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## **PARENT CORPORATION RESPONSIBILITY FOR SUBSIDIARY CORPORATIONS**

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**THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO "SINGLE-ENTITY" ISSUES. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.**

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In this era of mergers and acquisitions, the question is increasingly frequently asked whether a non-federally-involved subsidiary corporation is obligated to comply with OFCCP's three regulatory programs if the acquiring parent corporation is a covered federal contractor or covered federal subcontractor (i.e., is "federally-involved"). Conversely, the question is also asked whether a non-federally-involved parent corporation must comply with OFCCP's three regulatory programs if it acquires a subsidiary which has entered into federal contracts or federal subcontracts. Occasionally, the question also arises whether a non-federally-involved subsidiary must comply with OFCCP's three regulatory programs if it is owned by a non-federally-involved parent corporation which in turn owns a second subsidiary which is a covered federal contractor or covered federal subcontractor.

This is often a difficult and complex area of employment law raising the question whether it may be said that the two entities of concern are "sufficiently closely related" to reasonably conclude that they operate as a "single entity" or "single enterprise," as a matter of law. Extensive and complex legal analyses are often required. To assist with the "single-entity analysis," we provide the following discussion of legal case decisions and three attached documents:

- (1) "Sanitized" letter from (then) OFCCP Official John C. Fox identifying the analytical framework for decision;
- (2) Case Decision: *In Re Ernst Theodore Arndt* (09/21/72); and,
- (3) (Unofficial) OFCCP "27 Point Questionnaire."

## **I. THE OFCCP'S FIVE-FACTOR TEST.**

The OFCCP analyzes the following five factors to determine whether the Executive Order covers an employer which is not federally-involved by virtue of a federal contract held by a related entity:

- (1) Common Ownership
- (2) Common Directors and/or Officers
- (3) De facto Exercise of Control
- (4) Unity of Personnel Policies Emanating from a Common Source
- (5) Dependency of Operations

*Ernst-Theodore Arndt*, 52 Comp. Gen. 145 (September 21, 1972). No single factor controls the single-entity analysis. Rather, one should evaluate all five factors collectively when applying the test.<sup>1</sup>

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<sup>1</sup> See *Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990, 994 (6th Cir. 1997) (applying similar four-factor test in case under ADEA and ADA; explaining "[n]one of these factors is conclusive, and all four need not be met in every case").

Unfortunately, no recently reported cases discuss how one should interpret or apply the single entity test for purposes of determining coverage of the Executive Order. As we explain below, however, cases applying a similar four-factor test under Title VII and other statutes provide guidance regarding the OFCCP test.

**II. RELATIONSHIP BETWEEN THE OFCCP’S FIVE-FACTOR TEST AND THE FOUR FACTOR TEST FEDERAL COURTS TRADITIONALLY APPLY.**

When determining whether two distinct legal entities should be treated as a single-employer pursuant to various employment laws, federal courts typically analyze the following four factors: (1) interrelation of operations; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control.<sup>2</sup>

The OFCCP’s five-factor test does not differ substantively from the four-factor test the courts apply. As the table below illustrates, each of the OFCCP’s five factors pertains to a component of the four-factor test:

<u>OFCCP Factor:</u>		<u>Corresponding Federal Court Factor:</u>
Common Ownership (#1)	→	Common Ownership (#4)
Common Directors/Officers (#2)	→	Common Management (#2)
De facto Exercise of Control (#3)	→	Centralized control of labor relations and personnel (#3); Financial Control (#4)
Unity of Personnel Policies Emanating from a Common Source (#4)	→	See centralized control of labor relations and personnel (#3) above
Dependency of Operations (#5)	→	Interrelation of Operations (#1)

Also, the U.S. Department of Labor (“DOL”) has admitted that the five-factor test does not differ substantively from the four-factor test. In its Analysis and Comments as to the same five-factor test under WARN regulations, the DOL stated that the five-factor test “is intended only to summarize existing law that has developed under state corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employment Retirement Income Security Act (ERISA).” 50 Fed.Reg. 16,045 (April 20, 1989). Because the two tests are in essence the same, cases interpreting the four-factor test provide valuable information regarding how employers should analyze the facts in connection with OFCCP’s five-factor test.

<sup>2</sup> See, e.g., *Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990, 993-994 (6th Cir. 1997) (claims under ADEA and ADA); *Murray v. Miner*, 74 F.3d 402, 404 92d Cir. 1996) (involving claim of breach of employment contract); *Local 952 v. American Delivery Serv. Co.*, 50 F.3d 770, 775 (9th Cir. 1995) (alleged violation of WARN Act); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) (claims under Title VII and ADEA).

### **III. STRATEGIES TO AVOID COVERAGE UNDER THE SINGLE-ENTITY TEST.**

Based upon our analysis of federal cases, employers may implement the following strategies to avoid liability under the single-entity theory. We have organized this discussion by the steps employers can take to avoid liability (i.e., as opposed to a separate discussion of each factor) because most of these steps apply to more than one factor under the OFCCP test and the four-factor test (making a factor-by-factor discussion redundant).

#### **A. OBSERVE CORPORATE FORMALITIES.**

Employers which wish to avoid liability under the single-entity test should carefully observe corporate formalities. Courts place great emphasis on the observance of corporate formalities because state laws normally provide that shareholders are not liable for the debts of their corporation so long as the corporation observes corporate formalities.<sup>3</sup> Many single entity cases turn on whether the subsidiary corporation observed corporate formalities.<sup>4</sup> Some cases hold: “[i]f neither of the entities is a sham” then the factors relating to common ownership and financial control are “not met.”<sup>5</sup>

In determining whether an employer has properly observed corporate formalities, one should evaluate factors including: (1) whether shareholders and directors observe proper procedures when taking action in relation to the corporation (e.g., act pursuant to a formal meeting or unanimous written consent); (2) whether the corporation maintains adequate capital to pay its obligations and pays its own bills; (3) whether the corporation maintains functioning officers and directors; (4) whether the corporation commingles funds with another entity; and, (5) whether the corporation maintains its own separate records.<sup>6</sup> Every employer should consult with a corporate law attorney to make sure it is observing all necessary corporate formalities.

Even if an employer is comfortable that it has observed all required corporate formalities, the employer should be careful to document the observance of formalities (e.g., through a

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<sup>3</sup> See, e.g., *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993) (state corporate law’s “doctrine of limited liability creates a strong presumption that a parent is not the employer of its subsidiary’s employees, and the courts have found otherwise only in extraordinary circumstances”).

<sup>4</sup> Compare, *Local 952 v. American Delivery Serv. Co.*, 50 F.3d 770, 776 (9th Cir. 1995) (court refused to dismiss parent corporation where evidence demonstrated that subsidiary “did not adhere to corporate formalities [and] did not act independently through its Board of Directors”), with, *York v. Tennessee Crushed Stone Assoc.*, 684 F.2d 360, 362-63 (6th Cir. 1982) (court refused to treat separate corporations as single employer; emphasizing corporations were separate legal entities with separate boards and corporation at issue was not a “sham”), and, *Hassell v. Harmon Foods, Inc.*, 454 F.2d 199, 200 (6th Cir. 1972) (employee of subsidiary could not hold parent corporation liable where the “relationship between the parent corporation and the subsidiary [was] ‘a normal one, and . . . the subsidiary corporation could in no way be called a ‘sham’”).

<sup>5</sup> See, e.g., *Swallows v. Barnes Noble Book Stores, Inc.*, 128 F.3d 990, 995 (6th Cir. 1997).

<sup>6</sup> See, e.g., *Wholesale & Retail Food Distribution Local 63 v. Santa Fe Terminal Servs., Inc.*, 826 F. Supp. 326, 335 (C.D. Cal. 1993) (even though the parent and subsidiary shared three common directors, court held that the single employer test was not satisfied because the company was adequately capitalized, had functioning officers and directors, observed corporate formalities, and there was no evidence that the two entities commingled funds or that one entity siphoned funds from the other); *Trustees of Pension, Welfare & Vacation Fringe Benefit Funds of IBEW Local 701 v. Favia Elec. Co., Inc.*, 995 F.2d 785, 788 (7th Cir. 1993) (two family businesses were not a single entity where they “maintained separate records and bank accounts” and wife “was not simply a figurehead” in her role as president of one of the companies).

corporate minute book). Employers will find it difficult to prove observance of corporate formalities unless they can present adequate documentation.

One recent case involving the Executive Order warrants special discussion. In *Board of Governors v. United States Dept. of Labor*, 917 F.2d 812 (4th Cir. 1990), *cert. denied*, 500 U.S. 916 (1991), the United States Court of Appeals for the Fourth Circuit held that the Executive Order covered all campuses of the University of North Carolina, even though only some campuses of the university were involved in federal contracts. The court held that all campuses of the university constituted a single entity because a single Board of Governors retained “ultimate control” – as a matter of law – over the power to contract.<sup>7</sup> This was true even though the University’s Board of Governors delegated day-to-day powers to contract to the individual campuses. *Id.* at 816-18.

Corporate employers may distinguish *Board of Governors* on the following ground: under state corporate law, a parent corporation (i.e., the shareholder) lacks power to control directly its subsidiary. State corporate law requires parent and subsidiary corporations to have separate boards and each board must enjoy ultimate and exclusive control over its corporation. In *Board of Governors*, by contrast, state law created a *single* Board of Governors as “a body politic and corporate” for all of the campuses and vested the Board of Governors with power to control directly every campuses’ contracting activities. *Id.* at 816. In essence, the different campuses of the university resembled different locations or divisions of a single corporate entity. If parent and subsidiary corporations carefully observe corporate formalities, courts should recognize their separate legal identity and *Board of Governors* should not apply.

## **B. MAINTAIN DECENTRALIZED PERSONNEL DECISION MAKING.**

Parent corporations can reduce their risk of liability under the single entity test by allowing subsidiaries to make their own personnel decisions. Courts have held that “control over labor relations is a central concern” and that the most critical question to the single entity analysis is: “what entity made the final decisions regarding employment matters related to the person claiming discrimination?”<sup>8</sup>

To reduce the risk of liability, parent corporations should refrain (as much as possible) from making personnel decisions for subsidiary corporations. Because OFCCP audits typically focus on hiring, parent corporations should exercise extreme care to avoid involvement in hiring. We suggest corporations prepare written policies which define the parent corporation’s involvement (and lack thereof) in subsidiary employment decisions because such written policies: (1) tend to ensure that employees of the parent corporation operate within the proper corporate boundaries; and, (2) can serve as persuasive proof that a subsidiary makes personnel decisions

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<sup>7</sup> The court did not apply or even mention the OFCCP’s five-factor test or the four-factor test normally applied by federal courts.

<sup>8</sup> *Trevino v. Celanese Corp.*, 701 F.2d 397, 404 (5th Cir. 1983), *reh’g denied*, 707 F.2d 515 (5th Cir. 1983); *Swallows*, 128 F.3d at 994-95 (quoting *Trevino*); *Murray v. Miner*, 74 F.3d 402, 405 (2d Cir. 1996) (the policy underlying the single entity test is “most implicated where one entity actually had control over the labor relations of the other entity, and, thus, bears direct responsibility for the alleged wrong”); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1363 (10th Cir. 1993) (quoting *Trevino*); *Rogers v. Sugar Tree Prods., Inc.*, 7 F.3d 577, 582 (7th Cir. 1993) (“in light of the ADEA’s goal of remedying and eliminating age discrimination in the workplace, ‘control over the elements of labor relations is a central concern’”).

autonomously.

**C. ADOPT SEPARATE PERSONNEL POLICIES.**

Parent corporations should pause before imposing uniform personnel policies upon their subsidiary corporations. Courts are less likely to find that a parent and subsidiary constitute a single entity where the subsidiary drafts its own separate personnel policies.<sup>9</sup> Because OFCCP audits typically focus on hiring, subsidiaries particularly should be sure to formulate distinct written policies defining their own hiring policies and procedures.

**D. AVOID UNNECESSARY OVERLAP AMONG CORPORATE OFFICERS AND DIRECTORS.**

Officers and/or directors of one corporation commonly hold officer/director positions with related corporations. The more officers and/or directors one corporation shares with another, the more likely a court will find both corporations constitute a single entity. As to officers/directors who actively participate in managing the corporation, the corporations probably cannot avoid this overlap. Quite often, however, employers unnecessarily allow inactive officers/directors to maintain overlapping positions with related corporations. Many employers easily can reduce their risk of single entity liability by eliminating the unnecessary overlap among inactive officers/directors.

J.C.F.

Attachments:

Letter from John C. Fox, then Executive Assistant to the Director of OFCCP, setting forth OFCCP's "Single-Entity" Policy (1981)

*In Re Ernst Theodore Arndt* (09/21/1972)

The 27-Point Questionnaire

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<sup>9</sup> Compare, *Mas Marques v. Digital Equipment Corp.*, 637 F.2d 24, 26 (1st Cir. 1980) (parent and subsidiary did not constitute a single entity where parent did not draft personnel policies), with, *Quintanilla v. K-Bin, Inc.*, 8 F. Supp. 2d 928 (S.D. Tex. 1998) (finding parent and subsidiary constituted single entity where subsidiary utilized parent's "personnel policies and applie[d] them to its employees").

U.S. Department of Labor

Employment Standards Administration  
Office of Federal Contract  
Compliance Programs  
Washington, D.C. 20210



In Reply Refer To: EFEP/60-1/21951

This responds to your June 1981 request that an Executive Order 11246 coverage determination be made on the

Please be advised that we are unable to make a final coverage determination at this time given the limited data you have supplied. Two legal questions remain outstanding as well as the facts necessary to make the legal determination. They are whether \_\_\_\_\_ is a "contractor" within the meaning of Executive Order regulations and if not, is it a "subcontractor" within the meaning of the regulations.

OFCCP's regulations define a contractor to mean "a prime contractor or subcontractor". 41 CFR §60-1.3. To determine whether an employer is a contractor under the Executive Order, OFCCP must first determine whether the employer is involved in any oral or written contracts directly with the Federal government. If multiple companies are involved, whether parent/subsidiaries, brother/sister or holding companies, OFCCP uses the same "single entity" test applied by the National Labor Relations Board under the National Labor Relations Act and used by the Wage and Hour Division of the Department under the Fair Labor Standards Act.

Accordingly, assuming that an employer does not independently hold any government contracts or subcontracts, coverage under the Executive Order depends upon whether that company may be considered to be a single entity with a related company which holds such contracts or subcontracts.

Data on file in this office indicate that \_\_\_\_\_ and several of its subsidiaries and divisions, including the \_\_\_\_\_ are recipients of several ongoing federal contracts.

OFCCP must analyse the following five criteria to determine whether \_\_\_\_\_ is a "single entity" related to these or other Federal contractors:

1. Common ownership;
2. common directors and/or officers;
3. de facto exercise of control;
4. unity of personnel policies emanating from a common source; and
5. dependency of operations.

See Ernst-Theodore Arndt, 52 Comp.Gen. 145 (September 21, 1972) (enclosed).

To aid in the determination whether related companies are "single entities", we have developed the enclosed 27 point questionnaire. Please return your answers to these questions to the OFCCP Raleigh Area Office within 30 days so it may make a contractor coverage determination.

Should the Raleigh Area Office make a determination that is not a contractor within the meaning of the Executive Order regulations, it will then need to make a determination whether \_\_\_\_\_ is a "subcontractor" within the meaning of the Executive Order regulations at 41 CFR §60-1.3.

"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 furnishing of supplies or services or for the use of real or personal property, including lease arrangements, 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."


In order to conserve resources and that of the agency, the Raleigh office will not need any data relative to the sub-contractor issue until such time as it has determined that is not a contractor. If the Raleigh office should make such a determination, it will contact you and advise you regarding the data it will need to determine the subcontractor issue and the timeframe for your submission of these data.

You have also requested that I grant an exemption from coverage pursuant to 41 CFR §60-1.5(b)(2) should we determine that is a covered contractor. Under this section, the Director may decide, based on the evidence presented, "that such an exemption will not interfere with or impede the effectuation of the Order."

Consideration of your request for an exemption from the Executive Order at this time is premature given that the Raleigh office has not yet determined the threshold question of coverage under the Order. Should coverage be established, you may at that time file a request for exemption and appropriate supporting documentation to the Director, attention John C. Fox, Executive Assistant to the Director at the above address.

If I can be of any further assistance, please feel free to contact me or Mr. Fox.

Very truly yours,

  
for Elyen M. Shong  
Director

Enclosures

cc: Donald G. Webster, ARA  
Owen P. Kiely, Raleigh AOD

**To Ernst-Theodore Arndt, September 21, 1972:**

Reference is made to your letter of May 30, 1971, requesting reconsideration of our decision on March 15, 1971, 50 Comp. Gen. 627; your supplemental letter of December 16, 1971; and your "Summation, Appeal for Review" forwarded here by your letter of July 16, 1972, all dealing with the same matter. This last mentioned document is largely a summary of the issues raised and discussed in your letters of March 15 and December 16, 1971, together with related exhibits and an attachment thereto that sets out your account of the discussion which took place regarding those issues during the conference with representatives of our Office on January 25, 1972.

Primarily, you are concerned with the conclusion reached in that decision with regard to allegations by Apache Flooring Company (Apache) that Armstrong Cork Company (Armstrong) had been given preferential treatment over Apache under a tile supply contract. It is contended that Armstrong was accorded preferential treatment in that Armstrong has not been required to comply with the equal

employment opportunity provisions of Executive Order 11246 and the regulations issued thereunder (41 CFR 60-1.40(c)) requiring the submission of an affirmative action plan for each of its establishments within 120 days from the commencement of its contract.

Concerning this matter, Executive Order 11246, September 24, 1965, as amended, sets forth policies regarding equal employment opportunity (EEO) requirements. Under section 201 of the order the Secretary of Labor is required to adopt rules and regulations and issue such orders *as he deems necessary and appropriate* to achieve the purposes of the order in Government contracts.

The facts concerned in this case are fully set forth in our earlier decision and, therefore, will not be repeated in detail here. It may be noted, however, that the guidelines established by the Department of Labor for determining whether a parent and subsidiary are to be considered as a single entity for the purpose of the Executive order and 41 CFR 60-1.40(a) which requires each prime contractor to "develop a written affirmative action compliance program for each of its establishments" were stated in letter of February 26, 1971, addressed to you by the Solicitor, Department of Labor, to be as follows: (1) common ownership (2) common directors and/or officers (3) *de facto* exercise of control (4) unity of personnel policies emanating from a common source and (5) the dependency of operations.

The General Services Administration (GSA), being the contracting agency, was primarily responsible for determining whether Armstrong had defaulted under its contract by reason of the fact that it had not complied with 41 CFR 60-1.40(a) in that it had not submitted an affirmative action compliance program for its subsidiary, the Thomasville Furniture Industries, Inc. (Thomasville).

The above criteria were considered by GSA in its legal memorandum of January 28, 1971, and it was concluded that Armstrong, although it had potential control over Thomasville, did not exercise *de facto* day-to-day control over the subsidiary. As stated in our earlier decision, the Department of Labor did not find such conclusion to be erroneous nor did we, upon review of the evidence and arguments considered by GSA, find its conclusions and interpretation of Labor's guidelines to be arbitrary or capricious or not supported by substantial evidence. Accordingly, and since, as stated above, the regulations here involved were issued pursuant to the Executive order and section 60-1.44 of those regulations provides that rulings under, or interpretation of such regulations shall be made by the Secretary, we concluded that there existed no valid basis for us to object to GSA's refusal to require Armstrong to submit an affirmative action program for its subsidiary, Thomasville.

In asking that we reconsider our earlier decision you list in your letter of May 30, 1971, what you believe constitutes seven errors therein. Such errors are set out and discussed separately below, although there will be some overlapping in discussing several of the alleged errors.

Error No. (1) Arbitrary addition of "day-to-day" control.

As set forth above, the Department of Labor guidelines provide only for *de facto* exercise of control and you urge that the additional criterion of *de facto* "day-to-day" control by GSA is a wholly arbitrary one.

In commenting on the five elements contained in the guidelines set out above, the Acting Solicitor, Alfred G. Albert, Department of Labor, in a letter to us dated September 27, 1971, noted that those elements closely parallel those used by the National Labor Relations Board in deciding similar questions.

With particular reference to *de facto* control he stated that:

When this Department established these criteria, it turned to existing law in the area. *De facto* control is a dominant factor in determining corporate liability, and it is defined as actual control rather than the potential control present where there is common ownership. In the field of labor law, the NLRB and the courts have required the existence of actual control by one business over another in order to consider the businesses a single employer for purposes of the Board's remedial orders. See *Roy & Sons Co. v. NLRB*, 251 F. 2d 771 (1st Cir. 1958); *Bachman Machine Company v. NLRB*, 266 F. 2d 599 (8th Cir. 1959); *Majestic Molded Products, Inc. v. NLRB*, 330 F. 2d 603 (2d Cir. 1964); *NLRB v. Supreme Dyeing and Finishing Corp.*, 340 F. 2d 493 (1st Cir. 1965).

In the area of the liability of a parent corporation for the torts of its subsidiaries, the courts also have held that mere common ownership is not sufficient to justify imposing liability on the parent. There must be common, actual control as well. Where this element is absent, courts have refused to hold the parent responsible for the torts of its subsidiary. As in the above-cited labor cases, common ownership would normally presuppose a potential ability to control, but the courts have held that actual control is required in order to impose liability on the parent corporation. See *Bain & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D. N.Y. 1957); *Garret v. Southern R. Co.*, 17 F. Supp. 915 (E.D. Tenn. 1959), *aff'd.*, 278 F. 2d 424 (6th Cir. 1960), *cert. denied*, 364 U.S. 833 (1960); *Miller v. Bethlehem Steel Corp.*, 189 F. Supp. 916 (S.D. W.Va. 1960):

The GSA memorandum prepared as a result of Apache Flooring Company's challenge to a bid award to Armstrong Cork Co. indicates that *de facto* control is to be interpreted as day-to-day control. That memorandum concludes that the compliance status under Executive order 11246 of Thomasville Furniture Co., a wholly owned subsidiary of Armstrong Cork Co., should not affect Armstrong's status as a responsible bidder on government contracts covered by the Executive order. Although this Department agrees with the conclusions of that memorandum, it has not taken the position that day-to-day control is required to consider the parent and subsidiary as a single entity for the purpose of coverage. Nash, *Affirmative Action Under Executive Order 11246*, 46 N.Y.U.L. Rev. 225, 250-51, (1971). From our review of the challenge, we found no evidence to reverse GSA's determination that there was no *de facto*, or actual, control, as defined in the above-cited cases, by Armstrong over the operations of Thomasville. Consequently, GSA's interpretation of *de facto* control as day-to-day control is not necessary to the ultimate decision that was reached.

You will note from the above that the Department of Labor in its review of GSA's findings found no evidence to reverse GSA's findings

even though GSA had injected the term "day-to-day" into the criterion. Nor have you indicated why a different result would have been reached in this particular case if such term had not been added thereto. Consequently, while the addition of that term may have been in error, it is our view that, in this particular case, it was a harmless one and no change in the ultimate conclusion is thereby required.

Error No. (2) Capricious Interpretation of Criteria.

In his letter to you of February 26, 1971, referred to above, the Solicitor, after setting out the criteria for determining whether a parent and subsidiary corporation are to be considered as a single entity for the purposes of Executive Order 11246, stated that:

\* \* \* This has been the legal position of the Office of Federal Contract Compliance under Executive Order 11246 which I have reconfirmed with the Director of that Office. If, for good and sufficient business reasons, a parent corporation chooses not to exercise actual control over its subsidiary, the subsidiary will not be considered to be part of the parent corporation for purposes of Executive Order 11246. If the business is organized this way to escape its equal employment opportunity obligations, it would be another matter. However, there is no indication that this is the case with the Armstrong Cork Company and Thomasville Furniture Industries, Inc.

Relative to this matter you state in part that:

What sense does it make to prove conclusively the presence of all the criteria or guidelines if, in spite of this proof, a subsidiary will not be considered to be part of the parent corporation for purposes of Executive Order 11246, if, for so-called "good and sufficient business reasons," a parent corporation is permitted to choose not to exercise control over its subsidiary?

Such a wanton departure from the established guidelines, however, motivated, being an obvious *contradictio in adjecto*, can only be deemed "capricious."

Where a parent corporation has potential control over a subsidiary the question as to whether or not it will actually exercise that control, must, of course, be a matter of choice on its part. Consequently, we do not agree that the Solicitor's statement concerning choice by the parent corporation constitutes a departure from the established guidelines. Also, we believe it significant that the Solicitor added that the choice not to exercise control must be for good and sufficient business reasons and that it would be a different matter if the business is organized this way to escape its equal employment opportunity obligations. According to GSA, Thomasville, after its acquisition by Armstrong, remained separate and distinct in its functions and operations, and its personnel and labor relations programs are the same as they were prior to such acquisition. Further, there is no evidence of record that there was here involved any action taken by Armstrong based upon a "choice" of any kind to evade its EEO obligations.

Error No. (3) Disregard of Mohasco Precedent.

The Mohasco case is said in your letter to be analogous to the Armstrong case. However, in that case you state that the Govern-

ment insisted on proof of corporate-wide EEO compliance prior to award of the contract involved. The facts there involved are described in your letter as follows:

\* \* \* Mohasco, the parent corporation, a long-time holder of Federal Supply Contracts for carpets, saw no reason to extend its EEO liability to its wholly-owned subsidiaries, mostly furniture plants, e.g. Futorian, Barcalo, Chromcraft, which had no connection with the carpet supply contract, Mohasco contending that its subsidiaries were separate corporate entities and were autonomously managed. Notwithstanding the President's Committee on Equal Employment Opportunity issued on July 30, 1965 Order No. (C-13) to all Government Departments, proscribing Mohasco from further contracts pending the submission of a "corporate-wide program of affirmative action."

In view of the foregoing, you state that:

It would appear to be incompatible with the ruling of the President's Committee on Equal Employment Opportunity, whose functions were subsequently transferred to the Labor Department, to bar Mohasco Industries from receiving Government contracts for failure of its subsidiaries' EEO compliance and then to permit another, perhaps more powerful corporation, to exercise arbitrary control or waive control at its own choosing over a wholly-owned subsidiary under identical circumstances and thus qualify for a Government contract, without EEO compliance by the subsidiary.

At our request the Department of Labor furnished to us copies of certain material contained in the Mohasco files. While the facts in that case may be as stated by you, the material furnished does not disclose whether the question of *de facto* control was raised or considered. Also, it should be noted that the President's Committee on Equal Employment Opportunity was established under an earlier Executive Order, 10925, and its program administered under regulations pertinent thereto, which—according to the Department of Labor—differ in many respects to the requirements of Executive Order 11246, as amended.

In view of the foregoing we are unable to determine that the Mohasco case is completely analogous to the Armstrong case or that the Department of Labor acted arbitrarily or capriciously in not reaching a conclusion consistent with the holding in the Mohasco case. In any event in view of section 201 of Executive Order 11246 the Secretary of Labor would be authorized to issue rules, regulations, guidelines and orders that may result in rulings contrary to those reached in prior cases.

As to the court case (*Williams v. New Orleans Steamship Assoc.*, 341 F. Supp. 613 (1972)), cited for the first time in the "Summation" forwarded with your letter of July 16, 1972, while the court in that case held that individual companies "may" be treated as a single employer for purposes of coverage of title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, where certain facts exist, the court did not hold that such companies "must" be treated as a single employer in all cases. Further the facts that were present in that case are set forth therein as follows:

(3) Plaintiffs have pointed out, and it has not been refuted by the defendants, that the *New Orleans Steamship Association controls employment on the waterfront and establishes uniform employment policies and practices applicable to all member companies. It owns and operates a central hiring hall at which all longshoremen are hired on a day-to-day basis to work for the various member companies.* The New Orleans Steamship Association derives its broad authority by delegation from the member companies. In view of this, the Court finds itself in agreement with the plaintiffs that for purposes of Title VII coverage the individual companies which make up the New Orleans Steamship Association would be treated as a single employer. \* \* \* [Italic supplied.]

As pointed out elsewhere herein GSA found that Thomasville remained separate and distinct in its functions and operations and that its personnel and labor relations programs remained the same as they were prior to acquisition by Armstrong. Thus, the factual situation as far as Thomasville's employment policies and practices were concerned is clearly distinguishable from that existing in the above-cited *Williams* case. We might also point out that the *Williams* case discloses that some of the criteria the Equal Employment Opportunity Commission (EEOC) has applied in determining whether an enterprise is integrated for purposes of calculating the number of its employees are "interchange of employees, centralized control of labor relations and standards which have been used by the NLRB" (National Labor Relations Board). As indicated above, it appears that the Department of Labor gave consideration to decisions of the NLRB and the courts in adopting its guidelines for determining whether a parent corporation and a subsidiary are to be considered a single entity for purposes of Executive Order 11246 and 41 CFR 60-1.40(a).

#### Error No. (4) Failure to Recognize Substantial Evidence.

The material appearing under this heading in your letter relates to the question whether *de facto* exercise of control is practiced by Armstrong over Thomasville.

In urging that Armstrong does exercise *de facto* control over Thomasville you point out that six top executive officers of Armstrong control the "business and affairs" of Thomasville.

It is our understanding that at least after Armstrong acquired ownership of Thomasville—Thomasville had its own board of directors consisting of 10 members. Six of the ten were either directors or officers of Armstrong or both. However, one of the six was (and apparently still is) president of Thomasville and did not become an officer and director of Armstrong until after Armstrong had acquired ownership of Thomasville. Thus, four members of Thomasville's board of directors (after its acquisition by Armstrong) were neither directors nor officers of Armstrong. It should be noted here that Armstrong's board of directors consisted of 15 members including the six mentioned above.

To the extent that the six directors of Thomasville mentioned above (or any of the other directors) agreed with Armstrong policy they, of course, could have imposed such policy on Thomasville. Also, since Thomasville is a wholly owned subsidiary of Armstrong it is clear that Armstrong could completely dominate Thomasville if it chose to do so. However, as stated in letter of April 6, 1970, from the Solicitor, Department of Labor, to the Director of Equal Employment (your Exhibit "CC"), the cases of *United States v. Lehigh Valley R.R.*, 220 U.S. 257 (1911) and *Ford Motor Co. v. United States*, 9 F. Supp. 590, 81 Ct. Cl. 30, cert. denied, 296 U.S. 636 (1935), both appear to indicate that common ownership or an interlocking directorate alone would not constitute sufficient grounds for disregarding corporate entities.

As corollary evidence you point out that:

- 1) The parent corporation, Armstrong Cork Company, wholly owns Thomasville Furniture Industries, Inc.;
- 2) Armstrong and Thomasville file quarterly and annual Statements of Consolidated Earnings and Consolidated Balance Sheets;
- 3) The Senior Vice-President of Armstrong is President of Thomasville;
- 4) The common Secretary of Armstrong and Thomasville released to the trade a Resolution of Nov. 25, 1968 by Armstrong's Board of Directors and announced Armstrong's readiness, willingness and ability to extend to any lender and supplier of Thomasville, upon request, a guaranty authorized by this resolution.  
The payments under a Government Contract to Armstrong will thus inure—see Resolution of Nov. 25, 1968 under 4 above—to the benefit of Thomasville.

\* \* \* \* \*

5) Armstrong and Thomasville commingle their operations, as evident from Armstrong's perennial nation-wide advertising in leading home and trade journals under the motto: "ARMSTRONG—CREATORS OF THE INDOOR WORLD."

As to this last point, while it may be that such advertising has established the image of a single corporate entity in the eyes of the public, such advertising cannot make Armstrong a single corporate entity if it is not in fact such an entity.

All of these facts and more were recognized and treated by GSA in their opinion of January 28, 1971. GSA stated in its opinion that—

\* \* \* Its [Thomasville's] manufacturing operations have been continued in the basic pattern, in the same basic locations, and with the same end product as it had manufactured and sold prior to its acquisition. \* \* \*

Also, while recognizing that some advertising by Armstrong included Thomasville's products, GSA found that Thomasville has remained functionally independent of Armstrong, neither manufacturing, selling, nor distributing Armstrong's other products. Further, GSA noted in the opinion that Thomasville's personnel director remained the same and that it maintained its own independent personnel policies notwithstanding the Affirmative Program issued by Armstrong.

GSA then concluded that:

Under these conditions and these facts, it seems clear that while Armstrong has potential control over the day to day operations of Thomasville, it does not actually or actively exercise such control. For these reasons then, it is clear that the authority exercised by Armstrong is limited to certain financial matters inherent in common ownerships, and amounts to potential control, not the *de facto* control of the actual day to day direction and control of Thomasville. It seems clear that each corporation acts in its day to day operations as an autonomous separate corporate entity. Each operates in widely separated geographic areas in functionally distinct manufacturing processes producing functionally distinct independent end products.

GSA's conclusion that Armstrong did not exercise *de facto* control over Thomasville was concurred in by the Department of Labor.

Considering the evidence of record, there would not be a sufficient legal basis for us to conclude that GSA's findings as to *de facto* control, as concurred in by the Department of Labor, is either arbitrary or capricious.

Error No. (5). Incompatibility with Federal Procurement Regulations.

The material set out under this heading of your May 30 letter relates to the fact that the Department of Labor in administering Executive Order 11246 has borrowed its guidelines for determining the corporate relationship of affiliates or subsidiaries from rulings of the National Labor Relations Board, which primarily exercises jurisdiction over labor disputes.

It is your view that since Executive Order 11246 imposes on a Federal contractor certain obligations embodied in his Federal contract it would be more appropriate to adopt the provisions of Federal Procurement Regulations, 41 CFR 1-1.701-2, which for the purpose of making certain determinations under the Small Business Act defines "affiliates" as follows:

Business concerns are affiliates of each other when either directly or indirectly (a) one concern \* \* \* controls or has the power to control the other, or (b) a third party or parties \* \* \* controls or has the power to control both.

While we might agree that for the purpose of uniformity or otherwise the Secretary of Labor could have adopted the above definition of the term "affiliate" for the purposes of Executive Order 11246, or, as referred to in your Summation, the definition of the term "Control" as that term is defined in the General Rules and Regulations of the Securities and Exchange Commission, 17 CFR 230.405(f), he was not required to do so under the controlling Executive order. We might note here that the rulings of the National Labor Relations Board involve generally employer-employee relations as do rulings under the equal opportunity program in many cases.

Error No. (6). Unequal Treatment of Bidders.

Under this heading it is stated in your May 30, 1971, letter that:

If the interpretations by GSA and the Labor Department should prevail, it would pose a distinct hardship for corporations which are organized on a divisional basis, as there is no doubt that a division of a parent concern is *eo ipso* considered to be part and parcel of the parent corporation. Thus, corporations like General Electric Company, Container Corporation of America and Apache Flooring Company will be bidding at a distinct disadvantage when competing with a parent corporation which chooses to organize by dividing its corporate structure into wholly-owned subsidiaries. Under GSA's theory, the Government must then prove "day-to-day" control. Under the Labor Solicitor's theory, expressed in his latest letter of February 26, 1971, the parent corporation is *free to choose* not to exercise control over the wholly-owned subsidiary, thus permitting the subsidiary to escape the costly and time-consuming obligation of developing affirmative action plans. Such unfair advantage should not be given one bidder over another under our competitive bidding systems.

While it may be true that where parent and subsidiary corporations are treated as separate entities they may have a bidding advantage over other bidders, the manner in which corporations are organized, if otherwise authorized, is of course, a matter solely for consideration by the corporations themselves. The fact they may be less competitive or more competitive because of their internal organization is a matter within their own control. Also, as previously noted, the Solicitor in his letter to you of February 26, 1971, stated, in effect, that the business may not be organized in a way purposely designed to escape its equal employment opportunity obligations.

Error No. (7). Negation of the "Good Faith Effort" Mandate.

Concerning this heading you state that:

Affirmative Action Plans, properly demonstrated, pre-suppose a "good faith effort." Judicial determinations of "good faith" have been rendered for many years. A parent corporation having pledged itself by the terms of its contract to put forth "*every good faith effort*" to comply with Executive Order 11246 cannot honestly condone discriminatory employment practices of a wholly-owned subsidiary within its complete domain when it has the power to eliminate such practices.

Therefore, it follows that any pledge by a Federal contractor, if made "in good faith," should extend to any wholly-owned subsidiary within his complete domain.

While we agree that Armstrong, no doubt, could require an affirmative action program of Thomasville, we believe that, insofar as this particular contract is concerned, Armstrong is pledged only to apply "every good faith effort" with respect to the parent corporation and to all subsidiaries which under the criteria discussed herein cannot be considered as separate entities.

In your letter of December 16, 1971, you refer to an article written by the Solicitor, Department of Labor, which is contained in the April 1971 issue of the New York University Law Review. You quote a paragraph from that article as follows:

**B. ALL FACILITIES OF COVERED CONTRACTORS OR SUBCONTRACTORS  
ARE SUBJECT TO THE EXECUTIVE ORDER**

Section 204 of Executive Order 11246 makes clear that all facilities of contractors or subcontractors are subject to the requirements of the equal oppor-

tunity clause, whether or not they are directly or indirectly engaged in the performance of government contract work. Upon application, a contractor or subcontractor may secure an exemption for facilities "which are in all respects separate and distinct from activities of the contractor related to the performance of the contract." However, since an exemption may be granted only upon a determination that it will not interfere with or impede the effectuation of the order, it is not surprising that almost none have been granted since the order was issued in 1965. See Exhibit "II" as attached.

Relative to such matter you state that—

It is significant to observe in this connection that, to the best of our knowledge, Armstrong has neither applied for nor has been granted an exemption for any of its facilities.

What has been overlooked by the Labor Department, the legal successor to the President's Committee on Equal Employment Opportunity, the custodian of its files and executor of its former orders, consistent with Executive Order 11246—see Sec. 403(a) and (b) of this Order—and what your office has failed to cite in its March 15, 1971, decision is the specific provision of Sec. 204 of Executive Order 11246:

• • • "In the absence of such an exemption all facilities shall be covered by the provisions of this Order."

We think it evident that the facilities referred to above are those facilities which under the guidelines discussed herein would be subject to the Executive order. In other words if, in the instant case, Armstrong exercised *de facto* control over its subsidiary Thomasville, Thomasville would be subject to the provisions of the Executive order and could only be exempted from its provisions by an exemption granted under section 204.

The remaining items discussed in your letter of December 16, 1971, and in your Summation, are, as indicated above, similar to those presented in your letter of May 30, 1971, and, we feel, have been adequately covered in our above discussion of that letter.

In summary, it is our view that the criteria followed in this case to determine whether a parent and its subsidiary should be treated as separate entities closely parallel those used by the National Labor Relations Board in deciding similar questions and we cannot say that their use here was unreasonable, arbitrary, or capricious. Also, we agree with the views of the Solicitor, Department of Labor, that the question whether Armstrong and Thomasville qualified under that criteria to be considered as separate entities was a close one. However, we remain of the view that based on the record we cannot say that the result obtained here was either arbitrary or capricious.

We believe it important in this case to keep in mind that, as stated in connection with alleged error No. 2 and pertinent to other alleged errors where "choice" as to exercise of *de facto* control is mentioned, the subsidiary continued to be separate and distinct in its operation, and its personnel and labor relations program remained unchanged upon acquisition by Armstrong.

Accordingly, we see no proper basis to now reach a conclusion different from that reached in our earlier decision.



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## THE 27 POINT QUESTIONNAIRE

NOTE: The following 27 questions were taken verbatim from an unofficial OFCCP document. Answers to the 27 questions are useful to help contractors determine whether the relationship of two corporate entities (perhaps a parent and a subsidiary) are sufficiently closely related that it is fair to say that they operate as a “single entity,” each sharing the responsibilities and rights of the other.

The 27 questions are:

1. What percentage of the stock of the subsidiary or affiliate is owned by the parent corporation?
2. How many directors are on the Board of parent corporation?
3. How many directors are on the Board of both the parent and the subsidiary corporations?
4. How many individuals are officers of both the parent and the subsidiary corporations?
5. How many individuals are employees of both the parent and the subsidiary corporations?
6. What positions do the individuals in No. 5 hold in each corporation?
7. Does the parent corporation pay the wages of any of the subsidiary’s employees?
8. Does the parent corporation pay any other expenses of the subsidiary?

If yes, please list which expenses are paid.

9. In advertisements, is the subsidiary referred to as a part of the parent corporation?
10. In financial statements of either corporation, is the subsidiary described as a department or division of the parent corporation?
11. Does the same in house legal staff serve both the parent and subsidiary corporation?
12. Are any services provided by the parent corporation for the subsidiary corporation or vice versa?

If yes, what service?

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13. Are the books and/or financial records of the parent and subsidiary kept separately?
14. Does the parent corporation control the hiring practices and procedures of the subsidiary?  
For example:
  - (a) Does the parent corporation set hiring standards for the subsidiary?
  - (b) Does the parent corporation set any hiring rules for the subsidiary?
  - (c) Does the parent corporation set equal employment opportunity policy for the subsidiary?
15. Does the parent review and/or control the labor practices of the subsidiary? For example:
  - (a) Does the parent negotiate and/or take part in the negotiation of collective bargaining agreements of the subsidiary?
  - (b) Does the parent sign the collective bargaining agreements of the subsidiary?
16. Is there ever an exchange of personnel between parent and subsidiary?  
  
If yes, does the individual who transfers retain the same seniority date used at the transferor corporation for purposes of benefits, promotions, layoffs and/or recall?
17. Does the parent recruit personnel for the subsidiary or vice versa?
18. Does the parent hire the subsidiary's top management officials or vice versa?
19. Are minority employees of the subsidiary listed on the EEO 1 reports of the parent?
20. Has there ever been an infusion of capital from the parent to the subsidiary or vice versa?  
  
If yes, list dates and amounts.
21. What percentage of the subsidiary's business is with the parent?
22. What percentage of the parent's business is with the subsidiary?
23. Does either the parent or the subsidiary use any of the property of the other?
24. Is the product or service of either the parent or the subsidiary essential to the conduct or operation of the other's business?  
  
If yes, list the product(s) or service(s).
25. Does either the parent or the subsidiary provide any marketing service for the other?
26. Would either the parent or the subsidiary be unable to function if the other ceased to exist?

27. If the answer to questions 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 23, 24, 25 or 26 was negative, state separately for each such negative answer whether the answer would have been affirmative if the question was asked for the last five (5) year period.