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July 11, 2011

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

**RE: Control Number 1250-0003; Proposed Extension of the Approval of
Information Collection Requirements—Non-construction Supply and
Service Information Collection**

Dear Ms. Carr:

On behalf of the U.S. Chamber of Commerce, we are pleased to submit these comments in response to the Office of Federal Contract Compliance Programs (OFCCP) comment request concerning its proposal to extend the Office of Management and Budget (OMB) approval of the Non-construction Supply and Service Information Collections (scheduling letter and itemized listing), as published in the *Federal Register* on May 12, 2011.¹

The U.S. Chamber of Commerce (Chamber) is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region. Chamber members include a large number of federal contractors and subcontractors covered by Executive Order 11246 or otherwise within the OFCCP's jurisdiction. In addition, the Chamber represents many trade associations and state and local chambers of commerce that, in turn, represent a significant number of federal contractors and subcontractors. The proposed changes to the scheduling letter and itemized listing will have a significant impact on these members.

¹ 76 Fed. Reg. 27,670.

We have grave concerns with the proposed changes to the scheduling letter and itemized listing. Among our concerns is that the OFCCP is using the relatively obscure paperwork clearance process to enact a major policy change—a change that was explicitly rejected by Congress as recently as last year. Additional concerns include (1) the serious threat to both individual privacy and the confidential and proprietary information of businesses and (2) the tremendous increase in recordkeeping and reporting that would result if the proposed changes were implemented, without any assured benefit. Should OFCCP move forward with the proposed changes to the scheduling letter and itemized listing, the Chamber will ask that they be rejected by OMB.

End Run Around Congress

The proposed changes are a backdoor attempt for the government to begin creating a massive database of private sector compensation data. Such a provision was a component of the Paycheck Fairness Act (PFA),² legislation that was rejected by Congress as recently as last year. The provision of the PFA would have charged the Equal Employment Opportunity Commission (EEOC) with responsibilities for creating the massive database, but the purpose is still the same.

The connection between the current proposal and the rejected PFA is further evidenced by a report by the National Equal Pay Enforcement Task Force.³ The Report explicitly states as one of its goals:

2. Collect data on the private workforce to better understand the scope of the pay gap and target enforcement efforts. Private sector employers are not required to systematically report gender-identified wage data to the federal government. This lack of data makes identifying wage discrimination difficult and undercuts enforcement efforts. We must identify ways to collect wage data from employers that are useful to enforcement agencies but do not create unnecessary burdens on employers.⁴

The Report, though making no reference to the scheduling letter and itemized listing, does explicitly reference the how the PFA would have helped the government collect such information and that OFCCP may be one agency that could collect such data.⁵

² Many substantially similar versions of the bill have been introduced in recent years. S. 3772 failed a cloture vote on November 17, 2010.

³ Available at: http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

⁴ *Id.* at 5 (emphasis in original)

⁵ *Id.*

The PFA's compensation data requirements were among the many reasons employers opposed the legislation and were among the reasons Congress rejected the bill.⁶ Disregarding Congressional rejection of this proposal, OFCCP is now seeking to implement it. It is bad enough for an agency to propose an end-run around Congress through regulation, but the OFCCP is not seeking to make this radical policy change in an up-front manner, but is instead seeking to sneak it through in the Paperwork Reduction Act clearance process. Furthermore, even the National Equal Pay Task Force recognized that wage data should not create unnecessary burdens on employers. We address the inadequate burden estimates below.

Privacy Concerns

In the Supporting Statement⁷ OFCCP created in conjunction with its proposal, it rightly acknowledges that "Much of the employment data that OFCCP collects ... is viewed by the contractors who submit it as extremely sensitive."⁸ Indeed, the data that is currently collected is viewed as proprietary and confidential by many contractors and its disclosure to competitors could decrease a contractor's competitive advantage or even threaten its business model. Further expansion of the types of data collected, especially individualized compensation and benefits, will greatly exacerbate this concern.

The OFCCP provides no guarantee that this type of data will be protected from disclosure to competitors or others. It is true that the Supporting Statement states that OFCCP will give contractors an opportunity to object to the release of such information pursuant to a request under the Freedom of Information Act. OFCCP has also stated that it will not release any data it obtains during a compliance evaluation until "agency actions are completed."⁹ However, these assurances in no way guarantee that sensitive employment data will never be turned over to competitors or others.

Even if the OFCCP were to make such a guarantee, privacy concerns would still remain. Reports are replete with sensitive government data that is lost, stolen, or deliberately leaked. For example, one GAO analysis from 2007 found that "17 agencies

⁶ For example, see the HR Policy Association's Policy Brief, available at: <http://www.hrpolicy.org/documents/positions/10-55%20Paycheck%20Fairness%20Policy%20Brief%204%2025%2010.pdf>; See Statement by Sen. Michael B. Enzi, 156 Cong. Rec. S7926 (daily ed. Nov. 17, 2010).

⁷ Supporting Statement, Supply and Service Program, OMB No. 1250-0003 (formerly 1215-0072).

⁸ *Id.* at 9.

⁹ *Id.*

reported that they experienced at least one breach and, collectively, the agencies reported ... more than 788 separate incidents.”¹⁰

The inherent risks of disclosure argue against the OFCCP’s collection of individualized data at the initial steps of compliance. This is not to say OFCCP is never entitled to this information. Clearly such information may be relevant and necessary to help determine whether contractors have complied with their obligations in particular cases. However, the Chamber cannot support collecting of such information in every case. OFCCP must demonstrate some appropriate foundation before collecting such sensitive information.

Unrealistic Assumptions About Burdens

A comprehensive response to the OFCCP’s estimates of the burden the changes that would impose on contractors is beyond the scope of these comments. These comments focus on the estimates associated with new items 11 and 12, the items that we have heard the greatest concern expressed among Chamber members.

One thematic concern raised by changes proposed to both items 11 and 12 is that it appears OFCCP is moving toward a model where contractors are presumed guilty. Under current practice there is no requirement to disclose such detailed data unless some foundation exists to suggest further review is appropriate.

Item 11

OFCCP has proposed altering item 11 to require the submission of summary applicant, hire, promotion, and termination by individual racial and ethnic categories. It is also proposing to report such data by job group *and* job title (instead of job group *or* job title). The OFCCP offers little reasoning for this significant change, other than the assertion that the proposal “would result in OFCCP obtaining more accurate reporting data ...”¹¹

This is no small change and we are left to wonder whether the OFCCP intends another major policy change by focusing on job titles as opposed to job groups. The new data that contractors will be required to produce should this proposal be enacted is considerable as a single employer may have hundreds of job titles, now multiplied by the number of individual racial and ethnic categories.

¹⁰ U.S. Government Accountability Office, *Personal Information: Data Breaches Are Frequent, but Evidence of Resulting Identity Theft Is Limited; However, the Full Extent Is Unknown*, at 13 (Jun. 2007).

¹¹ Supporting Statement at 14.

OFCCP assumes that this new data request will not impose more than one additional hour per year on contractors, but this estimate is not based on any empirical data and appears to be a guess. Further, the OFCCP does not provide any explanation of how this level of information will help it in its enforcement duties. Indeed, it is our understanding that much of the data that would be created should the proposal be finalized is too small for valid statistical analysis.

Item 12

In the discussion of new item 12 in the Supporting Statement, the OFCCP concludes that by asking for individualized compensation data, it will *decrease* the burden on the contracting community. It arrives at this conclusion by suggesting that it is more burdensome for contractors to aggregate the data that they provide today. OFCCP also states:

The Compensation Questionnaire indicated that contractors spend an average of 5.23 hours to submit compensation data, and an average of 1.87 hours to submit additional compensation data (after the initial request and prior to an onsite review). The new compensation submission replaces the initial request with the follow-up request, meaning that a contractor's burden would decrease on average to 3.36 hours ($5.23 - 1.87 = 3.36$).¹²

This statement is puzzling for a number of reasons. First, it appears that the agency has not been consistent in reporting what it believes the decreased burden will be. As noted above, the agency says that a "contractor's burden would decrease on average to 3.36 hours." But on the very next page of the Supporting Statement, the OFCCP notes that it expects the contractor's burden hours under item 12 to decrease *by* 3.36 hours. The additional discussion accompanying item 12 would make it appear that the later approach is what OFCCP intends. But it is not clear and it is incumbent upon OFCCP to more clearly state its intent so that appropriate evaluation can be made by stakeholders.

Regardless, the OFCCP's claim that burden hours would be reduced is simply inaccurate. Item 12 of the proposed itemized listing would mandate submission of not just the individualized compensation figures for each employee, but several other variables relating to each employee that are not currently required to be submitted in response to the scheduling letter stage. Those variables, which may or may not impact pay, include hire date, job title, EEO-1 category, and job group. In addition, the proposed scheduling letter and itemized listing appears to mandate submission of several other data fields for each employee, including bonus data, "incentives,"

¹² Supporting Statement at 14.

commissions, merit increases, locality pay, and overtime, none of which is currently required in most audits. Obviously, it would take contractors much more time to calculate some of these variables, such as overtime and commissions, than it currently takes contractors to generate the aggregate compensation required by the current scheduling letter and itemized listing.

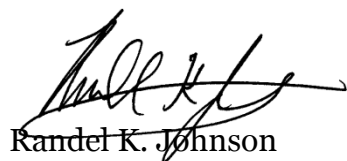
Because the agency is seeking entirely new information, it cannot rely on the Compensation Questionnaire to calculate the estimated burden. The OFCCP could conduct surveys or interviews with human resources professionals from the contractor community or utilize other tools to obtain more reliable data.

Conclusion

The Chamber has serious concerns with the proposed changes in the scheduling letter and itemized listing. We are concerned that the agency is seeking to develop a vast database of private sector compensation, a major policy change, without Congressional approval or even the protections afforded through the traditional notice and comment rulemaking process. Further, the proposed changes and additions to the Scheduling letter and itemized listing represent an opaque effort to dramatically change policy and place significant burden on contractors with any authority and without the benefit of a proper public notice and comment period. If adopted, the proposal will dramatically increase compliance costs for contractors and will threaten proprietary and confidential information. The Chamber urges the OFCCP to abandon or significantly modify its proposal.

Thank you very much for your consideration of these concerns. Please do not hesitate to contact us if the Chamber may be of assistance as you consider these important issues.

Sincerely,



Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits



Michael J. Eastman
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