Pay Equity:

OFCCP Compensation Audits
Next Chapter

May 20, 2021

GH-ILG

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Biddle Consulting Group (BCG)

- Preparing and defending AAPs for nearly 50 years
- In-depth compensation analyses
- Test validation
- Expert testimony
- More!

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BCGi - BCG Institute for Workforce Development

- Education and training arm of BCG

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Disclaimer

- **This presentation is <u>NOT LEGAL ADVICE</u>.**
  - We will touch on topics that may have legal ramifications.
  - The presentation is "technical" in nature: the mechanics and methods of compensation analysis.

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Overview

Goals for us Today

- **OFCCP Compensation Audits—Frontier**
  - **Resolution Procedure Final Rule**
    - *https://www.federalregister.gov/documents/2020/11/10/2020-24858/rin-1250-aa10*
  - **Pattern Analysis**
    - Type 1: Patterns of Pay Difference
    - Type 2: Workforce Distribution/Occupational Segregation
- **Recap**

Frontier in OFCCP Pay Equity Investigations

Frontier in OFCCP Pay Equity Investigations

OFCCP: Future Strategies

- **More Holistic and Expansive**
  - Resolution Procedure Final Rule (11/10)
  - NILG (07/20)
- **Patterns Analysis**
- **Aggregating PAGs**

More Holistic and Expansive Approach

- **Previously:** Statistical Regression, p-value, Standard Deviations, etc…

- **OFCCP Signaling a (not so subtle)** *Tell*
  - Resolution Procedure Final Rule (Federal Register Vol. 85, No. 218)

Section by Section Analysis

A. Definitions

To provide greater clarity and certainty to Federal contractors, the rule defines "qualitative evidence" and "quantitative evidence," which OFCCP uses to support a finding or preliminary finding of discrimination in a PDN or NOV. In the NPRM, OFCCP proposed to add definitions for "nonstatistical evidence" and "statistical evidence." In

Final Rules

- **Qualitative Evidence**
  - Non-statistical Evidence

The term "qualitative evidence" is defined in the final rule to include the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination, and clarifies the purposes for which it will be used.

Final Rules

- **<u>Qualitative Evidence</u>**
  - Non-statistical Evidence

below, the Department has decided that, subject to certain exceptions, OFCCP will issue a PDN or NOV only if there is quantitative (*i.e.,* statistical or other numerical) evidence, practical significance, and qualitative evidence.

Final Rules

- **Quantitative Evidence**
  - Statistical Evidence
  - Data-Driven Insights

As discussed above, the final rule uses a definition of *quantitative evidence* rather than *statistical evidence* as in the proposed rule. The most important difference is that the definition of *quantitative evidence* is broader than statistical evidence. OFCCP uses a number of quantitative measures to determine whether a particular disparity in employment selection or compensation is sufficiently robust to support a finding of discrimination. The final rule thus

Final Rules

- **Quantitative Evidence**
  - Statistical Evidence
  - Data-Driven Insights

The broader definition of *quantitative evidence* means that OFCCP does not necessarily need *statistical* evidence;

The definition of "quantitative evidence" in the final rule also includes quantitative analyses, such as cohort analyses, which are comparisons of similarly situated individuals or small groups of applicants or employees that are numerical in nature but do not use hypothesis testing techniques. Both terms are germane to the resolution procedures that this rule codifies.

category. The term "quantitative evidence" better encapsulates OFCCP's analytical evidence given the agency's use of descriptive statistics and non-parametric and cohort analyses, in addition to a variety of statistical tests based on hypothesis testing. Quantitative analysis involves numerical comparisons, but it is not limited to the sort of hypothesis testing that OFCCP typically performs in systemic assessments of pay or selection outcomes, which might be more clearly thought of as "statistical evidence." By contrast, the term "quantitative evidence" comfortably describes all these types of numerical analyses.

More Holistic and Expansive Approach

- **Final Rule: (Federal Register Vol. 85, No. 218)**

> below, the Department has decided that, subject to certain exceptions, OFCCP will issue a PDN or NOV only if there is quantitative (*i.e.,* statistical or other numerical) evidence, practical significance, and qualitative evidence.

- **OFCCP's *Tell*: Agency is Going Beyond Statistical Evidence**
  - Final Rule
  - NILG (07/20): BES Presentation and Pay Equity Roundtable

Pattern Analysis

Frontier in OFCCP Pay Equity Investigations

Pattern Analysis—Overview

- **Pattern Analysis: Visually Summarizes A Lot of Data for Patterns**
- **Currently, Two Major Pattern Analysis in Play**
  - Analysis Type 1: Patterns of Pay Difference
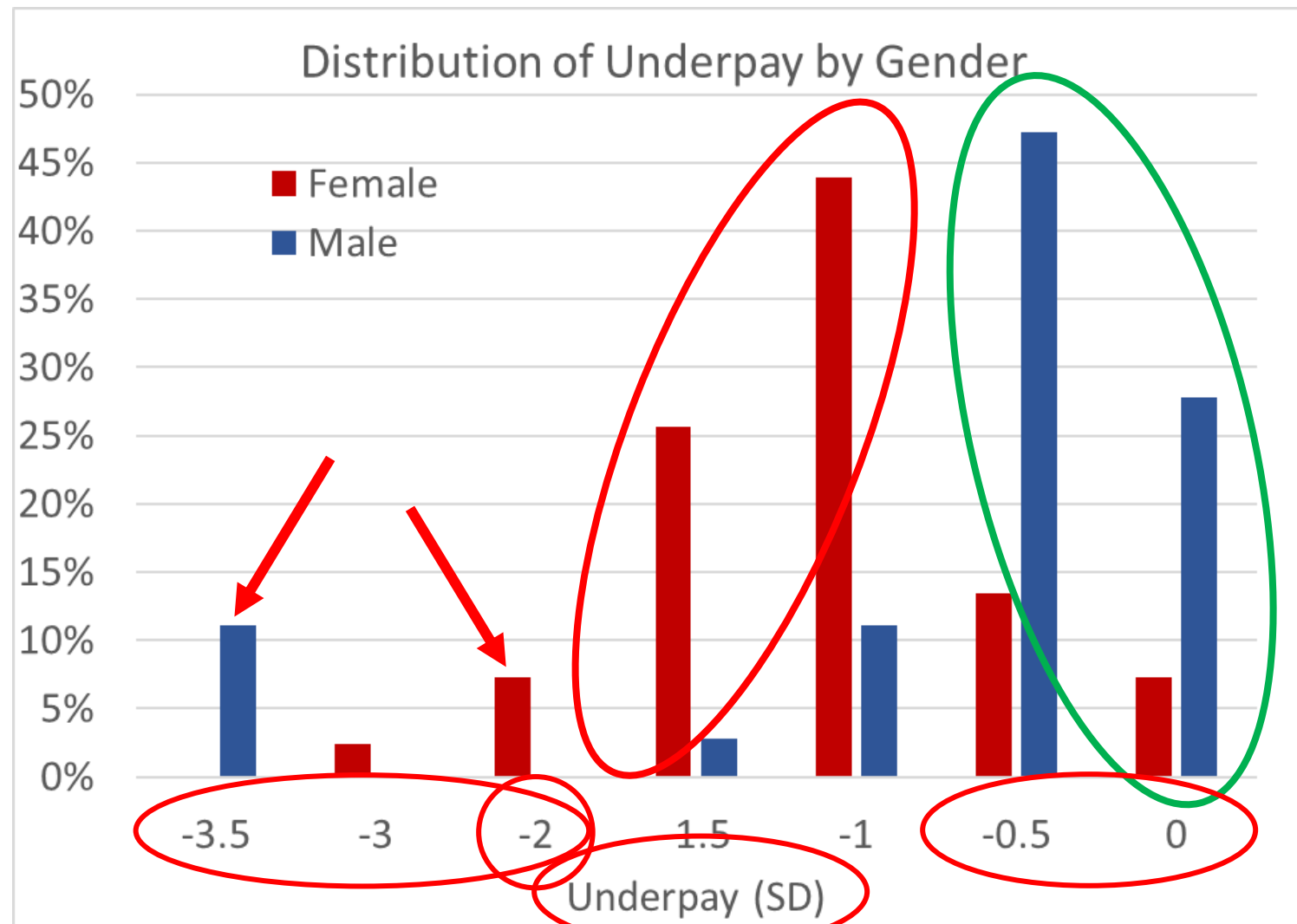 - Analysis Type 2: Workforce Distribution/Occupational Segregation

Pattern Analysis: Type 1
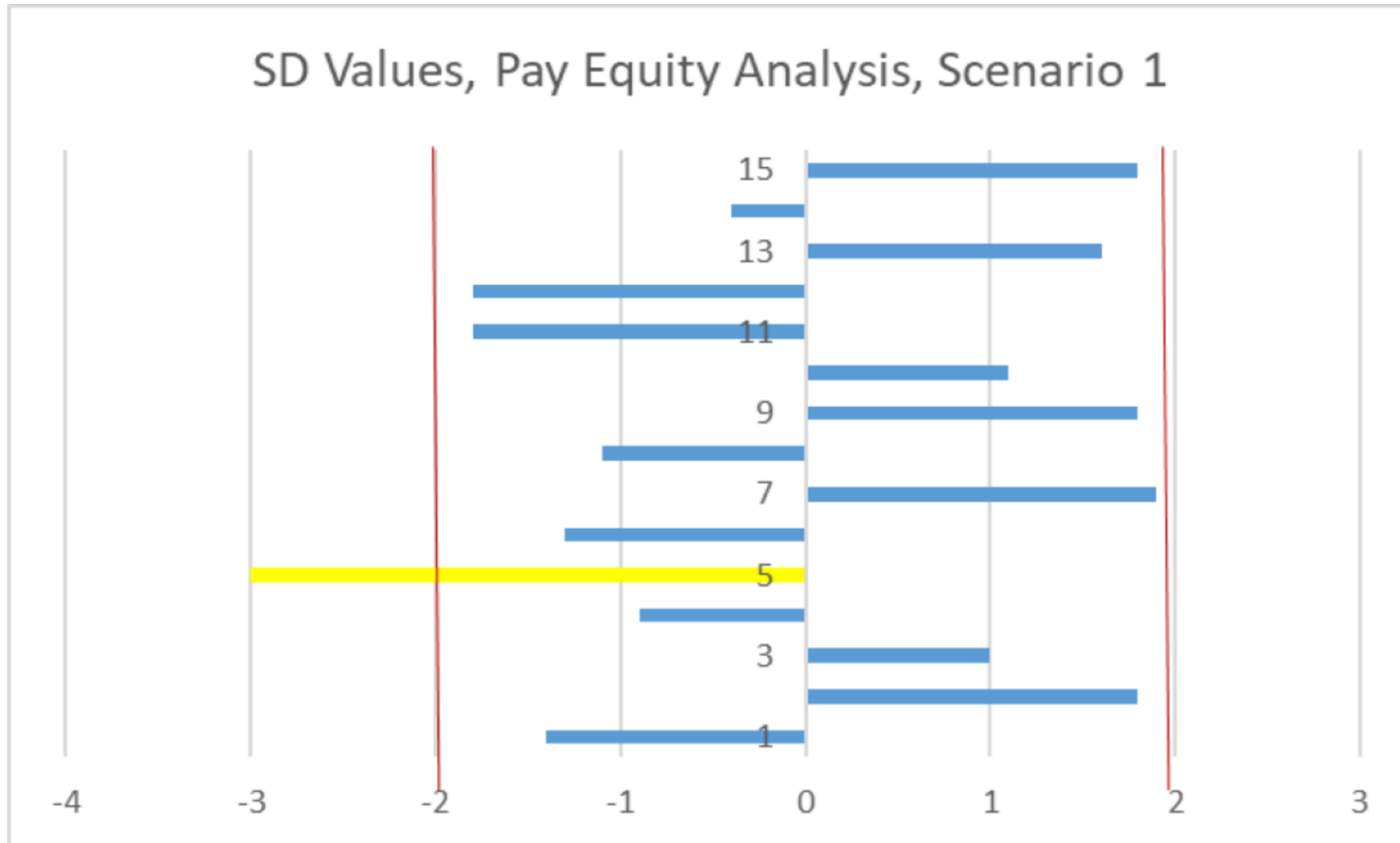
Frontier in OFCCP Pay Equity Investigations

Analysis Type 1: Patterns of Pay Differences
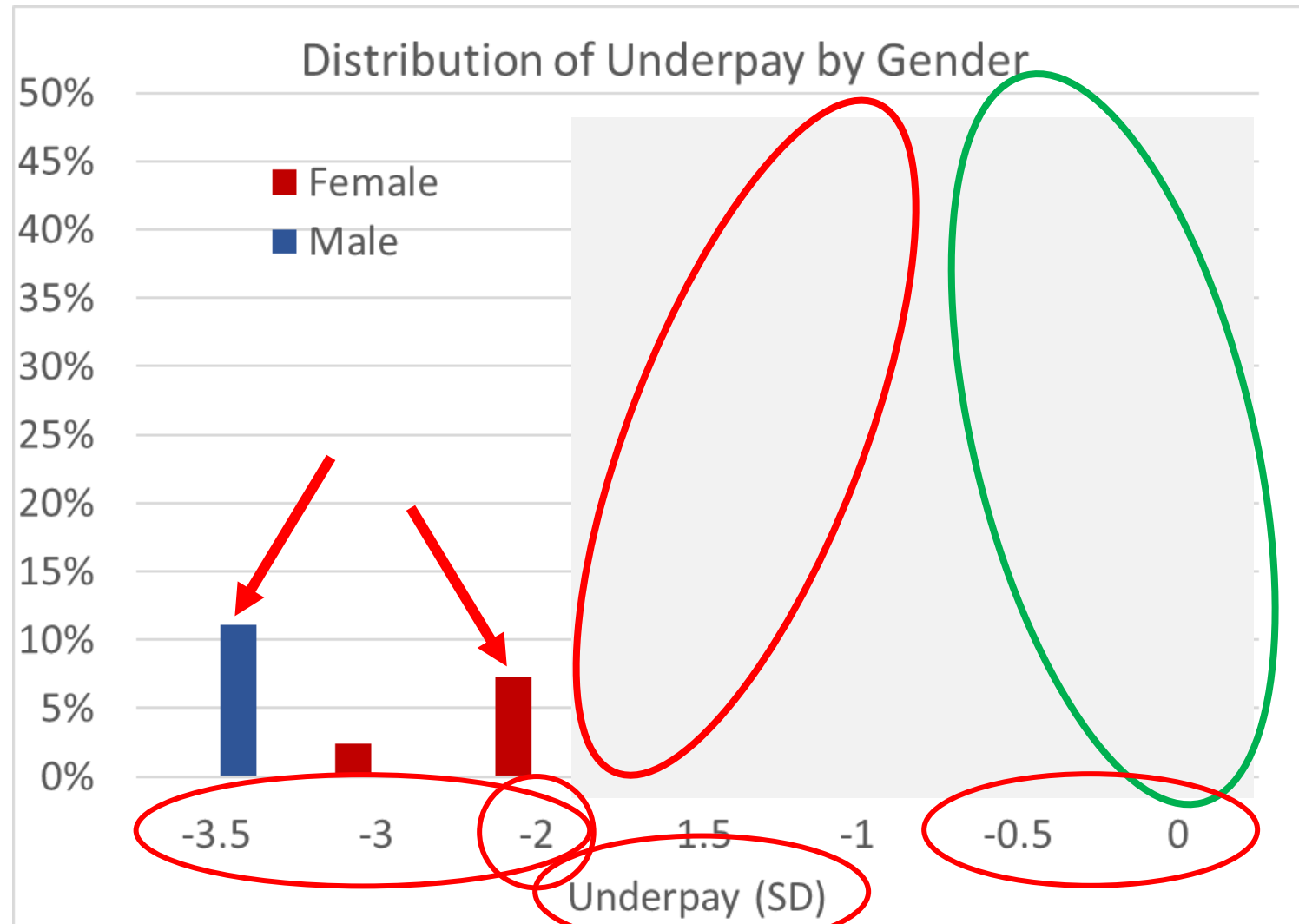
Distribution of Underpay by Gender

Analysis Type 1: Patterns of Pay Differences

Distribution of Underpay by Gender

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Patterns of Pay Differences: Pay Discrimination

Credit: Dr. Garber / OFCCP Branch of Expert Service. NILG Conference 2020

# Patterns of Pay Differences: Pay Discrimination

SD Values, Pay Equity Analysis, Scenario 2

Credit: Dr. Garber / OFCCP Branch of Expert Service. NILG Conference 2020

Patterns of Pay Differences: Pay Discrimination

SD Values, Pay Equity Analysis, Scenario 3
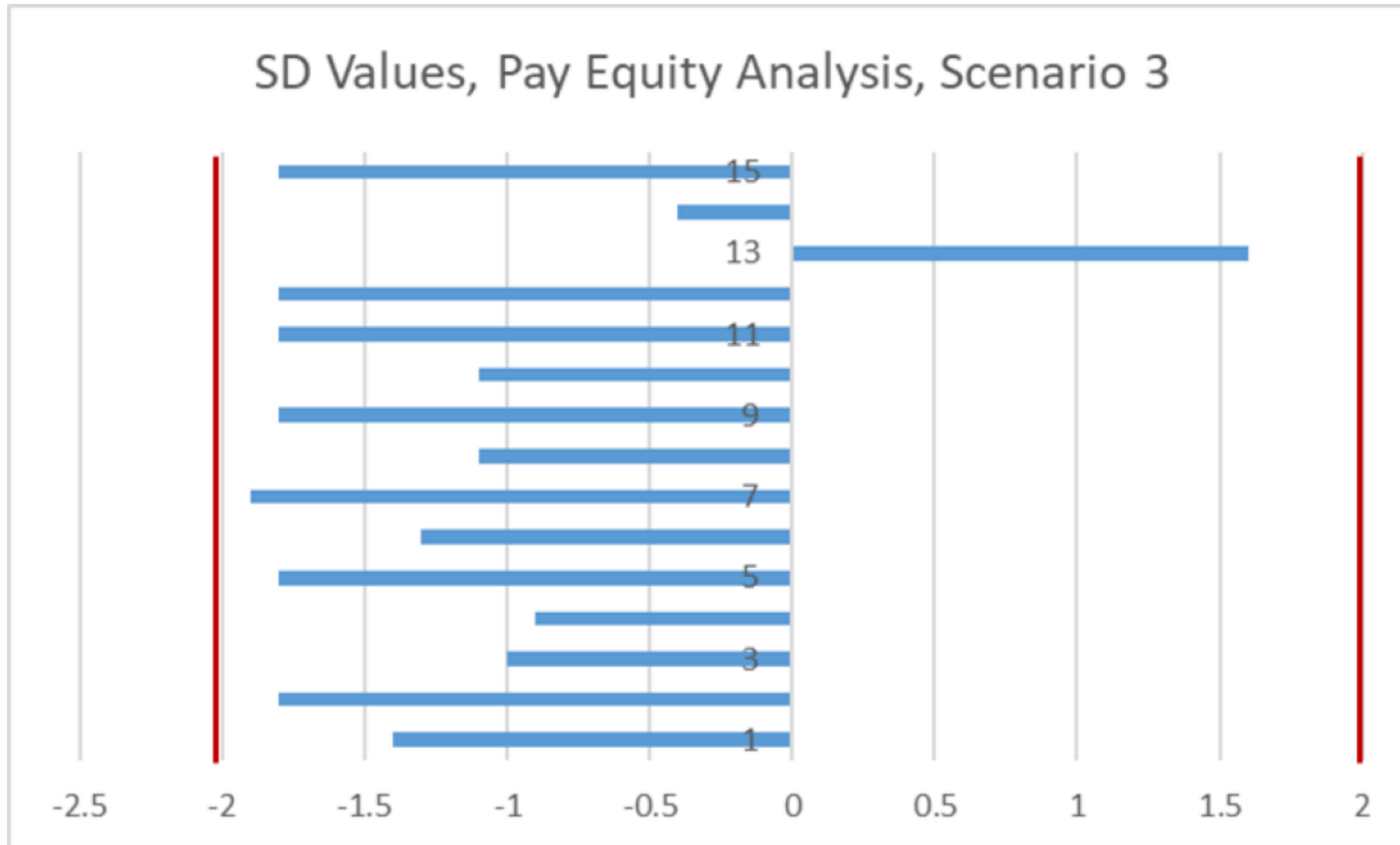
Credit: Dr. Garber / OFCCP Branch of Expert Service. NILG Conference 2020

Aggregating PAGs???

- **PAG=Aggregated Multiple Linear Regression**
  - Aggregating different Jobs
  - OFCCP v. Oracle
- **Uber-PAGs???**
  - Aggregate PAGs???
- **See NILG Conference (07/22/20): Dr. David Garber (OFCCP)**
- **What does this have to do with Patterns & Practical Significance?**
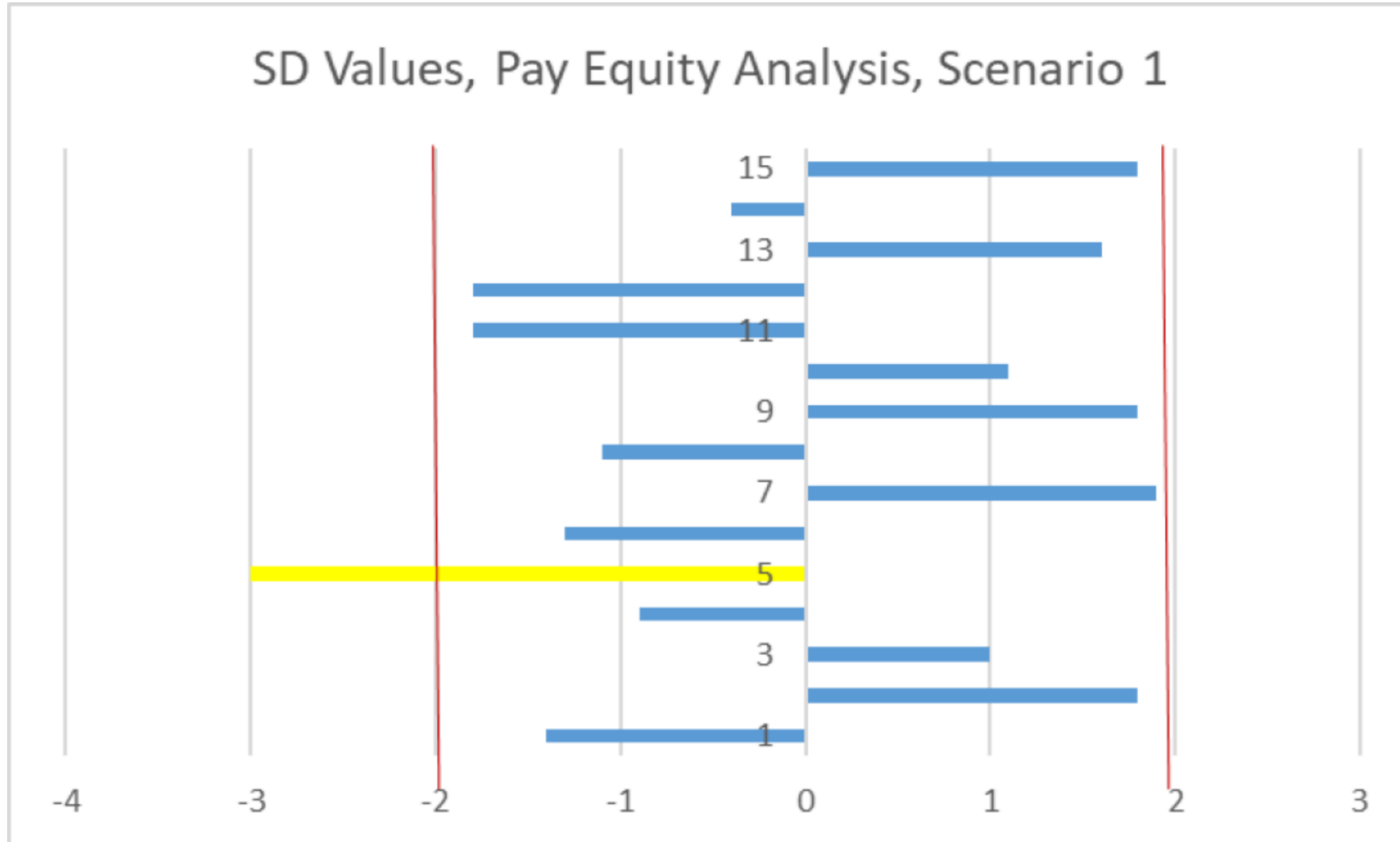
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Aggregating PAGs: Insight into Pay Bias

Credit: OFCCP Branch of Expert Service. NILG Conference 2020

Aggregating PAGs: Insight into Pay Bias

SD Values, Pay Equity Analysis, Scenario 3
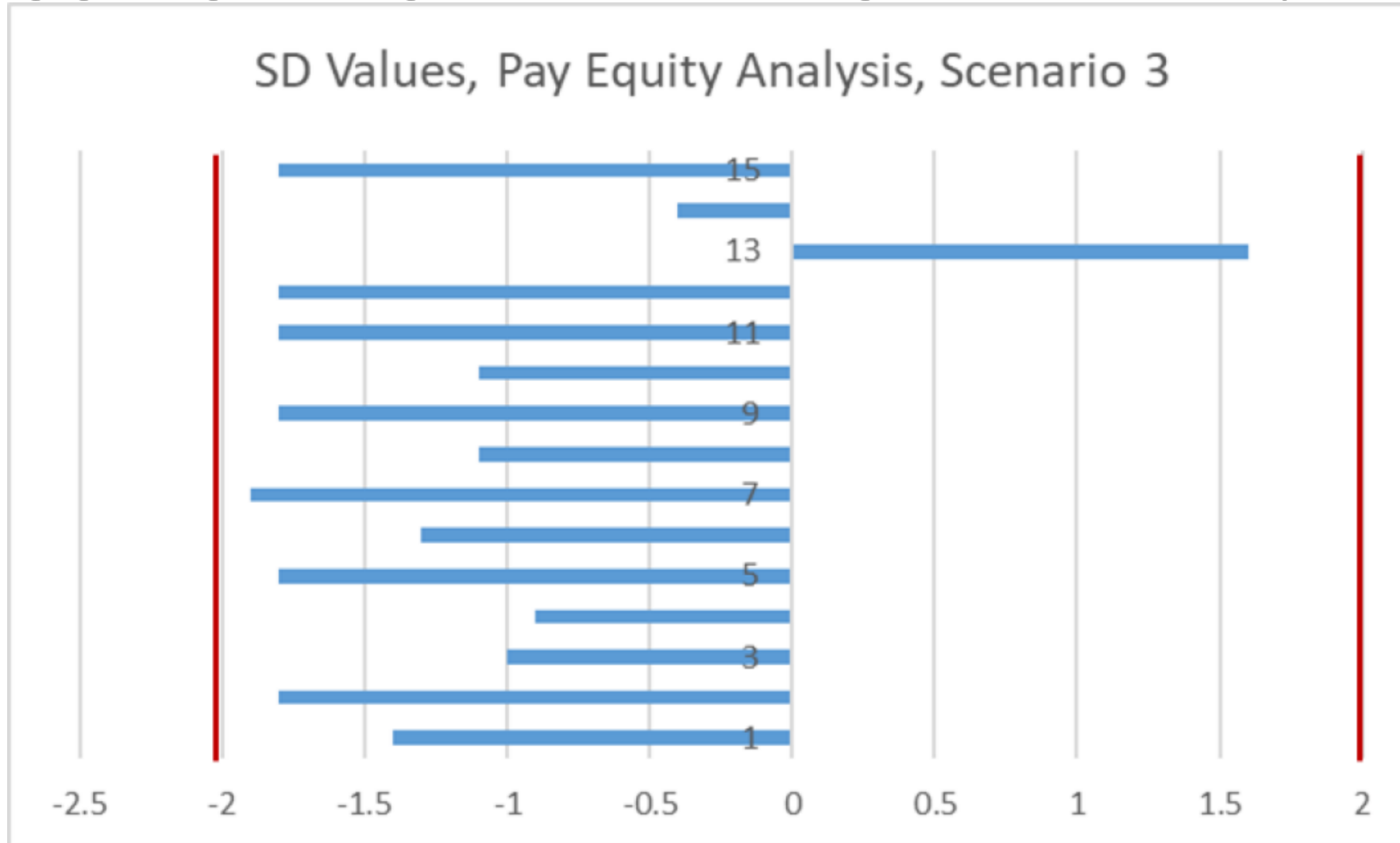
Credit: OFCCP Branch of Expert Service. NILG Conference 2020

Analysis Type 1: Practical Implications

- **Defense against "Patterns" inquiry? HOW???**

- **MUCH MORE DIFFICULT to defend than statistical.**

- **Defense in Audits**
  - Explain Pattern
  - Offer counter model

- **GAME CHANGER**
  - More Effective Pay Equity Enforcement
  - Force Contractors to Find and Fix PROBLEMS rather than "Gotchas"
  - Force Contractors to Reimagine Pay Equity

- **Aggregating PAG methods**
  - Statistically evaluate if **pattern** is significant: ~Pay bias in pay practice
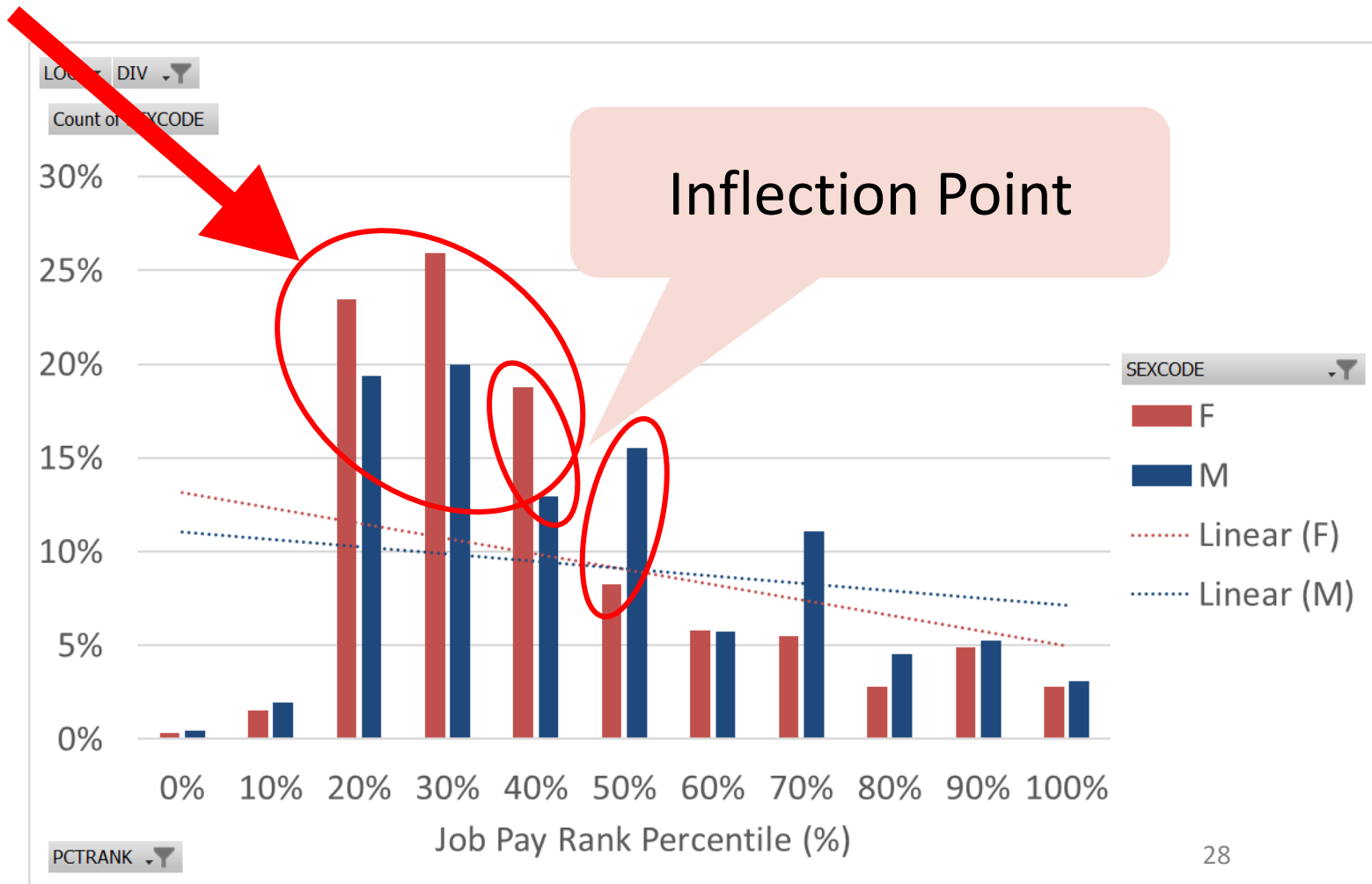 - MUCH MORE DIFFICULT to defend

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Pattern Analysis: Type 2

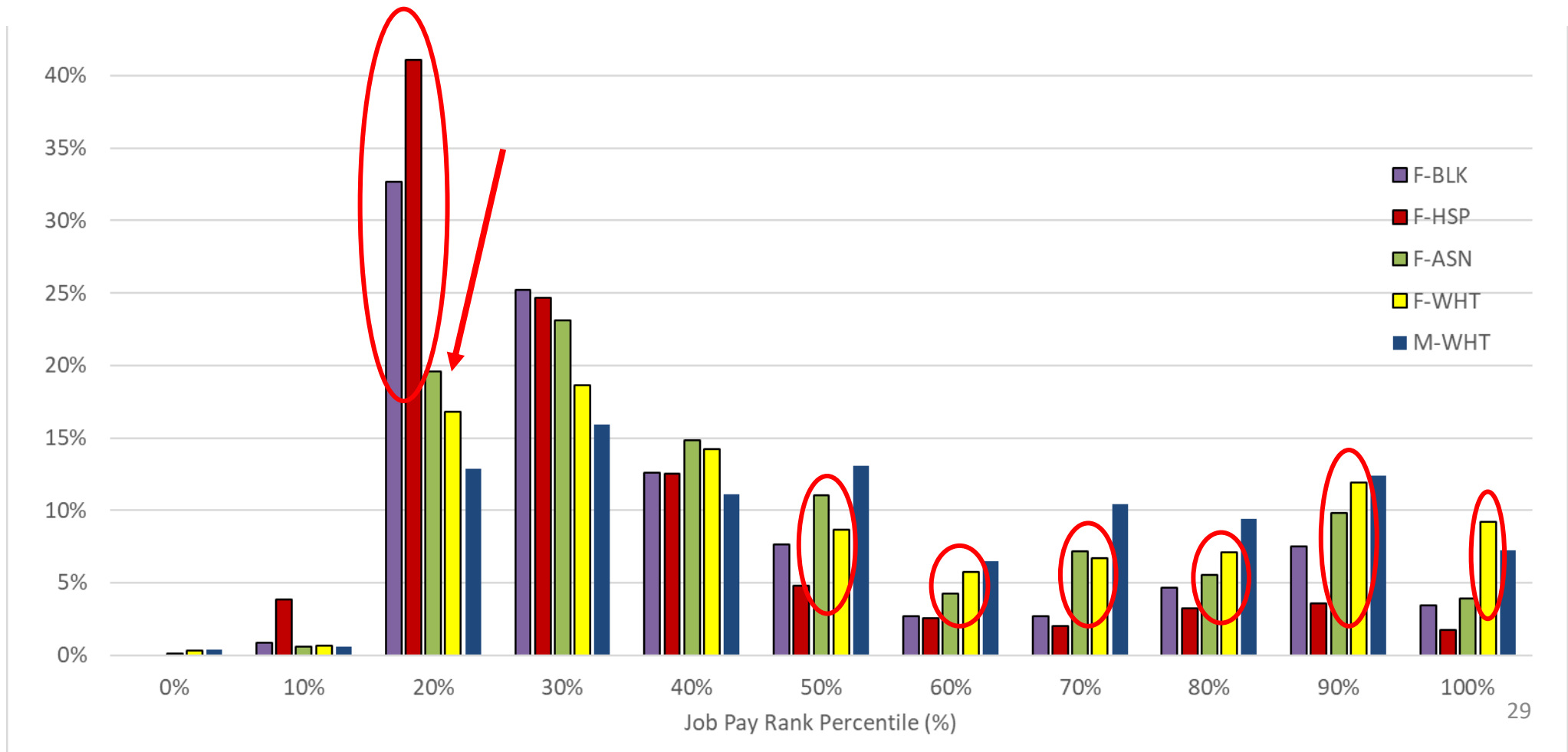**Frontier in OFCCP Pay Equity Investigations**

Workforce Distribution—Case Study 1

- **Sticky Floor/Broken Rung Impacting Females**
  - ~70% of Females dominate lower 20%-40% paying jobs

Workforce Distribution—Case Study 2

- **Gender-Race Intersection**
- **Black & Hispanic Females are most severely impacted**
  - Remove effects of White & Asian Females

Analysis Type 2: Practical Implications

- **Defense against "Patterns" inquiry? HOW???**
- **MUCH MORE DIFFICULT to defend than statistical.**
- **Defense in Audits**
  - Utilization Analysis
- **GAME CHANGER**
  - Close the Wage Gap
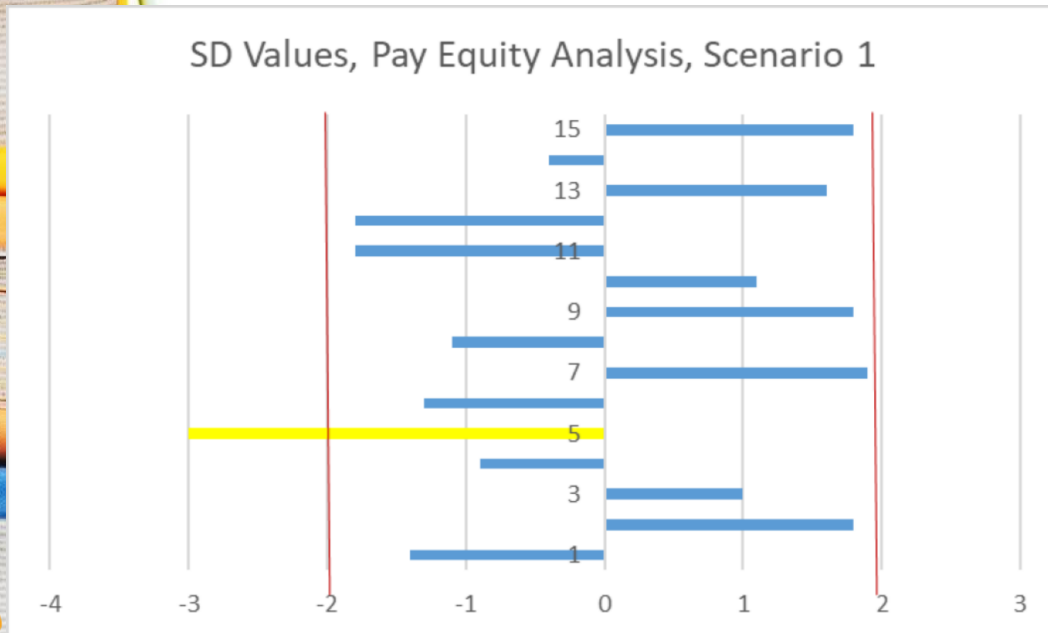 - Force Contractors to Reimagine Pay Equity
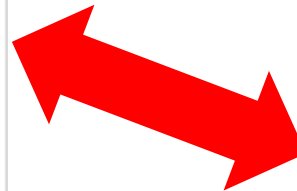
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Pattern Analysis: Type 3

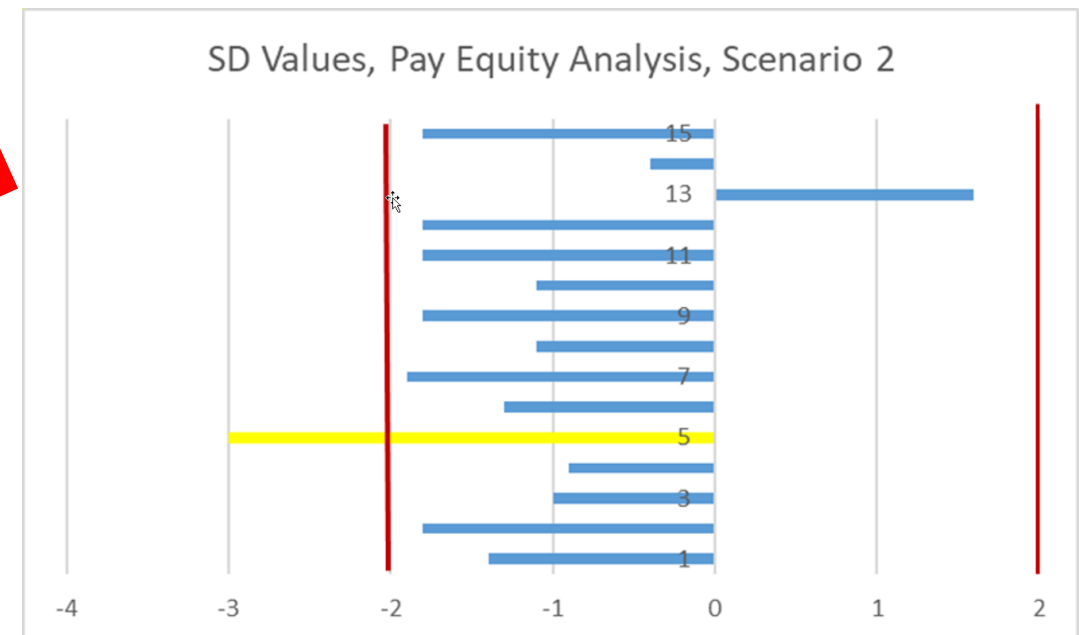**Frontier in OFCCP Pay Equity Investigations**
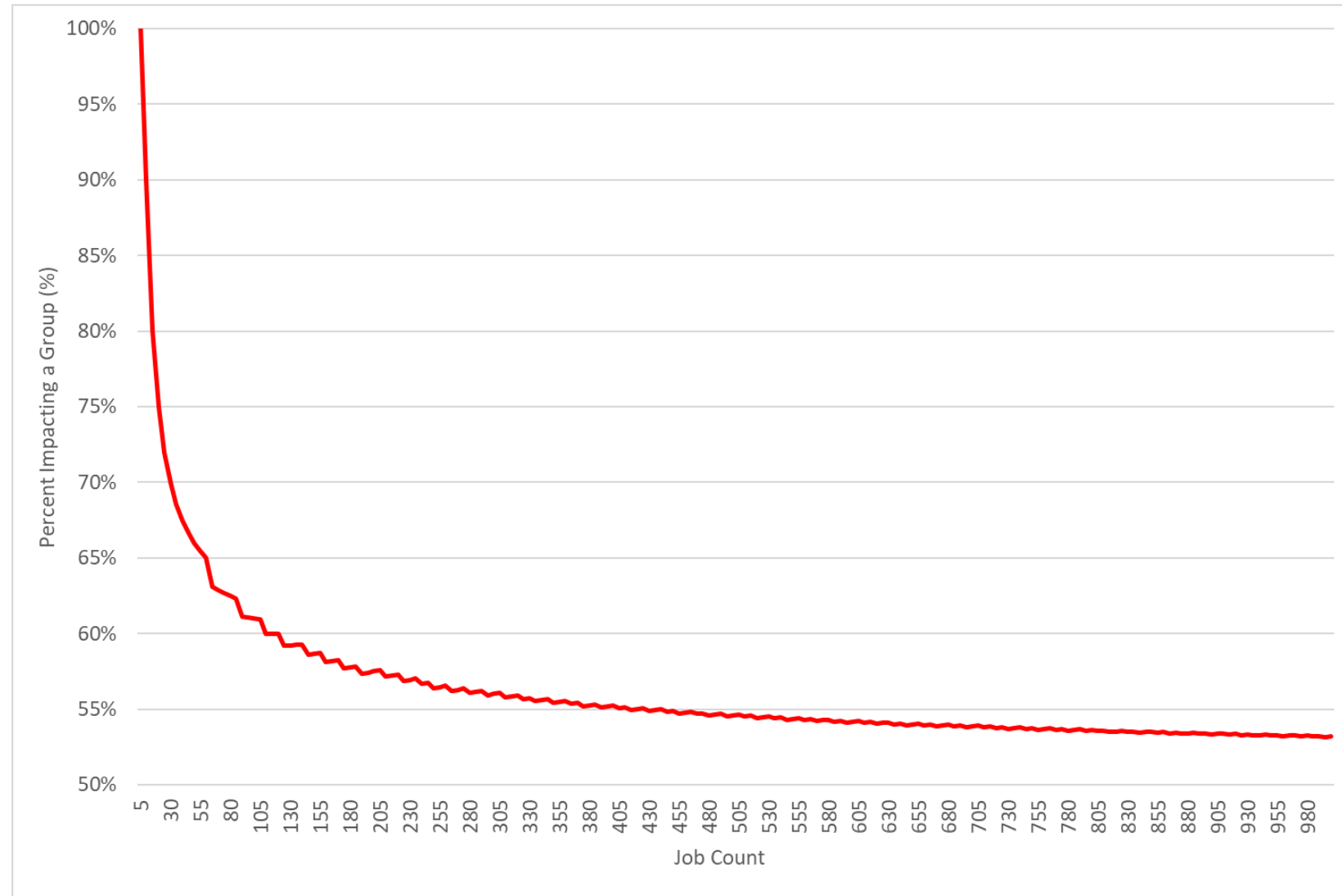
Analysis Type 3: Proportion Impact

SD Values, Pay Equity Analysis, Scenario 1

No Problem

SD Values, Pay Equity Analysis, Scenario 2

Problem

Analysis Type 3: Proportion Impact

Recap

Recap

- **OFCCP Compensation Audits—Frontier**
  - **Resolution Procedure Final Rule**
    - https://www.federalregister.gov/documents/2020/11/10/2020-24858/rin-1250-aa10
    - Quantitative & Qualitative Evidence
    - Statistical Evidence in PDN/NOV
  - **Patterns Analysis**
    - Type 1: Patterns of Pay Differences
    - Type 2: Workforce Distribution/Occupational Segregation
    - Type 3: Proportion Impact

Thank You!!! Questions???

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