NATIONAL INDUSTRY LIAISON GROUP

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Harvey D. Fort
Acting Director
Division of Policy and Program Development
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C-3325
Washington, D.C. 20210

Re: National Industry Liaison Group's Comment on OFCCP's Proposed Renewal of the Approval of Information Collection Requirements
OMB No. 1250-0003

Dear Mr. Fort:

The National Industry Liaison Group ("NILG") welcomes the opportunity to comment on the Information Collection Request published in the April 12, 2019 Federal Register regarding the OFCCP's "Proposed Renewal of the Approval of Information Collection Requirements" ("Proposal").

By way of background, the NILG was created over thirty years ago as a forum for the Office of Federal Contract Compliance Programs ("OFCCP" or "Agency") and federal contractors to work together towards equality in the workplace. Throughout the country, local Industry Liaison Groups ("ILGs") have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size, and large employers across the country, have reached out to the OFCCP and other agencies, such as the U.S. Equal Employment Opportunity Commission, with mutual goals of fostering a non-discriminatory workplace. Therefore, in response to the Proposal, the NILG seeks to present the views of well over sixty local ILGs and their members.

We commend the OFCCP for, and share its commitment to, promoting equal employment opportunity and non-discrimination of applicants and employees based on race, color, religion, sex, sexual orientation, gender identity, national origin, and veteran and disability status. In our

comments below, we respectfully offer observations and suggestions designed to ensure the OFCCP is able to carry out its duty to review contractor practices and evaluate the opportunities and treatment these individuals are afforded while, at the same time, balancing the contractor community's legitimate interest in ensuring the Agency receives data reflective of the employer's actual workplace policies and workforce and minimizing administrative burdens.

The NILG has reviewed the Agency's proposed changes to (1) the Scheduling Letter; (2) Compliance Check Letter; and (3) Focused Review Letters. As set forth in more detail below, many of the changes significantly increase the burden for federal contractors, while providing little, if any, benefit to the OFCCP's stated mission. The NILG respectfully requests that the OFCCP give careful consideration to the "real world" practical consequences of the OFCCP's Proposal. More significantly, and as addressed in more detail below, the Agency's estimated burdens on federal contractors is specious, unsupported by empirical evidence, and fails to take into account real world practicalities.

In an effort to provide meaningful and concrete feedback to the OFCCP, the NILG surveyed its ILG constituents on a variety of issues raised by the Proposal, and we received responses from well over 100 contractors. The feedback regarding the estimated time spent on different tasks in responding to these Letters differs substantially from that espoused by the Agency. We respectfully request the OFCCP to heed the actual burdens that the Proposal will place on contractors.

I. RESPONSE TO SCHEDULING LETTER & ITEMIZED LISTING PROPOSAL

Addressing the issues in the order they appear in the proposed Scheduling Letter and Itemized Listing, the NILG submits the following response:

A. List of Subcontractors

The OFCCP proposes that contractors be required to submit a list of their three largest subcontractors based on contract value. In the proposed footnote, the OFCCP notes that contractors should only provide information regarding entities that provide good or services necessary to the performance of a federal contract or that perform any portion of the contractor's responsibilities under a federal contract.

Many contractors would be unable to respond to this request. Over 41% of our survey respondents replied that responding to the request would be impossible because their organizations do not track contract value just for federal contracts. For contractors able to respond to the request, the research required is immeasurable; most survey respondents indicated that this would take well over twenty hours to answer. The OFCCP should understand that federal contractors do not typically maintain special or separate accounting databases where only federal work is tracked. Most federal contractors work with a variety of subcontractors and vendors (in the generic sense), only a portion of which would be considered *federal* subcontractors. However, organizations do not usually differentiate between which entities perform federal or non-federal work. Moreover, most federal contractors work with organizations that support both federal and non-federal work, and there is not necessarily a strict apportionment between federal dollars and non-federal dollars.

For a simple example, consider the following: Company ABC contracts with the federal government to provide widgets. Company ABC subcontracts with Entity XYZ to manufacture a component that is a necessary part of the widgets. Company ABC sells its widgets to both the federal government and to non-federal entities. Company ABC pays Entity XYZ for the components it purchases, but does not itemize or separately account for which components are included in widgets sold to the federal government as compared to which goods are not sold to the federal government. Company ABC would have to conduct extensive research to calculate the "value" of its federal subcontract with Entity XYZ to determine whether it is one of its three largest subcontractors. Company ABC would have to perform that same research exercise with every subcontractor that helps it manufacture widgets. If Company ABC also sells a different product to the federal government, then the research project expands exponentially. The burden and costs will significantly increase and will be dependent on how many employees of the contractor need to be involved to identify actual monies flowing from a federal contract to specific subcontractors.

The OFCCP's proposed requirement would be extraordinarily burdensome for most federal contractors, and the necessary research would likely lead to inaccurate and/or incomplete results. This approach is not a novel approach; it is our understanding that it was tried during the Carter Administration. However, this approach was abandoned for the same reasons stated above. The use of the question C(3) on the EEO-1 Report was found to be a less burdensome, albeit imperfect, alternative.

B. Electronic Submission[1]

The OFCCP's Proposal would require all contractors to submit the requested information electronically, instead of allowing electronic submission as an option. While most of the NILG survey respondents indicated that this would not pose a problem, more than a quarter of the respondents stated that this would create an additional burden, as not all of the information required to be submitted is maintained electronically. In addition, many of our constituents express concern about electronic transmission of sensitive and confidential information. The OFCCP should be required to provide a secure portal for submission if it adopts this requirement.

C. Information Sharing[2]

The OFCCP's proposed revised Scheduling Letter advises contractors that OFCCP "may share [the information provided during a compliance evaluation] with other enforcement agencies within DOL, as well as other federal civil rights enforcement agencies with which [the agency has] information sharing agreements." Contractors oppose the provision of their information with organizations, agencies, or other entities to whom it has not specifically granted access. However, if and when the OFCCP decides to share a contractor's information, that contractor should be provided advance written notice and an opportunity to object.

[1] This same discussion applies to corresponding proposal in the proposed Focused Review Letters.
[2] This same discussion applies to corresponding proposal in the proposed Focused Review Letters.

D. FOIA Statement[3]

The OFCCP's proposed change regarding requirements under the Federal of Information Act is alarming. The proposed elimination of "Rest assured that OFCCP considers the information you provide . . . as sensitive and confidential' signals that the OFCCP no longer considers the information provided by federal contractors to be "sensitive and confidential." While the contracting community understands that the OFCCP must comply with FOIA, an acknowledgment that the information provided will be treated confidentially to the fullest extent of the law is important to contractors. Further, the OFCCP should explain its process for responding to FOIA requests, specifically, that contractors will receive notice of any such request and the opportunity to object prior to the release of any information.

E. Proposed Item 3 – Job Group Analysis

The OFCCP proposes that the job group analysis identify the *specific race* for each employee in each job group. This proposal is not supported by the regulations, which provide that contractors "must separately state *the percentage of minorities* and the percentage of women it employs in each job group. . . ." 41 C.F.R. § 60-2.13 (emphasis added). Based on this regulation, the job group analysis is not required to include the individual race categories of employees. The proposal cites to 41 C.F.R. § 60.12(c), which provides, "For any record the contractor maintains pursuant to this [record retention] section, the contractor must be able to identify: (i) the race, gender, and ethnicity of each employee. . . ." The OFCCP's citation is inapplicable. While contractors must be able to identify each employee's race and ethnicity in general, the regulation that specifically describes the requirements of the job group analysis is clear that only an accounting of all minorities combined as one group is contemplated. The OFCCP's Proposal is contrary to the express language of the regulations and should not be adopted.

Further, the majority of NILG survey respondents stated that they do not currently break out racial groups in the job group analysis. Adding such a requirement would increase the burden on contractors, a factor which the OFCCP does not seem to have taken into account in its burden assessment. Moreover, it is unlikely that software solutions (including programming, coding, and testing of the new reporting requirements) would be available to provide this and all new required reporting for at least six months or more, which would mean that contractors would be unable to comply with the new scheduling requirements for at least one AAP development cycle.

F. Proposed Item 4 – Availability Determination

The OFCCP proposes the availability determination be conducted for each separate minority group instead of for minorities as a whole. The proposal relies on 41 C.F.R. § 60-2.16(d), which provides, "The placement goal setting procedures . . . contemplate[] that contractors will, where required, establish a single goal for all minorities. In the event of a *substantial disparity* in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor *may be required* to establish a separate goal for those groups." (Emphasis added).

[3] This same discussion applies to corresponding proposal in the proposed Focused Review Letters.

The agency's proposal is based on a vague and unenforceable regulation. Contractors have no basis or definition for determining what should be considered a "substantial disparity." The NILG believes that this vague term would have to be defined through rulemaking process. Further, the regulations provide only that contractors "may be required" to set separate goals for different minority groups. It fails to specify when or how such goals would be required with any detail. The law must provide reasonable specificity; otherwise, it is unenforceable.

Even assuming that this provision was enforceable, however, this proposal would place a significant burden on contractors, especially as to the potential assessment of availability of men or women of particular minority groups. Most contractors do not have access to availability data that is broken down to that level of detail. Over 75% of NILG survey respondents stated that they do not currently consider separate racial groups when analyzing availability or setting goals, and almost half indicated that they did not have the capability of comparing the availability of women or men of a particular racial group to the representation of women or men of a particular racial group. Thus, this proposal would radically change most contractors' approach to determining availability and setting placement goals. The OFCCP has not taken the additional burden that this would create into account; this increases the assessments that must be conducted exponentially.

G. Proposed Item 6 – Placement Goals

The OFCCP proposes that contractors set placement goals for individual minority groups and for men or women of particular minority groups where there are "substantial disparities" in their utilization. For the reasons set forth in the preceding section, the NILG opposes this proposal and requests that it not be adopted.

H. Proposed Item 7 – Compensation Analysis

The Proposal would require the submission of "Results of the most recent analysis of the compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities as explained in 41 C.F.R. § 60-2.17(b)(3)." This request ignores several practicalities faced by federal contractors and should not be adopted.

First, the OFCCP can and will conduct its own analysis of the compensation data that must be submitted. The contractor's own analysis will presumably have little to no bearing on the analysis conducted by the OFCCP. Based recent experiences, our constituents advise that the OFCCP does not take contractors' specific input into account regarding their compensation systems. Presumably, contractors' analyses would be given the same lack of weight. Thus, there is little utility in providing this information.

Second, the analyses are highly sensitive and confidential. Most contractors intentionally and purposefully conduct these analyses under the attorney-client privilege so that they will be protected from disclosure. Releasing that information to the OFCCP would obliterate that protection. (Over 71% of NILG survey respondents indicated that their compensation analyses are conducted under the protection of the attorney-client privilege; almost 15% responded that they were not sure if the privilege was applicable).

Third, many contractors analyze compensation on a broader or different basis than on an establishment level. However, the request would only envision and require the submission of information relevant to the specific establishment subject to the compliance evaluation. Thus, contractors would be forced, in many instances, to perform an artificial analysis simply to have results to provide to the OFCCP. This additional burden was not included in the OFCCP's burden assessment. This additional burden to breakout an establishment's compensation and conduct a separate analysis would likely require an additional five to twenty hours, depending on employee count, costing hundreds to thousands of dollars, which was not calculated in the OFCCP's burden assessment.

Fourth, the regulations provide only that an "evaluation" of compensation be conducted. 41 C.F.R. § 60-2.17(b)(3). This may or may not include a statistical or other formal analysis of the data. For example, many contractors conduct co-hort or other basic analyses that do not involve preparation of reports or other documents that could be submitted. It is unclear as to what OFCCP is requesting and whether the contractor's complete, privileged analysis must be submitted or whether a simple written statement regarding whether disparities were identified would suffice.

At most, the OFCCP should simply request certification from the contractor that it has complied with the regulations and evaluated its compensation schemes for racial, ethnic, or gender disparities.

I. Proposed Items 9, 12, 17 - Data for Every Completed Month of AAP Year[4]

The OFCCP proposes that contractors that are more than six months into their current AAP year when the Scheduling Letter is received be required to provide current year data for every completed month of the current AAP year. Currently, the Itemized Listing requires such contractors to provide "information for at least the first six months of the current AAP year." The OFCCP fails to recognize the extraordinary burden that these requirements place on contractors. These provisions realistically demand that contractors constantly be in "audit-ready mode" so that any and all data can be submitted on a moment's notice. As discussed more thoroughly below, developing an AAP and preparing data for submission to the OFCCP is a costly and time-intensive endeavor. By requiring the submission of even more data, while not expanding the window of time provided for the submission, the OFCCP is creating a standard that most contractors cannot meet and is setting contractors up for failure.

The NILG respectfully requests that the OFCCP maintain the current language, allowing contractors to submit no more than six months of data. To constantly require contractors, month-after-month, to update their AAP data and analyses is an unrealistic and overly burdensome approach. In the event a compliance evaluation shows indicators necessitating additional data, the OFCCP can rely on its regulatory authority to garner additional information from the contractor, but imposing such a mandate on all contractors as a matter of course is punitive and draconian. The NILG is steadfastly opposed to this proposal.

[4] This same discussion applies to the corresponding proposal in the proposed Focused Review Letters.

J. Proposed Item 16 – Prior Year Goals

The OFCCP proposes that contractors analyze progress toward prior year placement goals for individual minority groups and for men or women of particular minority groups where there are "substantial disparities" in their utilization. For the reasons set forth in the sections above, the NILG opposes this proposal and requests that it not be adopted.

K. Proposed Item 17(c) – Promotions[5]

Item 17(c) of the proposed Itemized Listing requires contractors to submit data reflecting the "pool of candidates from which the promotions were selected. . . ." The NILG's constituents are concerned that this request does not reflect the reality of the majority of promotions because promotion pool information is not regularly or easily collected or tracked by the current versions of most HRIS systems. To comply with this request, contractors will need to reconfigure their systems and employ personnel to identify and input this individualized pool information. Both of these are costly and burdensome tasks.

The proposed changes also fails to account for or differentiate between competitive and non-competitive promotions, and in the event of the latter, no pool of candidates would exist. In addition, and quite significantly, the regulations do not require contractors to maintain this information. While contractors are required to maintain records "pertaining to" promotions, 41 C.F.R. § 60-1.12(a), maintaining records related to promotions does not equate to a requirement that contractors track all candidates who were possibly considered for promotions. It simply means that contractors must keep records of all promotions awarded to employees. In our constituent survey, almost 50% of respondents indicated that they do not currently track persons considered for promotions on regular or consistent basis, and the majority of respondents stated that compiling the data for this request would take more than ten hours.

The OFCCP is seeking to add a new recordkeeping requirement that does not currently exist in any of its regulations. *By doing so, the OFCCP apparently seeks to do an end-run around the rule-making process.* This is inappropriate and should not be allowed. The NILG opposes this proposed change to the Itemized Listing.

L. Proposed Item 17(d) – Terminations[6]

The proposed changes to this section of the Itemized Listing would require contractors to indicate whether a separation was voluntary or involuntary. This proposal fails to account for other types of separations. Some organizations have another category of separations, often considered administrative, when the separation is neither voluntary nor involuntary. For example, if a new hire is rejected by the federal E-Verify system, his or her employment termination is not considered voluntary, but the employer is also not making the decision to end his or her employment. Almost 40% of the NILG survey respondents stated that they utilize such an "administrative" classification for certain separation events. The OFCCP's proposal does not take such unique circumstances into account.

[5] This same discussion applies to the corresponding proposal in the proposed Focused Review Letters.
[6] This same discussion applies to the corresponding proposal in the proposed Focused Review Letters.

II. RESPONSE TO COMPLIANCE CHECK LETTER PROPOSAL

Addressing the issues in the order they appear in the proposed Compliance Check Letter, the NILG submits the following response:

A. Proposed Item 1 – Written AAPs

The NILG opposes the OFCCP's suggestion that all three written AAPs should be submitted during a compliance check. A compliance check is supposed to be "limited in scope" and "is used to determine whether the contractor has maintained required records." Requiring submission of the entirety of all three written AAPs goes well beyond the intended parameters of a compliance check and may inappropriately lead to a full evaluation of the AAPs, which is not the stated intent or purpose of a compliance check. The NILG respectfully requests that the OFCCP remove this burdensome approach to the compliance check and focus instead of a few components of one of more of the AAPs to satisfy the minimal records check.

B. Proposed Item 3 – Requests for Accommodations

Item 3 in the proposed Compliance Check Letter requires contractors to provide records of requests for accommodations pursuant to Section 503 of the Rehabilitation Act and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act. The NILG's constituents expressed concern about the feasibility of this request and the significant burden of compliance. Tracking accommodations requested and granted is not currently a requirement of the aforementioned laws or regulations or the Americans with Disabilities Act. As a result, the OFCCP's proposed requirement will impose an obligation on contractors not mandated under any federal law, which may expose the Agency to challenges to the scope of its authority.

The NILG acknowledges that contractors are required to keep records of accommodations afforded to disabled employees. However, just because contractors have a "record" of an accommodation does not mean that providing these records to the OFCCP is not burdensome. There is a significant difference between placing a note in an employee's file to record an accommodation and the maintenance of a single database to record all accommodations. For those contractors that have created a method for tracking accommodations, this request would not be as significant. However, for those contractors that have not adopted such a mechanism, reviewing every employee's file to determine whether an accommodation has been requested would create a new and substantial burden. As discussed above, it appears this proposed request attempts to impose recordkeeping obligations not currently required by the regulations. Moreover, it is significant to note that not all accommodations made are for individuals who meet the definition of a disability; many contractors will make accommodations to go beyond the statutory and regulatory requirements. It will be unclear what information must be reported. Further, many accommodations are made as a matter of course and may not be recorded by the manager involved. For example, late arrivals, meal breaks, a new chair, etc., are types of accommodations frequently made, but not memorialized.

Requiring contractors to provide records reflecting accommodations will necessitate the development of a universal process by which they can obtain this information from all of their

locations, which will be burdensome. Furthermore, this process would very likely need to be automated into the contractor's HRIS system, thereby causing the contractor community additional time and expense. Overall, the requirements set forth in proposed Item 3 will require the contractor community to expend significant time and resources – all for a requirement that goes beyond anything currently mandated by any federal law.

III. RESPONSE TO FOCUSED REVIEW LETTERS PROPOSAL

Addressing the issues in the order they appear in the proposed Focused Review Letters, the NILG submits the following response:

A. Proposed Item 1 – EO 11246 AAP

The current and proposed Focused Review Letters request submission of the contractor's Executive Order 11246 written AAP. The current letter, but not the proposed version, requires submission of the contractor's job group structure. The proposed letters provide that the AAP "will only be used to help OFCCP understand the contractor's organizational structure, confirm Section 503 job groups, and understand generally how the Section 503 compliance strategies fit with the contractor's other affirmative action efforts. . . ." (Similar language is included in the Focused Review Letter for VEVRAA).

The NILG submits that the request for the job group structure should be retained, while the request for the Executive Order 11246 AAP be deleted from the Focused Review Letters. An organization's job group structure should provide sufficient information to achieve the OFCCP's stated purpose, and the submission of the job group structure would be much less burdensome to contractors. Accordingly, the NILG requests that the OFCCP consider this more streamlined approach to the Focused Review Letters.

B. Proposed Item 8 – Self-identification Information

The OFCCP proposes to collect "[a]pplicant and employee level information on self-identification maintained for individuals with disability. . ." and protected veterans. The corresponding footnote provides that this data "must include a name or identifier unique to each applicant and employee. The unique identifier must be consistent across databases (i.e., self-identification information, compensation information, and employment activity data)."

As an initial matter, the NILG needs clarity on the request itself. Does the agency seek a list of all applicants and all employees in the AAP that self-identified as an individual with a disability or as a protected veteran? Does the agency seek a list of all applicants and all individuals employed *at any time* during the AAP year that self-identified as an individual with a disability or as a protected veteran? The proposed request is ambiguous, but based on the footnote, it appears that the latter question would be answered affirmatively. The NILG suggests that the OFCCP more clearly define the parameters of the information sought by this request.

The NILG further requests that the OFCCP specifically state that the applicant data pertains only to individuals who meet the definition of an internet applicant pursuant to 41 C.F.R. § 60-1.3,

as opposed to every individual who expressed an interest in employment. Most of those individuals are not "considered" for employment or do not possess the basic qualifications and would not be relevant to any analysis.

The notation that contractors must provide a unique identifier across "databases" is also troubling. Over 73% of NILG survey respondents noted that their organizations' applicant tracking systems and employee Human Resources Information Systems do not assign the same number to applicants and employees; only 13% of respondents indicated that their systems did so. Thus, complying with this request would require comparison of applicants to employees and manual data entry of the information. For contractors with thousands of employees, this would be a monumental task. The OFCCP fails to account for the burden this would impose.

C. Proposed Item 11 – Employment Activity Information

The OFCCP seeks to obtain very detailed information regarding a contractor's applicant and employment activity for at least the twelve-month period covered by the AAP, and much more if the contractor is more than six months into its AAP year when the letter is received. A review of items (a) through (g) reveals a substantial amount of data that would be required, including, for example, whether each applicant was hired, the job title and job group to which each applicant applied, the date an applicant was hired, whether the employee was promoted, the job title and job group of the promotion, the date of the promotion, whether the employee was terminated, the job title and job group of the termination, and the date of the termination, etc.

This item would also request "whether the employee was externally hired into the current job group or promoted to it." This particular item is problematic, as it would typically require individual research for each employee in the AAP. Unless an employee happened to be hired or promoted during the AAP year, how and when an employee joins any particular job group would not be data that is typically included in the AAP development process. Otherwise, a contractor must research each employee or develop new programming that will include this information in its standard reports. Many NILG survey respondents noted that this data is not readily available, and most indicated that providing this information would take more than five hours. Given the burden and lack of meaningful utility of the information, the NILG requests that this item be removed from the OFCCP's proposed letters.

D. Proposed Item 12 – Compensation Data

The OFCCP proposes that contractors provide employee-level compensation data for all employees, similar to what is currently requested by Paragraph 19 of the current Itemized Listing. The proposal here, however, does not include race, ethnicity, or gender information, and presumably, the OFCCP would rely on the data provided in response to proposed Item 8 to identify employees who self-identified as having a disability or as a protected veteran. Also, presumably, the OFCCP intends that use this data to evaluate whether a contractor has compensation disparities between individuals with a disability and non-disabled employees or between protected veterans and non-protected veterans. Of course, the fallacy with that logic is that the data will not allow for such an analysis. Because many disabled individuals choose not the self-identify for a variety of reasons, any analysis would only provide comparisons between individuals who chose to self-

identify and individuals who did not self-identify. Thus, any resulting analysis can have no utility and could never be the basis for any violation or enforcement action. (The same reasoning applies to the request under VEVRAA and the analysis of compensation of protected veterans).

Because providing the detailed information requested regarding employee-level compensation is extremely burdensome, and because the detailed information can in no way further the OFCCP's objectives in truly analyzing compensation disparities for these protected groups, the NILG submits that this proposal should not be adopted. Any benefit provided by the data is far outweighed by the additional burden it places on contractors.

IV. RESPONSE TO OFCCP'S BURDEN ANALYSIS

A. Proposed Scheduling Letter & Itemized Listing

Amazingly, despite all of the new data reporting requirements, the OFCCP concluded that the burden on contractors to respond to the Agency's proposed Scheduling Letter and Itemized Listing will increase only from 27.9 hours to 29 hours. The NILG believes the proposed changes would not only dramatically increase the time burden on contractors, but submit the estimated increased burden should not be based on the Agency's current 27.9 hour estimate. This is a woefully underestimated amount of time for responding to the Scheduling Letter and Itemized Listing.

Further, it strains logic and credulity to new lengths to determine that the proposed changes would only increase the burden by 1.1 hours. It is unclear to the NILG how the OFCCP arrived at this conclusion. As detailed above, the requirements contained in the proposal are undeniably more detailed and more burdensome than the obligations of the current Scheduling Letter and Itemized Listing. As it is, most contractors spend significantly more time than the current estimated time of 27.9 hours compiling the required information. Although the amount of time involved necessarily varies by contractor, establishment, and individual AAP, 91% NILG survey respondents stated that these proposed changes would substantially increase the amount of time needed to respond to the Scheduling Letter, with many stating that sixty to ninety days would be necessary to prepare the submission.

The time expended to respond to the proposed Scheduling Letter and Itemized Listing will necessarily surpass current effort levels. This is especially true given the fact some of the proposed requests will require contractors to develop new systems, implement new processes and revise existing data collection and analysis methods, while others will require contractors to collect, manually enter, and synthesize information from multiple sources. Thus, in light of the extraordinary burdens, the NILG requests the OFCCP review and reevaluate the obligations imposed by the Agency's proposed changes to the Scheduling Letter and Itemized Listing to address these concerns.

In addition, the OFCCP estimates that it takes between 18 and 105 hours to develop an annual renewal of an AAP, depending on the size of the establishment. We agree that the amount of time is influenced by the number of employees in the establishment, but note that is only one factor that affects the amount of time required. The amount of employment activity, *i.e.*,

applicants, hires, promotions, and terminations, whether remote workers or employees from other establishments are included, etc., also have a tremendous effect on the complexity of an AAP and its analyses. Moreover, the OFCCP's assessment does not appear to take into account the number of employees involved in completing an AAP or the actual cost per employee hour, but is rather some random number with no explanation regarding how it was derived. The contracting community would appreciate more transparency regarding the basis for the OFCCP's calculations in this regard. Perhaps with the information, we could provide additional information to bridge this disconnect.

Based on our members' anecdotal responses, the NILG estimates that a small AAP (approximately 50 to 80 employees) would require at least forty hours of total headcount time. A large AAP (500 to 1000 or more employees) could take at least four times as long to complete. Further, assuming that most contractors use a senior HR professional-level employee to complete the AAP, market survey data shows that the general salary without benefits would be approximately $75,000 per year. The annualized cost of completing the new AAP requirements would range anywhere from $1,442 to $5,769 for a single AAP. This cost assumes only a single employee's time. It does not reflect the time of other employees gathering and reviewing data or of legal counsel review as well.

We respectfully disagree with the Agency's conclusion that a contractor with more than 1,000 employees will spend no more time than a contractor with 500 employees in developing an AAP. Our constituents report that the larger an establishment, the more time it takes to prepare an AAP, and there is no point where this "drops off" based on size. After all, an establishment that is twice the size of another is likely to have twice as many job groups and twice as many job titles, requiring twice as many analyses.

The OFCCP's burden estimate for developing AAPs, on which it continues to rely despite the NILG's prior comment submissions calling out the speciousness of this approach, is patently unrealistic. The majority of our survey respondents stated that the OFCCP's estimates are woefully short.

B. Proposed Compliance Check Letter

The OFCCP estimates that it will take contractors two hours to respond to a Compliance Check Letter. Over two-thirds of the NILG survey respondents stated that it will take more than two hours to respond. While submitting the information sought in the Compliance Check Letter is much less burdensome than the regular Scheduling Letter, compiling, organizing, cross-checking, consulting with colleagues to obtain data, and submitting the information will typically take ten or more hours for the average contractor.

C. Proposed Focused Review Letter

The OFCCP estimates that it will take contractors 10.5 hours to respond to a Focused Review Letter. This estimate is so off-base and low that it is laughable. Almost 70% of the NILG survey respondents stated that it will take longer than 10.5 hours, and another 17% stated that they were not certain how long it would take them. Just providing a unique identifier for each applicant

and employee that is consistent in the various fields of data would likely take ten or more hours for many contractors. Add to that the other eleven items requested, and contractors are facing a significant time frame for complying with these voluminous data requests.

V. TIME PERIOD TO RESPOND TO PROPOSED SCHEDULING LETTERS

The NILG and the contractor community respect the OFCCP's investigative authority and desire to comply with the obligations to provide information to the Agency in furtherance of that objective. However, as set forth in detail above, the information requested in the Proposal is significantly more than what the Agency currently requests. Despite this significant change, the OFCCP does not propose any additional time beyond the current thirty days for contractors to respond.

The NILG suggests the allowed response time be enlarged from thirty days to at least sixty days. (Over 75% of NILG survey respondents stated that sixty to ninety days would be a more appropriate time period; less than 10% of our survey respondents believe that thirty days would represent a reasonable time period for responding to the proposed Scheduling Letter and Itemized Listing). This enlargement of time will increase the likelihood contractors will be able to timely respond, necessarily decreasing the flood of extension requests the OFCCP will invariably receive under the current Proposal. We would also request that the OFCCP delay implementation of any changes and give the contractor community at least 180 days' advanced notice to prepare for the impending changes. The NILG does not believe this suggestion burdens the Agency in any way and would greatly benefit the contractor community and aid the furtherance of equal employment and affirmative action compliance.

VI. CONCLUSION

The NILG survey provides real world responses with meaningful insight into contractors' views and expectations. The NILG submits that the results of its survey are every bit, if not more, reliable than the data upon which the OFCCP relies. The OFCCP continues, as it has in its past burden analyses, to drastically underestimate how much time various tasks require to be completed by contractors. While the contracting community understands that the OFCCP itself is not faced with responding to such detailed and excessive requests for information regarding its applicants and employees, and therefore may not possess the background and experience relevant to formulating such estimates, the Agency's repeated refusals to consider the contracting community's real world assessments and our repeated protests against such underestimations is confounding and frustrating. Thus, the NILG respectfully requests that the Proposal be viewed through a lens of compliance and practicalities and that the Agency reconsider those changes that are overly burdensome and/or provide no real benefit to the OFCCP.

Except where noted above, such as with respect to promotion pools and calculating "substantial disparities" for purposes of setting goals for individual minority groups or for certain minority groups by gender, the NILG does not generally challenge the Agency's *right* to the information sought or its authority to request it. We do, however, challenge the propriety of substantially increasing contractors' burdens where the additional information is of limited utility.

We thank the OFCCP in advance for its consideration of our comments and suggestions. If the OFCCP should wish to discuss this request, please contact Cara Crotty, NILG Counsel at ccrotty@constangy.com.

Respectfully submitted,

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