The Institute for WORKPLACE EQUALITY

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VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Harvey D. Fort
Deputy Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C-3325
Washington, DC 20210

Re: Comments by The Institute for Workplace Equality, the HR Policy Association, and the LocalJobNetwork in response to OFCCP's NPRM on Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination

Dear Deputy Director Fort:

The Institute for Workplace Equality ("IWE" or "The Institute"), the HR Policy Association ("HR Policy"), and the LocalJobNetwork ("LJN") submit the following comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP" or the "Agency") invitation for comments on its Notice of Proposed Rulemaking on Nondiscrimination Obligations of Federal Contractor and Subcontractors To Resolve Potential Employment Discrimination (the "NPRM" or "proposed rule").[1]

Background on The Institute for Workplace Equality and the HR Policy Association

The Institute is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors regarding their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation's largest and most sophisticated federal contractors.

The HR Policy Association represents the most senior human resource executives in more than 390 of the largest companies in the United States. Collectively, these companies employ more than 12 million employees in the United States, nearly ten percent of the private sector workforce, and over 20 million employees worldwide.

[1] Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination, 84 *Fed. Reg*. 71875 (Dec. 30, 2019); available at https://www.federalregister.gov/documents/2019/12/30/2019-27258/nondiscrimination-obligations-of-federal-contractors-and-subcontractors-procedures-to-resolve.

LocalJobNetwork, with offices in Milwaukee and Minneapolis, is the industry leader providing federal contractors with a fully outsourced solution to comply with OFCCP enforced obligations. The company was founded in 1996, has 3800+ customers, and posted 5M+ jobs in 2019. LJN also offers diversity outreach management through its relationships with 20,000+ community organizations, outsourced recruiting, and delivers diversity candidates through its 600+ online employment websites.

The Institute, HR Policy, and LJN recognize the responsibility of all employers, including federal contractors subject to the nondiscrimination and affirmative action obligations that OFCCP enforces, to create a nondiscriminatory workplace. We support all efforts to make the workplace free from all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

I. Overview of Comments Regarding OFCCP's NPRM

The Institute, HR Policy, and LJN applaud OFCCP's efforts to codify notice procedures with the aim of resolving preliminary findings early in the compliance evaluation process. Our members are also encouraged by the inclusion of statistical thresholds and the reference to practical significance and anecdotal evidence. However, *the proposed regulations, in certain respects, deviate from well-established legal precedent and accepted statistical standards.* Accordingly, the proposed regulations, as drafted, may subject contractors (the proposed regulations likely will disproportionately adversely impact contractors with larger workforces) to unwarranted and significant burdens in responding to legally unsound claims.

The stated goal of the NPRM is to provide federal contractors and subcontractors with greater certainty about the procedures OFCCP follows during audits to resolve employment discrimination and other material violations under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Vietnam Era Veterans' Readjustment Assistance Act of 1974. The NPRM codifies the process to be used when issuing predetermination notices (PDNs) and Notices of Violations (NOVs) to contractors that precede litigation enforcement actions. In doing so, the NPRM correctly notes that OFCCP must consider two questions before issuing notice of a preliminary finding of discrimination during a review:

- Whether an unexplained disparity is both practically and statistically significant, and
- Where relevant, whether non-statistical, anecdotal evidence demonstrates an intent to discriminate

However, in a retreat from well-established Title VII principles and the governing rule of law, the NPRM improperly rejects the need for anecdotal evidence and allows OFCCP to issue PDNs and NOVs on the basis of statistical evidence alone when the statistical disparity is three or more standard deviations. There is no sound legal or statistical basis for the adoption of the three standard deviation rule, which is subject to being challenged as being arbitrary and capricious.

Moreover, OFCCP mistakenly and inaccurately states in the NPRM that three or more standard deviations is indicative of practical significance. The NPRM's definition of practical significance directly conflicts with OFCCP's guidance published on the Agency's website in which practical significance is defined as follows:

> In the EEO context, practical significance refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group. The concept focuses on the contextual impact or importance of the disparity rather than its likelihood of occurring by chance.[2]

As discussed in detail below, we conclude that the proposed rule is a radical, unjustified, and unexplained departure from 50 years of Title VII jurisprudence and OFCCP interpretation. Implementation of the proposed regulations will inevitably undercut the Agency's efforts to more quickly and efficiently move compliance reviews to an administrative closure without findings of alleged violations, a conciliated resolution, or a referral for enforcement by the Office of the Solicitor. Based on our experience, we anticipate that the proposed changes will result in audits extending for a greater period of time – the exact opposite of what the NPRM hopes to achieve – and likely will result in a growing backlog of aged reviews that will rival the record levels established during the Obama Administration.[3]

Also, the attempt to abandon controlling Title VII principles will result in relieving the Agency from legal and procedural burdens when identifying discrimination in compliance evaluations. Under the proposed standard, OFCCP's required burden of proof will be significantly lighter than Title VII standards require, and there will be corresponding reductions in the Agency's obligations during an investigation. This will have the consequence of increasing assertions of unjustified allegations of "discrimination," as defined in the NPRM that will not stand up under routine Title VII analysis.[4]

The following comments seek to provide clarity with respect to the intersection of the governing Title VII law principles, and the sound and legally grounded application of statistical and practical significance. In addition, the comments offer recommendations to achieve OFCCP's stated goals of transparency, efficiency, and expedited resolution of findings.

II. The NPRM Misstates Controlling Title VII Principles

The legal standards developed under Title VII of the Civil Rights Act of 1964, as amended (Title VII),[5] apply to actions under Executive Order 11246,[6] as was recently confirmed

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[2] Practical Significance in EEO Analysis, Frequently Asked Questions, *DOL OFCCP website*, available at https://www.dol.gov/ofccp/regs/compliance/faqs/PracticalSignificanceEEOFAQs.htm#Q1.

[3] Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance, GAO-16-750 (Sept. 22, 2016) available at https://www.gao.gov/products/GAO-16-750.

[4] The common, current justification that contractors frequently face today that payment of the moneys demanded by OFCCP should be made in a conciliation agreement because that is less expensive than facing years of litigation against the government is likely to become much more frequent under the proposed rule.

[5] 42 U.S.C. § 2000e et al. (2020).

[6] Executive Order 11246 of September 24, 1965, 3 CFR (1964-1965).

by DOL Administrative Law Judge Colleen A. Geraghty in her decision in *OFCCP v. Analogic Corporation.*[7]

Because discrimination claims under Executive Order 11246 must follow Title VII principles, a claim of systemic employment discrimination by OFCCP only can be established under one of two theories—disparate impact or disparate treatment.[8] As explained by the Supreme Court in its *Teamsters* decision, disparate treatment "is the most easily understood type of discrimination" in which the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin."[9] For disparate treatment cases, "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."[10] On the other hand, disparate impact cases "involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity" while proof of discriminatory motive "is not required."[11]

It is noteworthy and concerning that in the NPRM, the Agency fails to state that Title VII legal standards apply to and control the enforcement of Executive Order 11246, in contrast to its extensive discussion of that subject in the Executive Summary of the Preamble to the recently published Religious Exemption NPRM.[12] The same acknowledgement of the controlling Title VII principles should be included in this NPRM and govern its contents. The omission of the Title VII principles is particularly troubling because the NPRM proposes procedures for handling findings, preliminary or otherwise, of discrimination. In addition, and equally troubling, the NPRM does not recognize or discuss the differences between the two theories of employment discrimination at the core of Title VII. Instead, the NPRM apparently proposes a single uniform procedure for assessing disparate impact and disparate treatment claims, effectively eradicating the crucial legal and procedural distinctions between the two very different theories of discrimination. The approach outlined in the NPRM is wrong as a matter of law. This failure to acknowledge the difference between disparate impact and disparate treatment theories is a major flaw in the Agency's NPRM, as is discussed in detail below, and this shortcoming should be fully addressed and corrected in the final regulation.

A. OFCCP Misunderstands the Use/Purpose of Statistical Evidence in Title VII Cases

Although the NPRM was intended to provide clarity and certainty regarding the

[7] 2017-OFC-00001 (March 22, 2019), available at https://www.oalj.dol.gov/DECISIONS/ALJ/OFC/2017/In_re_ANALOGIC_CORPORATION_2017OFC00001_(MAR_22_2019)_090427_CADEC_PD.PDF. OFCCP did not appeal the ALJ's ruling in *Analogic*, in which the ALJ rejected the Agency's pattern and practice claims based on Title VII principles. The proposed rule should be revised to follow Title VII principles as relied on in *Analogic*. *See also, OFCCP v. Honeywell*, 1977-OFC-0003 (Sec'y June 2, 1993).
[8] *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 fn. 15 (1977).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] The OFCCP most recently reaffirmed that position in its Executive Summary of its recent NPRM, Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption, 84 *Fed. Reg.* 41677, 41678 (Aug. 15, 2019), available at https://www.federalregister.gov/documents/2019/08/15/2019-17472/implementing-legal-requirements-regarding-the-equal-opportunity-clauses-religious-exemption.

Agency's procedures, the proposed standards fail to follow the controlling rule of law.

i. Applicable Title VII Disparate Treatment Evidentiary Requirements include Anecdotal Evidence

In order to prevail on a class-wide disparate treatment claim against an employer, OFCCP must "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure – the regular rather than the unusual practice."[13] Evidence offered in support of a disparate treatment claim must be sufficient to raise an inference of intentional discrimination.[14] To satisfy this burden, plaintiffs, such as the OFCCP, often rely on circumstantial evidence including statistics, patterns, practices, general policies, or specific instances of discrimination.[15]

While statistical evidence is the starting point for alleging and proving a systemic claim of intentional discrimination, courts have recognized that "it will likely not be sufficient in itself."[16] Rather, the law typically requires something more than statistics in a systemic treatment case because "discriminatory intent implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decision maker . . . selected . . . a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group."[17] Accordingly, only where the evidence is so "*gross* or *stark* that a court *must* infer that [discrimination] was intended by the defendant," will statistical evidence alone be sufficient to show disparate treatment.[18]

The law is clear that absent extreme disparities, statistical evidence must be bolstered by compelling anecdotal evidence of discriminatory treatment.[19] However, the NPRM seeks to eradicate OFCCP's evidentiary burden for asserting disparate treatment claims by eliminating the anecdotal evidence requirement where the statistical significant test shows disparities of three or more standard deviations. In doing so, the NPRM creates an arbitrary bright-line distinction, equating three standard deviations with the types of gross or stark disparities which can independently support disparate treatment claims. Such a bright-line distinction and the elimination of anecdotal evidence based on a three standard deviation disparity is not recognized

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[13] *Teamsters*, 431 U.S. at 336; *see also Analogic*, No. 2017-OFC-00001, at 31 (*citing Texas Dept. of Commun. Affairs v. Burdine, 450 U.S. 248, 253 (1981).*

[14] *Burdine*, 450 U.S. at 253.

[15] *Equal Employment Opportunity Com'n v. Am. Nat. Bank*, 652 F.2d 1176, 1188. (4th Cir. 1981)

[16] *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 423 (7th Cir. 2000); *see also Analogic*, 2017-OFC-00001, at 40 ("Courts have recognized statistical evidence alone may not be sufficient and is bolstered when substantiated by other evidence bringing 'the cold numbers convincingly to life'" (*quoting Teamsters*, 431 U.S. at 339)).

[17] *Gay v. Waiters' & Dairy Lunchmen's Union*, 694 F.2d 531, 552 (9th Cir. 1982) (*quoting Personnel Administrator v. Feeny*, 442 U.S. 256, 279 (1979) (internal quotes omitted)).

[18] *Gay*, 694 F.2d at 552 (emphasis added); *see also Hazelwood School District v. United States*, 433 U.S. 299, 307-308 (1977) (statistical evidence revealed disparity between 5-6 standard deviations)*; Teamsters*, 431 U.S. at 337-339 (in a pattern and practice case gross statistical disparity such as an "inexorable zero" may be used to establish a prima facie case of discrimination).

[19] *See, e.g., Teamsters*, 431 U.S. at 339-340; *Morgan v. United Parcel Service of America, Inc.*, 380 F.3d 459, 466-469, 471-472 (8th Cir. 2004) (affirming summary judgment on compensation discrimination claim on the basis that statistical evidence was insufficient and plaintiffs presented no individual testimony regarding discrimination in pay); *Gay*, 694 F.2d at 553 (requiring plaintiff to show more than mere statistical evidence to meet prima facie burden); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 160 (2d Cir. 1991) (statistics alone were insufficient to show disparate treatment), *overruled on other grounds by St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993); *Woodbury v. New York Transit Auth.*, 832 F.2d 764, 771 (2d Cir. 1987) (recognizing the importance of anecdotal evidence to supplement or rebut statistical evidence); *Maddox v. Claytor*, 764 F.2d 1539, 1556-1557 (11th Cir. 1985) (flawed statistical evidence and sparse anecdotal evidence was insufficient to meet plaintiff's burden of proof); *Garcia v. Rush-Presbyterian-St. Luke's Medical Ctr.*, 660 F.2d 1217, 1225 (7th Cir. 1981) (affirming trial court's judgment in favor of employer where plaintiffs failed to present any direct or anecdotal evidence of discrimination to support the statistical evidence).

in the law and provides a strong basis for a judicial challenge to the final regulation if the bright-line distinction is retained.

As an initial matter, courts have cautioned against using a statistical test based purely on a quantitative threshold to determine whether a gross disparity exists (which is precisely what OFCCP is proposing here), and have repeatedly emphasized that this determination must be made on a case-by-case basis.[20] Moreover, the designation of three standard deviations as the threshold for a finding of discrimination has no basis in law, and is arbitrary and capricious. Notably absent from the proposed regulation is any citation or justification for the three standard deviation standard.

The Institute, HR Policy, and LJN of course recognize that disparities of two or three standard deviations are generally considered to be statistically significant.[21] However, that means only that "[t]wo standard deviations is normally enough to show that it is extremely unlikely (that is, there is less than a 5% probability) that [a] disparity is due to chance."[22] The NPRM misunderstands what a statistically significant disparity means -- *ruling out chance does not mean that discrimination is the reason for the identified disparity*.[23] To the contrary, courts have repeatedly found that merely satisfying the statistical significance threshold is insufficient to show a gross disparity which can support a claim absent other evidence.[24]

The NPRM provides no basis for this departure from established legal precedent requiring anecdotal evidence to support a statistical inference of discrimination, other than to state that "[t]here may be other factors applicable in a particular case which explain why OFCCP could not uncover nonstatistical evidence during its investigation despite the strength of statistical evidence."[25] The three standard deviation rule proposed in the NPRM is nothing more than an excuse to make little or no effort to find anecdotal evidence. But, Title VII principles do not waive the anecdotal evidence requirement simply because it is difficult to obtain, or because "there may be other factors" to explain the deficit. In point of fact, OFCCP has immense authority to investigate potential discrimination, and certainly has the means to collect all available evidence, whether it is statistical or nonstatistical and the Agency routinely exercises its broad investigatory authority during audits.[26] Accordingly, there is no basis for OFCCP to be held to a different, lesser evidentiary burden for disparate treatment claims.

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[20] *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (the Supreme Court has "not suggested that any particular number of "standard deviations" can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination"); *Gay*, 694 F.2d at 551 ("[i] t would be improper to posit a quantitative threshold above which statistical evidence of disparate racial impact is sufficient as a matter of law to infer discriminatory intent, and below which it is insufficient as a matter of law).

[21] *Hazelwood*, 433 U.S. at 309 n.14 (*citing Casteneda v. Partida*, 430 U.S. 482, 496-497 n.17 (1977)).

[22] *Ameritech Servs., Inc.*, 231 F.3d at 424.

[23] *OFCCP v. Bank of America*, No. 1997-OFC-016, slip op. at 9, 2016 WL 2941106 (Dep't of Labor Apr. 21, 2016).

[24] *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir.1988) (holding that statistical evidence that passes standard tests of statistical significance is not enough to make a prima facie case of discrimination); *Analogic*, 2017-OFC-00001, at 40 (finding that while "a wage disparity at 2.84 standard deviations is statistically significant, it does not reflect a 'gross' statistical disparity such that the statistics alone are enough to satisfy OFCCP's burden").

[25] 84 *Fed. Reg.*at 71877.

[26] For example, OFCCP recently litigated its demands for decades of data and information, and even though most of its most extreme claims were denied, OFCCP was authorized to secure additional years of data and contact information for thousands of current and former employees. *OFCCP v. Google, Inc.*, ALJ 17-OFC-00004, 2017 WL 4125403 (Dep't of Labor, July14, 2017); *aff'd, OFCCP v. Google, Inc.*, ARB Case No. 2017-0059 (ARB July 29, 2019).

ii. The NPRM Ignores a Major Requirement for Disparate Impact Cases

As in disparate treatment claims, courts have recognized the usefulness of statistics in proving discrimination under the Title VII disparate impact theory.[27] However, even in a disparate impact case where statistics are often the primary evidence of discrimination, the courts make clear that something more is required. Specifically, a plaintiff (or in this case the OFCCP) must identify and establish a facially neutral employment practice that has caused the alleged adverse impact on the protected class.[28] As Administrative Law Judge Steven B. Berlin recently explained in rejecting OFCCP's claims in the *OFCCP v. Google* decision,

> Statistical disparity, however, does not establish an adverse impact violation. Rather, Title VII expressly requires a plaintiff on such a claim to show that the employer "uses a particular employment practice that causes" the adverse impact. [29]

The NPRM's proposed bright-line three standard deviation rule ignores the fact that in a disparate impact case, OFCCP must not only show statistical significance, but must also identity the specific facially neutral employment policy or practice used by the employer that causes the disparity. The focus of the NPRM solely on statistical significance does more to confuse than to clarify the standards which will be used by the Agency to assert a finding of discriminatory impact that violates the requirements of Title VII principles, and therefore, Executive Order 11246.

III. The NPRM Misunderstands the Meaning of Statistical Significance

In addition to eliminating the anecdotal evidence requirement where statistical disparities of three or more standard deviations have been found, the NPRM also makes an exception for employers with "similar patterns of disparity in multiple years or at multiple establishments of a federal contractor."

Footnote 11 of the NPRM provides:

> that for multiple findings of discrimination without nonstatistical evidence present at a given contractor establishment, or at multiple facilities of the same contractor, OFCCP may issue a PDN where at least one finding is supported by statistically significant evidence at the 99 percent confidence level and may include additional findings that are supported by statistically significant evidence at the 95 percent confidence level (i.e., two standard deviations, or a p value of 0.05 or less) or above.[30]

As noted above, it is apparent based on these proposed procedures, that the NPRM misunderstands what a statistically significant disparity means. Statistical significance testing originated to test a null hypothesis (*e.g.*, whether there is no difference between an experimental

[27] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).
[28] *Ricci v. DeStefano*, 557 U.S. 557, 583 (2009); *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 657 (1989); *Google*, 2017-OFC-00004, at 14.
[29] *Google*, 2017-OFC-00004, at 14.
[30] *Id.*

and control group). For example, in a pay study, one might examine the differences in pay between males and females and use a statistical test to test the null hypothesis, that is, whether there is no pay difference between males and females. If the difference equates to two standard deviations, we expect to see a difference this large by chance only 5% of the time. If the difference equates to three standard deviations, we expect to see a difference this large by chance only 1% of the time. **The statistical significance of the difference says nothing about the actual *size* of the difference or the cause of the difference (*e.g.*, discrimination), as a matter of law.**

A. The NPRM is Overly Reliant on a Statistical Threshold

In addition to the legal issues described above, there are several inherent problems with using a statistical significance threshold as justification for a claim of discrimination, as the NPRM proposes. First, standard deviation tests are greatly affected by sample size. For example, with 2,400 job applicants, a 1% difference in selection rates (e.g., 90% v. 89%) would exceed two standard deviations; however, a 20% difference with 40 applicants (e.g., 80% v. 60%) would not. The chart below demonstrates that bigger samples will almost always yield larger disparities.

Large Sample Sizes Yield Larger Disparities

# Applicants		# Selections		Selection Rates			Statistical Significance Test	Practical Significance Test
Males	Females	Males	Females	Total	Males	Females	SD (Z) test	Impact Ratio
100	100	99	98	98.5%	99%	98%	0.58	0.99
1,000	1,000	990	980	98.5%	99%	98%	1.84	0.99
1,200	1,200	1,188	1,176	98.5%	99%	98%	***2.01***	0.99
10,000	10,000	9,900	9,800	98.5%	99%	98%	***5.82***	0.99
100,000	100,000	99,000	98,000	98.5%	99%	98%	***18.40***	0.99
1,000,000	1,000,000	990,000	980,000	98.5%	99%	98%	***58.17***	0.99

Moreover, the interpretation of a statistically significant finding depends on the parameters of the study. For instance, a pay difference equating to six standard deviations between males and females seems like obvious evidence of discrimination. However, if the groups contain employees in dissimilar jobs and if important job-related factors are not included, the difference becomes less meaningful. The OFCCP should look at the preponderance of evidence and not a single test before moving forward with a claim of discrimination.

B. The Proposed Rule Does Not Account for Practical Significance

The NPRM focuses on statistical significance, but fails to adequately address practical significance. It is generally understood that the greater the number of standard deviations, the less likely the difference in selection or compensation rates is the result of chance.[31] We agree with the NPRM's statement that practical significance, "refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group."[32] The standard deviation measures the likelihood that the difference in disparity occurred by chance whereas practical significance measures the "contextual impact or importance of the disparity."[33]

The preamble to the NPRM makes only a passing reference to practical significance, correctly referring to statistical and practical significance as two separate and equally important elements of proof when alleging systemic discrimination.[34]

> To determine whether the evidence of discrimination is sufficient to warrant a PDN, OFCCP considers whether an employment or compensation disparity identified during the compliance evaluation is both practically and statistically significant.[35]

However, this is where the NPRM's discussion of practical significance stops – a brief definition in the preamble. The proposed regulations do not define practical significance, nor do they require any assessment of practical significance before the issuance of adverse findings. This is a significant flaw.

As the chart above demonstrates, while a statistical significance test will indicate how likely the observed difference is due to chance factors, practical significance provides insight into the size of the difference and allows one to evaluate if it is large enough to be practically meaningful.

Practical significance is a concept with a long history. It is specifically noted in the Uniform Guidelines on Employee Selection Procedures (the "Uniform Guidelines") in both Section 4D and 15A(2)(a), which are part of OFCCP's existing regulatory standards.[36] The Uniform Guidelines provide a specific practical significance indicator (the impact ratio) and a

[31] 84 *Fed. Reg*. at 71876.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] 41 C.F.R. § 60-3 (2018).

specific threshold (4/5th or 80%) for interpretation. At the time the Guidelines were written, the ability to run sophisticated statistical analyses was limited, and the 4/5th rule was an indicator and threshold that was simple to compute, intuitively understood, and a reasonable compromise of professionals' judgment. But there are well established shortcomings to the universal use of the 4/5th rule as codified in the Uniform Guidelines, and this single practical indicator and threshold is wholly insufficient to represent the entirety of practical significance and the variety of contextual situations. However, what is clear is that, based on the Uniform Guidelines, the concept of practical significance is considered to be very relevant to the evaluation of adverse impact.

In the last two decades, OFCCP has steadily decreased its emphasis on practical significance, choosing instead to place increasingly more emphasis on statistical significance alone. This change in emphasis to statistical result alone has led to legally and statistically inaccurate results that are being relied on by the Agency to assert allegations of discrimination in some cases where there are statistically significant results that are not practically meaningful (*e.g.*, where sample sizes are large); or where non-statistically significant results are practically meaningful (*e.g.*, where sample sizes are small). *See* Chart, *supra.*

The earlier cited publication of a practical significance FAQ[37] by OFCCP was useful and important and suggested recognition that the Agency needed to reform its approach to statistical analytics and restore greater accuracy to the evaluation process that the Agency uses to identify potential discrimination. However, the tone and substance of the current NPRM reverts back to a primary emphasis on the statistical methods, with a focus on making interpretations as simple as possible.

Unfortunately, the NPRM either represents a step backward from aligning OFCCP practices with contemporary scientific methods, or a continuation of the flawed path of heralding statistical significance as a sole indicator of adverse impact and ignoring other legally required evidence.

IV. Utilizing Regression Analysis in Hiring and Compensation Cases

The NPRM attempts to codify the use of multiple regression analysis in the context of both hiring and compensation disparity analyses. We applaud the Agency for this approach, because the use of robust, theory-driven analyses that control for other legitimate factors that could explain a disparity in employment outcomes typically enhances confidence that an observed disparity may be due to protected group status.[38] Based on our broad experience, this approach is commonly used by OFCCP in compensation analyses, but far less so in analyses of hiring and other dichotomous outcomes (e.g., promoted/not promoted). Yet, regression procedures can be appropriate for analyses of hiring, particularly in situations where factors like education, experience, certification, basic qualifications, and other preferred qualifications

[37] Fn. 2 *supra.*
[38] Note that this point is specific to disparate treatment-pattern or practice allegations and not disparate impact allegations. In a reasonable disparate impact scenario, it is known that any disparity is a function of a facially neutral process, and as such there are no alterative explanations for what caused a disparity.

influence the likelihood of being hired. OFCCP has demonstrated awareness of this, as we have been involved in OFCCP matters where federal contractors requested that OFCCP conduct logistic regression analyses to control for legitimate factors in the prediction of hiring outcomes, and the Agency did so. Again, when implemented appropriately, such an approach enhances confidence that any leftover disparity is a function of protected group status.

However, the Agency has not stated who in fact has the burden for preparing a robust database needed to conduct these analyses. As the Agency is well aware, most contractors do not maintain the databases needed to conduct a robust logistic regression analysis. Although the data may be available via resumes and other employment documents as required under OFCCP's record keeping requirements, typically these data are not compiled in one easy to use database. Therefore, we recommend that the OFCCP clarify and specifically state in the final rule that contractors do not have the burden of preparing a database needed to conduct a robust logistic regression analysis. In the event that this information is needed, the Agency would incur the time and expense needed to prepare such a database. Contractors will continue to keep and maintain records required under 41CFR § 60-1.12.

V. Recommendations

The Institute, HR Policy, and LJN appreciate OFCCP's efforts to streamline the compliance review process, provide early notice of preliminary indicators and quickly close those audits with no significant findings. We further support codifying these notice procedures through a formal rulemaking. However, the NPRM went beyond simply formalizing the PDN and NOV processes. In doing so, OFCCP misstated and ignored well-established Title VII law.

The Institute, HR Policy, and LJN offer the following additions to the proposed regulations that will both achieve OFCCP's goal of a more streamlined review process and ensure compliance with Title VII principles:

(1) Affirmatively state that OFCCP will follow Title VII principles when reaching determinations leading to the issuing of both preliminary and formal notices of alleged violations.

(2) Clarify that this proposed rule only applies to disparate treatment pattern or practice cases.

(3) Comply with and follow established Title VII legal principles to differentiate the process required for establishing a case of discrimination on the basis of disparate treatment versus disparate impact.

(4) Clarify that the size of the standard deviation does not equate to the "size" of the discrimination.

(5) Explicitly include practical significance statistics in both disparate impact and disparate treatment investigations (given that practical significance indicators are

calculated on the same set of data as statistical significance indicators, the additional burden for the OFCCP to run the additional analyses is relatively light).

(6) State that, once OFCCP moves beyond an initial assessment at the desk audit stage, the Agency in compliance with legal requirements will consider all three types of evidence, statistical, practical, and anecdotal, before issuing any findings. If the Agency uses statistical thresholds that those thresholds will not be bright lines, but rather guideposts applied and interpreted with the appropriate context. Any notice, preliminary or otherwise, that does not address practical significance or include anecdotal evidence must require National Office review and approval.

(7) Although not addressed in the NPRM, the Agency should confirm in the final rule that the systemic claims OFCCP relies on to assert violations in a Notice of Violation and Notice to Show Cause, and to conciliate with federal contractors will be the same systemic claims that OFCCP will assert if a litigation enforcement claim is filed. Providing such transparency and consistency will ensure that federal contractors are fully apprised of OFCCP's claims, and that the parties can conciliate on a fully informed and good faith basis. OFCCP should acknowledge and commit that it will not assert differing claims or theories of liability in litigation that have not been fully identified and conciliated through the Notices of Violation and to Show Cause.

Conclusion

Thank you in advance for your consideration of the comments by The Institute, HR Policy, and LJN. We are happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,

The Institute for Workplace Equality

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Patrick Sheahan