July 11, 2011

VIA: http://www.regulations.gov
Ms. Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

OMB Control Number: 1250-0003
RE: Proposed Extension of the Approval of Information Collection Requirements; Comment Request

Dear Ms. Carr:

The Center for Corporate Equality (CCE)[1] is submitting this comment in response to the Proposed Extension of the Approval of Information Collection Requirements; Comment Request (OMB Control Number 1250–0003). The Notice, which was published on May 12, 2011, proposes a number of significant changes to the itemized listing used by OFCCP when scheduling compliance evaluations for non-construction Supply and Service contractors.

CCE is a nonprofit equal employment opportunity research and think tank organization that was established in 2007 to help organizations proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. CCE is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance.

Several sections of the proposed itemized listing differ minimally, if at all, from the current itemized listing. In the following comment, CCE addresses only the portions of the proposed

[1] Portions of this comment were written by the following CCE staff: David Cohen, Michael Aamodt, Marcelle Clavette, Jana Moberg, Fred Satterwhite, and Keli Wilson.

itemized listing that have changed significantly and, based on our experience and research with the contractor community and OFCCP, would either increase the burden of the collection of information on those who are to respond, or would produce information with minimal practical utility to the agency in its compliance and enforcement functions. Quoted text from the proposed itemized listing appears below in italics, with CCE's comments following.

8. Copies of your employment leave policies including, but not limited to, policies related to implementing the Family Medical Leave Act, pregnancy leave, and accommodations for religious observances and practices. Send your employee handbook or manual if these policies are a part of these documents.

As specified in 41 CFR § 60-20.3, Federal contractors with written personnel policies are required to indicate in such policies that there shall be no discrimination against employees on account of sex. In response to this regulation and other laws, businesses maintain policies in accordance to the law. Generally speaking, corporations have moved towards a paperless workforce and may not maintain an employee handbook in hardcopy. Policies may be stored electronically and can range from a broad policy statement to a more complex system based on company size. For example, a larger corporation may have corporate-wide policies with additional policies and procedures that vary by location or line of business. Supplying OFCCP with an electronic or hardcopy of all these policies and procedures would be a time-consuming task. Our recommendation is for contractors to supply only the pertinent leave policies. Such a requirement would be in the best interest of both parties, as it would minimize the production burden on contractors while saving time for OFCCP by allowing for a focused review of relevant information.

41 CFR § 60-20.3 states the following:

> (g)(1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female employee meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. The conditions applicable to her leave (other than the length thereof) and to her return to employment, shall be in accordance with the employer's leave policy.
>
> (2) If the employer has no leave policy, childbearing must be considered by the employer to be a justification for a leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her original job or to a position of like status and pay, without loss of service credits.

As a note, businesses may not have specific maternity leave policies, but rather general leave of absence policies. Human resources data systems generally track the leave of absence, but not the

specific details on the type of leave. Additionally, OFCCP has no authority to enforce the Family and Medical Leave Act (FMLA). If an employee or applicant has a complaint regarding their treatment by employee representatives, they may contact the Equal Employment Opportunity Commission or State Personnel Board for further guidance or investigation.

Contractors are required to follow the law; to the extent that a contractor has written policies relating to this subject area, those policies simply restate the law. Therefore, this request has no utility, and it would create a significant burden on a small contractor that had only limited written policy documentation.

9. A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.

The current scheduling letter requires contractors that have a collective bargaining agreement (CBA) to submit a copy of the CBA with the desk audit submission. This submission provides OFCCP with the terms and conditions of employment (e.g., compensation, promotion, termination) for those individuals who are covered by the CBA. In addition, Executive Order 13496 requires covered contractors to provide notice of employee rights under the National Labor Relations Act (NLRA) by displaying a poster that can be readily seen by employees, and include a clause in all non-exempt Federal contracts, subcontracts, and purchase orders referencing the contractor's posting obligation. Covered contractors are bound by the terms in the collective bargaining agreement, so it is unclear what the utility would be in reviewing documents other than the collective bargaining agreements. CCE recommends that OFCCP remove the reference to any additional documents outside of the requested CBA. We believe that these documents will not provide any additional relevant information, and the burden of collection and reproduction is not justified.

11. Data on your employment activity (applicants, hires, promotions, and terminations) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information in 11(a) through (c) below for at least the first six months of the current AAP year. You should present these data by job group (as defined in your AAP) and by job title.

a. Applicants and Hires: For each job group and job title, this analysis must consist of the total number of applicants and the total number of hires, as well as the number of African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, White, and the number of female and male applicants and hires. For each job group and job title applicants for whom race and/or sex is not known, should be included in the data submitted.

However, if some of your job groups or job titles (most commonly, entry-level) are filled from the same applicant pool, you may consolidate your applicant data (but not hiring data) for those job groups or titles.

For example, where applicants expressly apply for or would qualify for a broad spectrum of jobs (such as "Production," "Office," etc.) that includes several job groups, you may consolidate applicant data.

CCE recommends that OFCCP reconsider the revisions to Item 11 of the proposed scheduling letter. The proposed letter would require contractors to submit applicant data by affirmative action job group and job title. Currently, contractors are given the option of submitting their personnel activity data by either job group or job title. This allows the contractor to submit the data in a manner that is most consistent with its selection process. Affirmative action job groups are created for the purpose of conducting availability and utilization analyses, not for adverse impact analyses. The compliance manual recommends that jobs be grouped within an EEO category that is similar in content, wage, and opportunity. Job groups work for the purpose of goal setting but not for conducting adverse impact analyses.

It is common for adverse impact analyses to result in both false positives and false negatives. We believe that there are two main reasons that this occurs. First, job groups typically contain job titles that have vastly different recruitment sources, availability of minorities and females, basic qualifications, selection criteria, and hiring managers. Essentially you are comparing apples and oranges. Second, when conducting statistical significance testing, larger sample sizes will almost always result in findings of statistical significance. Consider the following example below where there is a 1% difference in selection rates between men and women:

# Applicants		# Selections		Selection Rates			Practical Measures		Statistical Test
Males	**Females**	**Males**	**Females**	**Total**	**Males**	**Females**	**Impact Ratio**	**Diff in rates**	**SD (Z) test**
1,200	1,200	1,188	1,176	0.985	0.99	0.98	0.99	0.01	***2.01***

It can be clearly seen from the analysis above that sample size will play a significant part in statistical significance testing. As stated above, the artificial aggregation will often yield a false positive when true impact is not occurring. These false positives will result in a waste of resources both for OFCCP and the federal contractor. Therefore, once again we recommend that OFCCP continue to allow a contractor to submit data that is most consistent with its selection process.

We also believe that there are inherent problems with the basic premise of conducting an analysis of "Applicants and Hires". Such an analysis might have worked some years ago, but the entire process of recruiting, posting jobs, and filling positions has changed dramatically with the implementation of robust applicant tracking systems (ATS).

Consider the following hypothetical scenario of how a typical contractor posts and fills a position:

Acme Technology is a large federal contractor with 100 locations across the U.S. Acme is a technology firm that hires many computer programmers. Acme implemented an ATS 10 years ago. When a position becomes available, the recruiter opens a requisition and posts the position on the company's ATS. This posting can be viewed and applied for by internal Acme employees, as well as external job seekers. Acme allows both internal and external job seekers to apply at the same time. Acme has recently opened a requisition for a computer programmer position for its newly opened Washington, D.C. office. This requisition has been approved for 20 new positions. The requisition is posted and within 30 days, over 1,000 job seekers have applied for the position. Of the 1,000 job seekers, 750 are external and 250 are internal. Interviews are then conducted and the company makes selection decisions. Note that the company has the same selection process for and does not differentiate between internal and external applicants.

As part of the company's affirmative action practices, it conducts a proactive adverse impact analysis of the selection process. Acme runs a query out of the ATS for this requisition and the data show the following:

	External	Internal
Job Seeker	750	250
Did not meet definition of "applicant"	250	50
Total Applicants	500	200
Total Selections (Includes Declined Offers)	18	7
External Hires	15	-
Internal Hire	-	5

On the basis of the summary data above, the company conducts 3 different adverse impact analyses: total selections, hires, and internal selections. The total selection analysis includes all of the individuals selected by the company as part of its selection process in comparison to all applicants within the requisition. The hires analysis (as suggested by OFCCP) is a comparison of external hires to external applicants. The internal selection analysis includes a comparison of internal applicants that were selected to internal applicants that applied. The results of the adverse impact analyses are as follows:

Total Selections

	Selections	Applicants	Selection R	80% Rule	Statistical Significance
Female	3	300	1.00%	0.18	3.175
Male	22	400	5.50%		

"Hires" Analysis

	Selections	Applicants	Selection R	80% Rule	Statistical Significance
Female	3	100	3.00%	-	-
Male	12	400	3.00%		

"Internal" Analysis

	Selections	Applicants	Selection R	80% Rule	Statistical Significance
Female	0	50	0.00%	0	1.3
Male	5	150	3.33%		

As can be seen above, the three analyses yield very different results. As described earlier, the requisition had a total of 700 applicants and 27 selections for an overall selection rate of 3.5% (1% female and 5.5% male). In the example above, the proposed "hires" analysis clearly does not mirror the reality of the selection process and produces meaningless results. A hires analysis might be appropriate when internal and external applicants apply separately or undergo different selection procedures (e.g., performance ratings are considered for internal candidates but not for external) but is not appropriate when internal and external candidates are simultaneously considered using the same criteria.

CCE recommends that OFCCP re-evaluate this request and make appropriate changes to request the data and information in a manner that is most consistent with the selection process. Clearly, there are some companies that do not follow the procedure we described and do NOT evaluate internal and external job seekers simultaneously. Certainly there are many other scenarios that are nuanced to each company. OFCCP should consider these nuances and allow contractors the flexibility to submit data and information in a manner that is most consistent with the contractor's selection process. This will ensure that both OFCCP and the contractor properly evaluate and make informed decisions based on the results of the analyses.

b. Promotions: For each job group and job title, provide the total number of promotions by gender and race/ethnicity, as well as the actual pool of candidates who applied or were considered for promotion by gender and race/ethnicity. Also, include a definition of "promotion" as used by your company. If it varies for different segments of your workforce, please define the term as used for each segment.

Similar to the problem seen with the applicants and hires data, the proposed request for promotions data does not represent a contractor's accurate promotions process. The item includes a request for "the actual pool of candidates who applied or were considered" in the promotions decisions. From our experience, there are two types of promotions that contractors

regularly conduct: competitive and non-competitive. A "competitive promotion" occurs when a new position is created or an existing position is vacated. In a competitive promotion, current employees are considered within a pool of internal and/or external applicants. In this case, all individuals considered for the position are represented in the applicant flow log, thus indicating the pool from which the selections were made. A "non-competitive promotion" occurs in the context of an internal career progression program (e.g., Engineer I, Engineer II) in which promotions are based on an increase in an individual's experience, performance, and skills. In such cases, the employee competes with a set of standards rather than other applicants. As a result, there is no actual applicant pool. Therefore, we recommend that the request for promotions data be re-evaluated so that the request best represents contractors' current promotion and selection practices.

Another concern is related to the race/ethnicity classifications requested in the proposed scheduling letter under item 11(a) and described in footnote 6 under item 11(b). The proposed five race/ethnicity categories are inconsistent with current EEO-1 reporting requirements and also conflict with OFCCP's directive titled "Use of Race and Ethnic Categories" dated August 14, 2008 (http://www.dol.gov/ofccp/regs/compliance/directives/dir283.pdf). After substantial changes were made to the EEO-1 report in November, 2005, OFCCP issued this directive surrounding the seven new race/ethnicity categories and how contractors should handle the discrepancy between OFCCP's request for race/ethnicity information and the contractor's reporting requirements for the EEO-1. In this directive it was made clear by OFCCP that contractors are given the opportunity—and should not be cited for noncompliance—to submit and analyze their data using the revised EEO-1 categories (seven race/ethnicity categories) versus OFCCP's currently recognized five race/ethnicity categories We are concerned that the proposed requirement for contractors to submit their data by five race/ethnicity categories will not only substantially increase a contractor's burden , but will also be inconsistent with OFCCP's own directive.

Additionally, we recommend a clarification of language related to the use of the terms "sex" and "gender." The term "sex" indicates innate biology (http://www.apa.org/) and is used in the request for applicants and hires data, as covered under Executive Order 11246. The term "gender" indicates the manner in which people express themselves related to being a man or woman (http://www.apa.org/) and is used in the request for promotions and terminations data, as well as in the regulations at 41 § CFR 60-2.10. Existing federal laws prohibit discrimination on the basis of "sex"; there are no federal laws that refer to "gender."

c. Terminations: For each job group and job title, provide the total number of employee terminations by gender and race/ethnicity, as well as the actual pool of candidates who were considered for terminations by gender and race/ethnicity.

Additionally, please identify employee terminations as either voluntary or involuntary, if available. When presenting terminations by job title, include the department and job group from which the person(s) terminated.

The proposed request for terminations data also is not representative of the method contractors utilize for terminations. Specifically, it appears that the request fails to recognize the differences between a typical termination (voluntary and involuntary) and a reduction-in-force. Typically, when a company prepares for a reduction-in-force, it evaluates a group of employees (i.e. department, line of business, etc.) and determines a set of criteria to determine who will ultimately be terminated. This type of review results in a clear pool of candidates and from the pool, those that were terminated. A typical non-reduction-in-force termination does not have a pool in which a termination decision will be made. Clearly, with a voluntary termination, the decision is made by the individual employee to leave the organization and there is no comparison from one employee to another. An involuntary termination is the result of the employer evaluating the employee on various performance measures (e.g., absenteeism, performance, discipline) and then making a decision about that individual. Neither of these cases allows for comparison of the terminated individual with other employees, thus making a pool for terminations non-existent. Therefore, we recommend that the basis of this request be re-evaluated and clarified in order for it to best represent contractors' current termination processes.

12. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1st (i.e., the data as it existed on the most recent February 1st date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 Category and job group in a single file.[2] *Provide all requested data electronically in Excel format, if available.*

a. *For all employees, compensation includes base salary, wage rate, and hours worked. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.*

b. *You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.*

c. *Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.*

CCE commends OFCCP for acknowledging that the current scheduling letter request for compensation information is not useful for conducting a meaningful evaluation of a contractor's compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.[3] The proposed item 12 moves the agency toward conducting statistical significance testing, using methodology that is widely accepted in the field of behavioral sciences, in the initial stage of a compliance evaluation—an approach that would streamline the review process

[2] 41 CFR § 60-2.17(b)(3) and (d).
[3] 41 CFR § 60-2.17(b)(3).

by eliminating perfunctory "screening" methods and multiple exchanges of information between the contractor and OFCCP.

However, several aspects of the request in proposed item 12 are problematic, particularly with respect to the practical utility of the information. In no specific order, our concerns are as follows:

- The definition of "all employees" does not necessarily comport with the definition used by contractors when developing their AAPs. For example, contract employees and temporary day laborers are not employees according to the definition provided in 1(e) of the Appendix to the EEO-1 Instruction Booklet (http://eeoc.gov/employers/eeo1survey/2007instructions.cfm), and, therefore, are excluded from the AAP. This discontinuity in defining the contractor's workforce could lead to confusion in recordkeeping and implementation of the program.

- Why February 1st? The curious selection of this fixed date leads to multiple difficulties:

    - The date means nothing to contractors, especially relative to their AAP years- a contractor can select any date as the beginning of its AAP year, and very few contractors use February 1 as that date. Therefore, a requirement to maintain and submit compensation data as of a date different from the contractor's AAP year results in discontinuity and confusion during the compliance evaluation, and also creates an unnecessary barrier to effective implementation of the contractor's AAP.

    - Such a fixed date causes temporal issues with the data during a compliance evaluation. For example, a contractor who receives a scheduling letter in late December would be evaluated on compensation information that is nearly one year old. In such a case, there would have been numerous changes in personnel, job titles, salaries and pay rates, and all factors that determine employee compensation since the "most recent February 1st date," yet these would not be included in the initial data submission. OFCCP would be reviewing outdated information in the vast majority of its compliance evaluations.

    - There could be potential coverage questions in certain compliance evaluations. For example, if a new contractor receives a scheduling letter late in the calendar year, but was not a covered contractor on the "most recent February 1st date," how would this situation be handled? The contractor would not have had an obligation to track and preserve all of the required information on the "most recent February 1st date." In such a case, requiring a contractor to reconstruct the requested compensation information for its workforce as of the "most recent February 1st date" would be a considerable burden, requiring much more time than OFCCP included in its estimate of burden hours.

- The request for compensation data for each employee "by job title, EEO-1 Category, and job group" does not mirror reality. Contractors generally do not consider employees'

EEO-1 Category or job group when determining compensation, and would never consider all three. Further, EEO-1 Category (always) and job group (almost always) are too broad to use as realistic levels of analysis when evaluating compensation data- these groupings would inevitably place together employees who were not similarly situated by any accepted legal or practical definition. In fact, one of the reasons the original Equal Opportunity (EO) Survey was not useful- and was ultimately rescinded- was because the information was requested by EEO-1 Category or job group. The request for compensation data by all of these classifications seems to serve the purpose of giving OFCCP additional ways to slice the data in hopes of "finding" a "disparity" (i.e., a post-hoc analysis), rather than conducting a meaningful evaluation of compensation data in a manner most consistent with how the contractor pays employees.

- The request for "compensation" in proposed item 12(a) creates unnecessary complexity in analyzing the data to determine whether there are gender-, race-, or ethnicity-based disparities, as well as imposing an unnecessary burden on the contractor given the lack of practical utility. For example:

    - Base salary and wage rate would be duplicative for salaried employees. The most appropriate request would be for contractors to supply a full-time equivalent salary both for salaried and hourly employees; a practice already used by most contractors.

    - "Hours worked" is not necessary for evaluating wage rates for gender-, race-, or ethnicity-based disparities. Because "hours worked" often changes during a year, asking for hours worked at the snapshot date would provide meaningless information and thus would be an unnecessary burden on contractors. Further, "hours worked," "bonuses, incentives, commissions, merit increases, locality pay, and overtime" as of the "most recent February 1st date" are nonsensical items. This information would neither be applicable to a specific date, nor would it make sense relative to February 1.

    - Requesting individual employee information on overtime pay and shift differentials places an unnecessary burden on contractors for several reasons. First, individual information on overtime pay would take additional time to obtain. Second, because compensation data are provided on a "snapshot date," such information could not be properly annualized; especially for employees who have not worked the entire AAP year. Take for example an employee who has worked one month for the company; the busiest month of the year for the contractor. The employee may have worked 20 hours of overtime during that month but would not work overtime during the other 11 months. Annualizing the atypical month would result in an inaccurate picture. Third, overtime pay is simply a percentage of the employee's hourly rate. Thus, if discrimination is occurring, it would be in the opportunity for overtime rather than the pay itself. Perhaps a better solution would be to ask the contractor how it determines overtime and shift assignments. If the policy itself is non-discriminatory (e.g., bona fide seniority system, rotating assignment, voluntary on a first-to-volunteer

basis), there would be no need for OFCCP follow-up. If, however, the policy involves management discretion, questions about overtime and shift assignments could be a topic addressed during an on-site audit.

- Bonuses, incentives, commissions, merit increases, locality pay, and overtime are different in nature from base salary or wage rate, and cannot be analyzed in the same manner. For example, eligibility for bonuses and incentives would have to be considered prior to analyzing the data. It is possible that those employees who were recently hired (e.g., just prior to February 1) were not eligible for bonus, commission, etc. Further, bonus, incentive, commission, locality pay, and overtime plans are typically paid as a percentage of another value (e.g., base salary, wage rate, or sales amount). Such mediating variables must be considered when analyzing the data under these categories; simply listing values for these categories as fields in a spreadsheet will not provide enough information for OFCCP to conduct a valid analysis to determine whether there are gender-, race-, or ethnicity-based disparities.

- Analyzing bonus and incentive data is an extremely complex and time-consuming process. To properly analyze such information, the analyst would need advanced knowledge of incentive systems in general, the organization's incentive system in particular, and statistical analysis. Given its already tremendous workload, it would be impossible for OFCCP to conduct such analyses. Furthermore, collecting such information would take a tremendous amount of contractor time—time that would be spent providing data that OFCCP could not reasonably analyze. Rather than asking for such information during the scheduling letter, a better solution would be to first determine if there are gender/race/ethnicity issues in base salary. If there are not, it is unlikely that there would be issues with incentive and bonus pay. If OFCCP found glaring issues with base pay, it would then have the option of exploring incentive and bonus pay. CCE cannot emphasize enough the contractor burden and the OFCCP difficulty in analyzing such data.

- The term "may" in proposed item 12(b) implies that contractors have the option to not submit the information listed in that paragraph, without fear of repercussion during the compliance evaluation. While we commend the agency for its flexibility and recognition that factors used to determine compensation will vary by job and by contractor, we would suggest further clarity by deleting the representative list of factors included in the proposed paragraph. Inclusion of such a list of factors may be misconstrued by both contractors and OFCCP staff as an official list of required elements in all situations when, in reality, some or all of the factors listed may not be applicable.

- The information requested in proposed item 12(c), while undoubtedly helpful in understanding a contractor's compensation system(s), potentially will be burdensome for a contractor to provide in a meaningful format. Much of this information will be specific to a particular job title in the contractor's organization, such that a contractor with a large number of job titles will need innumerable hours to gather and submit all of it.

13. Support Data for Section 503 and Section 4212 (commonly referred to as VEVRAA).

b. Copies of accommodation policies and records of accommodations granted under Section 503 and Section 4212.

A request for copies of accommodations granted creates a great concern for the privacy rights of those disabled applicants and employees requesting accommodations. Disclosure of individual accommodations granted can reasonably be assumed to indicate the related disability, and possibly the identity of the requesting individual. The proposed request, as stated, does not take into account the individual person's privacy and the fact that they are invited to confidentially disclose disabilities in order to receive accommodations. Often, such disabilities are non-apparent and immensely sensitive in nature. Requesting this information be submitted in copy form to OFCCP introduces a greater degree of risk for the individual receiving the accommodation, unlike simply reviewing this information while onsite, in which case it would remain in the individual's file.

In response to these concerns, we request OFCCP elaborate on what content is being requested for submission and how such information is purported to be used. Further, we recommend keeping the required material for submission at a general level. Summary information about the accommodations requested and granted will serve OFCCP's purpose of reviewing contractors' processes for making reasonable accommodations, without disability information being tied to a particular individual.

Conclusion

CCE thanks OFCCP and the Department of Labor for the opportunity to comment on the proposed changes to the itemized listing. We hope that this submission has raised some important issues for OFCCP to consider. It is critical that requirements on federal contractors are attainable, fair, and grounded in data that mirrors reality and allows for meaningful inferences. We hope that OFCCP considers the challenges described in this submission and anticipate that this response will stimulate positive dialogue on a variety of important topics.

Respectfully submitted,

David B. Cohen
Senior Vice President
The Center for Corporate Equality