

## OFCCP: Notice of Proposed Guidelines for Self-Evaluation of Compensation Practices With Executive Order 11246 With Respect to Systemic Compensation Discrimination (Part 2 of 2)

**A**s outlined in the October-December 2004 issue of the *EEO & Testing Quarterly Review Newsletter*, OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques to comply with 41 CFR 60–2.17(b)(3). However, as an incentive for contractors to implement a compensation self-evaluation system that conforms to the general standards outlined in the Notice, OFCCP will deem a contractor in compliance with Section 60–2.17(b)(3) and coordinate its compliance monitoring activities as explained in Section I: Guidelines (lead article in the October-December 2004 issue of the *Quarterly Review*) and Section II: Procedures (as follows).

**Section II: Procedures.** If the contractor’s compensation self-evaluation system meets the standards set forth in Section I: Guidelines of the Notice of Proposed Guidelines, OFCCP will coordinate its compliance monitoring activities as follows, based on Section II: Procedures:

A. During a compliance review, OFCCP will assess whether the contractor’s compensation self-evaluation system comports with the general standards outlined in Section I of this Notice.

B. If the contractor’s compensation self-evaluation system reasonably meets the general standards outlined in Section I of this Notice, OFCCP will consider the contractor’s compensation practices to be in compliance with Executive Order 11246. However, OFCCP may suggest in writing that the contractor make prospective modifications to improve the self-evaluation system’s conformity with the general standards outlined in Section I of this Notice, where OFCCP concludes that the self-evaluation system is only marginally reasonable under these guidelines; thereafter, during future compliance reviews, OFCCP will assess whether the contractor made the suggested changes in determining the contractor’s prospective compliance with E.O. 11246. If, during a future compliance review, OFCCP determines that the contractor has not made the changes that OFCCP suggested during

the prior compliance review, the contractor’s self-evaluation system will no longer be deemed to comport with the general standards outlined in Section I of this Notice.

C. OFCCP may review the documents and data set forth in Section IE to determine whether the contractor’s compensation self-evaluation system reasonably meets the general standards outlined in this Notice and, if applicable, whether the contractor reasonably made the changes that OFCCP suggested during a prior compliance review.

D. OFCCP personnel will direct technical issues about whether a contractor’s self-evaluation system meets the general standards outlined in Section I of this Notice to OFCCP’s Director of Statistical Analysis in the National Office, or his or her designee.

E. Alternative Compliance Certification: OFCCP understands that some contractors may take the position, based on advice of counsel, that their compensation self-evaluation is subject to certain protections from disclosure, such as the attorney client privilege or attorney work product doctrine, and that these protections would be waived if the contractor disclosed the self-evaluation. OFCCP does not take any position as to the applicability of such protections in the context of a compensation self-evaluation. However, to avoid protracted legal disputes over the applicability of such protections, OFCCP will permit the contractor to certify its compliance with 41 CFR 60–2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation analyses to OFCCP during a compliance review. The

certification must be in writing, signed by a duly authorized officer of the contractor under penalty of perjury, and the certification must state that the contractor has performed a compensation self-evaluation with respect to the affirmative action program or workplace at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation analyses and results are

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# OFCCP Questions? Answers to Frequently Asked Questions

As an EEO consultant, Biddle Consulting Group, Inc. is often asked detailed questions about how the Office of Federal Contract Compliance Programs (OFCCP) would respond to certain questions. Often, we must answer these questions based on our own opinions and experience with the leadership groups in the various OFCCP regions.

Recently, the OFCCP posted the answers to some common questions and we are fortunate enough to pass those answers on to you.

**We don't do any government work here. Federal Government work is performed in some other division in another state. Are we subject to the equal employment laws enforced by OFCCP?**

Yes. Generally speaking, once it has been determined that a business or organization is subject to the civil rights requirements enforced by OFCCP, all of the business's or organization's establishments or facilities will be subject to the same regulatory requirements, regardless of where the Federal contract is to be performed.

In addition, some businesses or organizations that do not independently hold Government contracts/subcontracts may still be covered under the laws enforced by OFCCP if they are

considered a "single entity" with a related business or organization that holds such contracts. In such instances, OFCCP uses a "single entity" test to determine whether the businesses or organizations are so closely related that they may constitute a single entity for purposes of OFCCP jurisdiction. The test requires OFCCP to consider whether:

1. The entities have common ownership;
2. The entities have common directors and/or officers;
3. One entity has de facto day-to-day control over the other through policies, management or supervision of the entity's operations;
4. The personnel policies of the entities emanate from a common or centralized source; and
5. The operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services.

The test focuses primarily on whether the ownership, management, and operations of the separate entities are, in fact, sufficiently interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered Federal contractor. However, there is growing recognition that centralized control over labor relations and personnel functions is the most important factor. By way of example, say that two entities are under common ownership, with a common board of directors, and have a central corporate office that determines and issues personnel policy for both entities, and generally manages most personnel-related issues for both entities. At the same time, the operations of the two entities are not particularly dependent on

each other. Despite the fact that one of the factors did not apply, the four factors that did outweigh the one that did not, so that the two entities being analyzed will most likely be considered a single entity.

**Have the proposed changes to the racial and ethnic categories for 2002 been adopted?**

The EEOC has proposed revisions to the EEO-1 and published the initial notice required under the Paperwork Reduction Act on June 11, 2003. See Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1), 68 FR 334965, June 11, 2003. The initial notice proposed changes to the ethnic and racial categories on the EEO-1 report, and also to the job categories. OFCCP intends to coordinate its data collection requirements with the changes made to the EEO-1 to avoid duplicative and inconsistent burdens on the Federal contractor community. OFCCP also intends to provide a reasonable transition period before any further changes by OFCCP become effective.

**What is the correct procedure for a contractor to obtain the ethnic information of its employees and applicants?**

OFCCP regulations 41 CFR 60-1.12(c) indicate that for any personnel or employment record a contractor maintains, it must be able to identify the gender, race, and ethnicity of each employee and, where possible, the gender, race and ethnicity of each applicant.

OFCCP has not mandated a particular method of collecting the information. Self-identification is the most reliable method and preferred method for compiling information about a person's gender, race and ethnicity.

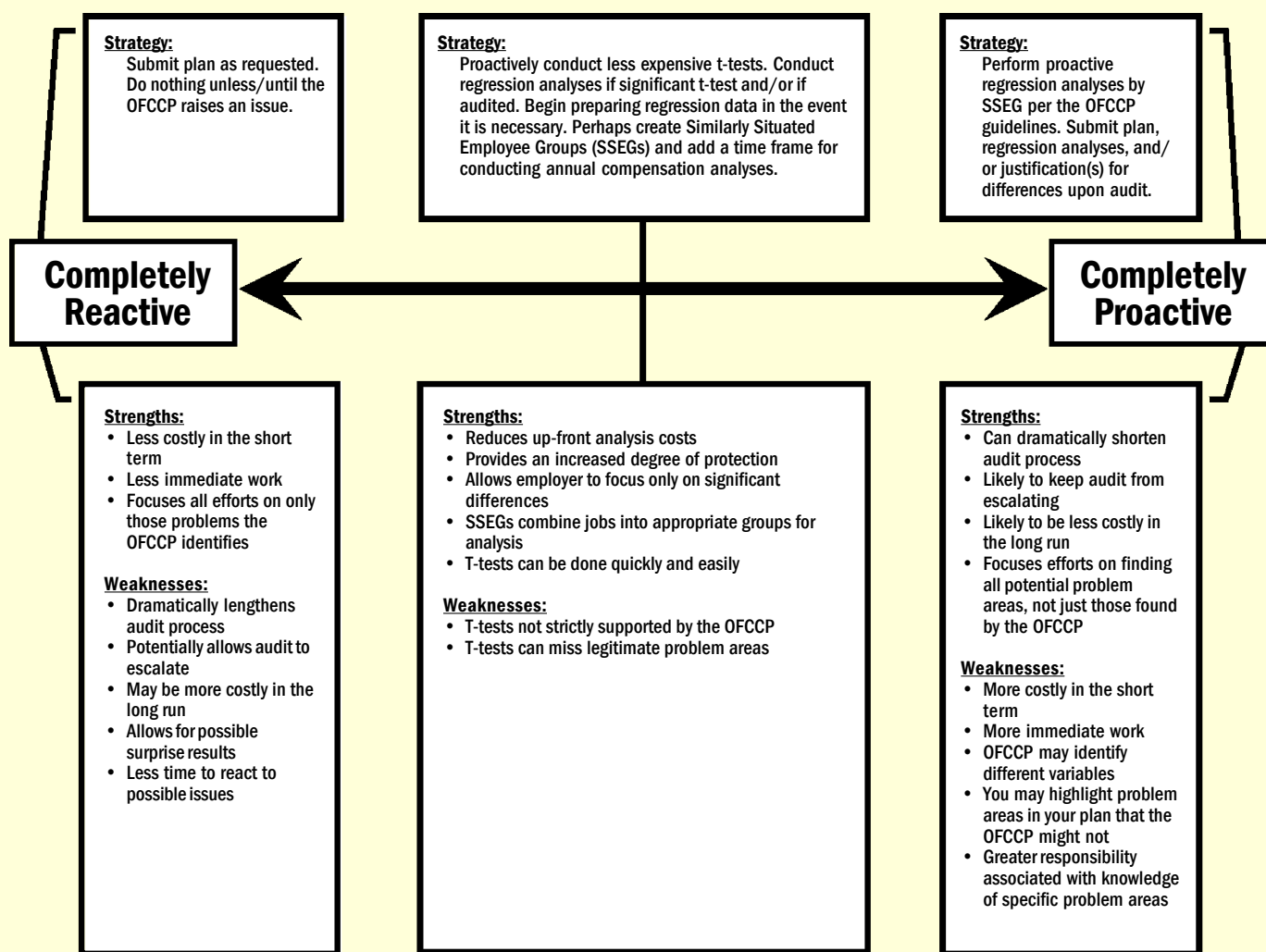
...see OFCCP: Q&A page 4

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## OFCCP Audits: The Reactive-Proactive Spectrum of Compensation Analyses

Organizations are quickly realizing that compensation equity is the latest high-profile topic with the Office of Federal Contract Compliance Programs (OFCCP) and it's not going to go away. The analyses required to determine the existence of problem areas can be time consuming and costly. As a result, many organizations are struggling with the question of whether to be proactive in seeking out and rectifying problem areas or to be reactive and only seek to justify problem areas in the event of an OFCCP audit. The chart below addresses three differing approaches to conducting compensation analyses and elaborates on the strengths and weakness of each.



## OFCCP: Q&A

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Contractors are strongly encouraged to rely on employee self-identification to obtain this information. Visual observation is an acceptable method for identifying demographic data, although it may not be reliable in every instance. If self-identification is not feasible, post-employment records or visual observation may be used to obtain this information. Contractors should not guess or assume the gender, race or ethnicity of an applicant or employee.

A contractor's invitation to an employee or applicant to self-identify his or her gender, race, and ethnicity should indicate to individuals that supplying such information is voluntary. OFCCP would not hold a contractor responsible for applicant data when the applicant declines to self-identify and there are no other acceptable methods of obtaining this information.

### **At what point during the review of compensation matters will the OFCCP perform a regression analysis?**

A regression analysis will be conducted when there are indicators of potential systemic compensation discrimination problems. OFCCP will perform a regression analysis and provide it to the contractor in support of a Predetermination Notice or a Notice of Violation alleging systemic compensation discrimination. The purpose of the regression analysis is to analyze the relationship between the compensation and the legitimate factors that the contractor uses to determine pay decisions, such as work performed, responsibility level, skills and qualifications, education, performance, or other relevant experience. The regression analysis will show whether or not race and/or gender have statistically significant effects on compensation.

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


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

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

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

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

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*For more detail please go to the OFCCP site: <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/emprfaqs.htm>* 


## OFCCP Notice

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subject to the attorney-client privilege and/or the attorney work product doctrine. Because in such an instance OFCCP cannot evaluate the contractor's compliance with the general standards outlined in Section I of this Notice, a contractor that opts for this compliance certification alternative will not be entitled to the coordination outlined in Section IIB of this Directive. That is, contractors that opt for this alternative compliance certification do not receive the benefit of OFCCP coordination of

agency compliance monitoring activities. Thus, for contractors that elect only to certify compliance with Section 60-2.17(b)(3), OFCCP will evaluate their compensation practices without regard to the analysis or results of their compensation self-evaluation systems.

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*Federal Register, Vol. 69, No. 22, Tuesday, November 16, 2004, Notices, pp. 67252- 67255, can be found on the BCG website at [www.biddle.com/resources/articles.htm](http://www.biddle.com/resources/articles.htm)* 

### **Check out these websites:**

[www.biddle.com](http://www.biddle.com) | [www.opac.com](http://www.opac.com) | [www.critical911.com](http://www.critical911.com)  
[www.fireselection.com](http://www.fireselection.com) | [www.uniformguidelines.com](http://www.uniformguidelines.com)

# 2005 Events Calendar

## AAP Training Schedule

**: April 19-20 :**  
*Affirmative Action Plan  
Methodology & Software Training*  
**Sacramento, CA**  
Cost: \$990

**: July 19-20 :**  
*Affirmative Action Plan  
Methodology & Software Training*  
**Sacramento, CA**  
Cost: \$990

## Conference Exhibiting Schedule

**: April 14-16 :**  
*American Association  
for Affirmation Action  
(AAAA) Conference*  
**St. Louis, MO**

**: June 19-21 :**  
*Society for HR Management  
(SHRM) Annual Conference*  
*Booth #2440*  
**San Diego, CA**

**: August 9-10 :**  
*National Industry Liaison Group  
(NILG) Conference*  
**Grapevine, TX**

For more information on any of the conferences or other events listed, please call BCG toll-free at (800) 999-0438 or e-mail us at [staff@biddle.com](mailto:staff@biddle.com)

