



July 11, 2011

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

Via PDF file uploaded to:
<http://www.regulations.gov>

Dear Ms. Carr:

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

This letter responds to the Office of Federal Contract Compliance Programs' (OFCCP) request for public comments to the Agency's proposed changes to information collection requirements and your audit scheduling letter for federal contractors. We learned of the proposed changes via your announcement published in the *Federal Register* on May 12, 2011, and appreciate this opportunity to make comments prior to the enactment of additional requirements put upon the contractor community.

Introduction & Statement of Interest

Maly Consulting LLC (originally founded as Maly & Associates in 1986) is a human resource management consulting firm with offices in California and Maryland. Serving a nationwide client base, we specialize solely in the analysis and reporting of human resource data for equal employment opportunity (EEO) and affirmative action program (AAP) compliance. All of our clients are federal government contractors, ranging in scope and size from large, multi-national corporations to smaller organizations of less than 100 employees. We assist clients in understanding and complying with the federal regulations for affirmative action, including Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002 (38 U.S.C. 4212, or VEVRAA and JVA) and Section 503 of the Rehabilitation Act of 1973. We further assist clients by taking total responsibility for compiling, pre-analyzing, and submitting their compensation and employment data along with other required AAP documents to your agency during audits with your compliance officers. By serving clients in this capacity since the late 1980s, we are keenly aware of the need for a better understanding of and clarity in audit communications and welcome the Agency's attempts to bring this about.

Focus of Our Response

Our comments and recommendations in the next section will be limited to addressing those items in your proposed changes that we believe to be most problematic from the contractor community's point of view. We recognize the OFCCP's jurisdiction and responsibility to monitor the compliance of federal contractors through compliance evaluations and the need for information and data to conduct such evaluations. Yet, we also question whether some of your proposed changes might be overstepping jurisdiction and going a bit too far in carrying out that responsibility. We have studied the proposed changes to the OFCCP's audit scheduling letter, OFCCP's "Supporting Statement" for these proposed changes, and several legal briefings from well-regarded

employment law firms regarding these proposed changes. From that study — and from the knowledge we have in working with contractors on a daily basis in support of their record keeping and reporting obligations — we limit our comments to the following six items (and notes) in the Itemized Listing that accompanies each audit scheduling letter.

- Proposed Item 8 - Employment Leave Policies
- Proposed Item 11 - Employment Activity Data
- Proposed Item 12 - Employee Compensation Data
- Proposed Item 13 - Support Data for Section 503 and Section 4212
- Note - Requesting Data in Electronic Format
- Note - Estimate of Time Required to Meet Proposed Collection Request

Comments & Recommendations

- **Employment Leave Policies** — The request for a contractor's leave policies is an entirely new requirement. If implemented to the OFCCP's stated desire (that is sending the entire employee handbook), this request for information becomes an additional bureaucratic burden as well as an invasion of a contractor's privacy rights. We understand OFCCP's stated reason to review policies surrounding employment leaves such as Family Medical Leave Act (FMLA) and pregnancy disability leave requesting a contractor send its entire employee handbook is certainly a bit of an overreach. Our initial reaction to this proposed change was that it was unnecessary since much of employee handbooks are not related to affirmative action regulations. Then we learned through several legal sources that the OFCCP does not have the authority to even enforce the FMLA and that this request indicated the OFCCP's intent to use its "broad authority under Executive Order 11246" to share contractor information and coordinate with other government agencies, specifically mentioning the Wage and Hour Division (WHD) and the Equal Employment Opportunity Commission (EEOC). The OFCCP's own "Supporting Statement" for these changes corroborates this intent.

We recommend that the OFCCP limit the scope of its information requests to that which is absolutely necessary to its own agency investigations. In this instance, that would mean requesting copies of leave policies rather than entire employee handbooks. Federal contractors, in good faith, submit private and confidential company and employee information to the OFCCP, trusting that it will be safeguarded and used for the purpose for which it is transmitted, not exploited and compromised in ways they do not even know about and therefore cannot defend themselves against. We believe U.S. businesses, including those who do business with the federal government, should be afforded more respectful consideration than that from the government officials who serve our country.

- **Employment Activity Data** — This Item 11 request proposes significant changes to the current scheduling letter's Item 10, which requests employment activity data for applicants, hires, promotions, and terminations. For decades, MALY consultants have sought for more clarity and understanding — on the part of OFCCP's own compliance officers — as to what exactly is being stated in this request and how exactly the data should be counted by the contractor and analyzed by the OFCCP. Therefore, we appreciate any attempts to clarify "employment activity data" for both contractors and the Agency's own compliance officers. Yet this revised request for employment activity data falls short in providing any appreciable clarity.

First, the terms "data" and "analysis" are used interchangeably. Second, while we believe your request that contractors provide a definition for "promotion" is good for the process, OFCCP compliance officers need to be trained that a contractor's counts for promotion activity (current Item 10; proposed

Item 11) are often — if not always — different than the contractor's counts for "promotions" in the *placement* activity (current Item 9; proposed Item 10). Even the terms "voluntary" and "involuntary" when used with the word termination carry different meanings to different people. We are often asked by clients how to count the termination of a deceased employee. Most find it rather difficult to label this a voluntary action. Perhaps "company-generated" and "employee-generated" would be better terms. We think it could be clearer if contractors identified terminations in at least three separate ways: Voluntary Terminations, For-Cause Terminations, and Reductions-in-Force (RIFs). Further, we do not think contractors should be required to provide "pool" information for either voluntary or for-cause categories because there is no pool from which company-selections are mad). This has often been a debating point with compliance officers, which indicates a real need for further clarification.

The OFCCP's insistence on using out-dated race/ethnicity categories is also a concern to us. In the left-hand column below are the seven race/ethnicity categories that have been used by government agencies since the 2007 EEO-1 reporting cycle. In the right-hand column below are the former five race/ethnicity categories still being used by the OFCCP and quoted in its proposed Itemized Listing as the race/ethnicity categories to be used in submitting employment activity data to the Agency.

Effective as of 2007 EEO-1 Report	Current and Proposed OFCCP Categories
1. Hispanic or Latino	1. African-American/Black
2. White not Hispanic or Latino	2. Asian/Pacific Islander
3. Black or African American not Hispanic or Latino	3. Hispanic
4. Native Hawaiian or Other Pacific Islander not Hispanic or Latino	4. American Indian/Alaska Native
5. Asian not Hispanic or Latino	5. White
6. American Indian or Alaska Native not Hispanic or Latino	
7. Two or more Races not Hispanic or Latino	

We would assume that a contractor would be able to use the newer seven categories as, in most cases, these new categories have already been hard programmed into the contractor's Human Resource Information System (HRIS) and electronic Applicant Tracking System (ATS). Working with two different categorization schemes is confusing, unnecessary, and extremely burdensome for contractors. We think both clarification and standardization are needed on this issue.

If the proposed changes to submit data by *both* job group *and* job title is implemented, this change alone will double the time needed to gather, prepare, and analyze these data. The Agency's estimate of "1 hour increased burden per contractor" is laughable.

We recommend that OFCCP clarify the language used in this request to notify contractors that they are to submit the data only or submit the analysis of those data. Additionally, we recommend more explicit terminology and pool requirements be given for the termination data request. We also recommend that OFCCP provide much needed clarity on the use of race/ethnicity categorization schemes for both employees and applicants. Finally, we recommend that OFCCP leave the current scheduling letter as is

with regard to providing employment activity by job group or job title. Having to submit by both increases a contractor's time and cost burden exponentially.

- **Employee Compensation Data** — First, the phrase “employee level compensation data” is both awkward and unclear. It also represents a very significant change to the current (Item 11) request for pay data, and if approved, would require contractors to submit significantly more compensation data at the earliest (desk audit) stage of the compliance review. Basically, OFCCP's new proposal (now Item 12) is asking contractors to create a mini or sub-database (in *Microsoft Excel* format) of their employee and compensation data — and, to release these confidential and proprietary data — offsite — at the earliest point in the review. A long-standing controversy between the Agency and contractors exists over this very issue. In the late 1990s, the OFCCP also pushed hard to get authority to receive individual pay data offsite at the beginning of the desk audit. That effort failed. Today's “proposed change” is being presented in such a way as to lead reviewers to believe that we are merely seeing a simple process change rather than a controversial and complicated change that will most likely require the full, formal rule-making process. At minimum, the regulations at 41 CFR §60-1.20(f) would need to be rewritten. When OFCCP regulations are at odds with other OFCCP publications like the scheduling letter's Itemized Listing, unnecessary confusion and controversy are likely to exist.

In addition to our concerns about the OFCCP's authority to make this change without appropriate, lawful rule-making, we also question the wisdom or necessity for the universal and mandatory data date of February 1. Requiring a separate set of data from the data date of the contractor's current AAP will cause a myriad of problems. Confusion and mistakes will occur for both the contractor and the OFCCP. We know, we have experienced dueling compensation data dates in compliance reviews in the past. It is not a good situation. Furthermore, many HRIS programs cannot reach back in time for report purposes, those contractors will have to run reports each year at their AAP start date and again on the February 1 date. Therefore, this new request will add time and cost not only to those scheduled for compliance evaluations, but potentially all contractors as a new regular annual reporting requirement.

The OFCCP's proposed demand to “provide all requested data electronically” is unrealistic because many contractor systems for managing compensation are varied (using an HRIS, a separate payroll database, and supervisors' individual bonus worksheets for example). Frequently the raw data are simply not readily available in electronic format. In fact, most often, we see the factors that most affect pay — experience, education, performance — are *not* maintained electronically. Concurrently, mandating that compensation data be submitted by three categories (job title, EEO-1 category, and job group) is an excessive, overreaching demand. The time and cost to create and build this mini or sub-database for the single purpose of submitting pay data to the OFCCP would be extraordinary.

Confidentiality issues surrounding this data request will be of great concern to most contractors. Individual employee compensation data sent to the OFCCP in electronic format is extremely vulnerable to breaches of privacy and security. Results of these compromises, such as identity theft and the theft of corporate intelligence property, can be serious, costly, harmful, and long-lived for companies and employees alike.

We recommend that OFCCP follow existing AAP regulations at 41 CFR §60-1.20(f) and only allow compliance officers access to compensation data when they arrive for the onsite review process.

- **Support Data for Section 503 and Section 4212** — This proposed request for copies of a contractor's Veterans' Employment Report (VETS-100 and/or VETS-100A) for the last three years and for copies of accommodation policies and records of accommodations granted under Section 503 and Section 4212 is *new*, meaning additional burden of time and costs to comply. What is particularly troublesome about this request — and the OFCCP's request under Item 7 for three years of EEO-1 Reports as well — is that the Department of Labor already has these reports. In its "Supporting Statement" the OFCCP states under A4, page 9 (Description of Efforts to Identify Duplication), that "no duplication of effort exists because there are no other government agencies with these specific data collection requirements." This is simply not true. The VETS-100 and VETS-100A reports are a joint venture data request from the Department of Labor (DOL) and the Veterans Employment & Training Service (VETS). Likewise, the collection of data for the EEO-1 Reports is a joint venture request with DOL/OFCCP and the Department of Justice. All contractors submit their data to these two joint entities annually by September 30th. The OFCCP can monitor contractor compliance internally without asking contractors to duplicate their efforts and provide these reports a second time during OFCCP compliance evaluations. This part of the request is both unnecessary and a duplication of contractor effort.

The second part of this request (copies of accommodation policies and records of accommodations) is vague and again arduous. In most organizations, accommodations are often made to individual managers and supervisors and are not always kept track of at a central location, nor in a standardized format. This request would add time and cost to contractors' record keeping procedures in order to provide this data in a consistent manner.

- **Request for Contractor Data in Electronic Format (Note 1)** — Thankfully, this request is not mandatory — at least for now. We have observed over the years that upon first writing new rules and regulations, the OFCCP will first permit but not require an action; then in future regulation updates we see the permitted action becoming mandatory. A case in point is the request for compensation data made in this proposal. Because of the ease at which confidential electronic data can be accidentally or purposely forwarded or shared, we believe many contractors will be reluctant to provide this data in electronic format. Additionally, electronic data files do not always contain data dates or other important identifying information and some computer programs do not always export to compatible files.
- **OFCCP's Estimate of Time Required to Complete Collection Request (Note 2)** — The OFCCP estimates that the time required to complete this request for information is 26.01 hours per response. Amazing! The current scheduling letter estimates 28.35 hours. We along with our clients always chuckled at the 28-hour estimate. Now with all the additional information requested under this proposal and all the additional mandates to organize and present data differently or duplicated, the OFCCP thinks the work can be done in even less time. This is simply not possible except in cases of very small companies with no prior year employment activity to report. The OFCCP estimates of burden have always been questionable. For instance in this proposal the Agency estimates two hours to prepare a religious accommodation policy. First, the preparation of the policy is merely the tip of the iceberg. After research, legal review, rewrites and final approval, any new policy requires more time for dissemination and the training of managers, supervisors, and employees. Both this initial behind-the-scenes burden and then the ongoing burden of cost and time to maintain compliance with government mandates is rarely if ever captured in original burden estimates.

Summary and Conclusion

When President Obama issued Executive Order 13563 (January 18, 2011), "Improving Regulation and Regulatory Review," one of his stated aims was to create a regulatory process that "strikes the right balance" between issuing federal regulations on the one hand and fostering economic growth, job creation, and competitiveness on the other. Just last Friday (July 8, 2011), another Department of Labor agency (Bureau of Labor Statistics) reported the U.S. unemployment rate ticked up (again) to 9.2%, that U.S. workers hourly pay fell, and that our economy added just 18,000 jobs when economists had expected 90,000 jobs — even that is just a "sliver of the 300,000 jobs needed each month to shrink unemployment significantly." The phrases printed in Saturday morning newspapers were "excruciatingly slow growth," "remarkable, across-the-board backslide," and "every major component of the report was weak."

While we cannot blame the OFCCP directly for these dismal reports, we can see, from our bird's-eye view of working with contractors, that aggressive regulations and bureaucratic, unnecessary government reporting requirements directly effect(?) a company's desire and ability to add jobs — in the USA. For those companies that are expanding, it is often to overseas locations where the business climate is more welcoming. In this letter, we have identified many (but not all) of the problems we see in the OFCCP's request to contractors to create new, additional information for audits and to submit other data in new, different and unnecessary ways during those audits. One has to believe that OFCCP's regulatory process, as demonstrated in these proposed changes, does not "strike the right balance" that President Obama says we are looking for. Perhaps the OFCCP wants to go back to the drawing board on this proposal.

Respectfully submitted,



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