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Office of Federal Contract Compliance Programs
41 CFR Part 60–1
Government Contractors, Requirement To Report Summary Data on Employee Compensation; Proposed Rule

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60–1

RIN 1250–AA03

Government Contractors, Requirement To Report Summary Data on Employee Compensation

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) proposes to amend one of its implementing regulations for Executive Order 11246, Equal Employment Opportunity, which sets forth the reporting obligations of Federal contractors and subcontractors. This notice of proposed rulemaking (NPRM) would amend the regulation by adding a requirement that certain Federal contractors and subcontractors supplement their Employer Information Report (EEO–1 Report) with summary information on compensation paid to employees, as contained in the Form W–2 Wage and Tax Statement (W–2) forms, by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked, and the number of employees. This summary compensation data collection from Federal contractors and subcontractors by OFCCP is a critical tool for eradicating compensation discrimination. It would enable OFCCP to direct its enforcement resources toward entities for which reported data suggest potential pay violations, and not toward entities for which there is no evidence of potential pay violations. It would also enhance two enforcement objectives: Greater voluntary compliance; and greater deterrence of noncompliant behaviors by contractors and subcontractors. OFCCP seeks to achieve these dual and complementary objectives while minimizing, to the extent feasible, the compliance burden borne by Federal contractors and subcontractors.

DATES: To be assured of consideration, comments must be received on or before November 6, 2014.

ADDRESSES: You may submit comments, identified by RIN number 1250–AA03, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Fax:* (202) 693–1313 (for comments of six pages or less).
- *Mail:* Debra A. Carr, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: Please submit your comments by only one method. Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission was received by telephoning OFCCP at (202) 693–0103 (voice) or (202) 693–1337 (TTY) (these are not toll-free numbers). All comments received by OFCCP, including any personal information provided, will be available for public inspection during normal business hours at Room C–3325, 200 Constitution Avenue NW., Washington, DC 20210, or via the Internet at *www.regulations.gov.* Upon request, individuals who require assistance viewing comments are provided appropriate aids such as readers or print magnifiers. Copies of this NPRM are available in the following formats: Large print, electronic file on computer disk, and audiotape. To schedule an appointment to review the comments and/or to obtain this NPRM in an alternate format, please contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Debra A. Carr, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW., Room C–3325, Washington, DC 20210. Telephone: (202) 693–0103 (voice) or (202) 693–1337 (TTY).

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose

The OFCCP proposes to amend the regulation found at 41 CFR 60–1.7 by adding a requirement that certain Federal contractors and subcontractors (hereinafter ''contractors'') submit additional, readily available data in a new ''Equal Pay Report.'' This report would require the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees. The OFCCP believes that collecting and strategically using this summary data would have a significant deterrent effect and impact on OFCCP's enforcement program. Voluntary compliance and self-assessments by Federal contractors are critical components of this NPRM given the vast number of establishments subject to OFCCP's jurisdiction in comparison to the agency's modest personnel and other resources. The agency estimates that, based solely on 2012 EEO–1 Report data, more than 116,000 establishments are subject to its jurisdiction because they have at least 50 employees and a contract or subcontract in the amount of $50,000 or more. However, this NPRM proposes to cover a subset of these establishments. Informed by the aggregate industry-based data that OFCCP will make available to them, Federal contractors will have the opportunity to conduct meaningful self-assessments of their compensation practices and policies, and make any necessary pay adjustments or other compensation modifications prior to an OFCCP compliance evaluation. Specifically, this NPRM will enhance the quality and quantity of data OFCCP collects. This data, in addition to data collected from publicly available sources, such as the Bureau of Labor Statistics (BLS), are critical to developing a data-driven approach for identifying and focusing OFCCP's evaluations and resources on Federal contractors that have potentially discriminatory compensation differences when compared to an objective industry standard.

This NPRM reflects extensive stakeholder input collected prior to and during a 2011 Advance Notice of Proposed Rulemaking, specific criteria stated in a Presidential Memorandum issued on April 8, 2014, and additional stakeholder input collected during listening sessions held following the release of the Presidential Memorandum (the Memorandum).[1] In the Memorandum, President Barack Obama directed the U.S. Department of Labor (DOL) to develop a compensation data collection proposal that would: (1) Maximize the efficiency and effectiveness of the agency's enforcement and its ability to focus on more likely violators; (2) minimize, to the extent feasible, the burden on Federal contractors and subcontractors, especially small businesses and small nonprofit organizations; and (3) use the data collected to encourage greater voluntary compliance and to identify and analyze industry trends. The Memorandum also encouraged the Department to develop a proposal that relies on existing reporting requirements and frameworks to the extent feasible, and to consider available independent

[1] Presidential Documents, Memorandum of April 8, 2014, ''Advancing Pay Equality Through Compensation Data Collection,'' Memorandum for the Secretary of Labor, April 11, 2014 (79 FR 20751).

studies regarding the collection of compensation data.

Data collection and analysis of data are likely to serve as a disincentive for noncompliance, and are, therefore, effective deterrents. One recent report found that deterring violations before they occur is one part of an ''overall enforcement policy.'' [2] However, deterrence is not often ''incorporated as a central component of how investigations are targeted, conducted, and followed up on, or in the way that penalties are assessed and levied.'' [3] Similarly, researchers have described deterrence as the ''second foundation of traditional enforcement'' with the potential to protect vulnerable workers and influence employers' behavior related to the broad goal of improving workplace compliance.[4] Research in this area has found that deterrence can effectively inform how enforcement agencies select and conduct investigations.[5]

The disclosure of compensation data summarized at the industry level enables contractors and subcontractors to assess their compensation structure along with those of others in the same industry, and provide useful data to current and potential employees. Some of these employers will not want to be identified as having pay standards that are significantly lower or different from those of their industry peers, since this may encourage valuable employees to consider moving to other employers, or discourage applicants who see that higher paying jobs may be available elsewhere. Employers do not want to be known as one of the lowest paying members of their industry, and may voluntarily change their pay structure.

OFCCP, through this NPRM, seeks to imbed deterrence into its existing three-prong enforcement framework which consists of: (1) Conducting compliance evaluations and complaint investigations, and obtaining remedies for victims of discrimination; (2) Issuing policy, technical assistance, and subregulatory guidance that is legally sound and effective; and (3) Strategically developing relationships and sharing information with contractors and workers about their respective rights and legal obligations.

In order to integrate deterrence into the first of the three prongs, that is, its compliance evaluations process, OFCCP will collect and analyze contractor summary compensation data to establish objective industry standards for identifying potential discrimination in employee compensation.[6] OFCCP will use these standards to determine which contractors it will prioritize and schedule for compliance evaluations. This prioritization will be based on the amount of difference or variance between a contractor's pay standards when compared to the appropriate industry standards. By requiring contractors and subcontractors to report the data, OFCCP believes that some of these employers will voluntarily change their employment policies and practices. When coupling this collection of data with its proposed use, that is, using it to establish and make public objective industry standards that can indicate whether a contractor or subcontractor is at higher risk for possible compensation violations, OFCCP believes that more contractors will voluntarily change their policies and practices.[7] These contractors will rightfully assume that OFCCP is strengthening its enforcement in the area of compensation discrimination; therefore, they will likely take voluntary measures to ensure that they are in compliance should they be scheduled for an OFCCP compliance evaluation.

Integration of deterrence into the second prong of OFCCP's enforcement policy comes through not only the proposals in this NPRM but also through OFCCP's ongoing commitment to providing the contractors' human resources (HR) and compliance officials with access to technical assistance materials and training that supports compliance with OFCCP's regulations. It has been OFCCP's experience that HR and compliance officials often drive compliance within an organization, as they are often the sponsor or champion for compliance within the company. As such, training them and supporting their compliance work is critically important to greater deterrence and voluntary compliance.

Finally, as to the third prong of OFCCP's enforcement framework, routinely sharing aggregate compensation data at the industry and/or labor market level with contractors should drive some additional portion of the contractor community to engage in voluntary self-assessments of their compensation practices and make needed corrections.[8] OFCCP plans to share summary industry standards information with the public annually, as soon as practicable. Moreover, OFCCP plans to provide training and technical assistance to contractors that explain the standards and how contractors could use them to conduct self-assessments of their compensation practices and differences.[9]

Consistent with this overall view of transparency, a 2010 study found that the Wage and Hour Division (WHD) of the U.S. Department of Labor could potentially increase its deterrence effects by being more transparent about its enforcement activities.[10] More specifically, the report concludes that greater transparency about investigation activities underway or the targeting of certain geographic areas by WHD, and information about closed investigations ''potentially increase deterrence effects not only among employer networks, but also through spreading the word to workers in a local area.'' [11] Consequently, OFCCP anticipates that by making publicly available the industry standards used to prioritize contractors for enforcement actions, and its overall emphasis on compensation

[2] David Weil, *Improving Workplace Conditions Through Strategic Enforcement,* May 2010, at 2, *available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf* (last accessed July 4, 2014).

[3] *Id.*

[4] *Id.* at 13.

[5] *Id.*

[6] A contractor's compensation practices, standing, or position relative to the ''objective industry standards'' do not constitute a violation of OFCCP's laws or regulations, and no violation, sanction or penalty is imposed based on a contractor's ability to meet or exceed the standard. This standard is a tool OFCCP may use to inform and refine its scheduling process for compliance evaluations.

[7] Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement,* 30 ELR 10245, 10247–10250 (2000) (finding that empirical studies demonstrate the effectiveness of government activities such as enforcement and compliance monitoring have a deterrent effect; a general deterrent effect exists when the regulated believe that they have a higher probability of being monitored; monitoring the behavior of regulated entities based on assessed noncompliance risk level has a deterrent effect); Executive Office of the President, Office of Drug Control Policy, *Measuring the Deterrent Effect of Enforcement Operations on Drug Smuggling, 1991–1999,* (August 2001), *available at https://www.ncjrs.gov/ondcppubs/publications/pdf/measure_deter_effct.pdf* (last accessed June 23, 2014) (a deterrent effect exists with increased penalties and targeted enforcement operations); Diane Del Guercio, Elizabeth R. Odders-White & Mark J. Ready, *The Deterrence Effect of SEC Enforcement Intensity on Illegal Insider Trading,* (Sept. 2013) (providing direct evidence that aggressive enforcement deters illegal activity).

[8] Mark A. Cohen, *Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement,* 30 ELR 10245, 10250 (2000) (sharing information is an important enforcement tool because it can change firm behavior; information disclosure has an important deterrent effect).

[9] These voluntary assessments should not be confused with and do not take the place of the assessments required of contractors' affirmative action programs under OFCCP's regulations.

[10] David Weil, *Improving Workplace Conditions Through Strategic Enforcement,* May 2010, at 83, *available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf* (last accessed July 4, 2014) (among the study recommendations were making investigation activities in a geographic area more transparent, and increasing public access to data on closed case investigations or industry initiatives to create a deterrent effect).

[11] *Id.*

discrimination enforcement, the agency will also see positive deterrence effects.

Yet another possible deterrence effect exists when OFCCP generally exercises its enforcement authority. When OFCCP finds and remedies violations during a scheduled compliance evaluation, because the contractor has not voluntarily changed its behavior, a preventive deterrent effect is the result. When OFCCP finds and remedies violations by contractors, they may be prohibited from, and thus prevented from, continuing their discriminatory practices. This enforcement approach is tantamount to ''preventive'' deterrence because the expectation is that at least some of these violators are prevented from continuing their unlawful conduct for some period.

Deterrence, unlike enforcement actions, is proactive in nature. As such, it can prevent jobs from being denied or lost, prevent workers from being unfairly compensated, and prevent individuals and their families from being placed in financial jeopardy due to employment discrimination. This NPRM is one means of enabling OFCCP to collect the data it needs to strategically prioritize compliance evaluations, and share that data, as appropriate, to support voluntary changes in contractor employment behaviors.[12] Collecting this readily available compensation information will permit OFCCP to identify and prioritize contractors and subcontractors that are likely to have possible compensation violations, and strategically deploy its enforcement resources to investigate those contractors. In an era of increased demand for productivity with dwindling resources, this enhanced data collection will inure to the benefit of both OFCCP and compliant Federal contractors and subcontractors.

Legal Authority

Originally issued in 1965, and amended several times in the intervening years, the purpose of Executive Order 11246 is twofold. First, the Executive Order prohibits employment discrimination on the basis of race, color, religion, sex, sexual orientation, and gender identity and national origin against employees and applicants by covered Federal contractors and subcontractors.[13] Second, it requires that each covered Federal contractor and subcontractor take affirmative action to ensure equal opportunity in employment. The nondiscrimination and affirmative action obligations of Federal contractors cover all aspects of employment, including rates of pay and other compensation.

The requirements in Executive Order 11246 generally apply to any business or organization that: (1) Holds a single Federal contract, subcontract, or Federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts with a combined total exceeding $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount. Pursuant to the Executive Order, the award of a Federal contract comes with a number of responsibilities. Section 202 of the Executive Order requires every contractor to agree to: (1) Comply with all provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor; (2) provide all information and reports required by the Executive Order and implementing rules, regulations, and orders; and (3) provide access to its books, records, and accounts to the Secretary of Labor for the purpose of investigation to ascertain compliance with such rules, regulations, and orders. Under Section 203 of the Executive Order, the Secretary of Labor has broad authority to require compliance reports from contractors that contain such information regarding their practices, employment policies, programs, and employment statistics, in such form as the Secretary of Labor may prescribe. Likewise, the implementing regulations at 41 CFR 60–1.12(a) provide that the Director of OFCCP may require a contractor to keep employment or other records, including records on compensation and other rates of pay by race and gender, and must supply this information to OFCCP upon request. A contractor in violation of the Executive Order may have its contracts canceled, suspended, terminated, or may be subject to debarment.

Major Proposed Provisions in the NPRM

The regulation at 41 CFR 60–1.7 sets forth the existing requirement that certain Federal contractors and subcontractors submit an annual Employer Information Report EEO–1 (EEO–1 Report), a standard Federal report on workforce demographics that is jointly promulgated by OFCCP and the Equal Employment Opportunity Commission (EEOC). The NPRM proposes the following major provisions:

- Amending the regulation at 41 CFR 60–1.7 by adding a requirement that employers who file EEO–1 Reports, have more than 100 employees, and a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, submit two columns of additional information to the EEO–1 Report in a new Equal Pay Report to OFCCP.[14] The report requires the submission of summary data on employee compensation by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees.
- Requiring that covered Federal contractors and subcontractors electronically submit the proposed Equal Pay Report using a web-based data tool. OFCCP will establish a process for requesting an exemption to the electronic filing requirement.
- Requiring contract bidders to make a representation related to whether they currently hold a Federal contract or subcontract that requires them to file the proposed Equal Pay Report and, if so, whether they filed the report for the most recent reporting period.
- Extending existing agency sanctions to Federal contractors and subcontractors for the failure to file timely, complete, and accurate Equal Pay Reports, and the representation of compliance.

OFCCP is also interested in amending the regulation to 41 CFR 60–1.7 by adding a requirement that employers who file the Department of Education's Integrated Postsecondary Education Data System (IPEDS) report, have more than 100 employees, and have a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, also file OFCCP's proposed Equal Pay Report. OFCCP is particularly interested in comments related to the need to collect additional compensation data from postsecondary academic institutions in light of the scope of their existing reporting obligations with the U.S. Department of Education. Consequently, information relevant to the feasibility of

[12] Archon Fung, Mary Graham & David Weil, *Full Disclosure: The Perils and Promise of Transparency,* Cambridge University Press (2007).

[13] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. This Order requires that a regulation be prepared within 90 days of the date of the Order. Though the new Executive Order is effective immediately, the protections apply to contracts entered into on or after the effective date of the new DOL regulation.

[14] Any reference to contractor obligations under the proposed rule described in this NPRM also apply to first tier nonconstruction subcontractors and construction subcontractors that satisfy the employee and contract size coverage criteria in the proposed rule.

using IPEDS data to satisfy the objectives of this NPRM is particularly helpful on the issue of the scope of coverage.

OFCCP proposes sharing summary industry standards information with the public annually, as soon as practicable. Moreover, OFCCP plans to provide training and technical assistance to contractors that explain the standards and how contractors could use them to conduct their self-assessments. This information could reflect the industry and/or labor market, or some other relevant aggregate grouping of the data received by OFCCP.[15] The published data will be made available to support and encourage genuine, in-depth, contractor self-assessments of their compensation policies and practices. OFCCP believes that the publication of data for contractors to use would significantly promote deterrence and voluntary compliance with their obligations under Executive Order 11246. The advancement of the societal goals of nondiscrimination in the workplace, and closing the pay gap, are the by-products of deterrence and compliance. Therefore, OFCCP is interested in comments on the cost to contractors of conducting these self-assessments of the data provided pursuant to the Equal Pay Report against published industry standards. These voluntary compensation difference assessments are not substitutions for mandatory assessments required by other provisions in Part 60.

Costs, Benefits and Transfers

The table below displays the estimated costs associated with the implementation of this NPRM. OFCCP estimates that the proposed cost of the NPRM is $684 per contractor establishment or $2,176 per contractor company.

TABLE 1—COST OF THE PROPOSED RULE

Frequency	Description	Estimated cost
One-Time Burden	Regulatory familiarization, modifications to contractor personnel tracking systems, and changes to the contractor's bidder representation process.	$33,591,233
Annual Recurring Burden	Contractors completing the proposed report and contractors requesting exemption from electronic filing.	12,654,414
Annual Operations and Maintenance Costs.	The cost of filing the exemption request	4,542
Cost to the Government	The cost of additional staffing and updating information systems	3,759,696
Total Cost of the Proposed Rule		50,009,885

Note that the first-year cost of the proposed rule is $46,250,189, which includes the one-time burden, annual recurring, and annual operations and maintenance costs.The goals of the proposed rule are:

- Increasing contractor self-assessment of compensation policies and practices, and expanding voluntary compliance with OFCCP's regulations, to advance OFCCP's mission of ensuring nondiscrimination in employment and decreasing the pay gap between males and females and between people on the basis of race.
- Providing probative compliance information, including data on industry and/or labor market standards, to promote industry-wide deterrence within the Federal contractor community and lead to modified compliance behavior in the compensation arena.
- Making data-driven enforcement decisions that support the efficient use of limited enforcement resources. OFCCP will strategically deploy its resources to focus on conducting compliance evaluations of contractors that are more likely to have compensation discrimination violations.
- Shifting, to the maximum extent possible, compliance evaluation costs from contractors that are likely to be in compliance with OFCCP's existing regulations prohibiting pay discrimination to contractors that are more likely not to be in compliance.
- Contributing to the stability of working Americans by helping minimize the pay gap and promoting broad societal policy objectives of nondiscrimination and equal pay. Providing workers victimized by discrimination the opportunity to obtain the best possible remedies and relief. OFCCP anticipates increasing its capacity to identify more violations and obtain prompt remedies through a better-informed scheduling process for the estimated 4,000 compliance evaluations it conducts annually.

Social science research also suggests that anti-discrimination law has broad social benefits. Workers who are capable of successfully enforcing their rights and obtaining redress experience these benefits, as do the workforce and the country's economy as a whole. In general, discrimination is incompatible with an efficient labor market. Discrimination interferes with the ability of workers to find jobs that match their skills and abilities and to secure wages that are consistent with a well-functioning marketplace.[16] Discrimination also harms employers, by artificially restricting the pool of available talent, by diluting the critical reward structure that relates compensation to actual job performance, and by adding unnecessary costs. For example, employers may prefer to select certain categories of workers based on bias and end up with less qualified or able employees.[17] Discriminatory decisions are thought to be the result of functioning with limited information. This lack of information may drive employers to use group-based characteristics as shortcuts in making decisions, or as statistical proxies for other qualifications. Both can lead to inefficient outcomes.[18] Favoritism or limited information can result in pay disparities when it causes employers to reward certain categories of employees based on bias rather than merit. Discrimination may reflect market

[15] The data could be made available at industry, labor market or other grouping levels based on OFCCP's assessment of the actual data it receives, and whether or not external data sources are used.

[16] Shelley J. Lundberg & Richard Starz, *Private Discrimination and Social Intervention in Competitive Labor Markets,* 73 Am. Econ. Rev. 340 (1983); Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets,* 30 Indus. and Labor Relations Rev. 175 (1977).

[17] Gary Becker, ''The Economics of Discrimination'' (1957).

[18] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Brendan More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination,* 94 Am. Econ. Rev. 991 (2004); Ian Ayres & Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car,* 85(3) Am. Econ. Rev. (1995); Stewart Schwab, *Statistical Discrimination,* 76 Am. Econ. Rev. 228 (1986).

failure, where collusion or other anti-discriminatory practices allow majority group members to shift the costs of discrimination to minority group members.[19]

Consequently, effective anti-discrimination enforcement can promote economic efficiency and growth. For example, a number of scholars have documented the benefits of the civil rights movement and the adoption of Title VII of the Civil Rights Act of 1964 on the economic prospects of workers and the larger economy.[20] One recent study estimated that improved workforce participation by women and minorities, including through adoption of civil rights laws and changing social norms, accounts for 15–20 percent of aggregate wage growth between 1960 and 2008.[21]

Background

The OFCCP is a civil rights and worker protection agency that enforces one Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.[22] Specifically, Federal contractors must engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, prohibits employment discrimination against certain protected veterans. Section 503 of the Rehabilitation Act of 1973 (section 503), as amended, prohibits employment discrimination against individuals with disabilities. Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, religion, color, national origin, sex, sexual orientation, and gender identity.[23] Compensation discrimination is one form of discrimination prohibited by the Executive Order.

Although laws protecting workers from pay discrimination have been in effect for more than 50 years, pay discrimination still exists. Pay discrimination is a real problem that continues to plague American working families. For example, looking at annual earnings reveals large gaps, where women working full-time earn approximately 77 cents on the dollar compared with men.[24] According to the latest BLS data, the weekly median earnings of women are about 82 percent of that for men.[25] While research has found that many factors contribute to the wage gap, such as occupational preferences, pay discrimination remains a significant problem for the working poor and the middle class.

Research also reveals a wage gap amongst various racial groups. At the end of 2013, median weekly earnings for African-American men working at full-time jobs were $646 per week, only 72.1 percent of the median for white men ($896).[26] Further, a study based on the hiring pattern of workers in the state of New Jersey found that African Americans, when re-entering the job market after periods of unemployment, are offered lower wages when compared to their white counterparts.[27] The study showed that the pay gap between these groups is typically 30 percent.[28] Controlling for various factors such as skills and previous earnings, the study found that up to a third of this pay gap could be attributed to racial discrimination in the labor market.[29] Similarly, a study based on National Longitudinal Survey data, found that the pay gap between African Americans and whites continues to exist, even after controlling for abilities and schooling choices.[30]

For Hispanic men, the wage gap is approximately 67 cents when compared to non-Hispanic white men.[31] Many of the studies analyzing pay disparities for the Hispanic populations focus on differences in education and age as compared to white workers.[32] However, even after analyzing the effect of these factors, these studies showed that these factors do not entirely account for the pay gap for Hispanics.[33]

The wage gap is significantly greater for many women of color. BLS data reveals that African-American women make approximately 68 cents, Latinas make approximately 59 cents, and Asian-American women make approximately 87 cents for every dollar earned by a non-Hispanic white man.[34] Comparable figures, based on Census data, are 64 cents for African-American women, 56 cents for Latinas, and 86 cents for Asian-American women.[35]

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[19] Kenneth J. Arrow, *What Has Economics to Say about Racial Discrimination*? 12 The Journal of Economic J. Econ. Perspectives 91 (1998).

[20] J. Hoult Verkerke, ''*Free to Search,*'' 105 Harvard Law Review Harv. L. Rev. 2080 (1992); James J. Heckman & Brook S. Payner, ''*Determining the Impact of Federal Anti-Discrimination Policy on the Economic Status of Blacks: A Study of South Carolina,*'' 79 American Economic Review Am. Econ. Rev. 138 (1989).

[21] C. Hsieh et. al., *The Allocation of Talent and U.S. Economic Growth,* NBER Working Paper (2013).

[22] Executive Order 11246, Sept. 24, 1965, 30 FR 12319, 12935, 3 CFR, 1964–1965, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793, (section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).

[23] On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. This Order requires that a regulation be prepared within 90 days of the date of the Order. Though the new Executive Order is effective immediately, the protections apply to contracts entered into on or after the effective date of the new DOL regulation.

[24] U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2012 (Sept. 2013), *available at http://www.census.gov/prod/2013pubs/p60-245.pdf.*

[25] Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics;* Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013 *available at http://www.bls.gov/news.release/wkyeng.t01.htm.* Based on Current Population Survey data, in 2012, among married women who worked full-time, median weekly earnings were $751. Among married men who worked full time, median weekly earnings were $981. Among married men and women in 2012, weekly earnings for fathers and mothers with children under age 6 were $935 and $765, respectively. Weekly earnings for married men with no children under age 18 were $973, compared with $748 for married women with no children under age 18. Bureau of Labor Statistics, U.S. Department of Labor, The Editor's Desk, Median weekly earnings by sex, marital status, and presence and age of own children under 18 in 2012, *available at http://www.bls.gov/opub/ted/2013/ted_20131203.htm* (last accessed March 28, 2014).

[26] Bureau of Labor Statistics, *Usual Weekly Earnings of Wage and Salary Workers,* Fourth Quarter 2013, *available at http://www.bls.gov/news.release/pdf/wkyeng.pdf,* January 22, 2014 (last accessed March 28, 2014).

[27] Roland G. Fryer Jr. et al., *Racial Disparities in Job Finding and Offered Wages* (2013), at 27, *available at, http://scholar.harvard.edu/files/fryer/files/racial_disparities_in_job_finding_and_offered_wages.pdf* (last accessed April 29, 2014).

[28] *Id.* at 29.

[29] *Id.*

[30] Sergio Urzua, *Racial Labor Market Gaps: The Role of Abilities and Schooling Choices,* 43.4 J. Hum. Resources, 919, 919–971.

[31] Additional calculations by race and sex based on 2012 Person Income Table PINC–10. Wage and Salary Workers—People 15 Years Old and Over, by Total Wage and Salary Income in 2012, Work Experience in 2012, Race, Hispanic Origin, and Sex, *available at https://www.census.gov/hhes/www/cpstables/032013/perinc/pinc10_000.htm* (comparison of median wage for workers working 50 or more weeks); Bureau of Labor Statistics 2012 CPS data, available at *http://www.bls.gov/cps/earnings.htm#demographics (last accessed on March 28, 2014).*

[32] Richard Fry & B. Lindsay Lowell, The *Wage Structure of Latino-Origin Groups across Generations,* 45 Indus. Relations 2 (2006); Abelardo Rodriguez & Stephen Devadoss, *Wage Gap between White Non-Latinos and Latinos by Nativity and Gender in the Pacific Northwest, U.S.A.,* 4 Journal of Management and Sustainability 1 (2014).

[33] *Id.*

[34] Current Population Survey, Earnings by Demographics 2012, *available at http://www.bls.gov/cps/earnings.htm#demographics* (last accessed March 28, 2014

[35] Additional calculations by race and sex based on 2012 Person Income Table PINC–10. Wage and Salary Workers—People 15 Years Old and Over, by Total Wage and Salary Income in 2012, Work Experience in 2012, Race, Hispanic Origin, and Sex, available at *https://www.census.gov/hhes/www/*

Women of color also earn less than men within their racial and ethnic groups.[36]

Regardless of how it is measured, over time, the significance of the differences in compensation for women and men becomes increasingly evident. According to one analysis by the Department of Labor, a typical 25-year-old woman working full-time would have already earned $5,000 less over the course of her working career than a typical 25-year old man.[37] If that earnings gap is not corrected, by age 65, she will have lost hundreds of thousands of dollars over her working years.[38] Decades of research shows this wage gap remains even after accounting for factors like the type of work people do, and qualifications such as education and experience.[39] Moreover, while some women may work fewer hours or take time out of the workforce because of family responsibilities, there is research suggesting that discrimination and not just choices can lead to women with children earning less.[40] At the current rate of progress, researchers estimate it will take until 2057 to close the gender pay gap.[41]

Although occupational segregation is an important contributing factor to the gender pay gap,[42] women earn less than men even within occupations. In a recent study of newly trained doctors, after considering the effects of specialty, practice setting, work hours and other factors, the gender pay gap was nearly $17,000 in 2008.[43] Catalyst, a nonprofit organization working for more gender-inclusive workplaces, reviewed 2011 government data showing a gender pay gap for women lawyers,[44] and that data confirms that the gap exists for a range of professional and technical occupations.[45] A study by the Institute for Women's Policy Research, based on information from BLS, found that women frequently earn less than men within the same occupation.[46] Despite differences in the types of jobs women and men typically perform, women earn less than men in occupations commonly filled by men such as managers, software developers, and CEOs. Women even earn less than men in those occupations commonly filled by women such as teachers, nurses, and receptionists. In a recent review of 2010 Census data, Bloomberg identified a particularly large pay gap in the financial sector.[47]

While occupational differences explain some of the gender wage gap, discrimination and other barriers play a role.[48] The significant underrepresentation of women in the highly compensated science, technology, engineering, and mathematics fields is one of many factors that can explain the overall average gender pay gap. However, a Department of Commerce study found that, after using statistical methods to account for workers' age, educational attainment, and region of residence, women who successfully enter these fields still earn less than their male counterparts.[49] Further, research has identified perceived hostility and fewer promotional opportunities for women as important reasons for female underrepresentation.[50] As the Council of Economic Advisors explained in a 2013 report issued by the White House Equal Pay Task Force: ''While occupational segregation is sometimes described as a simple matter of women's choices, historical patterns of exclusion and discrimination paint a more complex picture . . . occupational segregation may be due [in part] to discrimination that can take several forms, including outright refusal to hire, severe harassment of women in non-traditional jobs, or policies and practices that screen qualified women out of positions but are not job-related.'' [51]

Fewer dollars for workers and their families means a real loss of economic security, at a time when no family can afford to be earning less. Historically, data show that women are generally poorer than men. The poverty rates for unmarried female head of households with children are significantly higher than most poverty rates. Looking as far back as 1966, poverty rates for unmarried female head of households with children have been consistently two to three times higher than the

cpstables/032013/perinc/pinc10_000.htm (comparison of median wage for workers working 50 or more weeks); Bureau of Labor Statistics 2012 CPS data, available at *http://www.bls.gov/cps/earnings.htm#demographics* (last accessed on March 28, 2014).

[36] According to 2013 CPS usual weekly earnings data, African-American women earn 88 cents on the dollar compared with African-American men, Hispanic women earn 80 cents on the dollar compared with Hispanic men, AAPI women earn 75 cents on the dollar compared with AAPI men, and white women earn 74 cents on the dollar compared with white men. Calculated by the DOL Chief Economist Office from CPS ORG Annual Averages.

[37] Calculated by the Department of Labor based on CPS usual weekly earnings of wage and salary workers by sex. The cumulative lost earnings compare the difference in median earnings for full time workers who worked 52 weeks out of the year.

[38] White House Council on Women and Girls, *The Key to an Economy Built to Last* (April 2012), *available at http://www.whitehouse.gov/sites/default/files/email-files/womens_report_final_for_print.pdf.*

[39] A March 2011 White House report entitled Women in America: Indicators of Social and Economic Well-Being, found that while earnings for women and men typically increase with higher levels of education, male-female pay gap persists at all levels of education for full-time workers (35 or more hours per week), according to 2009 BLS wage data. Potentially nondiscriminatory factors can explain some of the gender wage differences. See, e.g., June Elliot O'Neill, The Gender Gap in Wages, Circa 2000, Am. Econ. Rev. (May 2003). Even so, after controlling for differences in skills and job characteristics, women still earn less than men. Explaining Trends in the Gender Wage Gap, A Report by the Council of Economic Advisers (June 1998). Ultimately, the research literature still finds an unexplained gap exists even after accounting for potential explanations, and finds that the narrowing of the pay gap for women has slowed since the 1980s. Joyce P. Jacobsen, *The Economics of Gender* 44 (2007); Francine D. Blau & Lawrence M. Kahn, *The U.S. gender pay gap in the 1990s: Slowing convergence,* 60 Industrial and Labor Relations Review 45 (2006).

[40] Shelley J. Correll, Stephen Benard, & In Paik, ''Getting a Job: Is There a Motherhood Penalty?,'' 112 *American Journal of Sociology* 1297 (2007).

[41] Institute for Women's Policy Research, *At Current Pace of Progress, Wage Gap for Women Expected to Close in 2057* (April 2013), *available at http://www.iwpr.org/publications/pubs/at-current-pace-of-progress-wage-gap-for-women-expected-to-close-in-2057.*

[42] White House Equal Pay Task Force, *Fifty Years After the Equal Pay Act* (June 2013), *available at http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.*

[43] Anthony T. LoSasso, et al, The *$16,819 Pay Gap For Newly Trained Physicians: The Unexplained Trend of Men Earning More Than Women,* 30 Health Affairs 193 (2011), *available at http://content.healthaffairs.org/content/30/2/193.abstract.*

[44] Catalyst Inc., Women in Law in the U.S. (March 2013), *available at http://www.catalyst.org/knowledge/women-law-us* (last accessed on April 24, 2014).

[45] Bureau of Labor Statistics, Median weekly earnings of full-time wage and salary workers by detailed occupation and sex (2013), *available at http://www.bls.gov/cps/cpsaat39.pdf.*

[46] Ariane Hegewisch, Claudia Williams, & Vanessa Harbin, *The Gender Wage Gap by Occupation* (2012), *available at http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-1/.*

[47] Bloomberg L.P., *Wall Street Jobs Show Largest Gender Gap in Pay* (2014), *available at http://www.bloomberg.com/video/88496286-wall-street-jobs-show-largest-gender-gap-in-pay.html* (last accessed on April 24, 2014).

[48] Francine D. Blau & Lawrence M. Kahn, *The U.S. gender pay gap in the 1990s: Slowing convergence,* 60 Industrial and Labor Relations Review 45 (2006) (estimate occupational differences may account for about half of the gender wage gap; the extent to which occupational differences reflect choice or potential discrimination is not addressed by this analysis).

[49] U.S. Department of Commerce, Economics and Statistics Administration. Women in STEM: A Gender Gap to Innovation (August 2011).

[50] Weinberger, Catherine J. An Economist's Perspective on Women in the IT Workforce. Encyclopedia of Gender and Information Technology (2006); Hunt, J., Why do Women Leave Science and Engineering? NBER Working Paper (2010).

[51] White House Equal Pay Task Force, *Fifty Years After the Equal Pay Act* (June 2013), *available at http://www.whitehouse.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.*

overall male and female poverty rates.[52] In 2009, 28 percent of unmarried working women with children had incomes below the poverty threshold compared to 6 percent for male workers.[53] According to one report, average annual earnings for women between 2009 and 2011 could have increased from $36,129 to $42,380 (or by 17 percent) annually if the wage gap had been closed.[54] This increase, in turn, could have reduced the poverty rate for working women by almost 50 percent.[55] Examining mean annual earnings, mean family income, and poverty rates from 2009 through 2011, the data on poverty rates for working single mothers, working single women living alone, and working married women demonstrate that closing the pay gap for these groups could also reduce their poverty rates. After pay adjustments, working single mother poverty rates would have decreased by 13.7 percent, the rate for the working single women living alone group would have dropped by 6.4 percent, and working married women poverty rates would have decreased by 1.3 percent.[56] It is, therefore, very likely that eliminating or significantly reducing the wage gap will have an overall positive impact on the poverty rates and financial stability of these groups of women and their families.

As research suggests, because discrimination is one of the factors contributing to the pay gap, improving the ability of Federal civil rights enforcement agencies such as OFCCP to identify and remedy pay discrimination is a critical element of a broader strategy for closing that gap—particularly in light of its substantial social cost. To advance that goal, in 2010, President Obama convened the National Equal Pay Task Force (the Task Force), which includes the Department of Labor, Department of Justice, the EEOC and the Office of Personnel Management, to provide a coordinated Federal response to pay discrimination. In its ''Recommendations and Action Plan,'' the Task Force developed a number of recommendations to address the persistent challenges to enforcement of Federal laws prohibiting compensation discrimination.[57]

In addition to deterring unlawful behavior and incentivizing the adoption of compensation policies and procedures, better and more comprehensive compensation data can substantially improve enforcement of anti-pay discrimination laws. Indeed, a key Task Force recommendation is that the Federal Government collect data on the private workforce to better understand the scope of the pay gap, and focus enforcement resources on employers that are more likely to be out of compliance with Federal laws prohibiting wage discrimination. The Task Force noted that the ''lack of data makes identifying wage discrimination difficult and undercuts enforcement efforts.'' [58] The Task Force recommendations urge OFCCP to devise a strategy to collect compensation data from Federal contractors and subcontractors, where feasible, in a manner that minimizes the burden on employers.[59]

Identifying and remedying compensation discrimination has been integral to OFCCP's mission for many years. OFCCP primarily enforces contractors' compliance with Executive Order 11246, including its prohibition on compensation discrimination, by conducting compliance evaluations of Federal contractors and subcontractors each year. These compliance evaluations analyze workforce data, employment practices, and records that OFCCP requires contractors and subcontractors to keep and produce upon request. These recordkeeping requirements specifically include information on compensation such as wages, salaries, commissions, and bonuses.[60] As part of a compliance evaluation, OFCCP may request and review compensation data from specific contractor establishments, including, as appropriate, detailed compensation data on individual employees, and investigate contractor pay practices, even without a specific discrimination complaint.

In searching for pay discrimination violations, OFCCP is limited to the data provided by the nearly 4,000 contractors and subcontractors it evaluates annually. This cohort is a small fraction of the more than 116,000 establishments that are estimated to fall under OFCCP's jurisdiction.[61] In the absence of a comprehensive, accurate database that captures all Federal contractors and subcontractors, the agency must develop its own list of contractors and subcontractors for compliance evaluations, using a neutral selection process. OFCCP develops this list by using multiple sources of information such as Federal acquisition and procurement databases, EEO–1 reports, Dun & Bradstreet (D&B) data, and the U.S. Census Bureau tabulations. Statistical thresholds such as industry type and employee counts of Federal contractor establishments are also used. The list may be further refined by applying a number of neutral factors such as contract expiration date and contract value on the number of establishments per contractor that will be scheduled in any one cycle.

Despite the labor-intensive development of the scheduling list, OFCCP is currently unable to determine the true likelihood of compliance with OFCCP's regulations, including the prohibition against compensation discrimination found in Executive Order 11246. The Equal Pay Report data will allow OFCCP to assess a broad array of compensation-related employment practices, such as differences in promotion, initial placement or job assignment, and pay. The pay practices would not just include salary but incentives or other earnings opportunities. OFCCP can use the representation data in EEO–1 reports to identify potential hiring or

[52] U.S. Department of Commerce, Economic and Statistics Administration, and the Executive Office of the President, Office of Management and Budget, for the White House Council on Women and Girls, *Women in American: Indicators of Social and Economic Well-Being,* March 2011 *available at http://www.whitehouse.gov/administration/eop/cwg/data-on-women* (last accessed on March 28, 2014).

[53] *Id.* at 14.

[54] Heidi Hartman, Ph.D., Jeffrey Hayes, Ph.D., & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy, Briefing Paper IWPR #C411,* Institute for Women's Policy Research, January 2014. The calculations are based on Current Population Survey Annual Social and Economic supplements, 2010–2012, for calendar years 2009–2011. The dollar valuations are in 2012 dollars.

[55] *Id.*

[56] *Id.*

[57] *See* National Equal Pay Enforcement Task Force Report, *available at http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf* (last visited March 25, 2014).

[58] *Id.*

[59] *Id.*

[60] 41 CFR 60–1.12. In addition, OFCCP uses a Scheduling Letter and Itemized Listing to request records and information for the desk audit portion of its compliance evaluations. Authorization of a revised Scheduling Letter and Itemized Listing is pending with the Office of Budget and Management (OMB) as an information collection request under OMB Control Number 1250–0003.

[61] The estimate of 116,000 establishments is based on the number of ''Yes'' answers to Question 3 on the 2012 EEO–1 Report to whether they have at least 50 employees and a contract or subcontract in the amount of $50,000 or more. OFCCP's proposed new reporting requirement will only effect a subset of this 116,000 establishment population; Specifically, those with more than 100 employees and contractor or subcontracts in the amount of $50,000 or more. In other rulemakings, OFCCP is using an estimate of 500,000 establishments because those proposed rules apply to all covered establishments and not just those filing EEO–1 reports with more than 100 employees as proposed in this NPRM. This 500,000 estimate is used elsewhere is based on the General Services Administration's (GSA) System for Acquisition Management (SAM) database that includes grants as well as contracts that would not be covered by OFCCP because they do not meet the minimum contract value of $10,000 for OFCCP jurisdiction.

affirmative action violations, but cannot provide insight into potential compensation violations.

There are voluntary compliance and enforcement benefits associated with collecting more data. For example, contractors could benefit from the potential cost savings. OFCCP currently estimates that a significant proportion of the establishments it evaluates annually are compliant with the nondiscrimination requirements of Executive Order 11246. Thus, some contractors and subcontractors may incur less burden hours and costs in preparing for and undergoing evaluations. If a contractor's compensation differences are within an acceptable range, when compared to the industry standard, OFCCP would not likely prioritize it for a compliance evaluation. Developing a data-driven scheduling process for compliance evaluations is more efficient and will likely reduce compliance costs for some contractors.

The collection of the data will allow OFCCP to conduct analysis and establish objective industry standards that it will make available to contractors and others. Contractors are encouraged to use this information to conduct self-assessments by comparing their pay to the industry standards, identifying indicators of potential issues, examining their pay practices to determine if problems or potential violations actually exists, and taking voluntarily steps to make needed corrections. Moreover, OFCCP will offer training and other assistance on the use of the standards for self-assessments.

Who Must File the Equal Pay Report

Contractors that are required to file EEO–1 reports, have more than 100 employees, have a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, would file the Equal Pay Report. This generally includes:

- Private employers that:
  - Are prime contractors or first tier subcontractors, and have a contract, subcontract, or purchase order amounting to $50,000 or more; [62] or
  - serve as a depository of Government funds in any amount, or
  - is a financial institution that is an issuing and paying agent for U.S. Savings Bonds and Notes.
- Private employers that are not covered by the exemption under 41 CFR 60–1.5.

Single establishment employers file one EEO–1 Report for their single location. Multi-establishment employers with several locations file additional EEO–1 reports; one for the headquarters location, a report for each establishment with more than 50 employees, and a report for each establishment with fewer than 50 employees or an Establishment List providing the name and locations of each of these locations with fewer than 50 employees. However, EEO–1 filers with 100 or fewer employees are exempt from the OFCCP filing requirement. Multi-establishment employers must also file a Consolidated Report that consolidates all of the employment data submitted for their various establishments and their headquarters. OFCCP evaluates contractors by establishment. This NPRM would require that each establishment, including the headquarters location, file a single Equal Pay Report. Unlike in EEO–1 reporting, no headquarters Consolidated Report is required.

OFCCP is considering requiring institutions of higher education to file the Equal Pay Report if they are required to file IPEDS reports with the Department of Education, have a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, and have more than 100 employees.[63] The IPEDS reports collect data on faculty and staff by race and ethnicity using eight designations and by gender.[64] However, the IPEDS system collects limited data on compensation by demographics. IPEDS requires reporting of base pay for faculty positions, excluding medical school faculty, only by sex.[65] Requiring institutions of higher education to file the Equal Pay Report would expand compensation data collection to staff and all faculty positions, significantly increasing the number of workers covered by the report. In addition, using the Equal Pay Report framework would allow cross tabulation by race, and would go beyond reporting base pay. Key considerations for applying the data collection requirement to institutions of higher education include whether to use the IPEDS occupational categories, which differ from the EEO–1 job categories, and how to account for work hours.[66]

OFCCP's proposed report harmonizes in many ways with the format of the EEO–1 Report. It also proposes to rely on existing IRS compensation reporting by using W–2 earnings as the source of compensation data. OFCCP believes that the Federal contractors and subcontractors that are required to submit the IPEDS reports are still highly likely to have the W–2 earnings information, business processes and information technology (IT) systems in place that could store and generate the specific information OFCCP is proposing to obtain through the Equal Pay Report. Accordingly, OFCCP is interested in comments on the following issues concerning a potential reporting requirement for postsecondary academic institutions:

- The proposal in the NPRM and any alternatives, including the feasibility of using a single Equal Pay Report format for all covered Federal contractors and how that could be implemented should postsecondary academic institutions (i.e., IPEDS filers meeting the proposed Equal Pay Report thresholds) be covered by the Equal Pay Report requirements,
- the cost and benefits, both qualitative and quantitative, of covering postsecondary academic institutions but deferring their reporting obligation for some period of time, and the estimated cost to these institutions for reporting their data using EEO–1 job categories, and
- the estimated number of IPEDS filers that could be covered by the proposed Equal Pay Report.[67]

What, When and How To File the Equal Pay Report

Using the Equal Pay Report, OFCCP proposes to collect three pieces of information related to calculating aggregate W–2 earnings for each group of workers within the EEO–1 job categories:

- The total number of workers within a specific EEO–1 job category by race, ethnicity and sex;

[62] A construction subcontractor at any tier must file the EEO–1 Report annually if it has a contract or subcontract of $50,000 or more.

[63] National Center for Education Statistics, U.S. Department of Education, Institute of Education Sciences, *https://surveys.nces.ed.gov/ipeds/* (last accessed June 19, 2014).

[64] The designations for race and ethnicity are Hispanic/Latino, American Indian or Alaska Native, Asian, Black or African American, White, Two or More Races. Race/ethnicity and gender data are collected on students and completers of covered institutions; OFCCP is not seeking student and completers data.

[65] National Center for Education Statistics, U.S. Department of Education, Institute of Education Sciences, *https://surveys.nces.ed.gov/IPEDS/VisInstructions.aspx?survey=1&id=30043&show=all#chunk_1612* (last accessed July 24, 2014).

[66] IPEDS uses categories aligned with the 2010 Standard Occupation Codes, *https://surveys.nces.ed.gov/IPEDS/VisInstructions.aspx?survey=1&id=30043&show=all#chunk_1596* (last accessed July 24, 2014), and limits reporting on salary to full time workers, based on contract length (9, 10, 11 or 12 months), *https://surveys.nces.ed.gov/IPEDS/VisInstructions.aspx?survey=1&id=30043&show=all#chunk_1612* (last accessed July 24, 2014).

[67] The OFCCP notes that it has not found a reliable source for the number of IPEDS filers that meet the more than 100 employee threshold covered by the Equal Pay Report.

• total W–2 earnings defined as the total individual W–2 earnings for all workers in the job category by race, ethnicity, and sex; and

• total hours worked defined as the total number of hours worked for all workers in the job category by race, ethnicity and sex.

This Equal Pay Report itself would annually require the submission of summary employee compensation data, by sex, race, ethnicity, and specified job categories from Federal contractors, as well as other relevant data points that would include hours worked and number of employees. In an effort to harmonize the Equal Pay Report with the existing EEO–1 reporting requirement, the Equal Pay Report includes the same workforce demographic data (e.g., the identical seven race and ethnicity categories, sex, and company identification information),[68] the same ten EEO–1 job categories,[69] the same exemptions, and the same definition of ''employee.'' [70] As with the EEO–1 Report, both full-time and part-time employees would be included in the Equal Pay Report, and Federal contractors and subcontractors would have to represent that they are in compliance with their reporting obligation.[71] Electronic submission of the report is being required, and OFCCP is proposing to create a hardship exemption for contractors unable to perform electronic submission. Similar provisions exist for EEO–1 reporting.

There are, however, some differences between the EEO–1 and the proposed Equal Pay Report. The EEO–1 uses a ''snapshot'' approach that requires employers to include in their report only those employees from one pay period between the months of July and September of the current survey year. The proposed Equal Pay Report, however, covers a full calendar year from January 1 through December 31. The Equal Pay Report includes summary compensation data using total W–2 earnings paid as of the end of each calendar year for each worker who was included in the contractor's EEO–1 report for that year. The use of summary W–2 earnings data for the calendar year aligns with the period covered under a contractor's W–2 filings. Workers no longer employed as of December 31 would still be included in the report. The EEO–1 Report does not collect summary or individual employee compensation data. While OFCCP proposes a report filing window of January 1 to March 31 of the following year in order to obtain W–2 compensation data for the full year, the EEO–1 Report requires filing and certification by September 30.[72] OFCCP seeks public comment on this proposal, including:

• The January 1 through December 31 reporting period, the March 31 filing deadline, and any additional cost resulting from these dates not aligning with the EEO–1 reporting dates, and

• the amount of additional cost contractors could incur from the proposed requirement for contractors to include on their Equal Pay Report the employees reported on their EEO–1 Report.

Collecting summary data from contractors as described here should contribute to minimizing the burden and cost of reporting incurred by Federal contractors and subcontractors. OFCCP is also seeking to reduce the burden associated with retrieving that data by using the same definition of compensation that is used to report W–2 earnings to the Internal Revenue Service (IRS). Thus, the expectation is that Federal contractors will not incur burden and cost related to collecting and producing new or different compensation data.

Contractors would be required to keep their Equal Pay Reports for a period of not less than two years from the date of the making of the report. However, if the contractor has fewer than 150 employees or does not have a contract of at least $150,000, this retention period is one year.

They would also have to make a representation related to whether they are currently a Federal contractor or subcontractor, and whether that they filed the report with OFCCP from the most recent reporting period when bidding on a Federal contract or subcontract. OFCCP proposes to apply sanctions in 60–1.4(a) and (b) and 60–1.27 to a failure to file a timely, complete and accurate Equal Pay Report and make the appropriate representations.

Confidentiality of the Equal Pay Report Data

The Freedom of Information Act, to the maximum extent that the information is exempt, would protect the information reported by contractors, including the summary compensation data. It is the practice of OFCCP not to release contractor data where (1) The contractor is still in business, and (2) the contractor indicates, and through the Department of Labor's review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm. In the NPRM, OFCCP proposes creating the authority to publish aggregate information based on compensation data collected from the Equal Pay Report, such as ranges or averages by industry, labor market, or other groupings, but only in such a way as not to reveal any particular establishment's or individual employee's data. OFCCP proposes that it would analyze the information collected on the Equal Pay Reports and, along with other available data, develop objective industry-based standards for compensation differences, and prioritize contractors and subcontractors for evaluation whose summary data show discrepancies that indicate possible compensation violations.

Additional Information

Bidders on Federal contracts and subcontracts will be required to state whether they currently have a Federal

[68] The seven race and ethnicity designations in the EEO–1 Report are Hispanic/Latino, White (non-Hispanic), Black or African American, Native Hawaiian or Other Pacific Islander, Asian, American Indian or Alaska Native, and Two or More Races. *See* Equal Employment Opportunity, Employer Information Report EEO–1, Section D: Employment Data.

[69] *Id.* The ten job categories are: Executive/Senior Level Officials and Managers, First/Mid-Level Officials and Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers.

[70] The term ''employee'' on the EEO–1 report is defined as ''any individual on the payroll of an employer who is an employee for purposes of the employers withholding of Social Security taxes except insurance sales agents who are considered to be employees for such purposes solely because of the provisions of 26 U.S.C. 3121(d)(3)(B) (the Internal Revenue Service Code). Leased employees are included in this definition. Leased Employee means a permanent employee provided by an employment agency for a fee to an outside company for which the employment agency handles all personnel tasks including payroll, staffing, benefit payments and compliance reporting. The employment agency shall, therefore, include leased employees in its EEO–1 report. The term employee SHALL NOT include persons who are hired on a casual basis for a specified time, or for the duration of a specified job (for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employees work at the site); persons temporarily employed in any industry other than construction, such as temporary office workers, mariners, stevedores, lumber yard workers, etc., who are hired through a hiring hall or other referral arrangement, through an employee contractor or agent, or by some individual hiring arrangement, or persons (EXCEPT leased employees) on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employers direction and control. Equal Employment Opportunity Commission, Equal Employment Opportunity, Standard Form 100, Employer Information Report EEO–1, Instruction Booklet.

[71] *Id.*

[72] The proposed reporting period and report filing window discussed here for the Equal Pay Report are not specified in the text of the proposed regulation. Instead, these details will be in the ICR authorizing the collection and reporting of data using the report.

contract or subcontract that requires them to create affirmative action programs, and file EEO–1 and Equal Pay Reports. If so, the contractor or subcontractor must state whether it has prepared the affirmative action programs; filed the EEO–1 Report(s) for the most recent reporting period with the Joint Reporting Committee; and whether it filed an Equal Pay Report for the most recent reporting period with OFCCP.

The NPRM also proposes making technical amendments to § 60–1.7, as explained in the Section-by-Section Analysis. Those amendments would conform other related recordkeeping provisions in § 60–1.7 to the proposed new reporting requirement, as well as update them to reflect current agency practice.

In addition, to ensure that the costs and burdens of this rule are minimized to the extent feasible, OFCCP requests public comment on an alternative reporting framework. This alternative would utilize a single report that would fulfill contractors' reporting obligations under this rule and the EEO–1. This single report would collect all the information currently included on the EEO–1, as well as summary compensation information and other appropriate data elements for the purposes of meeting the objectives of this rule. OFCCP would coordinate with EEOC on how the single report could be collected, which agency would collect the single report, and the timing of the collection. OFCCP invites public comment on:

- The feasibility of this alternative framework,
- the possible content and design of the single report, and how the report could meet the needs of both OFCCP and EEOC,
- the degree to which using a single report could both minimize burden and effectively meet the objectives of this rule, and
- the possible administrative, procurement and other modifications needed to implement a single report alternative.

Calculation of Objective and Reliable Standards for Assessing Contractor Pay Gaps

OFCCP proposes using the data it collects in the Equal Pay Report, in conjunction with other information available through existing resources such as labor market survey data, to generate reliable and objective industry standards for assessing individual contractor compensation data and conducting contractor self-assessments. After receiving the Equal Pay Reports from covered contractors, OFCCP proposes to aggregate each contractor's summary data with those of peer employers by industry to construct the objective industry standards. Labor market data would also be used to create the objective industry standard. As proposed, these standards would include the total number of employees in each EEO–1 occupational category from all the Equal Pay Reports submitted by contractors in a particular industry group, as well as the industry group's total W–2 pay and total hours worked, and the mean hourly wage calculated as total W–2 pay divided by total hours worked. This information would be determined separately by race and gender. OFCCP proposes to compare each contractor's summary statistics to the relevant objective industry standard. OFCCP is more likely to prioritize contractors for compliance evaluations with pay gaps that are greater than the standard.

Because OFCCP anticipates that Equal Pay Report data may have fewer observations in certain industries or job categories, and because it is self-reported data on contractors only, considering information available in these other data sources may inform and improve the analysis of reported contractor compensation data by providing a larger economic context. OFCCP is interested in related comments such as:

- The use objective industry standards and using contractor pay gaps that are greater than the standards to focus or prioritize contractors for compliance evaluations,
- the feasibility of using external data along with the Equal Pay Report data to develop the objective industry standards,[73]
- the potential benefits and limitations of using supplementary external data sets for this purpose, and
- the existence of other potentially useful supplemental data sources, in addition to ACS and BLS data.

Using just Equal Pay Report data alone has the benefit of focusing specifically on the pay gap among Federal contractors, which may or may not be different from employers generally. It is simpler to use Equal Pay Report data alone and the calculations would be easier to understand. However, contractors operate in a larger labor market and industry environment, and using supplemental data sources allows consideration of these broader trends. The potential benefits of using supplemental general labor market data is that they are typically based on well-understood samples from large populations of firms and are developed in a general survey context. This makes the data less prone to non-response bias that may occur when collecting pay data to enforce an anti-discrimination legal mandate. In addition, by using this data, OFCCP can likely determine the extent to which the pay practices of Federal contractors demonstrate important differences when compared to the pay practices of all employers generally. OFCCP cannot glean this information when only looking at Equal Pay Report data.

Incorporating supplemental data sources supports OFCCP's ability to refine its contractor pay gap standards to use for comparison purposes.[74] For example, the agency could develop better standards for specific industries using North American Industry Classification System (NAICS) codes and the Equal Pay Report's job, sex, race and ethnicity categories.[75] Where feasible and appropriate, OFCCP could also refine the standards by geographic locations such as state, Metropolitan Statistical Area (MSA),[76] and by contractor size.[77] OFCCP would use these standards to prioritize contractors for scheduling compliance evaluations; these standards would also be made publicly available to support contractor voluntary compliance.

OFCCP anticipates that the Equal Pay Reports for some contractors will contain sparse cells because certain combinations of job category and demographics will have only a few workers. Certain EEO–1 job category

[73] The actual Equal Pay Report and instructions will be published in an Information Collection Request (ICR). OFCCP encourages comments on the proposed report.

[74] The regulations enforcing VEVRAA also use a related but distinct concept of developing a benchmark linked to external labor market data, a different approach to measurement and calculation than the one discussed here.

[75] In some cases, sample size considerations and data limitations may require aggregating race categories for calculating metrics or for making selections. Where possible, the agency proposes to maintain separate measures for each race/ethnicity grouping in the Equal Pay Report.

[76] Because the pay gap is a ratio, and because some industries are also correlated to specific geographic areas, it may be less necessary to have location-specific metrics. Sample size considerations, as explained below, may also affect the ability to calculate metrics at all possible levels of analysis. However, to the extent local labor market characteristics, such as the race/ethnicity distributions in different parts of the country, may affect the pay gap, it may be important to assess the role of geographic location when constructing measures and/or making selections or conducting voluntary compliance.

[77] OFCCP would review the data submitted by contractors to determine whether there are enough actual differences in the reported pay gap by contactor size, after accounting for industry and job category, to justify separate measures.

groupings summarized by race or ethnicity and gender may be much smaller than others, especially when further subdivided by industry or other variables. Small cell sizes may arise on the current EEO–1 Report, or the proposed Equal Pay Report for a variety of reasons: Sales workers or craft workers may be less prevalent in certain industries, some geographic regions may have fewer members of specific racial or ethnic groups than others, and smaller contractors will generally report summary data on behalf of fewer workers in each group. This is an unavoidable reality when studying aggregate wage data of the kind OFCCP intends to collect.

OFCCP plans to address these potential issues when calculating measures. For example, OFCCP may calculate and report national metrics for some industries, or metrics by region instead of MSA or state. In addition to aggregating where appropriate and necessary, OFCCP would likely exclude extremely sparse cells from the metric calculation altogether due to reliability and validity concerns. As a result, for certain job categories in certain industry groups, the agency may not report a metric where the data are insufficient.

Use of the Equal Pay Report Data and the Metrics To Select Contractors for Evaluation

For purposes of selecting contractors for compliance evaluations using the Equal Pay Report data, OFCCP proposes to focus primarily on a strategy that ranks contractors against the objective standards, and then prioritizes compliance evaluations of those contractors and subcontractors who have larger race or gender pay gaps than what is typically reported in the industry as measured by the objective industry standard described in the section above. Those contractors and subcontractors who report patterns with the greatest deviation from the applicable standard would have the highest likelihood of selection for further investigation under this approach. Under its usual compliance evaluation procedures, the agency would then examine their detailed compensation data and practices to make a determination about the contractors' actual compliance. OFCCP specifically proposes comparing average pay differences across contractors who are in the same industry within EEO–1 job categories. While EEO–1 categories are far too broad to identify pay discrimination at the individual employer level with precision, they are practical and useful for setting enforcement priorities by comparing across employers based on summary data. As explained further in this section, the agency also plans to consider how other data sources may provide information on firm or employee characteristics that would help refine and improve OFCCP's ability to use Equal Pay Report data to rank contractors and prioritize compliance evaluations.

Under the approach proposed by OFCCP, using an objective industry standard, the goal is not simply to identify absolute differences in pay, which may be explained in any particular case by a variety of legitimate factors. Rather, it is to identify contractors with pay differences that substantially depart from the objective industry standard, reducing the likelihood that legitimate factors explain all of the difference. The most straightforward approach to analyzing earnings data would be to simply compare the earnings of, for example, female and male professional employees within a reporting establishment and select those with the largest differences in average compensation for compliance evaluations. Thus, an establishment where female professionals earn on average 75 percent of what male professionals earn may be reviewed, and those where women earned 90 percent of what men earned may not. This procedure might be labeled a ''simple ratio'' analysis. In contrast, setting an industry standard using the kind of metrics described above compares the wage ratios for men and women in each establishment to the typical ratio within an industry group or other peer establishments. Under this approach, an establishment where the average female professional earns 75 percent as much as her male co-worker might not be selected for an OFCCP compliance evaluation if the ratios for women in similar firms average 60 percent. These basic principles also would apply when analyzing race or ethnicity-based differences.

By using an objective industry standard as the measure against which a contractor's pay gap is assessed, OFCCP should be able to account for some of the potential effects of employee qualifications and other potentially nondiscriminatory explanations for observed wage gaps. For example, if female professionals as a group are favoring particular types of jobs, or coming to particular jobs with more education or less full-time work experience on average than similar men, those differences should be reasonably similar among peer employers within the same industry and/or labor market. They might result in an overall average gender-based pay difference within the EEO–1 category of ''professionals'' for all employers in that peer group.

Although EEO–1 categories involve a mix of jobs and workers, the average differences in pay by race and sex across employers are still valuable because the Equal Pay Report will generate similar and comparable data by peer employers. With rare exceptions, OFCCP anticipates that systematic gender- or race-based differences will merit further investigation. Using a contractor's Equal Pay Report data against the objective industry standard further focuses these differences to contractors most worthy of further investigation and will inform the development of OFCCP's scheduling list.

For the group of contractors scheduled for a compliance evaluation, OFCCP would then conduct a desk audit of the contractor's data and records, and may make a request for more detailed data to evaluate the precise mix of jobs, workers and pay practices and draw an accurate conclusion about potential violations. That a contractor departs from the metric or has an absolute pay gap of a particular size is not sufficient evidence to find a pay discrimination violation. Equal Pay Report data would only be a basis to select contractors for a deeper assessment of potential discrimination in their compensation systems and practices based on the pay disparities observed in their reported data.

The agency also considered collecting information that would allow for calculation of variance. Variance is useful because it takes into account cell size (i.e., how many individuals are used in the calculation of the mean for a group) as well as the spread or differences in salary data among the persons in the group. However, providing enough information to calculate a variance would go beyond the total number of employees and total W–2 earnings and hours worked by group, and would increase the burden by requiring contractors and subcontractors to calculate and report additional metrics from their individual level data. The public is welcome to comment on these issues and approaches.

OFCCP plans to share information on industry standards publicly annually, as soon as practicable. OFCCP would post the standards on the agency's Web site. Training courses and technical assistance materials will be available in the form of technical assistance guides, web-based training courses, frequently asked questions (FAQs), directives and other policy statements, and through OFCCP's Customer Service Unit

responding to telephone and email questions and general inquiries. These courses and materials would explain the industry standards and how contractors could use them for self-assessment purposes. By providing access to this policy and technical assistance information, OFCCP is educating contractors and, thereby, likely deterring future violations. These tools should allow contractors to determine if a ''deeper dive'' is needed into their pay practices, and if problems are identified, to voluntarily correct them.

OFCCP seeks comment on this approach, including comments on:

- How contractors would use the objective industry standards that are based on aggregate compensation data to assess their compensation practices and/or disparities; and
- data challenges contractors could face.

In using Equal Pay Report data as part of its process for selecting contractors for review, OFCCP must address a number of important practical and operational considerations such as resource constraints, data limitations, and enforcing contractor compliance with a broad range of employment practices and affirmative action requirements related to sex, race, ethnicity, disability, and status as a protected veteran. In requesting comment on the potential application and use of Equal Pay Report data to its overall scheduling practice, the agency retains the discretion to consider these comments in light of the agency's operational and enforcement priorities.

Consistent with the Fourth Amendment standard of neutrality, OFCCP will continue to apply a variety of criteria to its decisions to select contractors for review that go beyond the scope of the Equal Pay Report data.

Pre-Rulemaking Process—ANPRM

Prior to developing this proposed rule, OFCCP solicited significant stakeholder input on the design and operation of a potential compensation data collection tool in an Advance Notice of Proposed Rulemaking (ANPRM) published on August 10, 2011 (76 FR 49398). The ANPRM stated OFCCP was considering requesting contractor compensation data, and asked for responses to fifteen specific questions about categories of data or potential applications of a data collection tool. The ANPRM also invited general comments on the design or approach of such a tool.

OFCCP received a substantial response to the ANPRM. Over 7,800 organizations and individuals submitted comments, highlighting the significance of the issue and the strong public interest in a potential compensation report. More than 7,000 comments were form letters organized by women's rights groups advocating generally for a broad data collection tool, and several hundred more were statements of general support for taking greater steps to address equal pay issues. In addition, a broad range of stakeholders submitted substantive comments on both OFCCP's overall concept of collecting contractor compensation data and on the specific issues raised in the ANPRM.

The comments submitted in response to the ANPRM raised significant issues. These include a set of overarching issues regarding the scope and purpose of data collection, the potential benefits to workers and contractors, potential burden and cost, and legal questions about OFCCP's authority to collect and use compensation data. In addition, the comments discussed specific points regarding who should provide data, what types of compensation data OFCCP should collect, what workers should be included and how to group them, what kinds of factors might be collected, and analytic techniques. Comments also addressed specific implementation issues, such as the agency's experience using the Equal Opportunity (EO) Survey, coordination with the EEOC and its research into compensation data collection, OFCCP's technical capacity to manage and analyze data, and IT and electronic filing requirements. OFCCP considered the ANPRM comments in developing this proposed rule. General comments about the proposal to collect compensation data are discussed below, while comments that address specific aspects of the proposed rule and the proposed Equal Pay Report are discussed in the Section-by-Section Analysis.

OFCCP is aware that the EEOC is still considering the collection of compensation data, and that EEOC previously convened an expert panel of the National Research Council (NRC) of the National Academies (NAS) to advise on its data collection from all covered employers. The NRC report made several recommendations, including that EEOC prepare a comprehensive plan for using earnings data and that an independent contractor conduct a pilot of the proposed data collection plan.[78] Recently, EEOC prepared a Statement of Work (SOW) for its pilot study on how compensation earnings data could be collected from employers on EEOC's survey collection systems (e.g., EEO–1, EEO–4, and EEO–5 survey reports). The pilot study, among other things, seeks to identify and make recommendations on the definition of pay, the best summary measure of central tendency and dispersion for annual earnings, and the best statistical tests for analyzing annual earnings data using existing EEOC survey reports. It will also assess the cost for the data collection. This timing of the pilot study is incompatible with direction provided to DOL in the Presidential Memorandum issued in April 2014 directing proposed rulemaking within 120 days.

However, OFCCP looks forward to continuing to work with EEOC on pay data collection, including sharing information resulting from this proposed rule and engaging with EEOC on the results of its pilot project once it is completed. Informed in part by its examination of the NRC report, OFCCP studied its data collection process and identified a collection tool that it believes is suitable for its investigations and related policies and procedures. Indeed, OFCCP has addressed certain specific recommendations of that panel in its proposal and invited comments on other recommendations.

Finally, OFCCP intends to coordinate with EEOC on this data collection proposal. OFCCP has also consulted with the Department of Labor Agency Task Force members, including the Women's Bureau and the Wage and Hour Division, as well as the other Federal agencies on the Task Force.

General Comments

Contractors and contractor organizations, human resource information systems vendors, and law firms and consultants who assist Federal contractors with compliance, provided a diverse set of perspectives on the issues in the ANPRM. Many raised concerns about the potential burden of OFCCP's efforts to collect certain types of compensation data and asked for more clarity about the purpose of the compensation data collection tool. They were also interested in how the tool supported OFCCP's mission. While some were adamantly opposed to a data collection of any type or scale, even stating that OFCCP should withdraw or abandon the proposal, others requested a more specific proposal in order to determine whether

[78] National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), at 2–3, *available at http://www.nap.edu/openbook.php?record_id=13496* (''Collecting Compensation Data''). The EEOC invited the panel to make recommendations to assist it with formulating its regulations on methods for measuring and collecting pay information.

OFCCP's proposal was appropriate. Still others favored certain specific elements or strategies discussed in the ANPRM or recommended ways to design the tool that matched existing contractor practices and IT systems.

Women's rights, civil rights and worker protection organizations strongly supported a compensation data collection tool. They generally encouraged the agency to collect data in as specific a form as possible. Many also encouraged OFCCP to go beyond the confines of compensation practices and collect data on hiring, promotion and termination such as OFCCP's former Equal Opportunity (EO) Survey. These commenters repeatedly highlighted the importance of closing the pay gap, and reiterated their concern that OFCCP has sufficient tools and data to support its worker protection mission. Noting the barriers that workers face in trying to obtain compensation in their workplace, OFCCP's role in identifying and addressing compensation discrimination is critical.

Scope and Purpose of the Data Collection

Many of the ANPRM comments focused on the scope of the data collection, and expressing several concerns. These included concerns that OFCCP would collect too much data, and that it would be too difficult, costly or time consuming to comply with the new reporting requirement, or that OFCCP would only collect minimal data that would not be useful or relevant to its goal of addressing pay discrimination. In general, most of these comments assumed that the purpose of a data collection effort was directed at identifying specific evidence of a pay discrimination violation—which would in fact require reporting at a highly detailed level. Instead, OFCCP proposes to use the information from the Equal Pay Report primarily as neutral criteria to prioritize how it selects contractors and subcontractors for a compliance evaluation. Under these circumstances, OFCCP can rely on summary data without needing more detailed reporting. After OFCCP selects contractors and subcontractors and schedules them for regular compliance evaluations, the agency would then request the additional more detailed data and information necessary to make a complete assessment of whether a violation exists.

Many contractors and their representatives raised specific concerns about the burden of collecting different categories of data. They noted that certain types of information, like factors that can explain compensation for individual workers, are not consistently maintained in human resources databases or even in electronic form at all. Some raised similar objections to providing data on certain elements of compensation. Many also expressed substantial concerns about the collection of individual employee pay records, in terms of both burden, and privacy and confidentiality issues. The agency has carefully considered all of these concerns in developing this proposal to minimize burden, focus on the most readily available information, and ensure the maximum potential confidentiality protection would apply to the information.

While some objections concerned OFCCP collecting too much data, others expressed alarm that OFCCP might collect too little data. Almost all of the commenters who addressed substantive issues stated that, for a compensation data collection tool to have any utility, it must collect information at a sufficiently detailed level. A large number of these commenters argued that comparing contractors was not a one-size-fits-all exercise, or that an apples-to-apples comparison could not be used given the many employee-level and firm level differences in practices and factors that affect compensation. Commenters raised concerns about aggregating elements of compensation, aggregating workers with different job titles, aggregating across locations, and many other efforts to compare compensation differences that might incorporate different potential causal mechanisms. Several commenters suggested that contractors be afforded discretion to determine what type of compensation information they would submit. Similarly, contractors wanted discretion to determine how they would aggregate or disaggregate information. Both comments aimed to reduce burden or to compensate for factors that may affect compensation data.

Notably, although contractors, their representatives, and the civil and workers' rights commenters often disagreed about aspects of this endeavor, they largely agreed on this point. Most commenters questioned whether OFCCP could get an accurate picture of pay discrimination without gathering information at a substantial level of detail. Nevertheless, while contractors and employer organizations viewed this problem as fatal to the endeavor, pointing out the complexity and burden of detailed data collection, advocates for workers viewed it as both necessary and feasible. OFCCP agrees that establishing pay discrimination can be complex and nuanced, and would potentially require substantial data and other information. That is why the agency is not seeking to establish pay discrimination violations through a general reporting requirement. Determinations as to whether a contractor has violated the Executive Order may depend not only on data analysis, including individual compensation records, but also on the specific facts of the case. In order for the proposed report on compensation to be an effective tool, the data collected must be uniform and easy to compare. Allowing contractors to choose the type of data to submit, or having contractors submit a large number of unique job groupings or compensation types or explanatory factors, would prevent the tool from serving its intended purpose.

Indeed, data collected under the proposed Equal Pay Report would not be the only data that OFCCP uses to evaluate contractor pay practices. If OFCCP selects a contractor for a compliance evaluation, or is investigating a complaint, that review would cover compensation data beyond what is in the contractor's Equal Pay Report and would involve a more specific and detailed data request. To assess individual contractor pay practices, OFCCP can request significant detail during compliance evaluations about types of compensation, detailed job groupings, factors affecting pay, and other specific information—including analyzing individual employee—level compensation records. OFCCP compensation investigations address a broad range of practices and categories of compensation, and generally cover a broad set of workers. Specific investigations may rely on more detailed job category information, and consider potential explanatory factors like experience or education. In general, OFCCP will conduct an analysis relevant to the contractor's specific industry, workforce and practices, based on the available facts and data. OFCCP will also investigate hiring, promotion and other employment practices. Any final determination of a violation will be based on a factually sound, analytically rigorous, and legally appropriate assessment. Summary data provides a preliminary look at potential compensation disparities, allowing OFCCP to conduct more detailed compliance evaluations much more efficiently.

Notably, one commenter who focused on OFCCP's goal of using the data collection to prioritize contractors for further evaluation also proposed that OFCCP collect data in a manner very similar to the Equal Pay Report framework proposed in this NPRM. This commenter, a law firm with substantial

experience representing contractors in OFCCP compliance evaluations, stated that OFCCP should only collect a simple level of data sufficient to identify disparities and not attempt to collect enough information to draw conclusions about discrimination—because of burden and cost. OFCCP's proposal is consistent with this approach, as it is limited to summary data, and will be used for prioritizing contractors and subcontractors for evaluation, rather than making ultimate determinations of compliance.

A final set of issues regarding the overall scope and design of a compensation data collection tool concerned other ways OFCCP might use these data. For example, in the ANPRM, OFCCP discussed industry trend analysis and research. Some commenters suggested that such activities were outside of OFCCP's mission or authority. OFCCP does not intend to collect this data in order to conduct general compensation analysis unrelated to potential scheduling and enforcement, or simply to conduct its own independent peer-reviewed research. For example, OFCCP intends to analyze compensation data at an industry level in order to compare peer employers, and may use it to conduct research and analysis regarding how well certain aspects of the data used for scheduling ultimately predict the likelihood of violation. In addition, OFCCP intends to disclose certain aggregate data in order to assist contractors and subcontractors seeking to compare their own pay practices against others using the kind of industry-based standards described below. OFCCP does not contemplate any other specific use or release of this data.

Potential Benefits to Workers

A number of the commenters discussed how the collection and use of compensation data could confer broad benefits on workers and contractors. Many addressed the significant social problem of the pay gap, highlighting the importance that OFCCP have adequate enforcement tools to ensure that Federal contractors and subcontractors do not discriminate in pay.

In particular, women's and civil rights organizations noted that the prevalence of pay secrecy policies makes OFCCP's ability to obtain and review compensation data even more important. Workers find it extremely difficult to get information on pay practices or determine if they are being paid less because of pay discrimination. On April 8, 2014, President Obama issued Executive Order 13665, prohibiting discrimination by Federal contractors against employees and job applicants who inquire about, discuss, or disclose wages.[79] This Executive Order complements the proposed data collections by improving the overall transparency of contractor pay practices.

First, OFCCP agrees that collecting compensation data from Federal contractors can improve OFCCP's ability to enforce laws that prohibit contractor pay discrimination. This includes protecting contractor employees and their families from experiencing the negative effects of pay discrimination that can significantly reduce lifetime earnings, and improving OFCCP's ability to identify employees who were victims of discrimination and ensure they receive the remedies they deserve.

Second, because workers often do not know about pay discrimination and therefore cannot act to address it on their own behalf, improving OFCCP enforcement is important. Almost half of all workers report that they are prohibited from or strongly discouraged from discussing their own compensation with workplace colleagues.[80] In a compliance evaluation, OFCCP can request and review workforce data directly, and the agency may find problems of which workers are unaware.

A single OFCCP systemic investigation can resolve claims on behalf of a large group of workers. This benefits workers in the class directly, through back pay and reforms to pay practices that can improve pay equity over the long term. By collecting compensation data, OFCCP expects to increase both the number of pay discrimination cases it pursues and the proportion of systemic investigations. This would increase the credible deterrent effect of OFCCP enforcement—conferring benefits on workers at many other establishments by encouraging greater voluntary compliance.

Indeed, OFCCP expects that contractors and subcontractors are more likely to conduct the required self-analysis and correct existing problems if they regularly report their compensation data to OFCCP, and if they have access to the compliance assistance mechanisms OFCCP seeks to provide through Equal Pay Report data. In other words, OFCCP's impact is broader than only the establishments it investigates, but includes establishments it does not evaluate, ultimately further reducing the number of workers underpaid due to discrimination.

Equal Opportunity Survey

In 2000, OFCCP sought to collect data on compensation and other employment practices from Federal contractors through a mechanism known as the Equal Opportunity Survey.[81] Field tests of the survey instrument supported the conclusion that general survey data collection on employment practices from Federal contractors was feasible and that there would not be substantial non-response issues. In 2006, OFCCP rescinded the Equal Opportunity Survey in light of conflicting data on its effectiveness.[82] A number of commenters suggested that aspects of the Equal Opportunity Survey should serve as a model for OFCCP, like collecting data on a broad range of employment practices. Others stated that the Equal Opportunity Survey demonstrates OFCCP cannot and should not attempt to collect regular summary data from contractors, questioning the Equal Opportunity Survey's ultimate predictive power. OFCCP extensively reviewed the agency's experience with the Equal Opportunity Survey and identified some areas that might be considered in the development and design of the proposed Equal Pay Report. Notably, OFCCP never fully implemented the survey and never deployed a clear strategy or sufficient resources to analyze and apply the data for enforcement purposes.

OFCCP applied the lessons learned from the Equal Opportunity Survey, developed a plan for analyzing the data, and its compensation enforcement initiative will benefit from infrastructure improvements. In particular, OFCCP developed a careful plan for analyzing the data and using it to schedule compliance evaluations as described in this NPRM and related ICR. OFCCP also envisions periodically assessing its use of Equal Pay Report data to select contractors and subcontractors that are likely violators. Moreover, OFCCP is simplifying its approach by focusing on compensation data, unlike the Equal Opportunity Survey, which attempted to collect, track and use data on a variety of employment practices.

EEOC and the National Research Council Report

The EEOC is also exploring compensation data collection, through a

[79] Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, 79 FR 20749 (April 11, 2014).

[80] Institute for Women's Policy Research, *Pay Secrecy and Wage Discrimination,* (June 2011), *available at http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination.*

[81] 65 FR 68022, 68046 (November 13, 2000).

[82] *See* 76 FR 49398, 49399 (August 10, 2011).

different, complementary process to OFCCP's NPRM. EEOC commissioned an expert panel of the NRC of the National Academies to review options for collecting compensation data from employers. A number of commenters expressed concern that OFCCP and EEOC were not coordinating and intended to propose conflicting or overlapping reporting requirements. Over the past five years OFCCP and EEOC, both member agencies of the National Equal Pay Task Force, have discussed the importance of pay data collection and the approaches both agencies might take. OFCCP and EEOC will continue to coordinate on both this NPRM and the results of the EEOC's pilot study in order to minimize unnecessary burden, duplication, and inconsistency.

OFCCP provided information to EEOC's panel, and reviewed and analyzed the final report submitted to the EEOC.[83] As explained below, in a number of places the NPRM incorporates or discusses certain elements of the NRC report about the EEOC. The NPRM also reflects serious consideration of the panel's recommendations that might be applicable to the proposed OFCCP data collection.

First, this NPRM addresses the recommendation that Federal agencies state a clear plan for collection and use of pay data. Indeed, this document explains OFCCP's plan in detail, both in terms of the proposed scope of the data collection and the proposed use of data to engender greater voluntary compliance and to support improved efficiency in enforcement. The agency seeks comments on both of these points. This NPRM specifically tracks the panel's summary data option, which proposes collecting compensation data summarized by the EEO–1 job categories and demographic categories.[84] The NPRM also details how OFCCP intends to protect the confidentiality of information submitted by contractors in light of the report's discussion about confidentiality.

OFCCP's approach to data collection as described in this NPRM may be contrasted to the NRC's recommendations in two ways: (1) Defining the appropriate measure of compensation, and (2) the necessity of conducting an external formal pilot study of the data collection proposal prior to engaging in rulemaking. The NRC recommended using the definition of compensation found in the Occupational Employment Statistics Survey (OES) by BLS. The panel stated that this would be the easiest measure for employers to generate data out of current recordkeeping systems.[85] As set forth in the Section-by-Section analysis below, OFCCP believes that the OES definition of wages is not an appropriate measure of compensation for our data collection because it is narrower in scope than W–2 earnings and is likely to be more burdensome to provide.

W–2 earnings account for a broad range of pay elements such as bonuses, overtime, awards, allowances and reimbursements, and commissions.[86] By contrast, the OES definition excludes common pay elements such as overtime and other forms of premium pay.[87] Using the OES definition would limit OFCCP's ability to analyze pay disparities with respect to these common pay elements. In addition, employers generally report OES wages in terms of the number of employees they have within specified hourly or annual wage bands or ranges, rather than the actual wages paid to each employee. This means that the OES approach is untested in the context of reporting actual wage rates. Thus, OFCCP has concluded that the OES approach is less favorable than using W–2 earnings, with or without hours worked. OFCCP requests comments on which approach could impose the least burden on contractors given the capacity of existing electronic payroll records and other HRIS systems. OFCCP welcomes comments on:

- The cost of providing W–2 earnings data, and
- the cost of providing compensation data using the OES definition.

The NRC report also recommends conducting an independent external pilot study on the Equal Pay Report to test the collection instrument and the use of the data.[88] The Presidential Memorandum envisions that OFCCP will propose a rule in August 2014 on a compensation data tool. It is a reality, however, that EEOC's pilot study is following a different timeline. This does not prevent the two agencies from coordinating and collaborating on the compensation tool in the future. With respect to the NRC's recommendation that OFCCP conduct its own pilot project, OFCCP considered this recommendation and determined that the agency has already engaged in such a process with its Equal Opportunity Survey. The OFCCP studied that survey closely, identified and addressed many of the issues a pilot would uncover. While conducting a pilot would provide information regarding the Equal Pay Report's effectiveness, and identify ways to improve the collection, the cost and burden of conducting a pilot may well outweigh any potential benefit. All of the categories of information are already in use, well understood, and are relatively simple to collect. The field-testing of the Equal Opportunity Survey points to the general feasibility of compensation data collection, and the report calls for data that most covered Federal contractors and subcontractors should already maintain.

The OFCCP notes that its prior experiences with the Equal Opportunity Survey have informed this NRPM. As a result of the 2000 Equal Opportunity Survey and recent stakeholder listening sessions, OFCCP is aware that requesting a broad array of information related to multiple contractor employment practices, as the Equal Opportunity Survey did, creates challenges for contractors and the agency. Consequently, the proposed Equal Pay Report is much narrower in scope. OFCCP requests public comment on:

- The advantages and disadvantages of piloting the Equal Pay Report,
- the extent its prior work with the Equal Opportunity Survey satisfies the purposes of a pilot, and,
- the design of a pilot of the Equal Pay Report.

The OFCCP, mindful of the NRC's recommendations directed to the EEOC on protecting the confidentiality of contractor pay data,[89] believes these concerns are addressed in the NPRM.

[83] National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), *available at http://www.nap.edu/openbook.php?record_id=13496* (''Collecting Compensation Data'').

[84] *Id.* at 60.

[85] *Id.* at 58.

[86] Internal Revenue Service, ''Wages, Salaries, and Other Earnings,'' *http://www.irs.gov/publications/p17/ch05.html* (last accessed May 30, 2014).

[87] The measure of compensation used in the OES includes factors such as the base rate of pay, cost of living allowances, commissions, production bonuses, and tips. The W–2 earnings include these factors, but accounts for additional forms of compensation such as overtime, shift differential pay, and other bonuses. *Compare* Bureau of Labor Statistics, ''Occupational Employment and Wages—May 2013,'' at 7, *available at http://www.bls.gov/news.release/pdf/ocwage.pdf, with* Internal Revenue Service, ''Employee Compensation,'' *http://www.irs.gov/publications/p525/ar02.html#en_US_2013_publink1000229086.*

[88] National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), at 87, *available at http://www.nap.edu/openbook.php?record_id=13496* (''Collecting Compensation Data'').

[89] *Id.* at 5, 77. Recommendation number five in the report was for the agencies to ''*consider* whether the protections, now insured through the mechanism of interagency memoranda-of-understanding, should be incorporated in legislation.'' (emphasis added). Recommendation

Finally, OFCCP addresses ANPRM comments on its coordination with the EEOC's process for considering compensation data collection. The OFCCP concluded that developing a general data collection requirement for Federal contractors only, as in the proposed rule, is unlikely to conflict with any specific data collection requirement that EEOC may decide to propose in the future from a broader group of employers, especially if EEOC is proposing using its existing EEO–1 Report format to collect its compensation data. Further, the Presidential Memorandum directed the proposal of a rule by DOL in August 2014 while the EEOC process is likely to take 18 to 24 months to complete once a contract is awarded for its pilot study. To the extent the EEOC ultimately determines it will collect compensation data from employers, the flexibility built into the proposed rule would allow OFCCP to modify its data collection as needed to harmonize it with any EEOC approach. Indeed, OFCCP's proposed Equal Pay Report and collection of compensation data from contractors is also likely to assist the EEOC in its determination of whether and how to collect compensation data from a broader set of employers in the future.

OFCCP's Legal Authority To Collect and Use Compensation Data

A few questions arose in the comments to the ANPRM regarding legal issues, mostly involving whether OFCCP may collect data and use it for analysis by industry, across multiple facilities, and/or to develop a subset of contractors and subcontractors to prioritize for compliance evaluations. These commenters assert, incorrectly, that the Fourth Amendment of the U.S. Constitution requires that OFCCP use a ''random'' selection procedure to identify the contractors and subcontractors that will undergo a compliance evaluation. While selection procedures are outside the scope of the proposed rule, they are part of the purpose for developing the proposed Equal Pay Report. For this reason, OFCCP would like to address in this preamble several comments that incorrectly state the requirements of the Fourth Amendment.

First, when OFCCP requests that a contractor submit data for OFCCP to review off-site during the desk audit stage of a compliance evaluation, the Fourth Amendment only requires that the disclosure sought be reasonable.[90] A request is reasonable if it is ''sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.'' [91]

When OFCCP selects contractors and subcontractors for on-site compliance reviews, which are administrative searches for purposes of the Fourth Amendment, it need not do so ''at random.'' Rather, to satisfy the requirements of the Fourth Amendment, contractors and subcontractors may be selected for on-site compliance evaluation based on: (1) Specific evidence of an existing violation; (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor; or (3) an administrative plan containing specific neutral criteria.[92] Examples of acceptable neutral criteria include, among other factors, a contractor's geographical location, history of violations, number of employees, and work in a specific industry. The requirement that selection be based on specific neutral criteria is simply meant to ensure that selections are not ''the product of the unreviewed discretion of the enforcement officer.'' [93] If OFCCP were to include in its administrative contractor selection plan for on-site compliance reviews criteria that are based on information obtained from the proposed Equal Pay Report, then the agency would do so in a manner that comports with the requirements of the Fourth Amendment.

Finally, it is worth observing that identification as a potential violator based on data from the proposed Equal Pay Report would not itself result in any sanction or adverse action against the contractor; the contractor would be prioritized for a compliance evaluation, a procedure which any Federal contractor is already subject to under the Executive Order.

Section-By-Section Analysis

§ 60–1.7 Reports and other required information

§ 60–1.7(a)(1) EEO–1 Report

Existing § 60–1.7(a)(1) identifies contractors that are required to file the EEO–1 Report jointly promulgated by EEOC and OFCCP. Generally, § 60–1.7(a) requires a contractor to annually file an EEO–1 Report if the contractor has 50 employees and is either: (1) A prime contractor or first tier subcontractor with a contract or subcontract of $50,000 or more; or (2) serves as a fund depository or issuing and paying agent of U.S. savings bonds in any amount. Existing § 60–1.7(a)(1) also provides that a construction subcontractor at any tier must file the EEO–1 Report annually if it has a contract or subcontract of $50,000 or more. OFCCP proposes changing the title of existing § 60–1.7(a) from ''Requirements for Contractors and Subcontractors'' to ''EEO–1 Report.'' Since the current language of § 60–1.7(a)(1) addresses EEO–1 Report filing, the proposed new title is more precise. In addition, OFCCP proposes eliminating the reference in § 60–1.7(a)(1) to ''Plans for Progress'' because the program no longer exists. The proposed § 60–1.7(a) also includes technical changes to subparagraph numbers to add a new § 60–1.7(a)(2) and additional subheadings for clarity.

Currently, § 60–1.7(a)(2) addresses the EEO–1 reporting obligations of a new contractor. Section 60–1.7(a)(2) provides that each ''person'' required to file an EEO–1 Report under § 60–1.7(a)(1) must do so within 30 days after receiving a contract or subcontract, unless the ''person'' submitted an EEO–1 Report within the previous 12 months. The report is filed with the contracting agency or administering agency. After the initial filing, the new contractor will file annually as required under § 60–1.7(a)(1). In addition, § 60–1.7(a)(2) identifies the Deputy Assistant Secretary as having the authority to change or extend the time for filing the report. OFCCP also proposes renumbering this paragraph to § 60–1.7(a)(3), deleting the references to ''person'' and replacing them with ''prime contractor and subcontractor.'' Consistent with this change, OFCCP is proposing deleting the words ''to him'' in relation to who is awarded a contract or subcontract. OFCCP is also proposing deleting the provision in § 60–1.7(a)(2) which states that subsequent reports shall be submitted at such intervals as the Deputy Assistant Secretary may require, in order to conform the

number six is expressly directed to EEOC and states: ''The U.S. Equal Employment Opportunity Commission should seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.''

[90] *United Space Alliance, LLC v. Solis,* 824 F. Supp. 2d 68, 91 (D.D.C. 2011) (citing *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652–53 (1950)).

[91] *United Space Alliance,* 824 F. Supp. 2d at 91 (quoting *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186 (1946)); *Bank of America* v. *Solis,* Case 1:09–CV–02009–EGS–DAR, 2011 WL 7394512 (D.D.C. Dec. 13, 2011).

[92] *United States* v. *Mississippi Power & Light Co.,* 638 F.2d 899, 907 (5th Cir. 1981); *Beverly Enterprises, Inc.* v. *Herman,* 130 F. Supp. 2d 1, 14–15 (D.D.C. 2000); *Marshall* v. *Barlow's, Inc.,* 436 U.S. 307, 320–21 (1978).

[93] *Mississippi Power & Light Co.,* 638 F.2d at 907–8.

regulatory provision to the longstanding agency practice of requiring only the annual filings. Finally, OFCCP proposes deleting the language in the existing regulation regarding extension requests. The instructions for making extension requests, which are currently set forth on EEOC's Web site, direct EEO–1 Report filers to send an email request for an extension to EEOC before the filing deadline.

§ 60–1.7(b) Equal Pay Report

Existing § 60–1.7(b) addresses the certification requirements for bidders or prospective contractors. Each ''bidder or prospective prime contractor and proposed subcontractor'' must state, either in the bid or in writing at contract negotiations, whether it has an affirmative action program for each of its establishments, whether it held a contract or subcontract covered by the equal opportunity clause, and whether it filed all required reports, including the EEO–1 Report. The proposed rule would renumber § 60–1.7(b), making it a new § 60–1.7(d) and renaming the paragraph to ''Requirements for bidders or prospective contractors—(1) Certification and representation of compliance with the requirements of Executive Order 11246 and its implementing regulations.'' OFCCP proposes a new § 60–1.7(b) establishing a requirement that contractors and subcontractors complete and submit a report on employee compensation. The report proposed in § 60–1.7(b)(1), called the Equal Pay Report, requires contractors to provide summary data on the compensation paid employees by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees. Contractors and subcontractors must submit this report in the format and manner required by OFCCP, and must retain a copy of the submitted report in accordance with the record retention provisions in § 60–1.12.

As proposed, contractors and subcontractors must report summary compensation data; no individual employee data is required. Reporting summary data limits the amount of information contractors and subcontractors must collect and report to the agency on a regular basis. While OFCCP will still consider individual employee compensation data during compliance evaluations or complaint investigations related to a contractor's pay practices, aggregate data is adequate for the purpose of establishing objective industry compensation standards against which individual contractors can be measured. While micro data, rather than aggregate data collected from all contractors, could arguably improve the identification of potential violators, collecting this data would likely create considerable cost and burden for contractors. Collecting aggregate data should also address concerns about the possible release of individual compensation data. OFCCP's decision to collect aggregate data reduces the likelihood that an individual employee's information would be inadvertently disclosed, and data reported in the aggregate makes it more difficult to identify the amount paid to any particular individual. Moreover, OFCCP does not intend to publicly release the underlying data contractors and subcontractors submit on their Equal Pay Reports. The agency will protect the confidentiality of data submitted through the Equal Pay Report to the maximum extent permitted by law, and plans to design a web-based portal for reporting and maintaining compensation information that conforms with applicable government IT security standards. Finally, on the issues of confidentiality and security, the information will be accessible to a small group of agency employees who need to know the information, and the data will not be widely circulated. These measures should reasonably ensure the security and confidentiality of the aggregate data.

The proposed rule collects only information on compensation, and not any other employment practices. This distinguishes it from the former Equal Opportunity Survey. In the agency's view, information on other employment practices adds complexity without necessarily conferring sufficient benefit. To the extent differences in promotions, hiring into higher paying jobs, or other practices contribute to race or gender-based pay disparities, examining average pay differences can help identify those effects. One common way to identify discriminatory promotion patterns is by first observing underlying compensation differences across jobs, then testing to see if discrimination in promotion rates explains the lower earnings. Further, while OFCCP has identified categories of widely available and comparable data sources relevant to analyzing compensation, the agency has not identified analogous data sources that contractors and subcontractors generally maintain on other employment practices in simple, comparable, externally verifiable formats. OFCCP will continue its careful review of information on hiring, promotion, termination and other employment practices through its existing compliance evaluation procedures.

Definition and Measure of Employee Compensation

Elements of compensation can vary substantially depending on the types of workers and industries. Consequently, the earlier ANPRM asked several questions designed to elicit feedback on how to measure compensation. In general, responses addressed three strategies: (1) Base pay, (2) total compensation disaggregated into separate elements like base pay, bonuses, overtime or commissions, and (3) total compensation aggregated into a single amount. Contractors and representatives of the business community stated a preference for base pay as a measure. These commenters noted that base pay is the most common and comparable element of compensation across employees. They were concerned that aggregating multiple forms of compensation would not allow for the consideration of the different factors that go into explaining base pay. These factors may or may not be the same for explaining bonuses, overtime or other compensation elements.

On the other hand, employee groups, civil rights and worker advocacy organizations generally favored total compensation disaggregated into separate pay elements. These commenters believed that this strategy is best for addressing discrimination in compensation that does not result from base pay but from other earnings sources such as bonuses, overtime, and commissions. There were few comments on the third strategy, total compensation aggregated into a single amount.

After considering the comments submitted in response to the ANPRM regarding the best way to measure compensation for purposes of a compensation data collection tool, a definition of compensation is set forth in the proposed Equal Pay Report. In the Equal Pay Report, OFCCP proposes using aggregate compensation based on W–2 earnings along with one or more other relevant data points. One relevant data element is the number of hours worked. OFCCP proposes calculating hours worked as follows:

- For salaried workers, contractors should provide actual hours of work if the contractor records actual hours. This is required for nonexempt employees but is not required for exempt employees. If contractors do not have actual hours worked data, they may default to 2080 for full-time and 1040 for part-time.

• For hourly workers, actual hours of work.

• Reported hours may also be adjusted for part year work using date of hire or dates of leave as well, but this is not specifically required.

OFCCP proposes collecting aggregate measures of hours worked so that the aggregate measures of W–2 earnings can better account for potential differences in work hours over the reporting period. Total compensation data, that is, total W–2 earnings and hours worked, provides some insight into the effect that all contractor pay practices may be having on compensation by gender, race and ethnicity. OFCCP is also proposing to collect the total number of workers and the total aggregate compensation for each group of workers as defined by EEO–1 job category, sex, race and ethnicity.

OFCCP, by using this strategy, is striking an appropriate balance between minimizing contractor reporting burden and ensuring that the proposed report includes information on non-base pay elements. By limiting compensation reporting to W–2 earnings, and using existing EEO–1 job categories, contractors are not required to develop or significantly alter payroll and human resources systems. This is the case because existing contractor systems currently gather and report W–2 earnings data, and use EEO–1 job categories for required EEO–1 reporting. OFCCP similarly believes that existing contractor systems record the number of hours worked by employees or maintain sufficient information to report the requested data.

Though we are proposing the use of aggregate compensation based on W–2 earnings, and one or more relevant data points, we did examine the usefulness of the Occupational Employment Statistics Survey (OES) definition as a measure of employee compensation. The OES is a semiannual mail survey and participation is not compulsory, and it does not collect data by gender, race, and ethnicity.[94] It uses 800 detailed occupations based on the Office of Management and Budget's Standard Occupational Classification (SOC) system, and collects wage data from private-sector employers and reports it using 12 intervals or pay bands. The number of employees in each pay band is reported. The definition for wages includes a base rate of pay, cost-of-living allowances, guaranteed pay, hazardous-duty pay, incentive pay including commissions and production bonuses, and tips. The definition excludes overtime pay, severance pay, shift differentials, nonproduction bonuses, employer costs for supplementary benefits, and tuition reimbursements. The agency believes that the W–2 earnings are most appropriate for setting objective industry standards because all contractors must annually report W–2 earnings to the IRS. This compulsory reporting by all contractors provides a form of external validity and accountability that may improve the accuracy of the Equal Pay Report measures. Because the current OES survey relies on pay 12 intervals or bands, the survey sheds little light on the validity of requiring employers to report specific wage rates using that definition or the potential burden. To simply report the number of workers in a range, the employer may not need to calculate each worker's hourly rate with precision. Indeed, following the strict definition of how to calculate the rate—which involves selecting certain individual compensation elements but not others, compiling them and then incorporating hours—appears more burdensome than simply reporting W–2 earnings. In the absence of any reference to specific evidence or data in the report, it is not clear how and why the NRC determined that using the OES pay definition is the least burdensome measure.[95]

A concern regarding aggregate W–2 earnings is the potential inaccuracies when comparing part-time and full-time employees, and employees who have worked only part of the year. OFCCP proposes to address this issue by also collecting total hours worked for each group of employees whose compensation is being summarized. The Fair Labor Standards Act (FLSA) requires employers to keep records of actual hours worked for all non-exempt employees, whether hourly or salaried.[96]

New IRS reporting requirements for the Affordable Care Act (ACA) mandate that employers report the number of employees working at least 30 hours per week making it necessary that employers track hours, [97] although the ACA does allow employers to use certain default assumptions for salaried workers.[98] This new requirement covers employers who are close, though not identical, in size to the proposed Equal Pay Report coverage standard.[99] For this reason, OFCCP believes many contractors will be able to provide actual hours worked even for exempt employees. However, OFCCP also proposes to allow contractors to report either actual hours worked or to apply default assumptions about work hours for those employees who are exempt from the FLSA. Comments on the following are particularly useful:

• The definition of compensation and what data sources are available;

• the advantages and disadvantages of using the OES to define compensation;

• the statistical and analytical value associated with collecting hours worked, and the cost of collecting hours worked;

• the number of employees for the purpose of creating an objective industry standard against which contractors would be measured and prioritized for review; and

• the usefulness of applying existing standards for calculating worker hours and full-time or part-time status found in the FLSA, the ACA, or other existing Federal regulations.

OFCCP is not proposing that contractors provide data on ''factors'' that affect compensation. Such factors are elements that might explain differences in compensation. In analyzing compensation for potential discrimination, it is common to include

[94] National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), *available at http://www.nap.edu/openbook.php?record_id=13496* (''Collecting Compensation Data''). The survey estimates are based on a sample of about 1.2 million establishments grouped into six semiannual panels over a 3-year period. Each year, forms are mailed to two panels of approximately 200,000 establishments, one panel in May and the other in November.

[95] OES samples about 400,000 establishments a year (out of a total of 6.8 million), *http://www.bls.gov/oes/2013/may/oes_tec.htm.* This means an establishment may only participate in the survey once over the course of several years. One would not necessarily expect employers to have regularly established systems to generate this specific measure if it is only requested once every five to ten years.

[96] Department of Labor, *Fact Sheet #21: Recordkeeping Requirements under the Fair Labor Standards Act (FLSA), http://www.dol.gov/whd/regs/compliance/whdfs21.htm.*

[97] This refers to the general requirement in the statute that certain employers covered by the mandate report the number of full-time employees defined as 30 or more hours per week elsewhere in the ACA. *See* 26 U.S.C. 6056(a) and (b)(2); Cornell University Law School, Law Information Institute, *http://www.law.cornell.edu/uscode/text/26/6056* (last accessed July 28, 2014).

[98] This refers to the U.S. Department of the Treasury's regulation on how to determine hours of service and status as a full-time employee for purposes of section 4980H, which includes the ability to use default assumptions. See 26 CFR 54.4980H–3; *http://www.ecfr.gov/cgi-bin/text-idx?SID=03889366cda34926fa90ba8c324777e4&node=26:17.0.1.1.5.0.1.43&rgn=div8.*

[99] The employer shared responsibility provisions apply to employers that employed (for at least 121 days of the preceding calendar year) at least 50 full-time, nonseasonal employees or a combination of full-time and part-time, nonseasonal employees that equals at least 50. 26 U.S.C. 4980H(c)(2). A full-time employee is an individual employed on average for at least 30 hours per week, 26 U.S.C. 4980H(c)(4)(A), or 130 hours per calendar month, 26 CFR 54.4980H–1(a)(21)(ii).

information about factors such as experience, education, or other differences among workers that might affect their compensation. Commenters to the ANPRM strongly agreed that factors are significant and important to explaining differences in compensation. Generally, commenters from the business community stated that analyzing compensation without accounting for highly detailed factors yielded inaccurate results. They also acknowledged that collecting data on these factors would be too burdensome and complex. In particular, they stated that many employers do not keep all relevant factors in electronic form or in the same database. Other commenters, most employee groups and civil rights organizations, stated that collecting data on factors was both extremely important and quite feasible. OFCCP determined that the potential burden of collecting and analyzing factors generally outweighs any potential benefit.

Employers, including Federal contractors, vary widely in both the factors they use to determine compensation, and in how and whether they maintain that data in electronic form. Collecting information on factors would be much more expensive and time-consuming for both contractors and the agency. Finally, data at this level of detail would be extremely difficult for OFCCP to analyze meaningfully without extensive and time-consuming work devoted to deciphering and understanding the coding choices of each contractor, and cleaning and recoding many potentially inconsistent data fields. OFCCP's proposed methodology, to some extent, takes into account the particular compensation factors that may explain some or all of an overall pay gap reported by a particular contractor. This is so because the information reported by contractors within an industry, using the Equal Pay Report, will be used to develop the objective industry standard. It is assumed that the compensation factors within an industry may not vary widely, though some differences are still likely to exist. Individual contractors in an industry will be compared to the objective industry standard and the amount of difference between the two will help prioritize contractors for compliance evaluations. It is during the scheduled compliance evaluation, however, that OFCCP can meaningfully analyze a contractor's particular compensation practice, scheme, and philosophy, including the particular factors used to set compensation levels.

Job Categories for Reporting Compensation Information

Many substantive comments addressed how to group workers for purposes of reporting compensation information. Generally, commenters addressed four possible approaches: (1) Grouping by job title, (2) grouping by AAP job group, (3) grouping by EEO–1 job category, and (4) deferring to the contractor's choice of grouping among multiple options. There was no clear consensus from the comments.

Proposed § 60–1.7(b)(1) provides that data must be provided by ''specified job categories'' without identifying those categories; the Equal Pay Report will specify the job categories, as well as several other data points relevant to developing the objective industry standard. In the report, OFCCP is proposing to use the existing ten EEO–1 job categories and subcategories for contractors who already report using the EEO–1 form. The EEO–1 job categories have been used for many years and are clearly defined. Any contractor that is or was previously covered by the EEO–1 reporting requirement is already required to categorize their employees into these categories on an annual basis. Therefore, using the EEO–1 job categories will remove the step of categorizing employees for purposes of completing the Equal Pay Report. The EEO–1 categories are, therefore, the least burdensome and least confusing means of categorizing employees.

Unlike job titles and AAP job groups, which are defined by each contractor and not standardized across all contractors, contractors must consistently maintain their EEO–1 job categories. This creates clear comparability across contractors. A job grouping system is necessary for the Equal Pay Report to fulfill its intended purpose; without compensation data defined by uniform job groupings, contractor compensation practices towards similar groups of employees could not be easily compared to identify anomalies. These comparisons will not be used to determine violations, and any distortion caused by nuances not recognized by the grouping system can be clarified during a compliance evaluation.

A substantial number of ANPRM commenters argued against the use of EEO–1 job categories because they fail to reflect elements such as differences in skill, experience, education, and other factors potentially affecting pay. Comparing employers in similar industries will help minimize these differences. However, any job grouping system used will necessarily involve creating groups containing non-identical positions, with unique factors that may affect pay. In addition, comparing workers only within narrowly defined job groupings can obscure patterns of pay disparity that transcend jobs, and that may be caused by discrimination in promotion, job assignment or other glass ceiling or channeling practices. Broader groupings allow OFCCP to consider larger patterns of pay disparity that may transcend specific positions, levels or units. Notably, the National Academies panel recommended EEO–1 job categories for reporting of summary data, because of their broad applicability, the experience of enforcement agencies with their use, and their clarity and simplicity.[100]

However, as the comments to the ANPRM demonstrate, there is a variety of potential approaches to grouping data. For the reasons stated, OFCCP is proposing the use of the EEO–1 job categories for the Equal Pay Report but is interested in comments on the extent to which other possible job or occupation groupings are sufficiently universal that they could be used when developing objective industry compensation standards.

§ 60–1.7(b)(2) Who Must File the Equal Pay Report

The ANPRM asked a series of questions related to the issue of which contractors should be required to provide compensation data via a data collection instrument. In response, some commenters made additional suggestions regarding who should be included or excluded. In general, these comments addressed applying the data collection requirement to all contractors, to prior violators only, to supply and service contractors only versus including construction contractors, to small businesses, to bidders or new contractors, and addressed whether and how multi-establishment contractors would report.

Proposed § 60–1.7(b)(2) identifies the contractors and subcontractors that must submit the Equal Pay Report. Proposed § 60–1.7(b)(2) states that the contractors and subcontractors that are required under § 60–1.7(a)(1) to file EEO–1 Reports with the Joint Reporting Committee must complete and file the proposed Equal Pay Report if they also more than 100 employees and their contract or subcontract covers a period of at least 30 days, including modifications. Generally, this covers prime contractors and first tier subcontractors that are private employers and are large enough to be

[100] ''Collecting Compensation Data'' at 60.

subject to the requirement to prepare an affirmative action program.

Some commenters suggested that the reporting requirement should be applied exclusively to contractors and subcontractors previously identified as violators by the OFCCP. This limitation, they assert, would avoid imposing an additional burden on contractors and subcontractors who have not previously committed violations. The primary purpose of the proposed Equal Pay Report is to refine the agency's neutral selection of contractors and subcontractors by focusing on those that are most likely to be in violation of OFCCP's regulations. In particular, the Equal Pay Report provides OFCCP with a reasonable and practical means of prioritizing likely violators for compliance evaluations. For the report to perform its primary function, it must collect data from a large pool of contractors and subcontractors without regard to violation history. Additionally, to the extent that OFCCP seeks to use this data to make predictions about the likelihood of finding a violation, it is important to collect data from compliant contractors and subcontractors to provide comparisons. Therefore, collection of data regardless of prior violation history is essential to the benefits that this tool will confer.

Construction contractors and subcontractors are not specifically identified in the proposed rule, but they would be required to complete and file the proposed Equal Pay Report if they are required under § 60–1.7(a)(1) to file EEO–1 Reports, and meet the contract value and employee thresholds proposed in this NPRM. Many construction contractors and subcontractors do not meet the standards for filing EEO–1 Reports, either because of the number of employees or the short duration of employment.[101] OFCCP seeks comments on:

- The potential burdens for construction contractors and subcontractors, including comments on the feasibility of data collection,
- the sophistication of current payroll and HR systems, and
- the potential concerns regarding communication between prime and subcontractors about the proposed reporting requirements.[102]

Numerous commenters expressed concern that the reporting requirement would impose an undue burden on smaller contractors and subcontractors, damage their ability to compete, or serve as a disincentive to becoming a Federal contractor. A small number requested an exemption from the requirement by means of raising the jurisdictional threshold. A few others argued that it would be better to design two sets of questions, one for smaller contractors and subcontractors and one for larger contractors and subcontractors. OFCCP used a two-tiered approach for addressing these concerns.

First, the existing EEO–1 reporting requirements apply to contractors who are private employers with 50 or more employees and satisfy other specified jurisdictional thresholds.[103] Existing Federal regulations already require that these contractors create affirmative action programs, which include requirements to analyze compensation and provide compensation data to OFCCP upon request, as well as to file EEO–1 Reports using the employee classifications and job categories that would apply under this proposed rule. With the Equal Pay Report, OFCCP will continue to exempt contractors with fewer than 50 employees and will have similar jurisdictional thresholds as the EEO–1.[104] Further, by eliminating many of the most burdensome categories of data, OFCCP has made it easier for small businesses to comply.

Second, after examining small contractor considerations created in existing regulations and the rationale behind them, OFCCP is proposing to exempt even more small contractors. Contractors with 100 or fewer employees are excluded from this new reporting obligation. For example, in the regulations on equal employment opportunities and affirmative action for individuals with disabilities, OFCCP allows contractors with 100 or fewer employees to apply the aspirational utilization goal to their entire workforce rather the their job groups. By excluding contractors with 100 or fewer employees, OFCCP is further reducing the cost and burden on Federal contractors.

§ 60–1.7(b)(3) How, When, and Where To File the Equal Pay Report

Proposed § 60–1.7(b)(3) addresses the procedures for complying with the requirement to report on summary compensation data. The proposal would not specify a particular deadline for filing the proposed report; proposed § 60–1.7(b)(3)(i) states that the report must be filed by the date specified in the report. As noted earlier, OFCCP is proposing a January 1 through December 31 reporting period, and a report filing window of January 1 to March 31 of the following year. This window gives contractors one full quarter to compile the year-end earnings information in the format necessary for the Equal Pay Report. The December 31 date makes it easier to calculate summary W–2 earnings, as they are being simultaneously compiled for tax reporting purposes on an annual basis.

OFCCP considered other alternatives as well, including adopting the EEO–1 reporting period and filing dates. OFCCP determined that the EEO–1 dates do not give the agency a full calendar year's data, and contractors use different snapshots or payroll periods for EEO–1 reporting. Since OFCCP is proposing to collect annual W–2 earnings, contractors would be required to submit that information separately after having already filed the EEO–1 report and an interim Equal Pay Report in September. In lieu of an interim September filing date, which would possibly create additional burden, OFCCP considered delaying the report submission date until the following January. Under both approaches, OFCCP saw potential data issues and a likely increase in contractor burden.

Finally, OFCCP considered requiring contractors to report less frequently than annually. Requiring less frequent reporting would result in cost savings to contractors related to preparing and submitting an Equal Pay Report, and the amount of savings would depend on how frequently the contractor would be required to report. However, OFCCP determined that this could result in it setting objective industry standards that are based on stale or outdated data. This would compromise the integrity of OFCCP's enforcement program. For example, if there are long time lags, possibly delays of two or more years, between when a contractor submits data to OFCCP and when OFCCP uses the data to select contractors for review, important changes in the underlying data could have occurred. Since these data changes would not be reflected in

[101] 2011 Census data suggests that over 90% of companies in the construction sector have less than 50 employees. United States Census Bureau, *Statistics of U.S. Businesses—NAICS Sectors (2011), available at http://www.census.gov/econ/susb/.*

[102] Note that there are some construction contractors also covered by this proposal (those who fall within the requirements for filing an EEO–1 Report). This would not, however, include Federally assisted construction contractors. OFCCP intends to analyze Equal Pay Report data by industry; therefore, construction contractors will only be compared with other construction contractors. Selection of construction contractors for compliance evaluations uses a different process than scheduling of Supply and Service contractors.

[103] This includes being prime or first tier subcontractors with 50 or more employees who hold a Federal contract that is valued in excess of $50,000 or a company that serves as a depository of Government funds in any amount.

[104] OFCCP welcomes comment on the appropriate jurisdictional thresholds applicable to contractors covered by the proposed rule who are not private employers.

the data used by OFCCP to set the industry standard, it is possible that some contractors would be prioritized for compliance evaluations that might not have been otherwise scheduled. Currently, based on the proposed annual reporting, data reported in 2015 is for 2014. By the time the 2014 data are reviewed, edited, cleaned and verified, it could be another 10 months older before it can be used for the purpose for which it was intended. Less frequent reporting could also undermine the robustness of the data available for analysis by OFCCP. OFCCP requests public comment on how less frequent reporting could be done in a manner to address OFCCP's concern that it could be relying on stale or outdated data by collecting data in alternating years.

The proposed rule would require contractors to file the reports electronically. Proposed § 60–1.7(b)(3)(ii) provides that contractors and subcontractors must submit the Equal Pay Report electronically through OFCCP's web-based filing system by the specified filing deadline, unless a hardship exemption has been granted under subparagraph (3)(iii). Proposed § 60–1.7(b)(3)(iii) would provide that the Director may grant a hardship exemption from the electronic filing requirement where he or she concludes that electronic filing would impose an undue hardship on the contractor or subcontractor. Proposed § 60–1.7(b)(3)(iii) would require contractors and subcontractors to submit a written request for a hardship exemption and indicates that the eligibility criteria and application procedures will be available on the OFCCP Web site. Based on the number of electronic filings of EEO–1 reports, OFCCP expects that hardship exemptions would be granted only in exceptional circumstances. Examples include unexpected technical difficulties that prevent a contractor or subcontractor from electronically submitting the Equal Pay Report by the filing deadline and, in the very rare instances, when a contractor's payroll and human resources systems or other necessary systems are not automated. Contractors granted a hardship exemption would be required to submit the Equal Pay Report in the format specified in the notification granting the exemption, which, in some cases, could be a paper version of the report.

Several commenters addressed certain technical issues regarding how OFCCP might receive and maintain the data. Some contractor representatives requested the ability to upload their data directly to the agency; others expressed concern about OFCCP's capacity to safeguard confidential compensation data and its IT capacity. OFCCP will receive and maintain the compensation data using a secure IT system that fully complies with all applicable Federal Government security requirements and specifications. This will minimize the possibility of a security breach or hacking. The web portal will be password protected and information will be encrypted. Contractors will use the portal to key in their data directly or upload their own spreadsheets using standard formats. To make filing as easy as possible, OFCCP also proposes to provide a tool similar to that used by the state of New Mexico that would automate the few simple calculations necessary to file the report.[105] The New Mexico tool is an XML template that users can download, populate with their individual employee data and then generate the required summary information. A second template allows users to upload only the summary data back to the state agency, leaving the individual data in the possession of the user. New Mexico's experience using this approach has been very positive.[106]

The agency anticipates that some contractors will choose to modify their existing HRIS or payroll databases to generate the report on a regular basis. OFCCP is particularly interested in comments on:

- The important IT changes to existing HRIS or payroll systems, OFCCP system security concerns, system compatibility issues; contractor IT implementation timeframes; and
- the criteria for exemptions from the electronic filing requirement.

§ 60–1.7(b)(4) Protecting Information Provided to OFCCP in the Equal Pay Report

Proposed § 60–1.7(b)(4) is modeled, in part, after the confidentiality provision that was included in the repealed Equal Opportunity Survey regulation. This provision explains the information protections applicable to the proposed Equal Pay Report. OFCCP will protect the raw summary compensation data reported by contractors and subcontractors from disclosure to the maximum extent permitted by law. EEO–1 reports are not publicly available. This section specifies that OFCCP will treat information submitted for the report as confidential to the maximum extent permitted under the Freedom of Information Act (FOIA). It also states that, consistent with current agency practice, OFCCP will not publicly disclose information that could cause commercial harm to contractors and subcontractors who are still in business. In addition to what is specified in the proposal, the agency will put internal safeguards in place that include, but may not be limited to, providing limited staff access to the data, establishing staff protocols for ensuring the security of files and data, providing staff training on data security and any penalties and sanctions that may apply for wrongful disclosure of the data, and ensuring that OFCCP's IT systems meet applicable Federal Government security standards. Lastly, § 60–1.7(b)(4) states that OFCCP may publish aggregate information based on compensation data collected under this section, such as ranges or averages by industry, labor market or other groupings, but only in such a way that it does not reveal any employee specific data.

Several commenters voiced confidentiality concerns about a compensation data collection tool. Some commenters assumed that a compensation data collection instrument would require contractors to provide specific compensation information regarding individual employees at specific establishments. These commenters characterize individualized compensation data as ''especially sensitive and confidential'' and maintain that disclosure of an organization's individualized compensation information would be ''devastating'' and that it could ''decrease the contractor's competitive advantage or even threaten its business model.'' OFCCP believes that the concerns expressed by these commenters have been sufficiently mitigated by the proposal to collect summary data on employee compensation, rather than individualized compensation data, but seeks comments on other ways to address the concern.

Some commenters expressed concern that the data submitted to OFCCP could be requested under FOIA. They argue that FOIA and the Department's FOIA disclosure policy and procedures at 29 CFR part 70 do not provide adequate protections against disclosure. To address concerns about disclosure of confidential compensation data, proposed § 60–1.7(b)(4) would provide,

[105] New Mexico General Services Department, *New Mexico Pay Equity Initiative, available at http://www.generalservices.state.nm.us/state purchasing/Pay_Equity.aspx* (last accessed April 24, 2014).

[106] Institute for Women's Policy Research, *The New Mexico Pay Equity Initiative in State Contracting,* (May 2011), *available at http://www.iwpr.org/publications/pubs/the-new-mexico-pay-equity-initiative-in-state-contracting* (last visited April 24, 2014).

as did the repealed Equal Opportunity Survey regulation, that ''OFCCP will treat information contained in the Equal Pay Report as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act.''

Exemption 4 of the FOIA protects ''trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.'' If information falls within FOIA Exemption 4, the Trade Secrets Act, 18 U.S.C. 1905, also generally protects it. The Trade Secrets Act makes it a criminal offense for an officer or employee of the United States to disclose information relating to the trade secrets or confidential business information, including ''confidential statistical data,'' of any person, firm, partnership, corporation or association ''to any extent not authorized by law.'' Thus, because the information contained in the proposed Equal Pay Report generally falls within Exemption 4 and is protected by the Trade Secrets Act, OFCCP would not have discretion to release that information.

OFCCP's current practice is not to release data where the contractor still is in business and where the contractor or subcontractor asserts, and through the Department of Labor review process it is determined, that the data are confidential and that disclosure would subject the contractor to commercial harm. Moreover, the Department's FOIA regulations at 29 CFR 70.26 provide that business information will be disclosed under FOIA only in accordance with the procedures set forth in the regulation. The procedures instruct the submitter of business information to designate by appropriate markings either at the time of submission, or at a reasonable time thereafter, any portion of a submission that it considers to be protected from disclosure under Exemption 4. The regulations require OFCCP to notify the submitter on a case-by-case basis whenever a FOIA request is made for information the submitter has designated protected from disclosure or when OFCCP believes the information requested under FOIA may be protected from disclosure under Exemption 4. This notification gives contractors the opportunity to object to the disclosure of any data they consider confidential.

OFCCP currently collects compensation information during the course of its compliance evaluations, and the agency is not aware of any instance in which compensation data were disclosed without the consent of the contractor or subcontractor. It has always been OFCCP's policy not to release data that is determined to be confidential or has the potential to subject the contractor to commercial harm if disclosed, and this policy will be applied to the proposed Equal Pay Report as well.

Section 60–1.7(c) Additional Information

Existing § 60–1.7(a)(3) provides that the Deputy Assistant Secretary or the applicant, on their motions, may require a contractor or subcontractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such additional information about its employment practices as the Deputy Assistant Secretary or the applicant deems necessary for the administration of the Order. The proposed rule would include this provision in a new § 60–1.7(c), with one minor change. In proposed § 60–1.7(c) the title ''Director'' replaces ''Deputy Assistant Secretary.'' The proposed rule would include a reference to the applicability of the existing record retention provision found in 41 CFR 60–1.12; specifically, that each contractor shall retain its Equal Pay Report for a period of not less than two years from the date of the making of the report.

Section 60–1.7(d) Requirements for Bidders or Prospective Contractors

Section 60–1.7(b) of the existing regulations addresses the certifications concerning compliance with the requirements of Executive Order 11246 that bidders and prospective contractors must submit with their bids. The existing regulations require the bidder or prospective contractor to state in writing: (1) Whether it has developed an affirmative action program pursuant to part 60–2; (2) whether it has participated in a previous contract subject to the Executive Order's equal opportunity clause; and (3) whether it has filed with the Joint Reporting Committee, the Deputy Assistant Secretary, or the EEOC all reports due under applicable filing requirements. The proposed rule would revise and move the existing § 60–1.7(b) to a new § 60–1.7(d), and clarify that only bidders who currently hold Federal contracts or subcontracts must make a representation related to whether they are currently a Federal contractor or subcontractor and whether they filed the Equal Pay Report for the most recent filing period.

The NPRM proposes to delete the reference to part 60–2 from the paragraph's title and the paragraph itself. Instead, proposed § 60–1.7(d) would generally refer to Executive Order 11246 and the implementing regulations, making clear that the representation provisions apply to construction contractors as well as to supply and service contractors. Proposed § 60–1.7(d) would specifically require the contractor to state whether it is currently a Federal contractor required to create affirmative action programs and file EEO–1 Reports and Equal Pay Reports. If so, the contractor must state whether it has created an affirmative action program; filed the EEO–1 Report(s) for the most recent reporting period with the Joint Reporting Committee; and whether it has filed an Equal Pay Report for the most recent reporting period with OFCCP.

Several commenters provided views on the requirement to report compensation and whether it could or should apply to bidders and prospective contractors. Some suggested that OFCCP lacks the authority to collect data from bidders and that it raised the potential for unnecessary burdens or the risk of disclosure of sensitive compensation data to competitors. Under the proposed rule, the Equal Pay Report would be treated like current requirements to file EEO–1 Reports and prepare affirmative action programs. The proposed rule requires prospective contractors to make a representation as to whether they have complied with all requisite reporting as part of the bidding pre-award process, including the proposed Equal Pay Report if they currently are Federal contractors or subcontractors.

Existing § 60–1.7(b)(2) provides that the bidder or prospective contractor shall be required to submit such information as the Deputy Assistant Secretary requests prior to the award of the contract or subcontract. This provision is renumbered to proposed § 60–1.7(d)(2) without substantive changes. It does, however, add the title ''Additional information'' and changes ''Deputy Assistant Secretary'' to ''Director.''

Section 60–1.7(e) Sanctions for Failure To File Required Reports, and Certifications and Representations

Section 60–1.7(e) provides sanctions for the failure to file required reports, and certifications and representations. OFCCP proposes to set forth the provision regarding sanctions in a separate paragraph because it would apply to the failure to file the EEO–1 Report, the proposed Equal Pay Report, and any other report requested by the Director. Existing § 60–1.7(a)(4) addresses the sanctions under Executive Order 11246 for a contractor's failure to file timely, complete, and accurate reports. Proposed § 60–1.7(e) restates

the provision found in existing § 60–1.7(a)(4) of the regulations, but proposes several revisions. The revisions include extending sanctions for the failure to file a complete and accurate report to the filing of the Equal Pay Report, and deleting the reference to the imposition of sanctions on the prime and subcontractors by the Deputy Assistant Secretary. This deleted text is replaced with language noting that a failure to file violates Executive Order 11246 and is subject to sanctions under the Equal Opportunity Clause and specifically sections of OFCCP's regulations. To improve readability, OFCCP proposes adding the title ''Sanctions for failure to file required reports and certifications and representations.''

Section 60–1.7(f) Use of Reports

Existing § 60–1.7(c) states that the reports filed pursuant to this section shall be used only in connection with the administration of Executive Order 11246, the Civil Rights Act of 1964, or in furtherance of the purposes of the Order and the Act. Proposed § 60–1.7(f) sets forth the provision found in existing § 60–1.7(c) with several minor non-substantive changes. Specifically, in proposed § 60–1.7(f) ''Executive Order 11246'' is used instead of ''the order,'' the second use of the term ''the order'' is capitalized, and ''the Act'' is substituted for ''said Act.''

Regulatory Procedures

Executive Order 12866 (Regulatory Planning and Review) and Executive Order 13563 (Improving Regulation and Regulatory Review)

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Executive Order 13563 also requires agencies to periodically review existing rules to determine if they should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives. OFCCP plans to retrospectively review this rule at an appropriate time after it is finalized. OFCCP requests public comment on how the effectiveness of this rule could be evaluated, and what data and methods would be needed to do so.

This proposed rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. The NPRM is not economically significant, as it will not have an annual effect on the economy of $100 million or more. The Office of Management and Budget has reviewed the NPRM.

The proposed regulatory changes are have been developed to enhance OFCCP's efficiency and effectiveness in enforcing laws that prohibit compensation discrimination by Federal contractors and subcontractors. More specifically, the regulatory goals include:

- Increasing contractor self-assessment of its compensation policies and practices, and expanding voluntary compliance with OFCCP's regulations so as to advance OFCCP's mission of ensuring nondiscrimination in employment and decreasing the pay gap between males and females and between races.
- Providing probative compliance information, including data on industry and/or labor market standards to promote industry-wide deterrence within the Federal contractor community and lead to modified compliance behavior in the compensation arena.
- Making data-driven enforcement decisions that support the efficient use of limited enforcement resources. OFCCP will strategically deploy its resources to focus on conducting compliance evaluations of contractors that are more likely to have compensation discrimination violations.
- Shifting, to the maximum extent possible, compliance evaluation costs from contractors that are likely to be in compliance with prohibitions on pay discrimination to contractors that are more likely not to be in compliance.
- Contributing to the stability of working Americans by helping minimize the pay gap and promoting broad societal policy objectives of nondiscrimination and equal pay.
- Providing workers victimized by discrimination the opportunity to obtain the best possible remedies and relief. OFCCP anticipates increasing its capacity to identify more violations and obtain prompt remedies through a better-informed scheduling process for the estimated 4,000 compliance evaluations it conducts annually.

The Need for the Regulation

The specific proposal is to publish aggregate data gathered through the Equal Pay Report by industry, labor market, or other groupings to facilitate voluntary compliance efforts by Federal contractors and subcontractors. The data OFCCP proposes to collect would allow contractors and subcontractors to evaluate their performance against their peers and make determinations about how to focus their own self-assessments, thereby potentially promoting voluntary compliance and potentially avoiding the costs incurred during a compliance evaluation and/or litigation. This data sharing would also likely have both deterrent and preventive effects. In addition to gains in deterrent effects and voluntary compliance, OFCCP anticipates positive effects in enforcement. OFCCP's current ability to use data to find pay discrimination violations is limited to those contractors and subcontractors it evaluates, which is a small portion of the contractor universe. The increased availability of data should enable OFCCP to focus and allocate enforcement resources. Workers often do not know that they may be victims of pay discrimination; thus, this rule may be viewed as addressing an informational market failure. In other words, the NPRM could provide greater transparency on contractor compensation practices. This proposed data collection should provide OFCCP with the ability to focus its enforcement activities and, therefore, is a significant step forward in addressing the pay gap.

Background

Research conducted by The Institute for Women's Policy Research (IWPR) concluded that the poverty rate for working women could be reduced by half if women were paid the same as comparable men. The paper determined that nearly 60 percent (59.3 percent) of women could earn more if working women were paid the same as men of the same age with similar education and hours of work.[107] The poverty rate for all working women could be cut in half, falling to 3.9 percent from 8.1 percent.[108] The high poverty rate for working single mothers could fall by nearly half, from 28.7 percent to 15 percent.[109] For the 14.3 million single

[107] Heidi Hartman, Ph.D., Jeffrey Hayes, Ph.D., & Jennifer Clark, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy, Briefing Paper IWPR #C411,* Institute for Women's Policy Research, January 2014.

[108] *Id.*

[109] *Id.*

women living on their own, equal pay could mean a significant drop in poverty from 11.0 percent to 4.6 percent.[110]

These statistics are intended to provide general information about the potential impacts of eliminating pay differentials among men and women, including pay differentials not attributed to discrimination. In addition, the IWPR statistics include all employers and all employees in the U.S., whereas this proposed rule would apply to only a subset of such employers and employees. Therefore, the potential impact of this rule would be much smaller than the impact of eliminating pay differentials among all working men and women.

Discrimination, occupational segregation, and other factors contribute to creating and maintaining a gap in earnings and keeping a significant percentage of women in poverty. It is worth noting, however, that some research has established that women earn less than men regardless of the field or occupation.[111] This research also suggests that persistent pay discrimination for women translates into lower wages and family income in families with a working woman. The gender pay gap may also affect the economy as a whole. In 2012, some researchers estimate that the U.S. economy could have produced additional income of $447.6 billion (equal to 2.9 percent of 2012 GDP) if women received equal pay.[112]

OFCCP worked with several other Federal agencies on the National Equal Pay Task Force to identify the persistent challenges to equal pay enforcement and develop an action plan to implement recommendations to resolve those challenges. OFCCP also consulted a number of sources in order to assess the need for the proposed rulemaking. For instance, OFCCP reviewed national statistics on earnings by gender produced by BLS and the U.S. Census Bureau. Those statistics show persistent pay gaps for female and minority workers.[113] These well-documented earnings differences based on race and sex have not been fully explained by nondiscriminatory factors including differences in worker qualifications such as education and experience, occupational preferences, work schedules or other similar factors.[114] Thus, some of the remaining unexplained portion of the pay gap may be attributable to discrimination.

Currently, OFCCP lacks sufficient, reliable data to assess the gender- or race-based pay gap experienced by employees of Federal contractors or subcontractors, including how much of the potential pay gap is attributable to pay discrimination instead of nondiscriminatory factors, and how many contractors are violating the pay discrimination laws OFCCP enforces. This proposed Equal Pay Report is a step toward collecting useful data upon which OFCCP can make data-driven enforcement decisions.

Discussion of Impacts

In this section, OFCCP presents a summary of the estimated costs associated with the new requirements in § 60–1.7. Comments are welcome on every aspect of the cost and burden calculations including, but not limited to, the amount of time contractors would spend on complying with the proposals in this NPRM, including those related to IT (e.g., HRIS and payroll) system changes, data collection, recordkeeping and reporting, and any alternatives. The estimated labor cost to contractors and subcontractors is based on BLS data in the publication ''Employer Costs for Employee Compensation'' issued in December 2013, which lists total compensation for management, professional, and related occupations as $51.58 per hour and administrative support at $24.23 per hour.[115] Except where otherwise noted, OFCCP estimates that 25 percent of the contractor burden hours and associated costs are related to the review and oversight of the submission of the Equal Pay Report. These activities will likely be performed at the management level. OFCCP also estimates that 75 percent of the burden hours and associated costs are related to activities such as compiling the data and completing the report. These activities will likely be performed at the administrative level. OFCCP based these time estimates on the most appropriate value of this person's time performing the task or function.

Prime contractors and first tier subcontractors with a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, with more than 100 employees, and that are required to file an EEO–1 Report will be required to file the proposed new Equal Pay Report. OFCCP believes that the proposed new provisions may affect 21,251 Federal contractors. This estimate includes 21,224 contractor companies or 67,578 contractor establishments that filed EEO–1 Reports.[116] OFCCP is also interested in amending the regulation to 41 CFR 60–1.7 by adding a requirement that employers who file the Department of Education's Integrated Postsecondary Education Data System (IPEDS) report, have more than 100 employees, and have a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, also file OFCCP's proposed Equal Pay Report. Therefore, we identified and included 27 postsecondary educational institutions that filed IPEDs reports in this estimate. OFCCP based the number of postsecondary educational institutions included in this NPRM on the average number of compliance evaluations conducted of postsecondary institutions over a four-year period from 2010 through 2013.

Cost of Regulatory Familiarization

OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors and subcontractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials including, but not

[110] *Id.*

[111] Ariane Hegewisch et al., *Separate and Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap, Briefing Paper IWPR #C377,* Institute for Women's Policy Research (2010).

[112] *Id.*

[113] According to the latest Bureau of Labor Statistics (BLS) data, the weekly median earnings of women are about 82 percent of that for men. Bureau of Labor Statistics, U.S. Department of Labor, Current Population Survey, Labor Force Statistics from Current Population Survey, *available at http://www.bls.gov/cps/earnings.htm#demographics*; Updated quarterly CPS earnings figures by demographics by quarter for sex through the end of 2013 *available at http://www.bls.gov/news.release/wkyeng.t01.htm.* Looking at annual earnings reveals even larger gaps—women working full time earn approximately 77 cents on the dollar compared with men. U.S. Bureau of the Census, Income, Poverty and Health Insurance Coverage in the United States, Current Population Reports 2011 (Sept. 2012), *available at http://www.census.gov/prod/2012pubs/p60-243.pdf.* BLS data reveals that African-American women make approximately 68 cents, Latinas make approximately 59 cents, and Asian-American women make approximately 87 cents for every dollar earned by a non-Hispanic white man. OFCCP acknowledges that these statistics do not account for nondiscriminatory factors that may explain some of the differential.

[114] Women in America: Indicators of Social and Economic Well-Being (2011) (male-female pay gap persists at all levels of education for those working 35 or more hours per week), according to 2009 BLS wage data.

[115] Bureau of Labor Statistics, *Civilian workers, by major occupational and industry group, available at http://www.bls.gov/news.release/ecec.t01.htm* (last accessed March 28, 2014).

[116] Estimates based on number of contractors and contractor establishments with at least 50 employees who filed EEO–1 reports for 2012 and answered ''Yes'' to Question 3.

limited to fact sheets and ''Frequently Asked Questions.'' OFCCP will also host webinars for the contractor community that will describe the new requirements and conduct listening sessions to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

OFCCP estimates that it will take a minimum of 1 hour to have a management professional at each establishment either read compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn more about the new requirements. The estimated cost of this burden is based on data from the BLS in the publication ''Employer Costs for Employee Compensation'' (December 2013) which lists total compensation for management professionals at $51.58. Therefore, the estimated burden for rule familiarization is 67,605 hours (67,605 contractor establishments [117] × 1 hour = 67,605 hours). We calculate the total estimated cost as $3,487,066 (67,605 hours × $51.58/hour = $3,487,066) or $52 per establishment.

Cost of Proposed Provisions

The NPRM proposes requiring contractors and subcontractors to compile, complete and submit summary compensation data using the proposed Equal Pay Report. Coverage and exemptions for the proposed report would track those that already apply to contractors and subcontractors when filing the existing EEO–1 Report. In addition, contractors would have to: Meet the Equal Pay Report thresholds on the number of employees, and (1) have a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications; or (2) serve as a depository of Government funds in any amount; or (3) be a financial institution that is an issuing or paying agency of the U.S. savings bonds and savings notes. The reporting requirement would include construction subcontractors below the first tier that perform work at the construction site if they meet the requirements of criteria specified in proposed § 60–1.7(a)(1).

Federal contractors and subcontractors would be required to submit summary data by sex, race, ethnicity, job categories, and other relevant data points such as hours worked. In order to file the proposed report, OFCCP would provide a secure, easy-to-use, flexible web-based interface that permits them to either directly key in data or upload the data using a variety of standard formats. OFCCP proposes to provide detailed instructions on the completion and submission of the proposed Equal Pay Report. The NPRM contemplates that OFCCP would also provide a formatted XML template that could be downloaded and used to help automate the limited calculations necessary to file the reports from a spreadsheet of the contractor's current employee data exported from its HRIS and/or payroll system. Common payroll software packages and services could be programmed and/or integrated, as necessary, to generate this report for uploading. For contractors and subcontractors that may be unable to submit the report electronically, OFCCP proposes providing a hardship exemption that would allow for an alternate filing method for the report. The hardship request must be submitted, in writing, to the Director of OFCCP. The new requirements are limited to § 60–1.7. The NPRM proposes amending § 60–1.7(b) to mandate that contractors and subcontractors required to submit the EEO–1 Report provide data on employee compensation using the Equal Pay Report. In addition, OFCCP is considering covering postsecondary academic institutions that file the IPEDS report with the Department of Education and is seeking comment on that addition to the reporting requirement. More specifically, existing § 60–1.7(b) provisions on certification requirements for bidders would be placed in a new subsection, § 60–1.7(d).

Proposed § 60–1.7(b)(1) describes the requirements of the new report. The Equal Pay Report, promulgated by OFCCP, requires contractors and subcontractors to provide summary data on the compensation paid to employees by sex, race, ethnicity, specified job categories, and other relevant data points such as hours worked, and the number of employees. Contractors must submit the Equal Pay Report in the format and manner required by OFCCP.

As noted above, contractors would also be asked to submit hours worked. OFCCP proposes using the well-established EEO–1 job categories, with consideration of alternatives for postsecondary academic institutions. Based on the experience of the Joint Reporting Committee with electronic filing of the EEO–1 Report, OFCCP believes that 99 percent of its contractor and subcontractor establishments or 66,929 will complete the proposed form online and 1 percent or 676 will complete the proposed form manually. To complete the proposed report contractor establishments will need to identify, collect, summarize, and analyze demographic information and compensation data from their HRIS and payroll system.[118] OFCCP estimates contractor and subcontractor establishments with automated systems will take 6 hours to generate the report data using their IT and/or HRIS systems, conduct the analysis, review the analysis, complete the online report form, review the report, submit it to OFCCP online, and save a copy of the report. Thus, OFCCP estimates that the burden for completing the proposed form online will be 401,574 hours (66,929 contractor establishments × 6 hours = 401,574).

Contractors and subcontractors that do not complete the proposed form online will gather the same information, conduct the same analyses and then manually complete the proposed report. OFCCP estimates it will take these establishments 8 hours on average to complete these tasks, including saving a copy of the report. OFCCP estimates that the burden for those establishments will be 5,408 hours (676 contractor establishments × 8 hours = 5,408 hours). OFCCP seeks public comments on the accuracy of its estimates of the amount of time contractors would spend completing and submitting the Equal Pay Report (estimates of initial capital costs from modifying computer systems are provided below).

OFCCP estimates that the combined burden hours for completing the proposed report are 406,982 hours (401,574 hours + 5,408 hours = 406,982 hours). The cost for this provision is approximately $12,643,913 ((401,574 hours × 0.25 × $51.58) + (401,574 hours × 0.75 × $24.23) + (5,408 × 0.25 × $51.58) + (5,408 × 0.75 × $24.23)) or $187 per establishment ($12,643,913/67,605 contractor establishments).

Proposed § 60–1.7(b)(2) identifies who must file an Equal Pay Report. Proposed § 60–1.7(b)(2) states that contractors who must file the EEO–1 must also file the proposed OFCCP report. Should OFCCP determine that postsecondary academic institutions are to be covered by the new requirement they would be incorporated into proposed § 60–1.7(b)(2). Therefore, there is no new burden for this provision.

Proposed § 60–1.7(b)(3) describes the procedures established for complying with the requirement to report on summary compensation data. The

[117] In determining the number of establishments, OFCCP used the 67,578 EEO–1 filers with more than 100 employees and added the 27 postsecondary educational institutions.

[118] OFCCP accounts for contractor system changes under its discussion of Initial Capital and Start-up Costs below.

NPRM does not propose specifying a particular deadline for filing the proposed report; proposed § 60–1.7(b)(3)(i) specifically states that the report must be filed by the date specified in the report. OFCCP is proposing a filing window of between January 1 and March 31 in an accompanying ICR. The proposed rule would require contractors and subcontractors to file the reports electronically. Proposed § 60–1.7(b)(3)(ii) provides that contractors must submit the Equal Pay Report electronically through OFCCP's web-based filing system by the specified filing deadline, unless a hardship exemption has been granted under subparagraph (3)(iii). Proposed § 60–1.7(b)(3)(iii) provides that the Director of OFCCP may grant a hardship exemption from the electronic filing requirement where he or she concludes that electronic filing would impose an undue hardship on the contractor. Proposed § 60–1.7(b)(3)(iii) also requires contractors and subcontractors to submit a written request for a hardship exemption and indicates that the eligibility criteria and application procedures will be available on the OFCCP Web site. OFCCP estimates that 1 percent of contractor establishments or 676 contractor establishments will request a hardship exemption to the electronic filing requirement. OFCCP estimates it will take a contractor establishment 30 minutes to prepare, write, and send the exemption request. Therefore, OFCCP estimates the burden of this provision to be 338 hours (676 contractor establishments × 0.5 hours = 338 hours). The cost for this provision is approximately $10,501 ((338 hours × 0.25 × $51.58) + (338 hours × 0.75 × $24,23)) or about $0.16 per establishment.[119] OFCCP requests comments on its estimate of the cost for preparing and submitting exemption requests.

Proposed § 60–1.7(b)(4) would apply existing agency procedures on confidentiality of records and information to the Equal Pay Report. It also provides OFCCP the ability to publish aggregate compensation data, such as pay ranges or averages, by industry, labor market or other groupings, obtained because the submission of Equal Pay Reports. This provision does not create any new burden because it is an existing provision.

Proposed § 60–1.7(e) would apply sanctions under existing § 60–1.7(a)(4) to the failure to file a complete and accurate Equal Pay Report or representation, and makes minor changes for clarity and readability. As this is an existing requirement, there is no new burden for this provision.

Proposed § 60–1.7(d) would require Federal contractors and subcontractors, that are bidders or prospective prime contractors on a new contract or subcontract, to make two representations: (1) Make a representation or provide a written statement that they are currently a contractor or subcontractor; and (2) make a representation that the contractor or subcontractor submitted the required Equal Pay Report for the prior reporting period. OFCCP recognizes that bidders and prospective prime contractors register and make their representations and certifications in the General Services Administration's System for Award Management (SAM). Thus, the representation will be an additional check box added into the SAM system. OFCCP has included this burden in its discussion of initial capital and start-up costs, below.

Proposed 1.7(c) would require contractor establishments that file the proposed Equal Pay Report to maintain their records. For example, contractors would maintain compensation data, hours worked, and demographic information in accordance with OFCCP's current recordkeeping provisions at 41 CFR 60–1.12. Section 60–1.12(a) requires contractors to preserve any personnel or employment record made or kept for a period of not less than two years. However, if the contractor has fewer than 150 employees or does not have a contract of at least $150,000, this retention period is one year. Maintaining records is an existing obligation under OFCCP regulations. Any additional burden associated with preserving copies of the Equal Pay Report is included as stated above.

TABLE 2—CONTRACTOR PROPOSED NEW REQUIREMENTS

Estimated one-time burden		
Section	Burden hours	Estimated costs
Regulatory Familiarization	67,605	$3,487,066
60–1.7(b)(1) (modify IT system(s) for the Equal Pay Report)	637,530	30,104,167
60–1.7(d) (representation of compliance with this requirement)	0	0
Total One-Time Burden	705,135	33,591,233
Estimated recurring costs		
Section	Burden hours	Costs
60–1.7(b)(1) (complete compensation report)	406,982	$12,643,913
60–1.7(b)(2) (who must file)	0	0
60–1.7(b)(3)(i) (when to file)	0	0
60–1.7(b)(3)(ii) (electronic filing)	0	0
60–1.7(b)(3)(iii) (electronic exemption)	338	10,501
60–1.7(b)(4) (publication of aggregate compensation data)	0	0
60–1.7(e) (sanctions)	0	0
60–1.7(d) (representation of filing)	0	0
60–1.7(d)(2) (recordkeeping requirement)	0	0
Operations and Maintenance	0	4,542
Total Recurring Burden	407,320	12,654,414
Total Cost of the Proposed Rule	1,112,455	46,250,189

[119] $0.16 = ($10,501/67,605)

Note that the burden estimates for modifying IT systems is at the high end of the start-up cost range. The possible range for start-up cost is a low of $29,802,431 (assuming that 99 percent of companies make IT system changes) and an estimated high of $30,104,167 (assuming that 100 percent (or 21,251) of companies make system changes.

Initial Capital or Start-up Costs

Section 60–1.7(b)(1) Equal Pay Report

In order to estimate the start-up costs for the proposed Equal Pay Report, OFCCP considered what contractors would be required to do in order to extract required data from existing HRIS and payroll systems. Because contractors and subcontractors must already maintain information on their employees by race, ethnicity, sex and EEO–1 job category, and must already have a system to assign employees and jobs to these categories and record it; it is unnecessary to modify the existing databases to capture new information for this report. However, contractors may keep that demographic information in a database different from the one used to record payroll (W–2) and hours worked information, and may need to develop standard queries and reporting formats to extract and merge the data each year for the Equal Pay Report. In addition, contractors and subcontractors may need to write additional code or undertake other programming to summarize the data for entry into the proposed Equal Pay Report.

The minimum cost for modifying HRIS and payroll systems is based on the estimate that 99 percent of contractors utilize some type of electronic system. Based on information from IT professionals, OFCCP estimates it would take contractors on average 30 hours for an IT professional to write code, develop the queries, create a standard report that matches the employee demographic and job information to their W–2 earnings and hours worked, and summarize and enter the data totals for each job group/demographic combination in the proposed report. This includes time reviewing the rule itself and the forms and instructions, developing the requested change or work order, establishing a development schedule, confirming the scope and specifications of the work to be completed, working on specific system changes, testing the changes, resolving problems, conducting quality assurance, and implementing the final changes. The estimated costs for these modifications are based on the BLS data in the publication, ''Employer Costs for Employee Compensation'' (December 2013), which lists total compensation for professional and related occupations at a rate of $47.22 per hour. Therefore, the minimum capital and start-up costs estimated for Federal contractor companies is 631,140 hours (21,038 contractor companies × 30 hours = 631,140). We calculate the total minimum estimated start-up costs as $29,802,431 (631,140 × $47.22 per hour = $29,802,431). This represents an estimated cost of $1,417 per company ($29,802,431 start-up cost/21.038 contractor companies = $1,417). OFCCP seeks public comments on the accuracy of its estimate of the average cost of modifying HRIS and payroll systems in response to this proposed rule.

Assuming all contractor companies utilize HRIS and payroll systems and that they all have to make similar system changes, the estimated burden for modifying these systems is 637,530 (21,251 contractor companies × 30 hours = 637,530). We calculate the total costs as $30,104,167 (637,530 hours × $47.22 per hour = $30,104,167) or $1,417 per contractor company ($30,104,167/21,251 contractor companies). Assuming that all contractor companies utilize electronic HRIS and payroll systems may be an overestimation of costs because there may be some contractor companies that do not have electronic systems.

Section 60–1.7(d)(1)(iv) Requirements for Bidders or Prospective Prime Contractors

The General Services Administration maintains SAM, which consolidated eight Federal procurement systems and the catalog of Federal domestic assistance into one database. Companies that want to do business with the Federal government are required to register in SAM, and bidders including prime contractors are required to make representations regarding their compliance with a variety of requirements including OFCCP's current requirements. Contractors complete this representation process by responding to four questions. The contractor has only to check or mark the response in the appropriate check box. Thus, to comply with the proposed requirements, bidders and prospective prime contractors will check one additional box when registering and make their representation in SAM. OFCCP believes that there is no significant burden associated with responding to one additional question in the SAM registration process. Thus, OFCCP estimates that there is no additional burden associated with this representation.

Though OFCCP seeks comments on all aspects of its calculation of burden and costs, the agency specifically seeks comments on the burden associated with the representation process § 60–1.7(d)(1)(v), including matters related to the use of the SAM system.

TABLE 3—TOTAL INITIAL CAPITAL OR START-UP COSTS

Section	Costs
60–1.7(b)(1) (Equal Pay Report)	$30,104,167
60–1.7(d)(1)(v) Bidders or Prospective Contractors Representation	0
Total	$30,104,167

Note that the start-up cost estimate of $30,104,167 is at the high end of the start-up cost range. The possible range for start-up cost is a low of $29,802,431 (assuming that 99 percent of companies make IT system changes) and an estimated high of $30,104,167 (assuming that 100 percent (or 21,251) of companies make system changes).

Operations and Maintenance Costs

Section 60–1.7(b)(1) Equal Pay Report

OFCCP estimates that contractors will incur some operations and maintenance costs in addition to the initial capital or start-up costs calculated above. The contractor must annually report to OFCCP summary data on the compensation paid to employees by sex, race, and ethnicity within specified job categories using a web-based online filing system. OFCCP estimates that 67,605 contractor establishments will respond annually and 99 percent of them will do so electronically. Contractors using the web-based filing system will not incur copying and mailing costs. However, to account for the estimated 1 percent of contractors filing without using the web-based filing system for some reason (i.e. no access, compatibility, etc.), OFCCP is estimating their printing, copying and mailing costs. The estimated cost for printing and copying would be $216 (676 contractor establishments × 4 pages × $0.08 per page = $216). OFCCP estimates that the contractor will submit the report by registered mail and further estimates the cost to be $3,887 (676 contractor establishments × $5.75 = $3,887). The total estimated operations and maintenance cost for the Equal Pay Report is $4,103.

Section 60–1.7(b)(3)(iii) Hardship Exemption

OFCCP recognizes that some contractor establishments do not have automated HRIS or payroll systems or may have systems that would be incompatible with OFCCP's web-based online filing system. Contractors facing this challenge must annually request from OFCCP a hardship exemption to the electronic filing requirement. The request for exemption would be a one-page letter to the Director, OFCCP acknowledging the obligation to submit the report, explaining why the report cannot be submitted electronically and requesting exemption for that year's filing. OFCCP estimates that 1 percent of its contractor establishment universe or 676 contractor establishments will request a hardship exemption to the electronic filing requirement. Therefore, OFCCP estimates that the cost for printing and copying the one page letter would be $108 (676 contractor establishments × 2 pages × $0.08 = $108). In addition, OFCCP estimates the mailing cost would be $331 (676 contractor establishments × 1 letter × $0.49 per letter = $331). The total estimated operations and maintenance cost for the hardship exemption would be $439 ($108 + 331).

60–1.7(d)(1)(v) Bidders or Prospective Contractors Certifications and Representations

The expectation is that bidders and prospective prime contractors will include in their bid proposals the modified language indicating whether the bidder or prospective prime contractor filed the proposed Equal Pay Report for the most recent reporting period. This provision is a small part of a larger bid proposal sent to contracting agencies. Therefore, OFCCP does not assume any of the printing, copying or mailing costs associated with this provision.

TABLE 4—TOTAL OPERATIONS AND MAINTENANCE COSTS

Section	Costs
60–1.7(b)(1) Equal Pay Report (copying and mailing)	$4,103
60–1.7(b)(3)(iii) Hardship Exemption (copying and mailing)	439
60–1.7(d)(1)(v) Bidders or Prospective Prime Contractors Representation	0
Total	4,542

Cost Estimates for Government

OFCCP estimates that implementing the proposed Equal Pay Report will increase the costs related to staffing and improving current case management and information systems. In terms of staffing, OFCCP anticipates hiring four full-time positions at its national office. These staff members will be involved in providing technical assistance to contractors completing the forms, managing the content of the online portal, reviewing exemption requests, and analyzing data. OFCCP estimates the staffing costs to be $359,696.[120]

Additionally, as a part of an ongoing effort by DOL to enhance services provided to Federal contractors, OFCCP anticipates that it will be upgrading its existing IT system, including its case management system and support for the Web-based features for the online submission of the Equal Pay Report. OFCCP anticipates that these upgrades will cost $3.4 million. Therefore, OFCCP estimates the cost to the Federal Government to be $3.8 million.

Item	Estimated cost
Additional Staffing	$359,696
Updating Information Systems	3,400,000
Total	3,759,696

Transfer Payments to Workers Who Have Experienced Pay Discrimination

There are two ways in which this rule could have transfer effects: (1) The rule allows OFCCP to find more violations and recover payments for the violators' employees, and (2) contractors voluntarily increase transfers to certain employees, potentially to reduce their probability of being subject to a compliance evaluation or enforcement action by OFCCP. This includes, for example, changes in behavior during compliance monitoring that may be put into place as a part of the remedy for violations found through enforcement actions.

In order to develop an estimate of transfers that may result from this proposed rule, OFCCP notes that approximately 4,000 Federal contractor establishments, of a total of 500,000 (or 1 in 125 establishments) are audited each year. OFCCP anticipates that it will conduct approximately the same number of audits under this rule as it has in the past. In 2013, OFCCP recovered approximately $1.2 million for 965 workers. Estimating the amount of rule-induced future recoveries using only the 2013 data is problematic for several reasons. First, these calculations would be based on only one year's set of data and, as such, appear unreliable for establishing future projections. Also, collecting sufficient historical data could be challenging because monetary recoveries were not always calculated and reported using the same methodology. To address this challenge, the agency is refining and standardizing its data collection and reporting, including information on recoveries. Second, the recovery number is based on compliance evaluations conducted using a scheduling process that did not include prioritization to increase the likelihood of identifying violators and violations. This process was neither highly effective nor efficient. The use of the Equal Pay Report to set objective industry standards against which contractors' pay practices can be compared to determine the likelihood that a violation exists may increase monetary recoveries. However, these recoveries could be reduced, in part, by the potential for contractors to voluntarily increase the amount of transfers to certain employees. It could be further off-set by contractors who cease discriminatory practices as a part of participating in compliance monitoring or other activities related to remedying violations found during an OFCCP enforcement action.

OFCCP does not currently have sufficient information to reliably estimate the potential transfer payments from this rule, and requests public comment on data and methods to do so. Rule-induced transfers from OFCCP enforcement actions or voluntary actions by contractors most likely represent a transfer of value to underpaid employees from employers (e.g., if additional wages are paid out of profits) or taxpayers (if contractor fees increase due to the need to pay higher wages to employees) or other employees.

Analysis of Rulemaking Alternatives

OFCCP considered a range of regulatory alternatives that would better enable the agency to encourage greater voluntary compliance and effectively enforce its laws prohibiting compensation discrimination. In addition to the approach proposed in the NPRM, OFCCP considered two alternative approaches. First, OFCCP considered requiring contractors to submit individual compensation data for each employee and factors that

[120] OFCCP anticipates filing these positions in its headquarters office at the GS–13 salary level. This salary estimate is based on the Office of Personnel Management's salary range for a GS–13, Step 1 position located in the Washington-Baltimore-Northern Virginia area in 2014; the estimate includes locality pay.

explain compensation for each employee. Second, OFCCP considered relying solely on the current regulations with no changes. Each of these alternatives is discussed in further detail below. OFCCP seeks comments from stakeholders on the analysis of the proposal in the NPRM, as well as each alternative and variation, including OFCCP's assessment of the cost and benefits.

Alternative 1—Collecting Individual Compensation Data

OFCCP also considered collecting individual compensation data. Collecting individual compensation data would provide clearer information about potentially discriminatory compensation practices, both systemic and individualized. This would lead to a better-informed assessment of contractors' compliance with Executive Order 11246.

OFCCP ultimately determined that it would be burdensome and costly to require contractors to submit individual compensation data. Selecting aggregate data would permit easy analysis of comparability data across contractors. It would also allow OFCCP to devote the time to conduct a more detailed analysis where it is more likely to matter. Collecting aggregate data would also avoid many potential privacy or other concerns about protecting confidential employee salary data.

Alternative 2—Prioritization Models Relying Solely on Existing Compliance Evaluation Data

OFCCP also considered the alternative of developing a database for scheduling based on the individual compensation data the agency has collected from a number of Federal contractors over the last several years during regular compliance evaluations. When the agency schedules contractors for review, it requests preliminary summary data on compensation, in the form of average pay by sex and race within case-specific groupings determined by the contractor. Based on the initial analysis of this summary data, OFCCP can then request individual data showing the compensation paid to each worker, their demographics, and data on factors such as tenure or performance ratings.

The benefits of this approach are reduced burden and potential additional precision in assessing the reasons for contractor disparities. Because the alternative relies on existing data, it imposes no new data collection burden. Further, these individual data files are more comprehensive than the summary data in the Equal Pay Report, because they include individual pay records and factors. This would allow the agency to conduct more statistical tests and perform a more nuanced assessment of potential explanations for pay disparities. The agency could attempt to use this information, along with violation history, to determine what a ''profile'' of a potential violator looks like. OFCCP would then attempt to prioritize similar firms for a compliance evaluation.

However, there are a host of both practical and technical problems with this alternative. In the first place, once OFCCP determined the size and type of pay differences that may be linked to a potential violation, it would have to use data other than compensation to build the ''profile.'' Because there is no existing source of data on compensation by demographics for specific contractors, OFCCP could not select contractors with similar pay practices for review. Instead, the agency would have to use indirect markers such as industry, employer size, or basic EEO–1 demographics to make selections. This increases the likelihood of selecting contractors whose pay practices are actually in compliance.

Further, the agency requests individual data on a subset of the approximately 4,000 cases it schedules for review each year; these data are not necessarily representative of all contractors. This means the profile would be based on a highly limited and potentially biased sample of contractor pay data. The number of available records may vary widely by industry, geographic location, employer size or type of job. This means OFCCP could not use these data to develop comprehensive and objective measures of the contractor pay gap by industry.

Finally, this approach is not consistent with the Presidential Memorandum. The Memorandum directs the agency to collect new summary data that would increase the efficiency and effectiveness of its enforcement and support voluntary compliance. Using existing data is not a new data collection, it is less likely than the Equal Pay Report to improve the agency's ability to focus on potential violators, and it would not allow OFCCP to calculate the objective industry measures to support deterrence and voluntary compliance.

Moreover, OFCCP believes the current regulations have negative effects as well. For example, the current regulations do not provide OFCCP a systematic means for evaluating contractors with the greatest potential to be violating anti-pay discrimination laws. Therefore, under the current regulations, OFCCP is as likely to conduct compliance evaluations of contractors with no leading indicators showing potential for violating anti-pay discrimination laws as it is of contractors whose summary compensation data show a greater potential for violating such laws. The current regulations, therefore, impose compliance review costs on compliant contractors and subcontractors.

Regulatory Flexibility Act/Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* establishes ''as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and applicable statutes, to fit regulatory and informational requirements to the scale of the business organizations and governmental jurisdictions subject to regulation.'' Public Law 96–354. To achieve that principle, the Act requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis (IRFA) and to develop alternatives whenever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The Act requires the consideration for the impact of a proposed regulation on a wide-range of small entities including small businesses, not-for-profit organizations, and small governmental jurisdictions.

Agencies must perform a review to determine whether a proposal or final rule would have a significant economic impact on a substantial number of small entities.[121] If the determination is that it would, then the agency must prepare a regulatory flexibility analysis as described in the RFA.[122]

However if an agency determines that a proposed or final rule is not expected to have a significant economic impact on a substantial number of small entities, section 605(b) of the RFA provides that the head of the agency may so certify and a regulatory flexibility analysis is not required. See 5 U.S.C. 605. The certification must include a clear statement providing the factual basis and reasoning for this determination.

OFCCP designed its initial regulatory flexibility analysis to aid stakeholders in understanding the small entity impacts of the proposed rule and to obtain additional information on the small entity impacts. OFCCP seeks comments on the following estimates, including the number of small entities affected by the NPRM, the compliance cost estimates, and whether alternatives exist

[121] *See* 5 U.S.C. 603.

[122] *Id.*

that will reduce burden on small entities while still remaining consistent with the objective of the Presidential Memorandum.

Why OFCCP Is Considering Action

OFCCP is publishing this proposed regulation to implement the requirements of the April 8, 2014 Presidential Memorandum, ''Advancing Pay Equality Through Compensation Data Collection.'' The Presidential Memorandum directs the Secretary of Labor to develop a rule that requires Federal contractors and subcontractors to submit summary data on the compensation paid to employees.

Objectives of and Legal Basis for Rule

This proposed rule will provide guidance on the type of data covered Federal contractors and subcontractors are required to provide and specific information on providing the data. As discussed in the preamble, Section 202 of Executive Order 11246 requires Federal contractors to agree to comply with all provisions of the Executive Order and the rules, regulations, and relevant orders of the Secretary of Labor. Section 203 of Executive Order 11246 grants the Secretary of Labor broad authority to require compliance reports from contractors and subcontractors.

Compliance Requirements of the Proposed Rule, Including Reporting and Recordkeeping

As explained in this proposed rule, the purpose of this NPRM is to amend the regulations implementing Executive Order 11246 to add a requirement that Federal contractors and subcontractors report annually summary information on the compensation paid to employees by sex, race, ethnicity, and specified job categories. The requirements in Executive Order 11246 generally apply to any business or organization that (1) holds a single Federal contract, subcontract, or Federally assisted construction contract in excess of $10,000; (2) has Federal contracts or subcontracts that have a combined total in excess of $10,000 in any 12-month period; or (3) holds Government bills of lading, serves as a depository of Federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

This NPRM contains provisions that if adopted could impose compliance requirements on contractors. The general requirements with which contractors must comply are set forth in 41 CFR 60–1.7. Annually, covered Federal contractors must electronically submit an Equal Pay Report to OFCCP. Contractors who are unable to submit the report electronically may ask for an exemption in order to submit the report in another approved format. OFCCP's proposed new requirements cover prime contractors and first tier subcontractors that are required to file an EEO–1 Report, have more than 100 employees, and a contract, subcontract, or purchase order amounting to $50,000 or more. Such compliance requirements are fully described above in other portions of this preamble. The following section analyzes the cost of complying with this NPRM.

Calculating Impact of the Proposed Rule on Small Business Firms

OFCCP must determine the compliance cost of this proposed rule on small contractor firms, and whether these costs will be significant for a substantial number of small contractor firms (i.e., small business firms that enter into contracts with the Federal Government), and whether these costs will be significant for a substantial number of small contractor firms. If the estimated compliance costs for affected small contractor firms are less than three percent of small contractor firms' revenues, OFCCP considers it appropriate to conclude that this proposed rule will not have a significant economic impact on the small contractor firms. OFCCP has chosen three percent as its significance criterion. However, using this benchmark as an indicator of significant impact may overstate the impact of this proposed rule because the costs associated with efficient enforcement of the prohibitions against compensation discrimination are expected to be mitigated by societal benefits. These benefits include supporting working women and strengthening working families but are difficult to quantify; the benefits are discussed more fully in the preamble of this NPRM.

The data sources used in the analysis of small business impact are the Small Business Administration's (SBA) Table of Small Business Size Standards [123] and the U.S. Census Bureau's Statistics of U.S. Businesses (SUSB).[124] Since Federal contractors are not limited to specific industries, OFCCP assessed the impact of this NPRM across 19 NAICS codes.[125] Because data limitations do not allow OFCCP to determine which of the Federal contractors within these industries are small firms, OFCCP assumes that these small firms are not significantly different from the small Federal contractors that they will be directly affected by the proposed rule.

OFCCP used the following steps to estimate the cost of the proposed rule per small contractor firm as measured by a percentage of the total annual receipts. First, OFCCP used Census SUSB data that disaggregates industry information by firm size in order to perform a robust analysis of the impact on small contractor firms. OFCCP applied the SBA small business size standards to the SUSB data to determine the number of small firms in the affected industries. Then OFCCP used receipts data from the SUSB to calculate the cost per firm as a percent of total receipts by dividing the estimated annual cost per firm by the average annual receipts per firm. OFCCP applies this methodology to each of the industries and displays the results in the summary tables below (*see Tables 5–23).*

In the NAICS industry groupings of mining (NAICS code 21), utilities (NAICS code 22), Manufacturing (NAICS codes 31–33), and Wholesale Trade (NAICS code 42), the increase in the cost of compliance resulting from the NPRM is *de minimis* relative to revenue at small contractor firms in these industries no matter their size. All of these industries had an annual cost per firm as a percent of receipts of 3.0 percent or less. For instance, the manufacturing industry cost is estimated to range from 0.0 percent for firms that have average annual receipts of approximately $985 million to 0.54 percent for firms that have average annual receipts of under $403,338. In the NAICS industry groupings of Agriculture, Forestry, Fishing, and Hunting Industry (NAICS code 11), Construction (NAICS code 23), Retail Trade (NAICS codes 44–45), Transportation and Warehousing (NAICS codes 48–49), Information (NAICS code 51), Finance and Insurance (NAICS code 52), Real Estate and Rental and Leasing (NAICS code 53),

[123] United States Small Business Administration, Firm Size Data, *http://www.sba.gov/advocacy/849/12162#susb,* (last accessed June 9, 2014).

[124] United States Census Bureau, Latest SUSB Annual Data, *http://www.census.gov/econ/susb/* (last accessed June 9, 2014).

[125] Agriculture, Forestry, Fishing, and Hunting Industry (North American Industry Classification System (NAICS) 11, Mining NAICS 21, Utilities NAICS 22, Construction NAICS 23, Manufacturing, NAICS 31–33, Wholesale Trade NAICS 42, Retail Trade NAICS 44–45, Transportation and Warehousing NAICS 48–49, Information NAICS 51, Finance and Insurance NAICS 52, Real Estate and Rental and Leasing NAICS 53, Professional, Scientific, and Technical Services NAICS 54, Management of Companies and Enterprises NAICS 55, Administrative and Support and Waste Management and Remediation Services NAICS 56, Educational Services NAICS 61, Healthcare and Social Assistance NAICS 62, Arts, Entertainment, and Recreation NAICS 71, Accommodation and Food Services NAICS 72, Other Services NAICS 81.

Professional, Scientific, and Technical Services (NAICS code 54), Management of Companies and Enterprises (NAICS code 55), Administrative and Support and Waste Management and Remediation Services (NAICS code 56), Educational Services (NAICS code 61), Healthcare and Social Assistance (NAICS code 62), Arts, Entertainment, and Recreation (NAICS code 71), Accommodation and Food Services (NAICS code 72), and Other Services(NAICS code 81) the increase in the cost of compliance resulting from the NPRM is *de minimis* in all but the smallest of size categories when compared to the average annual revenue. Examining the areas where the impact of cost is above 3 percent, OFCCP determined that those contractor companies or firms do not meet the requirement for filing EEO–1 reports because on average these small firms do not have 50 or more employees. For example, OFCCP estimates the industry cost for the arts, entertainment, and recreation industry at 4.6 percent for firms that have average annual receipts of $47,301. Looking at the data, these same small firms have an average of 1.6 employees. Thus, these firms would not be subject to the requirements of 41 CFR 60–1.7(a) to file an EEO–1 Report because they do not have 50 or more employees. Based on OFCCP's analysis,, those firms that are impacted are not among those expected to submit the Equal Pay Report because they do not meet the threshold requirement for completing an EEO–1 Report. This is so even though the increase in the cost of compliance resulting from this NPRM appears to have an impact on the smallest of firms in 15 of the 19 NAICS industry groups. OFCCP seeks data and feedback from small firms on the factors and assumptions used in this analysis, such as the data sources, small business industries, NAICS codes and size standards, and the annual costs per firm as a percent of receipts. OFCCP seeks information on which data sources it could use to estimate the number of small Federal subcontractors. OFCCP also seeks information about the potential compliance cost estimates, such as any differences in compliance costs for small businesses as compared to larger businesses and any compliance costs that may not have been included in this analysis.

Estimating the Number of Small Businesses Affected by the Rulemaking

OFCCP now sets forth its estimate of the number of small contractor firms actually affected by the proposed rule. OFCCP determined the number of small regulated entities that would be subject to this NPRM by using the FY 2012 EEO–1 data and the identified universe of IPEDS filers within OFCCP's jurisdiction. Of the 21,251 contractor firms that would be required to file the proposed report, OFCCP estimates that 20,232 employ between 101 and 500 employees. Thus, OFCCP estimates that the number of small contractor firms affected by this regulation is 20,232. OFCCP believes that this NPRM will not have a significant economic effect on a substantial number of small businesses affected. OFCCP invites the public to provide information related to this data limitation, and any data on small contractors.

Relevant Federal Rules Duplicating, Overlapping, or Conflicting With the Rule

OFCCP is not aware of any relevant Federal rules that conflict with this NPRM.

Alternatives to the Proposed Rule

As described above, OFCCP is requesting input on a number of alternatives regarding the collection and submission of the compensation information.

Differing Compliance and Reporting Requirements for Small Entities

This NPRM applies to Federal contractors with more than 100 employees, a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, and that file an EEO–1 Report. Contractor companies that do not have more than 100 employees are not required to comply with this NPRM.

Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities

OFCCP drafted this NPRM to state in a clear way the compliance requirements for all contractors subject to this proposed regulation. The recordkeeping and reporting requirements imposed by this proposed rule are necessary for OFCCP to determine contractor compliance with Executive Order 11246 in the area of compensation practices.

Use of Performance Rather Than Design Standards

OFCCP drafted this NPRM to ensure compliance with the Equal Pay Report requirements by providing clear guidelines. Under the proposed rule, contractors may achieve compliance through a variety of means. OFCCP makes available a variety of resources to contractors for understanding their obligations and achieving compliance.

Exemption From Coverage of the Rule for Small Entities

Small contractor companies that do not meet the threshold of more than 100 employees and a contract, subcontract, or purchase order amounting to $50,000 or more are exempt from this requirement.

Cost per Firm as a Percent of Total Receipts

See the industry charts below.

Table 5: Cost per small firm in the agriculture, forestry, fishing, and hunting industry:

Table 5: Agriculture, Forestry, Fishing, and Hunting Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm[1]	Annual Cost per Firm [2]	Annual Receipts	Average Receipts per Firm [3]	Annual Cost per Firm as Percent of Receipts [4]
Firms with sales/receipts/revenue below $100,000	5,086	N/A	N/A	$2,176	$247,056,000	$48,576	4.48%
Firms with sales/receipts/revenue of $100,000 to $499,999	8,939	21,523	2.4	$2,176	$2,231,355,000	$249,620	0.87%
Firms with sales/receipts/revenue of $500,000 to $999,999	3,670	19,631	5.3	$2,176	$2,620,344,000	$713,990	0.30%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	3,230	30,944	9.6	$2,176	$4,975,078,000	$1,540,272	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	1,117	20,049	17.9	$2,176	$3,811,000,000	$3,411,817	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	289	8,997	31.1	$2,176	$1,730,128,000	$5,986,602	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	165	7,588	46.0	$2,176	$1,340,763,000	$8,125,836	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	112	6,130	54.7	$2,176	$1,288,588,000	$11,505,250	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	55	4,042	73.5	$2,176	$874,841,000	$15,906,200	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	44	5,325	121.0	$2,176	$858,761,000	$19,517,295	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	26	2,800	107.7	$2,176	$595,387,000	$22,899,500	0.01%

N/A = not available, not disclosed

[1] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average number of employees per firm (2.4) was derived by dividing the total number of employees (21,523) by the number of firms (8,939).

[2] The annual cost per firm ($2,176) accounts for regulatory familiarization and the costs of making changes to computer systems ($1,670), as well as the costs of filing a report or requesting an exemption ($919).

[3] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the average receipts per firm ($249,620) was derived by dividing the total annual receipts ($2,231,355,000) by the number of firms (8,939).

[4] In the case of agriculture, forestry, fishing, and hunting firms with receipts of $100,000 to $499,999, the annual cost per firm as a percent of receipts (1.04 percent) was derived by dividing the annual cost per firm ($2,176) by the average receipts per firm ($249,620).

Table 6: Cost per small firm in the mining industry:

Table 6: Mining Industry							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm[1]**	**Annual Cost per Firm[2]**	**Annual Receipts**	**Average Receipts per Firm[3]**	**Annual Cost per Firm as Percent of Receipts[4]**
Firms with 0-4 employees	11,223	17,874	1.6	$2,176	$6,809,517,000	$606,747	0.36%
Firms with 5-9 employees	3,186	21,314	6.7	$2,176	$6,304,810,000	$1,978,911	0.11%
Firms with 10-19 employees	2,451	33,344	13.6	$2,176	$9,092,457,000	$3,709,693	0.06%
Firms with 20-99 employees	2,775	107,447	38.7	$2,176	$32,035,288,000	$11,544,248	0.02%
Firms with 100-499 employees	690	102,299	148.3	$2,176	$38,463,690,000	$55,744,478	0.00%

[1] In the case of mining firms with 0-4 employees, the average number of employees per firm (1.6) was derived by dividing the total number of employees (17,874) by the number of firms (11,223).

[2] The annual cost per firm ($2,176) accounts for regulatory familiarization and the costs of making changes to computer systems ($1,670), as well as the costs of filing a report or requesting an exemption ($919).

[3] In the case of mining firms with 0-4 employees, the average receipts per firm ($606,747) was derived by dividing the total annual receipts ($6,809,517,000) by the number of firms (11,223).

[4] In the case of mining firms with 0-4 employees, the annual cost per firm as a percent of receipts (0.43 percent) was derived by dividing the annual cost per firm ($2,176) by the average receipts per firm ($606,747).

Table 7: Cost per small firm in the utilities industry:

Table 7: Utilities Industry							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with 0-4 employees	3,212	6,181	1.9	$2,176	$7,238,519,000	$2,253,586	0.10%
Firms with 5-9 employees	1,020	6,546	6.4	$2,176	$4,373,888,000	$4,288,125	0.05%
Firms with 10-19 employees	513	6,722	13.1	$2,176	$5,657,251,000	$11,027,780	0.02%
Firms with 20-99 employees	870	38,602	44.4	$2,176	$27,513,924,000	$31,625,200	0.01%
Firms with 100-499 employees	309	52,294	169.2	$2,176	$53,091,123,000	$171,815,932	0.00%
Firms with 500+ employees[1]	199	512,412	2,574.9	$2,176	$475,894,489,000	$2,391,429,593	0.00%

[1] The small business size standard for several subsectors within the utilities industry is 750 or 1,000 employees; however, data are not disaggregated for firms with more than 500 employees.

Table 8: Cost per small firm in the construction industry:

Table 8: Construction Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	151,986	N/A	N/A	$2,176	$7,636,718,000	$50,246	4.33%
Firms with sales/receipts/revenue of $100,000 to $499,999	316,475	776,806	2.5	$2,176	$81,110,428,000	$256,293	0.85%
Firms with sales/receipts/revenue of $500,000 to $999,999	124,214	642,823	5.2	$2,176	$88,028,843,000	$708,687	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	110,546	1,049,670	9.5	$2,176	$173,054,634,000	$1,565,454	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	47,962	864,701	18.0	$2,176	$167,758,626,000	$3,497,740	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	16,992	492,370	29.0	$2,176	$102,502,053,000	$6,032,371	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	7,801	308,512	39.5	$2,176	$66,977,650,000	$8,585,777	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	8,259	427,159	51.7	$2,176	$99,174,146,000	$12,008,009	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	4,354	289,441	66.5	$2,176	$73,881,089,000	$16,968,555	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	2,611	209,081	80.1	$2,176	$56,928,754,000	$21,803,429	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	1,621	150,754	93.0	$2,176	$43,119,720,000	$26,600,691	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,171	121,928	104.1	$2,176	$36,848,837,000	$31,467,837	0.01%
N/A = not available, not disclosed							

Table 9: Cost per small firm in the manufacturing industry:

Table 9: Manufacturing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	114,635	213,123	1.9	$2,176	$46,236,636,000	$403,338	0.54%
Firms with 5-9 employees	53,500	358,110	6.7	$2,176	$53,036,608,000	$991,338	0.22%
Firms with 10-19 employees	44,939	612,113	13.6	$2,176	$97,897,887,000	$2,178,462	0.10%
Firms with 20-99 employees	55,603	2,288,585	41.2	$2,176	$440,739,564,000	$7,926,543	0.03%
Firms with 100-499 employees	13,945	2,445,779	175.4	$2,176	$634,737,830,000	$45,517,234	0.00%
Firms with 500+ employees[1]	4,079	7,402,462	1,814.8	$2,176	$4,019,587,050,000	$985,434,432	0.00%
[1] The small business size standard for many subsectors within the manufacturing industry is 750, 1,000, or 1,500 employees; however, data are not disaggregated for firms with more than 500 employees.							

Table 10: Cost per small firm in the wholesale trade industry:

Table 10: Wholesale Trade Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with 0-4 employees	190,153	325,412	1.7	$2,176	$297,267,502,000	$1,563,307	0.14%
Firms with 5-9 employees	57,366	377,841	6.6	$2,176	$249,842,292,000	$4,355,233	0.05%
Firms with 10-19 employees	39,354	525,216	13.3	$2,176	$325,243,478,000	$8,264,560	0.03%
Firms with 20-99 employees	36,783	1,365,914	37.1	$2,176	$899,443,843,000	$24,452,705	0.01%

Table 11: Cost per small firm in the retail trade industry:

Table 11: Retail Trade Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	98,659	N/A	N/A	$2,176	$5,008,702,000	$50,768	4.29%
Firms with sales/receipts/revenue of $100,000 to $499,999	251,705	727,585	2.9	$2,176	$67,380,242,000	$267,695	0.81%
Firms with sales/receipts/revenue of $500,000 to $999,999	122,575	634,006	5.2	$2,176	$87,491,736,000	$713,781	0.30%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	120,985	1,019,672	8.4	$2,176	$190,373,341,000	$1,573,528	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	55,634	774,581	13.9	$2,176	$193,186,239,000	$3,472,449	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	19,594	418,263	21.3	$2,176	$117,223,823,000	$5,982,639	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	9,582	272,697	28.5	$2,176	$80,790,141,000	$8,431,449	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	9,824	366,889	37.3	$2,176	$115,236,313,000	$11,730,081	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	5,310	256,826	48.4	$2,176	$86,999,536,000	$16,384,093	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	3,498	201,289	57.5	$2,176	$72,964,681,000	$20,858,971	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	2,438	167,596	68.7	$2,176	$61,987,531,000	$25,425,566	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	1,835	144,987	79.0	$2,176	$55,162,317,000	$30,061,208	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	1,491	122,188	82.0	$2,176	$50,711,404,000	$34,011,673	0.01%
N/A = not available, not disclosed							

Table 12: Cost per small firm in the transportation and warehousing industry:

Table 12: Transportation and Warehousing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	40,510	N/A	N/A	$2,176	$1,939,749,000	$47,883	4.54%
Firms with sales/receipts/revenue of $100,000 to $499,999	67,987	181,924	2.7	$2,176	$16,284,066,000	$239,517	0.91%
Firms with sales/receipts/revenue of $500,000 to $999,999	22,377	151,019	6.7	$2,176	$15,756,895,000	$704,156	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	20,915	271,012	13.0	$2,176	$32,305,484,000	$1,544,608	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,183	223,156	24.3	$2,176	$31,359,227,000	$3,414,922	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,550	136,436	38.4	$2,176	$20,463,648,000	$5,764,408	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,800	91,408	50.8	$2,176	$14,261,554,000	$7,923,086	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,840	123,966	67.4	$2,176	$19,933,921,000	$10,833,653	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	988	85,367	86.4	$2,176	$14,057,603,000	$14,228,343	0.02%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	621	68,836	110.8	$2,176	$11,060,118,000	$17,810,174	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	429	51,989	121.2	$2,176	$8,257,805,000	$19,248,963	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	311	45,274	145.6	$2,176	$7,184,425,000	$23,101,045	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	235	32,922	140.1	$2,176	$5,902,588,000	$25,117,396	0.01%
N/A = not available, not disclosed							

Table 13: Cost per small firm in the information industry:

Table 13: Information Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	15,960	N/A	N/A	$2,176	$767,642,000	$48,098	4.52%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,678	80,336	2.9	$2,176	$6,876,130,000	$248,433	0.88%
Firms with sales/receipts/revenue of $500,000 to $999,999	10,311	67,954	6.6	$2,176	$7,260,927,000	$704,192	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	9,808	120,499	12.3	$2,176	$15,248,992,000	$1,554,750	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,508	100,331	22.3	$2,176	$15,472,313,000	$3,432,190	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,837	65,601	35.7	$2,176	$10,856,893,000	$5,910,121	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,018	46,846	46.0	$2,176	$8,447,070,000	$8,297,711	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,092	68,058	62.3	$2,176	$12,300,328,000	$11,264,037	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	601	49,812	82.9	$2,176	$9,293,544,000	$15,463,468	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	389	37,522	96.5	$2,176	$7,616,666,000	$19,580,118	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	270	30,523	113.0	$2,176	$6,512,265,000	$24,119,500	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	175	25,649	146.6	$2,176	$4,971,718,000	$28,409,817	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	136	21,553	158.5	$2,176	$4,082,897,000	$30,021,301	0.01%
N/A = not available, not disclosed							

Table 14: Cost per small firm in the finance and insurance industry:

Table 14: Finance and Insurance Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	61,548	N/A	N/A	$2,176	$2,931,522,000	$47,630	4.57%
Firms with sales/receipts/revenue of $100,000 to $499,999	118,169	308,539	2.6	$2,176	$29,379,598,000	$248,624	0.88%
Firms with sales/receipts/revenue of $500,000 to $999,999	33,703	177,822	5.3	$2,176	$23,302,679,000	$691,413	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	23,023	222,822	9.7	$2,176	$35,135,972,000	$1,526,125	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	9,728	185,783	19.1	$2,176	$33,574,070,000	$3,451,282	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,108	118,100	28.7	$2,176	$24,483,200,000	$5,959,883	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,405	90,442	37.6	$2,176	$20,088,983,000	$8,353,007	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,820	148,252	52.6	$2,176	$33,267,079,000	$11,796,837	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,564	106,896	68.3	$2,176	$25,663,650,000	$16,408,983	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,028	87,611	85.2	$2,176	$21,843,640,000	$21,248,677	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	685	65,621	95.8	$2,176	$17,478,694,000	$25,516,342	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	515	58,481	113.6	$2,176	$15,619,023,000	$30,328,200	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	418	51,263	122.6	$2,176	$14,150,222,000	$33,852,206	0.01%
N/A = not available, not disclosed							

Table 15: Cost per small firm in the real estate and rental and leasing industry:

Table 15: Real Estate and Rental and Leasing Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	86,219	N/A	N/A	$2,176	$4,165,673,000	$48,315	4.50%
Firms with sales/receipts/revenue of $100,000 to $499,999	124,930	299,041	2.4	$2,176	$30,501,166,000	$244,146	0.89%
Firms with sales/receipts/revenue of $500,000 to $999,999	39,747	191,958	4.8	$2,176	$27,836,936,000	$700,353	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	29,717	269,366	9.1	$2,176	$45,164,417,000	$1,519,818	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	10,013	181,600	18.1	$2,176	$33,652,743,000	$3,360,905	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,288	95,418	29.0	$2,176	$18,788,566,000	$5,714,284	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,553	62,482	40.2	$2,176	$12,221,244,000	$7,869,442	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,518	81,675	53.8	$2,176	$16,329,830,000	$10,757,464	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	771	48,442	62.8	$2,176	$11,037,708,000	$14,316,093	0.02%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	464	36,318	78.3	$2,176	$8,012,159,000	$17,267,584	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	365	32,555	89.2	$2,176	$7,621,190,000	$20,879,973	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	228	25,638	112.4	$2,176	$5,610,499,000	$24,607,452	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	161	17,743	110.2	$2,176	$4,144,542,000	$25,742,497	0.01%
N/A = not available, not disclosed							

Table 16: Cost per small firm in the professional, scientific, and technical services industry:

Table 16: Professional, Scientific and Technical Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	207,967	N/A	N/A	$2,176	$9,968,674,000	$47,934	4.54%
Firms with sales/receipts/revenue of $100,000 to $499,999	339,834	814,116	2.4	$2,176	$82,241,004,000	$242,003	0.90%
Firms with sales/receipts/revenue of $500,000 to $999,999	102,144	584,473	5.7	$2,176	$71,850,790,000	$703,426	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	78,520	870,369	11.1	$2,176	$120,442,007,000	$1,533,902	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	28,337	631,182	22.3	$2,176	$97,339,397,000	$3,435,064	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,714	355,210	36.6	$2,176	$57,721,674,000	$5,942,112	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,863	245,206	50.4	$2,176	$40,592,738,000	$8,347,263	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	4,658	313,530	67.3	$2,176	$53,578,044,000	$11,502,371	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,338	211,940	90.7	$2,176	$36,728,134,000	$15,709,210	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,381	147,737	107.0	$2,176	$27,448,191,000	$19,875,591	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	954	122,039	127.9	$2,176	$22,622,723,000	$23,713,546	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	603	91,258	151.3	$2,176	$15,961,413,000	$26,470,005	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	511	83,414	163.2	$2,176	$15,941,272,000	$31,196,227	0.01%
N/A = not available, not disclosed							

Table 17: Cost per small firm in the management of companies and enterprises industry:

Table 17: Management of Companies and Enterprises Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	1,895	11,318	6.0	$2,176	$44,606,000	$23,539	9.24%
Firms with sales/receipts/revenue of $100,000 to $499,999	1,387	4,529	3.3	$2,176	$293,971,000	$211,947	1.03%
Firms with sales/receipts/revenue of $500,000 to $999,999	964	5,082	5.3	$2,176	$373,917,000	$387,881	0.56%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	2,039	18,829	9.2	$2,176	$1,087,692,000	$533,444	0.41%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	2,242	26,723	11.9	$2,176	$1,698,014,000	$757,366	0.29%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,717	28,312	16.5	$2,176	$1,855,703,000	$1,080,782	0.20%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,258	22,469	17.9	$2,176	$1,711,464,000	$1,360,464	0.16%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,942	41,651	21.4	$2,176	$3,120,558,000	$1,606,878	0.14%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,423	34,363	24.1	$2,176	$2,997,064,000	$2,106,159	0.10%

Table 18: Cost per small firm in the administrative and support and waste management and remediation services industry

Table 18: Administrative and Support, Waste Management and Remediation Services Industry							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	99,021	139,832	1.4	$2,176	$4,500,981,000	$45,455	4.79%
Firms with sales/receipts/revenue of $100,000 to $499,999	129,948	513,457	4.0	$2,176	$31,661,803,000	$243,650	0.89%
Firms with sales/receipts/revenue of $500,000 to $999,999	40,405	409,563	10.1	$2,176	$28,444,220,000	$703,978	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	31,127	725,649	23.3	$2,176	$47,963,623,000	$1,540,901	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	12,294	678,340	55.2	$2,176	$42,093,718,000	$3,423,924	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,589	434,622	94.7	$2,176	$26,428,877,000	$5,759,180	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,411	311,321	129.1	$2,176	$19,304,673,000	$8,006,915	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,309	424,912	184.0	$2,176	$24,412,659,000	$10,572,828	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,266	292,501	231.0	$2,176	$17,408,483,000	$13,750,776	0.02%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	724	208,939	288.6	$2,176	$12,542,375,000	$17,323,722	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	528	174,359	330.2	$2,176	$10,341,768,000	$19,586,682	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	402	173,953	432.7	$2,176	$9,015,658,000	$22,427,010	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	267	122,013	457.0	$2,176	$6,382,657,000	$23,905,082	0.01%

Table 19: Cost per small firm in the educational services industry:

Table 19: Educational Services Industry							
	Number of Firms	**Total Number of Employees**	**Average Number of Employees per Firm**	**Annual Cost per Firm**	**Annual Receipts**	**Average Receipts per Firm**	**Annual Cost per Firm as Percent of Receipts**
Firms with sales/receipts/revenue below $100,000	21,831	50,906	2.3	$2,176	$1,003,931,000	$45,986	4.73%
Firms with sales/receipts/revenue of $100,000 to $499,999	27,938	158,913	5.7	$2,176	$6,788,475,000	$242,984	0.90%
Firms with sales/receipts/revenue of $500,000 to $999,999	8,504	112,142	13.2	$2,176	$5,984,604,000	$703,740	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	8,465	213,786	25.3	$2,176	$13,376,338,000	$1,580,194	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,302	209,778	48.8	$2,176	$14,792,101,000	$3,438,424	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,588	117,648	74.1	$2,176	$9,314,307,000	$5,865,433	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	888	83,741	94.3	$2,176	$7,129,969,000	$8,029,244	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,003	127,781	127.4	$2,176	$11,306,008,000	$11,272,191	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	461	79,059	171.5	$2,176	$6,983,007,000	$15,147,521	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	355	73,045	205.8	$2,176	$6,992,060,000	$19,695,944	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	268	70,191	261.9	$2,176	$6,343,422,000	$23,669,485	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	172	60,202	350.0	$2,176	$5,119,182,000	$29,762,686	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	138	55,753	404.0	$2,176	$4,536,897,000	$32,876,065	0.01%

Table 20: Cost per small firm in the health care and social assistance industry:

Table 20: Health Care and Social Assistance Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	107,112	162,265	1.5	$2,176	$5,064,756,000	$47,285	4.60%
Firms with sales/receipts/revenue of $100,000 to $499,999	242,566	1,027,234	4.2	$2,176	$66,168,531,000	$272,786	0.80%
Firms with sales/receipts/revenue of $500,000 to $999,999	125,095	1,054,985	8.4	$2,176	$88,227,442,000	$705,284	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	84,361	1,466,391	17.4	$2,176	$126,989,626,000	$1,505,312	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	26,466	1,107,445	41.8	$2,176	$91,034,690,000	$3,439,685	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	9,453	712,840	75.4	$2,176	$56,541,818,000	$5,981,362	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	4,867	501,258	103.0	$2,176	$41,063,966,000	$8,437,223	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	5,198	760,603	146.3	$2,176	$61,116,459,000	$11,757,687	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	2,468	497,184	201.5	$2,176	$40,851,963,000	$16,552,659	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	1,374	347,358	252.8	$2,176	$29,140,498,000	$21,208,514	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	978	284,827	291.2	$2,176	$25,026,728,000	$25,589,701	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	665	230,360	346.4	$2,176	$20,167,268,000	$30,326,719	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	485	185,982	383.5	$2,176	$16,744,181,000	$34,524,085	0.01%

Table 21: Cost per small firm in the arts, entertainment, and recreation industry:

Table 21: Arts, Entertainment, and Recreation Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	33,186	53,994	1.6	$2,176	$1,569,733,000	$47,301	4.60%
Firms with sales/receipts/revenue of $100,000 to $499,999	46,210	199,647	4.3	$2,176	$11,295,277,000	$244,434	0.89%
Firms with sales/receipts/revenue of $500,000 to $999,999	15,493	162,642	10.5	$2,176	$10,894,947,000	$703,217	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	12,148	259,480	21.4	$2,176	$18,531,141,000	$1,525,448	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	4,674	209,762	44.9	$2,176	$16,040,448,000	$3,431,846	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	1,718	120,586	70.2	$2,176	$9,983,571,000	$5,811,159	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	806	74,628	92.6	$2,176	$6,466,756,000	$8,023,270	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	660	77,131	116.9	$2,176	$7,102,423,000	$10,761,247	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	344	49,061	142.6	$2,176	$4,965,644,000	$14,435,012	0.02%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	224	40,309	180.0	$2,176	$4,136,002,000	$18,464,295	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	155	33,220	214.3	$2,176	$3,428,904,000	$22,121,961	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	115	28,855	250.9	$2,176	$2,873,044,000	$24,982,991	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	84	25,163	299.6	$2,176	$2,569,574,000	$30,590,167	0.01%

Table 22: Cost per small firm in the accommodation and food services industry:

Table 22: Accommodation and Food Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	99,592	207,093	2.1	$2,176	$4,845,922,000	$48,658	4.47%
Firms with sales/receipts/revenue of $100,000 to $499,999	216,446	1,349,187	6.2	$2,176	$55,536,558,000	$256,584	0.85%
Firms with sales/receipts/revenue of $500,000 to $999,999	79,875	1,260,097	15.8	$2,176	$55,913,962,000	$700,018	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	56,476	1,777,649	31.5	$2,176	$84,117,236,000	$1,489,433	0.15%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	14,095	896,373	63.6	$2,176	$46,231,300,000	$3,279,979	0.07%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	3,720	403,866	108.6	$2,176	$21,249,810,000	$5,712,315	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	1,621	244,772	151.0	$2,176	$12,835,230,000	$7,918,094	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	1,628	340,741	209.3	$2,176	$17,984,834,000	$11,047,195	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	859	252,279	293.7	$2,176	$13,054,878,000	$15,197,763	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	446	170,201	381.6	$2,176	$8,420,579,000	$18,880,222	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	363	153,594	423.1	$2,176	$7,987,110,000	$22,003,058	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	241	115,452	479.1	$2,176	$6,405,041,000	$26,576,934	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	170	90,301	531.2	$2,176	$4,832,335,000	$28,425,500	0.01%

Table 23: Cost per small firm in the other services (except public administration) industry:

Table 23: Other Services Industry							
	Number of Firms	Total Number of Employees	Average Number of Employees per Firm	Annual Cost per Firm	Annual Receipts	Average Receipts per Firm	Annual Cost per Firm as Percent of Receipts
Firms with sales/receipts/revenue below $100,000	195,234	322,002	1.6	$2,176	$9,308,948,000	$47,681	4.56%
Firms with sales/receipts/revenue of $100,000 to $499,999	307,613	1,225,144	4.0	$2,176	$75,113,021,000	$244,180	0.89%
Firms with sales/receipts/revenue of $500,000 to $999,999	87,833	756,186	8.6	$2,176	$61,131,552,000	$695,998	0.31%
Firms with sales/receipts/revenue of $1,000,000 to $2,499,999	55,883	926,035	16.6	$2,176	$84,065,314,000	$1,504,309	0.14%
Firms with sales/receipts/revenue of $2,500,000 to $4,999,999	16,522	531,104	32.1	$2,176	$55,620,907,000	$3,366,475	0.06%
Firms with sales/receipts/revenue of $5,000,000 to $7,499,999	4,967	252,838	50.9	$2,176	$28,838,406,000	$5,806,001	0.04%
Firms with sales/receipts/revenue of $7,500,000-$9,999,999	2,326	151,376	65.1	$2,176	$18,502,407,000	$7,954,603	0.03%
Firms with sales/receipts/revenue of $10,000,000 to $14,999,999	2,114	173,393	82.0	$2,176	$23,140,184,000	$10,946,161	0.02%
Firms with sales/receipts/revenue of $15,000,000 to $19,999,999	1,005	104,997	104.5	$2,176	$14,696,909,000	$14,623,790	0.01%
Firms with sales/receipts/revenue of $20,000,000 to $24,999,999	620	73,209	118.1	$2,176	$11,076,548,000	$17,865,400	0.01%
Firms with sales/receipts/revenue of $25,000,000 to $29,999,999	405	50,974	125.9	$2,176	$8,159,095,000	$20,145,914	0.01%
Firms with sales/receipts/revenue of $30,000,000 to $34,999,999	274	42,041	153.4	$2,176	$6,643,223,000	$24,245,339	0.01%
Firms with sales/receipts/revenue of $35,000,000 to $39,999,999	227	37,259	164.1	$2,176	$5,392,740,000	$23,756,564	0.01%

Paperwork Reduction Act

Effective Date: 180 days from the date of publication of the final rule.

Compliance Date: Affected parties do not have to comply with the new information collection request until the Department publishes a Notice in the **Federal Register** stating that the Office of Management and Budget (OMB) has approved these information collection requirements under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 et seq., or until this rule otherwise takes effect, whichever is later.

Under the PRA, no agency may conduct or sponsor, and no person is required to respond to, a collection of information unless the agency has obtained a valid OMB Control Number. OFCCP will submit the proposed collections of information contained in this proposed rulemaking to OMB for review in accordance with the PRA.

The proposed rule would amend the existing regulation at 41 CFR 60–1.7, which addresses reporting obligations of Federal contractors, by adding a requirement that contractors and subcontractors submit summary data on the compensation paid to employees aggregated by sex, race, ethnicity, job categories, and other relevant data points in the proposed Equal Pay Report. These other data points could include, for example, the number of hours worked and the number of employees. The proposed rule would require contractors to submit the Equal Pay Report electronically unless the Director granted a contractor a hardship exemption from the electronic filing requirement. Further, the proposed rule would require contractors to certify compliance with their reporting obligations under the regulations implementing Executive Order 11246 when bidding on contracts.

The collection of information contained in the existing regulations implementing Executive Order 11246, with the exception of those related to complaint procedures, are currently approved under OMB Control No. 1250–0003 (Recordkeeping and Reporting Requirements-Supply and Service) and OMB Control No. 1250–0001 (Construction Recordkeeping and Reporting).

Number of Respondents

As described above, covered contractors and subcontractors with more than 100 employees, a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications, and that are required to file an EEO–1 Report would also be required to submit the proposed Equal Pay Report. Thus, based on the 2012 EEO–1 data, OFCCP estimates that 67,605 contractor establishments would submit an Equal Pay Report in the first year of the rule's effect.

Information Collections

OFCCP's proposed information collection request includes the burden hours and costs for conducting the activities outlined in proposed section 60–1.7(b). This information collection package will request approval of a standard form entitled ''Equal Pay Report.''

Proposed section 60–1.7(b)(1) through (3)(ii) would require contractors to submit to OFCCP on an annual basis a report summarizing compensation paid to employees aggregated by gender, race, ethnicity, and job categories. OFCCP estimates that 99 percent of contractors will file the proposed report using the Web-based application and that 1 percent will obtain a hardship exemption to file the report in another manner. The estimated burden hours for contractors using the Web-based application is 401,574 (66,929 × 6 hours = 401,574). The estimated burden hours for those not using the Web-based application is 5,408 (676 × 8 hours = 5,408). The estimated total burden for this provision is 406,982 hours, which accounts for those contractors who use a Web-based application to file the report and those granted a hardship exemption from electronic filing.

Section 60–1.7(b)(3)(iii) proposes to require contractors that cannot file using the Web-based application to request a hardship exemption from OFCCP's Director. Contractors that request such an exemption must write to the Director acknowledging the responsibility, explaining their circumstances and requesting the exemption. OFCCP estimates it would take a contractor 30 minutes to prepare the request, including the time required to print, copy and send the document. The estimated total burden for this provision is 338 (676 × 0.5 hours = 338).

Section 60–1.7(c) requires contractors to maintain the records related to its submission of the proposed Equal Pay Report. OFCCP believes this recordkeeping requirement is within the requirements of section 60–1.12(a) and the burden is included in OMB Control Numbers 1250–0001 and 1250–0003.

Summary of Costs

OFCCP estimates the cost to contractors based on BLS data in the publication ''Employer Costs for Employee Compensation'' (December 2013), which lists total compensation for management, professional, and related occupations as $51.58 per hour and administrative support as $24.23 per hour. OFCCP estimates that 25 percent of the burden will be management, professional, and related occupations and 75 percent will be administrative support.

The total estimated cost for contractors to either fill out the proposed Equal Pay Report through the Web-based application or request a hardship extension and complete it using another manner, is listed in Table 24 below.

TABLE 24—SUMMARY OF RECURRING COSTS

Proposed requirement	Hours	Cost
Reporting:		
Section 60–1.7(b) Equal Pay Report	406,982	$12,643,913
Section 60–1.7(b)(3)(iii) Hardship Exemption Request	338	10,501
Total Reporting Burden	.....	$12,654,414
Recordkeeping:		
Section 60–1.7	*0	0
Total Recordkeeping Burden	0	.....
Total Cost	407,320	$12,654,414

*An existing requirement.

Public Comments

The Department seeks comments on the information collection requirements contained in this proposed rule. Commenters may send their views to the Department in the same way as all other comments (e.g., through the *www.regulations.gov* Web site). While much of the information provided to OMB in support of the information collection request appears in the preamble, a copy of this Information Collection Request, with applicable supporting documentation—including a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov Web site at *http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr*= [INSERTICR REFERENCENUMBER] (this link will only become active on the day following publication of this notice) or by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Office of Federal Contract Compliance, Office of Management and Budget, Room 10235, Washington, DC 20503; Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers). You can submit comments to OMB by email at *OIRA_submission@omb.eop.gov.* The OMB will consider all written comments that agency receives within 30 days of publication of this proposed rule. As previously indicated, written comments directed to the Department may be submitted within 30 days of publication of this notice.

The OMB and the Department are particularly interested in comments that:

- Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of IT (e.g., permitting electronic submission of responses).

Description of Proposed Report and Instructions

This NPRM proposes specific changes to OFCCP's existing regulation at § 60–1.7 that would make the benefits previously discussed possible. These changes include a proposed new reporting requirement for two categories of covered contractors and subcontractors; specifically, prime contractors and first tier subcontractors that are required to file EEO–1 Reports, and meet the jurisdictional threshold of having more than 100 employees and a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications. This Equal Pay Report would annually require contractors to submit summary compensation data, by sex, race, ethnicity, specified job categories, as well as other relevant data points. These points might include items such as hours worked and the number of employees. The report, as currently proposed, would seek summary W–2 earnings data. For the report, OFCCP is proposing a January 1 through December 31 reporting period, and a report filing window of January 1 to March 31 of the following year. However, OFCCP does not specify the use of W–2 data and the reporting dates in the text of the proposed new regulation. Instead, these details will be in the ICR authorizing the collection and the reporting of data using the report. Electronic submission of the report is being required; however, OFCCP is proposing to create a hardship exemption for those who are unable to perform electronic submission. Contractors and subcontractors would be required to keep their Equal Pay Reports for a period of not less than two years from the date of the making of each report. They would also have to certify that they filed the report with OFCCP from the most recent reporting period when bidding on a Federal contract or subcontract. OFCCP proposes to apply sanctions in 60–1.4(a) and (b) and 60–1.27 to a failure to file a timely, complete and accurate Equal Pay Report and make the appropriate certifications. The information provided on the report would be protected by the Freedom of Information Act to the maximum extent that the information is exempt. It is the practice of OFCCP not to release contractor data where (1) the contractor is still in business, and (2) the contractor indicates, and through the Department of Labor's review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm. In the NPRM, OFCCP proposes creating the authority to publish aggregate information based on compensation data collected from the Equal Pay Report, such as ranges or averages by industry, labor market, or other groupings, but only in such a way as not to reveal any particular establishment's or individual employee's data. OFCCP proposes that it would analyze the information collected on the Equal Pay Reports and, along with other available data, develop industry-based standards for compensation differences, and prioritize contractors and subcontractors for evaluation whose summary data show discrepancies that indicate possible compensation violations.

Reports are completed at the individual establishment level, with headquarters completing an individual report as well. Consolidated reports are not required.

Sample Format

A copy of the sample format of the report form and the instructions are provided with the ICR for the purposes of public comment, however, the form itself will not be codified in the regulatory text, but rather through finalization of the process associated with the Paperwork Reduction Act. This three-page report seeks specific information for Federal contractors and subcontractors. Page one of the report requires the contractor and subcontractor establishment to provide identifying information such as location and address, EEO–1 Unit and company numbers, Dun & Bradstreet identifier, and NAICS code(s). Page two of the report is for entering compensation data for all male employees summarized by race, ethnicity, specified job category, and other relevant data points such as the hours worked, and the number of employees in each specified job category. Page three of the report is for entering the compensation data for all female employees summarized by race, ethnicity, specified job categories, and other relevant data points such as the hours worked, and the number of employees in each specified job category. The instructions for completing and submitting the report, as well as definitions, are in a separate document or attachment.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Equal Pay Report.

OMB ICR Reference Number: 1250–AA03.

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 67,605.

Frequency of Response: Annually.

Estimated Total Annual Burden Hours: 407,320.

Estimated Total Initial and Other Costs: $46,250,189.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Unfunded Mandates Reform Act of 1995

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this proposed rule does not include any Federal mandate that may result in excess of $100 million in expenditures by state, local, and tribal governments in the aggregate or by the private sector.

Executive Order 13132 (Federalism)

OFCCP has reviewed this proposed rule in accordance with Executive Order 13132 regarding Federalism, and has determined that it does not have ''Federalism implications.'' This rule will not ''have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This proposed rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The proposed rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Effects on Families

The undersigned hereby certifies that the proposed rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045 (Protection of Children)

This proposed rule would have no environmental health risk or safety risk that may disproportionately affect children.

Environmental Impact Assessment

A review of this proposed rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.;* the regulations of the Council on Environmental Quality, 40 CFR 1500 et seq.; and DOL NEPA procedures, 29 CFR part 11, indicates the proposed rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211 (Energy Supply)

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630 (Constitutionally Protected Property Rights)

This proposed rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

Executive Order 12988 (Civil Justice Reform Analysis)

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 41 CFR Part 60–1

Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Labor, and Reporting and recordkeeping requirements.

Patricia A. Shiu,

Director, Office of Federal Contract Compliance Programs.

For the reasons set forth in the preamble, OFCCP proposes to amend part 60–1 of Title 41 of the Code of Federal Regulations as follows:

PART 60–1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

■ 1. The authority citation for part 60–1 continues to read as follows:

Authority: Section 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964–1965 Comp., p. 399, as amended by E.O. 11375, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, E.O. 12086, 43 FR 46501, 3 CFR, 1978 Comp., p. 230 and E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258.

■ 2. Section 60–1.7 is revised to read as follows:

§ 60–1.7 Reports and other required information.

(a) *EEO–1 Report.* (1) Each prime contractor and subcontractor shall file annually, on or before September 30, complete and accurate reports on Standard Form 100 (EEO–1) promulgated jointly by the Office of Federal Contract Compliance Programs and the Equal Employment Opportunity Commission (EEOC), or such form as may hereafter be promulgated in its place, if such prime contractor or subcontractor—

(i) Is not exempt from the provisions of these regulations in accordance with § 60–1.5;

(ii) Has 50 or more employees;

(iii) Is a prime contractor or first tier subcontractor; and

(iv) Has a contract, subcontract or purchase order amounting to $50,000 or more or serves as a depository of Government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes:

(2) *Provided,* That any subcontractor below the first tier that performs construction work at the site of construction shall be required to file such a report if it meets the requirements of criteria specified in paragraph (a)(1) of this section.

(3) Each contractor required under paragraph (a)(1) of this section to file the EEO–1 Report(s) must submit a copy of its most recently filed report(s) to the contracting or administering agency within 30 days after the award of a contract, unless the contractor has submitted its EEO–1 Report(s) to the contracting or administering agency

within 12 months preceding the date of the award.

(b) *Equal Pay Report.* (1) The Equal Pay Report, promulgated by OFCCP, requires contractors and subcontractors with more than 100 employees to provide summary data on the compensation paid to employees by sex, race, ethnicity, specified job categories, and other relevant data points. Contractors must submit the Equal Pay Report in the format and manner required by OFCCP.

(2) *Who must file the Equal Pay Report.* The Equal Pay Report must be filed by each prime contractor and first tier subcontractor that is required under paragraph (a)(1) of this section to file the EEO–1 Report(s) with the Joint Reporting Committee that has more than 100 employees, and a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days, including modifications.

(3) *How, when, and where to file the Equal Pay Report.* (i) The Equal Pay Report must be filed by the date specified in the report.

(ii) Each contractor must submit the Equal Pay Report electronically through OFCCP's web-based filing system by the specified filing deadline, unless the contractor has been granted a hardship exemption under paragraph (b)(3)(iii) of this section.

(iii) The Director may grant a hardship exemption from the requirement to submit the Equal Pay Report electronically where he or she concludes that electronic filing would impose an undue hardship on the contractor. Requests for hardship exemptions are only considered upon the written request of the contractor. The eligibility criteria and application procedures for the hardship exemption are available on the OFCCP Web site. A contractor granted a hardship exemption must submit the Equal Pay Report in the format specified in the notification granting the exemption.

(4) *Confidentiality of the Equal Pay Report.* (i) OFCCP will treat information contained in the Equal Pay Report as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release contractor data where:

(A) The contractor is still in business; and

(B) The contractor indicates, and through the Department of Labor's review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

(ii) OFCCP may publish aggregate information based on compensation data collected from the Equal Pay Report, such as ranges or averages by industry, labor market, or other groupings, but only in such a way as not to reveal any particular establishment's or individual employee's data.

(c) *Additional information.* The Director or the applicant, on their motions, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such additional information about its employment practices as the Director or the applicant deems necessary for the administration of the Order. In accordance with the existing obligations in 41 CFR 60–1.12(a), each contractor shall retain its Equal Pay Report for a period of not less than two years from the date of the making of the report. However, if the contractor has fewer than 150 employees or does not have a contract of at least $150,000, this retention period is one year.

(d) *Requirements for bidders or prospective contractors*—(1) *Certifications and representations of compliance with the requirements of Executive Order 11246 and its implementing regulations.* Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to represent by a statement in the bid or in writing at the outset of negotiations for the contract:

(i) Whether it has participated in any previous contract or subcontract subject to the Equal Opportunity Clause in § 60–1.4(a);

(ii) Whether it is currently required to develop affirmative action programs as prescribed under the regulations in this chapter and to file reports set forth in this section;

(iii) And, if so, whether it developed the affirmative action programs;

(iv) Whether it has filed with the Joint Reporting Committee all reports due under the applicable filing requirement; and

(v) Whether it currently holds a Federal contract or subcontract that requires the filing of an Equal Pay Report(s) with OFCCP, and whether it filed an Equal Pay Report with OFCCP for the most recent reporting period, as prescribed by paragraph (b) of this section.

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the Director requests prior to the award of the contract or subcontract. When a determination is made to award the contract or subcontract to a specific contractor, that contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the applicant or the Director requests.

(e) *Sanctions for failure to file required reports, and certifications and representations.* Failure to file timely, complete and accurate reports, and certifications and representations as required under this section constitutes a violation of Executive Order 11246 and its implementing regulations that may subject the contractor to the sanctions identified in paragraph (6) of the Equal Opportunity clause in §§ 60–1.4(a) and (b) and 60–1.27.

(f) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of Executive Order 11246, the Civil Rights Act of 1964, or in furtherance of the purposes of the Order and the Act.

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