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## **DEPARTMENT OF LABOR**

### **Office of Federal Contract Compliance Programs**

#### **41 CFR Parts 60-1, 60-2, 60-4, and 60-50**

**RIN 1250-AA07**

### **Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors**

**AGENCY:** Office of Federal Contract Compliance Programs, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Office of Federal Contract Compliance Programs (OFCCP) is revising the regulations implementing Executive Order (EO) 11246, as amended, in accordance with Executive Order (EO) 13672, “Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity,” which was signed by President Barack Obama

on July 21, 2014. EO 13672 amended EO 11246, which previously only prohibited discrimination by Federal contractors and subcontractors on the bases of race, color, religion, sex, and national origin and required them to take affirmative measures to prevent discrimination on those bases from occurring. More specifically, EO 13672 amended section 202 and section 203 of EO 11246, by substituting the phrase “sex, sexual orientation, gender identity, or national origin” for “sex or national origin.” This final rule implements EO 13672 by making the same substitution wherever the phrase “sex or national origin” appears in the regulations implementing EO 11246.

**DATES:** Effective date: These regulations are effective [insert date 120 days from date of publication in the Federal Register].

Applicability date: These regulations will apply to Federal contractors who hold contracts entered into or modified on or after [insert date 120 days from the date of publication in the Federal Register].

**FOR FURTHER INFORMATION CONTACT:** Debra A. Carr, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, at 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210, or by calling (202) 693-0103 (voice) or (202) 693-1337(TTY). The alternative formats available for copies of this rule are large print and electronic file on computer disk. The rule also is available on the Internet on the Regulations.gov website at <http://www.regulations.gov> or on the OFCCP website at <http://www.dol.gov/ofccp>.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights and worker protection agency that enforces Executive Order 11246, as amended, which, prior to the issuance of Executive Order 13672, prohibited employment discrimination by companies doing business with the Federal Government on the bases of race, color, religion, sex, and national origin and required those companies to take affirmative steps to ensure nondiscrimination on those grounds.<sup>1</sup>

On July 21, 2014, President Barack Obama issued EO 13672, “Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity.” The new EO added sexual orientation and gender identity to the prohibited bases of discrimination in EO 11246 (“the protected bases”).<sup>2</sup>

In pertinent part, Section 2 of EO 13672 amended numbered paragraphs 1 and 2 of section 202 and paragraph (d) of section 203 of EO 11246. Section 202 sets forth language that Government agencies must insert into all covered contracts and prime contractors must insert into covered subcontracts (“the Equal Opportunity Clause”). Prior to the issuance of EO 13672, numbered paragraph 1 of the Equal Opportunity Clause prohibited discrimination and required that contractors take affirmative action to

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<sup>1</sup> OFCCP also enforces the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, which requires affirmative action and prohibits employment discrimination against certain protected veterans and section 503 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of disability and requires affirmative action on behalf of qualified individuals with disabilities.

<sup>2</sup> The White House, [FACT SHEET: Taking Action to Support LGBT Workplace Equality is Good For Business](http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0), (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0> (last accessed Nov. 28, 2014).

ensure that job applicants and employees are treated without regard to their race, color, religion, sex, or national origin.

EO 13672 amended section 202, numbered paragraph 1, by adding “sexual orientation” and “gender identity” to the bases upon which Federal contractors<sup>3</sup> are prohibited from discriminating against job applicants and employees. It further amended the paragraph by requiring that contractors take affirmative action to ensure that applicants are employed, and that employees are treated, without regard to their sexual orientation or gender identity during their employment. EO 13672 states, specifically, that section 202, numbered paragraph 1, of EO 11246 is “revised by substituting ‘sex, sexual orientation, gender identity or national origin’ for ‘sex, or national origin.’”

Section 202, numbered paragraph 2, is also part of the Equal Opportunity Clause. This paragraph requires that solicitations or advertisements for employees state that the contractor considers all applicants for employment without regard to any of the protected bases. Executive Order 13672 specifically amended this paragraph by substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin.”

Section 203(d) of EO 11246 provides that prospective contractors may be required by the Secretary of Labor to provide a statement from any labor union or any agency referring workers or providing or supervising apprenticeships or other training with which the prospective contractor deals stating that their practices and policies do not discriminate in employment on any of the protected bases, as part of their Compliance Report. Executive Order 13672 amended the text of 203(d) by substituting “sex, sexual orientation, gender identity, or national origin” for “sex or national origin.”

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<sup>3</sup> Unless otherwise stated, the term “contractor” includes both “contractors” and “subcontractors,” and the term “contract” also includes “subcontracts.”

Section 3 of EO 13672 directs the Secretary of Labor to “prepare regulations to implement the requirements of section 2” within 90 days of the date of the order. Section 5 of EO 13672 provides that section 2 applies to Federal contracts “entered into on or after the effective date of the rules” promulgated by the Department of Labor in accordance with section 3 of the order. The existing OFCCP regulation, modeled on language from EO 11246 itself, defines a “Government contract” as “any agreement or modification thereof between any contracting agency and any person . . .”, and thus this rule also applies to contracts modified on or after the effective date of these regulations. See 41 CFR § 60-1.3 (emphasis added). Accordingly, revisions have been made to 41 CFR part 60-1 – Obligations of Contractors and Subcontractors, 41 CFR part 60-2 – Affirmative Action Programs, 41 CFR part 60-4 – Construction Contractors – Affirmative Action Requirements, and 41 CFR part 60-50 – Guidelines on Discrimination because of Religion or National Origin.

The regulatory changes made by this final rule directly implement the changes to EO 11246 made by EO 13672; specifically, the replacement of the words “sex, or national origin” with the words “sex, sexual orientation, gender identity, or national origin” throughout the EO 11246 implementing regulations.<sup>4</sup> No other regulatory changes are being made.

The only affirmative action requirements affected by this final rule are those contained in 41 CFR part 60-1. Contractors satisfy this obligation by including the updated Equal Opportunity Clause in new or modified subcontracts and purchase orders,

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<sup>4</sup> While the text of 41 CFR 60-1.11 contains the full list of protected characteristics, that section has been indefinitely suspended as per Notice of Further Deferral of Effective Dates of Regulations, 46 FR 18951 (Mar. 27, 1981) and Payment of Membership Fees and Other Expenses to Private Organizations; Proposed Rule Withdrawal, 46 FR 19004 (Mar. 27, 1981), and thus cannot be amended.

ensuring that applicants and employees are treated without regard to their sexual orientation and gender identity, and by updating the equal opportunity language used in job solicitations and posting updated notices. See 41 CFR 60-1.4(a) paragraphs 1, 2, and 7 of the Equal Opportunity Clause, and 60-1.4(b)(1) paragraphs 1, 2, and 7 of the Equal Opportunity Clause. This final rule makes no changes to the provisions governing reporting and information collection set forth at 41 CFR 60-1.7 and 60-1.12(c). The obligations updated by this final rule are separate from the additional affirmative action requirements set forth in 41 CFR parts 60-2 and 60-4 that comprise the contents of contractors' written affirmative action programs. No changes are being made to the written affirmative action program requirements of 41 CFR part 60-2, or the affirmative action requirements contained in § 60-4.3(a)(7) of 41 CFR part 60-4, and thus those programs will continue to be limited to gender, race, and ethnicity. While the terms "sexual orientation" and "gender identity" will now appear in two sections within part 60-2 that include the full list of protected bases (in §§ 60-2.16(e)(2) and 60-2.35), the final rule does not require contractors to set placement goals on the bases of sexual orientation or gender identity, nor does it require contractors to collect and analyze any data on these bases. Section 60-2.16(e)(2) simply states that placement goals for women and minorities under the existing regulations may not be used as a basis for discrimination on one of the bases protected by EO 11246, including sexual orientation and gender identity. The affected provision of § 60-2.35 indicates that both statistical and non-statistical data will be considered in determining whether contractors have complied with their nondiscrimination obligations; it does not require contractors to collect any

statistical data.<sup>5</sup>

In addition, as section 204(c) of EO 11246, which provides an exemption for religious organizations, was not amended by EO 13672, this rule does not make changes to the corresponding regulation at 41 CFR 60-1.5(a)(5), which tracks the language of the Executive Order.<sup>6</sup>

Lastly, although EO 13672 adds “gender identity” as an independent basis upon which discrimination is prohibited under EO 11246, nothing in EO 13672 or this final rule diminishes the pre-existing coverage of discrimination on the basis of gender identity or discrimination on the basis of transgender status as a form of sex discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012); OFCCP Directive 2014-02, “Gender Identity and Sex Discrimination,” effective August 19, 2014 (available online at [http://www.dol.gov/ofccp/regs/compliance/directives/dir2014\\_02.html](http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html)).

## **Publication as a Final Rule**

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<sup>5</sup> In accordance with its long-standing practice, OFCCP will continue to utilize the analytical framework of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., to determine whether discrimination has occurred under Executive Order 11246. See OFCCP, FCCM § 2H01 (July 2013), available at [http://www.dol.gov/ofccp/regs/compliance/fcm/FCCM\\_FINAL\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/fcm/FCCM_FINAL_508c.pdf) (last accessed November 28, 2014); see also OFCCP v. Honeywell, 77-OFC-3, Sec’y of Labor Dec. and Order on Mediation, June 2, 1993, at 14 and 16 & Sec’y of Labor Dec. and Remand Order, March 2, 1994; OFCCP v. Illinois Institute of Technology, 80-OFC-11, Sec’y Final Order, December 23, 1982; OFCCP v. Firestone, 80-OFC-15, Sec’y Dec., July 13, 1980, rev’d on other grounds, Firestone v. Marshall, 507 F. Supp. 1330 (E.D. Tex. 1981).

<sup>6</sup> This regulation states: “Section 202 of Executive Order 11246, as amended, shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in this Order.”

OFCCP is promulgating this final rule without notice or an opportunity for public comment (“notice and comment”) because the Administrative Procedure Act’s (“APA”) “good cause” exemption allows the agency to dispense with notice and comment when “impracticable, unnecessary, or contrary to the public interest.” 5 U.S.C. 553(b)(B).<sup>7</sup> Notice and comment are unnecessary when changes to regulations merely restate the changes in the enabling authority they implement. Gray Panthers Advocacy Committee v. Sullivan, 936 F.2d 1284, 1291 (D.C. Cir. 1991), citing Komjathy v. National Transportation Safety Board, 832 F.2d 1294, 1296-97 (D.C. Cir. 1987). Because these final rules merely amend 41 CFR parts 60-1, 60-2, 60-4, and 60-50 to conform with the amendments made to EO 11246 by EO 13672, amendments as to which OFCCP lacks discretion as to whether to make, notice and comment are unnecessary and the “good cause” exemption applies to this final rule.

OFCCP has previously relied on the “good cause” exemption in amending its rules under EO 11246 without notice and comment to implement EO 11375, which amended Executive Order 11246 to add sex as a basis of prohibited discrimination and replaced the term “creed” with “religion;” OFCCP’s rule amended the regulations in the same way. Obligations of Contractors and Subcontractors; Miscellaneous Amendments; Final Rule; 34 FR 744 (Jan. 17, 1969). Similarly, when EO 13279 added a religious exemption to EO 11246, OFCCP promulgated a rule without notice and comment under the good cause exemption by restating the religious exemption as a new provision in its regulations. Affirmative Action Obligations of Government Contractors, Executive

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<sup>7</sup> Although the Administrative Procedure Act’s notice and comment requirement does not apply to matters relating to public contracts, 5 U.S.C. 553(a), it is the policy of the Department of Labor not to rely upon that exemption. See 29 CFR 2.7.



Order 11246, as Amended; Exemption for Religious Entities; Final Rule; 68 FR 56392 (Sept. 30, 2003).

### **Sections Revised**

Several sections in 41 CFR chapter 60 are being revised by this final rule: §§ 60-1.1, 60-1.4(a)(1), 60-1.4(a)(2), 60-1.4(b)(1)(1), 60-1.4(b)(1)(2), 60-1.8, 60-1.10, 60-1.20, 60-1.41(a), 60-1.41(c), 60-1.42(a), 60-2.16(e)(2), 60-2.35, 60-4.3(a)(10), and 60-50.5.

As noted above, in each of these sections, wherever the words “sex, or national origin” appear, they have been replaced with the words “sex, sexual orientation, gender identity, or national origin,” as required by EO 13672. No other revisions have been made.

However, for the convenience of the reader, the entire section or paragraph containing the revised language is reprinted in this final rule.

### **REGULATORY PROCEDURES**

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

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives, and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects, distributive impacts, and equity, dignity, and fairness concerns). Here, the specific changes being made to the regulations are required by the amendments to Executive Order 11246 made by Executive Order 13672, and thus no less

burdensome alternatives existed. Although this rule is not economically significant within the meaning of Executive Order 12866, it has been reviewed by the Office of Management and Budget (OMB).

This rule replaces the words “sex, or national origin” with the words “sex, sexual orientation, gender identity, or national origin” wherever they appear in the current regulations. No other revisions have been made.

Benefits of this rule include equity, fairness, and human dignity. Such benefits are difficult to quantify but nevertheless are important and specifically recognized by Executive Order 13563. In addition, employment discrimination on the basis of sexual orientation or gender identity, like employment discrimination on other bases prohibited by EO 11246, may have economic consequences. It, like other forms of discrimination, may lead to reduced productivity and lower profits. Contractor employees who face discrimination on the basis of sexual orientation or gender identity on the job may experience lower self-esteem, greater anxiety and conflict, and less job satisfaction. Such employees may also receive less pay and have less opportunity for advancement. Job applicants who experience discrimination on the basis of sexual orientation or gender identity may not be considered for a job at all, even though they may be well-qualified. This rule is designed to address these problems to ensure a fair and inclusive work environment in the context of Federal contractors.

The expected costs to employers resulting from this rule are: Regulatory familiarization, incorporation of the modified new language into the equal opportunity clauses they currently use in covered subcontracts and purchase orders, the reporting of any visa denials, and administrative costs associated with providing required notices to

employees and modifying existing job posting templates. OFCCP expects that other changes made by this rule – such as the prohibition of segregation of facilities on the basis of sexual orientation or gender identity will have minimal costs to employers. This rule does not require contractors to set goals for employing persons on the basis of sexual orientation or gender identify, collect and maintain statistics on applicants or employees on the basis of sexual orientation or gender identity, or conduct statistical analysis of applicants or employees on the basis of sexual orientation or gender identity. Therefore, the costs of performing such activities are not included in this analysis.

### **Assumptions**

The estimated labor cost to contractors and subcontractors is based on U.S. Department of Labor, Bureau of Labor Statistics (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 for administrative support as \$24.23 per hour. OFCCP estimates that 25 percent of the burden will fall to management, professional, and related occupations and 75 percent will be administrative support.

For purposes of analyzing the economic effect of rules on federal contractors, OFCCP typically assumes 500,000 contractor companies or firms may be affected by these provisions because 500,000 contractor firms are registered in the General Service Administration’s System for Award Management (SAM). OFCCP recognizes that using SAM likely results in an overestimation of the number of covered contractors and subcontractors. For example, the SAM data includes recipients of Federal grants and Federal financial assistance, none of which are covered by this Rule. The SAM data also

includes firms that do not meet the jurisdictional dollar threshold of EO 11246. In addition, a large percentage of Federal contractors already prohibit discrimination based on sexual orientation and gender identity and/or operate in states or localities that do, and will therefore already be in compliance with the requirements of this Rule. This approach is consistent with the approach used in other recent OFCCP and WHD rulemakings.<sup>8</sup> However, the estimate of 500,000 contractor companies or firms does not include new companies and firms that become contractors in the future. OFCCP does not currently have a reliable data source or method for estimating the number of new contractor companies or firms each year.

### **Cost of Regulatory Familiarization**

OFCCP expects that human resources or personnel managers at each contractor establishment or firm will spend time becoming familiar with the amended requirements. In order to minimize the burden of these changes, OFCCP will publish compliance assistance materials such as, but not limited to, fact sheets and “Frequently Asked Questions.” OFCCP will also host webinars for the contractor community that will describe the amended requirements and engage in outreach to identify any specific challenges contractors believe they face, or may face, when complying with the requirements.

Therefore, OFCCP estimates that it will take 60 minutes or 1 hour for a management professional at each contractor establishment to either read the compliance

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<sup>8</sup> There is at least one reason to believe the SAM data yields an underestimate of the number of entities affected by this rule and other reasons to believe the data yields an overestimate. SAM does not necessarily include all subcontractors, thus potentially leading to an underestimate, but this limitation of the data is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus be included in the SAM data.

assistance materials provided by OFCCP or participate in an OFCCP webinar to learn more about the amended requirements. Consequently, the estimated burden for rule familiarization is 500,000 hours (500,000 contractor companies x 1 hour = 500,000 hours). We calculate the total estimated cost as \$25,790,000 (500,000 hours x \$51.58/hour = \$25,790,000).

### **Cost of Specific Provisions**

Sections 60-1.4(a) and (b) and 60-4.3(a) require contractors to incorporate this modified new language into the equal opportunity clauses they currently use in covered subcontracts and purchase orders. The amended Equal Opportunity Clause may be incorporated by reference. OFCCP estimates that contractors and subcontractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is added. The estimated burden for this provision is 125,000 hours (500,000 contractors x 0.25 hours). The estimated cost for incorporating the changes into the Equal Opportunity Clause is \$3,883,438 ((125,000 hours x 0.25 x \$51.58) + (125,000 x 0.75 x \$24.23) = \$3,883,438).

Sections 1.4(a)(1) and 1.4(b)(1) require contractors to notify job applicants and employees of their nondiscrimination policy by posting specific notices, provided by contracting officers, in conspicuous places. OFCCP recognizes that this rule requires contractors to update their existing postings to comply with the revised regulations. OFCCP estimates that it will take 15 minutes (or 0.25 hours) for contractors to locate the revised notice on OFCCP's website and one hour to print, copy and replace current posters with the revised notice. Therefore, OFCCP estimates that the burden of this provision is 625,000 hours (500,000 contractor companies x 1.25 hours). OFCCP

assumes that 95 percent of the time for this activity (finding the notice online; printing, copying, and posting the notice) will be at the administrative support level and 5 percent (reviewing the notice) will be at the management, professional, and related occupations level. Thus, the cost for this provision is \$15,998,438 ((625,000 hours x 0.05 x \$51.58) + (625,000 hours x 0.95 x \$24.23) = \$15,998,438). OFCCP believes that contractors will have some operations and maintenance costs associated with this provision and those costs are detailed in the Operations and Maintenance discussion, below.

Sections 60-1.4(a), paragraph 2 of the Equal Opportunity Clause, and 1.4(b), paragraph 2 of the Equal Opportunity Clause, require contractors to expressly state in solicitations for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. Section 60-1.41(a) details the options available to contractors for complying with this requirement, which range from stating in employment solicitations that “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin” to simply including the phrase “an equal opportunity employer.”<sup>9</sup> While some contractors include the detailed list, others include the phrase “equal opportunity employer.” OFCCP estimates that 50 percent of contractors will include the detailed list, and the remainder will use “an equal opportunity employer.” Thus, OFCCP acknowledges that 50 percent or 250,000 contractors that include the detailed list will

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<sup>9</sup> The other options include using an insignia approved by the Director of OFCCP in job advertisements and including a single advertisement in a group of advertisements which includes the statement that “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identify, or national origin.” Based on OFCCP’s reviews of job advertisements, contractors typically use either the “equal opportunity employer” tag line or include “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identify, or national origin.”

thus be affected by this change. OFCCP believes that contractors will modify their existing solicitation or job advertisement templates to incorporate the revised terminology. A substantial number of contractors are unlikely to see an increased cost, though, as most costs involved with advertisements and solicitations are not based on the number of words or specific words included. Therefore, OFCCP believes that the cost of the solicitation or advertisement will not be greatly impacted by adding the words “sexual orientation” and “gender identity” to the advertisement. OFCCP believes that contractors will spend approximately 15 minutes modifying existing job posting templates to ensure the additional words are added. The burden for this provision is 62,500 hours (250,000 contractors x 0.25 hours). The cost for incorporating the changes into the Equal Opportunity Clause is \$1,941,719  $((62,500 \text{ hours} \times 0.25 \times \$51.58) + (62,500 \times 0.75 \times \$24.23) = \$1,941,719)$ .

Section 60-1.8 requires contractors to ensure that facilities provided for employees are not segregated by any of the covered bases. This rule adds sexual orientation and gender identity as prohibited bases of segregation in the existing provision. OFCCP believes that this modification will not incur additional burden, as the provision does not require contractors to modify or construct additional facilities, but rather only provide equal access to any facilities that exist.

Section 60-1.10 prohibits contractors from discriminating against employees for work to be performed in the United States or abroad. It provides an exemption for employees hired outside the United States. Further, if a contractor is unable to obtain a visa of entry for an employee or potential employee to a country in which or with which it is doing business, and it believes that refusal is due to a basis covered by EO 11246, as

amended by EO 13672, then the contractor must immediately notify the OFCCP and the Department of State. Neither OFCCP nor the current office directors or senior officials in the Department of State's Bureau of Political-Military Affairs have received any visa denial notifications related to the existing protected categories.

There is no precise way of calculating how many LGBT employees of federal contractors will travel to foreign countries for work-related purposes. Although there is no single, authoritative source of labor force population data regarding sexual orientation and gender identity, separate independent surveys published between 2011 and 2014 estimate that between 2.3 and 4.0 percent of the U.S. population identify as LGBT.<sup>10</sup> This represents approximately 3.6 to 6.2 million LGBT individuals in the civilian labor force, approximately 1.5 to 2.6 million of who are employed by federal

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<sup>10</sup> This estimated range is derived from four separate sources: (1) Brian W. Ward, Ph.D. et al., Centers for Disease Control and Prevention, Sexual Orientation and Health Among U.S. Adults: National Health Interview Survey, 2013 (July 15, 2014), <http://www.cdc.gov/nchs/data/nhsr/nhsr077.pdf> (last accessed Nov. 28, 2014) (Survey of approximately 35,000 adults, age 18 and over found 2.3 percent identified as gay/lesbian or bisexual. An additional 1.1 percent identified as "something else."); (2) Gary J. Gates and Frank Newport, The Gallup Organization, Special Report: 3.4% of U.S. Adults Identify as LGBT (October 18, 2012), [http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx?utm\\_source=alert&utm\\_medium=email&utm\\_campaign=syndication&utm\\_content=morelink&utm\\_term=All%20Gallup%20Headlines](http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx?utm_source=alert&utm_medium=email&utm_campaign=syndication&utm_content=morelink&utm_term=All%20Gallup%20Headlines) (last accessed Nov. 28, 2014) (Gallup poll of a representative sample of 120,000 adults conducted in 2012 found 3.4 percent identified as LGBT); (3) Movement Advancement Project, Center for American Progress, Human Rights Campaign, A Broken Bargain: Discrimination, Fewer Benefits, and More Taxes for LGBT Workers at 5 (June 2013), <http://www.americanprogress.org/issues/lgbt/report/2013/06/04/65133/a-broken-bargain/> (last accessed Nov. 28, 2014) (2011 study aggregating results of five separate surveys conducted between 2004 and 2009 found 3.5 percent of those surveyed identified as lesbian, gay, or bisexual and 0.3 percent identified as transgender); and (4) Jennifer C. Pizer, Brad Sears, Christy Mallory, and Nan D. Hunter, Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits, 45 LOY. L.A. L. REV. 715, 717 (2012), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Mallory-Sears-Hunter-ENDA-LLR-2012.pdf> (last accessed Nov. 28, 2014) (analyzing a 2002 study from the National Survey of Family Growth finding 4 percent of the U.S. workforce identified as lesbian, gay, bisexual, or transgender).



contractors.<sup>11</sup> According to the Department of Commerce’s International Trade Administration, 4,875,000 U.S. residents departed the country for business or convention purposes in 2013, representing approximately 3.1 percent of the civilian labor force.<sup>12</sup> In the absence of data as to what percent of the LGBT employees in the federal contractor workforce would depart the country for business or convention purposes, a conservative estimate is that 6.1 percent (double the rate of the general national civilian labor force) of LGBT employees in the federal contractor workforce may visit foreign countries for work purposes, yielding a total of 91,500 to 158,600 LGBT employees each year.

The International Trade Administration tracks patterns as to what destinations United States residents travel to, both in general and for work purposes.<sup>13</sup> There is very limited precedent for LGBT individuals being denied entry on the basis of sexual orientation or gender identity. There are two countries with immigration laws that prohibit entry of “homosexual” persons, but there is no indication that these laws are actively enforced. Statistically, therefore, the percent of United States resident business travel to countries where LGBT individuals may face denial of entry on the basis of

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<sup>11</sup> Recent BLS data indicates that in October 2014 there were approximately 156 million people in the civilian labor force. U.S. Department of Labor Bureau of Labor Statistics, Table A-1, Employment Status of the Civilian Population by Sex and Age, online at <http://www.bls.gov/news.release/empsit.t01.htm> (last accessed Nov. 28, 2014). The estimated range of LGBT workers in the civilian labor force was derived by applying the 2.3 to 4.0 percent range to the total number of people in the civilian labor force, while the estimated range of LGBT federal contractor workers was derived by applying the 2.3 to 4.0 percent range to the contractor work force data from SAM (65 million).

<sup>12</sup> U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, 2013 U.S. Resident Travel: Business and Convention Travel, available at [http://travel.trade.gov/outreachpages/download\\_data\\_table/2013-US-Business.pdf](http://travel.trade.gov/outreachpages/download_data_table/2013-US-Business.pdf) (last accessed Nov. 28, 2014). This data excludes U.S. resident travel to Canada. OFCCP does not believe the exclusion of Canadian travel will have any impact on the burden incurred.

<sup>13</sup> See *id.*; U.S. Department of Commerce, International Trade Administration, National Travel and Tourism Office, 2013 United States Resident Travel Abroad, available at [http://travel.trade.gov/outreachpages/download\\_data\\_table/2013\\_US\\_Travel\\_Abroad.pdf](http://travel.trade.gov/outreachpages/download_data_table/2013_US_Travel_Abroad.pdf) (last accessed Sept. 30, 2014).

sexual orientation or gender identity, due to law or custom, is less than 1 percent.<sup>14</sup> As an overestimate, presuming all LGBT federal contractor employees who visit these countries for work purposes are denied a visa on the basis of sexual orientation or gender identity, this would lead to 915 to 1,586 incidences (or 1 percent of total LGBT employees who travel abroad for business) per year. To adjust this calculation from an incidence count to the estimate of burden on contractors, OFCCP assumes a ratio of one incident per contractor, thus an estimated 1,586 contractors could be impacted by this provision.

OFCCP estimates that it will take two hours for a contractor to identify from the Federal Acquisition Regulation (FAR) a contract at the Department of State, and prepare and send the notification of visa denial to the Department of State and OFCCP.

Therefore, the burden is 3,172 hours per year (1,586 contractors x 2 hours). Because of the nature of this provision, OFCCP estimates that 50 percent of the time addressing this provision will be management and 50 percent of the time will be administrative. Thus, using the high end of the estimate, the cost of this provision is estimated as \$120,235 ((3,172 hours x 0.50 x \$51.58) + (3,172 hours x 0.50 x \$24.23) = \$120,235).

The revised regulations incorporate the terms “sexual orientation” and “gender identity” into §§60-2.16 and 60-4.3. As modified, these provisions state that goals and timetables or affirmative action standards shall not be used to discriminate against any person because of their race, color, religion, sex, sexual orientation, gender identity, or national origin. Because these incorporations merely clarify that affirmative action programs may not be used to carry out discrimination prohibited by other sections of the

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<sup>14</sup> This figure is derived from tables in the two above-cited International Trade Administration reports.

regulations, and do not require any change in contractors' procedures or practices, OFCCP believes that there are no additional burdens associated with this modification.

Section 60-2.35 states that each contractor's compliance status with EO 11246 and its implementing regulations will be determined by analysis of statistical data and other non-statistical information. The change in the regulation adds sexual orientation and gender identity to the prohibited bases of discrimination. However, as with religion, contractors are not required to collect, keep, or report data on gender identity or sexual orientation. As this provision merely explains OFCCP's processes, no additional burden is incurred.

Section 60-50.5 clarifies that contractors may not use the Guidelines contained in part 60-50 to discriminate against qualified applicants and employees on any of the protected bases. The revision to §60-50.5 incorporates the terms "sexual orientation" and "gender identity" into the list of prohibited bases of discrimination. This provision does not require any action by contractors, and thus does not incur any additional burden.

### **Operations and Maintenance Costs**

OFCCP estimates that contractors will have some operations and maintenance costs in addition to the burden calculated above. Sections 60-1.4(a), paragraph 1 of the Equal Opportunity Clause, and 60-1.4(b), paragraph 1 of the Equal Opportunity Clause, require contractors to post a specific notice provided by the contracting officer for employees and applicants. Section 60-1.42 provides the text included in the notice. OFCCP estimates that contractors will comply with this provision by posting the notice on bulletin boards. The notice is publicly available on OFCCP's website and prints on 2 letter-sized sheets of paper. OFCCP assumes that on average these contractors will post

it on 10 bulletin boards. Therefore, OFCCP estimates the operations and maintenance cost of this recurring burden to be \$800,000 (500,000 x 2 pages x 10 copies x \$0.08 = \$800,000).

**Summary of Total and Annual Costs**

Contractors affected by this rule will have different burdens based on whether they are required to report to the Department of State and OFCCP. Thus, in summarizing the costs, Table 1 details the burden for those contractors that are affected by the visa denial reporting provision (“the visa reporting provision”). The recurring cost in Table 1 is limited to reporting denied visas to the Department of State and OFCCP. There are no recurring burdens or costs for ensuring that facilities are not segregated, contractor funded or reimbursed memberships are nondiscriminatory, placement goals do not provide a prohibited preference, nor are there any such burdens or costs associated with with the non-discrimination provisions of Part 60-50, or by the fact that OFCCP’s determination of compliance considers both statistical data and non-statistical data. Table 2 details the burden for those contractors that are not affected by the visa reporting provision. There are no recurring burdens or costs for this reporting provision; however, there are one-time costs.

<b>Table 1: Burden and Costs for Contractors Affected by the Visa Reporting Provision</b>		
<b>Estimated One-Time Burden</b>		
<b>Section</b>	<b>Burden Hours</b>	<b>Costs</b>

<b>Table 1: Burden and Costs for Contractors Affected by the Visa Reporting Provision</b>		
Regulatory Familiarization	1,586	\$81,806
Amending the Equal Opportunity Clause	397	\$12,334
Posting the notice for employees and applicants	1,983	\$50,760
Amending the tag line for solicitations and job advertisements	198	\$6,151
<b>One-time Burden</b>	<b>4,164</b>	<b>\$151,051</b>
<b>Estimated Recurring Burden</b>		
<b>Section</b>	<b>Burden Hours</b>	<b>Costs</b>
Reporting denied visas to Department of State and OFCCP	3,172	\$120,235
<b>Total Annual Recurring Burden</b>	<b>3,172</b>	<b>\$120,235</b>
<b>Estimated Operations and Maintenance</b>	<b>0</b>	<b>\$2,538</b>
<b>Total Burden and Cost of the Rule</b>	<b>7,336</b>	<b>\$273,824</b>

<b>Table 2: Burden and Costs for Contractors Not Affected by the Visa Reporting Provision</b>		
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<b>Table 2: Burden and Costs for Contractors Not Affected by the Visa Reporting Provision</b>		
<b>Estimated One-Time Burden</b>		
<b>Section</b>	<b>Burden Hours</b>	<b>Costs</b>
Regulatory Familiarization	498,414	\$25,708,194
Amending the Equal Opportunity Clause	124,604	\$3,871,135
Posting the notice for employees and applicants	623,018	\$15,947,703
Amending the tag line for solicitations and job advertisements	62,302	\$1,935,567
<b>One-time Burden</b>	<b>1,308,338</b>	<b>\$47,462,599</b>
<b>Total Annual Recurring Burden</b>	<b>0</b>	<b>\$0</b>
<b>Estimated Operations and Maintenance</b>	<b>0</b>	<b>\$797,462</b>
<b>Total Burden and Cost of the Rule</b>	<b>1,308,338</b>	<b>\$48,260,061</b>

OFCCP estimates the total cost of the rule at \$273,824 or \$173 per affected contractor for those contractors affected by the visa reporting provision and \$48,260,061 or \$97 per contractor for those contractors not affected by the visa reporting provision. If combined, the total cost of the rule would be \$48,533,885. Yet, this rule applies to contractors who enter into new and modified contracts on or after the effective date of the rule. Thus, some portion of the cost of the rule will not be realized in the first year and may be manifested over at least five years. There are a number of reasons why the

pattern of impacts over time is difficult to estimate: there is limited information regarding the number of new Federal contractors in a year, the number of Federal contractors can be fluid, and the terms of contracts may range in duration. While it might be plausible to assume that approximately 20 percent of contracts are new or modified each year, this rule applies to contractors, rather than contracts, and thus its impacts are likely to be relatively high in the first year or two, with lesser impacts through the fifth year of implementation. After all, it is common for contractors to have multiple contracts, and compliance with this rule will be required when the first of such contracts is renewed or modified.

However, there is no precise data with which to determine the number of new Federal contractors and subcontractors each year. Using a 2012 Small Business Administration study, OFCCP determined that, on average, 17.6 percent of Federal contractors that are small businesses were new to Federal contracting.<sup>15</sup> Recognizing that there is limited information regarding the number of new contractors in a year, that the terms of contracts may range in duration, that the rule applies to modifications to existing contracts, and taking into account the variety of industries affected by this rule, OFCCP conservatively assumes for the purposes of this analysis that roughly 20 percent of Federal contractors will be new each year. Thus, Table 3 shows the annual cost of this rule over the next five years for contractors affected by the reporting provision and Table 4 shows the annual cost of the rule over the next five years for those contractors not affected by the reporting provision.

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<sup>15</sup> Small Business Administration, “Characteristics of Recent Federal Small Business Contracting,” May 2012, <http://www.sba.gov/sites/default/files/397tot.pdf> (last accessed Nov. 28, 2014).

<b>Table 3: Annual Cost Summary for Contractors Affected by the Reporting Provisions*</b>				
	<b>Contractors</b>	<b>One-Time Cost</b>	<b>Recurring Cost</b>	<b>Total Cost</b>
Year 1	317	\$30,718	\$24,047	\$54,765
Year 2	634	\$30,718	\$48,094	\$78,812
Year 3	952	\$30,718	\$72,141	\$102,859
Year 4	1,268	\$30,718	\$96,188	\$126,906
Year 5	1,586	\$30,718	\$120,235	\$150,953
*The annual cost summary includes the one-time burden which occurs in the first year the contractor is covered and the recurring burden that increases by 20 percent annually up through the fifth year when the entire affected universe will be covered by the rule.				

<b>Table 4: Annual Cost Summary for Contractors Not Affected by the Reporting Provisions*</b>		
	<b>Contractors</b>	<b>Cost</b>
Year 1	99,683	\$9,652,012
Year 2	99,683	\$9,652,012
Year 3	99,683	\$9,652,012
Year 4	99,683	\$9,652,012
Year 5	99,683	\$9,652,012



<b>Table 4: Annual Cost Summary for Contractors Not Affected by the Reporting Provisions*</b>		
	<b>Contractors</b>	<b>Cost</b>
*This reflects the one-time cost associated with the provisions of this rule.		

**Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)**

Because no notice of proposed rulemaking is required for the rule under 5 U.S.C. 553(b)(B), the requirements of the Regulatory Flexibility Act and Executive Order 13272, pertaining to regulatory flexibility analysis, do not apply to this rule. *See* 5 U.S.C. §§ 601(2), 603(a). Accordingly, OFCCP has not prepared a regulatory flexibility analysis.

**Paperwork Reduction Act**

Compliance Date: The requirements apply to contracts entered into or modified on or after the effective date of these rules. Affected parties do not have to comply with the amended information collections contained in this rule until the Department publishes a Notice in the Federal Register stating that the OMB has approved the information collections 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.

As part of its continuing effort to reduce paperwork burdens, the Department conducts a preclearance consultation program to provide the general public and Federal

agencies with an opportunity to comment on collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3506(c)(2)(A). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The PRA typically requires an agency to provide notice and seek public comments on any collection of information contained in a rule. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to a collection of information until it is approved by OMB under the PRA.

This rule, which implements the provisions of Executive Order 13672, contains several provisions that could be considered amendments to “collections of information” as defined by the PRA. Specifically, the amendments to the Equal Opportunity Clause that is incorporated into covered subcontracts and purchase orders, to the notifications that must be given to employees and job applicants, and to the visa reporting provision contained in section 60-1.10. Sections 60-1.4(a), paragraph 1 of the Equal Opportunity Clause, and 60-1.4(b), paragraph 1 of the Equal Opportunity Clause, require contractors to post a notice for job applicants and employees. The notice is provided by Federal contracting officers. The disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure is not included within the PRA’s definition of “collection of information.” See 5 CFR 1320.3(c). OFCCP has determined that the posting requirements found in sections 60-1.4(a), paragraph 1 of the Equal Opportunity Clause, and 60-1.4(b), paragraph 1 of the Equal Opportunity Clause, do not meet the PRA’s definition of “collection of information.” Therefore, these

provisions are not subject to the PRA's requirement. OFCCP, however, determined that the amendments to paragraphs 2 and 7 of the Equal Opportunity Clauses at 60-1.4(a) and 60-1.4(b), and to the reporting provisions found at 60-1.10 could be considered information collections, thus an information collection request (ICR), has been submitted to OMB for approval. Concurrently with this final rule, OFCCP is publishing a notice of proposed amended information collection in the Federal Register. See 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8.

#### Number of Respondents:

This rule affects only contractors who enter into new or modified contracts with the Federal Government; it does not apply to those contractors who only have contracts entered into or last modified before the effective date. Thus, all new non-exempt Federal contractors with contracts, subcontracts, federally assisted construction contracts or subcontracts in excess of \$10,000 are required to comply with the rule. There are approximately 500,000 contractor firms registered in the General Service Administration (GSA)'s System for Award Management (SAM). OFCCP estimates that approximately 20 percent or 100,000 of its Federal contractor universe will be affected by this rule each year until its full implementation in five years. Therefore, OFCCP estimates there are 100,000 contractor firms affected by this rule annually.

#### Summary of Paperwork Burden

The total estimated burden for contractor companies to comply with the revised regulations is listed in the tables below. It is calculated based on a three-year approval of this information collection request. Table 5 shows the estimated PRA burden for those contractors affected by the visa reporting provision. Table 6 shows the estimated PRA

burden for those contractors not affected by the visa reporting provision.

<b>Table 5: Estimated Annual PRA Burden for Contractors Affected by the Visa Reporting Provision (3 years)</b>		
<b>Requirement</b>	<b>Estimated Annual Burden Hours</b>	<b>Monetization</b>
Amending the Equal Opportunity Clause	79	\$2,467
Amending the tag line for solicitations and job advertisements	40	\$1,230
Reporting denied visas to Department of State and OFCCP	1,269	\$48,094
<b>Total Annual Cost</b>	<b>1,388</b>	<b>\$51,791</b>

<b>Table 6: Estimated Annual PRA Burden for Contractors Not Affected by the Visa Reporting Provision (3 years)</b>		
<b>Requirement</b>	<b>Estimated Annual Burden Hours</b>	<b>Monetization</b>
Amending the Equal Opportunity Clause	24,921	\$774,227
Amending the tag line for solicitations and job advertisements	12,460	\$387,113
Reporting denied visas to Department of State and OFCCP	0	\$0
<b>Total Annual Cost</b>	<b>37,381</b>	<b>\$1,161,340</b>

These paperwork burden estimates are summarized as follows:

Type of Review: Amended collection

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

Title: Implementation of Executive Order 13672 Prohibiting Discrimination

Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors

OMB ICR Reference Number: 1250-0NEW

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

Average Number of Annual Responses: 100,000

Frequency of Response: on occasion

Estimated Annual Burden Hours: 38,769

Estimated Total Annual PRA Costs: \$0

### **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 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 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 rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The 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 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 rule would have no environmental health risk or safety risk that may disproportionately affect children.

**Environmental Impact Assessment**

A review of this 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 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 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 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 rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The 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**

**41 CFR Part 60-1**

Administrative practice and procedure, Equal employment opportunity, Gender identity, Government contracts, Reporting and recordkeeping requirements, Sexual orientation

**41 CFR Part 60-2**

Equal employment opportunity, Gender identity, Government procurement, Reporting and recordkeeping requirements, Sexual orientation

**41 CFR Part 60-4**

Construction industry, Equal employment opportunity, Gender identity,

Government procurement, Reporting and recordkeeping requirements, Sexual orientation  
**41 CFR Part 60-50**

Equal employment opportunity, Gender identity, Government procurement,  
Religious discrimination, Reporting and recordkeeping requirements, Sexual orientation

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**Patricia A. Shiu**  
Director, Office of Federal Contract Compliance Programs

Accordingly, under authority of Executive Order 13672 and for the reasons set forth in the preamble, OFCCP amends Title 41 of the Code of Federal Regulations, Chapter 60 as follows:

**PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS**

1. Revise the authority citation for 41 CFR part 60-1 to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, 3 CFR, 1964-1965 Comp., p. 339, 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, E.O. 13279, 67 FR 77141, 3 CFR, 2002 Comp., p. 258 and E.O. 13672, 79 FR 42971.

2. Revise § 60-1.1 to read as follows:

**§ 60-1.1 Purpose and application.**

The purpose of the regulations in this part is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons, without regard to race, color, religion, sex, sexual orientation, gender identity, or



national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. The regulations in this part also apply to all agencies of the Government administering programs involving Federal financial assistance which may include a construction contract, and to all contractors and subcontractors performing under construction contracts which are related to any such programs. The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause. Failure of a contractor or applicant to comply with any provision of the regulations in this part shall be grounds for the imposition of any or all of the sanctions authorized by the order. The regulations in this part do not apply to any action taken to effect compliance with respect to employment practices subject to title VI of the Civil Rights Act of 1964. The rights and remedies of the Government hereunder are not exclusive and do not affect rights and remedies provided elsewhere by law, regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

3. Amend § 60-1.4 by revising paragraphs (a) introductory text and (a)(1) and (2) and (b) introductory text and (b)(1) and (2) to read as follows:

**§ 60-1.4 Equal opportunity clause.**

(a) Government contracts. Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

\* \* \* \* \*

(b) Federally assisted construction contracts. (1) Except as otherwise provided, each administering agency shall require the inclusion of the following language as a condition

of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

\* \* \* \* \*

4. Revise § 60-1.8 to read as follows:

**§ 60-1.8 Segregated facilities.**

To comply with its obligations under the Order, a contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities," as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; Provided, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

5. Revise § 60-1.10 to read as follows:

**§ 60-1.10 Foreign government practices.**

Contractors shall not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin when hiring or making employee assignments for work to be performed in the United States or abroad. Contractors are

exempted from this obligation only when hiring persons outside the United States for work to be performed outside the United States (see 41 CFR 60-1.5(a)(3)). Therefore, a contractor hiring workers in the United States for either Federal or nonfederally connected work shall be in violation of Executive Order 11246, as amended, by refusing to employ or assign any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin regardless of the policies of the country where the work is to be performed or for whom the work will be performed. Should any contractor be unable to acquire a visa of entry for any employee or potential employee to a country in which or with which it is doing business, and which refusal it believes is due to the race, color, religion, sex, sexual orientation, gender identity, or national origin of the employee or potential employee, the contractor must immediately notify the Department of State and the Deputy Assistant Secretary of such refusal.

#### **Subpart B—General Enforcement; Compliance Review and Complaint Procedure**

6. Amend § 60-1.20 by revising paragraph (a) introductory text to read as follows:

##### **§ 60-1.20 Compliance evaluations.**

(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

\* \* \* \* \*

7. Amend § 60-1.41 by revising the introductory text and paragraphs (a) and (c) to read as follows:

**§ 60-1.41 Solicitations or advertisements for employees.**

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause in § 60-1.4 shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin;

\* \* \* \* \*

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin;

\* \* \* \* \*

8. Revise § 60-1.42 to read as follows:

**§ 60-1.42 Notices to be posted.**

(a) Unless alternative notices are prescribed by the Deputy Assistant Secretary, the notices which contractors are required to post by paragraphs (1) and (3) of the equal opportunity clause in §60-1.4 will contain the following language and be provided by the contracting or administering agencies:

**EQUAL EMPLOYMENT OPPORTUNITY IS THE LAW—DISCRIMINATION IS PROHIBITED  
BY THE CIVIL RIGHTS ACT OF 1964 AND BY EXECUTIVE ORDER NO. 11246**

Title VII of the Civil Rights Act of 1964—*Administered by:*

**THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

Prohibits discrimination because of Race, Color, Religion, Sex, or National Origin by  
Employers with 15 or more employees, by Labor Organizations, by Employment  
Agencies, and by Apprenticeship or Training Programs

**Any person**

**Who believes he or she has been discriminated against**

**Should contact**

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**THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**

**1801 L Street NW., Washington, DC 20507**

Executive Order No. 11246—*Administered by:*

**THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS**

Prohibits discrimination because of Race, Color, Religion, Sex, Sexual Orientation, Gender Identity, or National Origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

By all Federal Government Contractors and Subcontractors, and by Contractors Performing Work Under a Federally Assisted Construction Contract, regardless of the number of employees in either case.

**Any person**

**Who believes he or she has been discriminated against**

**Should Contact**

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**THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS**

**U.S. Department of Labor, Washington, DC 20210**

**PART 60-2—AFFIRMATIVE ACTION PROGRAMS**

9. Revise the authority citation for 41 CFR part 60-2 to read as follows:

Authority: Sec. 201, E.O. 11246, 30 FR 12319, E.O. 11375, 32 FR 14303, as amended by E.O. 12086, 43 FR 46501, and E.O. 13672, 79 FR 42971.

10. Amend § 60-2.16 by revising paragraph (e)(2) to read as follows:



**§ 60-2.16 Placement goals.**

\* \* \* \* \*

(e) \* \* \*

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.

\* \* \* \* \*

11. Revise § 60-2.35 to read as follows:

**§ 60-2.35 Compliance status.**

No contractor's compliance status will be judged alone by whether it reaches its goals. The composition of the contractor's workforce (*i.e.*, the employment of minorities or women at a percentage rate below, or above, the goal level) does not, by itself, serve as a basis to impose any of the sanctions authorized by Executive Order 11246 and the regulations in this chapter. Each contractor's compliance with its affirmative action obligations will be determined by reviewing the nature and extent of the contractor's good faith affirmative action activities as required under §60-2.17, and the appropriateness of those activities to identified equal employment opportunity problems. Each contractor's compliance with its nondiscrimination obligations will be determined by analysis of statistical data and other non-statistical information which would indicate whether

employees and applicants are being treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin.

**PART 60-4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS**

12. Revise the authority citation for 41 CFR part 60-4 to read as follows:

Authority: Secs. 201, 202, 205, 211, 301, 302, and 303 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

13. Amend § 60-4.3 in paragraph (a), by revising paragraph 10 in the clause to read as follows:

**§ 60-4.3 Equal opportunity clauses.**

(a) \* \* \*

Standard Federal Equal Employment Opportunity Construction Contract Specifications  
(Executive Order 11246)

\* \* \* \* \*

10. The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin.

\* \* \* \* \*

**PART 60-50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN**

14. Revise the authority citation for 41 CFR part 60-50 to read as follows:

Authority: Sec. 201 of E.O. 11246, as amended, 30 FR 12319; 32 FR 14303, as amended by E.O. 12086; and E.O. 13672, 79 FR 42971.

15. Revise § 60-50.5 to read as follows:

**§60-50.5 Nondiscrimination.**

The provisions of this part are not intended and shall not be used to discriminate against any qualified employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin.

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