

## EARLY RESOLUTION CONCILIATION AGREEMENT

Between

THE U.S. DEPARTMENT OF LABOR  
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

and

MERCK & COMPANY, INC. –  
PRIMARY CARE EAST

### **PART I. PRELIMINARY STATEMENT**

The Office of Federal Contract Compliance Programs (“OFCCP”) is currently evaluating Merck & Company, Inc.’s (“Merck”): Primary Care East (“PCE”) functional unit located at 351 North Sumneytown Pike, Upper Gwynedd, Pennsylvania and is alleging that Merck was not in compliance with Executive Order 11246, as amended (“E.O. 11246” or “Executive Order”), and its implementing regulations at 41 Code of Federal Regulations (“C.F.R.”) Part 60-1. Merck disputes that there are any violations. As part of OFCCP’s Early Dispute Resolution Process set forth in Directive 2019-02 and in the interest of resolving the alleged violations without engaging in further legal proceedings, and in exchange for sufficient and valuable consideration described in this document, OFCCP and Merck enter into this Conciliation Agreement (“Agreement”) and the parties agree to all the terms therein. The attachments to this Agreement are deemed incorporated into this Agreement.

### **PART II. GENERAL TERMS AND CONDITIONS**

1. In exchange for Merck’s fulfillment of all obligations in Parts IV and V of the Agreement, OFCCP agrees not to institute administrative or judicial enforcement proceedings under E.O. 11246, based on the violations described in more detail in Part IV below. However, OFCCP has the right to initiate legal proceedings to enforce the Agreement itself or to correct and obtain relief for the violations described in Part IV if Merck violates this Agreement. Nothing in this Agreement precludes OFCCP from initiating enforcement proceedings based on future compliance evaluations or complaint investigations, including during the 5-year exemption period if OFCCP deems that Merck is in breach of the agreement. In exchange for Merck’s fulfillment of all obligations in Parts IV and V of the Agreement, OFCCP further agrees not to initiate any new audits at the functional units listed in Attachment B until at least 60 days after Merck submits the final progress report described in Part VI of this Agreement and the OFCCP confirms to Merck that it has fully complied with the terms of this Agreement.
2. Merck agrees that OFCCP may review its compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents as may be relevant to the matter under investigation and pertinent to Merck’s compliance. Merck will permit access to its premises during normal

business hours for these purposes and will provide OFCCP with all reports and documents required.

3. This Agreement does not constitute an admission by Merck of any violation of or noncompliance with any laws or of any other wrongdoing whatsoever, including but not limited to any violation of E.O. 11246; Section 503 of the Rehabilitation Act of 1973, as amended (“Section 503”); the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”); and their implementing regulations at 41 C.F.R. Chapter 60; or other laws, nor has there been an adjudicated finding that Merck violated any laws.
4. Merck understands that nothing in this Agreement relieves Merck of its obligation to fully comply with the requirements of E.O. 11246, Section 503, VEVRAA, their implementing regulations, and other applicable equal employment laws.
5. Merck promises not to harass, intimidate, threaten, discriminate against, or otherwise retaliate against any individual because the individual: benefits from this Agreement, or files a complaint or participates in any investigation or proceeding under E.O. 11246, Section 503, and/or VEVRAA, or engages in any activity listed at 41 C.F.R. § 60-1.32(a).
6. OFCCP and Merck (“the parties”) understand the terms of this Agreement and enter into it voluntarily.
7. This document and its attachments contain the complete and final understanding of the parties with respect to the matters referenced therein. This Agreement contains all the terms by which the parties are bound and it supersedes all prior written or oral negotiations and agreements. There will be no modifications or amendments to this Agreement unless they are in writing and signed by all parties.
8. If one or more provisions of this Agreement are rendered unlawful or unenforceable, the remaining provisions will remain in full force and effect.
9. This Agreement becomes effective on the day it is signed by the Regional Director of the Mid-Atlantic Region (the “Effective Date”).
10. This Agreement will expire sixty (60) days after Merck submits the final report required in Part VI below, unless OFCCP notifies Merck in writing prior to the expiration date that Merck has not fulfilled all of its obligations under the Agreement, in which case the Agreement is automatically extended until the date OFCCP determines Merck has met all of its obligations under the Agreement.
11. Each party shall bear its own fees and expenses with respect to this matter.
12. If Merck violates the Conciliation Agreement,
  - A. The procedures set forth at 41 C.F.R. § 60-1.34 will govern:

- 1) If OFCCP believes that Merck violated any term of the Agreement while it was in effect, OFCCP will send Merck a written notice stating the alleged violations and summarizing any supporting evidence.
- 2) Merck will have 15 days from receipt of such notice to demonstrate in writing that it has not violated the Conciliation Agreement, unless such a delay would result in irreparable injury to the employment rights of affected employees or applicants.
- 3) If Merck is unable to demonstrate that it has not violated the Agreement, or if OFCCP alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement for those establishments with an open review at the time of this Agreement and seek a full make-whole remedy for victims.
- 4) OFCCP may seek enforcement of this Agreement itself and is not required to present proof of any underlying violations resolved by this Agreement.

B. Merck may be subject to the sanctions set forth in Section 209 of the Executive Order and/or other appropriate relief for violation of this Agreement.

13. OFCCP may seek enforcement of this Agreement itself and is not required to present proof of any underlying violations resolved by this Agreement.
14. The parties understand and agree that nothing in this Agreement is binding on other governmental departments or agencies other than the United States Department of Labor, and cannot be used as evidence that the Contractor is not in violation of any applicable federal, state, or local laws, including but not limited to E.O. 11246, Section 503, VEVRAA, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act.
15. This Agreement is limited to the facts of this case. Neither this Agreement, nor any part of the negotiations that occurred in connection with this Agreement, shall constitute admissible evidence with respect to any OFCCP policy, practice or position in any lawsuit, legal proceeding, administrative proceeding, compliance evaluation or audit, except for legal or administrative proceedings concerning the enforcement or interpretation of this specific Agreement.
16. All references to "days" in this Agreement are calendar days. If any deadline for an obligation scheduled to be performed under this Agreement falls on a weekend or a Federal holiday, that deadline will be extended to the next business day.

### **PART III. SPECIAL TERMS AND CONDITIONS**

- A. Merck agrees to review each establishment listed in Attachment B for potential compensation disparities and to implement corrective actions where necessary.
- B. OFCCP will not schedule any of Merck's establishments listed in the Preliminary Statement above for a compliance evaluation for a five-year period from the effective date of the ERCA.

- C. The five-year scheduling exemption is limited to regularly scheduled compliance evaluations and OFCCP retains the right to investigate complaints of discrimination at establishments covered by the ERCA under E.O. 11246, Section 503, and VEVRAA.
- D. If Merck violates the terms of the ERCA, OFCCP reserves the right to bring an enforcement action per the terms of 41 C.F.R. § 60-1.34 and the five-year scheduling exemption will be void.
- E. If during the five-year period, OFCCP schedules a different establishment of Merck for a compliance evaluation not covered by this ERCA, OFCCP will conduct the compliance evaluation consistent with its normal policies and procedures.
- F. This agreement will not relieve Merck from its annual ongoing OFCCP requirements of equal employment opportunity through affirmative action and non-discrimination across its entire workforce, including monitoring an up-to-date AAP.

#### **PART IV. ALLEGED VIOLATIONS AND REMEDIES**

1. **PRELIMINARY FINDINGS:** At least as of April 4, 2016, OFCCP found base pay differences for female Senior Customer Representatives in Merck's PCE functional unit and therefore alleges that Merck is in violation of 41 C.F.R. §§ 60-1.4(a)(1), -20.3(c), -20.5(c). Specifically, OFCCP found statistically significant compensation differences for 307 female Senior Customer Representatives in Merck's PCE functional unit.

**REMEDY:** Merck agrees to take the following action:

- A. **Monetary Settlement:** Merck agrees to distribute \$289,755.97 less legal deductions required by law from back pay only (such as federal, state and/ or local taxes and the Eligible Class Members' share of FICA taxes), to all eligible class members on the final approved list in Attachment A. Merck will pay the Internal Revenue Service ("IRS") the employer's share of social security withholdings and will mail each Eligible Class Member an IRS W-2 Form. These IRS forms will be mailed at the end of the year. Merck has also made salary adjustments in 2019 for some currently employed affected class members totaling \$146,000.
- B. All of the Eligible Class Members in this Agreement (listed in Attachment A) are members of a putative class action pending in the District of New Jersey (*Smith, et al. v. Merck & Co., Inc.*, et al. Case No. 3:13-cv-2970) asserting claims of gender discrimination in pay and Merck has entered into a settlement agreement to resolve all claims for all sales representatives. The parties agree that the above dollars shall be distributed and paid through the settlement fund being established as part of the settlement in the above referenced matter. Specifically, pursuant to the class settlement agreement, the monetary awards will be determined based on a formula based on the number of Workweeks worked by each person covered by this ERP Agreement.
- C. The procedures for notice and distribution of dollars are set forth in the Settlement Agreement, and are summarized below:

- 1) The Settlement Administrator shall (1) mail the Notice of Class Action Settlement (the "Notice" or "Class Notice") to Class Members; (2) seek additional information from Class Members or Class Counsel, when appropriate; (3) respond to questions from Class Members; (4) receive the amounts to be paid to Settlement Class Members per application of the Allocation Formula and distribute awards to Settlement Class Members; (5) maintain a toll-free number for communicating with Settlement Class Members; (6) mail checks to Settlement Class Members and Class Counsel; and (7) any other duties necessary to carry out its responsibilities described in this Agreement.
- 2) The Settlement Administrator shall mail the Notice approved by the Court to Class Members, by United States first class mail, postage prepaid. The Parties intend to provide actual notice to each Class Member, to the extent practicable.
- 3) In order to provide the best notice practicable, the Settlement Administrator will do the following before mailing the Notice: (1) run the list of all Class Members through the United States Postal Service's National Change of Address database ("NCOA"); and (2) perform address searches using public and proprietary electronic resources which collect their data from various sources such as utility records, property tax records, motor vehicle registration records (where allowed), and credit bureaus.
- 4) If envelopes from the mailing of the Notice are returned with forwarding addresses, the Settlement Administrator will re-mail the Notice to the new address within three (3) business days.
- 5) In the event that a Notice is returned to the Settlement Administrator by the United States Postal Service because the address of the recipient is no longer valid, i.e., the envelope is marked "Return to Sender," the Settlement Administrator shall perform a standard skip trace in an effort to ascertain the current address of the particular Class Member in question and, if such an address is ascertained, the Settlement Administrator will re-send the Notice within three (3) business days of receiving the newly ascertained address; if no updated address is obtained for that Class Member, the Notice shall be sent again to the Class Member's last known address. In either event, the Notice shall be deemed received once it is mailed for the second time unless the Class Member can demonstrate good reason why she did not receive it.
- 6) With respect to envelopes marked "Return to Sender," the Settlement Administrator may also call any identified last-known telephone numbers (and telephone numbers updated through public and proprietary databases) of Class Members to obtain their current addresses.
- 7) Eligibility: All members of the affected class (listed on Attachment A) who do not opt out of the settlement referenced above will receive a share of the monetary settlement.
- 8) Per the settlement agreement, subject to Court approval, any uncashed funds shall be issued to The Employee Rights Advocacy Institute for Law and Policy and the Impact Fund as cy pres beneficiaries.

## PART V. ENHANCED COMPLIANCE AGREEMENT

1. The Agreement will be in effect for a five-year period beginning on the Effective Date of the Agreement.
2. To proactively facilitate compliance with E.O. 11246, Merck will take the steps described below to enhance its compliance with E.O. 11246 in the compensation of Senior Customer Representatives at Merck's functional units listed in Attachment B.
3. Evaluation of Pay Policies, Procedures, and Practices: Within 120 days of the Effective Date of this Agreement, Merck will evaluate all policies, procedures, and practices involved in the compensation of employees in the functional units listed in Attachment B.<sup>1</sup> Merck will determine whether these policies, procedures, and practices have a disproportionately negative effect on the compensation of any protected group. Merck will produce a written report of its findings, which will be provided to OFCCP. Merck agrees that this report will not be withheld or redacted in whole or in part pursuant to any privilege, including the work product doctrine or the attorney-client privilege.

If this evaluation identifies any policy, procedure, or practice as having a disproportionately negative effect on the compensation of a protected group, Merck will take any and all actions necessary to remedy such effect as soon as possible. In addition, Merck will provide the compensation data, analysis, and record of all pay adjustments within 60 days of completion of the pay evaluation.

4. Eliminate Discriminatory Compensation Practices: Merck agrees to immediately cease using any compensation policies or practices that negatively affect the compensation of all employees identified in the titles above.
5. Implement Improved Policies: Merck will develop and implement new policies, as needed, to ensure that its compensation process is non-discriminatory.
6. Training: Within 120 days of implementing any new and revised policies, procedures, or programs, if any, developed under Part V of this Agreement, Merck will train all individuals involved in determining compensation about such policies, procedures and programs.
7. Self-Monitoring/Auditing: As part of this Agreement, Merck agrees to monitor base salary for any indication of statistically significant disparities based on race/ethnicity or sex at the functional units listed in Attachment B and will investigate and remedy any such inequity identified.
  - A. Merck expressly agrees to investigate any complaint or information it receives that may indicate compensation disparities at the functional units listed in Attachment B.

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<sup>1</sup> Merck has reorganized its FAAP structure. The proactive measures described in the remaining paragraphs of this part will apply to the Chronic Care functional unit and the Puerto Rico Human Health functional unit listed in Attachment B.

- B. Merck commits to self-monitor the compensation of employees employed in the functional units listed in Attachment B on an annual basis and submit pursuant to the dates agreed upon in Attachment C ("Timeline").
8. In accordance with 41 C.F.R. § 60-2.17(d), Merck will design and implement an internal audit and reporting system to measure the effectiveness of its total affirmative action program, to include auditing and reporting of its compensation practices as they impact all employees.

#### **PART VI. REPORTS REQUIRED**

Merck must submit the documents and reports described below to:

U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
Attention: Edward J. Rogers, District Director  
900 Market Street, Suite 311  
Philadelphia, PA 19107

Merck must submit a progress report covering each one-year period this Agreement is in effect. The first report shall be due on or before April 1, 2020. Each subsequent report must cover the successive one-year period and must be submitted within 30 calendar days after the close of that one-year period.

**Each report shall include:**

1. A copy of the report developed in accordance with Part V.3;
2. Documentation describing all salary adjustments required by Part V of the Agreement. The documentation must include the amount of each adjustment, the date each adjustment will be/was made, and the race/ethnicity and gender of each individual receiving an adjustment;
3. The results of Merck's monitoring of base salary as well as the administrations of non-base compensation and benefits for all positions in the functional units listed in Attachment B, for any indication of statistically significant disparities based on race/ethnicity or sex. If a disparity is identified, Merck will also submit documentation of any corrective action taken, if any. The documentation must include the amount of each adjustment, the date each adjustment will be/was made, and the race/ethnicity and gender of each individual receiving an adjustment;
4. Documentation that all managers, supervisors, and other personnel involved in making compensation decisions for Merck's positions have received training on any new and revised policies, procedures, and programs developed under Part V of this Agreement. The documentation must include the dates of the training, the name and job title of each attendee, an outline of the topics discussed during the training, and the name and job title of each person who conducted the training;

5. Copies of any new or revised policies, procedures, and/or programs developed and implemented as a result of this Agreement; and
6. Confirmation in writing that Merck complied with the notice and claim process referenced above, which is being administered pursuant to the settlement in Smith et al v. Merck.

TERMINATION DATE: This Agreement will terminate pursuant to the terms in Part II, Paragraph 10.

INTEGRATION CLAUSE: This Agreement represents the full Agreement between Merck and OFCCP and this Agreement supersedes any other agreements, oral or written. In signing this Agreement, neither Merck nor OFCCP relies upon any promise, representation of fact or law, or other inducement that is not expressed in this Agreement. This Agreement may be modified only by written agreement of the Parties affected and may not be modified by any oral agreement.

**Attachments**

- A. List of Female Senior Customer Service Representatives
- B. List of Functional Units
- C. Timeline

**PART VII. SIGNATURES**

This Agreement is hereby executed by and between the OFCCP and Merck & Company, Incorporated --Primary Care East at 351 North Sumneytown Pike, Upper Gwynedd, Pennsylvania.

**(b) (6), (b) (7)(C)**

STEVE MIZELL  
Chief Human Resources Officer  
Merck & Company, Inc.

Date: September 26, 2019

**(b) (6), (b) (7)(C)**

MICHELE HODGE  
Regional Director  
OFCCP Mid-Atlantic Region

Date: 9/27/19

**ATTACHMENT A**  
**FEMALE SENIOR CUSTOMER SERVICE REPRESENTATIVE CLASS MEMBERS**

No.	Unique ID
(b) (6), (b) (7)(C)	

No.	Unique ID
(b) (6), (b) (7)(C)	

No.	Unique ID
(b) (6), (b) (7)(C)	



No.	Unique ID
(b) (6), (b) (7)(C)	(b) (6), (b) (7)(C)

No.	Unique ID
(b) (6), (b) (7)(C)	(b) (6), (b) (7)(C)

No.	Unique ID
(b) (6), (b) (7)(C)	(b) (6), (b) (7)(C)

**ATTACHMENT B  
COVERED FUNCTIONAL UNITS**

Chronic Care, 351 North Sumneytown Pike, Mailstop: UG2AB-70, North Wales, PA

Puerto Rico Human Health, 65<sup>th</sup> Infantry, Km. 12.6, Carolina, Puerto Rico

**ATTACHMENT C  
TIMELINE**

Enhanced Compliance Agreement Timeline

Merck evaluates its compensation policies, procedures, and practices	January 1, 2020
Merck provides written report of its findings regarding its compensation policies, procedures, and practices	April 1, 2020
Merck provides training on any new and revised policies, procedures, or programs	April 1, 2020
Merck submits Annual ECA reports	April 1, 2020 April 1, 2021 April 1, 2022 April 1, 2023 April 1, 2024