



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 on Interpreting Nondiscrimination Requirements of 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 standards for systemic compensation discrimination under Executive Order 11246 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 — including compensation 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 regulations and standards issued by a multitude of government agencies.

### **Focus of Our Comments**

This letter will focus on the OFCCP's notice and invitation for comments on its proposed standards for defining and conducting evaluations for systemic compensation discrimination. Comments in response to the second notice (published on the same date) regarding guidelines for contractor self-evaluation of compensation are included in a separate letter.

Maly Consulting commends the OFCCP for its careful examination of current legal standards and for its efforts to make the standards for compliance clear to both contractors and OFCCP compliance officers. We wholeheartedly agree that "contractors and subcontractors are more likely to comply with E.O. 11246 if they understand the substantive standards which determine whether there is systemic compensation discrimination prohibited by E.O. 11246." However, we feel that fundamental questions need to be answered and further clarification made to avoid misunderstandings and ensure appropriate and consistent enforcement from one OFCCP district office to another.

### **Which employees will be included in the OFCCP's evaluation of compensation practices?**

Before deciding what compensation to analyze or even how to group employees for analysis, the OFCCP needs to establish which employees will be included in such an analysis. The current Scheduling Letter (OMB No. 1215-0072) 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 often include temporary employees, part-time employees, and employees from various geographic locations (based on the requirements of 41 CFR 60-2.1(d)). An effective compensation analysis cannot be conducted without accounting for these differences, and these differences are not known to the OFCCP under current data submission practices.

Note also that the other current source of regular OFCCP data collection, the Equal Opportunity Survey (41 CFR 60-2.18), requests only full-time employees. Additionally, the proposed standards do not make clear whether the analysis is to be performed on employee pay grouped by "establishment" or by "organization" — two frequently used terms that have very different meanings and usually encompass very different groups of employees.

### **What pay is subject to the OFCCP's evaluation of contractors' compensation practices?**

Although the current audit Scheduling Letter specifically requests "annualized compensation data (wages, salaries, commissions, and bonuses)," it has been our experience that different district offices and different compliance officers have different expectations for the type of compensation data submitted. Therefore, a contractor that has multiple AAP establishments across the country can be required to submit desk audit data in as many various ways.

The OFCCP should provide guidance to contractors — as well as its own compliance officers — on how to "annualize" pay data that come from two (and sometimes more) very different sources. That is, "wages and salaries" are most often provided from a contractor's human resource information system (HRIS) and represent a static amount often referred to as "base pay" but not representative of actual wages paid. "Commissions and bonuses," on the other hand, accumulate over a period of time and represent what was actually paid to the employee. Some compliance officers want to see the static amount (base pay) added to the "commissions and bonuses" amount, others want to see the amounts separated, and most appear unaware of the difference.

**When during the OFCCP's evaluation process will a regression analysis be necessary?**

The OFCCP should make clear in its guidelines that a regression analysis will be performed only after an onsite review and that then — and only then — will it become necessary for the contractor to go through the burdensome tasks of providing the *additional* data necessary for such an analysis. While the OFCCP's website includes the following guidance (Steps 1- 4) to contractors going through a desk audit, these steps are rather vague and are frequently not followed by its own compliance officers.

OFCCP's review of a contractor's compensation practices generally will proceed through the following steps:

Step 1: Analysis of the contractor's submission in response to Item Number 11 of the OFCCP Scheduling Letter.

Step 2: After assessing the contractor's submission, OFCCP may ask the contractor for additional compensation or personnel data to determine whether further investigation is warranted.

Step 3: If OFCCP determines that further investigation is required, OFCCP will conduct an on-site review in order to obtain a full understanding of the company's pay practices.

Step 4: After conducting the on site review to obtain a comprehensive understanding of the contractor's pay practices, OFCCP will perform a multiple regression analysis. This is a statistical analysis which will determine whether there are any significant differences in compensation by gender and/or race that are not explained by legitimate factors.

It has been our continuing experience that once the OFCCP receives compensation data submitted in the manner specifically requested and permitted in the desk audit Scheduling Letter (that is, *total number of employees by race and gender and total compensation by race and gender*), that a compliance officer will immediately call and ask for individualized compensation data on the entire population subject to the desk audit. While frequently made, such informal requests for the off-site review of contractors'

confidential data, are clearly not in line with the regulations at 41 CFR 60-1.20(f) which were specifically written to protect a contractor from having to provide private data offsite in a wholesale fashion. The informal "guidance" provided above may give compliance officers the false assumption that they can request all the data necessary for a regression analysis at this early stage of a compliance evaluation.

**What tests will be used on compensation data submitted in response to the Scheduling Letter (Step 1) to determine whether additional data is warranted (Step 2) or whether an on-site review is necessary (Step 3) to evaluate a contractor's compensation practices?**

Since the OFCCP will not be able to use multiple regression in every compliance evaluation, how will the agency determine when additional data are necessary and which contractors require an on-site review of compensation? When contractors submit their summarized — not individualized — pay data at the desk audit, will a comparison of mean or median pay be used? Will a statistical test be applied? How will the OFCCP determine from *summarized* data what constitutes "similarly situated" jobs? Since job descriptions or even job titles are not required at this early stage of the review, what standards will the agency apply to get from an analysis of summarized pay data to a situation requiring tremendous amounts of additional data for a regression analysis on similarly situated employees?

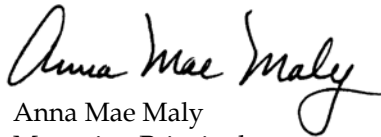
The burden of conducting the extensive review and data collection detailed in the proposed standards would impact both the OFCCP and the contractors subjected to this review. Much of the data required for multiple regression analyses will likely have to be manually collected from various files and systems — both hard-copy and electronic. Because of this extremely cumbersome and costly burden, the selection of establishments for an on-site review of compensation needs to be made with a great deal of concern. Contractors will and the OFCCP should want to prevent unnecessary fishing expeditions and arbitrary data requests from well-meaning compliance officers acting in a perfunctory manner.

Any standards on the evaluation of contractors' compensation practices should begin with the standards for determining when the use of multiple regression analyses is appropriate.

**Summary and Conclusion**

We again commend the OFCCP for its efforts to rectify the problem of inconsistent enforcement due to a lack of standards for conducting evaluations of compensation. However, the agency should be sure to address fundamental questions or risk generating new enforcement and interpretation problems. Finally, we would like to emphasize the importance of anecdotal evidence in evaluating compensation and caution against relying solely on any statistical model as a basis for allegations of systemic compensation discrimination.

Sincerely,



Anna Mae Maly  
Managing Principal

AMM/ETC/GS/SA