



Federal Register

**Monday,
March 29, 2004**

Part IV

Department of Labor

Office of Labor-Management Standards

29 CFR Part 470

**Obligations of Federal Contractors and
Subcontractors; Notice of Employee
Rights Concerning Payment of Union
Dues or Fees; Final Rule**

DEPARTMENT OF LABOR**Office of Labor-Management Standards****29 CFR Part 470**

RIN 1215-AB33

Obligations of Federal Contractors and Subcontractors; Notice of Employee Rights Concerning Payment of Union Dues or Fees

AGENCY: Office of Labor-Management Standards, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: The Office of Labor-Management Standards ("OLMS") is publishing this final rule to implement Executive Order 13201, which was signed by President George W. Bush on February 17, 2001. The final rule contains minor changes made as a result of comments received regarding the notice of proposed rule-making ("proposed rule" or "NPRM") published on October 1, 2001. *See* 66 FR 50010.

Executive Order 13201 ("the Executive Order," "the Order," or "EO 13201") requires non-exempt government contractors and subcontractors to post notices informing their employees that under Federal law, those employees have certain rights related to union membership and use of union dues and fees. The Order also provides the text of contractual provisions that Federal Government contracting departments and agencies must include in every government contract, except for collective bargaining agreements and contracts for purchases under the Simplified Acquisition Threshold. These provisions include the language of the required notices, and explain the sanctions, penalties, and remedies that may be imposed if the contractor or subcontractor fails to comply with its obligations under the Order. Covered government contractors and subcontractors must include these same provisions in their nonexempt subcontracts and purchase orders, so that the provisions will be binding upon each subcontractor or vendor.

The final rule provides the text of the required contractual provisions, explains exemptions, and sets forth procedures for ensuring compliance with the Order; it also contains other related requirements.

EFFECTIVE DATE: April 28, 2004.

FOR FURTHER INFORMATION CONTACT: Don Todd, Deputy Assistant Secretary for Labor-Management Programs, Office of Labor-Management Standards,

Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5605, Washington, DC 20210, 202-693-0122 (voice) (this is not a toll-free number) or 800-877-8339 (TTY/TDD). Copies of this final rule, including copies in alternative formats, may be obtained by calling OLMS at 202-693-0123 (voice) or 800-877-8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The preamble to the final rule is organized as follows:

- I. Background—provides a brief description of the development of the final rule, including a list of documents connected to the rule that OLMS has published
- II. Authority—cites the legal authority supporting the final rule, Departmental redelegation authority, and interagency coordination authority
- III. Overview of the Rule—summarizes pertinent aspects of the regulatory text, including a section-by-section analysis that discusses any comments received about each section and explains any changes made to the text as a result of those comments.
- IV. Regulatory Procedure—sets forth the applicable regulatory requirements.

I. Background

As described in detail in the preamble to the NPRM, Executive Order 13201 (66 FR 11221, February 22, 2001) is designed to promote economy and efficiency in government procurement by requiring government contractors to inform their workers that Federal labor laws give those workers certain rights related to union membership and use of union dues and fees. The Order provides the text of a contract clause that government contracting departments and agencies must include in all nonexempt government contracts and subcontracts. That clause requires contractors to post a notice, the exact language of which is included in the clause. The clause also requires contractors to include the same clause in their nonexempt subcontracts and purchase orders, and describes generally the sanctions, penalties, and remedies that may be imposed if the contractor fails to satisfy its obligations under the Order and the clause.

The text of the notice informs employees that they cannot be required to join, or maintain membership in, a union in order to keep their jobs; that under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay dues and fees to the union; and that, even where such union-security agreements exist, employees who are not union members

can only be required to pay their share of union costs relating to certain specific activities. The notice also provides a general description of the remedies to which employees may be entitled if these rights have been violated, and provides contact information for further information about those rights and remedies.

In April 2001, the Department of Labor ("DOL" or "the Department") issued an Interim Procedural Notice ("IPN") to provide guidance to contractors and subcontractors about how to comply with Executive Order 13201 pending the publication of a final rule implementing the Order. 66 FR 19988 (April 18, 2001). The IPN authorized covered contractors to fulfill their posting obligations under the Order by replicating the text of the notice set forth in the Order and posting it in conspicuous places in and about their plants and offices, including all places where notices to employees are customarily posted.

As noted above, OLMS published an NPRM on October 1, 2001, proposing regulations to implement Executive Order 13201. *See* 66 FR 50010. The NPRM set a deadline of November 30, 2001, for receipt of public comments about the proposed rule. However, because of anthrax-related problems with mail delivery, OLMS published a notice in the **Federal Register** on December 18, 2001, listing the six commenters from whom comments had been received by the deadline, and asking any other commenters who might have submitted comments via U.S. mail before the deadline to supply duplicate copies of such comments. 66 FR 65163. The notice set a deadline of January 2, 2002, for receipt of such duplicate copies. Two additional sets of comments were received. However, neither set appeared to be a duplicate copy of comments submitted before the original deadline; rather, both sets appeared to be new comments. As a result, the Department determined that these comments would not be analyzed and considered in the development of this final rule. The six timely comments that were analyzed and considered came from various nonprofit, public policy, and trade association groups, as well as a group of Members of Congress. No comments were received from labor unions.

As described in detail in the NPRM, Executive Order 13201 contains requirements similar, but not identical, to those included in Executive Order 12800, issued on April 13, 1992, by then-President George H. W. Bush. *See* 57 FR 12985 (April 14, 1992); 57 FR 13413 (April 16, 1992). Executive Order

12800 was revoked on February 1, 1993, by Executive Order 12836. 58 FR 7045 (published February 3, 1993). Both Executive Orders were, and the provisions of this final rule are, intended to inform employees of their rights under the decisions of the United States Supreme Court in *Communications Workers of America v. Beck*, 487 U.S. 735 (1988), and related cases. As a result, the final rule is sometimes referred to as the *Beck* rule, and the rights articulated in the decision are referred to as *Beck* rights.

In *Beck*, the Court held that a union may not use fees and dues that it collects from bargaining unit employees who have not joined the union to finance activities that are not “germane” to the union’s representational purposes over the objection of such employees. Examples of activities the Court considered “germane” include collective bargaining, contract administration, and grievance adjustment. *Beck*, 487 U.S. at 745, 760.

Soon after it was signed into law, Executive Order 13201 was challenged in court on two grounds: first, that it was preempted by the National Labor Relations Act, and second, that the President lacked sufficient authority to issue the Order. See *UAW-Labor Employment and Training Corp.*, et. al. v. *Chao*, 2002 WL 21720, 145 Lab. Cas. P. 11,166 (D. D.C. 2002). Although the U.S. District Court for the District of Columbia found that the Order was preempted by the National Labor Relations Act and issued a permanent injunction barring enforcement of the Order, that decision was appealed to the U.S. Court of Appeals for the District of Columbia, which reversed the District Court. See *UAW-Labor Employment and Training Corp.*, et. al. v. *Chao*, 325 F. 3d 360 (D.C. Cir. 2003), *reh’g denied*, No. 02–5080 (Sept. 11, 2003).

II. Authority

A. Legal Authority

The legal authority for this final rule is Executive Order 13201, issued pursuant to the Constitution and laws of the United States, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, now codified as amended at 40 U.S.C. 101 *et seq.*

B. Departmental Authorization

Section 1(b) of Executive Order 13201 delegates responsibility for the administration and enforcement of the Order to the Secretary of Labor, and directs the Secretary to adopt rules and regulations and issue such orders as are deemed necessary and appropriate to achieve the purposes of the Order.

Section 9 of the Order authorizes the Secretary to delegate any function or duty under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

Pursuant to that delegation authority, Secretary’s Order 4–2001, effective May 24, 2001, and published in the **Federal Register** on May 31, 2001 (66 FR 29656), delegates and assigns responsibility for the administration and enforcement of E.O. 13201 to the Assistant Secretary for Employment Standards. The Assistant Secretary, in turn, has delegated general responsibility for the administration and enforcement of the Executive Order to the Deputy Assistant Secretary for Labor-Management Programs. Under this delegation, the Deputy Assistant Secretary for Labor-Management Programs has specific responsibility for granting and withdrawing exemptions and waivers under this part, and for referring for administrative enforcement cases against contractors that have been found to have violated the provisions of the Order or this part.

The Assistant Secretary has conveyed responsibility for conducting compliance evaluations and complaint investigations under the Order and this part to the Deputy Assistant Secretary for Federal Contract Compliance.

C. Interagency Coordination

DOL is coordinating with the Civilian Agency Acquisition Council regarding the amendment of the Federal Acquisition Regulation (FAR) at 48 CFR parts 22 and 55 to include language implementing the Executive Order.

III. Overview of the Rule

The final rule is divided into three subparts. Subpart A, “Preliminary Matters,” contains definitions, the employee notice clause, and exemptions. Subpart B, “Compliance Evaluations, Complaint Investigations, and Enforcement Procedures,” addresses the three topics listed in the subpart’s title. Subpart C, “Ancillary Matters,” addresses miscellaneous matters, such as which authority the Secretary of Labor is able to delegate under the Order and the rule, and which official will make rulings and interpretations under the rule.

All six commenters who submitted timely comments regarding the NPRM expressed general support for the Executive Order and the rule. One commenter called the rule “an important and necessary step in rectifying unlawful practices and

advising employees of their rights under Supreme Court decisions.”

The following section discusses the timely comments received regarding the NPRM, and explains the differences between the NPRM and this final rule.

Section-by-Section Analysis of Comments and Revisions

Subpart A—Preliminary Matters

Section 470.1 What Definitions Apply to This Part?

One commenter suggested that to improve clarity, each of the definitions within this section should have an identifying letter. We concur that each definition should be identified. Accordingly, we are accepting this comment, and designating each definition in this section by letter.

Definition of “collective bargaining agreement”: Section 470.2(a) states that only certain contracts, including certain collective bargaining agreements as defined in section 470.1, are exempt from the requirements of the final rule. Section 2(a) of Executive Order 13201 refers to the specific statutory definition of collective bargaining agreement as found in the Federal Labor Management Relations Act, 5 U.S.C. 7101 *et seq.* (see, e.g., 5 U.S.C. 7103(a)(8): “collective bargaining agreement means an agreement entered into as a result of collective bargaining pursuant to this chapter”). The proposal attempted to list the key elements of the collective bargaining process by summarizing the relevant provisions of the Federal Labor Management Relations Act, specifically those found in 5 U.S.C. 7114, Representative Rights and Duties. While this summary provides a general framework for this process, it is not all-inclusive. Therefore, in order to avoid any possible confusion which may result from only a partial listing of the steps involved in the development of a collective bargaining agreement, and in order to maintain consistency with section 2(a) of the Executive Order, we are striking the definition of the term in § 470.1 and amending § 470.2(a) so that it references the same definition cited in the Executive Order. Accordingly, the definition of “collective bargaining agreement” in § 470.1 has been deleted, and § 470.2(a) has been amended to reference the definition of “collective bargaining agreement” in 5 U.S.C. 7103(a)(8) rather than § 470.1.

Definition of “subcontractor”: No change has been made to this definition. This note is intended to clarify that in the Department’s view, the term includes the “vendors” referred to in section 4 of the employee notice clause set forth in section 470.2.

Definition of "union-security agreement": Two commenters submitted comments regarding this definition. One commenter suggested that, to avoid any unnecessary confusion, the phrase "and/or fees" be added to the definition following the phrase "uniform periodic dues." We agree that the suggested addition would clarify the definition, and have added the suggested phrase.

Another commenter suggested that the definition be revised to define the term as "an agreement entered into between a contractor and a labor organization, whether written, oral, or understood, which requires certain employees of the contractor to acquire union membership or any incident of union membership, or to provide any union any financial support, as a condition of employment." However, the definition of the term that was included in the proposed rule more closely tracks the description of union security agreements in section 2(a) of the Executive Order. We therefore decline to adopt the suggested revision.

Definition of "United States": One commenter suggested that this definition be broadened by adding the clause "and all other territories or possessions belonging to the United States of America." Such a definition would be inconsistent with the definition of the term used in other Department regulations. See, e.g., Department of Labor, Office of Federal Contract Compliance Programs, Obligations of Contractors and Subcontractors, 41 CFR 60-1.3 (August 19, 1997) (definition of "United States"). We have retained the definition used in the NPRM.

Section 470.2 Under the Executive Order, What Employee Notice Clause Must Be Included in Government Contracts?

Paragraph 470.2(a), required employee notice poster: One commenter suggested that DOL add a pull-off pamphlet to the bottom of the required poster, and that both the poster and the pamphlet should contain the Internet address of a new Web page that DOL should create. According to the commenter, both the pamphlet and the Web page should contain basic legal advice to help employees navigate their way through the *Beck* rights-related procedures of unions and the National Labor Relations Board (NLRB). The commenter further suggested that the new DOL Web page should include form letters, requests, and similar documents that could be downloaded and used by employees seeking to enforce their *Beck* rights, and that the

required employee notice poster should be downloadable in Adobe Acrobat "PDF" format from the page.

We agree that a special Web page, devoted to Executive Order 13201 and the rights of employees under the Order and the final rule, is a good idea. We intend to create such a page on the Office of Labor-Management Standards Web site at www.olms.dol.gov, and will provide downloadable versions of the employee notice poster on the page. However, the addition of a pull-off pamphlet to the poster, which will be printed and distributed by DOL, would greatly add to the cost and difficulty of production of the poster. In addition, the purpose of the Executive Order is not to encourage or assist workers in exercising rights they have under the Supreme Court's decision in *Beck*, but to inform them of the existence of such rights. The employee notice poster will provide the headquarters and Web site address for the National Labor Relations Board, the agency entrusted with the enforcement of these rights, for the benefit of workers who need such assistance. The employee notice poster will also include a toll-free general information number recently announced by the General Counsel of the National Labor Relations Board.

Paragraph 470.2(a), language of poster and of required contract clause: The same commenter suggested a number of changes to the language of the required employee notice poster and contract clause. In our view, however, the wording of both the poster and the contract clause, as specified in the Executive Order itself, adequately reflect the President's intentions in issuing the Order. Therefore, we decline to make the changes requested by the commenter.

Paragraph 470.2(a), pass-through requirement: One commenter opposed the requirement that contractors pass on to their subcontractors the requirement of including the employee notice clause in subcontracts and purchase orders. This commenter was concerned about the expense a contractor will allegedly be required to incur in making changes to forms for supplier agreements, purchase orders, and other contracts, and suggested that section 3 of the Executive Order authorizes the Secretary of Labor to issue regulations exempting contractors from the pass-through requirement.

We disagree with the commenter's interpretation of the language of section 3. The intent of the Order was clearly that the clause be passed to subcontractors below the first tier; otherwise, there would be no reason for the provision in section 3(b)(v) of the

Order that authorizes the Secretary to exempt from the provisions of section 2 "subcontracts below an appropriate tier set by the Secretary." Further, such a blanket exemption would be inconsistent with procedures of Executive Order 11246, upon which these regulations are based. Like E.O. 13201, E.O. 11246 authorizes exemption for contractors below a specified tier; however, that authority has not been incorporated in regulations. The Department's experience with this regulatory framework has demonstrated the absence of a tier-based exemption is not unduly burdensome and best achieves the purpose of the Executive Order. In addition, a contractor need not incur the expenses cited by the commenter; nothing in the Order or the regulations precludes a contractor from simply adding a page that contains the required contract clause to supplier agreements, purchase orders, and other similar documents. The expense of adding such a page would be nominal. We therefore decline to adopt the commenter's suggestion.

Section 470.3 What Contracts Are Exempt From the Employee Notice Clause Requirement?

Paragraph 470.3(c), exemption of specific contracts when special circumstances in the national interest so require: One commenter suggested that a sentence be added to this paragraph specifying that "[r]equests for such exemptions are strongly discouraged, and there is a high burden on the requester to demonstrate that such special circumstances exist." The same commenter suggested that the phrase "special circumstances in the national interest so require" is overly vague, and suggested that a "narrow definition" of the phrase or an example of its operation be added to the paragraph. We believe that the language from the proposed rule provides the Deputy Assistant Secretary with the necessary flexibility to make case-by-case determinations regarding whether such an exemption should be granted in a particular instance, and therefore decline to adopt the suggested amendment.

Section 470.4 What Contractors or Facilities Are Exempt From the Posting Requirements?

Paragraph 470.4(a), number of employees: One commenter suggested that the exemption in this paragraph of the proposed regulations for contractors with fewer than fifteen (15) employees be eliminated. Another commenter suggested that the exemption be limited to contractors with two (2) employees,

the minimum number of employees that the National Labor Relations Board would certify as a bargaining unit to be represented by a labor organization.

As indicated in the preamble to the NPRM implementing Executive Order 13201, the proposed and final rules implementing the predecessor order, Executive Order 12800, provided an exemption for contractors with fewer than fifteen (15) employees. See 57 FR 33406 (July 24, 1992), 57 FR 49596 (November 2, 1992). The preamble to the 1992 NPRM explained that the exemption threshold of fifteen employees was "consistent with that under Title VII of the Civil Rights Act of 1964, as amended, and the eventual threshold under Title I of the Americans with Disabilities Act." See 57 FR 33404.

Section 3(b) of Executive Order 13201 authorizes the same exemption for "numbers of workers below appropriate thresholds set by the Secretary" as did section 3(b) of Executive Order 12800. In the absence of any indication to the contrary in Executive Order 13201, or any significant change in the law since 1992, we believe that it is consistent with the intention of Executive Order 13201 to provide the same exemption as was provided by the final rule implementing Executive Order 12800. In addition, as noted in the preamble to the 1992 NPRM, the fifteen-employee threshold is consistent with that of other significant Federal laws governing the workplace. Therefore, we have decided to retain the exemption for contractors with fewer than fifteen (15) employees.

Paragraph 470.4(b), union representation: One commenter noted that in situations (particularly construction projects) involving a prime contractor and a number of subcontractors, "the prime contractor typically posts the notices to employees required by law on construction sites at a central location, rather [than] have each subcontractor establish its own [posting] system." The same commenter noted that "mixed" worksites are also common in the construction industry. On these sites, both union shop and open shop contractors perform work at the same time; such situations arise, according to the commenter, when the prime contract is awarded to an open shop prime contractor that then subcontracts to union shop firms, or vice versa. The commenter suggested that the language of this paragraph be amended to clarify the responsibilities of prime contractors and subcontractors in such situations, as follows: "The posting requirement does not apply to contractor establishments or construction work sites where no union has been formally recognized by the

prime contractor or certified as the exclusive bargaining representative of the prime contractor's employees." We agree with the commenter's concerns and have adopted this suggestion.

Paragraph 470.4(c), State law: This paragraph provides that the posting requirement does not apply to contractor establishments or construction work sites in jurisdictions where State law forbids enforcement of union-security agreements. One commenter suggested that the paragraph be amended to clarify whether this exemption applies in facilities located in areas considered to be Federal enclaves. Upon consideration, we have concluded that amending the regulatory language to discuss each of the various types of Federal enclaves is not appropriate because the critical question here is not whether or not an entity is a Federal enclave, but whether or not State law applies to that entity. We note that we do not intend the exemption in this paragraph to apply to facilities located in Federal enclaves, or portions thereof, that fall entirely under Federal jurisdiction. By contrast, the exemption will apply to any facilities located in Federal enclaves, or portions thereof, that fall under concurrent Federal and State jurisdiction in States that have prohibited union-security agreements. Whether or not State law applies to a particular Federal enclave depends on a number of factors, including the extent of authority ceded by the State to the Federal government over that jurisdiction, and therefore is a question to be considered on a case-by-case basis. See, e.g., *Department of Labor and Industries of the State of Washington v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, 1020–21 (Wash. 1992) (scope of Federal jurisdiction over land ceded by State to Federal government is governed by terms of cession agreement); cf. *Goodyear Atomic Corp. v. Miller*, 108 S. Ct. 1704 (1988) (application of State law to government owned, contractor operated facility not permitted unless Congress has clearly authorized such regulation).

Another commenter suggested that the same paragraph should be expanded to include non-State jurisdictions such as Guam, which recently enacted a right-to-work law. This commenter proposed that the phrase "or local" be inserted in the regulatory language after the word "State." The proposed revision, however, would exempt a far broader spectrum of employers than the commenter apparently intends, including those located in municipal jurisdictions that preclude enforcement of union-security agreements. As a result, we have addressed the issue by

adding a clarification of the meaning of the term "State," as applied in this paragraph, to the end of the paragraph.

Paragraph 470.4(d), work not performed under government contracts: Two commenters asked that the exemption in this paragraph for work not performed under a government contract be eliminated. One of these commenters argued that "[s]uch discrimination against employees is unconscionable." It is important to understand, however, that the employee notice does not confer *Beck* rights on employees; all employees subject to the National Labor Relations Act who are covered by a union security agreement have such rights. The notice is merely intended to ensure that employees of government contractors are informed about those rights.

The other commenter advocating for elimination of the exemption contended that the Department had underestimated the cost of requesting an exemption in writing for work not performed under a government contract, and that the economic impact of the proposed waiver provision would increase the cost burden on employers and the public so much that the costs of the provision would greatly exceed the benefits. A third commenter also believed that the Department had underestimated the cost of preparing a written request for an exemption, but asked only that the requirement of the written request be removed, so that the provision would be self-executing. This commenter noted that the preamble to the NPRM contained no explanation of the rationale for imposing the requirement.

In response to these comments, we have recalculated the cost of preparing such written requests. The results of this recalculation are described below in the "Paperwork Reduction Act" discussion in section IV. Despite this recalculation, we have concluded that the exemption should be retained. Government contractors are already required, under at least three other Federal laws administered by the Deputy Assistant Secretary for Federal Contract Compliance, to submit written requests for exemptions from the application of such laws for facilities that are separate and distinct from activities of the contractor related to the performance of a contract. See 41 CFR 60–1.7(b)(2) (applying the same exemption under Executive Order 11246); 41 CFR 60–741.4(b)(3) (applying the same exemption under section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793); 41 CFR 60–250.4(b)(3) (applying the same exemption under the Vietnam Era Veterans' Readjustment

Assistance Act, 38 U.S.C. 4212). Eliminating the requirement of a written request for an exemption would result in inconsistent obligations for government contractors, and inconsistent enforcement of laws applying to government contractors.

Subpart B—Compliance Evaluations, Complaint Investigations, and Enforcement Procedures

Section 470.10 How Will the Department Determine Whether a Contractor Is In Compliance With the Executive Order and This Part?

Paragraph 470.10(a), compliance evaluations: This paragraph provides that the Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to determine whether a contractor holding a nonexempt contract is in compliance with the requirements of part 470. One commenter asked that the language of this paragraph be amended to replace “may” with “will,” in effect requiring the Deputy Assistant Secretary to conduct a compliance evaluation of all covered contractors and subcontractors in all cases. Section 4 of the Order, however, provides that the Secretary “may investigate” any government contractor, subcontractor, or vendor to determine whether the Order has been violated. Thus, the Executive Order confers discretion on the Secretary to make the determination whether a particular investigation is the best course of action under all the circumstances. The Department seeks to retain this discretion in the regulations and as such, we decline to adopt this suggested change.

Paragraph 470.10(b), contents of compliance evaluations: This paragraph describes the determinations that the Office of Federal Contract Compliance Programs (“OFCCP”) will make during compliance evaluations. The same commenter who asked for the change to the previous paragraph proposed that the language of subparagraph (b)(1) of this paragraph be amended. The proposed amendment would require OFCCP to determine that the contractor has posted “accurate, correct, and unmarred” employee notices in “many” conspicuous places. This comment addresses the notices contractors must post and the locations where they must be posted; those matters are governed not by this subparagraph, but by the mandatory contract clause set forth in section 470.2(a). The purpose of a compliance evaluation is simply to determine whether a contractor or subcontractor is complying with its legal obligations, not to impose

additional obligations. Moreover, even assuming that this subparagraph were the appropriate place to make the suggested amendments, those amendments would impose requirements regarding the employee notice poster that extend well beyond the requirements imposed by laws enforced by DOL regarding other mandatory posters. We therefore decline to adopt the suggested amendment.

The same commenter suggested that, for clarity, the phrase “under 470.2(a)” be added to the same subparagraph, following the word “notice.” We concur with the commenter’s suggestion that additional language referring to 470.2(a) would clarify the subparagraph, and have added such language.

Finally, the same commenter suggested that the subparagraph be amended to require that the notice be posted in “all” of the contractor’s establishments and/or worksites. We decline to adopt this change, for the reasons set forth in the above discussion of section 470.4(d) regarding the elimination of the requirement to request an exemption in writing for work not performed under government contracts. Under other laws enforced by DOL, government contractors are not required to post notices in facilities that are exempt from the application of the law because the work performed at the facility is not related to the performance of a Federal contract. Therefore, adopting the suggested amendment for this rule would result in inconsistent obligations for government contractors, and inconsistent enforcement of laws applying to government contractors.

Paragraph 470.10(c), results of compliance evaluation: This subparagraph lists the required contents of the evaluation record. The same commenter suggested that, for clarity, the phrase “under Section 470.13” be added at the end of the subparagraph, following the phrase “enforcement recommended.” We agree that the suggested phrase would improve the clarity of the sentence, and have adopted the suggestion.

Section 470.11 What Are the Procedures for Filing and Processing a Complaint?

Paragraph 470.11(a), filing complaints: This paragraph explains who is entitled to file complaints alleging violations of the Executive Order and/or part 470, and where such complaints should be filed. One commenter suggested that the word “complainant” be added in parentheses after the word “employee” in the paragraph. We agree with the commenter that the regulatory language

should be amended to clarify that an employee who files a complaint is called a “complainant,” but we have elected to make that clarification by amending the language of paragraph 470.11(b) instead of this paragraph.

Paragraph 470.11(c), referrals: This paragraph as drafted in the Notice of Proposed Rulemaking carried over a Departmental practice from the 1992 “Beck final rule” to refer complaints alleging use of union dues or fees for purposes unrelated to a collective bargaining agreement, and/or seeking a refund or future adjustment of such dues or fees, to the National Labor Relations Board or other appropriate agency. See 57 FR 49588, 49594 (Nov. 2, 1992). We are striking this section in its entirety to ensure that unfair labor practice charges will reach the NLRB in a timely manner.

The National Labor Relations Board requires complainants to file unfair labor practice charges with it directly and within 6 months of the alleged unfair labor practice. The referral of information regarding an alleged misuse of union dues from the Department of Labor, however, does not fulfill the NLRB’s filing requirements. In order to avoid potential confusion regarding the proper procedures for filing unfair labor practice charges, and to ensure that complainants are able to file such charges in advance of the expiration of the statute of limitations, we are striking any reference to referrals by the Department of Labor to the NLRB.

One commenter suggested that in addition to making such referrals, DOL should use a special E.O. 13201-related Web page, referred to above in the discussion of paragraph 470.2(a), to provide employees with detailed step-by-step information about how to obtain refunds of union dues and/or fees under Beck. The purpose of the Executive Order is not to encourage or assist workers in exercising rights they have under the Supreme Court’s decision in Beck, but to inform them of the existence of such rights. Accordingly, the employee notice poster will provide the headquarters and Web site address for the National Labor Relations Board, the agency entrusted with the enforcement of these rights, for the benefit of workers who need such assistance. Paragraph 470.11(d) has been redesignated as paragraph 470.11(c).

Sec. 470.12 What Are the Procedures To Be Followed When a Violation Is Found During a Complaint Investigation or Compliance Evaluation?

One commenter suggested that both this section and the following section be amended to require that the time period

for the Department's efforts to seek compliance with E.O. 13201 and part 470 through conciliation be limited to ten days, not including weekends and Federal holidays. We decline to adopt the proposed amendments. The length of time devoted to conciliation should be based on the facts of each case and the likelihood that a voluntary agreement may be achieved. Conciliation efforts that last for ten days may nevertheless result in compliance through continued efforts. The Department does not want to impose an artificial deadline that would preclude successful conciliation. Further, a mandatory deadline is not necessary to ensure expeditious resolution of violations. The Department is authorized to suspend unproductive conciliation efforts at any time and institute enforcement proceedings. The Department declines to impose a mandatory deadline for termination of conciliation efforts but will, however, attempt to resolve violations as expeditiously as possible.

§ 470.13 Under What Circumstances, and How, Will Enforcement Proceedings Under the Executive Order Be Conducted?

Paragraph 470.13(a), general provisions: One commenter asked that subparagraph (1) of this paragraph, which provides that "[v]iolations of the Executive Order may result in administrative proceedings to enforce the Order," be amended to require that such violations "will" result in such proceedings. Enforcement agencies are generally vested with broad prosecutorial discretion in determining which matters are litigation worthy. Such determinations are based on a complicated balancing of a number of factors, including considerations of available resources, likelihood of success on the merits, whether violations are technical or substantial, the number, and the merits of, cases with similar or more egregious violations, overall agency policies, and competing Department-wide priorities. Although the Department will vigorously enforce the Executive Order, the proposed amendment would inappropriately eliminate the Department's prosecutorial discretion to determine whether administrative proceedings are suitable in a given case. We therefore decline to adopt the proposed amendment.

Paragraph 470.13(b)(2), administrative enforcement proceedings: This subparagraph as written in the NPRM provided that proceedings would be conducted in accordance with the rules for expedited

proceedings at 29 CFR 18.42 unless otherwise provided by the Office of the Solicitor in its complaint. As a general matter, hearings in Departmental programs are not automatically subjected to expedited proceedings. Accordingly, we are amending this procedural rule to eliminate this "presumption" of expedited proceedings. *See, e.g.*, procedures for administrative proceedings to enforce Executive Order 11246 at 41 CFR part 60-30. We are deleting paragraph (b)(2), the effect being that non-expedited hearing procedures will be followed unless otherwise elected in accordance with the rules for expedited proceedings at 29 CFR 18.42.

As a result of this action, paragraph (b)(3) is redesignated as paragraph (b)(2); paragraph (b)(4) is redesignated as paragraph (b)(3); and paragraph (b)(5) is redesignated as paragraph (b)(4).

Paragraph 470.13(b)(4), administrative enforcement proceedings: This subparagraph explains the circumstances under which the Assistant Secretary for Employment Standards will issue a final administrative order in proceedings under section 470.13, and provides that where the Assistant Secretary has found violations, the final administrative order "may" order several specific actions. The same commenter that suggested an amendment to paragraph 470.13(a), as discussed above, also proposed that the word "may" in this subparagraph be replaced by "will." The Department is persuaded that once it is established that a violation has occurred, appropriate relief should be ordered. The Department does not believe that it would ever be appropriate to not issue an order upon a finding of a violation. Further, the number and kinds of orders that may be imposed is sufficiently great that the Assistant Secretary will have the flexibility needed to ensure that there will be a suitable resolution for each violation, despite the variations in facts that may be presented in these cases. In light of this change, the paragraph has also been amended to phrase the list of appropriate orders in the disjunctive, so as to avoid the impression that all possible orders, sanctions, and remedies must be imposed upon the finding of a violation. The paragraph has also been amended to clarify that the Assistant Secretary may impose one or more kinds of orders.

Section 470.14 What Sanctions and Penalties May Be Imposed for Noncompliance, and What Procedures Will the Department Follow in Imposing Such Sanctions and Penalties?

This paragraph requires the Department to consult with the affected contracting agencies. Pursuant to DOL practice, that consultation would take place after a decision on the merits has been issued and before the Department imposes sanctions or penalties. We have amended the regulatory text in this paragraph to clarify that procedural point.

Paragraph 470.14(c): This paragraph lists the circumstances under which sanctions and penalties will not be imposed on a contractor that has violated the Order or part 470. The commenter suggested that the word "will" in this paragraph be replaced by "may." This amendment would permit the Assistant Secretary to impose sanctions and penalties even in the listed situations. However, sections 5(b) and 6(a) and (b) of E.O. 13201 preclude the Department from imposing sanctions and penalties in these situations. The proposed amendment therefore exceeds our authority, and is not adopted.

Paragraph 470.14(d): This paragraph and its subparagraphs (1) and (2) list possible actions that the Assistant Secretary may take in enforcing the Executive Order and part 470. The commenter suggested that the word "may" in the paragraph be replaced by "will," in effect requiring the Assistant Secretary to take all of the actions listed in subparagraphs (1) and (2) in every case. Section 6 of the Executive Order vests the Secretary with discretion to impose or not impose a number of different sanctions, and that authority has been delegated to the Assistant Secretary. The commenter's suggestion would require the Assistant Secretary to treat willful violations the same as inadvertent violations, egregious violations the same as minor ones, and repeat offenders like first-time offenders. This inflexibility would not result in fair and evenhanded disposition of cases, and would thus not further the purposes of the Executive Order. Requiring that the Assistant Secretary take one or all of these actions would circumscribe her discretion in a manner inconsistent with the Executive Order. Therefore, we decline to adopt the proposed amendment.

Subparagraph 470.14(d)(2): This subparagraph permits the Assistant Secretary to issue an order of debarment providing that "one or more" agencies must refrain from entering into further

contracts, or extensions or other modification of existing contracts, with any noncomplying contractor. The commenter proposed that the language of the subparagraph be amended to require the Assistant Secretary to order "all" contracting agencies to refrain from contracting with a contractor. However, the "one or more" language is taken directly from section 6(b) of the Executive Order. We therefore decline to adopt the proposed amendment.

Paragraph 470.14(f): This paragraph requires the Assistant Secretary to publish and distribute to all executive agencies a list of contractors that are ineligible for future contracts and subcontracts because they have failed to comply with E.O. 13201 or part 470. The language of the paragraph requires the Assistant Secretary to publish and distribute the list "[p]eriodically." The commenter proposed that the paragraph be revised to require that the list be published and distributed "monthly," and that a new paragraph (g) be added to require the Assistant Secretary to publish the list in the **Federal Register**. We decline to adopt the proposed revisions. Use of the term "periodically" permits the Assistant Secretary to use his or her discretion to publish the list as often as he or she deems necessary, whether weekly, monthly, or less often. Similarly, the language of paragraph 470.14(f) permits the Assistant Secretary to publish the list in the **Federal Register** if he or she believes that such publication is necessary or appropriate.

Subpart C—Ancillary Matters

Section 470.22 What Actions May the Assistant Secretary Take in the Case of Intimidation and Interference?

One commenter suggested that we amend this section to ensure that the phrase "no person intimidates, threatens, or coerces any individual" is "given the broadest definition possible." To accomplish this goal, the commenter suggested two changes to the section: first, that a "very broad definition or example" be added to explain the phrase, and second, that language be added to the section that would require the Department to "give the broadest meaning possible to this phrase." We decline to adopt either of these suggestions. The Department intends to follow applicable caselaw in interpreting the relevant language; it is therefore unnecessary to address the matter in further detail in these regulations.

General Issues

One commenter raised the concern that the posting requirement for

contractors and subcontractors covered by the Railway Labor Act ("RLA") appears duplicative of a posting requirement imposed by the National Mediation Board, which, according to the commenter, advises employees of their rights to join or refrain from joining a union. This commenter acknowledged that the Executive Order does not appear to exempt RLA employers from the posting requirement, even if they have similar posters in place. Nonetheless, the commenter urged the Department to "consider the apparently duplicative posting requirement, especially in any compliance and enforcement proceedings."

The language of the Executive Order clearly contemplates that contractors and subcontractors governed by the RLA will be subject to the requirement of posting the employee notice poster set forth in section 2(a) of the Order. Given the President's clear intent to include such employers, the Department has no authority to exempt them, on the basis of RLA coverage alone, from the posting requirements, or from sanctions and penalties resulting from noncompliance. Moreover, the National Mediation Board posting referenced by the commenter is not duplicative of the notice at issue in these regulations. The National Mediation Board posting requires employers to post a notice to employees when an application for representation has been filed with the National Mediation Board. That notice to employees excerpts a portion of the Railway Labor Act discussing employees' right to select representatives without influence or interference, and includes a short statement concerning employees' rights to choose or not to choose union representation. It does not discuss, as the notice at issue here does, union security agreements and non-union members' rights to object to the use of their agency fees for certain purposes.

IV. Regulatory Procedures

Executive Order 12866

As noted in the preamble to the NPRM, this rule constitutes an "other significant regulatory action" within the meaning of Executive Order 12866. As such, this rule is subject to review by the Office of Management and Budget. However, the Department has determined that this rule will not have an annual effect on the economy of \$100 million or more, or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal

governments or communities. Therefore, the Department has concluded that this final rule is not "economically significant" as defined in section 3(f)(1) of E.O. 12866. As a result, the cost-benefit analysis called for under section 6(a)(3)(C) of the order is not required.

No commenter disagreed with the Department's ultimate determination that the implementation of the rule would not have an annual effect on the economy of \$100 million or more. However, two commenters disagreed with the cost-benefit analysis published in the NPRM. As a result, the Department recalculated the analysis, using the highest figures suggested by the commenters, to determine whether the annual effect on the economy could exceed \$100 million if all of the commenters' assumptions were correct. The recalculated cost of the rule remained significantly below the \$100 million threshold requirement for a formal cost-benefit analysis. Therefore, the recalculation affirms the Department's conclusion that this final rule is not "economically significant" as defined in section 3(f)(1) of Executive Order 12866, and that consequently, a formal regulatory economic analysis, as described under section 6(a)(3)(C) of Executive Order 12866, is unnecessary.

Executive Order 12866 requires agencies to assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating and, to the extent feasible, to specify performance objectives, rather than specifying the behavior or manner of compliance. Executive Order 13201 speaks with great specificity. The Order makes the Secretary responsible to implement the Order, and requires the Secretary to adopt rules and regulations deemed necessary and appropriate to achieve the purpose of the Order. The Order contains specific language that must be included in nonexempt contracts, and provides the Secretary with authority to exempt an agency from the Order if special circumstances require an exemption to serve the public interest. The Order provides that the Secretary may exempt certain classes of contracts that fall in five enumerated categories, and to exempt "separate and distinct" facilities. The Secretary is authorized to conduct investigations, receive complaints, hold hearings, and impose sanctions. Upon a finding of a violation, the Order permits the Secretary to direct that an agency cancel, terminate or suspend a contract, or continue a contract conditioned upon future compliance. The Secretary may provide that an agency refrain from entering into contracts with noncomplying contractors, and publish

a list of contractors that have failed to comply with the Order. In light of the great specificity with which the Order sets forth both substantive and procedural requirements, the Order affords little in the way of alternatives to compliance directed rulemaking.

The Office of Management and Budget (OMB) has reviewed this final rule for consistency with the President's priorities and the principles set forth in E.O. 12866.

Regulatory Flexibility Act

This final rule will not substantially change existing obligations for Federal contractors; it will merely require certain contractors to post notices informing their employees of certain rights those employees already hold under Federal law, and to include clauses in contracts with subcontractors and vendors, requiring those subcontractors and vendors to post the same employee notices. Accordingly, we conclude that the final rule will not have a significant economic impact on a substantial number of small business entities. The Secretary of Labor has certified this conclusion to the Chief Counsel for Advocacy at the Small Business Administration. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

Unfunded Mandates Reform

For purposes of the Unfunded Mandates Reform Act of 1995, as well as Executive Order 12875, Enhancing the Intergovernmental Partnership, this final rule does not include any Federal mandate that will result in increased expenditures by State, local, and tribal governments, or in increased expenditures by the private sector of more than \$100 million in any one year.

Paperwork Reduction Act

Certain sections of this final rule, including §§ 470.2(b), 470.4(d), and 470.11(a) and (b), contain information collection requirements. As required by the Paperwork Reduction Act (PRA), the Department has submitted a copy of these sections to OMB for its review.

The final rule also requires contractors and subcontractors to post notices, investigate complaints, and, where appropriate, file requests for waivers. The application of the PRA to those requirements is discussed below.

The final rule imposes certain minimal burdens associated with the posting of the employee notice poster required by the Executive Order and § 470.2(a) of the rule. As noted in section 470.2(d), the Department will supply the poster, and contractors will

be permitted to make and post exact duplicate copies thereof. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The final rule also imposes certain burdens associated with the filing and processing of a complaint on both the complainant and the contractor. We estimate, based on OFCCP's experience administering other laws applicable to Federal contractors, that it will take an average of 1.28 hours for a complainant to compose a complaint containing the necessary information, and to send that complaint to DOL. No comments were received that challenged this estimate of 1.28 hours in the Paperwork Package submitted to the Office of Management and Budget in 2001. We have used data from the Bureau of Labor Statistics National Compensation Survey: Occupation Wages in the United States (NCS), 2001 (Summary 02-05), the most recent survey available, to calculate the cost of these burden hours. The NCS Summary indicates that the average hourly wage for union workers during 2001 was \$19.50 per hour. We therefore estimate that the cost to a complainant of filing a complaint under EO 13201 and this final rule will be \$25.36, or \$24.96 ($\$19.50 \times 1.28$) + .40 postage and envelope. We further estimate that 1,046 individual complaints will be filed each year under the Executive Order and this final rule. No comments were received that challenged this estimate of 1,046 complaints in the Paperwork Package submitted to the Office of Management and Budget in 2001. Therefore, we project that this collection of information will impose on employees who file complaints a total cost burden of \$26,526.56 ($\25.36 per complaint \times 1,046 complaints).

With regard to the burdens for the contractor, the regulations implementing the PRA exempt from the requirements of the Act any information collection requirements imposed by an administrative agency during the conduct of an administrative action against specific individuals or entities. See 5 CFR 1320.4(a)(2). Once the agency opens a case file or equivalent about a particular party, this exception applies during the entire course of the investigation, before or after formal charges or complaints are filed or formal administrative action is initiated. 5 CFR 1320.4(c). Therefore, this exemption will apply to the Department's

investigation of complaints alleging violations of the Order or this final rule.

Finally, § 470.4(d) of this final rule will permit a contractor to apply in writing for a waiver from the requirement to post the employee notice contained in § 470.2(a). Our analysis of the burdens that will be imposed on contractors as a result of this requirement is based upon several factors discussed in the cost-benefit analysis in the preamble to the NPRM. Various commenters submitted comments regarding each of these factors. The following is a review of each of the factors, the comments submitted on each factor, and the Department's reconsideration of that factor.

(a) The first factor considered in the analysis was the estimated number of yearly requests that OFCCP would receive from contractors seeking waivers from the obligations of E.O. 13201 for facilities not involved in performing work on a Federal contract. The Department developed its estimates for the NPRM based on estimates regarding the number of waiver requests received by OFCCP under Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act. These laws were selected because they apply to the same Federal contractors and subcontractors as does E.O. 13201, and because the regulations implementing these laws require the same written requests for exemption under the same circumstances as were provided in § 470.4(d) of the NPRM. 41 CFR 60-1.5(b)(2), 60-741.4(b)(3), 60-250.4(b)(3); see discussion above regarding paragraph 470.4(d).

In the NPRM, the Department estimated that one-tenth of one percent (.1%) of Federal contractors annually would be likely to submit requests for waivers under E.O. 13201. Based on an estimate that 200,000 supply, service, and construction contractors would be subject to the proposed rule, the Department estimated that 200 contractors per year (.1% of 200,000) would be likely to request a waiver under the rule. Two commenters objected to these estimates. Both commenters suggested that a far higher percentage of contractors and subcontractors would request waivers under E.O. 13201 than under the other laws administered by OFCCP, because labor organizations would be likely to pressure the contractors and subcontractors to submit such requests. One commenter estimated that at least nine percent of Federal contractors "operate some facilities where union

organizations are present,” and, based on that estimate, suggested that 18,000 contractors would submit requests in the first year of implementation of the Order.

Based on the concerns expressed by these commenters, the Department reviewed the statistics used in the preamble to the NPRM and the data underlying those statistics. Review of that data, including data obtained from E.E.O. 1 reports filed with the Equal Employment Opportunity Commission, indicated that the figure of 200,000 actually represents the number of separate contractor establishments, not the number of contractors and that there are approximately 16,000 separate supply-and-service contractors and 10,000 construction contractors that hold Federal contracts. No reliable records are available that indicate how many, or what percentage, of those contractors have formally recognized a union or have had a union certified as the exclusive bargaining representative of its employees.

The Department also reviewed the requests for separate-facility waivers OFCCP received from Federal contractors and subcontractors, under the three laws listed above, from January 1999 through December 2001. OFCCP's records indicate that during that period, the agency received only 16 individual letters from contractors requesting separate-facility waivers, or an average of 5.3 requests per year. Even if that number were increased tenfold as a result of pressure from labor organizations, the number of requests received per year would total only 53, approximately a quarter of the number estimated by the Department in the NPRM. Moreover, the estimate of 18,000 requests per year, suggested by the commenter mentioned above, is based not only on the incorrect estimate of the number of Federal contractors provided in the preamble to the NPRM, but also on the assumption that every Federal contractor and subcontractor that operates “some facilities where labor organizations are present” would submit a waiver request. We view the latter assumption as unreasonable. As a result, we believe that the Department's estimate that 200 contractors a year will request separate-facility waivers is reasonable, and decline to adopt the commenter's estimates.

(b) The second factor in the analysis was the estimated time that would be required for a contractor to develop a letter requesting a waiver from the obligations of E.O. 13201 for facilities not involved in performing work on a Federal contract. In the NPRM, the Department estimated that it would take

an average of one hour to prepare and mail each waiver request, using 12 minutes of managerial time and 48 minutes of administrative time. Two commenters objected, contending that this estimate was too low. One commenter noted that applying for a waiver is likely to involve the use of in-house or outside counsel, and that some labor organizations are likely to demand to bargain over whether the employer should apply for such a waiver. The other commenter surveyed contractors that submitted waiver requests between 1990 and 1992, and estimated that those contractors expended an average of 15 hours per request, 90 percent of which was managerial/professional time and 10 percent of which was administrative/clerical time.

As a result of the concerns expressed by these commenters, the Department reviewed the records of those contractors that requested separate-facility waivers from OFCCP between 1999 and 2001. We also reviewed guidance developed by OFCCP on the criteria that would be considered by the Deputy Assistant Secretary in deciding whether to grant separate facility exemptions/waivers from the requirements of Executive Order 11246 (E.O. 11246) and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). Guidance provided with respect to the appropriateness of an exemption under those provisions is also relevant here. That guidance is contained in OFCCP ADM Notice 260, dated September 13, 2002 (“Directive”). Based on this review, we have accepted the second commenter's estimate of 15 hours as the average amount of time contractors will need to complete a waiver request. We have also accepted the commenter's estimate that 90 percent of this time will be managerial/professional and 10 percent administrative/clerical.

The test that a contractor must meet for obtaining a separate facility exemption under E.O. 11246 and the affirmative action provisions of VEVRAA is identical to the test for obtaining an exemption under this regulation. This test requires a two-part showing: (1) The facility for which an exemption is sought is in all respects separate and distinct from activities of the contractor related to the performance of a government contract; and (2) such an exemption will not interfere with or impede the effectuation of the relevant statutory or regulatory requirements, Directive p.2. The Directive explains how these standards are met by requiring that a showing be made under the following factors:

Separate and Distinct

(i) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a government contract;

(ii) The extent to which the contractor derives benefits from a government contract, directly or indirectly, at the facility to be exempted;

(iii) Whether any costs associated with operating the facility are charged to a government contract;

(iv) Whether working at the facility for which an exemption/waiver is sought is a prerequisite for advancement in job responsibility or pay at facilities connected to a government contract; and whether working at facilities connected to a government contract is a prerequisite for advancement in job responsibility or pay at the facility for which an exemption/waiver is sought;

(v) Whether employees who normally work at the facility are required to perform work related to a government contract at another facility;

(vi) Whether the facility regularly or substantially transfers employees to or from facilities at which a government contract is performed;

(vii) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

Other factors could include the number of facilities connected to the contractor's government contracts and the nature of the contractor's contractual relationship with the government.

Interfere With or Impede

(i) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under Federal, State, or local equal employment opportunity laws;

(ii) The contractor's record of compliance with Federal, State or local equal employment opportunity laws; and

(iii) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the granting of the exemption/waiver would interfere with or impede the effectuation of either the Executive Order or the affirmative action provisions of VEVRAA.

A contractor must submit proof under these criteria sufficient to demonstrate that its facility is separate and distinct and that the waiver will not be used to interfere with or impede the contractor's compliance with this Executive Order.

Because the showing required for obtaining a waiver/exemption under E.O. 11246 and VEVRAA is identical to that required under E.O. 13201, a contractor who has obtained a waiver under E.O. 11246 or VEVRAA will be entitled to a waiver pursuant to this regulation provided it would not impede the effectuation of E.O. 13201.

If this information is reasonably accessible to the contractor, it may take him an average of 90 minutes to prepare a response under each of the stated criteria, for a total preparation time of 15 hours. Contractors with few facilities may require less time; contractors with many facilities may require more. Similarly, the preparation time may vary depending on the accessibility of the required documentation. Fifteen hours is only predictive as an average; it may be more or less at the extremes.

(c) The third factor in this analysis was the estimated average hourly compensation rate for managerial and administrative employees. In the NPRM, the Department based its estimates of this compensation on the information contained in the 1999 version of the Bureau of Labor Statistics (BLS) publication "Employer Costs for Employee Compensation" (USDL 99-173). One commenter pointed out that the Department should have used BLS's estimated hourly compensation rates from 2001. We interpret this comment as requesting that the most current data be used, which in this case is contained in the BLS December 2002 edition of the Employee Compensation publication (USDL 03-130). This edition lists the average compensation for executive, administrative, and managerial positions as \$42.56 per hour, and for administrative support as \$18.74 per hour.

Total Time Expended: 200 waivers a year \times 15 hours = 3000 hours.

Executive, Administrative, and Managerial Time: .90 \times 3000 hours = 2700 hours.

Executive, Administrative, and Managerial Cost: 2700 hours \times \$42.56 = \$114,912.

Administrative Support Time: .10 \times 3000 hours = 300 hours.

Administrative Support Cost: 300 hours \times \$18.74 = \$5,622.

Postage and Envelope: 200 \times .40 = \$80.00.

Total Annualized Cost Estimate: \$120,614.

Dividing the total annualized cost estimate of \$120,614 by the estimated number of waivers (200), we calculate that the estimated average cost of separate-waiver requests per Federal contractor establishment will be \$603.07.

(d) One commenter pointed out that the cost-benefit analysis in the NPRM failed to take into consideration the time burden for contractors and subcontractors to familiarize themselves with the waiver requirement and to determine whether it is applicable to their circumstances. For purposes of this calculation only, we assume that this factor should be taken into consideration under the Paperwork Reduction Act of 1995, and accept the commenter's estimate that such a review will require approximately 40 minutes—66 percent of one hour—of total managerial time per contractor. Based on a Federal contractor universe of 26,000, we have estimated the costs of such a review as follows:

Executive, Administrative, and Managerial Time: .66 hour \times 26,000 contractors = 17,160 hours.

Executive, Administrative, and Managerial Cost: 17,160 hours \times \$42.56 = \$730,329.60.

Total Annualized Estimate of Familiarization Cost: \$730,329.60.

Dividing the total annualized familiarization cost estimate of \$730,329.60 by the estimated Federal contractor universe of 26,000, we calculate that the average cost for each Federal contractor to familiarize itself with the waiver requirement will be \$28.09.

(e) A commenter also pointed out that in the cost-benefit analysis in the NPRM, we failed to take into consideration the cost to the Federal government for processing waiver requests. However, the regulations implementing the PRA define the term "burden," in pertinent part, as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency." 5 CFR 1320.3(b)(1). The definition of the term "person" in the same regulations includes "an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision." 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government for processing waiver requests need not be taken into consideration.

(f) Finally, one commenter contended that the cost-benefit analysis in the

NPRM failed to take into consideration the cost associated with adding the employee notice clause to subcontractor contracts, subcontracts, purchase orders, and supplier agreements, and asserted that the cost of rewriting and printing all of these documents will be one of the most significant contractor costs associated with the Executive Order. However, § 470.2(b) of the rule explicitly permits contractors and subcontractors to incorporate the employee notice clause by reference, rather than by quoting the text of the clause verbatim. This option permits contractors and subcontractors to comply with the regulations simply by having their staff type a single sentence onto already-existing form documents, rather than by discarding and reprinting such already-existing forms. Moreover, even if the contractor or subcontractor wishes to incorporate the entire text of the employee notice clause in its documents, such incorporation may be accomplished merely by appending an addendum page to each document and ensuring that all parties signing the document are aware of the addendum. Therefore, the burdens that will be imposed upon contractors as a result of the requirement will be minimal.

Executive Order 13132 (Federalism)

We have reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and have determined that the rule does not have "federalism implications." Some States do hold Federal contracts as defined in this rule. However, as described above in the discussion of other regulatory procedures, we have concluded that the impact of the requirements of posting notices, and requesting waivers, that the rule will impose on those States will be negligible. Therefore, the rule does not "have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department certifies that this final rule does not impose substantial direct compliance costs on Indian tribal governments.

Executive Order 13045 (Protection of Children From Environmental Health Risks and Safety Risks)

In accordance with Executive Order 13045, the Department has evaluated the environmental safety and health effects of the final rule on children. The

Department has determined that the final rule will have no effect on children.

Executive Order 12630 (Governmental Actions and Interference With Constitutionally Protected Property Rights)

This final rule is not subject to Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights, because it does not involve implementation of a policy with takings implications.

Executive Order 12988 (Civil Justice Reform)

This final rule has been drafted and reviewed in accordance with Executive Order 12988, Civil Justice Reform, and will not unduly burden the Federal court system. The final rule has been written so as to minimize litigation and provide a clear legal standard for affected conduct, and has been reviewed carefully to eliminate drafting errors and ambiguities.

Environmental Impact Assessment

The Department has reviewed the final rule in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR part 1500), and the Department's NEPA procedures (29 CFR part 11). The final rule will not have a significant impact on the quality of the human environment, and thus, the Department has not conducted an environmental assessment or prepared an environmental impact statement.

Executive Order 13211 (Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use)

This final rule is not subject to Executive Order 13211, because it will not have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 29 CFR Part 470

Administrative practice and procedure, Government contracts, Union dues, Labor unions.

Signed in Washington, DC this 22 day of March, 2004.

Victoria A. Lipnic,
Assistant Secretary for Employment Standards.

Don Todd,
Deputy Assistant Secretary for Labor-Management Programs.

Charles E. James, Sr.,
Deputy Assistant Secretary for Federal Contract Compliance.

■ Accordingly, a new subchapter C, consisting of part 470, is added to 29 CFR chapter IV to read as follows:

SUBCHAPTER C—EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES

PART 470—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTICE OF EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES

Subpart A—Preliminary Matters

Sec.

- 470.1 What definitions apply to this part?
470.2 Under the Executive Order, what employee notice clause must be included in Government contracts?
470.3 What contracts are exempt from the employee notice clause requirement?
470.4 What contractors or facilities are exempt from the posting requirements?

Subpart B—Compliance Evaluations, Complaint Investigations, and Enforcement Procedures

Sec.

- 470.10 How will the Department determine whether a contractor is in compliance with the Executive Order and this part?
470.11 What are the procedures for filing and processing a complaint?
470.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?
470.13 Under what circumstances, and how, will enforcement proceedings under the Executive Order be conducted?
470.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?
470.15 Under what circumstances must a contractor be provided the opportunity for a hearing?
470.16 Under what circumstances may a contractor be reinstated?

Subpart C—Ancillary Matters

- 470.20 What authority under this Rule or the Executive Order may the Secretary delegate, and under what circumstances?
470.21 Who will make rulings and interpretations under the Executive Order and this part?
470.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

470.23 What other provisions apply to this part?

Authority: E.O. 13201, 3 CFR, 2001 Comp., p.754, (66 FR 11221), issued pursuant to the Constitution and laws of the United States, including the Federal Property and Administrative Services Act, 40 U.S.C. 471 *et seq.*, now codified as amended at 40 U.S.C. 101 *et seq.*

Subpart A—Preliminary Matters

§ 470.1 What definitions apply to this part?

(a) Assistant Secretary means the Assistant Secretary for Employment Standards, United States Department of Labor, or his or her designee.

(b) Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(c) Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

(d) Contract means, unless otherwise indicated, any Government contract or subcontract.

(e) Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

(f) Contractor means, unless otherwise indicated, a prime contractor or subcontractor, at any tier.

(g) Department means the U.S. Department of Labor.

(h) Employee notice clause means the contract clause that Government contracting departments and agencies must include in all nonexempt Government contracts and subcontracts pursuant to Executive Order 13201.

(i) Government means the Government of the United States of America.

(j) Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or nonpersonal services. The term "personal property," as used in this section, includes supplies, and contracts for the use of real property (such as lease

arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term "nonpersonal services" as used in this section includes, but is not limited to, the following services: utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federally assisted contracts.

(k) Labor organization means any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(l) Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

(m) Order or Executive Order means Executive Order 13201 (66 FR 11221, February 22, 2001).

(n) Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(o) Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order.

(p) Related rules, regulations, and orders of the Secretary of Labor, as used in section 470.2 of this part, means rules, regulations, and relevant orders of the Assistant Secretary for Employment Standards, or his or her designee, issued pursuant to the Executive Order or this part.

(q) Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

(r) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

(s) Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order.

(t) Union means a labor organization as defined in paragraph (k) of this section.

(u) Union-security agreement means an agreement entered into between a contractor and a labor organization which requires certain employees of the contractor to pay uniform periodic dues and/or fees, initiation fees, or other payments to that labor organization as a condition of employment.

(v) United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 470.2 Under the Executive Order, what employee notice clause must be included in Government contracts?

(a) *Government contracts.* Except in contracts exempted in accordance with Section 470.3 and collective bargaining agreements as defined in 5 U.S.C. 7103(a)(8), all Government contracting agencies must, to the extent consistent with law, include the following provisions in Government contracts entered into on or after April 28, 2004, that resulted from solicitations issued on or after April 18, 2001:

"1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form as the Secretary of Labor will prescribe, in conspicuous places in and about its plants and offices, including all places where notices to employees are customarily posted. The notice must include the following information (except that the last two sentences must not be included in notices posted in the plants or offices of carriers subject to the Railway Labor Act, as amended (45 U.S.C. 151-188)).

"NOTICE TO EMPLOYEES

"Under Federal law, employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract

administration, and grievance adjustment.

"If you do not want to pay that portion of dues or fees used to support activities not related to collective bargaining, contract administration, or grievance adjustment, you are entitled to an appropriate reduction in your payment. If you believe that you have been required to pay dues or fees used in part to support activities not related to collective bargaining, contract administration, or grievance adjustment, you may be entitled to a refund and to an appropriate reduction in future payments.

"For further information concerning your rights, you may wish to contact the National Labor Relations Board (NLRB) either at one of its Regional offices or at the following address or toll-free number: National Labor Relations Board, Division of Information, 1099 14th Street, NW., Washington, D.C. 20570, 1-866-667-6572, 1-866-315-6572 (TTY).

"To locate the nearest NLRB office, see NLRB's website at <http://www.nlrb.gov>."

"2. The contractor will comply with all provisions of Executive Order 13201 of February 17, 2001, and related rules, regulations, and orders of the Secretary of Labor.

"3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13201 of February 17, 2001. Such other sanctions or remedies may be imposed as are provided in Executive Order 13201 of February 17, 2001, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

"4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13201 of February 17, 2001, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance: However, if the contractor becomes involved in

litigation with a subcontractor or vendor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.”

(b) *Inclusion by reference.* The employee notice clause need not be quoted verbatim in a contract, subcontract, or purchase order. The clause may be made part of the contract, subcontract, or purchase order by citation to 29 CFR part 470.

(c) *Adaptation of language.* The Assistant Secretary may make such changes in the contractual provisions of the Executive Order as may be necessary to reflect Acts of Congress, clarifications in the law by the courts, or otherwise to fully and accurately inform employees of their rights under the Executive Order.

(d) *Obtaining employee notice poster.* The required employee notice poster, printed by the Department, will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5605, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster may also be downloaded from the Office of Labor-Management Standards Web site at www.olms.dol.gov. Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

§ 470.3 What contracts are exempt from the employee notice clause requirement?

(a) *Transactions below the Simplified Acquisition Threshold.* The requirements of this part do not apply to Government contracts for purchases that fall below the Simplified Acquisition Threshold, as that threshold is defined in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. Therefore, the employee notice clause need not be included in contracts for purchases below that threshold, *provided that*—

(1) No agency, contractor, or subcontractor is permitted to procure supplies or services in a way designed to avoid the applicability of the Order and this part; and

(2) The employee notice clause must be included in contracts and subcontracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the

amount to be ordered in any year under such a contract or subcontract will be less than the Simplified Acquisition Threshold.

(b) *Government contracts resulting from solicitations issued before April 18, 2001.* Pursuant to section 14 of the Order, the requirements of this part do not apply to Government contracts that result from solicitations issued before April 18, 2001, the effective date of the Order.

(c) *Specific contracts.* The Deputy Assistant Secretary for Labor-Management Programs may exempt a contracting agency or any person from requiring the inclusion of any or all of the employee notice clause in any specific contract, subcontract, or purchase order when the Deputy Assistant Secretary deems that special circumstances in the national interest so require. Requests for such exemptions must be in writing, and must be directed to the Deputy Assistant Secretary for Labor-Management Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5605, Washington, DC, 20210.

(d) *Withdrawal of exemption.* When any contract or subcontract is of a class exempted under this section, the Deputy Assistant Secretary for Labor-Management Programs may withdraw the exemption for a specific contract or subcontract or group of contracts or subcontracts when, in the Deputy Assistant Secretary's judgment, such action is necessary or appropriate to achieve the purposes of the Order.

§ 470.4 What contractors or facilities are exempt from the posting requirements?

(a) *Number of employees.* The requirement to post the employee notice given in § 470.2(a) (hereafter, posting requirement) does not apply to contractors and subcontractors that employ fewer than 15 persons.

(b) *Union representation.* The posting requirement does not apply to contractor establishments or construction work sites where no union has been formally recognized by the prime contractor or certified as the exclusive bargaining representative of the prime contractor's employees.

(c) *State law.* The posting requirement does not apply to contractor establishments or construction work sites in jurisdictions where state law forbids enforcement of union-security agreements. For purposes of this paragraph, the term “state” is intended to include any of the entities identified as comprising the United States, as defined in § 470.1(2).

(d) *Work not performed under Government contracts.* Upon the written

request of the contractor, the Deputy Assistant Secretary for Labor-Management Programs may waive the posting requirements with respect to any of a contractor's facilities if the Deputy Assistant Secretary finds that the contractor has demonstrated that:

(1) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(2) Such a waiver will not interfere with or impede the effectuation of the Executive Order.

(e) *Work outside the United States.* The posting requirement does not apply to work performed outside the United States that does not involve the recruitment or employment of workers within the United States.

Subpart B—Compliance Evaluations, Complaint Investigations and Enforcement Procedures

§ 470.10 How will the Department determine whether a contractor is in compliance with the Executive Order and this part?

(a) The Deputy Assistant Secretary for Federal Contract Compliance may conduct a compliance evaluation to determine whether a contractor holding a nonexempt contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by Section 470.2(a) is posted in conspicuous places in and about each of the contractor's establishments and/or construction work sites not exempted under section 470.4 of this part, including all places where notices to employees are customarily posted; and

(2) The provisions of the employee notice clause are included in nonexempt Government contracts entered into on or after April 28, 2004, that resulted from solicitations issued on or after April 18, 2001.

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under Section 470.13.

§ 470.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required by the Executive Order and this part; and/or has failed to include the employee notice clause in nonexempt subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include the name, address, and telephone number of the employee who filed the complaint (the complainant), the name and address of the contractor alleged to have violated the Executive Order, an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred, and any other pertinent information that will assist in the investigation and resolution of the complaint. The complainant must sign the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under paragraph (a) of this section, the Deputy Assistant Secretary for Federal Contract Compliance will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 470.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of the Executive Order or this part, the Department will make reasonable efforts to secure compliance through conciliation.

(b) The contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with nonexempt subcontractors and vendors to include the employee notice clause), and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance with the Executive Order or this part.

(c) If a violation cannot be resolved through conciliation efforts, the Deputy Assistant Secretary for Labor-Management Programs may proceed in accordance with Section 470.13.

(d) For reasonable cause shown, the Deputy Assistant Secretary for Labor-Management Programs may reconsider, or cause to be reconsidered, any matter on his or her own motion or pursuant to a request.

§ 470.13 Under what circumstances, and how, will enforcement proceedings under the Executive Order be conducted?

(a) *General.* (1) Violations of the Executive Order may result in administrative proceedings to enforce the Order. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to provide information as required by the Executive Order and the regulations in this part.

(2) If a determination is made that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, the Deputy Assistant Secretary for Labor-Management Programs may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures set forth in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued pursuant to 29 CFR 18.57 to the Assistant Secretary. The decision will be served on all parties and amici.

(3) Within 25 days (10 days in the event that the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Assistant Secretary.

(4) After the expiration of time for filing exceptions, the Assistant

Secretary may issue a final administrative order, or may make such other disposition of the matter as he or she finds appropriate. In an expedited proceeding, unless the Assistant Secretary issues a final administrative order within 30 days after the expiration of time for filing exceptions, the administrative law judge's recommended decision will become the final administrative order. If the Assistant Secretary determines that the contractor has violated the Executive Order or the regulations in this part, the final administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in Section 470.14, impose appropriate sanctions and penalties, or any combination thereof.

§ 470.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Assistant Secretary will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, among which reasons must be a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section, however, will not be imposed if:

(1) The head of the contracting agency continues personally to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been afforded an opportunity for a hearing.

(d) In enforcing the Order and this part, the Assistant Secretary may:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure of the contractor to comply with its contractual provisions as required by section 2 of the Executive Order and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under section 6(b) of the Order providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any noncomplying contractor.

(e) Whenever the Assistant Secretary has exercised his or her authority pursuant to paragraph (d) of this section, the contracting agency must report the actions it has taken to the Assistant Secretary within such time as the Assistant Secretary will specify.

(f) Periodically, the Assistant Secretary will publish and distribute, or cause to be published and distributed, to all executive agencies a list of the names of contractors that have, in the judgment of the Assistant Secretary under section 470.13(b)(4) of this part, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts or subcontracts under the Executive Order and the regulations in this part.

§ 470.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Assistant Secretary takes the following action, a contractor must be given the opportunity for a hearing before the Assistant Secretary:

(a) Issues an order debarment of the contractor from further Government contracts under section 6(b) of the Executive Order and § 470.14(d)(2) of this part; or

(b) Includes the contractor on a published list of noncomplying contractors under section 6(c) of the Executive Order and § 470.14(f) of this part.

§ 470.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts or subcontracts under the Executive Order may request reinstatement in a letter to the Assistant Secretary. If the Assistant Secretary finds that the contractor or subcontractor has come into compliance with the Order and this part and has shown that it will carry out the Order and this part, the contractor or subcontractor may be reinstated.

Subpart C—Ancillary Matters

§ 470.20 What authority under this part or the Executive Order may the Secretary delegate, and under what circumstances?

Section 9 of the Executive Order grants the Secretary the right to delegate any of his/her functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 470.21 Who will make rulings and interpretations under the Executive Order and this part?

Rulings under or interpretations of the Executive Order or the regulations contained in this part will be made by the Assistant Secretary or his or her designee.

§ 470.22 What actions may the Assistant Secretary take in the case of intimidation and interference?

The sanctions and penalties contained in Section 470.14 of this part may be exercised by the Assistant Secretary against any contractor or subcontractor who fails to take all necessary steps to ensure that no person intimidates,

threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration of the Executive Order or the regulations in this part.

§ 470.23 What other provisions apply to this part?

(a) The regulations in this part implement Executive Order 13201 only, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Consistent with section 8 of the Executive Order, each contracting department and agency must cooperate with the Assistant Secretary, the Deputy Assistant Secretary for Labor-Management Programs, and/or the Deputy Assistant Secretary for Federal Contract Compliance, and must provide such information and assistance as the Assistant Secretary or Deputy Assistant Secretary may require, in the performance of his or her functions under the Executive Order and the regulations in this part.

(c) Consistent with section 13 of the Executive Order, nothing contained in the Executive Order or this part, or promulgated pursuant to the Executive Order or this part, is intended to confer any substantive or procedural right, benefit, or privilege enforceable at law by any party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

[FR Doc. 04-6823 Filed 3-26-04; 8:45 am]

BILLING CODE 4510-CP-P