

September 7, 2014

Via Electronic Mail to: OIRA_submission@omb.eop.gov

OMB Desk Officer for the U.S. Department of Labor's
Office of Federal Contract Compliance Programs
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10235
725 17th Street, N.W.
Washington, DC 20503

**Re: Preliminary Comments of the Equal Employment Advisory Council on the
Office of Federal Contract Compliance Programs' Proposed Equal Pay
Report (1250-AA03), 79 Fed. Reg. 46562 (August 8, 2014)**

Dear Sir or Madam:

The Equal Employment Advisory Council ("EEAC") welcomes the opportunity to file these comments on the Office of Federal Contract Compliance Programs' ("OFCCP" or "the agency") proposed "Equal Pay Report" (OMB Control Number 1250-AA03). Our letter is submitted in response to the August 8, 2014 *Federal Register* notice indicating that the Department of Labor ("DOL") had submitted this information collection request ("ICR") to the Office of Management and Budget ("OMB") for review and clearance under the Paperwork Reduction Act of 1995 ("PRA"). 79 Fed. Reg. 46562.

If approved by OMB, OFCCP intends to use the proposed Equal Pay Report to annually collect from federal contractors large volumes of summary compensation data which the agency claims will help "eradicate compensation discrimination." To be clear, EEAC has been and remains supportive of reasonable, practical, and effective mechanisms to accomplish the important policy objective of ending unlawful compensation discrimination. We respectfully submit, however, that OFCCP's proposed Equal Pay Report will not satisfy these conditions, and therefore recommend that OMB require OFCCP to develop a more reasonable, practical, and effective alternative, as recommended below.

As a threshold matter, it is important to point out that a 30-day comment period for a massive new recordkeeping and reporting burden that OFCCP intends to impose on a large cross-section of the nation's employers is unreasonable. It is also premature, because at this early stage of the rulemaking process, OFCCP has not yet considered public comments on the collection instrument's underlying regulation, nor has the agency described in any meaningful detail how the collection itself will be administered. Accordingly, EEAC respectfully urges

OMB to accept OFCCP's request that OMB itself "file comment on this ICR so that the Department of Labor may consider views received from the public."

Offered below are EEAC's initial thoughts and comments on the proposed Equal Pay Report, including discussion of a less-burdensome alternative approach that we believe OFCCP should consider. Pending further consultation with our members, EEAC intends to file more complete comments with OFCCP by the November 6, 2014 deadline for this ICR's underlying Notice of Proposed Rulemaking ("NPRM"), and then again with OMB at the final stage of the rulemaking process.

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership currently includes approximately 270 of the nation's largest private-sector corporations, all of which are firmly committed to the principles and practice of workplace nondiscrimination. All of EEAC's member companies are major employers subject to the compliance, recordkeeping, and reporting requirements imposed by federal laws and regulations prohibiting workplace discrimination, and nearly all of our members are federal contractors subject to the *additional* recordkeeping, reporting, and compliance requirements imposed by Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations.

Thousands of EEAC member company establishments have been subjected to one or more OFCCP compliance evaluations since 2000, when OFCCP began collecting compensation data at the outset of each audit pursuant to the agency's ongoing effort to identify and remedy compensation discrimination. Many thousands more of our members' establishments have had actual experience responding to OFCCP's first "compensation data collection tool"—the widely discredited Equal Opportunity Survey ("EO Survey") first implemented by OFCCP in 2000 and rescinded by the agency in 2006. EEAC members thus have a direct and significant stake and interest in the outcome of this ICR's underlying rulemaking, as well as the outcome of OMB's review of the ICR itself.

BACKGROUND

OFCCP's proposed ICR is intended to implement the data collection requirements associated with the agency's August 8, 2014 NPRM entitled "Government Contractors, Requirement To Report Summary Data on Employee Compensation." 79 Fed. Reg. 46562. Briefly, the NPRM would require covered federal contractors to submit an Equal Pay Report for each of their establishments, reporting summary employee counts by EEO-1 job category, race, ethnicity, gender, and, for the previous calendar year, total W-2 wages and total hours worked for those employees.

The proposed Equal Pay Report mimics the already existing Equal Employment Opportunity Commission (“EEOC”) Employer Information Report (“EEO-1”) (OMB Control Number 3046-0007) in nearly every respect, save for the addition of reporting compensation data. OFCCP is proposing that the EEO-1 Report and the Equal Pay Report share, among other things, the same headcount, EEO-1 job categories, and race, ethnicity, and sex classifications, although importantly the effective date of the compensation data to be reported in the proposed Equal Pay Report would not be the same as the effective date of all of the remaining components of that report.

It is important to note here that EEAC and other interested stakeholders have not yet had an opportunity to comment to OFCCP on the ICR itself. The NPRM in question introduces the proposed Equal Pay Report for the first time. As part of the rulemaking process, OFCCP has invited comments on both the proposed rule and the instant ICR. Notably, however, OFCCP has yet to describe how it intends to administer this proposed mandatory collection of data, other than noting that it believes 99 percent of contractors will file via a “web-based data tool.” Nor has OFCCP detailed how that tool will be administered, or the options that federal contractors will have in interacting with it (*e.g.*, manually keying in data for each establishment, uploading a single electronic file, or both).

Given these factors, we strongly urge OMB to accept OFCCP’s request, found in the supporting statement submitted along with this ICR, to “file comment on this ICR so that the Department of Labor may consider views received from the public.” Presumably, OFCCP will incorporate the NPRM comments it receives in a revised ICR, which stakeholders will have another opportunity to review and comment on during the final stage of the rulemaking process.

COLLECTION OF SUMMARY COMPENSATION DATA AS PROPOSED BY OFCCP WILL NOT FURTHER THE AGENCY’S EFFORTS TO ERADICATE COMPENSATION DISCRIMINATION

EEAC’s concerns with the questionable utility of this particular data collection tool are already well documented. Briefly, in 2011 OFCCP announced its intention to collect summary compensation data from federal contractors, via an Advanced Notice of Proposed Rulemaking (“ANPRM”). EEAC filed two comment letters with the agency—one independently and another as a joint letter signed by several major business and human resources associations—detailing our concerns with the proposed collection and its limited utility. These letters are attached hereto for OMB’s reference.

Put simply, the results of the tens of thousands of compensation investigations OFCCP has conducted over the last decade suggest to us that the introduction of the highly burdensome new reporting requirement proposed by OFCCP is not necessary. Indeed, according to OFCCP’s own enforcement data, the agency has completed 42,800 compliance evaluations since fiscal year 2004, and in only 0.36% of those compliance evaluations (a total of 153 compliance evaluations) did the agency identify alleged compensation discrimination. Moreover, just 32 of these audits conducted over a period spanning more than 10 years were classified by OFCCP as involving a systemic pay issue. It is important to point out that the data provided to the agency during these investigations were more detailed than what OFCCP now is seeking to collect

through its proposed Equal Pay Report. This suggests to us that the alleged “widespread” compensation discrimination OFCCP is seeking to eradicate is not nearly as prevalent as the agency claims.

To be clear, EEAC is not suggesting that U.S. workplaces are free from unlawful pay discrimination. Nor are we recommending that the OFCCP should discontinue its pursuit of eradicating compensation discrimination. We do, however, respectfully and fundamentally disagree with this rulemaking’s underlying hypothesis, namely that unlawful gender- and race/ethnicity-based pay discrimination are now and have long been an endemic problem among federal contractors, and that a highly burdensome new reporting requirement of questionable utility is somehow necessary to root out or discourage this alleged discrimination.

At most, the proposed Equal Pay Report will allow OFCCP to assess each industry’s or contractor’s “wage gap,” a measure that OFCCP itself admits is composed of factors that *may* include discrimination, but which certainly does include differences that are the result of legitimate, nondiscriminatory factors as well. While the wage gap continues to be an issue that deserves further research and study, it does not and should not be used to justify the extraordinary additional burdens associated with this ICR.¹

OFCCP SHOULD BE REQUIRED TO CONSIDER LESS BURDENSOME ALTERNATIVES

Our objections notwithstanding, should OFCCP and OMB conclude that the collection of summary compensation data by EEO-1 category will further OFCCP’s enforcement objectives, we respectfully submit that OFCCP should be required to consider a less burdensome alternative to the proposed Equal Pay Report. While we acknowledge that OFCCP’s intent to collect data within the framework of a well-established structure such as the EEO-1 Report is certainly less burdensome than creating a new reporting format, we respectfully urge OMB to work with OFCCP during this early stage of the ICR-development process to consider adopting the following alternatives:

- File a single report with the Joint Reporting Committee that would satisfy both existing EEO-1 reporting obligations and the proposed Equal Pay Report. The existing EEO-1 Report is currently filed with the Joint Reporting Committee, which consists of representatives from both OFCCP and EEOC. EEOC maintains the online filing system where the reports are filed and stored. This single report alternative would obviate the need for covered federal contractors to effectively file their EEO-1 Reports twice, once with EEOC and once more with OFCCP (but with the addition of compensation data). This level of inter-agency collaboration to minimize burdens was envisioned by President Obama’s National Equal Pay Enforcement Task Force, which in 2010 issued a report stating that “[t]o avoid duplicative data collection

¹ OFCCP itself has stated “that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action.” Foreword to *An Analysis of Reasons for the Disparity in Wages Between Men and Women*, prepared by CONSAD Research Corporation for and under contract with the U.S. Department of Labor, January 12, 2009.

efforts, OFCCP and the EEOC will work collaboratively when evaluating data collection needs, capabilities, and tools.”²

- Synchronize the dates on which the EEO-1 Report and the proposed Equal Pay Report must be filed, or in the alternative, revise the Equal Pay Report so that all data on the Equal Pay Report reflect the effective date of that report and not the effective date of the contractor’s previously-filed EEO-1 Report. We submit that this is important because an employee’s position when the EEO-1 Report is filed often will not reflect his or her compensation at the end of the year. For example, an administrative assistant promoted to management *after* the EEO-1 Report has been filed will end the year with compensation not reflective of the employee’s previous position, but under OFCCP’s instructions, that same employee would have to be reported in the job category that included administrative assistants.
- Undertake a more rigorous examination of the costs and burdens associated with this ICR. Other than noting that it believes 99 percent of contractors will file via a “web-based data tool,” OFCCP has not described in any meaningful detail how this tool will work. For example, EEOC maintains a similar “web-based data tool” for completing the EEO-1 Report, which provides companies two options for completing the EEO-1 Report electronically: (1) the more burdensome establishment-by-establishment data entry method; or (2) the single, all-establishment electronic file transmission method. It will be critical for OFCCP to offer at least both of these options, and the instructions to the proposed Equal Pay Report should make this clear.
- Pilot test the Equal Pay Report, perhaps using alternative versions, to ensure that the final version is the most reasonable and effective. This is consistent with the recommendation of a report by the National Academy of Sciences (NAS), “Collecting Compensation Data from Employers,” that prior to collecting compensation data from employers, the government should conduct an independent pilot study to test both the collection instrument and the plan for use of the data. The NAS report also concludes that the government should be required to measure the data quality, the fitness for use in the comprehensive plan, the cost of data collection, and the burden on employers.
- Ensure consistency with the EEO-1 Report’s race, ethnicity, sex, and job categories, should those categories ever change.
- Ensure that OFCCP’s filing and storage methods are certified as ISO/IEC 27001- and ISO/IEC 27002-compliant and also meet the standards set forth by the Federal Information Security Management Act (“FISMA”).
- Administer the Equal Pay Report less frequently than annually.

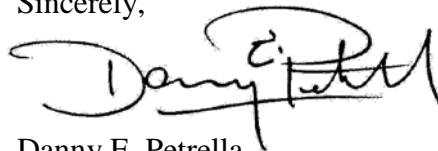
² See July 20, 2010 Equal Pay Enforcement Task Force Report, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

CONCLUSION

In conclusion, EEAC respectfully submits that the proposed Equal Pay Report will not help achieve the agency's goal of eliminating compensation discrimination, and will simply add another burdensome reporting requirement of questionable value onto the already heavily regulated workplaces of federal contractors. These objections notwithstanding, however, should OFCCP and OMB decide to move forward with approving such a collection, we recommend that OMB work with OFCCP to consider the recommendations for a less burdensome alternative as presented herein. We also look forward to providing more complete comments as the rulemaking process continues.

We appreciate the opportunity to make our views known to OMB, and would welcome any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny E. Petrella". The signature is stylized with a large, looping "D" and a cursive "Petrella".

Danny E. Petrella
Vice President, Compliance Policy

cc: Debra A. Carr
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs

Chad Lallemand
Office of Information and Regulatory Affairs

September 28, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL

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

Re: Advance Notice of Proposed Rulemaking: Non-Discrimination in Compensation;
Compensation Data Collection Tool (RIN 1250-AA03)

Dear Ms. Carr:

The following letter is submitted jointly on behalf of the following major employer associations: the Equal Employment Advisory Council, U.S. Chamber of Commerce, National Association of Manufacturers, Center for Corporate Equality, HR Policy Association, Society for Human Resource Management, College and University Professional Association for Human Resources, Associated Builders and Contractors, and The Associated General Contractors of America. Collectively, these groups represent a substantial number of the private sector employers in the U.S. who as government contractors are responsible for complying with the affirmative action and recordkeeping regulations of the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). As such, our member companies will be directly impacted by any new compensation data collection tool that OFCCP might require contractors to complete and file.

For the reasons set forth below, we are recommending that OFCCP withdraw the above-referenced Advance Notice of Proposed Rulemaking ("ANPRM"), at minimum until such time that OFCCP, in conjunction with the Equal Employment Opportunity Commission ("EEOC") and affected stakeholders, has conducted the research necessary to determine whether there is an actual need for yet *another* collection of sensitive, private sector compensation data, and if so, the least burdensome means for doing so.

In his recent jobs speech to a joint session of Congress, President Obama stated that "[w]e should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test." Notably, of the 15 questions posed by OFCCP in the ANPRM, none addresses this critical threshold issue. Rather, the ANPRM appears to assume that the need for a new compensation data collection tool already has been established, a premise that we respectfully reject. Indeed, the OFCCP already collects compensation data from thousands of contractor establishments each year, and there is nothing in the agency's enforcement procedures and compliance data to suggest that the current laws and enforcement mechanisms are failing to achieve their stated objectives.

OFCCP Enforcement Data Suggest That Current Compensation Discrimination Laws Are Functioning as Intended

OFCCP already has been collecting detailed compensation data from federal contractors since the year 2000. Employee-specific and/or aggregate compensation data are submitted in every one of the roughly 4,000 compliance evaluations conducted each year. Certainly, the literally millions of compensation data points collected from the nation's federal contractors over this period should have enabled the agency to develop a methodology to identify and root out any widespread systemic discrimination that might have existed.

In fact, according to OFCCP enforcement data that have been published since fiscal year 2006, when the agency began putting a strong emphasis on systemic discrimination enforcement, OFCCP has completed 25,503 compliance evaluations, but only *seven* (7), or 0.027% of those compliance evaluations have ended with a finding of systemic compensation discrimination. When individual cases of compensation discrimination (58) are added to that figure, the number rises only slightly to 0.255% of all compliance evaluations conducted. These figures simply do not support the assertion that compensation discrimination "continues to plague" the U.S. workforce, as stated in OFCCP's press release accompanying the ANPRM.

The So-Called Wage Gap Alone Does Not Provide the Basis for New Federal Contractor Regulation

In its ANPRM, OFCCP relies heavily on the "wage gap" as justification for the need for a new compensation data collection tool, implying that any unexplained portion of the gap is attributable to discrimination, and therefore justifies the extremely burdensome new requirement that OFCCP is proposing to mandate. We respectfully disagree. Standing alone, the wage gap simply cannot be used as the basis for new regulation or information collection. Indeed, OFCCP's own prior research into this issue produced exactly that conclusion.

Three years ago, OFCCP commissioned CONSAD Research Corporation to conduct a statistical analysis of the attributes that contribute to the wage gap. The report, titled "An Analysis of Reasons for the Disparity in Wages Between Men and Women," was published by the agency on January 12, 2009. OFCCP noted in the Foreword to the CONSAD report "that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct." Yet, in the wage gap "research literature" cited in the ANPRM, OFCCP curiously has failed to cite its own report.

We are not by any means suggesting that compensation discrimination has been eliminated from the U.S. workforce. Indeed, the CONSAD study also concluded that further research in this area was "clearly needed." The ANPRM, however, offers no indication that OFCCP either has conducted that research or commissioned a third party to do so. We respectfully submit that the ANPRM should be withdrawn until that research can be performed, some of which already is underway by other agencies.

In 2010 President Obama formed the National Equal Pay Enforcement Task Force. Among other things, a subsequent report issued by the Task Force repeatedly states that the OFCCP and EEOC would “work collaboratively when evaluating data collection needs, capabilities, and tools,” *so as to avoid duplicative efforts* (emphasis added). Given the absence of OFCCP’s own research, and the fact that EEOC has already commissioned the National Academy of Sciences (“NAS”) to conduct a study “to evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data,” it would seem both prudent and consistent with the task force’s direction for the OFCCP to withdraw its proposal pending the outcome of the NAS study.

OFCCP Has Not Justified the Significant Burden and Confidentiality Concerns That Would Be Created by Its Proposed New Compensation Data Collection Tool

President Obama's Executive Order 13563 requires federal agencies to tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations*. With the current ANPRM, the agency’s pending proposed changes to its desk audit scheduling letter and itemized listing, the Notice of Proposed Rulemaking (“NPRM”) under Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act, and the upcoming NPRM under Section 503 of the Rehabilitation Act, OFCCP is actively moving forward on four major regulatory proposals, each of which standing alone is anticipated to produce new and increased burdens on the contracting community. Accordingly, we implore OFCCP to take seriously the President’s commitment to reduce the regulatory burdens on covered contractors, rather than proceeding to create new ones such as the new compensation data collection tool.

Finally, we ask that OFCCP consider the data confidentiality implications associated with the new data collection tool. We are deeply concerned by the fact that OFCCP apparently intends to publicize contractors’ compensation data. While not stated directly in the ANPRM, OFCCP has stated separately to Congress that it “will design a web-based, searchable database system comprised of aggregated data from the Compensation Data Collection Tool.” We fail to see how publishing the compensation data of millions of American workers, even if at an aggregate level, will serve this nation’s interests.

Conclusion

For the reasons outlined above, we respectfully urge OFCCP to withdraw its ANPRM, unless and until such time as there is reliable evidence to show that a new compensation data collection tool, over and above the tools that OFCCP already uses to collect detailed compensation data from contractors, is needed. Thank you for the opportunity to comment.

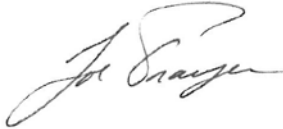
Sincerely,



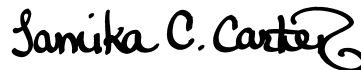
Jeffrey A. Norris
President
Equal Employment Advisory Council



Randel K. Johnson
Senior Vice President, Labor, Immigration
& Employee Benefits
U.S. Chamber of Commerce



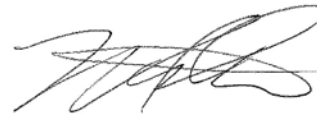
Joe Trauger
Vice President, Human Resources Policy
National Association of Manufacturers



Tamika C. Carter, PHR
Director, Construction HR
Associated General Contractors of America



David Cohen
Senior Vice President
Center for Corporate Equality



Michael D. Peterson
Director, Labor & Employment Policy
HR Policy Association



Michael P. Aitken
Vice President, Government Affairs
Society for Human Resource Management



Joshua A. Ulman
Chief Government Relations Officer
The College and University Professional
Association for Human Resources



Geoffrey Burr
Vice President, Federal Affairs
Associated Builders and Contractors

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget

October 11, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL

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

Re: Advance Notice of Proposed Rulemaking: Non-Discrimination in Compensation;
Compensation Data Collection Tool (RIN 1250-AA03)

Dear Ms. Carr:

The Equal Employment Advisory Council (“EEAC”) respectfully submits these comments in response to the Office of Federal Contract Compliance Programs (“OFCCP”) Advance Notice of Proposed Rulemaking (“ANPRM”) soliciting public input on the agency’s plans to develop and implement a new Compensation Data Collection Tool. 73 Fed. Reg. 49398 (August 10, 2011). The ANPRM seeks “comments on a series of [fifteen] specific questions about the possible design of [OFCCP’s] new data collection tool, as well as comments on other aspects of the tool that would assist the agency in carrying out its mission.”

The ANPRM does not, however, seek comment on what we believe is the most critical question on which OFCCP should be seeking public input at this initial stage of the rulemaking process, that is, *whether* such a tool should be developed and implemented in the first place. For the reasons set forth below, as well as those articulated in our September 28, 2011 comment letter jointly filed with the U.S. Chamber of Commerce, the National Association of Manufacturers, the Center for Corporate Equality, HR Policy Association, the Society for Human Resource Management, The College and University Professional Association for Human Resources, Associated Builders and Contractors, and The Associated General Contractors of America, we submit that the answer to this critical threshold question is no.

Statement of Interest

EEAC is the nation’s largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate workplace discrimination. Founded in 1976, EEAC’s membership currently includes approximately 300 of the nation’s largest private-sector employers, who collectively operate tens of thousands of individual establishments and employ more than 19 million workers in the United States alone.

All of EEAC's member companies are major employers subject to the compliance, recordkeeping, and reporting requirements imposed by federal law and regulation prohibiting workplace discrimination, and nearly all of our members are federal contractors subject to the *additional* recordkeeping, reporting, and compliance requirements imposed by Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. Many thousands of our members' establishments have been subjected to one or more OFCCP compliance evaluations since 2000, when the agency began collecting compensation data at the outset of each such review pursuant to its still-ongoing focused effort to identify and remedy compensation discrimination. Many thousands more have had actual experience responding to OFCCP's first "compensation data collection tool" — the widely discredited Equal Opportunity Survey ("EO Survey") implemented in 2000 and rescinded by the agency in 2006.

EEAC's member companies also have extensive experience conducting the proactive, "in-depth analyses" of compensation data and systems required annually by OFCCP's regulations.¹ They understand — and agree with — OFCCP's statements that "[i]nvestigations of systemic compensation discrimination are complex and nuanced," and that such investigations require a "tailoring of compensation investigation and analytical procedures to the facts of the case based on Title VII principles."² Indeed, they have told us that these OFCCP statements — and their own experience — contradict any possible credible and reliable use of the very type of data collection tool OFCCP appears now to be contemplating. Accordingly, they have urged us to make clear the direct and significant stake and interest they have in this misguided rulemaking effort.

OFCCP Has Not Demonstrated Any Credible Need for an Intrusive and Burdensome New Reporting Tool Which Would Require Employers To Disclose Highly Sensitive Pay Data

Even at this early stage of the rulemaking process when the exact form and frequency of the proposed Compensation Data Collection Tool are unknown, it seems clear that OFCCP is firmly committed to developing a new compensation data collection tool that will allow it to collect, review and retain a wide array of proprietary and confidential pay information from hundreds of thousands of the nation's private-sector employers. The result will be to impose on these jobs-producing entities yet another burdensome OFCCP mandate to collect, calculate, and disclose to the agency millions of sensitive data points on their pay and benefits decisions and policies.

In its ANPRM, OFCCP asserts that this additional regulation — and the additional burdens it will impose — are justified by the fact that "women still earn only 77 cents for each dollar earned by a man," and that the principal underlying cause for this so-called gender "wage gap" is unlawful discrimination by U.S. employers. We respectfully disagree. Empirical research into both the extent and underlying causes of the wage gap are, at best, inconclusive,

¹ 41 C.F.R. § 60-2.17(b)(3).

² See OFCCP's Notice of Proposed Rescission pertaining to the agency's 2006 Interpretive Standards for Systemic Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246, 76 Fed. Reg. 62 (January 3, 2011).

with one such study published in 2009 for the U.S. Department of Labor³ concluding that the “unexplained” wage gap — that is, the portion of the raw wage gap left unexplained after controlling for the influence of legitimate nondiscriminatory variables — is significantly narrower than the 23 cent figure cited in the ANPRM.⁴ That study’s Foreword, authored by then OFCCP Director Charles James, states

[a]lthough additional research in this area is clearly needed, this study leads to the unambiguous conclusion that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers.

Moreover, OFCCP’s own enforcement database containing the results of more than 25,000 compliance evaluations conducted since October 1, 2003 *proves* that the wage gap is *not* the result of systemic pay discrimination, at least among the thousands of federal contractor employers regulated and routinely audited by OFCCP. These data indicate that OFCCP has found unlawful pay discrimination in only a small fraction of one percent of more than 25,000 audits, all of which involved OFCCP analyses of aggregate, or in some cases detailed, compensation data, under an enforcement plan that for more than 11 years has emphasized finding and remedying compensation discrimination. These results simply do not substantiate OFCCP’s claim that compensation discrimination “continues to plague” the U.S. workforce; if anything, they appear to *disprove* that claim, at least with respect to the same employers who would become subject to OFCCP’s burdensome new Compensation Data Collection Tool.

To be sure, we are not claiming that these data suggest that U.S. workplaces are free from unlawful pay discrimination. We do, however, fundamentally disagree with this rulemaking’s underlying hypothesis, namely that unlawful gender- and race/ethnicity-based pay discrimination is now and has long been an endemic problem among federal contractor employers, and that a massive and broad new reporting requirement is somehow necessary to root out or discourage this discrimination.

³ *An Analysis of Reasons for the Disparity in Wages Between Men and Women*, prepared by CONSAD Research Corporation for and under contract with the U.S. Department of Labor, January 12, 2009, attached hereto for inclusion in the official record of this rulemaking.

⁴ Curiously, the wage gap referenced in the ANPRM is inconsistent even with nearly contemporaneous publications by other DOL offices, including DOL’s Bureau of Labor Statistics (“BLS”), whose July 2011 *Highlights of Women’s Earnings in 2010* report states that in 2010, “[w]omen earned 81 percent of the median weekly earnings of their male counterparts,” and that “the women’s-to-men’s earnings ratio has been in the 80 to 81 percent range since 2004.” In addition, the Secretary of Labor issued an August 25, 2011 *Statement on Women’s Equality Day* indicating that “women still only make 81 cents on the dollar compared to men.” Both the BLS report and the Secretary’s press release are attached hereto for inclusion in the official record of this rulemaking.

OFCCP Should Suspend This Rulemaking Effort Pending the Final Outcome of the National Academy of Sciences' Current Project Entitled *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin*

As OFCCP is aware, the U.S. Equal Employment Opportunity Commission (“EEOC”) currently is sponsoring a project being conducted by the National Academy of Sciences (“NAS”) National Research Council, through its Committee on National Statistics, entitled *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin*. The outcome of this project, which involves a panel of experts convened to “review methods for measuring and collecting pay information from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964, as amended,” will (or should) have a direct bearing on OFCCP’s efforts to develop its own Compensation Data Collection Tool, a fact which apparently led the panel to invite an OFCCP official to give a presentation during its meeting on July 21, 2011.⁵

Indeed, the Project Scope for the NAS study, available on the NAS website,⁶ describes an ongoing effort that appears to significantly overlap with OFCCP’s intent to implement a new compensation data collection tool in many important respects:

The panel will evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data. The panel will consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues. It will issue a report with findings and recommendations on what data the EEOC should collect to enhance wage discrimination law enforcement efforts, which will assist the . . . EEOC in formulating regulations at the conclusion of an 18-month study.

The seeming disconnect between the NAS study and OFCCP’s efforts to develop its own compensation “collection instrument” is troubling, especially in light of the 2010 report issued by President Obama’s National Equal Pay Enforcement Task Force, a group that includes members of both OFCCP and EEOC, that makes clear that “[t]o avoid duplicative data collection efforts, OFCCP and the EEOC will work collaboratively when evaluating data collection needs, capabilities, and tools.”⁷

At this stage of the rulemaking process, we submit that little if any evidence suggests that such collaboration has occurred. In fact, the ANPRM does not even *mention* the pending NAS study, much less explain how OFCCP’s rulemaking is being coordinated with it. Accordingly, we submit that is both prudent and consistent with the direction of the President’s Equal Pay Enforcement Task Force for OFCCP to suspend its instant rulemaking effort pending the outcome of the NAS study.

⁵ See <http://www8.nationalacademies.org/cp/meetingview.aspx?MeetingID=5355&MeetingNo=2>.

⁶ See <http://www8.nationalacademies.org/cp/projectview.aspx?key=49344>.

⁷ See July 20, 2010 Equal Pay Enforcement Task Force Report, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

OFCCP's Stated Intent To Make Public the Sensitive Data Collected by Its Proposed Compensation Data Collection Tool Raises Serious Privacy Concerns

As we explained in our September 28, 2011 joint comment letter, our members are deeply concerned by OFCCP's stated intent to publicize the highly sensitive, proprietary and confidential compensation data the proposed Compensation Data Collection Tool would collect. The ANPRM makes no mention of OFCCP's plans to disclose these sensitive data. Instead, the agency chose to publicize its intent in a separate report to Congress that offers little justification for *why* OFCCP intends to do so. Clearly, if OFCCP does indeed intend to "design a web-based, searchable database system comprised of aggregated data from the Compensation Data Collection Tool," as its recent Congressional Budget Justification states,⁸ then the agency must include these plans in the official rulemaking record, and specify which data the agency does and does not intend to publish, along with the underlying public policy goals which the agency believes will be furthered by such publication.

Conclusion

At this critical time in the nation's economic recovery, when the federal regulatory agencies are under specific direction to pursue regulatory reform initiatives that are consistent with President Obama's Executive Order 13563, we respectfully submit that a burdensome new rulemaking effort that is based on a fundamentally incorrect assumption that unlawful pay discrimination is endemic to the federal contractor community is simply the wrong policy at the wrong time. We therefore urge OFCCP to withdraw its ANPRM, unless and until such time as the agency has put forth reliable evidence demonstrating that a new compensation data collection tool is necessary and justified to accomplish a clear and compelling public policy objective. Thank you for the opportunity to comment.

Sincerely,

Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget

⁸ See, OFCCP Fiscal Year 2012 Congressional Budget Justification, available at <http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf>.