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VIA EMAIL AND U.S. MAIL

Joseph DuBray, Jr.
Director, Policy, Planning and Program Development
OFCCP
Room C-3325
200 Constitution Avenue, NW
Washington D.C. 20210

Re: Comments on OFCCP's Proposed Systemic Compensation
Discrimination and Self Evaluation Guidelines

Dear Mr. DuBray:

The Labor and Employment Law Committee of the Association of Corporate Counsel ("ACC") requests permission to file, subsequent to the January 19, 2005 deadline, the following comments in response to OFCCP's notices: "Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination" ("Compensation Discrimination Guidelines") and "Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination" ("Self Evaluation Guidelines") (the Compensation Guidelines and the Self Evaluation Guidelines collectively are referred to as the "Guidelines").

ACC is the only global bar association exclusively serving the professional objectives and goals of in-house counsel to corporations and other private sector organizations. Since its founding in 1982, ACC has grown to represent more than 14,000 individual in-house counsel members who work in more than 6,000 business entities. The Labor and Employment Law Committee ("Committee") is one of the largest of ACC's committees, with approximately 4,000 attorney members, many of who manage the employment-law function of government contractors subject to the nondiscrimination and affirmative action requirements of Executive Order 11246. The Committee believes our comments provide the OFCCP (sometimes the "Agency") with the unique perspective of in-house employment counsel for contractors regarding fundamental issues that are the subject of the Guidelines.

Overall, we commend the OFCCP for its singular leadership in proposing Guidelines establishing procedures to further integrate consideration of systemic compensation practices into contract compliance processes and providing some measure of technical assistance about the complex legal principles and statistical methodologies applicable to evaluating systemic compensation practices. Each is long overdue and the Committee commends the OFCCP's initiative. The Guidelines represent a considerable improvement over the "salary-grade"

methodology embraced by prior administrations, in which differences around mean or median average compensation by grade-level, after accounting for time-in-grade, performance and experience, were deemed to be *prima facie* evidence of unlawful discrimination. That approach contradicted a significant body of long-standing case law establishing substantive and evidentiary principles applicable to proving systemic compensation discrimination. The Committee applauds the OFCCP's embrace of Title VII principles applicable to evaluating compensation practices. The Committee also supports the OFCCP's decision to establish and staff a Division of Statistical Analysis with expert-level statisticians. However, we believe that certain changes in methodology under the Guidelines are so extensive and significant that at the very least the OFCCP should pilot-test principles with a select group of contractors of various sizes and resources for a two-year period before the compensation Guidelines are issued in final form. **This is especially the case given the length of time that the previous compensation methodology has been in use.**

Section I of this Comment sets forth the Committee's concerns about the considerable resource implications of the requirement that federal contractors generally conduct annual multiple regression analyses of compensation. **Section II** recommends that OFCCP clarify and strengthen protections against disclosure of high sensitive and confidential compensation data as part of any final Guidelines, recognizing and preserving the attorney-client privilege and attorney work product doctrine. **Section III** identifies areas within the Compensation Discrimination Guidelines and the Self Evaluation Guidelines needing clarification. **Section IV** requests that the OFCCP issue comprehensive technical assistance contemporaneous with the adoption of any final Guidelines.

I. RESOURCE IMPLICATIONS OF REQUIRING CONTRACTORS TO CONDUCT ANNUAL MULTIPLE REGRESSION ANALYSES

A. OMB Study. The requirement to analyze compensation through the use of a multiple regression analysis places a very significant resource burden upon most federal contractors. Use of multiple regression analyses requires contractors to extensively research, investigate, and compile data on its employees that are not routinely kept electronically (*e.g.*, prior work experience, education history, job performance assessments, *etc.*) or are not maintained in one centralized location. Compiling, analyzing, maintaining and updating such data would require contractors to dedicate significant new and/or additional human and system resources. In addition, the Guidelines require contractors to develop "similarly situated employee groupings" based on similarity of work performed, responsibility level, and skills required for the position and conduct multiple regression analyses based on such groupings. The OFCCP acknowledges that the required use of "similarly situated employee groupings" most likely differs from the "job family" groupings contractors are required to use when constructing annual affirmative action plans, which in turn differs from job classification and compensation protocols typically used by contractors. Indeed, contractors most likely do not make compensation decisions based on the mandated artificial groupings. Consequently, contractors will have one of two choices under the proposed Guidelines. They can expend significant additional resources, revamp their compensation systems and restructure the manner in which compensation decisions are made to reflect this new system of analysis or continue to make compensation decisions consistent with their business objectives and methods, but be prepared to bear the burden of collecting and analyzing volumes of information merely to comply with the OFCCPs methodological preference.

Recommendation 1: Because the use of a multiple regression analysis creates a significant new and/or additional human and systems resource burden on contractors generally, submit the Guidelines to the Office of Management and

Budget (OMB) so it may appropriately study their impact on federal contractors and the contracting process.

B. Two-Year Pilot. Only some large contractors have the budgets and resources to routinely use sophisticated electronic information systems, teams of human resources professional and a phalanx of lawyers and professional statisticians to conduct compensation analyses embodying the components embraced by the Guidelines. Such analyses are quite costly. Generally, contractors devote considerable resources to purchase or develop sophisticated, integrated human resource information systems ("HRIS") that capture relevant personal information about job applicants and employees. However, even the most sophisticated HRIS typically needs to be supplemented in order to fully reflect and explain determinants of pay, particularly as iterative analyses are conducted in order to rationalize results and refine statistical models. Such supplementation typically requires hundreds of hours interviewing human resource personnel and/or business area management and manually reviewing records. In addition, it is not unusual for a contractor to hire specialized professional consultants with advanced training in probability theory and statistics to conduct multiple regression analyses and employment-law counsel to interpret and provide advice about the legal compliance implications of the results. Consequently, the Committee believes that the requirements set forth in the Guidelines will have profound resources, time, and budgetary implications for most contractors that do not typically operate with the assistance of sophisticated electronic information systems, a phalanx of human resources professionals and a team of professional statisticians and employment counsel.

Recommendation 2: Pilot-test proposed compensation analyses for a two-year period with a select group of contractors of various sizes and resources before the compensation Guidelines are issued in final form.

C. Annual Multiple Regression Analyses. Given the personnel and other resource commitments necessary to conduct a compensation review under the proposed Guidelines, it is not clear that the Executive Order ought to be interpreted to mandate that contractors conduct *annual* reviews of compensation practices, as opposed to review based on a schedule tailored to the circumstances unique to a contractor's workforce, generally, or compensation practices, specifically. Our collective experience teaches that compensation analyses of the type envisioned by the Guidelines often have a shelf-life of at least three years and sometimes longer depending on employee attrition rates, changes in organizational structure, job classifications and compensation programs and practices. Instead, the Guidelines adopt a "uniform one-size-fits all" requirement and enforcement philosophy that fails to recognize this reality, and as such is overly burdensome.

Recommendation 3: Amend the Guidelines to affirmatively acknowledge that appropriate compensation analysis need not be conducted annually in order for a contractor to be in compliance with the contractor's obligation to review compensation practices.

Recommendation 4: Incorporate into the Guidelines factors that OFCCP will use to evaluate whether the contractor's prior compensation analyses continue to satisfy its obligations and that such factors include consideration of hiring and attrition rates as well as changes in organizational structure, job classifications and compensation programs and practices.

D. Under-Inclusiveness of Current Definition of "Small-Contractor." The multiple regression methodology recommended for use in conducting compensation analyses will be particularly costly and burdensome for smaller contractors. While Section IC of the Self-Evaluation Guidelines does not require small employers to adhere to the OFCCP specified

methodology for conducting analyses, this size distinction is under-inclusive because a company with 250 employees simply is not large. Defining "small employer" as entities with less than 250 employees is woefully under-inclusive given the resource commitments necessary to conduct the specified compensation analysis.

Recommendation 5: Raise the employee threshold to 2,500 employees and use additional criteria such as annual revenues or dollar amount of government contracts.

II. PROTECTION OF HIGHLY SENSITIVE AND CONFIDENTIAL BUSINESS INFORMATION AND RECOGNITION OF APPLICABLE PRIVILEGES

E. Protecting Highly Confidential, Sensitive Compensation Data. Under Section IF of the Guidelines, contractors must make available to the OFCCP all of the documents supporting the contractor's self-evaluation system. The coordinated compliance review also gives the OFCCP access to 'any' personnel records. The Guidelines are silent as to what constitutes 'make available' and whether the OFCCP will retain copies of any of the contractor's compensation records, documents, and or data which may be reviewed. Most of that data typically is of a highly confidential and proprietary nature, if not otherwise privileged, and directly affects the contractor's success in the market in which it competes. Accordingly, and without regard to whether the contractor waives any work product and or attorney client privileges, at least with respect to the compliance review process itself, the Self Evaluation Guidelines should establish procedures under which contractors' confidential compensation data and related materials would be protected from disclosure to any third party including but not limited to disclosure through the Freedom of Information Act and the like. Section IF should contain an affirmative statement that, except as may be required by court order or in connection with any subsequent litigation involving the OFCCP as a party, the OFCCP will not release or provide third party access to obtained contractor information. In order to help insure against inadvertent or unintended disclosures, Section IF should also provide that all materials made available or reproduced for OFCCP's use during a coordinated compliance review will be returned to the contractor upon conclusion of the OFCCP's investigation. OFCCP enforcement and data retention procedures also should mandate that the OFCCP's compliance officers will not reveal any specific employee compensation data, provided in any individually identifiable manner, to the contractor's employees who are being interviewed as part of the agency's review process with the exception of contractor representatives and management responsible for the self evaluation data itself and or for responding and assisting in the coordinated agency review.

Recommendation 6: Amend the proposed guidelines to include affirmative statements that: (i) confidential contactor data and self evaluation information made available during a coordinated compliance review shall remain confidential as between the OFCCP and the individual contractor; (ii) the OFCCP will reasonably preserve the confidentiality of individually identifiable employee compensation data; and (3) the Agency will return confidential compensation data to the contractor upon completion of the coordinated compliance review.

F. Preservation of the Attorney-Client Privilege and Attorney Work Product Doctrine. Under Section IIE of the Self-Evaluation Guidelines, in order to certify compliance to the OFCCP and obtain the benefit of self-evaluation and bypass further scrutiny/investigation of a company's compensation practices, contractors are asked to waive the attorney-client privilege, attorney work product privilege, the self-critical analysis privilege, and any other applicable privileges by turning over their data and analyses of compensation to the OFCCP. Attorney-client privilege is a rule that prevents compelled disclosure of confidential attorney-client communications and is recognized under Federal Rules of Evidence 501. The Model Rules of Professional Conduct R. 1.6, comment 13, notes that the obligation of confidentiality requires

lawyers to invoke the attorney-client privilege when it is applicable. Similarly, attorney-client communications as well as other material may be protected from disclosure under the Attorney Work Product Immunity. The privilege stems from the U.S. Supreme Court decision of *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) and is now codified in the Federal Rules of Civil Procedure 26(b)(3). It is clear from the proposed Guidelines that OFCCP recognizes the application of the attorney-client privilege and work product immunity to compensation analyses conducted in order to assess legal risk and provide legal advice, but inappropriately (in our view) proposes to structure the compliance process to reward contractors that waive these fundamental privileges (by permitting contractors that meet several proposed strict requirements to certify compliance with 41 CFR 60-2.17(b)(3)) and penalize contractors who do not (by subjecting the latter's compensation practices to a full audit). A contractor should not have to choose between waivers of evidentiary privileges and immunities arising from their seeking and obtaining legal risk assessments on the one hand and undergoing full-scale compensation audits on the other hand. Such a choice will not encourage or achieve increased voluntary compliance and it is not an effective or efficient use of the Agency's limited enforcement resources

Recommendation 7: Permit contractors to certify compliance with 41 CFR 60-2.17(b)(3) by briefly summarizing the methodology and factors considered in a Self Evaluation and thereby be entitled to the coordination outlined in Section IIB. And, randomly select contractors that use the proposed revised certification process for compliance reviews of their compensation practices.

III. CLARIFICATIONS NEEDED FOR BOTH COMPENSATION DISCRIMINATION and SELF EVALUATION GUIDELINES

Several aspects of the Compensation Discrimination Guidelines and the Self Evaluation Guidelines are either unclear or fail to provide meaningful guidance to contractors seeking in good faith to comply with their nondiscrimination obligations.

G. Statistical and Non-Statistical Analysis. Section II of the Compensation Discrimination Guidelines reflects the OFCCP's decision to use multiple regression analysis to determine whether systemic discrimination exists within a contractor's compensation system. According to Section I of the Self Evaluation Guidelines the "OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques pursuant to 41 C.F.R. § 60-2.17(b)(3)." Furthermore, Section 60-2.17(b)(3) does not contain any limitations on the type of statistical analysis that must be used. However, a reading of section I of the Self Evaluation Guidelines (in conjunction with the Systemic Compensation Discrimination Guidelines) appears to indicate that a contractor can use only the methods described in both sets of Guidelines to comply with 60-2.17(b)(3); especially because the OFCCP will use these Guidelines to determine compliance and whether there is systemic compensation discrimination.

In addition, Section IC of the Self Evaluation Guidelines requires contractors to conduct statistical analysis on an annual basis. The Self Evaluation Guidelines provide procedures for determining whether a contractor's compensation analysis complies with the OFCCP's chosen statistical methods of analysis and contractor self evaluation. Section IB of the Self Evaluation Guidelines requires contractors to establish similarly situated employee groupings ("SSEGs") that contain at least 30 employees with no fewer than five minority/non-minority or male/female pairings. The Self Evaluation Guidelines also require that SSEGs cover at least 80% of the workforce. The OFCCP permits those employees who fall outside of a SSEG to be subjected to self-evaluation using "non-statistical" methods (*see* Section IB). The Self Evaluation Guidelines, however, do not provide contractors guidance about acceptable alternative statistical or non-statistical tests. Nor do the Self Evaluation Guidelines address with any specificity how the OFCCP will determine when a contractor's method of analysis is acceptable in the event it does

not comply with the Guidelines. In addition, section IC of the Self Evaluation Guidelines requires the use of multiple regression analyses for contractors with 250 or more employees, and does not seem to permit the use of any non-statistical analyses (*e.g.*, for any employees who fall outside of a SSEG). Presumably, contractors who employ at least 250 employees are prohibited from using non-statistical analyses for any portion of their workforce. These apparent conflicts must be resolved.

Recommendation 8: Amend the Guidelines to clarify: (i) whether and, if so, what statistical tests may be substituted for the multiple regression methodology and specify the circumstances in which use of such tests would be permissible; and (ii) when and, if so, under what circumstances non-statistical tests are permissible to satisfy a contractor's obligations to evaluate its compensation practices for discrimination.

H. Collection of Anecdotal Evidence. Section III of the Compensation Discrimination Guidelines state that the OFCCP will seldom rely on statistical evidence alone, but also will gather and rely on anecdotal evidence, prior to making a finding of systemic compensation discrimination. While employee interviews during onsite visits are certainly within the authority of the OFCCP, the conduct of employee interviews in support of possible pay disparity following the potential extensive interviewing of supervisory and managerial level employees in developing SSEGs and refining of statistical models will be extremely burdensome and intrusive. Indeed, the Guidelines put the "cart before the horse." Given that compensation is one of the most confidential and sensitive audit areas, the Guidelines should specify that interviewing employees to collect anecdotal evidence generally will be limited to contractors that fail to justify and/or remedy statistically significant pay disparities. In the absence of evidence of unjustified or un-remedied pay disparity or discrimination, employee or manager witness interviews, should not be employed (*i.e.*, this should not be an automatic step in an on-site investigation, but rather one carefully considered and justified based on other evidence before being utilized).

Recommendation 9: Amend the Guidelines to state that the agency generally will not collect anecdotal evidence in support of findings of systemic pay discrimination based on multiple regression analyses unless the contractor fails to satisfy its burden of adequately justifying or remedying *actionable* disparities.

I. Notice of Violation. Section I of the Compensation Guidelines makes clear that the OFCCP will issue a Notice of Violation alleging systemic compensation when (in addition to anecdotal evidence) there is a statistically significant compensation disparity at a level of two or more standard deviations. We believe that prevailing case law standards for finding pay disparities unlawful is more subtle and nuanced than what is stated in the Guidelines. Simply put, pay disparities of two standard deviations are not *per se* unlawful, but merely simply shift to the contractor the burden of explaining or justifying the disparity on the basis of legitimate, non-discriminatory factors. Thus, we believe it is inappropriate to issue a Notice of Violation prior to: (i) affording the contractor the opportunity to justify or explain such low-level disparities, and (ii) concluding that the contractor failed to satisfy its burden of proof.

In addition, pursuant to section III of the Compensation Guidelines, when a Notice of Violation is issued, the OFCCP will attach the *results* of the regression analysis to and *summarize* the anecdotal evidence that led to the finding. ACC strongly believes that any Notice of Violation issued by the OFCCP should include the *entire* analysis conducted as well as any other *specific* evidence that was marshaled in arriving at the discrimination finding. The provision of such information is crucial to allowing the contractor to properly evaluate and respond to the OFCCP's findings. Indeed, it is not unusual in private pattern and practice litigation for the parties to agree on a method of data sharing in order to narrow, and facilitate resolution of,

issues. A public enforcement agency's procedures should incorporate that "best-practice" process; details matter and may be dispositive. Our experience teaches that there often is a stark difference between specific evidence and any consequent summary prepared to advocate a particular result.

Further, Section IIB of the Self Evaluation Guidelines indicates that where the OFCCP determines that a contractor's self-evaluation system "is only marginally reasonable" under the Self Evaluation Guidelines, it will "suggest in writing" that the contractors make improvements in its self-evaluation. The Self Evaluation Guidelines, however, do not detail the form the written suggestions will take. Will these suggestions be contained in a conciliation agreement, a Notice of Violation, a letter of closure with a resolved violation, or in some other document?

Recommendation 10: The Guidelines should clearly reflect prevailing legal principles that pay disparities of two standard deviations are not *per se* unlawful, but such disparities simply shift to the contractor the burden of explaining or justifying the disparity on the basis of legitimate, non-discriminatory factors.

Recommendation 11: Limit the issuance of a Notice of Violation to pay disparities that significantly exceed two standard deviations or to pay disparities in excess of two standard deviations that a contractor failed to justify on the basis of legitimate, non-discriminatory factors.

Recommendation 12: Notices of Violation should contain the actual analysis, and specific evidence, not just summary results.

Recommendation 13: Notification of "marginally reasonable" self-evaluation should not be in the form of a Notice of Violation or Conciliation Agreement that places additional burdens on contractors.

J. Remedy. Sections ID and E of the Self Evaluation Guidelines require that contractors that find discriminatory pay disparities must "remedy" those disparities in order to certify compliance to the OFCCP. However, the Guidelines do not define or specify how a contractor should remedy such disparities, or what types of remedies would be compliant. Applicable case law is clear that pay disparities at or below two standard deviations are not statistically significant and may be attributable to chance.

Recommendation 14: Amend the Guidelines to clarify when a contractor's remedial obligations arise and that define the remedies, pursuant to applicable case law.

K. The 80% Rule. The Self Evaluation Guidelines require a valid statistical analysis encompass no less than 80% of the employees in the workplace under review. The Guidelines further provide that the analyses must encompass a significant majority of the employees in a particular affirmative action plan or workplace. When that is not the case, OFCCP will "carefully scrutinize the statistical analyses and associated non-statistical self-evaluations." Consequently, if a contractor, company-wide, has all of its employees in a statistical analysis, but in the facility that is the subject of the compliance review, those included in statistical analysis fall below 80%, the contractor's compensation data would be subject to increased scrutinized by the OFCCP. These rules are artificial, have no basis in the case law governing systemic compensation discrimination and do not account for a contractor's organizational structure, site location and personnel assignment decisions or compensation practices.

Recommendation 15: The 80% of the workplace requirement should apply organization-wide, not on a facility or affirmative action plan basis.

L. Record Retention Requirements. Pursuant to § 60-1.12 of the Code of Federal Regulations, contractors must preserve any employment or personnel record for a period of 2 years from the date of the making of the record or of the personnel action involved, whichever is later. Section IE of the Self Evaluation Guidelines describes several record retention periods. First, in sections E(2) and E(4), the Self Evaluation Guidelines set forth a two year retention period. This period would include the 2 year window for back pay corrections. Accordingly, a reading of the two sections would suggest that contractors be required to maintain employment or personnel action records for a minimum of 4 years (*i.e.*, 2 years back pay period + 2 years from the date the analyses are performed). If this is correct, this record retention period conflicts with the record retention period outlined in § 60-1.12 of the Code of Federal Regulations.

Second, in sections E1 and E3, certain documents, “must be retained throughout the period in which the OFCCP would deem the contractors practices to be in compliance with Executive Order 11246.” We are unsure what this means. It would appear to require perpetual record keeping. Furthermore, how is a contractor to know when the OFCCP would “deem the contractors practices to be in compliance?”

Recommendation 16: ACC recommends that final Guidelines clarify contractor record-keeping requirements.

IV. RECOMMENDED PUBLISHED TECHNICAL ASSISTANCE SIMULTANEOUS WITH FINAL GUIDELINES.

M. Compliance Manual. The OFCCP’s preferred multiple regression methodology for evaluating systemic compensation discrimination and contractor self evaluation has strong support in applicable case law pertaining to nondiscrimination in employment. As the cases cited by the OFCCP in the Guidelines demonstrate, the legal standards can be exacting and the statistical analyses complex and subtle. However, the standards articulated in the Guidelines are too elementary to provide meaningful guidance and a roadmap for contractors as to the issues that arise when conducting multiple regression or other acceptable statistical analyses of compensation practices.

In addition, the OFCCP notes that it has created a Division of Statistical Analysis and hired expert level statisticians to staff the unit. The SCD Guidelines, however, do not outline how front-line compliance officers will implement the agency’s preferred methodology, review contractor self evaluation or evaluate indicators of systemic compensation discrimination during compliance audits. We are concerned that the contractor community is being asked to discuss and analyze complex compensation factors in the context of multiple regression analyses with compliance officers who are inexperienced in statistical analysis. These same compliance officers will be, at least initially, the arbiters of the acceptability of a contractor's compensation system and any analysis thereof.

Recommendation 17: Contemporaneous with any final Guidelines, issue detailed technical assistance (similar to that issued by four federal agencies in the form of the Uniform Guidelines on Employee Selection Standards) to facilitate contractor understanding of applicable legal and regulatory standards for the conduct of multiple regression analyses. Such technical assistance should provide more detailed guidance about significant components of any final Guidelines, including illustrations of acceptable and problematic SSEGs, the 80% rule, pooling, the factors OFCCP will consider in determining whether a contractor’s self-evaluation system “is only marginally reasonable” and remedies.

Recommendation 18: Alternatively, publish a compliance manual or some other form of the instructions the compliance officers will be given (i) regarding under

what circumstances they will be instructed to pursue and how they are to evaluate indicators of systemic compensation discrimination (ii) explaining the interplay between the Division of Statistical Analysis and the local offices and (iii) disclosing the training curriculum provided to the Agency's compliance officers.

N. **Software.** Due to the complex statistical tests that the OFCCP is about to institute, we expect that the Agency will utilize statistical software. Most contractors do not employ expert statisticians. Accordingly, because the contractor community is being asked to conduct these same analyses, it should be provided with access to any such software that is used or at least be provided with guidance as to which software the OFCCP uses and its availability.

Recommendation 19: Make software applications the OFCCP uses to conduct its analyses available on-line free of charge.

V. **CONCLUSION**

To reiterate, ACC applauds the OFCCP's efforts to establish a uniform system for evaluating a contractor's compensation systems. However, the proposed compensation guidelines include a significant change in approach for compensation analysis from the approach that has previously been utilized by the OFCCP and the contractor community for years. A more systemic and thorough evaluation of the impact of the proposed Guidelines under a two-year pilot study and an OMB review (akin to that which preceded the Glass Ceiling Initiatives under then Secretary Dole) should precede the issuance of any final Guidelines. The Guidelines generally need to be modified to allow for flexibility in analyzing compensation on a contractor-by-contractor basis rather than strictly annually and to more faithfully adhere to prevailing case law. The Guidelines should recognize both the attorney-client privilege and attorney work product doctrine and must explicitly set forth that a contractor's compensation system is assumed to be in compliance unless there is compelling legally sufficient evidence or other indicators of systemic compensation discrimination. The burden to identify compensation disparities still lies with the OFCCP. A Notice of Violation should not issue before the agency considers the contractor's explanations and the contractor community should not be required to provide compensation explanations before any actionable disparity is identified. In effect, the Guidelines shift the burden from the Agency to the contractor community to prove their compensation systems lawful without and prior to any finding of discrimination by the Agency. As discussed in Section III above, there are a number of clarifications needed before the Guidelines are issued in final form. Finally, contemporaneous, published technical assistance would aid contractors in their compliance efforts with final compensation Guidelines.

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We appreciate the opportunity to comment of the OFCCP's Guidelines, and would welcome the opportunity to elaborate upon and further discuss our comments.¹

¹ These comments are submitted exclusively on behalf of the Labor and Employment Law Committee of the ACC and do not reflect the views and opinions of any individual member or the business entities with which they are affiliated. The Committee appreciates the assistance of Matt Halpern of the Long Island, New York, office of Jackson Lewis, LLP in the Committee's preparation of this comment.

Respectfully submitted,

The Association of Corporate Counsel –
Labor and Employment Law Committee