



January 18, 2005

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

RE: Notice of Proposed Guidelines for Self-Evaluation of Compensation Practices for Compliance With Executive Order 11246 With Respect to Systemic Compensation Discrimination

Dear Mr. DuBray:

This letter responds to the invitation for written comments on the Office of Federal Contract Compliance Programs' (OFCCP) proposed guidelines for self-evaluation of compensation practices as published in the Federal Register on November 16, 2004.

Background - Maly Consulting LLC

Maly Consulting (originally founded as Maly & Associates in 1986) is a management consulting firm located in San Rafael, California. We specialize in the analysis and reporting of human resource data, affirmative action compliance, and OFCCP audits. The majority of our clients are federal government contractors and range in scope from large, multi-national corporations to smaller organizations of 100+ employees nationwide. We assist clients in understanding and complying with the federal regulations for affirmative action, including Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973. Our firm has analyzed data for and developed thousands of Affirmative Action Programs (AAPs) over the 18 years that we have been in business. We have assisted many clients with compiling their data for OFCCP audits, EEO-1 reports, VETS-100 reports, and EO Surveys. We are keenly aware of the high costs and organizational burdens imposed on our clients by vague and conflicting requirements.

Focus of Our Comments

Our comments in this letter will focus on the OFCCP's proposed guidelines for contractor self-evaluation of compensation under 41 CFR 60-2.17(b)(3). Comments on the OFCCP's first notice (published on the same date) regarding the agency's own standards for defining and conducting evaluations for systemic compensation discrimination are included in a separate letter.

Maly Consulting commends the OFCCP for its efforts to provide contractors and OFCCP personnel with guidance on techniques for completing compliant compensation self-evaluations. We agree, in principle, that guidelines for conducting self-evaluations would strengthen the ability of contractors to ensure compliance with OFCCP regulations. However, we feel that the OFCCP's proposed techniques are too burdensome and costly to be used by most contractors on an annual basis. At minimum, several fundamental questions need to be addressed to avoid unnecessary confusion and provide sufficient guidance.

What constitutes contractor compliance with the compensation self-evaluation requirement?

The regulations at 41 CFR 60-2.17(b) state that a contractor must "perform in-depth analyses of its total employment process" that include an evaluation of compensation systems "to determine whether there are gender-, race-, or ethnicity-based disparities." The question for contractors is what self-evaluation techniques satisfy this compensation analysis requirement?

The proposed guidelines fail to answer the threshold question of what constitutes compliance and have already generated quite a few public responses that reveal a great deal of confusion on this issue. That is, several commentators have suggested that the guidelines will establish the *only* compliant self-evaluation methods. For instance, it has been suggested that performing multiple regression analyses will be the only compliant self-evaluation method for contractors with 250 or more employees. Although the notice appears in general to suggest that the OFCCP will allow any self-evaluation method (even non-statistical), the language in several sections of the guidelines gives the impression of a mandate.

The following quotes illustrate where the language in the notice may lead to different interpretations.

Language that suggests any self-evaluation method will be considered compliant:

- "...compliance with this Directive is not required for compliance with Section 60-2.17(b)(3)."
- "However, compliance with this Directive is not the only way to comply with Section 6-2.17(b)(3)."
- "OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques to comply with 41 CFR 60-2.17(b)(3)."

Language that suggests only multiple regression analyses will be considered compliant (at least for contractors with 250 or more employees):

- "...OFCCP will deem a contractor in compliance with Section 60-2.17(b)(3)... if the contractor's compensation self-evaluation system meets the following general standards:..."
- "On an annual basis, the contractor *must* [emphasis added] perform some type of statistical analysis..."
- "For contractors with 250 or more employees, the statistical analysis *must* [emphasis added] be multiple regression analyses."

The OFCCP should make clear that there is no required method for compensation self-evaluation and that any method of compensation self-evaluation will be considered compliant if performed in good faith.

What other methods may contractors use to perform compensation self-evaluations?

The OFCCP recognized in its Federal Register notice that contractors have real concerns about confidentiality and potential liability when conducting self-evaluations. Additionally, contractors are generally concerned about unnecessary burdens and costs associated with unproven and ineffective compensation self-evaluations methods. The record keeping and documentation required to complete the analyses currently proposed by the OFCCP would be prohibitive for most contractors.

To comply with the proposed guidelines, contractors would have to create extensive documentation and compile data from various record keeping systems—much of which may only be stored in hard copy files. Compliance with the guidelines would also mean that, in addition to already maintained EEO-1 job categories, Affirmative Action Program (AAP) job groups, FLSA categories, job families, and pay grades, contractors would now have to develop new Similarly Situated Employee Groupings (SSEGs). For most contractors, and certainly for those with fewer than 250 employees, compliance with the proposed guidelines is simply not feasible.

Furthermore, is there any evidence to show that the groupings and analyses of the proposed guidelines are effective in uncovering illegal discrimination? Has the OFCCP determined that there is no less burdensome method that contractors might use that would also be effective?¹

¹See the following reference materials for discussions of the weaknesses of multiple regression analyses in analyzing compensation and possible alternatives:

Copus, David and Jaime Cole. 2004. "Statistics Often Tell Much, and Courts Listen: Back to Basics When Analyzing Hiring, Promotion, Termination and Compensation Decisions." National Employment Law Institute, October/November.

Peterson, David W., Ph.D. 2002. What Does a Regression Analysis Really Show? Peopleclick, Inc. <http://www.eosource.com/resources/paper25.asp>

Simpson, Murray, Ph.D. 2004. Regression Analysis: Does the Model Fit? Peopleclick, Inc. http://www.peopleclick.com/knowledge/wpaper/PRI_WP_RegressionAnalysisa.pdf

We recommend that the OFCCP provide guidance on possible statistical and non-statistical methods for performing self-evaluations that do not require the otherwise unnecessary burden of identifying, collecting, recording, and measuring all legitimate factors required for multiple regression analyses. For instance, we have found that the Wilcoxon Rank Sum test can provide contractors with an analysis method that does not entail the substantial additional burdens associated with multiple regression analyses.

At the very least, the OFCCP should provide guidance as to what method the agency will use to conduct its initial analysis of summarized compensation data during the desk audit.

Which individuals should be included in an evaluation of compensation practices?

The current Scheduling Letter requests compensation data on those employees included in the Organizational Profile of an establishment's Affirmative Action Program (AAP). However, employees included in the Organizational Profile may include temporary employees, part-time employees, and employees from various regions (based on the requirements of 41 CFR 60-2.1(d)). Note also that the other source of regular data collection, the Equal Opportunity Survey (41 CFR 60-2.18), requests only full-time employees. Additionally, the proposed guidelines appear to refer to contractors' compensation self-evaluation for the entire organization and not by establishment. Different establishments of the same organization may have different compensation systems, have different workforce sizes, and be in different geographical locations.

The OFCCP should make clear, given the above considerations, which individuals are required to be part of the self-evaluation spelled out by the proposed guidelines. For example, does the OFCCP intend that the 250 employee threshold include employees in the entire organization or just those within the Organizational Profile of the establishment being audited?

What alternatives are there for contractors that do not fit the Similarly Situated Employee Groupings (SSEGs) model?

As jobs become more specialized, finding employees that are truly similarly situated becomes more and more difficult. The OFCCP should not dilute the similarly situated requirement by requiring that a "reasonable attempt" be made to produce SSEGs at what are, at least from an employee management standpoint, an arbitrary size. Rather than stating that SSEGs should contain at least 30 employees and five incumbents of each specific category, the guidelines should provide self-evaluation alternatives for those cases where appropriately formed SSEGs do not reach a size large enough for meaningful statistical analysis.

The second threshold of requiring that the statistical analyses encompass at least 80% has even less justification than the 30 employee requirement. Why 80% and not 75% or 70%? And more importantly, instead of providing analysis guidelines for what may turn out to be a very small portion of the contractor community, the OFCCP should provide guidelines for all contractors.

Summary and Conclusion

It is our opinion that compensation self-evaluation guidelines would benefit both contractors and OFCCP personnel. However, guidelines should be provided that are clear and that will accommodate contractors of all sizes.

Sincerely,



Edward Corrao
Consultant

ETC/AMM/SA/GS