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Director  
Division of Policy, Planning, and Program Development  
Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
Room N3422  
200 Constitution Ave., NW  
Washington, D.C.20210

**RE: Interpretive Standards for Systemic Compensation Discrimination  
and Voluntary Guidelines for Self-Evaluation of Compensation  
Practices Under Executive Order 11246; Notice of Rescission**

**Reference: 1250-ZNE**

Dear Ms. Carr:

This letter is submitted in response to the Notice of Proposed Rescission with respect to the Interpretive Standards for Systemic Compensation Discrimination (“Standards”) and Voluntary Guidelines for Self-Evaluation of Compensation Practices (“Guidelines”) Under Executive Order 11246 (“Executive Order”) by the U.S. Department of Labor (the “Department” or the “DOL”) published January 3, 2011<sup>1</sup> with respect to 41 CFR Parts 60-1 and 60-2. The underlying Standards and Guidelines relate to certain nondiscrimination requirements of the Executive Order, those designed to ensure that federal contractors do not discriminate in compensation against employees on the basis of race, color, national origin, religion, and sex. More broadly, the Executive Order also provides that federal contractors shall take affirmative action to ensure that vestiges of discrimination are removed from their employment practices. To achieve the affirmative action objective, contractors must engage in an effort to affirmatively recruit minority and female candidates and develop affirmative action plans (“AAPs”) that analyze the composition of the workforce and prescribed human resource activities that occur during a one-year period.

These comments<sup>2</sup> are submitted on behalf the (1) Center for Corporate Equality (“CCE”); (2) College and University Professional Association for Human Resources

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<sup>1</sup> 76 Fed. Reg. 62 (2011).

<sup>2</sup> We thank the authors of this response for the time and effort they dedicated to this important response. Portions of this response were written by David Cohen, Eric Dunleavy, David Fortney, Burton Fishman, Fred Satterwhite, Mike Aamodt and Art Gutman.

(“CUPA-HR”); (3) Fortney & Scott, LLC; (4) Mercer ORC Networks (“ORC”); and (5) Society for Human Resource Management (“SHRM”).

*CCE* was established in 2007 to help companies proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. *CCE* is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance.

*CUPA-HR* provides dynamic leadership to the higher education human resources profession and the higher education community by delivering essential knowledge, resources and connections that enhance individual and institutional capacity and effectiveness. Its membership is institution-based and includes close to 90 percent of all U.S. doctoral institutions, around 70 percent of all master’s institutions, over 50 percent of all bachelor’s institutions, and almost 500 two-year and specialized institutions. *CUPA-HR* also serves other organizations that are affiliated with higher education. It provides vital resources to more than 12,000 higher education HR professionals at over 1,700 institutions—every day.

*Fortney & Scott, LLC* is a Washington, D.C.-based law firm counseling and advising clients on the full spectrum of workplace-related matters. Its practice focuses on employment discrimination and labor matters, representing clients primarily before government enforcement agencies governing the workplace, including the DOL and its agencies, with particular emphasis on the Office of Federal Contract Compliance Programs (“OFCCP”), the Equal Employment Opportunity Commission (“EEOC”), and the National Labor Relations Board (“NLRB”).

*ORC*, now a part of Mercer, has been helping employers manage diversity for nearly fifty years. For even longer, *ORC* has had a proud history of helping some of the world’s largest and most progressive organizations advance the art and science of organizational and human relationships at work. Its equality, diversity and inclusion experts work closely with colleagues in *ORC*’s talent management, organizational development, employee communications, and compensation specialty areas to help you create integrated and sustainable EDI strategies and programs. Mercer is a leading global provider of consulting, outsourcing and investment services, with more than 25,000 clients worldwide.

*SHRM* is the world’s largest association devoted to human resource management. Representing more than 250,000 individual members, the Society’s mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, the Society’s mission is also to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, *SHRM* currently has more than 575 affiliated chapters and members in more than 140 countries.

The identification and elimination of pay discrimination is of critical social importance in this country and we encourage OFCCP, the EEOC, the Department of Justice (“DOJ”), and the federal government as a whole to continue to work toward these goals. However, it is critical that requirements on federal contractors are attainable, reasonable, fair, and grounded in science that mirrors reality and allows for meaningful inferences. We urge OFCCP to consider the challenges described in this submission and hope that this response stimulates positive dialogue on a variety of important topics.

This submission is organized into seven sections. Section One provides a general overview of the issues involved in the complex realm of systemic compensation discrimination analysis and enforcement. Section Two reviews the historical context of compensation discrimination enforcement at OFCCP, with particular emphasis on the Standards and Guidelines. Section Three identifies some of the key practical reasons why OFCCP should not rescind the Standards and Guidelines, and Section Four addresses more detailed legal and statistical considerations supporting the Standards. Section Five explains why a rescission of the Standards without new standards in place would be damaging to both the spirit and enforcement of equal employment opportunity. In Section Six, the compliance challenge posed by possible ‘reverse’ discrimination claims is addressed in the context of a regulatory vacuum. Section Seven concludes the submission with a set of recommendations that (1) are grounded in controlling Title VII principles and judicial determinations and (2) would enhance the identification and enforcement of compensation discrimination.

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## Section 1: Introduction

The submitters of these comments all have a long history of actively supporting the goals of affirmative action and of equity in the workplace. Both by example of their workplace conduct and by their participation in various governmental forums, educational seminars, and conferences, the submitters have demonstrated their adherence to fair and equitable workplace policies and practices as contemplated by the Executive Order. At the root of their compliance efforts lies a body of clearly articulated and well-recognized federal laws, rules, regulations, and standards grounded on controlling Title VII principles. The Title VII principles provide the required basis for both the self-evaluation and the enforcement which animate the Executive Order. This body of law, which includes the materials at issue here, permits the regulated community and the regulators to know the rules by which the conduct at issue is to be governed. That common knowledge is the source of the common efforts needed to meet or exceed the requirements of the Executive Order.

By the action announced in its recent Notice, namely, the rescission of the Interpretive Standards for Systemic Compensation Discrimination (“Standards”) and the Voluntary Guidelines for Self-Evaluation of Compensation Practices (“Guidelines”), OFCCP may be weakening compensation discrimination identification and enforcement mechanisms. It may do so in many ways, all of which will be discussed in greater detail below, but two stand out.

The first is to invoke the past and then claim to be returning to it. In its Notice, OFCCP claims that by rescinding the Standards and Guidelines, it is returning to a time when the agency followed a “traditional tailoring of compensation investigation and analytical procedures to the facts of the case based on Title VII principles.” 76 FR at 63. As experienced contractors know, such a tradition is more hope than reality and cannot be returned to in the future. Contractors know that the Standards and Guidelines were devised to end a period of inconsistent enforcement, exemplified by the discredited Pay Grade theory of compensation analysis, a theory that the OFCCP has itself reasonably described as “inconsistent with administrative and judicial interpretations of Title VII.” 71 CFR 35124 (June 16, 2006); *see also* 69 FR 67248-49 (November 16, 2004). A regulatory future based on such past practices is one to be avoided. Indeed, precisely such a rationale provides the basis for retaining the Standards and Guidelines—**not** rescinding them.

The second reason follows from the first: a rescission without rules, regulations, and standards to replace them creates the potential for the “inconsistent” enforcement contractors experienced in the past. The Notice gives indications of what OFCCP will do in the absence of published guidelines. However, a contractor has the right to know the standards by which it is being judged. The reasons the Standards and Guidelines were issued still provide the rationale for avoiding a regulatory situation where OFCCP enforcement will be bound solely by amorphous “Title VII principles.”

As more fully explained below, the submitters maintain that OFCCP should withdraw the Notice of Rescission and retain the widely-used, broadly-understood, and practically effective Standards and Guidelines that the agency has developed. At a minimum, there should be no rescission of the Standards and Guidelines until OFFCP has been able to develop and refine new criteria, offer them for Notice and Comment, and promulgate them in accordance with law.

## **Section 2: Understanding the Historical Context of Compensation Discrimination Enforcement at OFCCP**

Before one can make an informed decision regarding the practical implications of the proposed rescission of the Standards, it is important to understand the history of OFCCP's involvement with compensation analyses. OFCCP has a long history of investigating systemic compensation discrimination and has had its fair share of both success and failure. A quick review of that history will help put the proposed rescission in context.

### *The Early 1990's and the Glass Ceiling Initiative*

Historically, OFCCP spent much of its time focusing on the affirmative action requirements, goals, timetables, and good faith efforts of the Executive Order rather than the identification and remedy of systemic discrimination. During the period of 1989 to 1991, Secretaries of Labor Elizabeth Dole and Lynn Martin and Deputy Assistant Secretary of Labor for OFCCP, Cari Dominguez, launched a Corporate Management Review, more widely known as the "Glass Ceiling Initiative." Glass ceiling reviews were reserved for larger, multiple-establishment federal contractors. The idea was to focus on the executive levels of the organization to determine if there was a glass ceiling that impacts advancement, pay, promotion, opportunities, etc. During the course of a glass ceiling review, OFCCP would focus on the compensation of female and minority executives in comparison to similarly situated male and non-minority executives, as applicable. To conduct this type of investigation, a contractor was required to submit detailed compensation data so that OFCCP could conduct an "analysis". The two things that were not delineated in this initiative were the definitions of "similarly situated jobs" and "analysis". At that time, there were no clearly defined standards or protocols available through either the Federal Contract Compliance Manual or agency directives. Due to the lack of standards within the agency, OFCCP staff was left without any logically defined framework in which to operate. Without clear guidance and standards, the glass ceiling initiative lead to very few, if any, findings of systemic discrimination.

### *Fairfax Hospital and the Beginning of the Dubray Analysis*

In September of 1992, the Philadelphia region, under the direction of Regional Director Joseph Dubray, scheduled a Corporate Management Review of Fairfax Hospital. In addition to the executive level compensation data, OFCCP requested compensation data for all non-executive personnel. To determine whether there were differences in pay that warranted an explanation by the contractor, Mr. Dubray employed a new method for

analyzing compensation data. The theory was quite simple; Employees would be grouped by their existing salary grades. The theory was that the employer had evaluated those jobs and determined that they were comparable enough to be placed in the same grade. Therefore, the jobs would be similar enough to analyze together. For each salary grade, the median salary was calculated for the men, women, non-minorities and minorities. These calculated medians would then be compared to determine whether or not there were differences between groups. No *a priori* threshold was established in determining what would constitute a “meaningful” difference. The definition of “meaningful difference” became a moving target and would change from grade to grade.

Ultimately, OFCCP identified five grades as having meaningful differences (actual differences ranged from \$4,000 to \$11,000). Statistical significance tests, as prescribed in the current standards, were not used to determine whether the observed median differences between groups were statistically significant (*i.e.*, did not occur by chance). Once the five grades were identified, OFCCP calculated the median time in grade of each group (male, female, minority, and non-minority). The median time in grade was then compared to the median salary difference. After a comparison of the time in grade variable to the median salary difference, OFCCP concluded that the time in grade difference did not acceptably explain the observed salary difference. OFCCP ultimately reached a settlement with Fairfax Hospital grounded on OFCCP’s contention that the hospital had engaged in illegal systemic compensation discrimination due to the unexplained differences in the five grades. In the resulting 1993 conciliation agreement, the hospital agreed to pay \$693,000 in back-pay and salary adjustments.

The method used in the Fairfax Hospital audit became known as the “Dubray Analysis.” After the Fairfax Hospital conciliation, Mr. Dubray briefed DOL’s National Office representatives in Washington, D.C. including Deputy Assistant Secretary Shirley Wilcher, senior OFCCP staff, and attorneys from the Solicitor of Labor’s (“SOL’s”) office. It is important to note that, at that time, the SOL advised OFCCP that the Dubray Analysis method was not consistent with Title VII principles and was not litigation worthy. Meaning, if OFCCP chose to adopt this method and use it during routine compliance evaluations, it would not have the backing of the SOL for enforcement via an administrative complaint (*i.e.*, litigation). OFCCP, however, made a decision to move forward with this method with a full understanding that it was not “litigation worthy.”

### Dubray White Papers

Four years would ultimately go by without any official document coming from OFCCP addressing this new compensation initiative. In 1997, an unofficial white paper was “leaked” through a local ILG in the Mid-Atlantic region entitled *Systemic Discrimination Analysis*. This document was not released on DOL letterhead and did not have an author. The contractor community generally understood that the white paper was authored by Philadelphia Regional Director Joseph Dubray. The paper laid out the methodology and theory behind the Dubray Analysis. The methodology was as follows:

A company has placed jobs within a grade, therefore establishing that all of those jobs are similarly situated. Therefore, the initial step in the compensation analysis is a comparison of the median/average salaries of men to women and non-minorities to minorities within the same salary grade.

If a median/average difference is identified, the difference should be explained by the median/average time in grade. Mr. Dubray made the argument that, because each individual has the same opportunity to go from the minimum of the grade to the maximum of the grade, this variable should be the single best predictor of pay.

Once again, the definition of “difference” was never provided, and no standard was developed to determine how much time in grade difference was enough to justify the pay difference. Clearly, OFCCP’s philosophy had been laid out in this paper, but no clearly defined method was established.

As one can imagine, the release of this white paper set off a firestorm within the contractor and legal communities. Several scathing papers were written in protest of the “Dubray Analysis” and public opposition began to grow. The general criticism from the legal community was that all jobs in a grade are NOT similarly situated and that a meaningful difference must be defined using some sort of statistical significance testing in order to withstand legal scrutiny under a Title VII or 14<sup>th</sup> Amendment (Equal Protection Clause) standard. Further, the presumption that an employer’s placement of jobs into the same grade established them as “similarly situated” seemed to rely on “comparable worth” theory, which had been widely rejected by the courts. The bottom line was that the legal community felt strongly that OFCCP’s theory would fail if a case was ultimately litigated.

In response to the criticism launched against Mr. Dubray and OFCCP, a second paper was released by OFCCP in 1999 entitled, *An Update to Systemic Compensation Discrimination*. Once again, no author was identified in the paper, but it was well known that this second paper also was published by Mr. Dubray. The paper addressed the criticisms lodged by the contractor and legal communities. The theme of the paper was that the criticism raised by the legal and contractor communities may have some merit, but the agency was not held to Title VII standards during the course of a routine compliance evaluation. Mr. Dubray further clarified that the agency is not required to establish a “court ready” analysis during a compliance evaluation because the burden of proof is not the same. The thought was that a compliance review is not a courtroom, and therefore, OFCCP doesn’t have to produce evidence that would withstand legal and judicial scrutiny. More specifically, the 1999 paper states:

For many attorneys, “proving” one’s case often means that investigative procedures ought to be identical to the procedures utilized in a formal judicial setting. That is to say, the analysis at the investigation stage should be as sophisticated as an analysis that meets the guidelines established by the courts for the presentation and evaluation of evidence in a legal proceeding. The investigation process is much less formal;

however, it is not OFCCP's policy or practice to 'litigate' the merits of investigation findings at the investigatory stage of a review.

That being said, our investigative findings should be persuasive enough that a reasonable person might conclude that a serious problem exists. In addition, the investigative techniques used to allege a systemic problem must adhere to Title VII principles. Finally, if the employer refuses to conciliate, the investigative finding, when put in a form for presentation at trial, must indicate the existence of "provable" discrimination.

Interestingly, the paper states that OFCCP did **not** have to prove discrimination during the course of an investigation but must otherwise adhere to Title VII principles. Those two statements were clearly at odds with one another. Mr. Dubray concluded that, because a conciliation agreement included a clause stating that the contractor did not admit guilt, it was held to a lesser standard than a court ordered consent decree. This operational distinction between the standard required for voluntary conciliation of an "investigative finding" and the standard required to "prove" discrimination once a review had moved to litigation was consistent with OFCCP practices up to that point. OFCCP could "win" a case under the lesser standard, as long as the review remained within the realm of a voluntarily conciliated finding and the contractor was agreeable to the terms. Despite the possibility of OFCCP's success being thwarted by an unbridgeable gap between the two standards if the review moved to litigation, the agency continued to conduct its reviews using this approach.

The release of the two papers and the Fairfax Hospital settlement piqued the interest of the other regional directors at OFCCP. Mr. Dubray was asked by the national office to train the other regions on this new method of systemic compensation analysis. During the course of his nationwide training, Mr. Dubray specified that there is no fixed definition of what constituted a meaningful difference, but that this should be a moving target. The regions set out to implement this method, with most using either a 5% difference or an absolute value difference of \$1,000.

The "Dubray" method was implemented nationwide and contractors had no idea in which manner their compensation systems would be analyzed. Ultimately, this inconsistency lead to extremely long and contentious compliance evaluations, and the agency's successful enforcement of systemic compensation discrimination was limited. In addition, because contractors did not know the method in which their compensation systems would be analyzed, there was no incentive to expend the resources and time to conduct proactive analyses. This led to the obvious question: why would a contractor take the time to conduct an internal analysis, identify a problem, and remedy the issue with salary adjustments, when OFCCP would come in and do something vastly different and potentially identify very different issues?

### The Boeing Case

In November of 1999, the Boeing Corporation resolved 10 open OFCCP compliance evaluations, some of which dated back to 1994. Although all the audits ultimately were conciliated in a comprehensive agreement that included \$4.5 million in salary adjustments for various groups, the Boeing settlement was a turning point for OFCCP. OFCCP realized that in order to “move” on a case, the “Dubray” method was not legally defensible and it had to abide by Title VII principles if it were to litigate. Therefore, Boeing and OFCCP worked together to develop legally acceptable and reasonable employee groupings. These groupings were ultimately called job aggregation groupings (“JAGs”). The definition and designation of a JAG was very similar to the definition of a similarly situated employee grouping (“SSEG”) in the Interpretive Standards. In addition, both OFCCP and Boeing agreed that the appropriate way to evaluate whether or not there are meaningful differences was through multiple regression analysis. Analyses were then performed by JAG using multiple regression analysis, and a settlement was negotiated.

This case was a watershed for the agency because it agreed to a public settlement that flew in the face of the “Dubray” method by endorsing the notion of similarly situated, not grades, and the use of statistical significance testing via multiple regression analysis. The ground work for the Standards had been laid seven years prior to their release in 2006.

### 2006 Compensation Standards and Guidelines

OFCCP came to realize that if it wished to continue to investigate and enforce systemic compensation discrimination, it had to develop and publish standards. In part, this realization sprang from concerns about the possibility of “reverse discrimination” (*Rudebusch v. Hughes*, 313 F.3d 506 (9th Cir., 2002)) or Equal Protection-based lawsuits that might arise if a contractor made race/ethnicity or gender-based pay adjustments to a group (*e.g.*, women, Blacks, Hispanics) in the absence of statistical significance.

The Standards codified the protocol and methodology that OFCCP would use during the course of a compliance evaluation when investigating systemic compensation discrimination. The standards required the development of similarly situated employee groupings (SSEG), some form of statistical significance testing (*e.g.*, multiple regression analysis), and, in **most** cases, some form of anecdotal evidence.

Contractors finally had criteria that both they and OFCCP could follow. These standards allowed contractors to be proactive and follow a “blue print” for the identification of systemic discrimination. In addition, the standards allowed OFCCP to be consistent from region to region, district to district, and audit to audit. There was no ambiguity on the interpretation of Title VII principles and what was needed to successfully identify and pursue systemic compensation discrimination.

## Conclusion

Before deciding to rescind the Standards, it is important to understand the history leading up to their creation and release in 2006. If the Standards are rescinded and nothing is put in their place that is available to the contractor community, the resulting vacuum will cause a decrease in voluntary compliance within the contractor community and a decrease in consistency within OFCCP. Ultimately, OFCCP will be back to where it was in the late 1990's, when there was increased tension between OFCCP and the contractor community and very little actual enforcement. As was evident in the late 1990's, both the contractor community and OFCCP knew all too well that in order to move forward on a case of systemic discrimination, the agency needed to conform with Title VII principles: SSEG's, multiple regression analysis, and some sort of anecdotal evidence.

### **Section 3: Why OFCCP Should Not Rescind the Standards and Guidelines**

Shortly after the publication of OFCCP's Notice of Proposed Rescission, the Center for Corporate Equality (CCE) conducted two surveys to determine the reactions of the contractor community to OFCCP's proposal. The first survey was sent to contractors and the second was sent to compensation experts (*e.g.*, attorneys, consultants, academicians) whose clients are or have been federal contractors. One hundred thirteen contractors and 33 "experts" responded to the two surveys. As can be seen in the following sections, it is clear that the contractor community uses the current Guidelines, does not favor the rescission of the Guidelines and Standards, and believes compliance efforts will suffer from a lack of formal guidance. In fact, these results indirectly suggest that rescission could weaken the OFCCP's effort to eliminate the gender wage gap by making it difficult or even impossible to identify and eliminate potential discrimination.

#### Survey Participants-The Experts

Areas of expertise for the 33 responding experts included industrial-organizational psychology, labor economics, employment law, HR compliance, and HR statistics. The majority of experts were external consultants (54.5%) and attorneys (21.2%), internal practitioners (12.1%), academics (6.1%), and government employees (6.1%) were also represented. The experts had experience in a variety of roles including working on the defendant (81.8%) and plaintiff (30.3%) sides of litigation/audits, helping organizations proactively conduct compensation analyses (78.8%), working on behalf of an EEO agency (21.2%), and for the court as an independent expert (9.1%).

#### Survey Participants-The Contractors

The primary role for the majority of responding contractors was compliance (61.3%) followed by human resources (17.1%), compensation (10.8%), and legal (10.8%). The respondents represented both large employers with over 20,000 employees (41.4%) and well as smaller contractors with fewer than 1,000 employees (18.9%).

### Contractors Actually Use the Current Guidelines

In its Notice of Proposed Rescission, the OFCCP stated, “OFCCP is proposing to rescind the Voluntary Guidelines because they are largely unused by the Federal Government contracting community...” On the basis of the CCE survey results, it appears that this is not an accurate statement as 61.3% of contractors indicated that they used the Guidelines when conducting their proactive compensation analyses. Just as compelling is the finding that only 14% of attorneys and consultants indicated that none of their clients use the Guidelines. Thus, there is clearly a dissonance between the OFCCP’s perception of use and actual use. OFCCP may be confusing a contractor’s use of the Guidelines with contractor’s use of the Compliance Coordination Incentive Option (*i.e.*, voluntarily submitting the results of an equity analysis before any triggers have been identified) which our survey indicates is used by fewer than 6% of contractors.

### Contractors Want Guidance

According to our survey results, 81.3% of contractors believe that OFCCP guidelines are needed, 91.3% believe that cross-agency guidelines on compensation are needed, and 88.7% believe guidelines are useful. These results mirror the responses of experts as 73% thought cross-agency compensation guidelines are needed. Some contractors believe that guidelines are so essential that 7.8% indicated that they would stop doing proactive analyses if the OFCCP does not publically release new standards.

### Guidelines and Standards Increase Efficiency and Fairness

Although contractors and experts might disagree with some of the individual standards of the current Guidelines (*e.g.*, 60% v. 70% statistical coverage, 30 v. 40 employees for a regression), 84% of contractors believe the Guidelines increase the fairness of an audit by standardizing the process. That is, rather than a contractor and OFCCP arguing about whether a Fisher’s exact test or a regression analysis should be conducted on a given SSEG, the current protocol is that SSEGs meeting the “30 and 5” rule would be analyzed by a regression and those not meeting the rule would be analyzed by a small groups test. Given that the Guidelines are voluntary, a contractor can opt to follow the recommend protocol and thus mirror the OFCCP’s analysis during an audit or it can ignore the Guidelines and use its own standards.

Contractors also believe that published criteria:

- reduce the length (79.2%) and stress (73.6%) of an audit by reducing the number of disagreements over methodological and statistical analysis issues;
- ensure that OFCCP and the contractor are using a methodology that both OFCCP and the contractor will accept (85.8%);
- encourage contractors to proactively correct gender and race/ethnicity disparities in compensation (81.1%); and
- encourage OFCCP and the contractor community to serve as partners in eliminating discrimination (81.1%).

These responses are contrary to the OFCCP's position that the Standards "significantly undermine OFCCP's ability to investigate and identify discrimination." Significantly, 79.2% of experts agreed that the Standards do NOT undermine the OFCCP's ability to do its job.

*Contractors are Entitled to Know The Standards (Due Process)*

The OFCCP is proposing that "once rescinded, nothing in the Standards or Voluntary Guidelines or their Preamble can be relied upon as a statement of the OFCCP's interpretation of Title VII Principles or OFCCP regulations." Therefore, there would be no published guidance on how OFCCP would investigate and enforce systemic compensation discrimination cases. Our survey results indicate that 94.4% of contractors and 88.5% of experts believe that it is necessary for OFCCP to publicly state its interpretation of Title VII Principles in the context of systemic compensation discrimination. This due process is a legal right.

If there are no published standards that will be used by the OFCCP, there is little incentive for a contractor to conduct a thorough proactive analysis. For example, imagine a situation in which a contractor analyzes its compensation data in good faith using a particular methodology. As a result of this thorough analysis, it proactively makes any necessary salary or policy adjustments to correct any unexplained gender/race/ethnicity disparities in compensation. Two months later, the OFCCP audits the contractor and, using a completely different methodology, concludes that the contractor is engaging in systemic discrimination. In such a situation, the contractor's only choices would be to agree with OFCCP or rely on the results of its own analyses and force the OFCCP to litigate. If, however, there were published guidelines, both the contractor and the OFCCP would have reached the same conclusions, avoiding the need for costly litigation in which neither side would be sure of the outcome.

*Rescinding the Guidelines is Contrary to the Department of Labor's Regulatory Agenda*

In the spring of 2010, the Department of Labor published its regulatory agenda and highlighted two strategies: "Plan/Prevent/Protect" and "Openness and Transparency to Achieve Compliance." The plan to rescind the Standards without putting in place any new standards results in a complete regulatory gap and fails to provide any guidance to the regulated community, which clearly violates the "openness and transparency" strategy that is widely advocated by the Obama administration. Given the OFCCP's plan to rescind the Standards and not publicly replace them, 74.1% of contractors believe it will be more difficult for a contractor to achieve the DOL's goal of compliance.

## Section 4: A Detailed Consideration of Relevant Legal and Statistical Theory

A major problem with the proposed rescission of the Standards and Guidelines is that OFCCP's interpretation of Title VII principles in the proposed rescission is not consistent with the legal standards established in case law, particularly by the Supreme Court. Interestingly enough, those legal holdings are essentially stated in the current Standards that OFCCP now has proposed rescinding.

It is important to understand that the OFCCP's initial purpose in publishing the Standards was to ensure that any charges brought against a contractor for compensation discrimination would withstand legal scrutiny. That is, the analyses conducted by OFCCP and the evidence that it collected would be sufficient to meet the Title VII principles established by decades of case law. In rationalizing its request to rescind the Standards, the OFCCP is essentially stating that the legal theory that it articulated in creating the Standards was flawed and that the key components that are the backbone of the Standards—similarly situated groups, statistical evidence of compensation disparities, and anecdotal evidence of discrimination—are not needed to meet Title VII principles in proving systemic discrimination.

OFCCP's legal rationale is threefold. First, the OFCCP believes that under Title VII case law, statistical disparities **alone** are sufficient to **prove** a pattern or practice of disparate treatment. Or, in the words of the OFCCP:

[U]nder Title VII, a pattern or practice class-wide disparate treatment case **may be proven by statistics**. *See, e.g., Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Palmer v. Shultz*, 815 F.2d 84, 90-91 (DC Cir. 1987). *Cf. OFCCP v. Greenwood Mills, Inc.*, No. 89-OFC-39, Decision and Order of Remand, slip op. at 14 (Sec'y of Labor Nov. 20, 1995); *OFCCP v. Jacksonville Shipyards*, 89-OFC-1, Decision and Remand Order, slip op. at 5 (Sec'y of Labor May 9, 1995). (emphasis added.)

Second, the OFCCP assumes that **anecdotal evidence** is generally **not** required in Title VII case law to **prove** a pattern or practice of discrimination. In the words of the OFCCP:

**[R]equiring anecdotal evidence** is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers and, as a result, anecdotal evidence from victims of pay discrimination may not exist. (emphasis added.)

Third, the OFCCP rejects the need for statistical analyses to identify compensation discrimination, most notably **multiple regression**. In the words of the OFCCP:

The Standard's mandate to use a **multiple regression** analysis to

identify compensation discrimination is also overly narrow and is not required under Title VII principles. While a multiple regression analysis may be a useful tool in identifying compensation discrimination, other statistical or **nonstatistical** analyses may be better suited, depending on the facts of the case. (emphasis added.)

This section addresses each rationale in turn. As a starting point, three landmark Supreme Court rulings on intentional discrimination are reviewed: *McDonnell Douglas v. Green*, 411 U. S. 792 (1973), *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *Hazelwood v. United States*, 433 U.S. 299 (1977).

*McDonnell Douglas v. Green*

Percy Green was a civil rights activist who was also employed as a machinist with McDonnell Douglas. After being laid off from McDonnell Douglas, Green participated in two illegal acts designed to highlight racial discrimination at McDonnell Douglas: (1) a “stall-in,” where cars were illegally parked on the roads leading to the McDonnell Douglas plant to prevent employees from entering the plant, and (2) a “lock-in,” where an exit was padlocked to prevent employees from exiting the plant. When the company subsequently advertised for mechanics (Green’s prior position), Green was not rehired, and sued alleging race discrimination. In deciding the case, a unanimous Supreme Court adopted a three-phase procedure (later modified in *Texas Dept. of Commun. Affairs v. Burdine*, 450 U. S. 248 (1981)), as outlined in the following table.

<b>The McDonnell-Burdine Scenario</b>	
<b>Phase 1</b>	Plaintiff presents presumptive evidence of a violation: (protected group membership, qualification to perform the job, application for the job, rejection followed by continuation of the search).
<b>Phase 2</b>	Defendant must articulate a legitimate reason for the selection decision made in phase 1; proof is unnecessary (burden of production).
<b>Phase 3</b>	Plaintiff must provide direct or indirect evidence that the articulation by defendant in phase 2 is a pretext for discrimination (burden of persuasion).

Green’s burden in Phase 1 (the *prima facie* phase) was light; to simply show he was protected by Title VII, was qualified to perform the job, was passed over, and the search continued. The defense burden in Phase 2 is equally light; to articulate (without proving) a legitimate nondiscriminatory reason for not rehiring Green. The company stated that he was not rehired because of the illegal acts he performed against the company. The burden then fell to Green to prove with direct (*e.g.*, eyewitnesses; incriminating documents) or indirect (*e.g.*, circumstantial) evidence that the articulated reason proposed by the defendant was a pretext for illegal discrimination. In general, many strong pretext cases are characterized by indirect (or anecdotal) evidence that others, who are similarly situated, were less harshly treated. Green lost because the

company did not rehire anyone who committed illegal acts during the layoff, white or black.

*International Brotherhood of Teamsters v. United States*

In general, pattern or practice claims of disparate treatment have rules similar to those outlined in *McDonnell Douglas v. Green*. For example, in *Teamsters*, there was an “inexorable zero” number of minorities in the lesser paid of two bus driving jobs. Speaking for a unanimous Court, Justice Stewart defined the Government’s *prima facie* burden as follows:

As the plaintiff, the Government bore the initial burden of making out a *prima facie* case of discrimination...and because it alleged a systemwide **pattern or practice** of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts. It had to establish by a **preponderance** of the evidence that racial discrimination was the company's **standard operating procedure**—the regular rather than the unusual practice. (emphasis added.) 431 U.S. at 336.

The Teamsters asserted (in the Court’s words):

[S]tatistics can never in and of themselves prove the existence of a pattern or practice of discrimination, or even establish a *prima facie* case shifting to the employer the burden of rebutting the inference raised by the figures. 431 U.S. at 339.

The Court responded that “**gross**” statistical disparities are “**probative,**” and require “**explanation,**” as in individual claims of disparate treatment in *McDonnell Douglas v. Green*. The Court noted further that the “company’s inability to rebut the inference of discrimination came not from the misuse of statistics, but from ‘the **inexorable zero.**’” 431 U.S. at 342. In short, the Teamsters did not lose simply because of the gross statistical disparity; they lost because they could not provide a believable nondiscriminatory reason for why it existed.

*Hazelwood v. United States*

The *Hazelwood* case involved a claim that black schoolteachers were underrepresented in the Hazelwood School District in comparison to the available and qualified (*i.e.*, licensed) black teachers in the relevant labor pool. The claim sounded compelling, but the Government’s case was not as strong as it appeared. In the words of Justice Stewart, again speaking for a unanimous Court:

[T]he Government mounted its “pattern or practice” attack in the District Court upon four different fronts. It adduced evidence of (1) a history of alleged racial discriminatory practices, (2) statistical disparities in hiring, (3) the standardless and largely subjective hiring practices, and (4) specific instances of alleged discrimination against 55 unsuccessful... applicants for teaching jobs. 433 U.S. at 303.

There were three weaknesses in the Government’s case. First, the statistical evidence was insufficient to meet the *prima facie* burden. Specifically, the percentage of newly hired black teachers in the school district was 3.7%. The key issue was the definition of the relevant labor pool. The percentage of black teachers in the county as a whole, which included St. Louis, was 15.4%, but in the immediate Hazelwood area, it was only 5.7%. The disparity was significant when compared to the country as a whole, but not when compared to the immediate Hazelwood areas. The Court ruled that the relevant reference point was the immediate area, thus discrediting the *prima facie* case. Most significantly, the Court used a 2-standard deviation (“SD”) definition of “gross disparity” derived from *Castaneda v. Patrida*, 430 U.S. 482, 499 (1977), a jury pool case decided three months earlier.

Second, the Court discredited other “anecdotal” evidence in the case, rejecting all of the individual claims of disparate treatment, and rejecting the other claims (*e.g.*, standardless subjective hiring decisions) based on the school district’s affirmative action plan, which successfully increased minority representation from 1.8% in 1972 (when Title VII was first applicable to government entities) to 3.7% at the time the lawsuit was filed.

Third, even assuming a successful *prima facie* claim, the Court ruled that the school district had a plausible nondiscriminatory reason for the disparity relative to the county as a whole: that they tried, but were unable to compete for teachers from the St. Louis area.

### OFCCP’s Interpretation of a Title VII Standard

#### Statistics Alone are Sufficient

With these cases in mind, let us examine each of OFCCP’s three-prong argument for rescinding its compensation Standards.

The first and perhaps most important argument is whether **statistics alone** are sufficient to **prove** systemic discrimination. The OFCCP interprets *Teamsters* and *Palmer v. Shultz*, 815 F.2d 84 (DC Cir., 1987) as stating that statistics alone are sufficient to prove discrimination. (Note that *Palmer* was an adverse impact case which cited *Teamsters* to support the 2 SD requirement for statistical significance.) We believe this to be an incorrect interpretation of those cases. It is clear that both cases actually state that statistics are sufficient only to establish a *prima facie* case of discrimination that must then be rebutted by the defendant; statistics alone are not the ultimate proof of discrimination. For example, in *Teamsters*, the Supreme Court ruled:

We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances. 441 U.S. at 340.

The legal theory adopted in *Hazelwood* and *Teamsters* has been consistent; the only difference in the two cases is that the statistical evidence was refutable in *Hazelwood*, but not in *Teamsters*. OFCCP cited two other cases in support of its position: *OFCCP v. Greenwood Mills* and *OFCCP v. Jacksonville Shipyards*. However, *Greenwood* was an ALJ ruling and *Jacksonville Shipyards* was an ARB ruling. Further, in *Jacksonville Shipyards*, the OFCCP's case was *not* limited to statistics alone, but also included anecdotal evidence that was insufficient to buttress the attempt to state disparate treatment hiring claims. These cases were not decided in a federal district court and, thus, have little value as judicial precedents; there also appears to be some inconsistency in how the *Teamsters* standard was interpreted.

More specifically, it appears that both the ALJ and ARB interpreted *Teamsters* in a way that implied that statistics alone are sufficient to **prove** a pattern or practice of discrimination versus meeting the burden of *prima facie* evidence. Critically, the *Teamsters* Court never ruled that statistics alone are generally sufficient to **prove** systemic discrimination, but rather, that "gross disparities" (*i.e.*, 2 SDs or more) are sufficient to make the *prima facie* case. Defendants still have the right to respond with an explanation which the plaintiffs can then prove is pretextual. Further, if the employer is unable to justify that its employment decisions were non-discriminatory, this is essentially a form of indirect anecdotal evidence. This rationale would certainly apply to a compensation case.

### Anecdotal Evidence

The OFCCP's interpretation is that there is nothing in the Court's decisions that require both anecdotal evidence and statistical evidence. Anecdotal evidence can come in a variety of forms, including individual disparate treatment charges, past illegal policies, and inconsistent applications of a policy or procedure. Many of these are happenstance in pattern or practice cases. The Government would have succeeded in making a *prima facie* claim in *Hazelwood* if the relevant disparity was statistically significant regardless of the presence or nature of additional anecdotal evidence. However, this merely shifts the legal burden to the employer and does **not** necessarily prove the case.

Another critical point is that because the OFCCP proactively audits federal contractors, in the vast majority of cases there is no claim of discrimination on which to focus. Claims of discrimination often include anecdotal evidence as a starting point, so OFCCP does not have a "head start" in demonstrating intent as they would in a traditional Title VII case. However, that should not insulate OFCCP from the burden of proving pretext in the event that an employer can justify a disparity.

At this point, we must consider the typical OFCCP compliance evaluation of a federal contractor. Assume OFCCP evaluates compensation data and conducts a statistical analysis by some sort of employee grouping. Also assume that a given contractor has about 100 employee groupings. Using basic statistical standards, one would expect one out of 20 (5%) of the groupings to have statistically significant differences by chance alone. What if there are statistically significant results and three of those favored men while two favored women? If isolated statistics alone are enough to prove discrimination, this contractor would be guilty of a pattern or practice of compensation discrimination against both men and women. Does that really make sense? In other words, is it reasonable to infer that the contractor engaged in a pattern or practice of intentional discrimination against both men and women? All federal contractors would eventually be flagged if this were the case. Anecdotal evidence differentiates an isolated statistical disparity from a meaningful disparity that warrants the inference of discrimination.<sup>3</sup>

One other thought warrants consideration: If anecdotal evidence is not needed, what purpose would an OFCCP on-site investigation serve? These investigations typically include a review of policies and procedures, employee files, and interviews with managers and employees. One would assume that the purpose of such focused investigations is to identify anecdotal evidence that would bring the statistics “to life.” If this is not the case, OFCCP would only need the statistical analyses from the desk audit to conclude a pattern or practice of discrimination and on-site investigations would no longer be needed.

### Multiple Regression is **Not** Needed

As its final argument for rescinding the Standards, the OFCCP argues that the use of multiple regression should not be required. This notion runs counter to the appropriate analysis of class action discrimination in general and of compensation discrimination in particular. As the OFCCP Standards demonstrated via an exhaustive review of applicable case law, multiple regression has a long and well-established history in Title VII compensation cases. The rationale is an intuitive one: an initial disparity in pay that is originally attributed to protected group status (*i.e.*, a *prima facie* case made by a simple *t* test) may be reasonably explained via a set of legitimate and non-discriminatory factors such as experience, education, and performance. Assuming a reasonable sample size,

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<sup>3</sup> This point was recently articulated in *Morgan v. UPS*, 380 F.3d 459 (8<sup>th</sup> Cir. 2004):

However, even the best regression equation cannot directly show discrimination because it cannot prove causation. The most it can show is a correlation that can give rise to an inference of discrimination. *Id.* § 2.05; *Rubinfeld, ante*, at 183-85....One of the most important flaws in Plaintiffs’ case is that they adduced no individual testimony regarding intentional discrimination. As mentioned above, Plaintiffs’ purported anecdotal evidence was insufficient for the working-conditions claim, and we see none with regard to pay. Although such evidence is not required, the failure to adduce it ‘reinforces the doubt arising from the questions about validity of the statistical evidence.’ *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 311 (7<sup>th</sup> Cir. 1988) (*quoting Griffin v. Board of Regents*, 795 F.2d 1281, 1292 (7<sup>th</sup> Cir. 1986)). Such evidence would bring the ‘cold numbers convincingly to life.’ *Teamsters*, 431 U.S. at 339.

multiple regression is a flexible and intuitive statistical methodology that can test the above notion and can be fitted to accommodate the nuances of any federal contractor's pay system. The use of statistics, both to make a *prima facie* case and to determine whether an employer justification is accurate, is the controlling Title VII precedent upon which the OFCCP Standards were based. This is **the** lesson of *Hazelwood*.

#### A Final Point of Confusion

As a final point, there appears to be continuing confusion by some in the EEO community concerning the difference between pattern or practice cases and disparate impact cases. Statistical analyses are critical in demonstrating a *prima facie* case under both theories. However, pattern or practice theory is one of intentional discrimination, whereas disparate impact theory is one of unintentional discrimination.

Historically, OFCCP has evaluated compensation discrimination by using base pay as the outcome of intent and under a pattern and practice theory. Thus, the allegation is one of intent, and not that a facially neutral process is the discriminatory mechanism (*e.g.*, a performance appraisal tool, seniority, etc.). Some evidence of intent (whether it is direct or indirect) is a critical difference between these two theories. For this reason, the requirement of anecdotal evidence in the OFCCP standards was a reasonable one. In fact, those Standards endorsed a set of clear, intuitive, and necessary Title VII standards.

#### **Section 5: There Cannot Be a Rescission without New Standards Put in Place**

We have already presented the reasons why a rescission of the Standards and Guidelines would inevitably lead to uncertainty and confusion among the contractor community as well as to inconsistent enforcement by the OFCCP. We maintain that this undesired option can be avoided *even if* OFCCP ultimately decides to carry out its Notice of Rescission. It is a straight-forward and administratively-sound alternative: delay any rescission until new standards are in place.

Any regulated community deserves to know the standards by which it will be judged, but to leave such a huge sector of the U.S. economy as is made up of federal contractors in a regulatory limbo is both unwelcome and avoidable. OFCCP should begin at once to draft new compensation standards and offer them for Notice and Comment at the earliest possible date. Only the promulgation of new standards will permit the contractor community to understand and comply with the criteria OFCCP would be using to assess compliance.

The submitters urge that any new standards give meaning to the new era of inter-agency cooperation and coordination announced as recently as February 8, 2011 by representatives of OFCCP, EEOC, and the Department of Justice. New OFCCP standards should be consonant with the EEOC's compensation standards under Title VII and should incorporate, as well, the conclusions of the National Academy of Science study commissioned by EEOC (*Science and Judgment in Risk Assessment*, NAS 1994). Obviously, any newly promulgated standard would, perforce, comply with the Paperwork

Reduction Act and other regulatory criteria to assure that the President's goal of eliminating duplicative and needlessly burdensome regulation is reached.

### **Section 6: Reverse Discrimination Risk when there are no Clear Standards for Defining Discrimination**

As described earlier in this submission, the OFCCP had incorporated three major criteria that Title VII case law demonstrates are necessary for a continued proper analysis of compensation cases. These include:

1. Individuals grouped into similarly situated employee groupings (SSEG);
2. Statistically significant differences in pay between protected classes after controlling for legitimate and non-discriminatory variables (multiple regression analysis); and
3. Anecdotal evidence of discrimination to bring those statistics to life.

When these factors are ignored, as would occur were the Standards rescinded, employers would be exposed to discretionary remedies imposed by the OFCCP, on the one hand, and the threat of reverse discrimination suits from unjustly overlooked individuals on the other. This is no imaginary dilemma. Such cases as *Rudebusch v. Hughes*, 313 F.3d 506 (9th Cir. 2002) and its progeny make this abundantly clear.

#### *Facts and Holding in the Rudebusch Case*

In *Rudebusch*, the problem began with a flawed analysis of the compensation of professors, conducted as part of Northern Arizona University's Affirmative Action obligations. This study then provided the basis for a *voluntary* granting of one-time pay adjustments to numerous (but not all) minority and female professors at the University who were deemed to be underpaid. The principal flaw in the original analysis of compensation is that it failed to control for critical factors in professorial compensation such as the number of publications and the proven ability to attract grant funds. A number of faculty members who were not given pay adjustments, principally, white men, objected, claiming that pay raises were improperly granted on the basis of race and gender without regard for the recognized factors that went into compensation decisions at the University. They sued. In the ensuing "reverse discrimination" suit, the limitations of the original analysis were presented and challenged by a multiple regression that controlled for the variety of applicable factors that should have been included. Although *Rudebusch* included a multiplicity of state law issues not relevant here, the critical point is that the University lost the reverse discrimination case and was ordered to give 22% pay increases to 18 of the unjustly overlooked professors.<sup>4</sup>

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<sup>4</sup> As one judge noted, wryly, "Any competent university president would know that he can't pay people more or less than others based on their sex and race."

## Implications

It is imperative that the implications of rescinding the 2006 Standards be considered in light of *Rudebusch*. The OFCCP is on record as stating the following:

[U]nder Title VII, a pattern or practice class-wide disparate treatment case **may be proven by statistics**. See, e.g., *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Palmer v. Shultz*, 815 F.2d 84, 90-91 (DC Cir. 1987). Cf. *OFCCP v. Greenwood Mills, Inc.*, No. 89-OFC-39, Decision and Order of Remand, *slip op.* at 14 (Sec'y of Labor, Nov. 20, 1995); *OFCCP v. Jacksonville Shipyards*, 89-OFC-1, Decision and Remand Order, *slip op.* at 5 (Sec'y of Labor, May 9, 1995).

This is an incorrect interpretation of the cases. The correct interpretation is that although “gross disparity” or “manifest imbalance” may state a *prima facie* case, that case may be rebutted by multiple regression statistics showing that the disparity disappears after controlling for key confounding variables (e.g., merit and performance factors). Under Title VII law, if rebutted, there is no *prima facie* case and, absent more, that case is dismissed. Even if a *prima facie* case is assumed, the defendant still has the opportunity to explain, without having to prove, why the disparity exists, and it is up to the plaintiff to **prove** that the explanation is pretextual. The problem, therefore, with rescinding the Standards as currently proposed is that nothing would prevent OFCCP from making subjective judgments based on weak *prima facie* evidence and concluding that a violation exists, when, in fact, under applicable Title VII criteria, there is none. Likewise, the agency could choose to reject the defendant’s explanation without applying Title VII standards. Thus, the OFCCP can force a “settlement” on a defendant that would not be enforced by a federal judge.

The reality in this scenario is that non-affected parties can file reverse discrimination claims and win in federal court despite what the OFCCP decides. In other words, if there is weak evidence of discrimination and a federal contractor decides to make salary adjustments based on race or gender in order to settle with the OFCCP, those salary adjustments may later deemed discriminatory acts against those whose salaries were not adjusted.

Note that *Rudebusch* was decided well before the highly publicized *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009) ruling. In that case, under Title VII standards, the Supreme Court required a “strong basis in evidence” on the part of an employer for believing it would lose a Title VII law suit brought by minorities in order to counter reverse discrimination charges from non-minorities. Although there are core differences between *Rudebusch* and *Ricci* (*Rudebusch* employed a 14<sup>th</sup> Amendment standard and *Ricci* involved discarding test results for fear of losing a Title VII adverse impact case), the fact remains that the two cases taken together establish as never before that there is potential vulnerability to employers for “pay adjustments” made in the name of affirmative action that cannot meet rigorous legal scrutiny. As a result, federal contractors need to consider the potential vulnerability of reverse discrimination claims when there are no clear

standards for defining what discrimination is in an OFCCP audit. The proposed rescission of the Standards and Guidelines would create precisely such an ambiguous state.

### **Section 7: Our Recommendations**

The submitters maintain, as has been demonstrated above, that there is no valid basis for rescinding the Standards and Guidelines. The rationales and explanations for rescission offered by OFCCP do little to alter this conclusion. The surveys presented above challenge, if not wholly refute, OFCCP's assertions that the Standards and Guidelines are little used, poorly understood, or difficult to meet. Most seriously, OFCCP confuses the alleged "rigidity" of the Standards and Guidelines with the certainty any regulated community must have under our system of law. Were the Standards and Guidelines rescinded and replaced by new rules that do not provide numerical thresholds, analytic frameworks, reliable statistical analyses, and a requirement for a strong evidentiary basis for enforcement, then regulation and enforcement could easily become discretionary. The Standards ensure that it is reasonable to determine whether the inference of discrimination is warranted.

The submitters propose that the clear best alternative is to retain the current Standards and Guidelines in their present form. If this best recommendation is rejected, the next best is to delay any rescission until new Standards and Guidelines have been drafted, reviewed, and promulgated in accordance with the provisions of the Administrative Procedure Act. Should this alternative be adopted, a rule-making hearing should be scheduled forthwith to assess the impact of the altered regulatory conditions under which federal contractors must work.

We reiterate that the identification and elimination of pay discrimination is of critical importance in this country, and we encourage OFCCP, EEOC, DOJ, and the federal government as a whole to continue to work toward these goals. However, it is critical that requirements on federal contractors are attainable, reasonable, fair, and grounded in science that mirrors reality. We urge OFCCP to consider the challenges described in this response, and hope that this response stimulates positive dialogue on a variety of important topics.

Thank you for the opportunity to submit these comments on behalf of CCE, SHRM, CUPA-HR, Mercer ORC Network and Fortney & Scott. We urge OFCCP to consider the issues raised by this submission and we are available to provide any additional assistance that you may find helpful.

Respectfully submitted,



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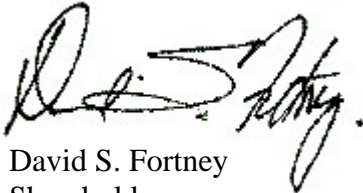
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