TRANSMITTAL

U.S. DEPARTMENT OF LABOR
Office of Federal Contract Compliance Programs

Number: 295 Date: December 16, 2010 OFCCP Order No. ADM Notice/Other

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1. **SUBJECT**: Active Case Enforcement (ACE) procedures.

2. **PURPOSE**: To outline the procedures for conducting Supply & Service (S&S) compliance evaluations under the Active Case Enforcement process.

3. **FILING INSTRUCTIONS**:

   Holders of ADM and LEG Binders only: File this Notice behind the "Other" tab in your Administrative Practices Binder.

   District and Area Office EOSs and EOAs only: File this Notice behind the tab for ADM Directives in your FCCM Binder.

4. **OBSOLETE DATA**: Directive Number 285, issued September 17, 2008. Subject: Active Case Management. Additionally, if there is a conflict between any previous guidance or existing procedures and the ACE procedures outlined in this directive, the ACE procedures will take precedence.

5. **DISTRIBUTION**: A, B (both hard copy and electronically); C (hard copy only)

6. **ATTACHMENTS**: Closure Letter for No Apparent Violations or Technical Violations; and Closure Letter for Substantive Violations.

7. **EXPIRATION DATE**: This directive remains in effect until rescinded or modified.

Patricia A. Shiu — 12/16/10

PATRICIA A. SHIU
Director
Office of Federal Contract Compliance Programs

DATE

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
WASHINGTON, D.C. 20210

1. **SUBJECT**: Active Case Enforcement (ACE) procedures.

2. **PURPOSE**: To outline the procedures for conducting Supply & Service (S&S) compliance evaluations under the Active Case Enforcement (ACE) process.

3. **BACKGROUND**: On July 25, 2003, the Active Case Management (ACM) process for conducting S&S compliance evaluations was adopted by the Office of Federal Contract Compliance Programs (OFCCP). The stated purpose of ACM was to concentrate agency resources on identifying and remedying cases of systemic discrimination, thereby enabling the agency to use its resources in a more efficient manner. However, ACM proved to be of limited utility in that it did not allow OFCCP to effectively use all of its investigative tools. OFCCP has therefore rescinded ACM (see Directive 292, dated December 02, 2010) and determined that the ACE process described in this directive will more effectively utilize its resources and strengthen its enforcement efforts.

4. **DEFINITIONS**: To ensure consistency in implementation, the following terms are defined:

   - **Compliance Check** - An investigative procedure that may be used by OFCCP when conducting a compliance evaluation. A compliance check is a determination of whether the contractor has maintained appropriate records consistent with 41 CFR Parts 60-1.12, 60-250.80, 60-300.80, and 60-741.80. See 41 CFR 60-1.20(a)(3), 60-250.60(a)(3), 60-300.60(a)(3), and 60-741.60(a)(3).

   - **Compliance Evaluation -** The investigation and review process used by OFCCP to determine if a federal contractor is complying with the nondiscriminatory and affirmative action employment obligations outlined in 41 CFR Chapter 60. A compliance evaluation consists of any one or any combination of the following investigative procedures: compliance review; offsite review of records; compliance check; or focused review; See 41 CFR 60-1.20(a), 60-250.60(a), 60-300.60(a), and 60-741.60(a).

- **Compliance Review** - The most common investigative procedure that is used by OFCCP when conducting a compliance evaluation. A compliance review is a comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis; See 41 CFR 60-1.20(a)(1), 60-250.60(a)(1), 60-300.60(a)(1), and 60-741.60(a)(1).

- **Contractor** - Unless otherwise indicated, a prime contractor or subcontractor.

- **Focused Review** - An investigative procedure that may be used by OFCCP when conducting a compliance evaluation. A focused review is an onsite review that focuses on one or more components of the contractor's organization or one or more aspects of the contractor's employment practices; See 41 CFR § 60-1.20(a)(4), 60-250.60(a)(.4), 60-300.60(a)(4), and 60-741.60(a)(4).

- **Full Desk Audit** - Comprehensive analyses of all of a contractor's written AAPs - Executive Order 11246 (EO 11246), Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) - and supporting documentation. These analyses include, but are not limited to, an impact ratio analysis, compensation analysis, and assessment of the reasonableness and acceptability of each AAP.

- **Full Compliance Review** - Implementation of all three stages of a compliance review, i.e., desk audit, onsite, and where necessary, an offsite analysis.

- **Indicator (of discrimination or violation)** - Any one or any group of the following: statistical indicators of possible discrimination, anecdotal evidence to support possible discrimination, patterns of individual discrimination, patterns of systemic discrimination, patterns of major technical violations such as recordkeeping deficiencies or failure to maintain an AAP, and indicators of non-compliance with

labor and employment laws administered by other federal agencies that may relate to violations of OFCCP's laws.[1] For example, a contractor with a history of recordkeeping violations under WHD and OSHA may indicate that potential violation of OFCCP's recordkeeping requirements.

- **Offsite Review of Records** - An investigative procedure that may be used by OFCCP when conducting a compliance evaluation. An offsite review of records is an analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the EO 11246, Section 503 and VEVRAA and the regulations at 41 CFR Chapter 60;[2] See 41 CFR 60-1.20(a)(2), 60-250.60(a)(2), 60-300.60(a)(2), and 60-741.60(a)(2).

- **Preaward Compliance Evaluation** – A compliance evaluation of any prospective contractor or first-tier subcontractor establishment entering into an S&S contract or subcontract of $10 million or more conducted before the award of the contract to determine the contractor's compliance with EO 11246. A preaward compliance evaluation is conducted unless the OFCCP has evaluated and found the contractor or subcontractor establishment to be in compliance within the past two years. See 41 CFR § 60-1.20(d) and 60-1.29(a).

5. **POLICY**: Effective January 1, 2011, all S&S compliance evaluations scheduled from the Federal Contractor Scheduling System (FCSS) will be processed using the ACE procedures established in this directive. Additionally, if there is a conflict between any previous guidance or existing procedures and the ACE procedures outlined in this directive, the ACE procedures will take precedence.

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[1] OFCCP currently obtains compliance information from the Equal Employment Opportunity Commission (EEOC), and is in the process of expanding its indicators to include findings of non-compliance with the laws administered by the Department of Labor's Veterans' Employment & Training Services (VETS), Occupational Safety and Health Administration (OSHA) and Wage and Hour Division (WHD).

[2] An offsite review of records is different from the offsite analysis stage of a compliance review. See 41 CFR 60-1.20(a)(1)(iii) and 41 CFR 60-1.20(a)(2).

A. Basic Principles:

1) All S&S contractors selected for review by the FCSS system will be required to submit their AAPs and supporting documentation to OFCCP. See 41 CFR 60-1.20(a), 60-250.60(a), 60-300.60(a), and 60-741.60(a).

2) A full desk audit will be performed in every compliance evaluation to ensure the contractor's compliance with EO 11246, Section 503, and VEVRAA.

3) For quality control purposes, every 25th federal contractor establishment will be selected by FCSS for a full compliance review.[3]

4) Indicators of potential discrimination may be of an individual and/or class (i.e., two or more victims) nature.

5) Whenever an onsite review is conducted, the CO will document the contractor's compliance with Executive Order 13496, which requires notification to employees of their rights under the National Labor Relations Act (NLRA).

6) Contractor establishments that have undergone a compliance evaluation will be excepted from scheduling from the FCSS for another compliance evaluation of any kind for 24 months from the date of closure of the compliance evaluation.

6. **PROCEDURES:** The following procedures apply to scheduling and conducting compliance evaluations of Supply & Service contractors.

A. Scheduling Procedures:

OFCCP will use the FCSS to select Supply & Service contractor establishments for compliance evaluation using administratively neutral selection criteria.

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[3] This replaces the quality control measure in the ACM directive that required a full desk audit for every 25th contractor establishment on the FCSS list, and a full compliance review for every 50th contractor establishment on the FCSS list.

Once identified by the FCSS, establishments selected for evaluation will appear on a computer-generated list developed by the OFCCP National Office. This list will designate the contractor establishments that each Regional/District/Area Office is to schedule for a compliance evaluation during the scheduling cycle. Using administratively neutral selection criteria, this list will also designate which investigative procedure (i.e., compliance review; off-site review of records; compliance check; or focused review) will be followed.

The Regional/District/Area Offices are required to schedule the federal contractor establishment identified on the FCSS in strict sequential order.

B. Compliance Evaluation Procedures:

1) Compliance Review

When a contractor is designated for a compliance review, OFCCP will take the following steps:

A. Coinciding with the mailing of the scheduling letter, OFCCP will contact the Equal Employment Opportunity Commission (EEOC) and the State and/or Local Fair Employment Practice (FEP) agency to determine the nature, status and outcome of any complaints that have been filed against the contractor at the establishment under review.

B. The CO will conduct a full desk audit in every compliance review and evaluate the contractor's compliance with its obligations under EO 11246, Section 503, and VEVRAA. See 41 CFR Parts 60-1 through 60-50, 60-741, 60-250 and 60-300.

C. The CO will review the contractor's compliance history for the past three years, to assess the contractor's recent compliance history and determine if there are patterns of non-compliance. To do this, the CO will use the OFCCP internal database system, and review any information received from EEOC, State or local FEP, and/or other labor and

employment agencies, such as the Department of Labor's Veterans' Employment and Training Service and Wage and Hour Division.

D. The CO will determine whether there are indicators of potential discrimination or violation that will require an onsite investigation. In addition to statistical and anecdotal evidence of discrimination, indicators of potential discrimination/violation also include, but are not limited to: patterns of individual discrimination, patterns of systemic discrimination, patterns of major technical violations such as recordkeeping deficiencies or failure to maintain an AAP, and non-compliance with other labor and employment laws, e.g., wage and hour laws.

E. If the contractor's AAP or supporting document submitted is insufficient to make a compliance determination, the CO may elect to proceed to the onsite.

F. The CO may close the compliance review at the conclusion of the desk audit, if no indicators of potential discrimination/violation are found. However, if the compliance review is designated as the "quality control" review or a focused review, the CO must conduct an onsite review, even in the absence of indicators.

G. If indicators are identified during the desk audit, the CO may conduct an onsite review of the contractor's compliance with all of the laws enforced by OFCCP.

H. An onsite review is not limited to the nature or scope of the indicators that triggered the onsite review.

I. Where an onsite review is conducted, the CO will also document the contractor's compliance with Executive Order 13496.[4]

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[4] For more information on E.O. 13496 see Directive Number 290, issued on June 15, 2010. Subject: Verification Procedures Under Executive Order 13496, Notification of Employee Rights under Federal Labor Laws, and the Department of Labor's implementing regulations at 29 C.F.R. Part 471

J. During the desk audit, if minor technical violations are identified and there are no indicators of potential discrimination, the CO should try to remedy the deficiencies at this stage.

K. If the compliance review indicates that there is no potential discrimination or unresolved minor technical violations with EO 11246, Section 503 or VEVRAA the CO will follow established closure procedures and issue the Closure for No Apparent Violations or Technical Violations. See Attachment 1.

L. At the conclusion of an investigation where major technical violations were resolved and/or discrimination was remedied through a conciliation agreement, the CO will issue the appropriate closure document(s), including the Closure Letter for Substantive Violations. See Attachment 2.

M. If the contractor denies OFCCP access or refuses to provide requested information, the CO will follow the show cause notice procedures authorized in 41 CFR 60-1.28; 60-250.64; 60-300.64; 60-741.64, as appropriate.[5]

2) Other Investigative Procedures

Some contractors selected on the FCSS list may be designated for a compliance evaluation that uses an investigative method other than a compliance review. Specifically, OFCCP may designate a contractor for a compliance evaluation using the offsite review of records, compliance check or focused review investigative procedure:

A. All S&S contractors selected for review by the FCSS system will be required to submit their AAPs and supporting documentation to OFCCP for a full desk audit.
B. An offsite review of records, compliance check or focused review, may be expanded to include the use of one or more additional investigative methods, including conducting a full compliance review in

[5] Field offices must obtain approval from the National Office before issuing such a show cause order.

appropriate circumstances, *e.g.*, when indicators of discrimination are found.

C. If there are no indicators found during an offsite review of records, compliance check, or focused review the compliance evaluation may be closed. To close the evaluation the Compliance Officer will issue the Closure Letter for No Apparent Violations or Technical Violations. See Attachment 1.

7. **QUALITY CONTROL**: As a quality control measure to ensure contractor compliance with the laws enforced by OFCCP, a full compliance review - including an onsite review - will be conducted of every 25th contractor establishment. Contractor establishments selected for this quality control compliance review will be selected by the FCSS and provided to OFCCP field offices on their scheduling list.

8. **CASE MANAGEMENT SYSTEM (CMS)**: The Case Management System (CMS) is being revised to incorporate the aforementioned ACE procedures.

Patricia A. Shiu

PATRICIA A. SHIU
Director
Office of Federal Contract Compliance Programs

12/16/10
DATE

ATTACHMENTS

Attachment 1: Closure Letter for No Apparent Violations or Technical Violations

Name of Establishment CEO
Title of CEO
Establishment Name
Street Address
City, State, Zip

Dear [Name of CEO]:

Our recent evaluation of your equal employment opportunity policies and practices at (Name and Location of the Establishment reviewed) has been completed.

[Select either Paragraph 2 or Paragraphs 3 and 4]

(2)

During the compliance evaluation process we found no apparent violations of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212, or VEVRAA). This determination may be modified by the Regional Director, or by the Director of the Office Federal Contract Compliance Programs, within 45 days of the issuance of this letter.

[OR]

(3) and (4)

During the compliance evaluation process, we identified and resolved the following violation(s): [identify the technical violation(s) resolved during the compliance evaluation, including the appropriate regulatory citation and specific remedy]. It is understood that this/these problem area(s) will not recur.

We found no additional violations of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212, or VEVRAA). This determination may be modified by the Regional Director, or by the Director of the Office Federal Contract Compliance Programs,

within 45 days of the issuance of this letter.

[Optional]

The Office of Federal Contract Compliance Programs sincerely appreciates the cooperation and courtesies extended by you and your staff during the conduct of the compliance review.

Sincerely,

(Name of District Director)
District Director

cc: (as appropriate)

Attachment 2: Closure Letter for Substantive Violations

Name of Establishment CEO
Title of CEO
Establishment Name
Street Address
City, State, Zip

Dear [Name of CEO]:

Our recent evaluation of your equal employment opportunity policies and practices at (Name and Location of the Establishment reviewed) has been completed.

Subject to the implementation of commitments detailed in our Conciliation Agreement dated (date), it is the determination of this office that there are no further apparent violations of the requirements of our regulations. This determination may be modified by the Regional Director, or by the Director of the Office of Federal Contract Compliance Programs. However, if neither the Regional Director nor the Director of the Office of Federal Contract Compliance Programs takes action on it within 45 days of my signature on this Agreement, it shall be deemed approved.

This determination does not preclude a future determination of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

[Optional]
The Office of Federal Contract Compliance Programs sincerely appreciates the cooperation and courtesies extended by you and your staff during the conduct of the compliance review.

Sincerely,

(Name of District Director)
District Director

cc: (as appropriate)