



THE MANAGEMENT ADVANTAGE, INC.

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William H. Truesdell
President

June 2, 2008

Ms. Hazel M. Bell
U.S. Department of Labor
200 Constitution Avenue NW Room S-3201
Washington, DC 20210

RE: Comments on OFCCP Request to Extend Compliance Evaluation Scheduling Letter
OMB No. 1215-0072

Dear Ms. Bell:

The Office of Federal Contract Compliance Programs (OFCCP) conducts a Desk Audit--as the first of three stages of a Compliance Evaluation of federal contractors--using data collected from contractors under what OFCCP variously calls a "Scheduling Letter" or "Notice of Desk Audit" or "Letter #1" which the Office of Management and Budget (OMB) approves (currently, number 1215-0072).¹

We are writing in response to OFCCP's request to extend that letter, without changes, for three more years. We believe extension approval should be denied unless Item #11 is removed from the Itemized Listing that is appended to the Scheduling Letter. OFCCP routinely tells contractors in audits that Item #11 permits it unbounded authority to gather whatever compensation data it wishes arrayed in various and ever-changing formats (by job title; by job group, by "all minorities," by "individual races") and OFCCP ultimately routinely springboards its asserted Paragraph 11 "permission" from OMB to demand a detailed and onerous data dump from the contractor for each employee in the contractor's establishment workforce to fuel a so-called 12 part "Mini-regression analysis." Yet, nothing in Item #11 even hints at approval of the outrageous demands this agency is routinely making of federal contractors coast-to-coast. If Item #11 is not deleted from the Itemized Listing, the entire Compliance Evaluation system should be subjected to detailed audit by the OMB with emphasis on the abuses OFCCP has brought to the community it is supposed to be fairly governing.

Anyone involved in OFCCP audits from the contractor's side of the table can tell you that the agency routinely over-reaches its authority in data collection and repeatedly returns to contractors--after it publishes the Scheduling Letter and Itemized Listing and while still in its Desk Audit mode--with demands for additional unauthorized data arrayed in any variety of unorthodox ways.

Specifically in question is OFCCP's Desk Audit analysis of contractor compensation data. The agency has created, for deployment during the Desk Audit, a three-tiered analysis with a first-tier protocol it refers to as the 2:30:3 test. This approach was allegedly developed by agency statisticians in an effort to

¹ Notice: Tuesday, May 6, 2008: "Proposed Extension of the Approval of Information Collection Requirements." 73 *Fed. Reg.* 88 pp. 25032-25033

analyze compensation data Paragraph 11 harvested for OFCCP from the contractor establishment under audit. While deployment of the 2:30:3 test does not itself violate OMB's approval of OFCCP's Paragraph 11 data request, it is what OFCCP does with the results of the 2:30:3 test thereafter that causes OFCCP to then routinely proceed beyond its Paragraph 11 authority to request much more compensation data, during the Desk Audit, than OMB ever imagined, let alone authorized OFCCP to collect.

Perhaps a look at what OFCCP is actually doing may help you understand just how abusive, burdensome and costly this Paragraph 11 "camel's nose under the tent" permission has become to contractors.

Tier 1 – 1st Pass Test

OMB has approved a list of 11 items contractors must submit to OFCCP when it begins the audit process. The "Itemized Listing" is an appendix to OFCCP's approved Scheduling Letter. Item number 11 requests annualized compensation data showing headcount for all minorities (as a group) and gender. It says specifically, **"Present these data in the manner most consistent with your current compensation system."** In the private sector where contractors most often reside, compensation is managed by job title, education, experience, job location, length of service (seniority), time in title, market rates, and a host of other factors. Seldom, if ever, are there any wage progression charts like those used in the public sector. Looking at current compensation is an incomplete method of analysis. Private sector compensation is dependent on starting rate and other decisions made over a period of time called "length of service." That length of time often spans more than one or two years. Yet, OFCCP insists on looking at a two-dimensional array of information that ignores the real causes for differences in compensation.

If a contractor uses OFCCP's protocol for Tier 1, it would do this:

- For each "pay division" (meaning job title, job group, salary level, range, band, etc.), determine the average pay for males by dividing the total annual compensation of males by the count of males. Do the same for females in each pay division.
- Compare the males with females in each pay division. If the difference is 2% or more, separate those pay divisions into two groups.
- One group would be pay divisions with the disadvantage falling to Men and the second would be the pay divisions with the disadvantage falling to Women.
- If the resulting percentage of Women at a disadvantage is a) equal to or greater than 30% AND b) at least 3 times larger than the percentage of disadvantaged males the contractor FAILS the "1st Pass Test."

The same process is repeated for minorities versus non-minorities.

It is important to understand the reason OFCCP takes the fruits of the Paragraph 11 information and is then tempted, in each and every audit, to thereafter broaden the Paragraph 11 permission for data collection and expand it so dramatically. Specifically, OFCCP has published its declaration that the preferred method for analyzing compensation is to use regression analysis.²

² Final Notice: Friday, June 16, 2006: "Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination." 70 *Fed. Reg.* 116, pp. 35124-35141 (statement of OFCCP's compensation discrimination policy.)

Final Notice: Friday, June 16, 2006: "Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination." 71 *Fed. Reg.* 116, pp. 35114-35122 (incentive to contractors to voluntarily undertake regression analyses of compensation paid.)

Tier 2 – Mini-Regression Analysis (12-Item Test)

Once the 1st Pass Test (Tier 1) has been applied and failed (which happens at least 80% of the time) OFCCP then comes back to the contractor, in derogation of Paragraph 11, and requests the contractor to re-array the data by Job Group (since almost all contractors turn the Paragraph 11 data in by “Job Title”), Tier 2 calls for a “mini-regression” analysis on data collection demands which OMB has not approved. OFCCP routinely demands database files to fuel the “Mini-Regression” analysis as part of the Desk Audit phase of OFCCP’s Compliance Review. OMB has never approved this letter which OFCCP now routinely sends to thousands of contractors every year demanding a database populated with information from ALL employees at the establishment under review.

The unauthorized letter says in part:

While the desk audit results suggest possible indicators of compensation discrimination, the results should not be regarded as a finding of discrimination with respect to the company's compensation system. The desk audit analysis is only an initial screening procedure based on limited information. Therefore, in an attempt to better understand the compensation practices at [REDACTED], we are requesting that you provide additional data for further analysis and clarification. See 41 CFR 60-1.43.

Unfortunately for OFCCP, the regulation they cite gives them reasonable access to data “on-site” if they extract it themselves from contractor sources. It does not authorize them to demand that contractors provide them with additional data at the desk audit stage. The letter goes on to list the 12 data items the agency wants.

For the next phase of our investigation, we are requesting that you provide the following information, for all employees in [REDACTED] workforce, as of the date used for the salary analysis included in the AAP.

Technically, OFCCP is entitled only to explore information regarding specific non-compliance conditions. Yet, it proclaims more and more frequently in compliance evaluations that it has discovered “indicators” and wants contractors to produce a database to be used in a mini-regression analysis.

The office completed a desk audit review of the compensation data submitted. The results of our analysis indicate unexplained differences in average compensation that require further investigation of [REDACTED] compensation practices.

It does not explain what “indicators” it has found, nor how it has found them. The demand for more data representing ALL employees is clearly a fishing expedition in violation of the *Paperwork Reduction Act*. Some legal experts proclaim those OFCCP demands to be unconstitutional under the Fourth Amendment.

In any event, if the mini-regression analyses point to “potential problems,” whatever they might be, only then will the OFCCP move to Tier 3, and perform a full regression analysis, again while still in Desk Audit mode and while still purporting to operate under the permission OMB has given OFCCP via Paragraph 11. Why? Because full regression analysis requires exceptionally time-intensive database construction, usually done by manually pouring through paper employee records to construct the history of compensation decisions necessary for proper analysis. For contractors of any size, that is an expensive and burdensome exercise.

OFCCP points to its authority for information analysis by SSEG, Similarly Situated Employee Group. SSEGs are defined as a grouping of jobs that are similar in characteristics.³ OFCCP continues to push for a minimum of 30 people in each SSEG, regardless of job content, so it can perform statistical analysis on that population. It is almost as if someone tried to analyze a group composed of horses, donkeys, zebras, mules and Shetland ponies. None of the group members are identical to any of the others, all live quite differently from each other, and each has a different monetary value. OFCCP insists on gathering and analyzing compensation data in much the same way...combining different jobs into a single pool which cannot possibly survive scrutiny. And, its behavior is in direct contradiction to its own final notice on Systemic Compensation Discrimination when it said, "...it may be expected that certain employees are not similarly situated to any other employee in the organization, workplace, or AAP. Under no circumstances will OFCCP attempt to combine, group, or compare employees who are not similarly situated under these final interpretive standards."⁴ The agency is bending and re-bending interpretations to force contractors to produce more data, well beyond what it is authorized under Item 11 of the Scheduling Letter. In fact, it often combines jobs just to achieve a headcount of 30 incumbents. At best, its methods are arbitrary. At worst, they are unreasonable search and seizure of contractor data.

When a contractor's job title populations are too small for OFCCP to analyze statistically, the agency will create artificial groupings of job titles, or use affirmative action job groups to create a failure in the 1st Pass Test. Why? Because without failure, there is no prospect for cash settlement. This is behavior in direct contravention of its stated policy.

A case in point... On its 1st Pass Test, OFCCP is now sometimes using 5% instead of 2% and requiring at least 30 females or minorities be affected within a JOB GROUP. By definition, job groups are not a representation of sameness for which identical compensation should be paid. They are used for affirmative action plan development only and are composed of job titles with similar levels of responsibility, similar compensation, and similar promotional or developmental opportunities.⁵ For example: Accountants, HR professionals, marketing planners, and public relations specialists can reside in the same Job Group for affirmative action purposes but are almost never paid the same amount. However, pulling these dissimilar jobs together to achieve a minimum headcount of 30 incumbents will almost always guarantee the agency will find compensation differences. It should. The jobs are different. Consequently, they are paid at different rates. OFCCP must force a failure at the 1st Pass Test in order to insist on moving to Tier 2, demanding more data which is not authorized at the Desk Audit phase of its Compliance Review. We believe OFCCP has arbitrarily altered its formula for the 1st Pass Test to accomplish a higher failure rate.

In short, while they are not a valid set for comparing compensation, the agency now uses analysis of job groups (SSEGs) to produce a higher failure rate, demanding more data for a Tier 2 mini-regression analysis. That demand has not been approved by OMB but is used daily by OFCCP District Directors.

If OFCCP is permitted to change its testing formulae by whim, with no public or OMB scrutiny, the contractor community will be paying an exceedingly high price for data collection and delivery. And, that is what is happening currently in Compliance Evaluations. Contractors submit their 1st Pass Test analyses showing no problems for job title testing of women and minorities. OFCCP realigns job titles into job groups, arbitrarily applies a 5% threshold and declares failure to pass the test. That allows them,

³ *Ibid*

⁴ Final Notice: Friday, June 16, 2006: "Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination." 70 *Fed. Reg.* 116, pp. 35124-35141 (statement of OFCCP's compensation discrimination policy.)

⁵ 41 CFR 60-2.12(b)

in their minds, to immediately demand full submission of the database populated with 12-items on ALL employees. They simply ignore requests to explain what out-of-compliance condition they have discovered and how they arrived at those conclusions. They also ignore contractor claims that the letter demanding 12-Item submission on all employees has not been approved by OMB as required by law. By requesting information on ALL employees, the agency is violating the requirement that it target only the out-of-compliance condition it has detected. The camel keeps poking its nose under the tent.

In summary, several things are wrong with that process.

First, OFCCP has never sought approval for its 1st Pass Test, nor for its 12-Item Mini-Regression data collection or analysis process. Second, the application and volatility of its testing formulae have never undergone any OMB scrutiny or approval. And, most importantly, the demand for a database containing 12-Items for every employee is a burden that has never been presented to OMB for its examination and approval.

Contractors don't have the slightest idea what OFCCP will demand next, nor how to react when the compliance evaluation outcome is held to their head as a loaded gun, with the threat that their contracts could be cancelled, suspended, or payments halted for work already completed. That is overreaching at its worst. And, it is an abuse of governmental authority that the *Paperwork Reduction Act of 1995* was intended to control. Obviously, the agency has ignored its responsibilities under that legislation. Contractors are hard pressed to object, given the potential for such negative outcomes if they do.

In its Tier 2, 12-Item Mini-Regression Analysis, OFCCP demands the contractor submit specific additional data elements for every employee including: Date of Hire; Date of Latest Job Placement; Date of Birth; Full-time or Part-time Status; Exempt or Non-Exempt Status; and, Work Location. None of these data items are authorized by OMB. To produce them, many contractors must dedicate scores of staff hours to pour through manual records, extracting the information OFCCP says it must have. That is in direct contradiction to OFCCP's promise to "accept the burden of gathering data and conducting the multiple regression analyses." If OFCCP wishes to conduct a mini-regression analysis, or a full regression analysis, it has obligated itself to have one of its staff extract all of the variable information and construct the database it will use in such an analysis. It has no right to demand contractors construct the database. And, it hasn't even demonstrated a legitimate reason in most cases to access the information.

Tier 3 – Full Regression Analysis

OFCCP has not been given authority to request regression analysis data from a contractor. If it wants the data it must construct its own data base from contractor documents, presuming it can make a case for legal access. "...OFCCP, not the contractor, has the burden of gathering data and conducting the multiple regression analyses. Contractors need not convert their data to electronic format for purposes of a compliance evaluation."⁶ OFCCP's "Voluntary Guidelines for Self-Evaluation of Compensation Practices" says "If a contractor decides that performing a multiple regression is too burdensome or otherwise undesirable, it can choose another self-evaluation technique without any adverse consequences from OFCCP."⁷ The agency has conveniently ignored every method of analysis other than its own.

⁶ *Ibid.*

⁷ Final Notice: Friday, June 16, 2006: "Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination." 71 *Fed. Reg.* 116, pp. 35114-35122 (incentive to contractors to voluntarily undertake regression analyses of compensation paid.)

We ask OMB to insist on OFCCP alterations to its practices, ceasing the unauthorized demands for data beyond that specified in the current Item #11. Anything less constitutes flagrant abuse of the contractor community. OFCCP is clearly bullying contractors to extract more data at the contractor's expense and burden when the agency has not bothered to seek approval for such demands.

Sincerely,

Bill Tuerdell, SHR

cc: The Office of Management and Budget
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