AFFIRMATIVE ACTION BRIEFING BOOK

MARCH 17, 1995

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STUDY SHOWS NO WIDESPREAD REVERSE BIAS CLAIMS

- **A report prepared by Rutgers Law Professor Alfred W. Blumrosen for the Office of Federal Contract Compliance Programs shows there is no widespread abuse of affirmative action programs in employment. It also shows there are only a small number of reported reverse discrimination cases by white males -- a high proportion of which have been dismissed by federal courts.**

- Based on an analysis of reported federal district and appeals court decisions, Professor Blumrosen found that reverse discrimination cases accounted for **between 1 and 3%** of some 3,000 reported employment discrimination cases between 1990 and 1994.

- The study was based on an analysis of both individualized claims and broader challenges to affirmative action programs, which were either voluntarily undertaken or adopted because of a court order or consent decree.

- Many of the reverse discrimination claims were brought by disappointed job applicants, who were found by the courts to be less qualified for the job than the chosen female or minority applicant.

- None of the cases challenging affirmative action programs involved application of Executive Order 11246.

FYI
[signature]

Leading the News

Affirmative Action

NO 'WIDESPREAD ABUSE' IN JOB CASES, FEW REVERSE BIAS CLAIMS, STUDY SAYS

An internal report prepared for the Labor Department by a prominent employment law professor concludes that there is "no widespread abuse" of affirmative action programs in employment and that there are only a small number of reported reverse discrimination cases by white males—a high proportion of which have been dismissed by federal courts.

Reverse discrimination cases accounted for between 1 percent and 3 percent of some 3,000 reported employment discrimination cases between 1990 and 1994, according to the study prepared by Alfred W. Blumrosen, a law professor at Rutgers University, for the department's Office of Federal Contract Compliance Programs. "Nothing in these cases would justify dismantling the existing structure of equal employment opportunity programs," he concluded.

A draft of the study, which has not been released by the Labor Department, was obtained by BNA.

Federal agencies currently are compiling data on affirmative action programs for an ongoing White House review. Bernard Anderson, assistant secretary of labor for employment standards, said earlier this month that he expected information submitted by the department to show that programs administered by OFCCP under Executive Order 11246 have made a "major difference" in expanding employment opportunities for women and minorities and should be continued (53 DLR AA-1, 3/20/95).

A Labor Department official declined to comment on the report, other than to say it is a draft that has not been reviewed. It reportedly is one of several that Blumrosen has prepared under a DOL contract. Blumrosen was out of the country and unavailable for comment.

'No Widespread Abuse'

Based on an analysis of reported federal district and appeals court decisions between mid-1990 and 1994, Blumrosen concluded that there was "no widespread abuse of affirmative action programs in employment" and that many of the individual reverse discrimination claims were brought by "disappointed" job applicants, who were found by the courts to be less qualified for the job than the chosen female or minority applicant.

"This research suggests that the problem of 'reverse discrimination' is not widespread; and that where it exists, the courts have given relief," he wrote.

Blumrosen analyzed both individualized claims of reverse discrimination and broader challenges to affirmative action programs, which were either voluntarily undertaken or adopted because of a court order or consent decree. Of the challenges to affirmative action programs, 12 upheld the programs and six either invalidated them or called for a reexamination in light of current conditions.

None of the cases challenging affirmative action programs involved application of Executive Order 11246—the affirmative action order covering federal contractors that is administered by OFCCP—or the Labor Department regulations implementing that order. Blumrosen attributed the absence of litigation under the executive order to the parameters of the program: goals are agreed to between OFCCP and the contractor; the obligation is to use "good faith efforts" to meet the goal; and the contractor "is not required or encouraged to hire unqualified personnel."

"An affirmative action plan applied as intended by OFCCP regulations will not provide a basis for 'reverse discrimination' suits," he concluded.

'Significant Minority, Female Improvement'

Citing earlier research he has compiled on the subject (122 DLR C-1, 6/28/94), Blumrosen wrote that ongoing EEO programs have produced "significant improvements" in the occupational position of women and minorities since the 1960s.

"My estimate is that more than five million people of color and six million women are in higher occupational categories today than they would be if we still distributed people through the labor force the way we did in the sixties," he wrote.

"One fascinating aspect of these statistics is that affirmative action apparently continued through the Reagan-Bush period of intense opposition to affirmative action and broad interpretation of [Title VII of the 1964 Civil Rights Act," Blumrosen observed. "These figures tend to confirm my suggestion based on earlier statistics that 'affirmative action has deep roots in the industrial relations system'."

Although "improvement and simplification" of the federal EEO programs "is desirable," he concluded, "nothing in these cases would justify dis-

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mantling the existing structure of equal employment opportunity programs."

(Text of the reverse discrimination study appears in Section E.)

—By *Nancy Montwieler*

Affirmative Action

EEOC, OFCCP NEED MORE VISIBLE ROLE IN CIVIL RIGHTS DEBATE, JACKSON ASSERTS

The federal government's leading fair employment agencies—the Equal Employment Opportunity Commission and the Labor Department's Office of Federal Contract Compliance Programs—should become more visible players in the affirmative action debate, the Rev. Jesse Jackson asserted March 22, following a meeting with EEOC Chairman Gilbert Casellas.

EEOC and OFCCP officials "are not in the inner circle" of Clinton administration discussions on the issue, Jackson charged, and their absence has had an impact in drawing the direction of the debate toward politics and away from substance.

During a meeting with President Clinton earlier this month, Jackson said he had "made it clear" that the enforcement agencies should be taking a greater role in defending the merits of affirmative action. He said he intended to reassert his views on the subject with Clinton aide George Stephanapoulous.

"At this point, EEOC and OFCCP are not even in the debate," he said. "Fear and foolishness is prevailing over fact. Evidence is not part of the debate."

Citing the Labor Department's recently released Glass Ceiling Report as evidence of the barriers that still prevent minorities and women from advancing to higher-paying jobs, Jackson said more "substantive data" must be brought into the debate. "That data's not out there," he said. "If most Americans knew about it, they would be for affirmative action as a conservative remedy."

Casellas and Vice-Chairman Paul Igasaki said they had provided Jackson with data on EEOC charges and litigation and that he was "impressed by the statistics."

EEOC has been providing similar information to the White House for its ongoing review of affirmative action programs, Casellas said, and has been "involved to a degree" in the review.

"The public debate [over affirmative action] is based on a lot of misinformation," Casellas said. "My role has been to provide fact to counter some of that fiction and misinformation."

End of Section

Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
202/466-3311

MEMORANDUM

FYI

To: Members of the Press

From: Ralph G. Neas

Date: 3-22-95

Recently, the Executive Order on Affirmative Action (11246) has become part of the debate on affirmative action. Along with the Voting Rights Act of 1965, the Executive Order on Affirmative Action is perhaps the nation's most important and effective civil rights program over the past thirty years. Literally millions of women and minorities have been given an opportunity to compete in the workplace thanks to the Executive Order. The heart and soul of the Executive Order, the provision for goals and timetables and the prohibition of quotas, is the model on which almost all other affirmative action programs are based.

Some pertinent facts about the Executive Order on Affirmative Action:

- Affirmative Action programs under the Executive Order consist essentially of three elements, all of which are prepared by the employer. If the employer receiving federal funds determines that there is an underutilization of women and minorities in the workforce, the employer must establish goals and timetables and then must make good faith efforts to meet them. Failure to meet a goal does not subject one to sanctions as long as there were good faith efforts.

- The Executive Order on Affirmative Action prohibits quotas.

- The goals and timetables language was added to the 1965 Johnson Executive Order by President Richard Nixon and Secretary of Labor George Shultz in 1970. The business community recommended this "management by objectives" concept to the Nixon Administration in the late 1960s.

- Private and public studies, including one done by the Reagan Labor Department, have shown that the Executive Order program has worked well and does not lead to quotas.

- The Executive Order has always had strong business community support.

- The Executive Order has always had strong bipartisan support. Indeed, 69 Senators and more than half of the Reagan Cabinet opposed the efforts of Ed Meese, Brad Reynolds, and Clarence Thomas to gut the Executive Order in 1985 by deleting the goals and timetables provision.

Enclosed are materials from the successful 1985/86 campaign to save the Executive Order on Affirmative Action.

FYI 3-24-95

USA TODAY POLL ON ISSUES SURROUNDING AFFIRMATIVE ACTION

▸ An overwhelming majority of Americans deny ever having been negatively impacted by affirmative action.

When asked about their personal experiences, an overwhelming majority of respondents said they had **not** experienced exclusion in jobs and college admissions because of affirmative action which favor racial minorities.

98% of respondents said they have never been denied admission to a school as a result of any affirmative action program based on race.

92% of respondents said they have never been passed over for a promotion which went to a member of a racial minority.

88% of respondents said they had never had an experience where they were not offered a job which went to a member of a racial minority.

Respondents had even fewer experiences being negatively affected by affirmative action programs which favor women.

98% of male respondents said they have never been denied admission to a school as a result of any affirmative action program based on gender.

93% of male respondents said they have never been passed over for a promotion which went to a woman.

92% of male respondents said they had never had an experience where they were not offered a job which went to a woman.

► **Majorities of White Respondents Favor Affirmative Action Measures.**

Majorities of white respondents said they favor existing affirmative action programs, such as:

	Favor	Oppose	N/O	
Providing special educational classes for minorities and women to make them better qualified for college	75%	22%	3%	Ttl
	90%	9%	1%	Wht
	73%	24%	3%	Blk

	Favor	Oppose	N/O	
Providing job training programs for minorities and women to make them qualified for better jobs.	82%	17%	1%	Ttl
	80%	18%	2%	Wht
	94%	6%	*%	Blk

	Favor	Oppose	N/O	
Companies making special efforts to find qualified minorities and women and then encouraging them to apply for jobs with that company.	73%	24%	3%	Ttl
	71%	26%	3%	Wht
	87%	12%	1%	Blk

	Favor	Oppose	N/O	
Favoring a well-qualified minority applicant over an equally qualified white applicant, when filling a job in a business w/few minority workers	48%	44%	8%	Ttl
	47%	45%	8%	Wht
	51%	42%	7%	Blk

In summary, white support for affirmative action programs is high:

	White Support
Special Educational Classes	90%
Job Training	80%
Special Recruitment Efforts	71%
Favoring Equally Qualified Minority	48%

White support for quotas and favoring less qualified applicants for jobs is low:

	Favor	Oppose	N/O	
Favoring a minority applicant who is <u>less</u> qualified than a white applicant, when filling a job in a business w/few minority workers.	13%	84%	3%	Ttl
	11%	86%	3%	Wht
	22%	68%	10%	Blk
	Favor	Oppose	N/O	
Making a certain number of scholarships at public colleges and universities available only to minorities and women.	31%	67%	2%	Ttl
	27%	71%	2%	Wht
	51%	45%	4%	Blk
	Favor	Oppose	N/O	
Establishing quotas which require businesses to hire a certain number of minorities and women.	35%	63%	2%	Ttl
	30%	68%	2%	Wht
	66%	30%	4%	Blk
	Favor	Oppose	N/O	
Establishing quotas which require schools to admit a certain number of minorities and women as students.	39%	57%	4%	Ttl
	35%	61%	4%	Wht
	70%	27	3%	Blk
	Favor	Oppose	N/O	
Requiring a certain percentage of government contracts to be awarded to be businesses owned by minorities and women.	48%	48%	4%	Ttl
	44%	52%	4%	Wht
	73%	24%	3%	Blk

LCCR

Leadership Conference on Civil Rights

1629 "K" St., NW, Suite 1010
Washington, D.C. 20006
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3-16-95

In light of Senator Dole's remarks regarding the Executive Order on Affirmative action, I thought you might appreciate this 1986 LCCR memo.

Ralph Neas
466-3311

FYI

Leadership Conference on Civil Rights

2027 Massachusetts Ave., N.W.
Washington, D.C. 20036
202 667-1780

January 24, 1986

The Executive Order Has Absolutely Nothing To Do With Quotas!

At present, everything appears to be "on hold" regarding the Executive Order on Affirmative Action. But most likely, sometime soon, Don Regan, Ed Meese, and Bill Brock will meet to discuss the Executive Order. Regardless of what may happen, please keep the following facts in mind:

1. Contrary to the assertions of Mr. Meese and Brad Reynol the Executive Order regulations explicitly prohibit the use of quotas. (See Appendix B). In other words, at this very moment, it is against the law to use quotas in the Executive Order program. Moreover, several Department of Labor studies, published during the Reagan Administration have demonstrated conclusively that goals and timetable have not led to quotas. If these are isolated incidents of someone using quotas, the Administration simply has to enforce the law. There is no reason to change the law.

2. There is an overwhelming bipartisan consensus on behalf of not changing the Executive Order. This consensus include 69 Senators the Republican leaders of the House and the Senate, most key business leaders, a substantial number of Reagan Cabinet members, and over 200 civil rights organizations (See Appendix A).

3. The Executive Order Program has worked extraordinarily well. Both private and government studies have documented that it has been one of our Nation's most effective civil rights tools. One Reagan Labor Department study showed that between 1974 and 1980, the number of minorities and women in companies covered by the E.O. increased by 20% and 15% respectively.

4. Mr. Meese and Mr. Reynolds may offer yet another "compro which would eliminate the present goals and timetable progra and substitute a "voluntary" goals and timetable program. Their compromise, which has appeared thus far in several forms, would gut the effective program now in place. First voluntary civil rights enforcement has never worked in our Nation's history. The Executive Order would no longer have any enforcement "teeth". Second, their proposal would not really allow voluntary goals and timetables, for the Meese-Reynolds proposal would allow them only if they did not "discriminate" or "create preferences." But, as we all know, that is exactly what Meese and Reynolds believe goals do. Therefore, the Department of Justice would be able to sue those companies that set up a goals and timetabl program. And that is one of the many reasons why most business leaders vigorously oppose this so-called compromise and support the present Executive Order.

5. Finally, if the Order is gutted or weakened, a bipartisan coalition of Representatives and Senators will introduce legislation, which has already been drafted, to codify the existing Executive Order.

Appendix A

SUPPORTERS OF THE PRESENT EXECUTIVE ORDER ON AFFIRMATIVE ACTION

A. Congressional

Senator Robert Dole - Senate Majority Leader
Congressman Robert Michel - House Republican Leader
69 Senators have already contacted the President asking him not to revise the Executive Order

B. Administration

Secretary of Labor William Brock
Secretary of State George Shultz
Secretary of Treasury James Baker
Secretary of Commerce Malcolm Baldrige
Secretary of HHS Margaret Heckler
Secretary of HUD Sam Pierce
Secretary of Transportation Elizabeth Dc

C. The Civil Rights Community

More than 200 national minority, religious, women, labor, disabled and senior citizen organizations.

D. The Majority of the Key Leaders in the Business Community

Led by the National Association of Manufacturers, the Business Roundtable, and the New York Chamber of Commerce.

E. The American Public

A September 1985 Harris Poll showed a record 75-21 percent of the American people in favor of federal affirmative action programs for minorities and women "provide there are no rigid quotas."

SENATORS WHO HAVE ASKED PRESIDENT REAGAN NOT TO CHANGE THE EXECUTIVE ORDER

DEMOCRATS

Cranston
Long
Hollings
DeConcini
Bentsen
Biden
Moynihan
Chiles
Bradley
Ford
Melcher
Rockefeller
Proxmire
Nunn
Bumpers
Byrd

Exon
Johnston
Dixon
Kennedy
Kerry
Metzenbaum
Bingaman
Burdick
Lautenberg
Pell
Dodd
Hart
Mitchell
Zorinsky
Pryor

Boren
Sasser
Inouye
Gore
Leahy
Sarbanes
Glenn
Simon
Matsunaga
Levin
Eagleton
Harkin
Riegle
Baucus
Heflin

REPUBLICANS

Dole
Quayle
Mattingly
Gorton
Andrews
Boschwitz
Stafford
Chafee
Heinz
Hatfield
Domenici
Stevens

Durenberger
Cochran
Specter
Kassebaum
Danforth
Evans
Mathias
Weicker
Packwood
Cohen
D'Amato

Appendix B

Goals are Not Quotas

A. History of the Executive Order on Affirmative Action

Starting with President Roosevelt, eight successive Presidents have supported equal employment opportunity requirements.

The current standards for affirmative action programs were recommended in the late 1960's to the Nixon Administration by a group of 350 large corporatio These recommendations, including the "management-by-objectives" concepts of employment goals and timetables, were incorporated in the Department of Labor regulations in 1970 by President Nixon and then Secretary of Labor George Shultz. They have remained substantially unchanged since that time.

B. How the Executive Order Works

Affirmative Action Programs under the Executive Order consist essentially of three elements, all of which are prepared by the employer. If the employer receiving federal funds determines that there is an underutilization of minorit and women in the workforce, the employer must establish goals and timetables, and then must make good faith efforts to meet them. Failure to meet a goal does not subject one to sanctions as long as there were good faith efforts.

C. The Executive Order Regulations Explicitly Forbid the Use of Quotas

1. Department of Labor regs governing the Office of Federal Contract Complianc provide:

> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work, 41 CFR §60-2.12 (1984).

2. Further, regulations 60-2.30 and 60-4.3 prohibit contractors from using affirmative action program goals to discriminate against any employee or applic because of his or her race, color, religion, sex, or national origin.

3. On May 26, 1982, then Deputy Under Secretary of Labor Robert B. Collyer, in his testimony before the Senate Committee on Labor and Human Resources, distinguished between goals and quotas and reiterated agency policy:

> A quota means a specific set-aside of a certain number or percentage of positions for the exclusive use of blacks, Hispanics, women, etc. Whil quotas have been used by courts as remedies in specific situations to correct harm done by discrimination, the use of quotas otherwise has been generally rejected by the great majority of Americans, including minorities and women.
>
> A goal creates no set-aside positions. A goal is, in fact, an estimate of the number of persons of a particular group [e.g. minorities and women] who are available and could reasonably be expected to be employed in the absence of discrimination. It is an estimate made by OFCCP, and its test is that it be both reasonable and attainable. The goal is a measure of the contractor's progress in eliminating the discriminatory exclusion of minorities and women.

4. President Reagan in January 1981 reaffirmed the Federal government's continued advocacy of affirmative action programs and its opposition to any such programs becoming quotas:

> No, there will be no retreat [on affirmative action programs]. This administr is going to be dedicated to equality. I think we've made great progress in the civil rights field. I think there are some things, however, that have but may not be as useful as they once were or that may even be distorted in the practice, such as some affirmative action programs becoming quota systems.

Appendix C

Some Consequences of A Decision to Gut Or Weaken The Executive Order

A. Political Consequences

1. A *Bob Jones* type political firestorm that would politically harm President Reagan and congressional Republicans, especially those up for reelection in 19

2. As several White House aides have recently stated publicly, one reason for President Reagan's rise in the polls among Blacks and women has been the absence of any personal involvement in civil rights controversies since his reelection. There have been no *Bob Jones*, MLK, or Voting Rights Act snafus. Indeed, the only 1985 civil rights issue in which the President personally participated was South Africa. And on that one he eventually abandoned constructive engagement.

B. Legislative and Legal Consequences

1. Legislative Battle

Republican and Democratic Senators and Representatives have already drafted legislation to codify the existing Executive Order, if it becomes necessary. An acrimonious legislative battle between the Administration and Congress could seriously disrupt an already crowded 1986 legislative calendar and endan current legislative priorities.

2. Proliferation of Lawsuits

The business community, in particular, fears a spate of lawsuits. Presently, compliance with the Executive Order helps protect companies from lengthy and costly Title VII employment discrimination lawsuits. Ironically, the abandonme of goals and timetables could lead to more judicially-imposed quotas.

3. Confusion and Uncertainty in the Business Community

The elimination of an effective Executive Order could mean that those companies operating in more than one state could be subject to as many as 50 different sets of state and local affirmative action regulations. A very costly legal morass.

March 17, 1995

TABLE OF CONTENTS

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All materials are draft and preliminary; most is merely descriptive at this stage. Some expected submissions did not arrive, or were just too raw.

1. **Overview materials**

   - Hard questions for discussion with Cabinet members on Monday 3/20, at 12:30
   - Heuristic Matrix: "Federal Affirmative Action Efforts: Technologies & Spheres
   - Preliminary Council of Economic Advisers material on the research evidence

2. **EEOC:** Some facts and considerations regarding the Federal civilian affirmative action effort

3. **DOL:** **Material on E.O. 11246** -- the requirement of affirmative action plans, goals and timetables for Federal contractors

4. **Education:** Descriptive overview of the principal programs within the Department

5. **SBA 8(a) Program:** A description of the program and their plan, announced last summer, for legislative and administrative reforms

6. **GSA:** A description of one set of initiatives

Divider Title: **1**

Some Questions For Monday Discussion

1. Do you support using race or gender as *a factor* in selecting among suitably qualified candidates --

   - In university admissions
   - in hiring
   - in layoffs
   - in government procurenent?

2. Do you support using race and gender as a "tiebreaker" when the candidates' other qualifications are "equivalent?"

   - in university admissions?
   - in hiring?
   - in layoffs?
   - in government procurement?

3. Do you support scholarship programs limited to:

   - traditionally underserved racial and ethnic groups?
   - women?
   - the disabled?

4. Do you support government procurement "preferences" limited to the groups listed above?

   - if the preference is in the form of a *market advantage*, such as bid discounts or "points"?
   - if the preference is in the form of a *set aside*?

5. Do you believe that affirmative action programs are transitional? If so, when should they end, and how will we know when we have succeeded?

6. Are there more helpful terms than "affirmative action" and "preference"?

Federal Affirmative Action Efforts:
Technologies & Spheres

		1	2	3	4	5	6	7	8
		Technologies							
	Spheres ⇩	*Outreach & Hortatory Efforts*	*Disclosure of Data*	*AA Plan Requirements*	*Targeted Training & Investment Efforts*	*Goals (including benchmarks)*	*Market Advantages (factors, enhancements, bonuses, etc)*	*"Soft" Set-Asides*	*"Hard" Set-asides*
A	*Federal (and GSE) employment and promotion: e.g., civilian and military services*	Targetted military recruitment	EEOC	Farm Credit System	Civil Serv. Minority Recruit Program; Foreign Serv. Internship				
B	*Federally-administered benefits: e.g., grants, guarantees, licenses,*	HUD, USDA, other minority-banking regs	SBA 7(a)	DOD grants (2196); DOI grants	SBIR (USDA); DoL HBCU program	SBA 7(a)	Bank charters; FCC licenses, distress sales, & tax incentives (1071--Viacom)		USDA grants (3154(c)); Public Works (317.19)
E	*Nonfederal governments*	PHA regs; FEMA banking regs;		HHS grants on aging		EPA fair share RF			Crime bill trust fund
C	*Federal procurement: contracts for goods and services*	OSDBU offices; FIRREA outreach	Small Business Act (502) report		EPA Mentor/Protege Program; SSBIC; SBA 7(j)	DoD statute (2323); DoD regs (219); Small Business Act (502--Adarand)	SBA 8(a); RTC bonuses; SCC (Adarand); 1207; Indian Ed. Act	ISTEA; Airport & Airways	USAID; State Dip. Security Projects;
D	*Federal contractor practices*	EVE awards		EO 11246; EPA regs					
F	*Private enterprises*	Glass ceiling initiative; DoL rehab program;	HMDA	CRA					

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Illustrative Affirmative Action "Technologies"

1. ***Outreach & Hortatory Efforts:***
- Various statutes *encourage* recipients of federal monies to use minority-owned and women-owned banks in handling federal funds.
- The Office of Federal Contract Compliance Programs (OFCCP) offers awards for contractors manifesting superior affirmative-action practices.

2. ***Disclosure of Data:***
- The Small Business Act (§502) requires SBA to monitor and report on agency contracting with small disadvantaged businesses (SDBs). This reporting serves hortatory purposes and can create a competitive dynamic among agencies.
- Last year, the Administration announced plans to publish the rates at which financial institutions made federally guaranteed loans to women- and minority-owned firms. This reporting can leverage public and intra-industry pressures to expand such lending.

3. ***Affirmative Action Plan Requirements:***
- E.O. 11246 requires federal contractors to maintain affirmative action plans.
- The Community Reinvestment Act (CRA) requires certain chartered financial institutions to plan and conduct efforts to reach out to underserved communities.

4. ***Targeted Training & Investment Efforts:***
- The Foreign Service maintains a minority internship program designed to increase minority participation in the Foreign Service.
- EPA maintains a Mentor/Protege program to encourage prime contractors to develop constructive relationships with SDBs.

5. ***Goals:***
- The Small Business Act requires each agency to set goals for contracting with small businesses and SDBs. Congress has often legislated these goals.
- SBA set goals for guaranteed lending to women- and minority-owned businesses under its §7(a) program.

6. ***Market Advantages:***
- In its auction of the spectrum, the FCC provided a 25% discount for women- and minority-owned businesses.
- Under §1207, the Defense Department and now other federal agencies are authorized to provide a 10% bid preference, and to use reduced-competition methods when contracting with SDBs.
- The Surface Transportation Assistance Act authorizes use of "subcontractor compensation" bonuses to prime contractors who use SDBs (at issue in *Adarand*).

7. ***"Soft" Set-Asides:***
- ISTEA provides that DoT direct 10% of contracts to disadvantaged business enterprises (DBEs), *except to extent that Secretary determines otherwise.*
- The Airport & Airway Improvement Act requires the same.

8. ***"Hard" Set-Asides:***
- The Omnibus Diplomatic Security & Antiterrorism Act requires that a minimum of 10% of funds appropriated for diplomatic security projects be allocated to minority business enterprises.

Five Potential Problem Areas in Affirmative Action

A. ***When programs are abused:***

- *Example*: The §8(a) program has long been criticized for three failings:
  (i) sham or front companies;
  (ii) concentration of contracting opportunities among a few firms; and
  (iii) weakness in requiring that firms be *economically* (as well as socially) disadvantaged.

B. ***When decisions appear more arbitrary:***

Even if they are more efficacious, quotas are resisted as arbitrary at the margins. Moreover, as interracial marriages increase, the appearance of arbitrariness (e.g., the Anglo male who marries and, adopts the surname of, a Latina) increases.

- *Example*: Should a company jointly owned (50–50) by a married couple be treated as a women–owned business? Does a shift of 1 percent ownership really make a difference?

C. ***When default distributive criteria are widely accepted:***

The best example of this may be seniority rules. When the norm of "last hired, first fired" is upset, resentment seems to be quite high. Compare this with the education context, where concepts of merit and entitlement are somewhat less clear.

- *Example*: A school district lays off white teachers with more seniority than minority teachers who are retained.

D. ***When the distribution of wealth or income, rather than opportunity, are at stake:***

The distribution of opportunity–building investments (training and education) are less problematic than income–generating opportunities (government contracts) which are less problematic than wealth–creating assets (bank charters, FCC licenses).

- *Example*: Affirmative action in education is less controversial because education is viewed largely as a means; government contracts are viewed by some as ends rather than means.

E. ***When program costs do not justify the benefits:***

Market–advantage programs tend to impose at least two types of costs: stigmatizing members of "beneficiary" groups and demoralizing "non–beneficiary" groups. (Advantages for the disabled and for small businesses generally tend to impose fewer costs in this regard than advantages based on race or gender. In some cases these costs do not justify the benefits.

- *Example*: Some have criticized the paperwork burdens imposed by OFCCP under E.O 11246 as excessive and unproductive. There may be ways (such as incentive–based mechanisms) to improve the cost–effectiveness of this effort.

(36)

EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL OF ECONOMIC ADVISERS
WASHINGTON, D.C. 20500

February 24, 1995

MEMORANDUM FOR THE PRESIDENT

FROM: MARTIN BAILY AND JOE STIGLITZ

SUBJECT: Evidence on the Economic Effects of Affirmative Action

This is a CEA analysis of what the economics literature says about the effects of Affirmative Action for Federal contractors. There is now a very wide consensus that during the late 1960s the sum of government policies to help African Americans had large positive effects. Unravelling the effects of a single program is difficult. For Affirmative Action programs for Federal contractors, the evidence shows the program was somewhat effective during the mid- to late 1970s, but ineffective during the 1980s (plausibly due to lax enforcement).

The modest measured effect of Affirmative Action is in contrast to the larger effect that the Civil Rights Act and other changes in government policy had in increasing the wages of African Americans substantially from the mid-1960s to the mid-1970s, and for women during the last three decades. For African Americans, for example, a significant portion of the wage increase during the late 1960s appears to have been due to the racial integration of Southern employers. The Civil Rights Act coupled with a host of other Federal interventions were important forces pushing these employers to open their doors to African Americans.

What is Affirmative Action? Executive Order 11246, signed by President Johnson in 1965, not only prohibits Federal Government contractors from discriminating, but also requires them to take affirmative actions to increase their employment of protected groups: women, African Americans, and other minorities. The rules apply only to firms with 50 or more employees doing more than $50,000 worth of business with the Federal Government in a year.

In practice, Affirmative Action requires Federal contractors to have plans for outreach to non-traditional employees, and other means of increasing employment. These plans must include quantitative goals and timetables, although contractors are not punished for failure to meet these goals. Contractors also must file a two-page summary of their employment patterns, broken down into several major occupations (professional, clerical, craft) for each of several groups (male, female, African Americans, white, and Hispanics).

Enforcement is carried out by the Office of Federal Contract Compliance Programs (OFCCP). OFCCP can perform detailed audits of a contractor's Affirmative Action plans, and examine whether it is in fact making an affirmative effort to recruit protected groups. When OFCCP finds a contractor out of compliance (that is, not making a good faith effort to take affirmative actions), consequences usually include a negotiated promise to do better, but can involve agreements to provide back pay and (rarely in the 1970s and almost never in the 1980s) debarments from future government contracts.

Does Affirmative Action Increase Protected Groups' Employment? In the early years, Affirmative Action had no discernable effects in improving the employment status of protected groups other than a slight improvement for African American men. During the mid- to late 1970s, however, employment of African Americans and women at Federal contractors appears to have grown 1 or 2 percentage points more quickly than at non-contractors. (Only the contractors were required to have Affirmative Action programs.) Growth was even more rapidly (at least in the case of African Americans) at firms that had undergone a compliance review. In the 1980s, OFCCP enforcement became much weaker, and Affirmative Action's measured effects disappeared. The effects of Affirmative Action may be larger than the measured effects if Affirmative Action changed hiring practices even in non-contractors, perhaps as more people experienced African Americans and women in non-traditional jobs.

Does Affirmative Action Increase Protected Groups' Wages? During the ten years after the 1965 order, wages of African American men rose rapidly relative to white men, particularly for college-educated men. As enforcement of Affirmative Action (and other civil rights laws) declined, so did the wages of college-educated African American men, hinting that Affirmative Action may have played a role in their relative success.

Employment of women in traditionally male-dominated managerial and professional occupations also rose dramatically (from very low levels) in the decades following the Executive Order. It is possible that knowledge of Affirmative Action's effects on the job market may have induced more women to enter these fields. If so, government policies may have played a role (in addition to massive social changes) in moving to a new self-sustaining equilibrium with far more women in high-wage occupations (although the crafts and highest-level executive jobs remain male-dominated).

Does Affirmative Action Lead to Quotas? Affirmative Action and the disparate impact rules under Title VII of the Civil Rights Act have often been criticized as leading to quotas. (Disparate impact rules make it expensive to use hiring or promotion criteria that disproportionately rule out protected groups.) Furthermore, many people appear to believe that quotas are prevalent. Nevertheless, with the exception of court-ordered quotas and a few statutory quotas, no evidence exists that Affirmative Action typically leads to quotas. However, if the charge were generally valid, the composition of each individual company's work force should eventually come to resemble the racial and gender makeup of the local labor market. In fact, work force profiles have been becoming less similar rather than more.

Does Affirmative Action Reduce Productivity? If Affirmative Action coerced contractors into hiring less qualified female or minority applicants, productivity should be lower in Federal contractors (who have Affirmative Action programs) than in non-contractors. In fact, productivity growth has not been lower in sectors with more contractors--nor in regions and industries in which there has been more Title VII class-action litigation.

Weighing the Costs and Benefits. Affirmative Action has not dramatically spurred the employment of disadvantaged groups. If the experience of the late 1970s serves as any guide, some modest gains should result if enforcement of the Executive Order becomes more energetic.

At the same time, Affirmative Action imposes several direct costs on government contractors. These include the costs of:

- collecting and filing information on each establishment's demographics every year;
- filling out Affirmative Action plans, which currently average about 300 pages, but are not filed with the OFCCP except on specific request; and
- preparing for compliance reviews (in the event they occur). In the early 1980s, two business groups estimated the costs of a review as ranging between $3,000 and $24,000.

Several steps to reduce these costs are under consideration by the Reinventing EEOC Group under the Vice President's initiative to Reinvent Regulation. For example, the OFCCP could give regulatory relief to contractors with good records to complement its efforts to target enforcement efforts at those with bad records. Evaluation of records might include such factors as good employment numbers compared to the local labor market, good improvement numbers, good process measures (perhaps from evaluating voluntarily-submitted Affirmative Action plans), few EEOC complaints, and third-party certifications. Companies with high ratings would not only be lower on the list of compliance audits and eligible for Exemplary Voluntary Effort (EVE) award (as is currently done), but might also submit demographic information less often, and no longer be required to maintain Affirmative Action plans that OFCCP can ask for.

An additional step the President can take is to promulgate an Executive Order banning all quotas in the Federal Government except when required by statute or court order. Such an Executive Order would have no effect on current Affirmative Action efforts, which already ban quotas, but might clarify the distinction to a public that frequently equates Affirmative Action with quotas.

<u>SPECIAL ANALYSIS</u>

Discrimination in Hiring Persists

Affirmative action is under attack from several quarters. House Republicans reportedly are planning to hold hearings on the topic in the next few months. The Supreme Court will rule on a related case by mid-year. And conservatives in California are pushing for a ballot initiative that would eliminate all state affirmative action requirements.

The charge from many opponents is that affirmative action often leads to reverse discrimination against white males. Evidence based on "testing" indicates that conventional discrimination in the markets tested remains much more prevalent than reverse discrimination. (See box for a discussion of testing.) Results from one recent survey of the literature indicate that <u>in order to have the same probability of obtaining a job offer, blacks and Hispanics have to submit approximately three times as many job applications as do non-minority job candidates</u>.

These results are based mainly on tests of employers in the retail sector. It remains to be seen whether similar results are obtained from other employers, including those who are subject to Federal affirmative action requirements.

Testing as a Method for Diagnosing Discrimination

In a typical testing-based study of hiring practices, minority and non-minority "candidates" with matched fictitious backgrounds (e.g., similar education and experience) are sent to apply for the same jobs. Differences in job offer rates for minority and non-minority candidates are useful in measuring the pervasiveness of discrimination in the job market at large. In general, however, testing is not a powerful means of detecting discrimination by any but the largest employers, because only one or a few pairs of matched candidates can plausibly be sent to apply for a given job.

In a few cases, though, the treatment of black and white "candidates" has been so different as to strongly suggest discrimination by an individual employer. For example, in some cases, a non-minority candidate was interviewed after the minority candidate had been denied an interview and told that the position had been filled.

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THE EEOC AND FEDERAL AFFIRMATIVE EMPLOYMENT PROGRAMS

History of Federal Affirmative Employment Programs

Federal Affirmative Employment Programs were created in 1969 by Executive Order 11478, which required Federal agencies to establish affirmative programs of equal employment opportunity for minorities and women. Section 717 of the Equal Employment Opportunity Act of 1972 extended coverage of the Civil Rights Act of 1964 making these programs statutory. The President's Reorganization Plan No. 1 of 1978 transferred the affirmative employment functions from the Civil Service Commission to EEOC, including the responsibility to review and approve annual equal opportunity plans submitted by each agency.

EEOC staff in the Office of Federal Operations evaluate agency submissions and provide technical assistance to agencies in developing and implementing an affirmative employment program. The EEOC also may conduct on-site reviews of agency programs if efforts show insufficient improvement. The Commission also issues an annual report to the President and Congress describing the progress made by Federal agencies. The Commission also has nine field units that provide technical assistance to agencies, review accomplishment reports of agencies under their jurisdiction and conduct at least one on-site review per year.

EEOC has implemented the various federal affirmative employment program requirements through a series of Management Directives ("MDs"). The first, MD-707, was issued in 1981. It instructed Federal agencies to submit equal employment opportunity plans for a five-year period. The Directive instructed each agency (i) to perform an extensive analysis to determine whether there is underrepresentation of minorities and women in various employment categories by comparing the agency's work force with the civilian labor force, and (ii) to set annual goals for underrepresented groups in categories where vacancies were expected.

In 1987, EEOC issued EEO-MDs-713 and 714. MD-713 provided guidance in affirmative employment of individuals with disabilities and MD-714 provided guidance in affirmative employment of minorities and women. MD-714 **eliminated** the requirement that agencies set goals and placed greater emphasis on the identification and removal of barriers to the advancement of women and minorities. Agencies were instructed to devise flexible approaches to improving the representation of women and minorities in their workforces. Pursuant to MD-714, agencies again prepared plans for a five-year period covering 1988 to 1992, and thereafter filed annual accomplishment reports and updates outlining progress toward achieving their five-year objectives. Since 1992 agencies have continued to submit annual accomplishment reports and updates which are reviewed by analysts for compliance with Commission regulations and directives.

In 1993 and 1994, EEOC staff drafted a new management directive (MD-715) to succeed MD-714 and circulated it to agencies for comment. The draft Directive proposes the following changes:

- streamlining procedures by reducing all existing directives into one;
- reducing reporting requirements by, among other things, relying on new technology which permits EEOC to retrieve data directly from OPM's Central Personnel Data File, rather than relying on agency reporting;
- requiring agency heads to hold senior and program managers accountable for the accomplishment of agency objectives through their actions and performance appraisals;
- eliminating any requirement for the use of goals;
- greater emphasis on agency evaluation of own employment practices, greater self-identification of barriers to equal employment opportunity, and development of creative ways of removing those barriers;
- require the reporting of discharge rates for minorities, women and people with disabilities, to allow greater analysis of retention trends; and
- address "glass ceiling" and wage gap (*i.e.,* differences between earnings of non-Hispanic white men and women and minorities) issues -- which emerged since the last management directive -- by reporting on promotion, training, and monetary awards of employees.

How Agencies Prepare Affirmative Employment Plans

As stated previously, since 1987 every agency in the Federal Government has been subject to the requirements of MD-713, which relates to the employment of people with disabilities, and MD-714, which relates to the employment of minorities and women. In 1988, MD-713 required every Federal agency, regardless of size, to submit a multi-year affirmative employment plan with regard to people with disabilities, and annually thereafter submit an accomplishment report and plan update.

In 1988, MD-714 required every agency with 500 or more employees to submit a multi-year affirmative employment plan with regard to women and minorities, which described its workforce profile, identified areas where improvements are needed, and outlined objectives designed to achieve those improvements. Thereafter, each agency was required to submit an annual accomplishment report and plan update describing any changes in workforce profiles and alterations in the objectives. Agencies with fewer than 500 employees were not required to submit plans under MD-714 to EEOC.

In order to develop its multi-year plan in 1988 under MD-714, an agency had to analyze its workforce profile, organization, and activities to determine its starting point and to assess areas where improvement was needed. Each agency with 500 or more employees developed a statistical workforce profile that showed the representation of women and minorities by PATCOB (Professional, Administrative, Technical, Clerical, Other, and Blue Collar) categories, by grade level, and by the major occupations of the agency.

Each agency also evaluated its organizational structure and processes in relation to discrimination complaints, employee development and training, promotions, and separations. Once the evaluation was complete, the agency identified barriers to the recruitment, hiring, or advancement of women or minorities, and established methods designed to eliminate those barriers. The resulting document became the multi-year plan that was submitted to EEOC.

Agencies also submit an annual accomplishment report and a plan update to EEOC. They include current profiles as well as an assessment of progress made in accomplishing the objectives described in the multi-year plans. Agencies have the option of updating their objectives annually if circumstances change (*e.g.*, downsizing). They may identify new problem areas and establish new objectives to address them, or they may eliminate objectives that have been accomplished. The purpose is to have flexible plans that will address the changing needs of the agencies. Most agencies have updated their multi-year plans with their annual submissions.

EEOC's Role in Federal Affirmative Employment

EEOC's authority is **only** advisory. Agencies analyze their own workforces, identify their problem areas, and describe their own solutions. EEOC evaluates the work of the agencies, but cannot require them to change their mode of operation. EEOC staff evaluate multi-year plans and annual accomplishment reports and assess if improvement is being made.

Multi-year affirmative employment plans were submitted by agencies with 500 or more employees in 1988. Annual accomplishment reports are due by February 15 of each year for small to medium size agencies and by April 15 for large agencies. These reports indicate whether progress is being made in the plans. EEOC staff review agency submissions to determine whether each reporting agency has: conducted an analysis of barriers, properly identified problems in their workforce profile, and developed a plan that is likely to correct the problems it is designed to address.

Additionally, EEOC staff conduct program reviews of agencies that are found to have difficulty meeting requirements in developing and implementing an affirmative employment program or insufficient improvement resulting from program efforts. Commission staff in headquarters and field units provide technical assistance to agencies as needed and requested.

When an agency has serious problems in the area of affirmative employment, EEOC may conduct an on-site investigation to determine the reasons for the problems so that possible solutions can be suggested. EEOC has conducted 27 on-sites in the last two years (list of on-sites is attached).

Survey of Progress of Federal Agencies

Many variables must be considered when evaluating a particular Federal agency with respect to its EEO profile and its progress in affirmative employment. For example, one agency may have a relatively high representation of women, while another agency may have a high representation of one or two minority groups but not others. A third agency may have a somewhat lower overall representation of minorities and women, but have a higher representation of minorities and women at the upper grade levels. Another agency may have a relatively high proportion of jobs in which minorities and women are less represented in the Civilian Labor Force (*e.g.*, scientific/technical jobs), and consequently may have an apparently less representative work force profile despite an active recruitment effort.

When affirmative employment monitoring began, the focal point was on hiring activity. As barriers to the employment of women and minorities were eliminated, their numbers increased, and thus the focus has changed to upward mobility and "glass ceiling" issues.

The following survey of Federal agencies is based upon grade level representation for FY 1993. The following agencies show that the average white collar grades of minorities and non-minorities, or women and men are closest to one another.

Minority Representation	Representation of Women
Federal Emergency Management Agency	Smithsonian
Small Business Administration	Panama Canal Commission
Nuclear Regulatory Commission	U.S. Information Agency
Transportation	Education
Agriculture	Environmental Protection Agency

Agencies showing the greatest difference between the average white collar grades include the following:

Minority Representation	Representation of Women
National Science Foundation	National Labor Relations Board
Securities and Exchange Commission	Commerce
Federal Trade Commission	Federal Communications Commission
Pension Benefit Guaranty Corp.	Air Force
National Archives & Records Admin.	Government Printing Office

If agencies were ranked based upon specific minorities, these lists might differ. With downsizing and re-engineering occurring throughout the Federal government, other results may occur.

Federal Affirmative Employment of People with Disabilities

With regard to disabilities, due to the low numbers of people with targeted disabilities in the total work force, the focal point remains hiring. The number of people with targeted (severe disabilities such as blindness, deafness and paralysis) disabilities in the workforce of Federal agencies has barely changed since Congress enacted affirmative employment requirements for people with disabilities in 1973.

In 1987 EEOC issued MD-713, which requires Federal agencies to set numerical objectives for people with targeted disabilities. Each agency is permitted to set whatever objective that it feels it can achieve. Currently, there is no census data available to serve as a benchmark as to the availability of individuals with targeted disabilities. There are no mandatory benchmarks. Each agency has complete flexibility to set any objective it wants in this area.

Trends

EEOC's experience indicates that there is no one answer to the challenge of overcoming barriers to minorities, women, and people with disabilities in the Federal government. Agencies have unique workforces and barriers to equal employment opportunity vary from one agency to another. Successes are gradual in nature and depend considerably on the good will engendered in the Federal executives who manage these programs.

Overall (white collar and blue collar) and white collar employment of women and every minority group has increased steadily between 1982 and 1993. White women and Hispanics are the only groups whose employment in the overall Federal workforce and in white collar ranks remains below their availability in the overall and white collar civilian labor force. Minorities and women continue to be disproportionally employed in clerical jobs and in the lower grade levels of other occupational series. In FY 1993, for example, 85.98% of clerical jobs were held by women and 39.48% by minorities, while their employment in the Professional workforce was 34.57% and 18.08% respectively.

While employment of women and minorities in the Federal workforce has increased, their representation falls as grade level rises. In FY 1993, women comprised 72.90% and minorities 38.15% of employees in grades 1-8, while 16.16% of GS/GM-15 employees were women and 12.04% were minorities. In the same year, 13.40% of SES employees were women and 8.5% were minorities.

Prepared by the U.S. Equal Employment Opportunity Commission
Chairman Gilbert F. Casellas and Claire Gonzales, Director
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AFFIRMATIVE ACTION REVIEW:

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

EXECUTIVE ORDER 11246

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs
Executive Order 11246

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Executive Order 11246

I. Facts About the Program

A. Program Description

Executive Order 11246, as amended, prohibits all non-exempt Federal contractors and subcontractors and federally assisted construction contractors and subcontractors from discriminating in employment. E.O. 11246 also requires these contractors to take "affirmative action" to ensure that employees and applicants for employment are treated without regard to race, color, religion, sex or national origin. The regulations implementing the Executive Order establish different affirmative action requirements for nonconstruction (i.e., service and supply) contractors and for construction contractors. In both cases goals for hiring and promoting women and minorities are a part of the affirmative action program contractors are required to develop and/or implement; however, there are no preference or set-aside requirements.

B. History and Legal Authorization

The requirement that Government contractors refrain from discriminating in employment has been an established part of Federal contracting policy since 1941, when President Roosevelt signed Executive Order 8802 outlawing discrimination based on race, color, creed and national origin in the Federal Government and in the war industries. In December 1951, President Truman issued Executive Order 10308, creating the Committee on Government Contract Compliance. Similarly, President Eisenhower created the President's Committee on Government Contracts through Executive Order 10479.

On March 6, 1961, President Kennedy issued Executive Order 10925 which created the President's Committee on Equal Employment Opportunity. It called upon Federal contractors not only to refrain from employment discrimination, but also to take affirmative action to ensure that applicants are hired and employees are treated during employment without regard to race, creed, color, and national origin. In addition, the order specifically authorized the President's Committee on Equal Employment Opportunity and the Federal contracting agencies to institute procedures leading to contract cancellation, debarment from future contracts, and other sanctions.

President Johnson signed Executive Order 11246 on September 24, 1965, transferring responsibility for supervising and coordinating the Federal Contract Compliance Program from the Presidential Committee to the Secretary of Labor. The Secretary of Labor, in turn, established the Office of Federal Contract Compliance (OFCC) and delegated most of the authority and responsibility for the Executive Order program to the Director of OFCC.

Effective October 14, 1968, near the end of the Johnson administration, Executive Order 11375 added sex discrimination to the prohibited practices. In addition, in 1978 Executive Order 12086 consolidated all Executive Order enforcement responsibility into the Department of Labor.

In 1970, the Nixon Administration, under Secretary of Labor George Schultz, promulgated the current regulations that require "goals and timetables" as a means to measure progress toward equal employment opportunity. On March 23, 1973, the Departments of Justice, Labor, the Equal Employment Opportunity Commission and the former Civil Service Commission issued a joint memorandum that distinguished goals from quotas. The four agencies made clear in that memorandum that goals and timetables are, in appropriate circumstances, a proper means to measure progress in eradicating discrimination and as a tool to implement the nation's commitments to equal employment opportunity through affirmative action programs.

In 1975, OFCC's name was changed to the Office of Federal Contract Compliance Programs (OFCCP) because the agency had added to its jurisdiction contract compliance activities affecting individuals with disabilities and Vietnam-era veterans.

During the Reagan Administration, there were major efforts to abolish or substantially alter the affirmative action requirements of the Executive Order. In 1985, a draft executive order was circulated that would have deleted the requirement for the "goals and timetables" component of affirmative action planning. Then Attorney General Edwin Meese III and Assistant Attorney General William Bradford Reynolds were strong proponents of the draft order. The U.S. Chamber of Commerce and Associated General Contractors also supported the draft order.

The majority of the cabinet, led by Labor Secretary William Brock fought the efforts to undermine the Executive Order and affirmative action. Employer organizations, including the Business Roundtable and National Association of Manufacturers, as well as civil rights groups also opposed the effort to eliminate numerical goals and timetables. Further, there was strong bi-partisan support for retaining the Executive Order and its affirmative action requirements. As a result of the widespread support, the Executive Order program survived in tact.

Since the consolidation of the contract compliance program within the Department of Labor in 1978, there has been a steady decline in staff resources. Immediately after consolidation there was a staff level of approximately 1480. In FY 1994, a staff of 829 (approximately a 44 percent reduction) administered and enforced the nondiscrimination and affirmative requirements for Government contractors.

C. Operation of the program.

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that "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 or national origin." American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action an integral part of a contractor's agreement with the government. Failure to comply with the EEO and affirmative action provisions is a violation of the contract.

1. Coverage

Executive Order 11246 covers Government contractors and subcontractors and applies only to the employment practices of such contractors. The regulations implementing the Executive Order exempt contracts of $10,000 and less but do permit aggregation of nonconstruction contracts over the period of a year to meet the dollar-volume threshold.

Coverage means the contractor is subject to the nondiscrimination and affirmative action requirements, but the contractor is not obligated to develop a **written** affirmative action program unless it is a nonconstruction (i.e., supply and service) contractor that has at least 50 employees and a contract of $50,000 or more.

Among the other exemptions expressly provided for in the regulations are: (1) contracts for work outside the United States; (2) contracts with State or local governments; and (3) contracts with certain educational institutions owned or supported in substantial part by a religious association. Finally, other exemptions (e.g. national security and national interest) are permitted by the regulations and may be granted by OFCCP or the contracting agency upon application by the contractor. See 41 CFR § 60-1.5. For FY 1993, OFCCP's covered federal contractors included 92,500 nonconstruction establishments and 100,000 construction establishments. These represent coverage of approximately 26 million employees. More than 176,000 prime contracts were awarded to these establishments in FY 1993 at a cost of $161 billion dollars.

2. Affirmative Action Requirements

a. For Supply and Service Contractors

Nonconstruction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required to develop and implement a **written** affirmative action program (AAP) for each establishment. The regulations define an AAP as a "set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort." The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review (see discussion below).

The analysis identifies those areas in the contractor's workforce that are deficient in the utilization of women and minorities. The regulations at 41 CFR 60-2.11 (b) define underutilization as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." There are no written administrative directives that further define "underutilization." When determining availability of women and minorities, contractors are required to consider at least eight specific factors specified in the regulations at 41 CFR 60-2.11(b) and assign a weight to each of the factors. The weighting is done by the contractor, not OFCCP, depending on the contractor's determination as to the relevance of the particular factor.

OFCCP has permitted contractors to identify underutilization using either a two-standard deviation analysis or the so called "80 per cent rule," i.e., where employment of women and minorities was less than 80 percent of their availability. Some contractors choose to use the "any difference" rule to determine underutilization, which was OFCCP's policy until it was successfully challenged and ruled unenforceable in 1981 in Firestone Synthetic Rubber & Latex Co. v. Marshall, 507 F.Supp. 1330 (E.D. Tex. 1981). According to this rule, underutilization occurs whenever there exists "any difference" between the availability of minorities and women for a job group and the number of such persons employed in the job group.

Based on those analyses, the contractors establish goals to reduce or overcome the underutilization, and the contractors attempt to make a good faith effort to achieve their goals. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of minorities and females.

b. For Construction Contractors

OFCCP has established a distinct approach to affirmative action for the construction industry due to the fluid and temporary nature of the construction workforce. In contrast to the service and supply affirmative action program, OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. OFCCP issued nationwide goals for minority utilization in the construction industry in 1980 based on the 1970 census data. OFCCP establishes minority employment goals expressed as a percentage of the construction workhours, for each Standard Metropolitan Statistical Area or Economic Area in the country. Although the regulations indicate that the goals would be updated periodically, the minority goals have not been changed since 1980.

OFCCP issued specific national goals for women for the first time in 1978 and were derived from the 1970 census data. The female goals were to increase over three years from 3.1 percent to 5.0 percent to 6.9 percent. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today.

All Federal and federally assisted construction contractors that have contracts of $10,000 or more are required to comply with the affirmative requirements that are set forth in the bid solicitations. **Construction contractors are not required to develop written affirmative action programs.** The regulations enumerate the good faith steps construction contractors must take in order to increase the utilization of minorities and women in the skilled trades.

3. Goals, Timetables, and Good Faith Efforts

The numerical goals component of affirmative action programs is not designed to operate as employment quotas or require preferential treatment with respect to persons of any race, color, religion, sex or national origin. **The regulations at 41 CFR 60 -2.12(e), 60 - 2.30 and 60 - 2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals.**

The numerical goals are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. Numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination.

The Executive Order and its supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. Enforcement efforts are limited to situations in which a

contractor discriminates in the hiring process or fails to make good faith efforts to recruit qualified individuals and/or increase the availability of qualified minorities and women for the job in question. OFCCP has no specific statistical measure that would demonstrate the success of good faith efforts in achieving results. Rather OFCCP focuses on the quality of the efforts and the likelihood of their yielding positive results in the employment of women and minorities.

4. E.O. 11246 Enforcement Procedures

a. Compliance Reviews/Investigations

E.O. 11246 is enforced by OFCCP primarily through compliance reviews and complaint investigations. The compliance review is OFCCP's major method of investigation. Approximately 4000 contractors are reviewed annually. In FY 1994 OFCCP conducted reviews of 3.26% of its supply and service universe and 1.55% of its construction contractor universe.

OFCCP uses the Equal Employment Data System (EEDS) to select nonconstruction (i.e., supply and service) contractors for compliance review. EEDS is derived from the Employer Identification Reports ("EEO-1"), which are utilized by the EEOC and from the Federal Procurement Data System. EEDs computes participation rates of minorities and women by job category for industry groups in standard metropolitan statistical areas. It then compares each contractor establishment by industry within each statistical area against an average participation rate. If a contractor has a less than average participation of minorities and women or shows a declining participation rate, the contractor is "flagged" or targeted for review. OFCCP district office directors are required to select and schedule reviews of a subset of the "flagged" contractors based on several factors, including frequency of past reviews, outstanding complaints and community concerns, size of facility and projected employment opportunities.

The EEDs system also randomly selects a portion of all contractor establishments in the system. OFFCP district office directors are permitted to select for review up to 15 percent of the reviews of nonconstruction (i.e., supply and service) contractors from among contractors other than the "flagged" contractors. In making these "discretionary" selections, however, the district office directors are to consider the above noted criteria.

(See Appendix ___ for a more detailed description of the contractor selection system).

A compliance review consists of an examination of the contractor's affirmative action program; personnel, payroll, and other employment records; interviews of employees and company officials; and other aspects of employment. The review focuses on both the possible existence of discrimination and the good faith steps that have been taken to increase the utilization of minorities and females.

During the investigative process, the OFCCP utilizes principles developed in Title VII case law to identify areas of potential discrimination for further analysis. After conducting an analysis of the results of hiring activity for a contractor in those areas where the comparative ratio for minority hiring versus nonminority hiring or female hiring versus male hiring is less than 80 percent and statistically significant, [2 or more standard deviations], OFCCP will conduct an in-depth analysis of the contractor's hiring practices. This same analysis would be conducted of all personnel activities, such as promotions, terminations, layoffs, and recalls.

Other factors that may lead to an investigation for possible discrimination include specific allegations made by employees either formally or informally during a compliance review; the filing of a formal class action complaint; and results of a salary/compensation analysis that indicate that protected group members are disproportionately represented in lower paying job titles or areas.

b. Alternative Dispute Resolution

When a compliance review discloses evidence of discrimination or evidence of failure to develop and/or implement affirmative action requirements, the regulations require OFCCP to attempt to conciliate with the contractor before entering into a conciliation agreement. The conciliation agreement contains a precise description of the remedial action the contractor is required to take in order to correct the violations or deficiencies, including back pay, seniority, credit, promotions, or other relief for the victims of discrimination. The conciliation agreement also may require the contractor to undertake new training programs, expanded recruitment efforts, or other affirmative action measures.

In FY 1994, OFCCP conducted over 4,000 compliance reviews and discovered violations of the Executive Order and the other laws it enforces in 73 percent of the cases. Over 99 percent of these violations were resolved through conciliation and negotiation and less than 1 percent were referred to the Solicitor of Labor's Office for formal administrative enforcement.

Individuals may file complaints with OFCCP under the Executive Order alleging discrimination based on race, sex, national origin, and religion. OFCCP refers individual complaints filed under the Executive Order to EEOC. Complaints which suggest systemic problems or practices which show a pattern of discrimination are retained and investigated by OFCCP.

c. Enforcement Sanctions

A contractor in violation of E.O. 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future Government contracts. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order. However, a contractor cannot be debarred without being afforded the opportunity for a full evidentiary hearing.

If a matter is not resolved through conciliation, OFCCP may refer the matter to the Office of the Solicitor of Labor, which is authorized to institute administrative enforcement proceedings. Cases also may be referred to the Department of Justice for judicial enforcement of E.O. 11246 primarily when use of the sanctions authorized by the Order are impracticable, such as a case involving a sole source supplier.

d. Compliance Incentives

OFCCP presents awards to Federal contractors, associations of Federal contractors and public interest groups each year for their exceptional performance or contribution to affirmative action and equal employment opportunity. The awards are based on nominations submitted each year to the Deputy Assistant Secretary for Federal Contract Compliance.

The Opportunity 2000 Award is given each year to the Federal contractor whose nomination submission shows evidence of significant accomplishments in the areas of affirmative action through multi-facetted employment and development programs, the elimination of the "glass ceiling," and contributions to the development of women and minorities in the communities that the company serves. Companies that have received the award are: IBM, Pacific Gas and Electric, Digital Equipment, Johnson and Johnson, Westinghouse, Motorola, and Procter and Gamble.

The Exemplary Voluntary Efforts ("EVE") awards are given to companies whose nomination submissions show evidence of significant accomplishments in affirmative action and equal employment opportunity in their companies. Nominations are received for a wide variety of types and sizes of companies in all industries. Some recipients of the EVE award are: Hyman/Manhattan Construction, Temple University, Falcon Jet, Glaxo, Saturn, US Sprint, Texas Instruments, Polaroid and the Louisianna Industry Liaison Group.

The Exemplary Public Interest Contribution ("EPIC") awards are given to public interest groups whose nomination submissions show evidence of a significant contribution in the development and placement of minorities in jobs with Federal contractors. The first EPIC awards were given in 1994 and the recipients were: Crispus Attucks Association, Women Employed, the Council for Tribal Employment Rights and the Cheyenne River Sioux Tribe TERO.

D. Contemporary Evidence of Discrimination

Several types of economic research suggest that labor market discrimination is a continuing problem. First, "audit" studies -- in which white and black (or male and female) job seekers are given similar resumes and sent to the same set of firms to apply for work -- have found that employers are less likely to interview or offer a job to black applicants and to female applicants. Second, after adjusting for observed characteristics (e.g., years of education, experience, etc.), studies often find that black workers and women are paid less than white workers and men. These studies are not uniformly accepted as providing evidence of discrimination, however, as some researchers have argued that the studies fail to adequately control for differences in average characteristics between the demographic groups. Many of the studies that claim the observed wage gaps between groups are not due to discrimination have focused on skill differences, typically as proxied by test scores.

A fact-finding report of the Federal Glass Ceiling Commission, <u>Good for Business: Making Full Use of the Nation's Human Capital</u>, released March 16, 1995, found that in the private sector, equally qualified and similarly situated citizens are being denied equal access to advancement into senior-level management on the basis of gender, race, or ethnicity. The research conducted at the request of the Commission study finds that while the American workforce is increasingly diverse, white men fill most top management positions in corporations. In 1950, white men comprised 65 percent of the labor force; in 1990 white male representation had dropped to 43 percent. During the same period, representation of white women in the labor force increased from 24.2 percent to 35.3 percent. At the same time, minority representation in the labor force doubled, to 15.2 percent.

Yet, the Commission cites a survey of senior-level managers in Fortune 1000 Industrial and Fortune 500 service industries which shows that almost 97 percent are white, .06 are African-American, .03 percent are Asian, and .04 are Hispanic. African-American men and women comprise less than 2.5 percent of total employment in the top jobs in the private sector. Data collected by the Commission show that women hold 3 to 5 percent of the senior-level jobs in major corporations and 5 percent of the women who hold senior-level jobs are minority women.

OFCCP continues to discover situations in which women and minorities have been discriminated against in the work place, thus demonstrating that discrimination persists. Some examples of OFCCP cases resolved during 1994 are included in Appendix ___.

II. PERFORMANCE MEASURES

A. Best objective evidence

Five academic studies[1] by leading labor economists that examined the impact of OFCCP on minority employment using data from the 1970s all find that contracting firms have higher rates of minority employment growth than noncontracting firms -- almost a one percent per year higher rate of employment growth for black male workers than for white male workers. The studies find that establishments that have undergone an OFCCP review have even faster rates of growth of black employment than other contractors. A 1984 study done by OFCCP, Employment Patterns of Minorities and Women in Federal Contractor and Noncontractor Establishments, 1974-1980 came to similar conclusions. Its findings are summarized in Appendix ___. The studies generally find somewhat larger effects of OFCCP on employment for black females, but smaller (though still positive) effects for white females.

Most studies have found that OFCCP has had a weak effect on hiring of minorities in skilled occupations. Although these studies provide fairly convincing evidence that OFCCP has led contracting firms to hire more minorities -- and possibly in better occupations -- the effects are considered modest.

Less research has been done on OFCCP in the 1980s and 1990s than in the 1970s. Jonathan Leonard has conducted an evaluation of the effect of OFCCP on employment growth between 1980 and 1984. In contrast to his findings for the 1970s, results for this period indicate that contracting firms hired fewer minority workers than noncontracting firms. Leonard attributes this to weakened enforcement of OFCCP, which led to a return to historical patterns. For example, he points out that OFCCP doubled its compliance reviews in the 1980s without increasing its budget or staff. Leonard also finds that OFCCP and Title VII enforcement efforts do not appear to lead to the promotion or hiring of unqualified minorities or women. He examined this question by estimating productivity of minorities and women in state-by-manufacturing-industry-level data. Leonard finds that OFCCP and Title VII increased hiring of minorities and women in manufacturing industries, but did not have a statistically significant effect on productivity.

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[1] Two of these studies are by Jonathan Leonard (Berkeley), one is by Jim Heckman (University of Chicago) and Orley Ashenfelter (Princeton), one is by Heckman and Kenneth Wolpin, and one is by Morris Goldstein and Robert Smith (Cornell).

A number of limitations of the OFCCP evaluation studies have been raised. One issue concerns shifting of employment between sectors. The literature clearly shows that if it is actively enforced OFCCP can lead to greater employment of minorities in contracting firms. However, some researchers have raised the possibility that this employment comes at the expense of an equivalent decline in employment of minorities in non-contracting firms. With available data, it is impossible to know how much of the increased minority and female employment in contracting firms is a result of declining minority and female employment in noncontracting firms, and how much is a net addition to employment. Yet even if minority employment growth in contracting firms is entirely a result of shifting employment between sectors, OFCCP should still make minority workers better off because the compensation in contracting firms is higher (otherwise they would not have shifted to work there). Another limitation of the evaluation studies is that OFCCP may lead to improved conditions in noncontracting firms, which may offer higher wages to prevent minority workers from moving to contracting firms. Finally, by reducing discrimination generally, OFCCP may lead noncontracting firms to hire more minorities and women, which would lead the evaluation studies to understate the effect of OFCCP.

The evidence on a broader set of questions on OFCCP is scantier. First, evidence suggests that productivity at contracting firms is unaffected by OFCCP. This suggests that OFCCP has not caused contracting firms to hire less qualified workers. Second, a new study by Peter Wright and others finds that exemplary affirmative action plan helps a company's stock market values (<u>Academy of Management Journal</u>). The article examines the stock market reaction to announcements of 34 companies winning DOL's annual Exemplary Voluntary Efforts Award (presented by OFCCP), between 1986 and 1992. The authors find that award-winning firms have an excess stock market return (i.e., excess over the overall market return that day) of 1 percent on the day of, plus the day after, the announcement. This suggests that the investors value firms that have successful affirmative action programs. Third, Glenn Loury and others have argued that affirmative action may affect minority workers' self esteem, and influence (increase or decrease) employer stereotypes. Little systematic evidence is available on these effects.

B. Appraisal of the Inadequacies of the Program.

OFCCP's goals for women and minorities in construction were developed based on data from the 1970 census and are sorely in need of updating.

OFCCP's efforts do not have an effective educational component. The lack of an educational component also adversely affects newly covered small contractors. No "user friendly" technical assistance methodology is available to such firms, and they frequently feel obliged to retain law firms and consultants to assist them in developing a written affirmative action program. This, in part at least, explains some of the criticisms from small employers regarding the expense associated with developing a written affirmative action program. In FY'95, OFCCP has begun to undertake the development of a comprehensive compliance assistance program including a technical assistance manual.

C. Appraisal of abuses of the program

OFCCP utilizes formal accountability reviews; quality audits; customer and conciliation agreement surveys; quarterly assessments and consultations with stakeholders, to assess the quality of its enforcement program. (See Appendix __)

For example, the OFCCP national office conducted a random survey of conciliation agreements (CA) obtained by the field in FY'93 and FY'94. OFCCP reviewed 247 conciliation agreements for the express purpose of determining if any of the CAs contained the following: (a) use of the word "quota;" (b) remedies calling for job offers and/or back pay merely because the contractor failed to meet a goal; and (c) remedies obtained by OFCCP that appear to be egregious or not within its regulatory authority to obtain. OFCCP did not find any instances of contractors being cited for not meeting their goals, use of the word "quota," or obtaining remedies outside the scope of OFCCP's authority.

Further, during the review of the conciliation agreements OFCCP found an example of an OFCCP regional office requiring corrective action by a contractor who had created a "preference" or rendered an employment decision based on gender or race. In a review completed by OFCCP's Southern New Jersey District Office, a contractor was found to have an employment practice that discriminated against males, both whites and minorities. The office cited the contractor and required it to enter into an agreement providing relief to both white and minority victims.

Through policy alerts and training, OFCCP's staff are consistently reminded of the need to ensure the correct implementation of the program and the proper evaluation of the contractors' efforts to achieve diversity and to ensure equal employment opportunity.

D. Costs and Benefits.

To accomplish its functions in fiscal year 1996, the OFCCP is requesting $63,831,000. With these funds, OFCCP will conduct 4,470 compliance reviews, 950 complaint investigations and provide technical assistance to contractors, constituency groups and the public.

OFCCP estimates that the economic cost of compliance seldom approaches the cost of non-compliance. For example, a 1993 study, Economic Cost of Discrimination Against Black Americans by

Andrew Brimmer, concludes that disparate treatment of blacks cost the American economy approximately $215 billion in 1991 which equated to roughly 3.8 percent of gross domestic product (GDP). The economic cost originates from two sources: (1) inefficiencies in the use of the labor force that arise from failure to fully use the existing education, skills, and experience of the black population, and (2) failure to fully develop potential education, skills, and experience. Brimmer posits that if racial discrimination were eliminated, blacks could migrate more freely from low to high productivity occupations. The result would be a gain in the total output of goods and services in the domestic economy and a elimination of the persistent disparity in income between blacks and whites.

E. Media articles on the program.

Most recently the popular press reported that Senator Dole critized the policy of requiring federal contractors to file "goals and timetables," saying that was not the original intent of the 1965 executive order. OFCCP's affirmative action requirements are often mischaracterized as quotas or a preference program.

III. EVALUATIONS OF THE PROGRAM

A. Internal studies

Internal studies or audits of OFCCP have focused primarily on internal program management and administration issues rather than on the success of the program in eradicating discrimination. These studies include an Inspector General report, OFCCP Needs to More Effectively and Consistently Enforce Federal EEO Regulations, September 1988. This study concluded that more effective program management in the areas of program planning, enforcement of EEO regulations, and accomplishment reporting would result in stronger, more timely and consistent enforcement of EEO regulations. In another OIG report, OIG Final Audit Report: FY 1993 Performance Measures Audit, the IG concluded that OFCCP needed to improve internal controls in order to comply with the presentation and disclosure requirements for outcome performance measures designed to assess effectiveness.

Three GAO reports have addressed employment discrimination issues related to OFCCP's programs. Two were industry specific: Equal Employment Opportunity - Actions Needed for FAA to Implement Committee Recommendations in the Airline Industry, August 1989; and Equal Employment Opportunity - Women and Minority Aerospace Managers and Professionals, 1979-86, October 1989. The third GAO study, Federal Contractor Hiring: Effect of Veteran Hiring Legislation, October 1993, focused on veterans issues.

The FAA study was undertaken in response to a Congressional Committee's conclusion that FAA should assume a shared role in enforcing affirmative action and equal employment opportunity in the airline industry. Both the Secretary of Labor and the Secretary of Transportation disagreed with the report's recommendation for joint responsibility. Their opinion was that the transfer of an enforcement role to FAA would lessen the effectiveness of the federal contract compliance program.

In response to numerous complaints on EEO matters from aerospace industry employees, the House Committee on Education and Labor requested that GAO examine national data on equal employment opportunity among government contractors in the aerospace industry. The report concluded that minorities were underrepresented in the industry, women lagged behind men in employment gains as managers and professionals, and salary disparities existed between minority men and white men between 1979 and 1987. As a result of this study, the Secretary of Labor established a task force to review the plight of women in nontraditional jobs in the aerospace and construction industries. This task force completed its work and prepared final reports in 1992 which were never issued.

The GAO report on veteran hiring legislation concluded that after 20 years, the effect of legislation on veteran hiring is still unknown, primarily because of the absence of comparative data.

B. Congressional Studies

1. Committee Analysis of Executive Order 11246 (The Affirmative Action Program), Committee on Labor and Human Resources, U.S. Senate, 97th Congress, 2nd Session (1982)

The yearlong study, which included five days of hearings, focused on whether OFCCP's then current regulatory program was capable of achieving the intent of Executive Order 11246 and whether the program was the most effective, practical and equitable method a available. According to the Committee Report, the testimony presented at the hearings indicated that while OFCCP had succeeded in making more employment opportunities available to minorities and women, the agency was plagued with a number of conceptual, administrative and practical problems. The Report included 14 regulatory recommendations for revitalizing the agency, among them: developing a more effective method for selecting contractors for review; increasing the agency's jurisdictional thresholds to reduce the burden on smaller contractors; developing standards for measuring the program's accomplishments; and limiting OFCCP's authority to enforcing the affirmative action requirements and giving EEOC the sole responsibility for remedying discrimination. A copy of the Forward and Executive Summary is attached at Appendix ___.

2. A Report on the Investigation of the Civil Rights Enforcement Activities of the Office of Federal Contract Compliance Programs, U.S. Department of Labor, by the Majority Staff of the Committee on Education and Labor, U.S. House of Representatives, 100th Congress, 1st Session (1987)

The study examined a number of issues concerning OFCCP's policies and operations. The Committee found that OFCCP's level of enforcement had dropped precipitously during the period 1980-1986, as evidenced by the following indicators: 1) a marked decline in back pay recoveries; 2) a decrease in the number of cases referred to the Solicitor of Labor's Office for administrative enforcement; 3) a decrease in the number of administrative enforcement actions filed by the Solicitor; and 4) decline in the number of debarments. Additionally, the Committee was critical of the agency's practice of developing and disseminating policy guidance orally, rather than through formal directives and agency memoranda. A copy of the Executive Summary is attached at Appendix ___.

C. Planned Program Changes

As part of the NPR process, OFCCP plans to implement proposals that will eliminate unnecessary paperwork requirements associated with the written affirmative action plan; initiate an AAP summary format that will greatly assist in the agency's targeting its limited resources more efficiently; and reduce its internal administrative procedures and regulations by fifty percent. The OFCCP also has instituted a more focused operational plan that targets contractors with a history of violations, growth industries, first-time reviewees and region-specific initiatives ranging from the use of testers to computers for conducting glass ceiling reviews. This plan was complimented in the report issued by Citizens Commision on Civil Rights in the fall of 1994. See Appendix ___ for a more detailed description of the proposed program changes.

IV. COURT CHALLENGES TO THE PROGRAM

In the 30-year history of the Executive Order Program, there have been several court challenges to the President's authority to issue an Executive Order requiring nondiscrimination in employment by federal contractors and affirmative action by those contractors to prevent or correct discrimination. Additionally, there have been challenges to OFCCP's interpretation of the Executive Order's implementing regulations, and the way in which the agency exercises its enforcement authority. Following is a brief description of some of the significant cases.

A. Pending Case

Nationsbank v. Secretary of Labor, C.A. No. 395-CV-103-H (W.D.N.C.), was filed on March 1, 1995. The Bank alleges that the agency's decision to initiate concurrent compliance reviews at four of its establishments violates the Fourth Amendment's prohibition against unreasonable searches and seizures. The Government has 60 days to file its Answer, but expects that a Motion to Dismiss will be filed prior to that time. The case is being handled by the Justice Department.

B. Significant Precedents

1. Legal Authority for the Executive Order

Contractors' Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1970), cert. denied, 404 U.S. 854 (1971), was brought by construction contractors to challenge the Philadelphia Plan. That Plan, which was promulgated under Executive Order 11246, required bidders on Federal and federally assisted construction contracts to submit an acceptable affirmative action program which included specific goals for the utilization of minorities in six skilled crafts. At issue was the validity of Executive Order 11246 as applied to the construction industry on state government contracts that involved federal financial assistance. The Third Circuit held that Executive Order 11246 requiring nondiscrimination and affirmative action is authorized by the President's inherent authority under the Constitution to promote economy and efficiency in the procurement process by all reasonable means.

2. Constitutionality of the Executive Order

No judicial decision has decided the constitutionality of Executive Order 11246.

Stouffer Foods Corporation v. Secretary of Labor, C.A. No. 7-89-2149-3, (D. S.C.), filed on August 28, 1989, involved a challenge to the constitutionality of Executive Order 11246. The Government argued that, because neither the Executive Order nor the implementing regulations require race or gender-based employment decisions, the Executive Order was subject to the equal protection analysis set forth in the Supreme Court's decision in Metro Broadcasting, Inc. v. Federal Communications Commission, 497 U.S. 547 (1990). The court did not get an opportunity to decide the issue as the case was settled. A Stipulation of Dismissal was entered on February 8, 1993.

3. Contents of Affirmative Action Programs

Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319 (9th Cir. 1979) was brought by several Black residents against compliance officers, alleging they had failed to discharge their duty to ensure that a food processing contractor maintained

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Divider Title: 4

This paper addresses Department of Education (ED) requirements and policies on affirmative action on the basis of race, national origin, and sex by educational institutions that receive funds from ED. Affirmative action programs in the educational context differ in many respects from affirmative action in the employment context. Educational institutions use affirmative action primarily in two areas -- admissions and student financial aid. This paper describes the use of affirmative action pursuant to civil rights statutes enforced by ED, as well as pursuant to federal grant programs administered by ED.

I. Affirmative Action Under Civil Rights Statutes Enforced by ED

Regulations implementing the nondiscrimination requirements of Title VI of the Civil Rights Act of 1964 (prohibiting discrimination on the basis of race, color, or national origin). address affirmative action as follows:

Section 100.3(b)(6) of the Title VI regulations states that--

(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.
(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

34 C.F.R. 100.3(b)(6)[1]

These regulatory provisions, as well as case law interpreting Title VI and the Fourteenth Amendment, serve as the basis for two ED policies on affirmative action:

1. On October 10, 1979, ED issued a policy interpretation under Title VI based on the Supreme Court's decision in Regents of the University of California v. Bakke. 44 Fed. Reg. 58509. The policy interpretation stated that a college -- even in a case that does not involve remedying its past discrimination -- may take voluntary affirmative action to increaase minority student enrollments by (1) considering race or national origin as a positive factor with other factors such as geographic or economic circumstance, in selecting from among qualified candidates for admission, (2) recruiting in predominantly minority institutions and communities, (3) modifying admissions criteria for minorities

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[1] The regulations implementing Title IX of the Education Amendments of 1972 (prohibiting discrimination on the basis of sex in education programs) contain a similar provision. 34 C.F.R. 106.3

if it determines that it is necessary for a fair appraisal of the academic promise of minority applicants, (4) offering special services, including summer institutes and special tutoring services, to assist educationally and socially disadvantaged students in meeting admissions requirements, and (5) establishing numerical goals to achieve the racial and ethnic composition of the student body it seeks through the previous techniques.

2. On February 23, 1994, ED issued a notice of final policy guidance setting out the circumstances in which ED believes that it is permissible to consider race or national origin in awarding student financial aid. 59 Fed. Reg. 8756. Under the policy guidance, a college may consider race or national origin in awarding student aid only if its purpose in doing so is to remedy its past discrimination or to achieve a diverse student body and its consideration of race or national origin is narrowly tailored to that purpose.[2] In addition, colleges may administer federal student aid programs where Congress has authorized the use of race or national origin in awarding the aid.[3]

The final policy on race-targeted student aid took into account the serious concerns raised by the higher education community regarding the proposed policy issued by the Bush Administration.[4]

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[2] The courts have delineated the factors to be considered in determining whether the use of race or national origin is narrowly tailored. They include whether a race-neutral or less intrusive use of race has been considered, whether the use of race or national origin is of limited extent and duration, is applied flexibly so that exceptions can be made, is periodically reexamined to determine whether it continues to be necessary, and will not create an undue burden on individuals who are not the beneficiaries of the affirmative action. The policy guidance states that ED will apply these factors in determining whether a particular student aid program is lawful under Title VI.

[3] The policy also creates a limited exception for historically Black colleges and universities (HBCUs) to permit their participation in third party scholarship programs, such as the National Achievement Scholarship Program, which are limited to African American students. The purpose of this exception is to avoid undermining congressional efforts to enhance HBCUs, which otherwise would be precluded from competing for students who receive these third party awards.

[4] The principal differences between the proposed and final policies are that the final policy (1) permits a college to remedy its past discrimination without waiting for a formal finding by a court, legislative body, or administrative agency, so long as the college has a strong basis in evidence of past discrimination; and (2) does not limit a college in its efforts to achieve diversity to considering race or national origin as one among several competitive factors, so long as use of race or national origin as

Specifically, colleges and universities were concerned that their efforts to promote diversity, remedy past discrimination, and provide access to higher education for minority students would be greatly undercut by the approach taken in the proposed policy. Those concerns were supported by a report issued by the General Accounting Office which found that, while student aid awarded on the basis of race or national origin was a very small percentage (3%) of all scholarship aid awarded by undergraduate and graduate schools, nearly two-thirds of the postsecondary institutions surveyed used some form of minority-targeted aid and considered it crucial in their efforts to enroll minority students. The report found that race-targeted scholarships assisted in recruiting and retaining minority students by enabling minority students to meet the financial costs of attending college, sending a message that minority students are welcome, and building a critical mass of minority students on campus.[5]

II. Affirmative Action Under Grant Programs Administered by ED[6]

The following grant programs provide for affirmative action by educational institutions:

1. Patricia Roberts Harris Fellowship Program, 20 U.S.C. 1134

Under this program, ED awards grants to institutions of higher education for fellowship awards to make available the benefits of master's level, professional, and doctoral education programs to individuals from minority groups and women who are underrepresented in these programs. Congress appropriated $20,244,000 for this program in fiscal year (FY) 1995. The Administration has proposed repeal of this program and has not requested an appropriation for FY 1996.

2. Legal Profession Training Program, 20 U.S.C. 1134l

ED awards a grant to the Council on Legal Education Opportunity to provide assistance in gaining admission to law school, a summer program to prepare for law school, and tutorial services during law school to assist minority, low-income and educationally disadvantaged college graduates pursue a law degree. Congress appropriated $2,964,00o for this program in FY 1995. The Administration has proposed repeal of this program and

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an eligibility criterion is narrowly tailored to those efforts. The final policy also created the exception for HBCUs discussed above.

[5] Another recent GAO study found that the impact of the availability of scholarship aid on college attendance was greater for minority students than for white students.

[6] We have not included programs that specifically address Native Americans, Native Alaskans, or Native Hawaiians.

has not requested an appropriation for FY 1996.

3. Faculty Development Fellowship Program, 20 U.S.C. 1134r

ED awards grants to institutions of higher education to provide fellowships to minorities who wish to obtain a doctoral degree and to enable minority faculty members to participate in professional development programs designed to advance their careers. Congress appropriated $3,732,000 for this program in FY 1995. The Administration has requested the same amount for FY 1996.

4. Minority Teacher Recruitment Programs, 20 U.S.C. 1112

Ed supports programs to recruit, prepare, and train minority students to become elementary and secondary teachers. Congress appropriated $2,458,000 for this program in FY 1995. The Administration has requested $3,000,000 for FY 1996.

5. Paul Douglas Teacher Scholarships, 20 U.S.C. 1104

ED awards grants to States to provide scholarships to outstanding high school graduates who demonstrate an interest in teaching. Special consideration is given to students who are members of underrepresented racial and ethnic minority groups, among others. Congress appropriated $14,599,000 for this program in FY 1995. The Administration has proposed repeal of this program and has not requested an appropriation for FY 1996.

6. Ronald E. McNair Postbaccalaureate Achievement Program, 20 U.S.C. 1070a-15

ED awards grants to provide support services to low-income students, first-generation college students, and students from groups underrepresented in graduate education, including minority groups, to prepare these students for graduate education. Congress appropriated $20,000,000 for this program in FY 1995 and the Administration has requested the same amount for FY 1996.

III. Assessing the Effectiveness of Affirmative Action

Overall, it appears that affirmative efforts to increase the enrollment of minority students at institutions of higher education are meeting with success. In 1976, there were 1,690,800 minority students enrolled in postsecondary educational institutions, representing 15.7% of total enrollments. By 1992, that number had risen to 3,163,600, representing 22.5% of total enrollments.[7] Efforts to enroll increased numbers of female students in graduate and professional schools also have been successful, with the percentage of graduate and professional

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[7] See attached table of enrollment data from the NCES Digest of Educational Statistics (1994).

degrees awarded to women rising dramatically since the 1970's. Moreover, the significant concern generated in the higher education community by ED's policy statements on race-targeted student aid reflects the importance educational institutions attach to a racially and ethnically diverse student body and the vital role of affirmative action in achieving that diversity.

In addition, it is important to note the success of affirmative efforts to remedy segregation of students at elementary and secondary schools, as well as in higher education. A series of studies, from the late 1960's through the early 1990's, has found that African American students in desegregated schools have increased educational achievement, including improvements on standardized achievement tests, increased high school graduation and college-going rates, and increased enrollment in academic subjects leading to more remunerative jobs.[8] For example, one study found a 50% reduction in the gap in academic achievement between African American and white students over the twenty year period between 1966 and 1986.[9] These studies demonstrate the strong influence of affirmative action on educational outcomes for African American students.

Attachment

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[8] See Brief of the National Urban League, et al., at 18-26, Missouri v. Jenkins, United States Supreme Court, No. 93-1823 (October Term 1994).

[9] Marshall S. Smith and Jennifer O'Day, Educational Equality: 1966 and Now, in Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook (Deborah A. Verstegen and James F. Ward eds. 1991).

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Divider Title: **5**

Summary of Our Program

Minority Enterprise Development

SMALL BUSINESS ADMINISTRATION

1953

MED = Access + Opportunity

THE MINORITY ENTERPRISE DEVELOPMENT (MED) PROGRAM

EXECUTIVE SUMMARY

- Considerable growth in minority business sector since beginning of 8(a) Program but there are still shortcomings which prohibit minorities from fully participating in American economy.
- In the past SBA's focus on assisting minority businesses has been thru 8(a) contracting which has not produced a meaningful survival rate.
- MED Program will address shortcomings and utilize all SBA resources.
- MED Program supports President's commitment to minority business and revitalizing economy.
- MED Program was developed with input from numerous sources.

PROGRAM OVERVIEW

- Focus is on developing businesses (SBA and partners) to build survival skills and infrastructure.
- Three phase program (not necessarily sequential).
- Phases I and II emphasize training - self certification to enter.
- Phase III (8(a) business development) District Director certifies.
- National Training Coordinator position established.
- Provide greater access to capital.

HISTORY OF SBA's INVOLVEMENT IN MINORITY ENTERPRISE DEVELOPMENT

- Small Business Act of 1953 authorized 8(a) contracting but authority not used for 15 years.
- 1967 - 8(a) authority initially used to create jobs.
- 1969 - 8(a) authority used as "contracting" program for SDBs.

- 1978 - PL 95-507 gave statutory authority to use 8(a) as "business development" program for SDBs.
- 1980 - PL 96-481 addressed problem of 8(a) firms staying in program too long.
- 1988 - PL 100-656 addressed: program abuse issues, timely application processing, dependency on 8(a) contracts, and program term, and benefits based on stages.
- In spite of all of previous efforts, Program still does not provide adequate assistance.

BACKGROUND TO DEVELOPMENT OF THE PROPOSED PROGRAM

- Administrator sought input from customers.
- Wrote to and received input from 8(a) firms.
- Brainstorming sessions with 8(a) firms.
- Meetings with Federal agencies, associations, Small Business Committees.

THE PROPOSED MED PROGRAM

Phase I: Start-up

- Objective is to help get businesses started.
- Two years maximum participation from self-certification.
- 51% owned by socially and economically disadvantaged citizen(s) with less than two years operation.
- District Office can approve application.
- Assigned BDS will assist with individual training plan.
- Will have access to orientation and array of training based on need.
- SBA assistance will be augmented by resource partners.
- Completion certificate issued based on meeting criteria.
- Success measured by considering certain factors indicative of business progress.

1Phase II: Developmental

- Aimed at firms beyond start-up.
- Three years maximum participation from self certification.
- 51% owned by socially and economically disadvantaged citizen(s) with at least two years operation and full-time management.
- District Office can approve application.
- Would have written Developmental Agreement to pursue certain training with BDS assistance.
- SBA assistance will be augmented by resource partners.
- Completion certificate issued based on meeting criteria.
- Success measure will be based on contracts awarded, training received and jobs created.

PHASE III: GOVERNMENT CONTRACTING [8(a) CONTRACTING AND BUSINESS DEVELOPMENT

- Will utilize 8(a) and M&TA to assist in developing firms.
- Similar to current eligibility criteria.
- District Director will certify and AA/MED decide reconsiderations.
- Retain competitive business mix requirements with more procedural guidance.
- Will provide more training primarily thru 7(j).
- Expansion of executive development training.
- Exit program via completing nine year term, voluntary withdrawal, graduation, or termination for cause.
- Success measured by viability after program completion, improved financial capacity, achievement of competitive business mix, 8(a) contract support received, and jobs created.

ACCESS TO CREDIT AND EQUITY CAPITAL

- Restrictions in 8(a) Program have impeded access to capital.

- Will adjust personal net worth economic disadvantage thresholds for inflation.

- In order to enhance access to capital for firms requiring significant investment in plant equipment, minimum of 51% ownership requirement will be reduced to 35% of "aggregate" shares while continuing to be required to own minimum of 51% of "voting" stock.

- Will increase allowable investment by non - 8(a) firms in the same or similar line of business from 10% to 20%.

- Prequalification program for SBA loans and surety bonds.

- Will offer higher SBA loan guaranty percent to credit worthy firms.

GRANDFATHERING PROVISIONS

- Will review 8(a) portfolio to assess appropriate stage of development. Phase III firms that have not received an 8(a) contract could move to Phase II.

CONTRACTING OPPORTUNITIES

- Government-wide SDB set-aside program.

- 8(a) Program to be sole source up to $10 million threshold for manufacturing and $7 million for all other, with waiver provisions.

- Local buy and national buy distinction will be eliminated.

- SBA will be removed from 8(a) contract award as prime contractor.

- SDB goals will include number of contracts, dollars and number of firms.

- 8(a) contract support levels will be eliminated as a bar to contract award.

- Will be less restrictive on adding SIC codes.

TEAMING ARRANGEMENTS

- Barriers which contribute to low "survival rate" will be eliminated.
- Teaming will be permitted/encouraged within relaxed rules via joint ventures, Mentor/Protege relationships, and subcontracts.

PARTICIPATION OF COMMUNITY DEVELOPMENT CORPORATIONS

- SBA will publish rules and regulations to permit CDCs to participate in MED Program.

REDUCTION IN BURDENSOME REPORTING REQUIREMENTS

- Will reduce frequency of required reports.
- Will permit firms to submit business plan in its own format without separate treatment of transition management plan.

CONCLUSION

- Development of the MED Program was a "Team" effort. Continued teamwork will be needed to make the Program a reality. Legislative and regulatory proposals have been developed to implement the MED program.

FYI

History of the Section 8(a) Program

The origin of the 8(a) program can be found in Public Law 603, June 11, 1942, which created the Smaller War Plants Corporation. This corporation had broad authority to contract with the United States to furnish goods and services to the government and to arrange for the performance of these contracts by subcontracting to small businesses or others.

The Defense Production Act amendments of 1951, Public Law 96, created the independent Small Defense Plants Administration with authority to enter into contracts with the United States and to arrange for performance by subcontracting to small businesses or others.

The 8(a) authorities under Public Laws 96 and 603 was not used.

The Small Business Acts of 1953 authorized SBA to enter into contracts with federal agencies and to subcontract the work to small businesses. However, for 15 years SBA did not use the section 8(a) authority because it believed that the effort to start and operate such a program was not worthwhile in terms of developing small businesses.

The 8(a) program simply evolved as a result of Executive Orders issued by Presidents Johnson and Nixon in response to the 1967 Report of the Commission on Civil Disorders, commonly called the Kerner Commission. The finding that triggered the 8(a) effort was that disadvantaged individuals did not play an integral role in America's free enterprise system, in that they enjoyed no appreciable ownership of small businesses and did not share in the community redevelopment process. The report, recommended that steps be taken to increase the level of business ownership by minorities so that they would have a better opportunity to materially share in the competitive free enterprise system.

In 1967, President Johnson ordered that the section 8(a) authority be used to direct contracts to businesses locating plants in distressed urban areas in order to create jobs. After rioting in inner cities in 1967, section 8(a) authority was used for the first time in support of the Test Cities Program in 12 cities. Sole source federal contracts were provided to induce businesses to locate in areas of high unemployment. This effort was short lived. The effort to promote more employment in inner cities was turned over to the National Alliance for Business JOBS Program.

In 1969, SBA redesigned the program to provide federal contract support for small firms owned by socially or economically disadvantaged individuals. The 8(a) program grew to include, in a 10 year period from 1970 to 1980, approximately 2000 firms. Throughout this period the program was subject to abuse and fraud, particularly due to the intrusion of "front" companies.

In an attempt to correct the abuses, Congress enacted Public Law 95-507 in 1978 to provide the program with statutory authority. The law provided a number measures to shift the program's focus to business development and required program participants be at least 51% owned and controlled by socially and economically disadvantaged individuals. The legislation was designed to foster business ownership by socially and economically disadvantaged persons and to promote the viability of businesses run by such persons by providing contract, financial, technical and management assistance.

It also created the position of Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) to administer the 8(a) and 7(j) management and technical assistance programs. Prior to this the 8(a) program was administered by the Associate Administrator for Procurement Assistance and the 7(j) program was administered by the Associate Administrator for Management Assistance.

As a result of the inequitable determinations of eligibility by the field offices, P.L. 96-507 contained specific eligibility criteria and required that all determinations be made by the AA/MSB&COD.

Unfortunately, even with P.L. 95-507 the program failed to develop viable competitive firms that would graduate from the program.

As a result of so few firms graduating from the program, Congress passed P.L. 96-481 in October 1980. This law required SBA to negotiate with all 8(a) firms a fixed period of time to participate and definite graduation dates.

Through regulations, SBA established the fixed program participation term (FPPT) which limited a firm's participation in the program to an original term of up to 5 years with a possible extension of 2 years. Full implementation of these regulations took place on April 21, 1982.

Evidence before the Congress in 1988 showed that the disadvantaged business program had thus far made unsatisfactory progress in removing discriminatory barriers to minority business success: "Only six percent of minorities own businesses and the average receipts per minority firm is less than 10 percent the average receipts of all businesses." These businesses still only account for less than 1 percent of the nations gross business receipts and employment.

On November 15, 1988, President Reagan signed into law the "Business Opportunity Reform Act of 1988", P.L. 100-656. This law provided for, among other things, competition in the 8(a) program, a nine year participation term, attainment of non 8(a) revenue at certain levels during program years 5 through 9, a 8(a) loan program to replace business development expense, transfer of surplus property, employee skills training, establishment of the division of program certification and eligibility that would process applications within 90 days, Miller Act surety bond exemptions, Walsh-Healey Act exemptions, business plans prior to award of any 8(a) contracts, a transition management plan during the first year of the transition stage, and it required SBA to submit an annual report on the program to the Congress.

Currently, the 8(a) program consist of approximately 5,200 firms and awards approximately $5.0 billion in 8(a) contracts annually. The 8(a) program continues to be the primary tool which minority small businesses are provided the opportunity to participate in the federal procurement process.

Eligibility

To participate in the 8(a) Program, a business must be at least 51% unconditionally owned by either:

- An individual(s) who is a socially and economically disadvantaged citizen of the United States; or
- An economically disadvantaged Indian tribe, including an Alaska Native Corporation or an economically disadvantaged Native Hawaiian Organization.

An applicant firm must qualify as a small business based on industry classification size standards. Size determinations include the applicant concern and all its domestic and foreign affiliates. Brokers, packagers, franchises, debarred or suspended persons or concerns, non-profit organizations, and concerns owned by other disadvantaged concerns, are ineligible for 8(a) Program participation.

Social Disadvantage

Socially disadvantaged individuals have been subjected to racial or ethnic prejudice or cultural bias because of their identify as a member of a group without regard to their individual qualities.

Without evidence to the contrary, the following individuals are presumed to be socially disadvantaged:

- Black Americans
- Native Americans
- Hispanic Americans
- Asian Pacific Americans
- Subcontinent Asian Americans and
- Members of other groups designated from time to time by the SBA.

Individuals who are not members of the aforementioned groups must establish their social disadvantage on the basis of clear and convincing evidence (See Page ____, SBA Form 1010A, Personal Eligibility Statement for guidelines).

Economic Disadvantage

Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line

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of business and competitive market area who are not socially disadvantaged.

- In determining the degree of economic disadvantage, the SBA considers the financial condition of the business, its access to capital, credit and markets, as well as the applicant's personal financial worth and access to capital and credit.

- An individual whose personal net worth exceeds $250,000, excluding ownership interest in the applicant firm and equity in his or her personal residence, will not be considered economically disadvantaged for the purposes of program eligibility. (Note: NTE $500,000 in years 1-4
NTE $750,000 in years 5-9)

<u>Control and Management</u>

Management and daily business operations must be controlled by an individual or individuals who have been identified as socially and economically disadvantaged, and such individual(s) must be engaged in the daily management and operation of the business:

- The individual must have management or technical expertise directly related to the primary product or services of the business.

- At least one socially and economically disadvantaged full-time manager must hold the position of President or Chief Executive Officer.

- The socially and economically disadvantaged individual(s) upon whom eligibility is based must control the Board of Directors either in actual numbers of voting directors or through weighted voting (e.g., in a concern having a two-person Board of Directors where one individual on the Board is disadvantaged and one is not, the disadvantaged vote must be weighted-worth more than one vote-in order for the concern to be eligible for 8(a) participation.) <u>All arrangements regarding the structure and voting rights of the Board must comply with applicable state law.</u>

Individuals who are not socially and economically disadvantaged may be involved in the management of an applicant concern, and may be stockholders, partners, officers, and/or directors of such concern. Such individual(s), their spouses or immediate family members who reside in the individual's household may not:

- Exercise actual control or have the power to control the applicant concern.

- Be an officer or director or more than a 10% owner, stockholder, or partner of another firm in the same or similar line of business as the applicant concern.

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- Receive excessive compensation (exceeds the compensation of the Chief Executive Officer or President) from the applicant concern.

- Be former employers of the disadvantaged owner(s) of the applicant concern.

- Have an equity ownership interest of more than 10 percent in another 8(a) concern.

Potential for Success

An applicant concern must demonstrate that it possesses a potential for success. The firm must have been in business in the primary industry classification in which it seeks 8(a) certification for two full years as evidenced by income tax returns showing revenue for each of the two previous years.

In extraordinary circumstances an applicant concern which has not been in business for two years may be eligible to participate in the 8(a) program, provided that all of the following conditions are met:

- The individual or individuals upon whom eligibility is based have substantial and demonstrated business management experience;

- The prospective program participant has demonstrated technical expertise to carry out the business development objectives of the 8(a) program with a substantial likelihood for success;

- The prospective program participant has adequate capital to carry out the business development objectives of the 8(a) program;

- The prospective program participant has a record of successful performance on contracts from governmental and nongovernmental sources in the primary industry category in which the prospective program participant is seeking program certification; and

- The prospective program participant has, or can demonstrate its ability to timely obtain the personnel, facilities, equipment, and any other requirements needed to perform such contracts.

A tribally-owned concern, including a concern owned by an Alaska Native Corporation may be eligible to participate in the 8(a) program if it has been in business for less than two years, provided that it meets the following condition:

- The concern has a marketing and development strategy for meeting the 8(a) program competitive business mix

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requirements without undue dependence on one or more 8(a) contracts.

In determining whether a tribally-owned concern or an Alaska Native Corporation has the potential for success, SBA will look at a number of factors including, but not limited to:

- The technical and managerial experience and competency of the individual(s) who will manage and control the daily operations of the tribally-owned or the Alaska Native Corporation;
- The financial capacity of the tribally-owned concern or the Alaska Native Corporation; and
- The concern's record of performance on any previous Federal or private sector contract in the primary industry in which the concern's seeking 8(a) certification.

This instruction manual was designed as an aid to help applicants apply for 8(a) program participation. For more detailed information on the 8(a) program and the eligibility requirements, contact your local SBA District office. For the address and telephone number of one nearest you, consult the telephone directory under U.S. Government, or call the Small Business Answer Desk at 1-800-8-ASK-SBA. For the hearing impaired, the TDD number is (202) 205-7333.

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Divider Title: **6**

GENERAL SERVICES ADMINISTRATION
DRAFT PILOT PROJECT
NEW CONSTRUCTION PROJECTS
U.S. COURTHOUSES AND FEDERAL BUILDINGS

Chapter 2, Section 211. Section 8(d) of Public Law 95-507 amends the Small Business Act and the Small Business Investment Act of 1958, and provides the General Services Administration (GSA) the authority to mandate the inclusion of subcontracting plans in all contracts awarded to large businesses in excess of $500,000 ($1 million for construction).

Through the direction of the new administration, GSA identified the small, disadvantaged and women-owned business utilization program as one requiring changes, particularly the subcontracting program (the "Program"). On August 1, 1994, Chapter 5 of the General Services Administration's Acquisition Regulation (GSAR) was revised to strengthen the subcontracting program. GSA has developed a new "teaming" approach for major federal construction projects, working with other federal agencies, unions, the affected community, and contractors in order to increase minority and women owned business participation in these projects. The agency is doing so through development of reasonable equal employment and subcontracting goals for women and minorities, and greatly increased communication among all of the relevant parties for a project. This new approach is in its infancy, but is expected to achieve increased employment and contracting diversification on federal construction projects.

CONSIDERATIONS:

1. Most individual subcontracting program opportunities procured by GSA are found in the Public Building Services (PBS). PBS is responsible for building, maintaining, and leasing spaces for U.S. Courthouses and federal buildings. The new construction projects offer a long-term economic benefit to the small, disadvantaged and women-owned business community (the "community") in which they are being built and have the greatest potential for maximum participation by small, disadvantaged and women-owned business utilization.

2. Prior to this administration, GSA's contracting officers were treating the subcontracting program as an afterthought while conducting their procurement responsibilities, and had no information on the barriers existing in the community to participate successfully as a subcontractor.

3. The small, disadvantaged and women-owned business community was not being informed on a timely basis of procurement opportunities on both the subcontracting and prime contracting levels by both GSA and the prime contractors. This problem negatively affected their ability to participate successfully. Additionally, this group experienced difficulty in obtaining bid documents in a timely fashion.

4. The potential prime contractors who expressed interest in participating in the Program were not obtaining a message of commitment to the Program by some GSA contracting officers. When such a commitment was expressed, the prime contractors spent unnecessary amounts of time identifying potential subcontractors while compiling their bid documents.

5. GSA, the potential prime contractors, and the community lacked information concerning resources available through the Small Business Administration (SBA), the U.S. Department of Commerce - Minority Business Development Agency (MBDA), and state and local government agency resources available to assist the community in participating as subcontractors.

6. Because of a lack of resources and training, the GSA contracting officers were not regularly conducting compliance review activities on the subcontracting program. The program requires bi-annual submission of standard form #294 and an annual submission of standard form #295, which only require the prime contractor to identify the total dollar amounts of subcontracting dollars that went to the community. Additionally, the contracting personnel do not have a strong enough understanding of the community to be able to identify potential abuses to the Program.

7. The Department of Labor - Office of Federal Contract Compliance Program (OFCCP) was utilizing outdated employment statistics as a basis for identifying equal employment opportunity (EEO) goals for construction projects. The community expressed serious concern, in public settings, against utilizing the outdated goals. It also encouraged GSA to establish EEO goals that reflected the current make-up of the community in which the project was being built.

8. EEO compliance activities on the construction projects were relatively non-existent, and the Department of Labor (OFCCP) was rarely called upon as a resource.

OVERVIEW OF THE PROGRAM:

The new subcontracting compliance Program stresses a proactive approach through early identification of procurement opportunities and budget allocation nationwide rather than merely as a contracting officer's afterthought. Upon receiving the necessary information, the GSA small business technical advisor (SBTA) reviews it on a regional basis, contacting trade associations representing the small, disadvantaged and women-business (sb/sdb/swb) community to identify capacity and availability for use in the establishment of regional subcontracting goals.

GSA has identified ten major new construction projects to test the new Program. They include the following:

Region #2 Brooklyn Courthouse, NY
Region #3 IRS Federal Building, Martinsburg, WV
Region #4 Fort Meyers Courthouse, FL
Region #5 Cleveland Courthouse, OH
Region #6 Kansas City Courthouse, MO
Region #7 Brownsville Courthouse, TX
Region #8 Fargo Courthouse, ND
Region #9 Phoenix Courthouse, AZ
Region #10 Seattle Courthouse, WA
NCR Region South East Federal Building

On all of these projects, the GSA contracting officer is now required to provide timely information concerning procurement opportunities to the SBTA. The SBTA reviews and incorporates GSA's commitment to the subcontracting program through explicit language in Commerce Business Daily advertisements, the solicitation prior to issuance, and contract language. This activity alleviates any confusion that may be experienced by the large business community to the subcontracting program requirements.

Upon completing the review of language, the SBTA schedules a meeting with the Business Service Center (BSC), the contracting officer, the SBA, MBDA, OFCCP, state and local government agencies with programmatic responsibilities, and trade associations representing the sb/sdb/swb communities in order to begin the teaming concept. Through this process GSA establishes reasonable and realistic subcontracting and EEO goals. The trade associations are required to submit names (and contact information) of construction projects of similar scope and size to support the goals identified. The GSA contracting officer is responsible for verifying the goals and accomplishments. The SBTA is responsible for verifying goals and accomplishments established by state and local government agencies. The trade associations and state and local government agencies discuss the current local climate the community is experiencing, such as: other on-going construction projects; barriers (i.e., bonding, financing, union) that may affect the availability of the community to participate in subcontracting and employment opportunities; the prevalence of abuses to the Program; and prime contractors' sensitivity to the Program. This discussion provides the GSA contracting officer with the following:

* Information necessary to make educated decisions concerning the establishment of goals,
* Exposes the contracting officer to the community's needs and resources,
* Fosters the teaming approach with other various government agencies and trade associations to address unique problems experienced by the community,
* establishes a method for the community to act as a resource to the prime contractor in meeting their committed subcontracting program and EEO goals, and
* To hold the prime contractor accountable to utilizing good faith efforts.

Finally, the trade associations begin to work closely with GSA and the other relevant federal agencies in an effort to coordinate a project-specific Outreach Program. The purpose of the Outreach Program is to create a forum for GSA to communicate our subcontracting program commitment to the large and small business community, to provide for questions and answers concerning the program, to identify other federal agencies that offer assistance and resources to both the large and small business community, and to provide a networking environment. The networking environment assists the large businesses in developing their subcontracting plans through meeting actual sb/sdb/swb firms who provide construction-related services, thereby alleviating the burden of searching for them.

The intent of the teaming approach is to encourage on-going communication with the trade associations. With this in mind, it is extremely important that the GSA contracting officer be in communication with the community prior to the selection of the successful bidder to determine the responsiveness of the potential bidders to the subcontracting program. It is at this juncture that the contracting officer will be informed if a potential prime contractor is not answering telephone calls, providing bid documents, or not using good faith in developing the subcontracting plans. This information is useful as the contracting officer is reviewing and evaluating the submitted subcontracting plans. Once the award has been made, the community will be able to assist the contracting officer in performing informal compliance activities by reviewing the prime contractor's reports on the progress of the Program and identifying those firms that have a reputation in the community for abusing the Program. It is only through detailed reporting that includes the names of the sb/sdb/swb firms participating and the dollar amount of the subcontracting that true compliance activities can occur. If a firm is identified as a potential abuser, the information should be used by the contracting officer to trigger a compliance review to assure that abuses are not occurring on the Project. This activity assists the contracting officer in deciding how to allocate sorely needed personnel resources. The community is also to be working closely with the prime contractor to identify potential subcontractors available to bid on upcoming trade packages, identifying technical assistance, bonding and financial resources available, if needed, and to identify training programs for potential employment opportunities for minority and female tradepersons.

RESULTS:

BOSTON COURTHOUSE:

The prime contractor on this Project committed to 30% small business, 20% small disadvantaged business, and 5% women-owned business in their subcontracting plan. Due to early involvement in the teaming approach, they are reporting 50% small business, 19% small disadvantaged business, and 27% small women-owned business participation with eighty percent (80%) of the subcontracting opportunities procured.

The DOL - OFCCP EEO goals established for this area were 4% minority and 6.9% female tradeperson participation. The minority community expressed great concern about these goals and requested GSA to establish more reasonable goals. The Regional Administrator for Region #1 scheduled a meeting with the local building trades council, community groups, the Dept. of Labor - OFCCP, the prime contractor, and the contracting officer to discuss the possibility of increasing the minority goals. All those represented agreed that the goals were extremely low, and agreed to a 23% minority tradeperson goal on the Project. The Dept. of Labor agreed to provide on-site compliance reviews and to generate EEO reports. In the event the prime contractor is not in compliance with the EEO goals, the contracting officer agreed to notify the prime contractor to submit a corrective action plan. In addition, GSA included subcontracting and EEO compliance activities as part of the Construction

Management Consultant's (CMC) services. The construction phase has only just begun; there are now approximately 20 workers on the job-site. Therefore, it is too early to measure the success of the EEO program.

Brooklyn, Fort Meyers, Brownsville, Phoenix, and Seattle Courthouses and the IRS Computer Center:

Currently in the design phase.

Tampa Courthouse:

The contracting officer in Region #4 contacted the OED to express his appreciation for utilizing the proactive approach on this Project. The prime contractor committed to 35% sb, 10% sdb, and 5% swb in its subcontracting plan. The community expressed its pleasure with the increased accessibility to GSA procurement opportunities.

DOL - OFCCP goals are 17.9 % minority, and 6.9% female tradeperson participation. The prime contractor committed to 41% minority tradeperson, and 6.9% female tradeperson EEO goals.

South East Federal Center:

The prime contractor is providing Development Management services on this Project, and committed to 30% sb, 25% sdb, and 5% swb subcontracting participation. However, GSA is making direct awards to the general contractors after the design phase is complete. Because of this factor, GSA will be able to maintain tighter control over the procurement process, which allows for further flexibility.