider compliance options in the context of how OFCCP will evaluate the data during a compliance review. Contractors may benefit from consultation with counsel on these issues.

5. Review the Appropriateness of Availability Calculations in AAPs.

Under the new regulations, OFCCP will look at Census and labor force statistics to assess whether basic qualifications have an adverse impact on female and minority job seekers. It is likely that OFCCP investigators will rely on a contractor’s own availability statistics to make initial assessments about whether basic qualifications have an adverse impact. Accordingly, contractors should review the availability estimates in their AAPs and ensure that they are accurate.

D. Should Contractors Worry About Coordination Between OFCCP and EEOC Obligations?

Probably not, for three reasons:

1. The Equal Employment Opportunity Commission (“EEOC”) has already acknowledged formally that the current rules are unclear about applicant recordkeeping obligations in the context of the Internet and related electronic data technologies. *See* 43 Fed. Reg. 10153 (Mar. 4, 2004) (“The advent of the Internet and related technology raises questions about how to monitor employment practices when employers and job seekers use online resources UGESP provides for the maintenance of records or other information on ‘applicants.’ A 1979 guidance in Question and Answer format, issued by the EEOC, DOL and sister UGESP agencies, provides a general definition of ‘applicant.’ The document focuses on interpreting the definition of ‘applicant’ in

the context of the Internet and related electronic data processing technology. With this interpretation, the UGESP agencies are providing guidance about when employers should identify the race, gender, and ethnicity of their applicant pool when they use the Internet and related technologies.”).

2. Because of the admitted lack of clarity about applicant recordkeeping obligations in the context of Internet recruiting, it is unclear whether the EEOC has legal authority to pursue an enforcement action against an employer that did not conform to a standard that the EEOC has not yet announced. An Agency generally must provide public notice of an obligation before it may seek enforcement against an entity for failing to meet the obligation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 471-72 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress. . . . [A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”); *cf. Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (“Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”). Title VII does not contain an express conveyance of power authorizing the EEOC to promulgate retroactive rules. *See* 42 U.S.C. § 2000e-8 (2005). Indeed, Title VII appears to mandate prospective recordkeeping requirements by obligating the EEOC to conduct a public hearing before adopting such requirements, and the law expresses a congressional intent that EEOC recordkeeping requirements be consistent with requirements imposed by other federal agencies. *See* 42 U.S.C. §§ 2000e-8(c) & (d) (2005).
3. As a practical matter, we doubt that the EEOC would pursue enforcement actions. The EEOC has not historically pursued enforcement of the Uniform Guidelines on Employee Selection Procedures (“UGESP”) applicant recordkeeping obligations, and we are not aware of any agency intention to change that historical practice. An employer that complied only with the OFCCP regulation is unlikely to be a target in light of the pending proposed Additional Questions and Answers and the fact that the Department of Labor (“DOL”) – which is a party to UGESP – has formally stated (apparently with the Office of Management and Budget’s approval) that OFCCP’s new applicant definition is consistent with the Proposed Additional Questions and Answers. *See* 70 Fed. Reg. 58, 947 (Oct. 7, 2005). It is noteworthy that

OFCCP has committed itself in the new regulations to interpreting its own UGESP regulations (41 C.F.R. Part 60-3) in a way that avoids inconsistent recordkeeping and data analysis requirements. In particular, the new regulation adds a new section 41 C.F.R. 60-1.12(d), which provides that “[w]hen evaluating whether a contractor has maintained information on impact and conducted an adverse impact analysis under part 60-3 with respect to Internet hiring procedures, OFCCP will require only those records relating to the analyses of the impact of employee selection procedures on Internet Applicants, as defined in 41 CFR 60-1.3, and those records relating to the impact of employment tests that were used as employee selection procedures.” 70 Fed. Reg. 58, 963 (Oct. 7, 2005).

III. OFCCP COMPENSATION ANALYSIS

A. Current Status of the Proposed Compensation Discrimination Standards:

We have received indications that DOL leadership is committed to publishing final compensation standards and guidelines in the coming months. We would be surprised if the final standards did not substantially adopt the approach for determining systemic compensation discrimination that was outlined in the proposed standards. The proposed standards based that approach on court interpretations of Title VII and we doubt that DOL will depart from its historical practice of relying on Title VII authority when interpreting the nondiscrimination obligations of Executive Order 11246.

However, contractors’ groups have argued that OFCCP should publish standards on how investigators will assess compensation practices during the preliminary stages of the compliance review. Contractors’ groups also requested that OFCCP defer to analysis that the contractor submits at these preliminary stages. It appears likely that OFCCP may somehow respond to these requests in the final standards, although it is doubtful that the agency will agree to altogether defer to contractors’ analyses. However, OFCCP has attempted to establish a framework for deferring to contractors’ analyses through its self-audit guidelines.

B. Summary of the Proposed Systemic Compensation Discrimination Standards

On November 16, 2004, the OFCCP published standards defining systemic compensation discrimination under Executive Order 11246. These proposed standards set forth the methodology the OFCCP will use to study and evaluate employer pay statistics during its compliance reviews.

The new OFCCP methodology to evaluate systemic compensation discrimination abandoned the DuBray method in favor of a multiple regression analysis approach. Under this new approach, OFCCP will issue a Notice of Violations alleging systemic discrimination only where (1) there exists statistically

significant disparities at two or more standard deviations and (2) there is anecdotal evidence of pay discrimination.

In general, the proposed standards contemplate that OFCCP will investigate contractors' compensation practices through a three-step process:

1. OFCCP will conduct a desk audit analysis of compensation data the contractor submits in response to Item 11 of the scheduling letter. There are indications that OFCCP may standardize the analytical approach it uses for its initial analyses of compensation data and adopt thresholds for determining if the analyses warrant further investigation. Those standards have not been publicly released in any directive or OFCCP announcement, but some district offices are already using them.

The standard analytical approach that OFCCP may formally adopt involves a three-part test of compensation averages. Under this approach, OFCCP compares the average compensation of women and men and the average compensation of minorities and nonminorities in large groups based on data submitted at the desk audit stage. These groupings could be based on EEO-1 categories, job groups, and the like. Where there is an average disparity between the groups' compensation greater than 2%, OFCCP "flags" the grouping. For example, if the disparity favors women, OFCCP adds the number of affected men to its total; if the disparity favors men, OFCCP adds the number of affected women to its total. OFCCP adds up the total number of affected employees in each flagged grouping and calculates the percentage of men and women flagged compared to their representation in the contractor's total workforce. If more than 30% of women or minorities are affected, and if the percentage of women affected is more than three times the percentage of affected men, OFCCP prepares a follow-up request for information.

2. OFCCP will request the following 12 data items for each employee in the group that it is studying:
 - (a) Employee ID number (or suitable ID for matching purposes)
 - (b) Gender
 - (c) Race/Ethnicity (White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native)
 - (d) Time with company or date of hire

- (e) Time in current position or date of last change in grade/title (i.e., experience)
- (f) Date of last degree earned; or, if not available, date of birth (this information will be used as a substitute for prior experience outside the company)
- (g) Current annual salary or hourly wage
- (h) Part-time vs. full-time status (including typical hours per week)
- (i) Exempt vs. nonexempt status
- (j) Job title
- (k) Grade level or salary band classification
- (l) Employee location (if not housed at the facility) (now and at hire)

Once OFCCP receives this additional compensation data, it will use it to run a “cluster regression” model. The cluster regression forms artificial comparison groups by having the computer run various combinations to see which one best achieves three objectives: (1) including as many employees as possible into comparison groups that contain 30 total employees, including five males and five females or five minorities and five nonminorities; (2) to the extent possible, not combining individuals in different job titles; to the extent crossing job titles is required to achieve the first objective, combining job titles based on similarity in average pay for the job titles; and (3) when grouping across job titles, not grouping jobs in different pay grades. Once the cluster model determines the optimal comparison groups, those groups will be used in a regression analysis along with the other factors that OFCCP requests. If this cluster regression indicates statistically significant pay disparities based on race or gender, OFCCP continues the investigation as described in step 3.

3. OFCCP will run a full regression analysis, as outlined in detail in the proposed standards. See 69 Fed. Reg. 67,246-52 (Nov. 16, 2004). In connection with this process, the agency will request documentation on compensation systems and job duties for each title or position. It will also conduct interviews with management and HR officials on the company’s system, compensation factors, organization tree/advancement plan, and specific facility situations.

The agency will then determine the workforce to be studied in each regression analysis by grouping employees into similarly situated employee groups (“SSEGs”), based “on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions.” 69 Fed. Reg. 67,249 (Nov. 16, 2004).

The agency has warned that preexisting job classification systems may not meet SSEG standards, because (1) grades and bands are too diverse to adhere to the new standards, (2) titles are often too narrowly defined and sample sizes too small to study separately, (3) affirmative action job groups were created for different purposes and have different standards, and (4) job descriptions tend to be too broad in definition.

The agency has indicated that to overcome these hurdles, it will use job titles and job descriptions to classify jobs into “functionally similar” groups, further sorted by grade or band, and then conduct targeted face-to-face interviews with a sample of employees from each position in question to clarify and confirm similarities in job functions.

The agency will make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis, defined as having at least 30 employees, including at least five women or minorities, in the group. The agency has indicated that it will utilize sophisticated statistical techniques and consider sophisticated statistical concepts when conducting the multiple regression analyses, including outliers and influencers, R-squared results, and multicollinearity.

C. Responding to OFCCP Compensation Audits

OFCCP’s diagnostic analyses produce large numbers of “false positives” because they do not control for two factors that OFCCP itself believes are the most important predictors of compensation: (1) an appropriate grouping of employees into “similarly situated employee groupings,” i.e., groupings of employees who perform similar work and occupy positions involving similar levels of responsibility, skills, and qualifications; and (2) actual experience. Because data on these factors typically are not readily available and are difficult to derive, OFCCP’s initial diagnostic analyses do not include them. The result is that the vast majority of the indicators produced by the OFCCP’s initial analyses will be false positives, and agency decision-makers know this.

At the desk audit stage, OFCCP decision-makers know that their determination will result in the commitment of significant resources even though the analyses they must use to make their decision are unreliable. Thus, OFCCP decision-

makers may be receptive to a more refined statistical analysis submitted by the contractor. If the contractor's analysis appears reasonable to the decision-makers, it may make OFCCP question whether additional investigation is warranted, despite indicators from its own analyses.

Even during this period of uncertainty about the OFCCP's ultimate approach, a contractor can try to develop an analysis to convince OFCCP that further investigation is unnecessary. The type of analysis that may resonate with OFCCP decision-makers will be based on groups that appear to be performing generally similar functions, that are large enough for statistical analysis (OFCCP's "30/5 rule") but not too large, and that cover a significant majority of the employees in the AAP. This analysis could also control for factors that OFCCP will accept at face value, for example, education level, experience (or age as a proxy for experience), time in the company, time in the grade, and time at the job.

OFCCP decision-makers may be suspicious about performance as a factor, even though the proposed OFCCP compensation standards state that the agency will not assume that a factor is automatically "tainted" simply because its determination is within the employer's control. At this stage, the idea is to convince OFCCP to exercise its discretion not to pursue further investigation, so the analysis may prove more convincing to OFCCP if it does not include performance as a factor.

Contractors must be cautious about using pay grades. Pay grade may be acceptable to OFCCP as a proxy for responsibility level if the analysis uses fairly large functional groups. However, if the employee groupings used in the analysis are more refined, OFCCP may question whether grade is a redundant factor that should be excluded because of its close association with current compensation.

If the contractor's analysis indicates statistically significant pay differentials, do not expect OFCCP at this stage to accept an explanation that factors unique to particular employees explain the differentials. This might work, if at all, only for a very small number of employees where the unique factors are obvious and compelling.

Convincing OFCCP to end its compensation review at the desk audit stage cannot and must not be the only consideration in creating these analyses. Any analysis a contractor undertakes for OFCCP purposes can come back to haunt it if OFCCP decides to investigate further or if the company is hit with a private class action lawsuit.

If OFCCP decides to investigate further, it may choose to use parts of the model the company submitted, but also include factors that the company did not consider. The company knows what its own model implies in terms of potential liability, but will not know the implications if OFCCP decides to accept some of the model's features but to reject or modify others. For example, OFCCP may decide that it likes the employee groupings, but not the way the company factored

in prior experience. If that happens, the company cannot argue later that the job groups contain employees who are dissimilar; the company created those job groups.

Even if the company's analysis convinces OFCCP to end its compensation review, the model could still be used by plaintiffs' lawyers as statistical evidence of a pattern or practice of discrimination. The company would probably have run its analysis on the particular establishment that was the subject of the OFCCP compliance review. But what about other business units or other facilities? There's nothing to stop plaintiffs' lawyers from examining them. There's also nothing to stop plaintiffs' lawyers from arguing that the employee groups and use of age as a proxy for experience are perfectly legitimate; after all, the company itself conceded as much when it gave that model to the U.S. Government.

There are two other important considerations: cost and more false positives. In the compensation arena, you get what you pay for. For example, most compensation analyses will be far more accurate if the company uses actual experience data, but it is costly to review each employee's employment history and code that into a database.

A final consideration is that, unlike the OFCCP's diagnostic tool, the contractor's analysis should avoid producing a large number of false positives. However, it is likely that any low-cost analysis that passes the OFCCP plausibility standards will generate many false positives. For example, age is a very poor proxy for actual experience and will produce misleading results.

Perhaps the best balance of these competing considerations is achieved by conducting a two-stage analysis. Stage one involves a very general model as an initial screen using large functional employee groups, pay grades or levels, education, and age as a proxy for experience. Stage two involves a more refined analysis of any of the large functional groups that indicated a potential problem in stage one. This refined analysis should be tailored to the particular facts about employees' job duties and responsibilities, and should include good data on the factors that influence compensation, such as relevant prior experience.

This approach may convince OFCCP that further investigation is unwarranted. From OFCCP's viewpoint, the general analysis is likely to be no worse than the agency's own diagnostic models, and any indication of discrimination in the general model is addressed in the more refined model. OFCCP will have to do some significant work to fully assess the refined model, and agency decision-makers may conclude that the effort is not justified.

At the same time, the general model is too simple to be the basis for a plausible argument that it is appropriate for any purpose other than as a diagnostic screen. Moreover, the contractor will have submitted both the general model and the more refined model to OFCCP as a package. This approach is likely to defeat any argument that the employer has conceded the appropriateness of the general

model as evidence of discrimination. For example, this approach convinced the Seventh Circuit that the stage-one model was insufficient to prove pay discrimination. *See, e.g., Cullen v. Indiana Univ. Bd. of Tr.*, 338 F.3d 693, 702 (7th Cir. 2003) (University's pay equity analysis was not sufficient to establish pay discrimination because "[t]he study was designed as the initial step in a two-part process of evaluating faculty for raises, not as a single quantitative measure of appropriate salaries").

IV. OFCCP COMPLIANCE ISSUES DURING MERGERS AND ACQUISITIONS

Mergers, acquisitions, restructurings, and other major corporate transactions can cause extreme disruption of normal HR functions and employment practices. Integrating workforces, employment policies, and HRIS databases involves tremendous effort and singular focus. In these circumstances, employers typically do not have time to immediately attend to OFCCP compliance issues.

However, employers will do well to consider OFCCP compliance issues during major corporate transactions. Addressing these issues during an OFCCP compliance review is far less effective than assessing compliance options proactively. Employers that address these issues reactively often find that they have not placed themselves in a favorable posture for achieving their objectives regarding OFCCP compliance issues.

There are several types of compliance issues that should be considered during a corporate transaction, including:

(A) Will OFCCP have jurisdiction over the organization or its affiliated corporate entities after the transaction? This depends first on whether the organization meets OFCCP's jurisdiction thresholds. Generally, contractors must develop written AAPs if they have at least 50 employees and have contracts worth at least \$50,000. Coverage also depends on whether an otherwise uncovered entity has imputed compliance obligations based on the nature of its relationship with an entity that is covered by OFCCP requirements. OFCCP typically takes an aggressive view that presumes that most affiliated organizations are sufficiently related to impute compliance obligations across from the covered organization to any affiliated organizations. Under this presumption, OFCCP requires the organization to establish that the relationship does not satisfy a five-part test for determining whether affiliated entities constitute a "single entity." OFCCP makes extensive information requests, initially requesting some 27 items of information, from the organization during an evaluation of this single entity issue.

(B) If the organization and/or affiliated entities are likely to be covered by OFCCP requirements, what compliance requirements will the organization face and what will be the time frame for complying with those requirements? In general terms, the development of AAPs encompassing all of the organization's employees will be the most burdensome requirement. The timetable to develop and implement AAPs will allow 120 days. Because this short deadline will be nearly unattainable for many large organizations following a major corporate

transaction, those organizations may benefit from an important recent development in OFCCP's approach to these situations. OFCCP recently has negotiated compliance assistance agreements with contractors who face extraordinary compliance challenges such as the prospect of developing hundreds of AAPs within 120 days. Under these compliance assistance agreements, OFCCP provides contractors with a specific timetable for developing and implementing AAPs in successive stages, which offers a more reasonable deadline than 120 days. Another recent OFCCP development that may assist contractors facing extreme compliance burdens is that the agency recently issued a directive that indicates that it will be more open to considering reasonable requests for separate facility exemptions. Under OFCCP regulations, the OFCCP Director has authority to exempt a contractor from the requirement to develop an AAP for a particular facility if the facility does not perform work on a government contract. In the past, OFCCP almost never granted such an exemption.

(C) Will the organization face any liability for OFCCP violations because of the actions or inactions of other parties to the corporate transaction? OFCCP has historically assessed successor liability under a multi-factor test derived from court interpretations of Title VII. Many of the factors involve items over which the successor employer has some degree of control, such as whether the successor employer retains the same jobs and working conditions of the predecessor employer.

A. OFCCP Coverage Issues

1. OFCCP's Jurisdiction

The OFCCP is responsible for the enforcement of Executive Order 11246, the Vocational Rehabilitation Act of 1973 (the "Rehabilitation Act") and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"). These authorities impose nondiscrimination and affirmative action obligations on federal contractors and subcontractors with respect to their employment of women, minorities, individuals with disabilities and certain veterans.

By far the most burdensome requirement imposed by these authorities is the obligation under Executive Order 11246 to develop written AAPs. Written AAPs must encompass all employees in a contractor's workforce, regardless of whether every employee is engaged in work on a government contract.

Federal contractors and subcontractors with contracts exceeding \$10,000 are covered by Executive Order 11246, but only those supply and service contractors or subcontractors with 50 or more employees and contracts exceeding \$50,000 are subject to the written AAP obligations.

2. OFCCP's Single Entity Test:

A separate business or organization without government contracts may be covered under the laws enforced by OFCCP based on an integrated relationship or "single entity" status with a government contractor. OFCCP generally takes an aggressive approach to single entity status, presuming that affiliated entities satisfy the test unless the organization can prove otherwise.

OFCCP historically has used a five-factor test in determining whether related corporate entities constitute a "single entity" for jurisdictional purposes. Under this single entity test, OFCCP considers the following factors: (1) common ownership; (2) common directors and/or officers; (3) de facto exercise of control; (4) unity of personnel policies emanating from a common source; and (5) the interdependency of operations. *See Ernst-Theodore Arndt*, 52 Comp. Gen. 145, 146 (1972) (citing letter from the Solicitor of Labor).

OFCCP recently discussed these factors in compliance assistance materials published on its website. OFCCP asserted that there is a new focus on centralized control over labor relations as a determinative factor:

The test focuses primarily on whether the ownership, management, and operations of the separate entities are, in fact, sufficiently interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered Federal contractor. However, there is growing recognition that centralized control over labor relations and personnel functions is the most important factor.

See "Federal Contract Compliance Advisor," at http://www.dol.gov/elaws/esa/ofccp/single_entity_test.asp (under heading, "Single Entity Five-Factor Test").

OFCCP's recent statement on its website is inconsistent with the agency's historical interpretation of the single entity test. For example, in *Ernst-Theodore Arndt*, the Comptroller General noted a letter from the Acting Solicitor of Labor, explaining that under the single entity test, "[d]e facto control is a dominant factor in determining corporate liability, and it is defined as actual control rather than the potential control present where there is common ownership." 52 Comp. Gen. at 147. Contractors should investigate whether there is more favorable authority in particular jurisdictions that can be of assistance in opposing OFCCP's claim that related entities constitute a single entity. *See, e.g., Papa v. Katy Indus., Inc.*, 166 F.3d 937, 941 (7th Cir. 1999) ("The basic principle of affiliate liability is that an affiliate forfeits its limited liability only if it acts to

forfeit it – as by failing to comply with statutory conditions of corporate status, or misleading creditors of its affiliate, or configuring the corporate group to defeat statutory jurisdiction, or commanding the affiliate to violate the right of one of the affiliate’s employees.”).

The single entity issue typically arises when an establishment of an organization that is affiliated with a federal contract is selected by OFCCP for a compliance review. OFCCP identifies the “universe” of federal contractors over which it has authority to conduct compliance reviews through EEO-1 forms that employers file annually. The EEOC’s instructions on completing the EEO-1 forms instruct parent corporations to collect EEO-1 forms of their subsidiaries for filing as a single package. Where the parent corporation and the subsidiary corporations share the same employer identification number (the EEOC’s instructions suggest that the parent company identification should be listed, and employers frequently file in this manner), OFCCP will assume that all affiliated entities that share the same identification number with a covered contractor also fall under OFCCP’s jurisdiction. Thus, OFCCP includes such affiliated entities and all of their establishments in the pool of establishments eligible for a compliance review.

In these situations, OFCCP sends the affiliated entity a scheduling letter notifying it that one of its establishments has been selected for a compliance review. The entity typically responds that it is not a federal contractor. OFCCP researches the possible bases for its jurisdiction, and determines that the entity is affiliated with a known contractor. Then OFCCP sends the affiliated entity a 27-item questionnaire requesting an array of information pertaining to the single-entity issue.

The following is a list of the 27 questions, organized by the particular factor of the five-factor single entity test under which the requested information falls:

- a. Whether the entities have common ownership;
 - (i) What percentage of stock of the subsidiary or affiliate is owned by the parent corporation?
- b. Whether the entities have common directors and/or officers;
 - (ii) What are the names of the directors on the board of the parent corporation?
 - (iii) What are the names of the directors on the board of the subsidiary or affiliate corporation?
 - (iv) What are the names of the directors on the boards of both the parent and the subsidiary corporation?

- (v) What are the names of the officers of both the parent and the subsidiary corporation?
 - (vi) What positions do the individuals listed in No. (v) hold in each corporation?
- c. Whether one entity has de facto day-to-day control over the other through policies, management or supervision of the entity's operations;
- (i) Does the parent corporation pay the wages of any of the subsidiary's employees?
 - (ii) Does the parent corporation pay any other expenses of the subsidiary? If yes, which expenses are paid?
 - (iii) Does the parent corporation negotiate and/or provide health insurance, pension or any other employment-related benefits of the subsidiary corporation?
 - (iv) In advertising, is the subsidiary referred to as part of the parent corporation?
 - (v) In financial statements of either corporation, is the subsidiary described as a department or division of the parent corporation?
 - (vi) Does the same in-house legal staff serve both the parent and the subsidiary corporation?
 - (vii) Are any services provided by the parent corporation for the subsidiary corporation or vice versa? If yes, what services?
 - (viii) Are the books and/or financial records of the parent and subsidiary kept separately?
- d. Whether the personnel policies of the entities emanate from a common or centralized source; and
- (i) Does the parent corporation control the hiring and/or compensation practices and procedures of the subsidiary?
For example:
 - (a) Does the parent corporation establish hiring standards for the subsidiary?
 - (b) Does the parent corporation establish any compensation ranges or criteria for the subsidiary?

- (c) Does the parent corporation establish an equal employment opportunity policy for the subsidiary?
 - (ii) Does the parent review and/or control the labor practices of the subsidiary? For example:
 - (a) Does the parent negotiate and/or take part in the negotiation of collective bargaining agreements of the subsidiary?
 - (b) Does the parent sign the collective bargaining agreements of the subsidiary?
 - (iii) Is there ever an exchange of personnel between parent and subsidiary? If yes, does the individual who transfers retain the same seniority date used at the transferor corporation for the purposes of benefits, promotions, layoffs and/or recall?
 - (iv) Does the parent recruit personnel for the subsidiary or vice versa?
 - (v) Does the parent hire the subsidiary's top management officials or vice versa?
 - (vi) Are minority employees of the subsidiary listed on the EEO-1 reports of the parent?
- e. Whether the operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services.
 - (i) Has there ever been an infusion of capital from the parent to the subsidiary or vice versa? If yes, list dates and amount.
 - (ii) What percentage of the subsidiary's business is with the parent?
 - (iii) What percentage of the parent's business is with the subsidiary?
 - (iv) Does either the parent or the subsidiary use any of the property of the other? If so, what property?

- (v) Is the product or service of either the parent or the subsidiary essential to the conduct or operation of the other's business? If yes, list the product(s) or service(s).
- (vi) Does either the parent or the subsidiary provide any marketing service for the other?
- (vii) Would either the parent or the subsidiary be unable to function if the other ceases operation?

B. Timetable for Compliance

Under OFCCP regulations, covered contractors are required to develop a written AAP within 120 days of the commencement of the government contract. See 41 C.F.R. § 60-2.1(c) (2005). This deadline may be unreasonable for contractors involved in a major corporate transaction. Those contractors should explore options for modifying their compliance obligations through several processes that OFCCP has recently used in these situations.

1. Compliance Assistance Agreements (with phased-in compliance timetables):

Over the past three years, OFCCP has negotiated several innovative agreements with contractors or organizations that were becoming contractors, under which the agency provided compliance assistance to the contractors to help them develop compliant AAPs. Under these agreements, the agency worked with the contractor to develop AAPs and/or systems to implement AAPs based on specific timetable that reflected the effort involved with each aspect of the AAP development project. The timetable used in these agreements generally provided that aspects of AAPs requiring less effort, such as AAP narrative sections, must be developed first, followed by aspects that lay the foundation of much of the AAP analysis, such as formation of AAP job groups and design of data systems, then data collection and analysis, and finally, the organization of the parts into a coherent AAP. During this phase-in period, the agency agrees not to conduct a compliance review of the contractor's facilities.

2. Separate Facility Exemptions

OFCCP has recently granted several requests for separate facility exemptions. Such exemptions allow contractors to avoid the burden of developing an AAP at a particular facility or group of facilities. The contractors still remain covered by the nondiscrimination requirements of Executive Order 11246, and OFCCP retains jurisdiction to investigate complaints of discrimination.

OFCCP may consider granting an exemption for a limited period of time in order to accommodate a contractor that is undergoing a major restructuring or a merger. OFCCP may also consider requests for exemptions from particular AAP requirements, such as requirements that would be difficult to implement following a major corporate transaction.

OFCCP has published a Directive, discussed below, in which it adopted formal standards for assessing requests for separate facility exemptions. However, there are several informal considerations that may guide contractors in assessing whether they have a reasonable chance of obtaining an exemption:

The value of the government contracts: OFCCP will be less inclined to grant an exemption where a contractor derives substantial revenues from government contracts. This might be mitigated if the government contract revenues constitute only a small fraction of the contractor's overall revenues and if the compliance burdens are very significant.

Whether OFCCP would be embarrassed by granting an exemption to the particular contractor: A contractor with a poor track record of EEO compliance, or of corporate citizenship generally, will likely have a difficult time convincing OFCCP to grant the exemption. OFCCP will review the contractor's EEOC and EEO litigation docket and will question whether the contractor has entered into any significant settlements and whether there are any pending class actions.

Whether the contractor has a strong track record for providing equal employment opportunity: Contractors who have been successful in obtaining an exemption offered indications that they were concerned with EEO compliance and had successful programs in place to ensure equal employment opportunity. These indications might include demographic statistics showing strong representation of women and minorities, diversity programs and awards, sponsorship of community organizations and programs, and nondiscrimination policies.

Whether the AAP makes sense in the context of the facilities for which the exemption is requested: if the AAP requirements are not very meaningful in the particular context, OFCCP may be more inclined to grant the exemption. AAP requirements are predicated on a stable workforce that is large enough for meaningful statistical assessments. AAPs do not function well in the context of temporary and part-time workers, workforces with high turnover, or small workforces (e.g., 20 employees).

On September 13, 2003, OFCCP published a Directive establishing formal criteria for the agency's consideration of requests for separate facility exemptions. Regulations implementing Executive Order 11246 authorize OFCCP to grant a request for exemption of contractor facilities that are not connected to the performance of a government contract. See 41 CFR 60-1.5(b)(2). Under these regulations, a contractor must provide sufficient information for OFCCP to determine that (1) the facility for which an exemption is sought is in all respects separate and distinct from facilities of the contractor related to the performance of a government contract; and (2) such an exemption will not interfere with or impede the effectuation of Executive Order 11246.

The OFCCP Directive sets out factors that the agency will assess to determine whether the regulatory standard has been satisfied in a particular case. Under the Directive, the factors that OFCCP will use to determine if a facility is in all respects separate and distinct from facilities of the contractor related to the performance of a government contract are as follows:

Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a government contract;

The extent to which the contractor derives benefits from a government contract, directly or indirectly, at the facility to be exempted;

Whether any costs associated with operating the facility are charged to a government contract;

WHETHER WORKING AT THE FACILITY FOR WHICH AN EXEMPTION/WAIVER IS SOUGHT IS A PREREQUISITE FOR ADVANCEMENT IN JOB RESPONSIBILITY OR PAY AT FACILITIES CONNECTED TO A GOVERNMENT CONTRACT; AND WHETHER WORKING AT FACILITIES CONNECTED TO A GOVERNMENT CONTRACT IS A PREREQUISITE FOR ADVANCEMENT IN JOB RESPONSIBILITY OR PAY AT THE FACILITY FOR WHICH AN EXEMPTION/WAIVER IS SOUGHT;

WHETHER EMPLOYEES WHO NORMALLY WORK AT THE FACILITY ARE REQUIRED TO PERFORM WORK RELATED TO A GOVERNMENT CONTRACT AT ANOTHER FACILITY;

WHETHER THE FACILITY REGULARLY OR SUBSTANTIALLY TRANSFERS EMPLOYEES TO OR FROM FACILITIES AT WHICH A GOVERNMENT CONTRACT IS PERFORMED; AND

SUCH OTHER FACTORS THAT THE DEPUTY ASSISTANT SECRETARY OF OFCCP DEEMS ARE NECESSARY OR APPROPRIATE FOR CONSIDERING WHETHER THE FACILITY IS IN ALL RESPECTS SEPARATE AND DISTINCT FROM THE FACILITIES OF THE CONTRACTOR RELATED TO THE PERFORMANCE OF A CONTRACT. OTHER FACTORS COULD INCLUDE THE NUMBER OF FACILITIES CONNECTED TO THE CONTRACTOR'S GOVERNMENT CONTRACTS AND THE NATURE OF THE CONTRACTOR'S CONTRACTUAL RELATIONSHIP WITH THE GOVERNMENT.

Under the OFCCP Directive, the factors that OFCCP will use to determine whether the exemption will interfere with or impede the effectuation of Executive Order 11246 are:

Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under federal, state, or local equal employment opportunity laws;

The contractor's record of compliance with federal, state or local equal employment opportunity laws; and

Such other factors that the Deputy Assistant Secretary of OFCCP deems are necessary or appropriate for; considering whether the granting of the exemption/waiver would interfere with or impede the effectuation of either Executive Order 11246 or the affirmative action provisions of VEVRAA.

C. Successor Liability

OFCCP has adopted a case-by-case analysis for determining whether a successor is liable for the discriminatory acts of its predecessor based on the MacMillan factors used by some federal courts to assess successor liability under Title VII. See OFCCP Federal Contract Compliance Manual, at ¶ 7F14 (citing EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974)). Under MacMillan, there is a presumption in favor of applying successor liability in Title VII cases. The Sixth Circuit in MacMillan articulated nine factors to be considered when determining whether a successor will be liable:

- o Whether the successor company had notice of the charge;

- O THE ABILITY OF THE PREDECESSOR TO PROVIDE RELIEF;
- O WHETHER THERE HAS BEEN A SUBSTANTIAL CONTINUITY OF BUSINESS OPERATIONS;
- O WHETHER THE SUCCESSOR USES THE SAME PLANT;
- O WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME WORKFORCE;
- O WHETHER THE SUCCESSOR USES THE SAME OR SUBSTANTIALLY THE SAME SUPERVISORY PERSONNEL;
- O WHETHER THE SAME JOBS EXIST UNDER SUBSTANTIALLY THE SAME WORKING CONDITIONS;
- O WHETHER THE SUCCESSOR USES THE SAME MACHINERY, EQUIPMENT AND METHODS OF PRODUCTION;
- o Whether the successor produces the same product.

V. FUTURE DIRECTIONS FOR OFCCP?

A. The Corporate Report Card Initiative

Charles James, Director of OFCCP, announced recently that OFCCP plans to improve the contractor selection process and develop corporate report cards to provide outside assessment of companies' equal employment posture. See "James Plans Improved Contractor Selection, Development of 'Corporate Report Cards,'" Daily Labor Report, No. 153, August 10, 2005. The Corporate Report Card would be designed to analyze each contractor's EEO posture on an organization-wide basis and, possibly, allow the agency to conduct analysis on an industry-wide basis. The stated deadline for implementing this concept is 12 to 18 months from now. Director James has indicated that the Corporate Scorecards will be intended to make OFCCP information available to "the boardrooms of corporate America":

Compliance reviews happen down at the bottom and aren't worthy of executives' time, but if we have a report for them, they may react. . . . [OFCCP has] 10 years of data, but we've never pulled it together. We need to analyze it and point out to companies what we know.

Id.

B. Improved Contractor Selection Process

OFCCP has reported a desire to move away from its long-established approach of selecting federal contractors for compliance reviews on the basis of the contractor's self-reporting on annual EEO-1 reports. As noted above, EEO-1 forms can be inaccurate or incomplete in identifying whether a company is a federal contractor and frequently create jurisdiction disputes.

OFCCP is considering a new approach of starting the selection process from a list of federal contractors, such as the lists compiled by the General Services Administration or the Federal Procurement Data System. The contract lists will then be cross-referenced with the EEO-1 establishment data.