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January 19, 2005

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Joseph DuBray, Jr.
Director, Division of Policy, Planning
and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington D.C. 20210

**RE: National Industry Liaison Group's Comment in
Response to the Office of Federal Contract Compliance
Programs' Proposed Guidelines for Self-Evaluation of
Compensation Practices for Compliance With
Nondiscrimination Requirements of Executive Order
11246 With Respect to Systemic Compensation
Discrimination**

Dear Director DuBray:

The National Industry Liaison Group (NILG) appreciates the opportunity to offer comments concerning the "Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination."

As background, the Industry Liaison Group (ILG) concept started over 20 years ago with a partnership between the Office of Federal Contract Compliance Programs (OFCCP) and federal contractors as a forum for working together towards equality in the workplace through open communications between industry and government. ILGs formed voluntarily around the country, reflecting a unique relationship of public and private sector cooperation to deal proactively with advancing workplace equal opportunity. Over the years, ILGs have reached out to other agencies, such as the Equal Employment Opportunity Commission (EEOC), with mutual goals of fostering a non-discriminatory workplace. The NILG is comprised of approximately 24 members, who are elected from local ILGs from across the



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INTRODUCTION

The NILG applauds the OFCCP's efforts in developing detailed guidance regarding recommended contractor self-audit procedures and to provide transparency and consistency regarding the method the OFCCP uses to analyze the compensation practices of federal contractors. Providing such guidance hopefully will eliminate the various divergent methods used by OFCCP compliance officers in different regions of the country and provides clear guidance regarding the OFCCP's recommended methodology for contractors to employ when conducting compensation self-audits.

In general, the NILG is pleased with the OFCCP's acknowledgement that the grouping of employees in a particular salary grade, job family, job group or other employee grouping does not necessarily mean that they are indeed "similarly situated," and that the factors which influence pay decisions may not bear the same relationship to compensation for all categories of jobs. We are encouraged (with some reservations, described below) to see the OFCCP propose a clear, objective statistical measure to determine if a compensation disparity is statistically significant, *i.e.*, two or more standard deviations.

While we are encouraged that the proposed guidelines will permit contractors and the OFCCP to "play by the same rules", we offer the following specific comments, observations and suggestions in the hopes of improving the self-audit guidelines before the OFCCP issues them as final regulations.

DETERMINING WHICH EMPLOYEES ARE "SIMILARLY SITUATED": "SIMILARLY SITUATED EMPLOYEE GROUPINGS" (SSEGs) MAY INVOLVE FACTORS OTHER THAN THOSE IN THE PROPOSED SELF-AUDIT GUIDELINES

- *Work Performed*

In Section IA, the OFCCP has indicated that it recognizes that the crucial determinant of whether employees are similarly situated is their *actual work activities*. The Guidelines suggest that contractors must group employees together who are similarly situated (*i.e.*, work performed is similar in content, responsibility, requisite skills and qualifications). For most contractors, this will require a major re-grouping of their populations and will consume monetary and manpower resources.



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- *Level of Responsibility*

It is important for the OFCCP to note that the level of responsibility would include such things as accountability, *etc.*, and not just whether or not the incumbent

supervises other employees. Within the contractor community are a significant number of “sole contributors” who possess creative talents and/or specialized expertise and who manage significant processes and projects in support of their company's strategic objectives.

- *Skills and Qualifications Involved in the Positions*

The Guidelines, in Section IA, indicate that "similarly situated" pertains to the skills and qualifications involved in the jobs themselves, rather than particular skills individuals incidentally may happen to possess who hold those jobs. However, the Agency should recognize that compensation could be influenced by individuals with a higher skill level who are able to perform more difficult tasks or produce more results, even if the basic requirements of the jobs they hold do not require those higher-level skills.

The self-audit Guidelines also are unclear as to whether these criteria are mutually exclusive. Moreover, the Guidelines do not address whether these factors will be given different weight depending upon the specifics of each job being analyzed. In addition, the Guidelines are unclear regarding who will serve as the ultimate arbiter of which employees are similarly situated. Will the ultimate determination be made by the contractor or the OFCCP? NILG urges inclusion in the final Guidelines of an explanation of whether the criteria listed above are mutually exclusive. In addition, NILG believes that contractors are in the best position to determine which of their employees are similarly situated.

REQUIRING THAT SSEGs GENERALLY CONTAIN A FAIRLY HIGH MINIMUM NUMBER OF EMPLOYEES AND PROTECTED GROUP MEMBERS IS AN ARBITRARY STANDARD WHICH CONFLICTS WITH THE OFCCP'S STATED GOAL OF IDENTIFYING "SIMILARLY SITUATED" EMPLOYEES

In Sections IA and B, the OFCCP requires federal contractors to group their workforce into Similarly Situated Employee Groupings (SSEGs). The OFCCP explains that employees may be placed into the same SSEG "if the



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work they perform is similar in content, responsibility, and requisite skill and qualifications." The OFCCP further requires that these SSEGs must generally contain at least 30 employees and at least 5 or more protected group members (the "30 and 5 Rule"). The self-audit Guidelines go on to provide that if the statistical analyses do not encompass at least 80% of the employees in an affirmative action program or workplace, the analyses and any non-statistical analyses will be subject to increased scrutiny.

The 30 and 5 Rule is an arbitrary and often artificial standard designed to allow the OFCCP to conduct statistically significant analyses (requiring large employee

groups) that will in turn allow the OFCCP to subject those large groups to an analysis using the "two or more standard deviation" method to identify significant large-group disparities. Consequently, contractors will be forced to group their employees into SSEGs that meet the 30 and 5 Rule despite the fact that such a grouping may be inappropriate due to the lack of similarity among different jobs. If the contractor decides that it cannot group at least 80% of its workforce in SSEGs, its self-audit analyses will be subject to enhanced scrutiny by the OFCCP. On the other hand, if the contractor accedes to the OFCCP's requirements and complies with the 30 and 5 Rule, the result often may be groupings of marginally similar and/or dis-similar employees. This is inherently unfair and will fall particularly hard on mid-size and small contractors. Instead, the NILG recommends that SSEGs not be required as a general rule to meet the 30 and 5 Rule but rather be judged solely on whether they successfully group together similarly situated employees, whatever the number of employees may be. We urge the OFCCP to approach each compliance audit separately and judge the employee groupings on their own merits rather than in comparison to an arbitrary and artificial standard.

In Section ID of the Guidelines, the OFCCP indicates that it will use a standard of two or more standard deviations in determining statistical significance. However, it is well established that the relevance of a two or more standard deviation test is entirely dependent on sample size. Therefore, as described in the preceding paragraph, if a company cannot group 80% of its workforce into SSEGs, which satisfy the 30 and 5 Rule, measuring statistical significance with a two or more standard deviations standard often may be inappropriate. Accordingly, NILG urges greater detail in the final Guidelines regarding whether a standard deviation analysis will be used in all instances regardless of sample size.



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NILG URGES CLARIFICATION IN THE FINAL GUIDELINES REGARDING WHETHER THE 250 EMPLOYEES THRESHOLD APPLIES TO THE COMPANY AS A WHOLE, AT ANY GIVEN FACILITY, OR IN THE COVERED AFFIRMATIVE ACTION PLAN

Section IC of the proposed self-audit Guidelines requires contractors with 250 or more employees to annually conduct a multiple regression analysis on its compensation systems. NILG urges clarification in the final Guidelines regarding whether the 250 employees threshold applies to the company as a whole, at any given facility, or in the covered affirmative action plan.

CLARIFICATION IS REQUESTED REGARDING WHO WILL INVESTIGATE PAY DISPARITIES IN A CONTRACTOR'S COMPENSATION SYSTEM

In Section ID, the OFCCP indicates that it will "carefully evaluate whether the contractor has properly investigated [pay disparities] and has adequately corrected any disparities that are not explained by legitimate factors." Contractors need clarification regarding who will be the arbiter of this evaluation -- the compliance officer or the regional statistician.

THE RECORD RETENTION REQUIREMENTS ARE UNCLEAR AND SEEM TO CONFLICT WITH EXISTING RECORDKEEPING REGULATIONS

Pursuant to § 60-1.12 of the Code of Federal Regulations, contractors must preserve any employment or personnel record for a period of 2 years from the date of the making of the record or of the personnel action involved, whichever is later. Section IE of the Self-Evaluation Guidelines describes several record retention periods.

First, in Sections E(2) and E(4), the Self-Evaluation Guidelines set forth a 2-year retention period. Pursuant to Section ID, this period would include the 2-year window for back pay corrections. Accordingly, a reading of the two sections together would suggest that contractors be required to maintain employment or personnel action records for a minimum of 4 years (*i.e.*, 2 years back pay period + 2 years from the date the analyses are performed). If this is correct, this record retention period would conflict squarely with the two year record retention period set forth in § 60-1.12 of the Code of Federal Regulations.



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Second, in Sections E(1) and E(3), certain documents, “must be retained throughout the period in which the OFCCP would deem the contractors practices to be in compliance with Executive Order 11246.” This would seem to indicate a perpetual record-keeping requirement. Furthermore, at what point would a contractor know when the OFCCP would “deem the contractor's practices to be in compliance?”

Third, Section E(2) requires contractors to retain “[t]he data used in the statistical analyses and the results of the statistical analyses for two years from the date that the statistical analyses are performed.” However, the Guidelines make no mention of whether the 2-year period is to be measured prospectively or retroactively.

SUGGESTED MODIFICATIONS TO CONTRACTOR'S COMPENSATION SYSTEMS DO NOT SEEM TO BE SUGGESTIONS, BUT RATHER REQUIREMENTS

Section IIB of the Self-Evaluation Guidelines indicate that a contractor's self-evaluation system will no longer be deemed to comport with the Guidelines if during a subsequent compliance review, it is determined that the contractor failed to make the modifications “suggested” by the OFCCP. Accordingly, it seems in practice, the “suggested” modifications are not suggestions, but rather requirements. The final Guidelines should include clarification regarding this issue and whether such a reading is accurate.

THE PROPOSED GUIDELINES INAPPROPRIATELY REQUIRE CONTRACTORS TO CHOOSE BETWEEN THE OFCCP'S INCREASED SCRUTINY OF PAY PRACTICES DURING AUDITS OR A FORCED WAIVER OF THE CONTACTORS' ATTORNEY-CLIENT PRIVILEGE

Section IIE of the Self-Evaluation Guidelines allow certification by a contractor of its compliance with the Guidelines in lieu of producing the methodology or results of its compensation self-evaluation analysis during a compliance review if the contractor conducted the self-analysis at the direction of counsel under the attorney-client and/or attorney-work product privileges. However, the proposed Guidelines provide that this will deny the contractor “the benefit of OFCCP coordination” in the Agency's investigation and enforcement during an audit. Under these circumstances, how would the OFCCP evaluate a contractor's compensation practices? The NILG requests that the OFCCP explain how the Agency intends to evaluate a contractor's compensation system under the second scenario. In addition, what is the tangible benefit to contractors of “coordination” with



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the Agency? We urge the OFCCP to clarify these unanswered issues in the final Guidelines.

The NILG is troubled about the waiver of the attorney-client privilege contained in Section IIE of the proposed Guidelines. As a prerequisite to certifying compliance to the OFCCP and receiving the benefit of self-evaluation and avoiding further inquiry into their compensation systems by the OFCCP, contractors are being asked to waive their attorney-client privilege as well as the attorney-work product privilege, by providing their data and analyses of compensation to the Agency (*see* Section IIE of the Self-Evaluation Guidelines). The alternative is for contractors to maintain the privileges but invite a full-blown review by the OFCCP. NILG is concerned that contractors may waive any privileges that apply to highly sensitive compensation data just to avoid an in-depth review of their compensation systems. NILG strongly urges the OFCCP to revisit this section of the proposed Guidelines prior to their implementation.

OFCCP SHOULD CLARIFY THE STAGE AT WHICH COMPENSATION DATA WILL BE REQUESTED AND IN WHAT FORM IT MUST BE PROVIDED

Section IF requires contractors to produce voluminous compensation data to the OFCCP during a compliance review. The Guidelines, however, are unclear as to the particular stage of the compliance review compensation data would be requested (*i.e.*, desk-audit or on-site stage). In addition, the Guidelines fail to indicate whether the contractor will be required to produce these data electronically or in hard copy format. NILG requests clarification of these two issues in the final Guidelines.

COMPENSATION DATA PROVIDED TO THE OFCCP SHOULD BE SHIELDED FROM DISCLOSURE

Contractors exercise extreme care in the dissemination of confidential compensation data. The Self-Evaluation Guidelines should establish procedures under which contractors' confidential compensation data would be protected from disclosure through the Freedom of Information Act and the like, and all such materials should be returned to the contractor upon conclusion of the OFCCP's investigation. Moreover, compliance officers should be sternly instructed not to reveal information about the company's compensation system or individual employee compensation to third parties



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and to employees or managers, who are being interviewed as part of the review process.

COMPLIANCE WITH PROPOSED GUIDELINES PRESENTS EXTRAORDINARY AND ADDITIONAL BURDENS FOR FEDERAL CONTRACTORS

- *HRIS Systems*

Compliance with these proposed Guidelines presents a significantly enhanced burden for contractors. Implementation of these Guidelines should not proceed until and unless the Agency can demonstrate that these Guidelines will not have an unduly burdensome impact on the contractor community. Full compliance with these Guidelines will require contractors to completely modify the way data are gathered and maintained. In addition, contractor HRIS systems will have to be completely modified (*i.e.*, adding "similarly situated indicators", performance, experience, *etc.*). Most contractors purchase HRIS software programs from outside vendors with pre-determined fields of information. Contractors will now be required to scrap any HRIS system that it presently has, in favor of a new version that tracks information that may be requested by the OFCCP in a compliance review.

- *Statistical Expertise*

Moreover, the OFCCP indicates that if separate regressions by categories of jobs do not permit the Agency to assess the manner in which the contractor's compensation practices impact a significant number of employees, it may perform a "pooled" regression, which includes "interaction terms" to account for differences in the effects of certain factors. The Chow Test, which the OFCCP intends to use, is a sophisticated statistical test, which statisticians and IO psychologists use to determine whether two coefficients are similar. It is too complicated in general, for the contractor community. Moreover, most companies do not have this type of expertise in-house. Indeed, many EO professionals and in-house attorneys are unfamiliar with interpreting the results of such a test. Most EO professionals are neither statisticians nor attorneys. However, the use of such statistical methods may have the effect of inadvertently raising the educational level requirement among such professionals in order to keep up with the expertise in use at the OFCCP. Like the OFCCP's establishment of a Division of Statistical Analysis staffed by expert level statisticians, companies would need to contract with outside consultants or hire statisticians or IO psychologists to perform these types of analysis, adding a



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substantial financial burden on many companies who are trying to reduce costs to achieve economies of scale.

In order for the OFCCP to implement these new proposed Guidelines, it created and staffed a Division of Statistical Analysis. Like the OFCCP, most contractors must now seek the assistance of statistics professionals. The proposed Guidelines require contractors to conduct these statistical analyses, but make no mention of how contractors are to do this. Do all contractors now have to create and staff their own Division of Statistical Analysis? If not, will contractors be expected to bear the cost of educating their present staffs in statistical analysis methodology? This is especially troubling to smaller contractors that may not be able to bear the cost of hiring a statistician or educating its present staffs in statistical analysis.

As discussed above, contractors will be required to group their employee populations into SSEGs and ensure that at least 80% of their population is included in an SSEG. To facilitate the two standard deviation model, additional criteria includes a minimum group size of 30 employees with at least 5 pairs of protected and non-protected group members. This grouping requirement will require substantial human resources support to identify and capture data as well as IT support to modify HRIS systems.

- *Delays in OFCCP's Audit Cycle*

In addition, it is not uncommon for routine compliance reviews in the OFCCP's current compliance review cycle to remain open for on upwards of one year. The NILG is concerned that the time delay may grow with the expanded use of statistics as suggested by these proposed Guidelines, especially if the statistical portions of all compliance reviews are referred to a lone regional statistician.

- *Need for Office of Management and Budget Study*

The proposed Guidelines offer no indication of whether the OFCCP has or plans to conduct a study on the impact of the burden that these requirements present. NILG strongly urges that these Guidelines be submitted to the Office of Management and Budget for a study on the burden's impact.

CONCLUSION

NILG applauds the OFCCP on its efforts to establish a uniform system for evaluating a contractor's compensation systems. As the OFCCP is aware, contractors vary in their methods to administering compensation. The Self-



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Evaluation Guidelines likely will have the impact of forcing contractors' compensation systems into a pre-determined compensation model. Not all contractors administer compensation in the same way and accordingly, despite the OFCCP's efforts, there is not one way to analyze all compensation systems. Accordingly, the "one size fits all approach" is unworkable. We urge the Agency to modify the Guidelines to reflect greater flexibility in the self-analysis of compensation systems.

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Once again, we sincerely appreciate the opportunity to provide our comments and observations in this important process. We hope they were helpful. If the Agency wishes, we would be happy to discuss our comments further. Please contact Mickey Silberman, NILG Board Counsel, to discuss at (631) 247-0404 or silbermm@jacksonlewis.com.

Respectfully submitted,

National Industry Liaison Group (NILG)