

July 8, 2011

VIA FEDERAL EXPRESS

Ms. Deborah A. Carr, Director
Division of Policy & Planning
Program Development
Office of Federal Contract Compliance Programs
United States Department of Labor
200 Constitution Avenue, N.W.
Room C-3325
Washington, DC 20210

Re: Office of Federal Contract Compliance Programs
Proposed Extension of Approval of Information Collection Requirements,
Control No. 1250-0003
Comments of General Nutrition Companies, Inc.

Dear Ms. Carr:

The following comments are submitted by General Nutrition Companies, Inc. ("GNC") in response to the Notice published in Volume 76, Federal Register, Vol. 76, No. 92, Thursday, May 12, 2011, Page 27670.

GNC is the nation's largest specialty retailer of vitamin, mineral, herbal supplements and sports nutrition supplements, as well as many personal care and related products. It is an equal opportunity and affirmative action employer, and complies with the requirements of Executive Order No. 11246, as amended, Section 303 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended.

The following comments are submitted on behalf of GNC, in opposition to the changes proposed by Office of Federal Contract Compliance Programs ("OFCCP") in its Scheduling Letter and attached information requests contained in its "Itemized Listing." Specifically, GNC objects to the burdensomeness of the new requirements in the Itemized Listing. GNC disagrees with OFCCP's contention in its "Supporting Statement" that these new requirements will reduce, rather than increase, the burden of compliance on federal contractors and subcontractors. To the contrary, the burden will be increased substantially if these changes are approved.

Changes to the Itemized Listing

GNC will not attempt to address all of the issues raised by the proposed changes. Instead, GNC will focus specifically on the requirements in the Itemized Listing reflected in new Item 8; changes in new Item 11 (current Item 10); and changes in new Item 12 (current Item 11).

1. New Item 8. Submission of employment leave policies. These new requirements call for the contractor to submit, with its initial response to Scheduling Letter, copies of all policies covering FMLA leave, pregnancy leave, and accommodations for religious observances and practices. Moreover, they require that, if those policies are contained in an employee handbook or policy manual, the entire employee handbook or manual is to be submitted.

This is a significant additional burden on contractors. Currently, copies of such documents and manuals would not be requested unless the contractor is identified for an on-site audit or there are specific follow-up questions regarding issues identified during a desk audit. This new requirement forces the contractor to identify, assemble and copy all potentially responsive documents, including the entire contents of manuals and handbooks, and submit them in each review before any indicia of a problem has been identified. This will significantly change the desk audit phase, and is a burden on the contractor which the OFCCP fails to describe correctly in its "Supporting Statement."

The OFCCP's allegation that this requirement will increase a contractor's burden by only .02 hours per contractor is completely unsupported. For one thing, each of a contractor's facilities with at least 50 employees must prepare its own written Affirmative Action Program ("AAP") and is independently subject to the Scheduling Letter and Itemized Listing requirements. Different facilities may have individual facility-specific or unit-specific leave and accommodation policies, in addition to other policies that are common throughout a contractor's total, multi-facility workforce. This means that a contractor with multiple facilities of 50 or more employees will have the burden of responding multiple times. Moreover, OFCCP does not limit its compliance reviews to one per year per contractor, so a contractor with multiple facilities could well be subject to multiple Scheduling Letters and Itemized Listing requests in any given year.

OFCCP's proposal would require the production of multiple policies, manuals and handbooks across a contractor's locations. The majority of the contents in manuals and handbooks would not even deal with leave policies, and most of the documents would only be needed if there were an identified problem with the contractor's granting of leave. OFCCP's contention that the burden of this completely new requirement is only .02 hours (six minutes) per contractor is unsupportable. GNC submits that this new requirement should not be approved.

2. Changes to Item 11 (current Item 10). Data on employment activity. This item requests specific demographic information related to applicants, hires, promotions, and terminations. Rather than characterize them by minority and non-minority, specific demographic data is required for each racial / ethnic subgroup. This requirement is inconsistent with the Uniform Guidelines on Employee Selection Procedures ("UGESP"), 41 CFR Part 60-3.15 (2) "Adverse impact determinations should ... for each such group which constitutes at least 2 percent of the labor force in the relevant labor area or 2 percent of the applicable workforce." The UGESP (which are cited by OFCCP in its Supporting Statement) recognize the difficulties of submitting and analyzing detailed data by individual race and ethnic categories as opposed to minority group versus non-minority group status, and thus do not require it for categories comprising less than 2 percent of the relevant population. OFCCP proposes no similar limit in requesting detailed data from contractors.

Moreover, contractors will be required to submit data by job group and by job title, rather than by job group or by job title. OFCCP claims that the changes to current Item 10, contained in new Item 11, would increase the compliance burden by only one hour per contractor, but offers no rational support for this contention. Again, these data would have to be submitted for both job group and job title for each facility of over 50 employees that is subject to a Selection Letter and Itemized Listing, not for each contractor. Moreover, GNC disagrees that this is the sufficient estimate for the increased burden required, even on a per facility basis.

Subsection 11 a. Applicants and Hires. OFCCP proposes to require each contractor facility with 50 or more employees to provide the new, more detailed demographic data for each job title applied for as well as each job group. This will require more detailed identification than current requirements that allow submission by job group. Also, current AAP requirements are that the contractor's facility analyze utilization of its workforce and set placement goals, for each facility's AAP, by job group rather than by job title. 41 CFR Part 60-2.15 and 2.16. There is no reason for the detailed requirement of job titles applied for as well as job groups, unless and until the job group analysis indicates possible problems that require follow-up in specific cases.

Subsection 11 b. Promotions. This change will require each covered facility of a contractor to identify and produce data as to the "actual pool of candidates who applied or were considered for promotion." Currently, promotion data are submitted by job group (consistent with the AAP analysis and goal setting regulations at 41 CFR Part 60-2.16 and 2.17). There is currently no requirement that the contractor identify the pool of candidates who applied or were considered for promotion.

Moreover, each facility would be required to "define the term [promotion] as used for each segment." of its workforce. Promotions come in a variety of "competitive" and noncompetitive" forms. Thus, promotions will include individuals who are selected from an identifiable group of competitors – such as a pool of prospective candidates in a

department or group, or a list of bidders or applicants for promotion. Promotions also include individuals who are "promoted in place" by an increase in title, responsibility and pay based on their job performance, experience and tenure. Some promotions may be based on a defined line of progression or completion of a training program. Some may be based on a mandatory job posting and bidding system. Other promotions may be determined by management from a variety of high potential individuals across departments, fields of expertise and geographic areas.

GNC had approximately 2,100 promotions during 2010 which would require many hours of review to determine the applicable pools of applicants and prospects for these promotions, if it could even be done. The first review would require determining, for example, whether the promotion was competitive, a noncompetitive promotion in place or an automatic promotion based on a line of progression. Large companies like GNC have thousands of promotions each year across multiple facilities and of various categories. The proposed requirement that contractors identify pools of potential promotion prospects and prepare descriptions for each promotion is a tremendously burdensome task, which is not required by any regulation or likely currently undertaken by most contractors.

The current requirement is that promotion data be submitted by job group, consistent with the AAP analysis and goal setting requirements. If the AAP and current support data review indicates specific problems, the OFCCP can request particularized information about the circumstances. There is no justification for placing this burden on contractors at the outset of every compliance review, where there are not even any indicia of promotion problems.

Subsection 11 c. Terminations. This proposal would require contractors to identify the "actual pool of candidates who were considered" for terminations. Currently, termination data is provided by job group, not by individual termination, and there is no requirement to identify a "pool" of termination prospects by termination. OFCCP's proposal would now require this to be done by job title as well as job group.

Terminations, like promotions, come in a variety of forms. For some terminations, such as layoffs, there may be an identifiable decisional unit from which the terminations are made. That decisional unit could be a specific department, a line of progression, an entire facility, or even a number of facilities. The new proposal would require the identification of each such decisional unit and the race, ethnicity and gender of all individuals in that decisional unit, which is well beyond any current requirement for submission at a desk audit phase. Moreover, this would include "voluntary" as well as "involuntary" terminations, and the contractor would be required to identify whether the termination is voluntary or involuntary. There will be a question in many cases as to whether a termination is voluntary or involuntary. For example, an employee who simply fails to return to work may be considered to have quit voluntarily through job abandonment, or an involuntary termination for absenteeism.

Voluntary terminations would include retirements; in which case, the "pool" could be those eligible for retirement, those who were offered retirement incentives or those who requested retirement. Involuntary terminations include disciplinary discharges, for which the "pool" may be all employees who worked for the supervisor who imposed or recommended the disciplinary discharge, or those employees who committed the same or "similar" offenses during an unspecified time period and were or were not discharged.

OFCCP suggests that there be no time allowance for all of these additional requirements, other than the assertion that in the aggregate all of these changes will result in only a "one hour increase burden per contractor". GNC submits this dramatically understates the burden of the proposed "shotgun" approach to data collection in the Itemized Listing. Contractors should not have to provide this level of information for each facility at the outset of a compliance review. If OFCCP identifies specific potential problem areas during its review of the AAP and needs additional support data, then it can properly focus its data and document requests on the relevant areas of inquiry. The approach, as currently in place, allows OFCCP to do its job while avoiding unnecessary burdens on contractors to provide data and documents where no problems exist.

3. New Item 12 (current Item 11). Employee level compensation data for all employees. Here, OFCCP requests far more extensive information on compensation than is required by the current compensation data request. OFCCP asserts in its "Supporting Statement" that these changes in its compensation submission will decrease the contractor's burden from 5.23 hours to 3.36 hours. This assertion is totally wrong.

Currently OFCCP requests aggregate compensation data, and does not request detailed data unless and until it determines in a compliance review that there are compensation indicators in the summary data that require more specific information on certain job groups or job titles. The new request would require the contractor to assemble and provide all of this information for every employee at each facility when it is initially selected for review. This would be required, even though there may never be any indication of problems that would result in such a request as a follow-up in the current review process.

New request 12 requires this submission of data for all employees, including but not limited to full-time, part-time, contract, per diem or day labor, and temporary. This appears to be a broader definition of "employee" than is currently used in parallel regulatory requirements. OFCCP's "Supporting Statement" at page 4 refers to the EEO-1 report, for example, as having been approved for data collection by OMB. (OMB No. 3046-0007). A review of the Instruction Booklet for the EEO-1 Report, (approved pursuant to OMB No. 3046-0007) states in the Appendix: "1. **Definitions Applicable to All Employers**" "e. 'Employee' ... [t]he term employee SHALL NOT include persons

*who are hired on a casual basis for a specified time, or for the duration of a specified job . . . ; persons temporarily employed in any industry other than construction, such as temporary office workers, mariners, stevedores, lumber yard workers, etc., who are hired through a hiring hall or other referral arrangement, through an employee contractor or agent, or by some individual hiring arrangement, or persons (**EXCEPT** leased employees) on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employers direction and control."*

The inclusion of per diem, day labor, temporary and contract employees appears to be inconsistent with the EEO-1 Report definition of "employee." This guarantees confusion between these two agency data collection requirements and will result in duplicate and inconsistent collection, submission and review by contractors. It will also cause confusion when OFCCP is comparing EEO-1 data on "employees" with the "Itemized Listing" compensation data for "employees." And it makes no sense to include temporary and casual workers as the data are requested only on a specific calendar day, and may not be at all representative of the normal work force of the contractor.

Under the proposal, the contractor is required to provide all compensation data for all employees, including incentives, bonuses, commissions, merit increases, locality pay or overtime, identified separately for each employee, as well as base salary, wage rate and hours worked. Contrary to the statements of OFCCP, these data are not all readily identifiable and retrievable, and would not normally be compiled and presented except in response to a specific OFCCP follow-up request in a compliance review. For example, the data are required as of February 1 of the calendar year. Is this requesting data projected for the balance of the current calendar year, which will be unknown for many types of compensation and benefits, such as bonus and incentive pay, or is it requesting data for the prior year? If the prior year, how will it be adjusted for persons no longer in the workforce, or who may have worked only portions of the prior year and therefore had varying opportunities for incentive compensation and bonuses? Even if these issues are clarified, it will be very burdensome for contractors to collect and produce all of these calculations for each employee in its initial response to a Selection Letter.

The proposal also says the contractor should 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 levels/range/grade." Absent any indication of problems with compensation, it is unreasonable and burdensome to expect the contractor to describe all the factors that may go into explaining the varied compensation and benefits for each person in the workforce at the outset of a facility compliance review. It is unclear what happens if these data on factors are not submitted at the time of the initial response. While these data might be appropriately be requested in the event OFCCP's desk audit reveals

indicia of possible compensation discrimination or issues for specific jobs or job groups, these detailed data should not be required unless and until potential problems have been identified.

The proposed requirements also state that "documentation and policies relating 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." Again, this would require the contractor to identify, assemble, copy and submit in its initial submission potentially voluminous documents describing compensation systems, bonus plans, incentive programs, and other policies and practices that may affect or determine compensation even where there is no indication of compensation problems. These policies and documents will vary by facility, depending on the types of jobs at each facility. There is no allowance in OFCCP's estimate for any time spent identifying, compiling and copying all of these policies and documents for submission by each facility that receives a Scheduling Letter.

OFCCP's representation in its "Supporting Statement," that 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 minus 1.87 = 3.36), is completely inaccurate. This request would be responded to by each facility with at least 50 employees. It clearly would not take less time to assemble all of the data and documents required by this new request than it currently takes to submit summary data. Currently there is no requirement to produce policies, documents, and explanations of compensation factors for specific jobs, unless and until OFCCP has found reason to believe there may be a problem with compensation for a specific job or job group and has made an appropriately limited follow-up request. OFCCP's sweeping new approach would place extensive and unnecessary burdens on the contractor in every facility compliance review, even those where there are no indications of problems whatever.

OFCCP's conclusion, that the "overall burden hourly changes per contractor are to decrease the current burden of 28.35 hours per contractor to 26.01 hours per contractor" completely misstates the situation in which OFCCP's proposed changes would place contractors. OFCCP's proposals significantly increase the time required and burden for each facility reviewed, and the time and burden per contractor increases with the number of facilities for which the requested data and documents much be prepared and submitted.

Confidentiality

There are important concerns about the OFCCP's assertion that the newly required and highly detailed data submitted will be treated as confidential. Much of the data requested, particularly that relates to compensation, is personal and highly sensitive, both to the individual and to the contractor. For example, a contractor's

competitors have great incentives to try to get access to a contractor's compensation and staffing levels by job title and location. Data about promotion and termination "candidates" and termination and promotion "selections" are similarly highly sensitive. Access to this type of information would enable the competitor to forecast costs, sabotage morale, recruit away valuable personnel, solicit business and otherwise gain a competitive advantage because of the data that had to be developed and submitted in compliance with the new proposed requirements.

At page 11 of its Supporting Statement, OFCCP offers an "assurance of confidentiality". OFCCP concedes that much of the data that is requested in the new proposals "is viewed by the contractors who submit it as extremely sensitive." However, the only assurance of confidentiality provided by OFCCP is that the contractor will be notified in writing if a FOIA request is made, and that OFCCP will evaluate the request for inspection and copying under the provisions of FOIA after the contractor has had an opportunity to state its objections. However, FOIA is fundamentally a disclosure statute, and its provisions do not ensure the level of confidentiality that will give contractors much comfort, especially in light of the sensitive nature of the data requested in the overly-broad new requirements.

OFCCP also states that "it is OFCCP's position that the agency will not release any data it obtained during the course of a compliance evaluation until the agency actions are completed." This gives no comfort at all to a contractor, since it expressly contemplates the potential disclosure of information once the agency's actions have been completed. This leaves the contractor with the limited protections available under FOIA to safeguard sensitive data and documents.

While OFCCP currently may be able to seek access to highly confidential and sensitive data during an on-site review, these data are not requested in all cases and for all employees. Rather, such specific requests are in the context of a specific investigation after a desk audit and after a problem has been identified. OFCCP is frequently able to provide safeguards to confidentiality when conducting an on-site review or follow-up data request. This is not the case with the sweeping demands for documents and data are made at the initial submission stage. OFCCP seeks to collect highly sensitive and voluminous data and documents that it may never need to review, and store it for potential response to FOIA requests.

FOIA requests are likely to become more frequent if OFCCP's proposal is approved. The proposed Itemized Listing itself would provide a checklist for potential FOIA requests by competitors and others, who will know what specific types of confidential data and documents OFCCP will have collected from a given contractor and facility. This is not the case under the current process, with a more limited initial request, and non-public investigative follow-up requests, if necessary. Contesting FOIA requests is yet another burden for contractors, who must resist disclosure of confidential

data and documents that may never have even been requested, and would therefore not be in OFCCP's possession, under the current procedure.

Conclusion

GNC is committed to equal employment opportunity and affirmative action compliance. However, when OFCCP's proposed changes to the Selection Letter and, in particular, the Itemized Listing, are reviewed, it is impossible to accept OFCCP's assertion that the requirements are "less burdensome than those currently in effect." The proposed changes, if approved, will substantially increase the time and burden on contractors in responding to the Selection Letter, as well as the time and burden of objecting to any potential disclosure of these sensitive, confidential documents and data under FOIA. This burden may well cause qualified federal contractors and subcontractors to question whether they are able profitably to participate in the federal contracting process. This would neither increase equal employment and affirmative action opportunities for workers nor further the federal government's interest in having qualified, cost-competitive contractors. GNC urges that the OMB not approve the requested changes in the Itemized Listing, for reasons stated above.

Respectfully submitted,



W. Carter Younger
Counsel for General Nutrition
Companies, Inc.

WCY:db