COMPETITIVE ENTERPRISE INSTITUTE

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September 2, 2025

Catherine L. Eschbach
Director, Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Washington, D.C. 20210

Re: Comment on Rescission of Executive Order 11246 Implementing Regulations
Docket OFCCP-2025-0001

Dear Director Eschbach:

On behalf of the Competitive Enterprise Institute, I respectfully submit these comments to the Department of Labor ("the Department") concerning its proposed rule entitled Rescission of Executive Order 11246 Implementing Regulations, 90 Fed. Reg. 28,472 (proposed July 1, 2025) (to be codified at 41 C.F.R. ch. 60).

An executive order President Donald Trump issued January 21, 2025, terminated most of the authority of the Office of Federal Contract Compliance Programs (OFCCP), including its authority to enforce regulations that it never had authority to adopt in the first instance. Executive Order 14173 (EO 14173), "Ending Illegal Discrimination and Restoring Merit-Based Opportunity,"[1] did this by revoking Executive Order 11246 (EO 11246) of Sept. 28, 1965.[2] EO 11246 instituted without lawful authority an oppressive regulatory regime that imposed vast transaction costs on federal contractors. The wisdom of revoking EO 11246 is not at issue, however. The president has already made that decision. Rather, the Department seeks comments on proposed regulations implementing that decision.

Current OFCCP regulations require federal contractors to include in their contracts a provision whereby they agree that they will "not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity,[3] or national origin."[4] Notwithstanding the agreement not to discriminate, the required contractual provision goes on to reflect a policy "to engage in an extensive affirmative action program, albeit under the transparent fig leaf of equal opportunity," as law Professor Richard Epstein put it.[5] In the very next sentence of the required provision, contractors further agree that they "will take affirmative

[1] 90 Fed. Reg. 8,633 (Jan. 21, 2025), https://www.whitehouse.gov/presidential-actions/2025/01/ending-illegal-discrimination-and-restoring-merit-based-opportunity/.
[2] 3 C.F.R. 339 (1964–1965) *reprinted as amended in* 42 U.S.C. § 2000e.
[3] Sexual orientation and gender identity were added to the litany in 2014. Implementation of Executive Order 13672, "Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors," 79 Fed. Reg. 72,985 (Dec. 9, 2014).
[4] 41 C.F.R. § 60-1.4(a).
[5] Richard Epstein, *Forbidden Grounds: The Case against Employment Discrimination Laws* 435 (1992).

action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin."[6]

A contractor's compliance with the affirmative action requirement begins with preparing an affirmative action plan for each of its establishments within 30 or 120 days from commencement of the contract (depending on the size of the contract) and then annually thereafter.[7] An affirmative action plan must contain a narrative summarizing the contractor's equal employment and affirmative action policies and statistical analyses of the race and sex of its employees by job title and by job group (with organizational charts) compared with the availability of women and minorities having requisite skills in each job group in the recruitment area.

Based on the comparison, the contractor must determine if women or minorities are "underutilized." If they are, the contractor's affirmative action plan must include placement goals[8] and specific practical steps to redress the underutilization.[9] Economist Thomas Sowell observed that through this regulatory structure "'[a]ffirmative action' was now decisively transformed into a numerical concept, whether called 'goals' or 'quotas.'"[10] Ostensibly the regulations do not compel quotas. The regulations disavow quotas, asserting that "[q]uotas are expressly forbidden."[11] In fact, however, under current regulations, quotas are expressly prohibited but implicitly required.

EO 14173 lifted a heavy burden off the shoulders of federal contractors, one that was never lawfully imposed on them. The Department of Labor should swiftly take action to ensure that a future administration cannot easily restore OFCCP's powers with an executive order revoking President Trump's executive order and reviving President Johnson's order along with the quota system deriving from it.

What remains of OFCCP after EO 14173 is the authority lawfully delegated to it by the secretary of labor under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)[12] and section 503 of the Rehabilitation Act.[13] All regulations that are not confined to implementation of VEVRAA or section 503 of the Rehabilitation Act never rested upon any statutory authority, and now they no longer have even the spurious authority of an executive order. As a result, everything in chapter 60 of title 41 of the Code of Federal Regulations except parts 60-30, 60-300, 60-741, and 60-742, and parts 60-30 and 60-999 should be amended to remove any references to implementation of EO 11246 or to the rescinded regulations.

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[6] 41 C.F.R. § 60-1.4(a).
[7] *Id.* §§ 60-1.7, 60-2.1.
[8] *Id.* § 60-2.15(b)
[9] *Id.* § 60-2.10(a)(1), (b).
[10] Thomas Sowell, *Civil Rights: Rhetoric and Reality* 41 (1984).
[11] 41 C.F.R. § 60-2.16.
[12] 38 U.S.C. § 4212.
[13] 29 U.S.C. § 793.

These regulatory reforms would fulfill the directives of President Trump—not only EO 14173 but also his orders Restoring Equality of Opportunity and Meritocracy,[14] Directing Repeal of Unlawful Regulations,[15] and Restoring Common Sense to Federal Procurement.[16]

A further step that the secretary of labor could take to prevent a resurgence of OFCCP and its powers is to assign the enforcement of VEVRAA and section 503 of the Rehabilitation Act to other offices of the Department of Labor and shut down OFCCP altogether. VEVRAA could be assigned to the Veterans' Employment and Training Office and section 503 of the Rehabilitation Act could be assigned to the Office of Disability Employment Policy. These transfers by the secretary of labor within the Department of Labor would not require legislation because the statutes authorize the secretary and the Department to execute them rather than any particular office of the Department.

Thank you for your consideration of these comments.

Cordially yours,
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[14] Exec. Order 14,281, 90 Fed. Reg. 17,537 (Apr. 23, 2025).
[15] Memorandum on Directing Repeal of Unlawful Regulations, Compilation of Presidential Documents 202500466 (Apr. 9, 2025).
[16] Exec. Order 14,275, § 2, 90 Fed. Reg. 16,447 (Apr. 15, 2025). *See also* Reducing Anti-Competitive Regulatory Barriers, Exec. Order 14,267, § 3(v), 90 Fed. Reg. 15,629 (Apr. 9, 2025).