June 11, 2019

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

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

RE: Letter of Comment From The Institute for Workplace Equality on Proposed Renewal of the Approval of Information Collection Requirements—Service and Supply Scheduling and Compliance Check Letters - (OMB No. 1250-0003)

Dear Acting Director Fort:

The Institute for Workplace Equality ("IWE" or "The Institute") submits the following Comment in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP" or the "Agency") invitation for comments on its proposed Renewal of the Approval of Information Collection Requirements published in the *Federal Register* on April 12, 2019.[1]

Background on The Institute for Workplace Equality

The Institute, formerly known as The OFCCP Institute, is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors as to their affirmative action, diversity and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal and staffing functions representing many of the nation's largest and most sophisticated federal contractors.

The Institute recognizes the responsibility of all employers, including contractors, to create a nondiscriminatory workplace. We applaud and support all efforts to make the workplace freefrom all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

[1] *See*, Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.

Overview of Scheduling Letter and Itemized Listing Revisions

The OFCCP while telling contractors that it wants to make compliance evaluations more transparent and more efficient is nevertheless proposing with its revised scheduling letter and itemized listing to require contractors to provide burdensome amount of increased data prior to finding any indicators. In addition to the burdensomeness of the proposed changes, the agency has not provided contractors with any guarantees that the sensitive data it is requiring contractors to submit will be protected from third parties.

In addition to the concerns about the overall burdensomeness of the proposed changes and the lack of protection from disclosure, The Institute has outlined its specific concerns about certain proposed revisions to the letter below.

I. The Requirement to Identify a Contractor's "Three Largest Subcontractors" Is Vague and Unclear

Proposed Item 4[2] of the proposed Service and Supply Scheduling Letter would require contractors to provide "a list of your three largest subcontractors[4] based on contract value, excluding those expiring within six months of receipt of this letter." In footnote 4 to Item 4 the agency states:

> Provide only subcontractors that perform work or provide supplies or services necessary to the performance of the federal contract, and those subcontractors who perform, undertake, or assume any portion of the contractor's obligation. For more information, see 41 CFR §60-1.3 (defining "subcontract" and "subcontractor).

The term "subcontractors" appears frustratingly, deceptively simple. In reality, it is anything but.

As the Letter's footnote[3] observes, not all of a contractor's subcontracts are "subcontracts" for OFCCP purposes. OFCCP jurisdiction extends only to subcontracts which, in whole or in part, are "necessary to the performance of any one or more contracts."[4] The term "necessary" is not defined.

OFCCP has consistently struggled with identifying subcontractors over which it has jurisdiction. And Contractors have struggled for years — truly, since the regulations were issued — to determine which subcontracts are "necessary" to their performance of a federal contract. Clearly, the regulations do not intend for *every* subcontract to be covered by their reach. If that were the intent, their language would simply extend to all subcontracts; there would not be an express qualifier that limits coverage to only subcontracts "necessary" to the prime contract. But, there is no clear place to draw the line, no criteria a contractor can use to assess this "necessary" threshold. Further, contractors are not obligated to confirm a subcontractor's status as a covered subcontractor, but to put the subcontractor on notice that its relationship with the covered contractor could subject it to OFCCP regulations.

Consider the following example. A company has a contract with the U.S. Army to build armored vehicles. A subcontract for the vehicles' engines is "necessary" to the prime contractor's performance of its contract. A vehicle cannot move without an engine, thus, the contractor could not deliver on its commitment to the Armey without that subcontract. But, what about the company who supplies fuses for their control panel? Or rivets for the armor? Or material for the seat? Or, the company who services the

[2] *Id.*
[3] *Id.*
[4] 41 CFR §60-1.3.

contractor's machinery, or provides safety equipment for its workers? Each of those subcontracts is also "necessary" for the prime contractor to deliver a satisfactory final product, without which the company could not "perform" its federal contract.

The plain meaning of "necessary" is "absolutely needed; required."[5] Taken to the extreme, to its logical conclusion, that would encompass anything and everything that allows a company to operate. Without a regulatory definition for the term "necessary," contractors cannot distinguish between subcontracts that fit this category, and those that do not.

Perhaps even more importantly, there is no way for a company to know if its judgment will match that of OFCCP. Say a company determines, based on its knowledge of its business, operations, products, and services, which subcontracts are "necessary" to its performance of a first tier federal contract. Such is for naught, if OFCCP determines the necessity of the product or service was assessed incorrectly. And it is common, indeed, for contractors and OFCCP to have divergent views.

A company engaged in good faith efforts at compliance, including those that properly notify its subcontractors of their potential obligations, could nonetheless find itself in violation of this Item 4 requirement. The requirement is simply too vague to impose upon contractors.

A. The Requirement to Identify a Contractor's "Three Largest Subcontractors" Is Not Supported By Law.

No law or regulation requires a covered prime federal subcontractor to identify, track, or "rank" its OFCCP-covered subcontractors. This proposed requirement lacks any legal support or justification, and should not be implemented.

OFCCP may point to federal contractors' obligation to provide certain "notices" to companies who are covered subcontractors.[6] However, contractors currently satisfy these requirements by including the appropriate OFCCP citations and clauses in *all* their subcontracts, with prefatory language explaining they should be given effect "as applicable." This is fully compliant with OFCCP requirements, and is a practice long accepted by the Agency.

There is, in other words, no current requirement that a contractor painstakingly determine (i) whether a subcontract will be providing goods or services towards a federal contract, (ii) if so, whether the value of those goods and services is over $50,000, and/or (iii) if so, whether those goods or services are "necessary" to performance of the prime contract. Companies certainly are not required to determine whether such a subcontract is one of the company's three largest at the time it receives a scheduling letter.

Nowhere in Executive Order 11246,[7] Section 503 of the Rehabilitation Act,[8] the Vietnam-Era Veterans Readjustment Assistance Act ("VEVRAA"),[9] or any of their implementing regulations, is a federal contractor required to specifically identify each of its covered federal subcontractors, — much less, to rank those subcontractors by size. OFCCP would exceed its authority if it implements a Scheduling Letter with the proposed Item 4.

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[5] *See*, Merriam-Webster's Dictionary, available at https://www.merriam-webster.com/dictionary/necessary.
[6] *See*, *e.g.*, 41 CFR §60-1.4(a)(8) and (c) (covered contractors must include the OFCCP's EEO clause in all non-exempt subcontracts); 41 CFR §60-1.40(a)(2) (contractors "must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if [it meets certain criteria]").
[7] Executive Order 11246 of Sept. 24, 1965, 3 CFR, 1964–1965.
[8] Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.
[9] Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 4212.

B. The Requirement to Identify a Contractor's "Three Largest Subcontractors" Is Burdensome

OFCCP fails to appreciate the time and effort it would take contractors to identify and isolate its "three largest [necessary] subcontractors." OFCCP estimates a "public reporting burden" of "29 hours" for the *entirety* of the twenty-one (21) items in revised Scheduling Letter.[10] This is a naïve underestimation. It could take 29 hours, or more, simply to comply with this Item 4 requirement.

OFCCP seems, fundamentally, not to understand how businesses operate. In this electronic age, the Agency appears to believe that a contractor need only enter criteria and run a quick report, then its system will produce a neat list of subcontracts, ranked in order of size and relative importance. If only that were true.

The reality is, it will take a great deal of manual effort to identify which subcontracts are, or theoretically may be, covered by OFCCP obligations. Companies are not currently required to make that identification, and do not have processes in place to do so. Identification of federal "subcontracts" is thus a time-intensive exercise, wherein companies must manually review all their existing contracts with suppliers and service providers. For large companies, in particular, there could be hundreds of such contracts. Many subcontracts call for goods or services that go to both commercial contracts, and federal ones, within the same entity. It can be difficult, if not outright impossible, to untangle exactly which goods or services end up where. That is particularly true when adding the ambiguous and confusing requirement that such goods or services be "necessary" to performance of the prime federal contract.

Employers will need to pull in people from procurement, HR, compliance, legal, and other departments, to undertake this involved and difficult identification task. That means substantial time away from their job duties, and business operations. That is an incredible burden to add to contractors, who already have a host of obligations and requirements under OFCCP.

C. The Requirement to Identify a Contractor's "Three Largest Subcontractors" Will Have A Negative Chilling Effect on Subcontracting

An OFCCP-covered subcontractor becomes bound by all the same compliance obligations as a first-tier prime contractor.[11] It is thus no small matter for a contractor to put a company's name forth, to OFCCP, as a covered entity subject to review.

Under OFCCP's proposal, the prime contractor alone, and subjectively, determines which three subcontractors to list for OFCCP as the "largest" providing "necessary" goods or services to its prime contract. Yet it is entirely possible those named subcontractors would not know, and could not know, they are providing goods or services towards a federal contract. How? Because many prime federal contractors also have a thriving commercial business. A subcontractor could enter into contracts with a company with a strong commercial presence, wholly unaware that company also has federal contracts for the same good or service.

For instance, a food service company may supply to both grocery stores, and military bases. It buys packaging materials from three different suppliers. How can any given supplier know whether its

[10] *See, Note to Reviewer-Supporting Statement Supply and Service Program*, IMB No. 1250-003 (April 12, 2019) available at https://www.regulations.gov/document?D=OFCCP-2019-0002-0005.
[11] *See, e.g.*, 41 CFR 60-1.40 (affirmative action programs).

baskets are going to the military bases, or the grocery stores, or some combination thereof? The prime contractor is not required to separately track where different volumes of subcontracted goods or services are used. Thus, the subcontractor has no way of knowing if its goods — much less, what portion of its goods (over $50,000?) — go into a federal contract, or whether such goods are deemed "necessary" to performance of such contract. It can be impossible to untangle the supply stream when multiple employers supply goods or services to a business with both commercial and federal contracts.

Many companies have done a cost-benefit analysis, and deliberately chosen not to become federal contractors. The time and expense of creating company-wide affirmative action programs, tracking applicants, etc. (to name just a few OFCCP requirements), simply outweighs the value of many federal contracts. That is a company's prerogative, as a business judgment. Yet under OFCCP's proposed Item 4, these businesses, despite all efforts to the contrary, could be named to a federal enforcement agency, and brought within the scope of review and auditing, wholly without their knowledge, control, or consent. Rather than face this possibility, many companies will simply stop doing business with any employers who have federal contracts.

Proposed Item 4 will almost certainly cause companies to decline business with a federal contractor — even if they believe their particular contract is for commercial goods or services —lest they be reported, potentially inaccurately, under Item 4. This will have a chilling effect on commerce. It may deprive federal agencies of the goods and services they require, when prime contractors are unable to obtain the subcontracts needed for their work.

II. Changes to the Way Contractors Perform Utilization Analyses Should Be Implemented through Formal Notice and Comment Rulemaking, Not a Revised Scheduling Letter and Itemized Listing

Items 3 – 6 of the agency's Proposed Scheduling Letter and Itemized Listing[12] request information related to a contractor's evaluation of its workforce representation as compared to the available pool of qualified individuals:

1. For each job group, a statement of the percentage of minority and female incumbents as described in 41 CFR § 60-2.13.[13] Per 41 CFR § 60-1.12(c) please identify the specific race for each employee contained within each job group.

2. For each job group, a determination of minority and female availability that considers the factors given in 41 CFR § 60-2.14(c)(1) and (c)(2). Also, per 41 CFR § 60-2.16(d), provide the availability for each job group by race/ethnicity used to determine whether there were substantial disparities in the utilization of specific minority groups such that separate goals for those groups may be necessary.

3. For each job group, the comparison of incumbency to availability as explained in 41 CFR § 60-2.15.

4. Placement goals for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability as described in 41 CFR § 60-2.16.

[12] *See,* Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.

[13] The term "race/ethnicity" as used throughout the Itemized Listing includes these racial and ethnic groups: African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White. [Contractors] also have the option of submitting the requested data using the race and ethnic categories on the EEO-1 Report.

> Also, per 41 CFR § 2.16(d), provide information sufficient to determine whether there were substantial disparities in the utilization of any one particular minority group or the utilization of men or women of any one particular minority group, such that separate goals for these groups may be necessary.

Taken together, these proposed items of the Scheduling Letter and Itemized Listing appear to require – for the first time - that all contractors evaluate workforce representation by specific minority/ethnicity groups, as well as the intersectionality between specific minority/ethnicity groups and gender, as part of their annual affirmative action plan (AAP), and to submit such information to the OFCCP in response to a Scheduling Letter. Although not entirely clear, these proposed information collection requests also appear to impose a second, also entirely-new obligation to set placement goals by specific minority groups and/or for men or women of specific minority groups as part of a contractor's annual AAP. The Institute respectfully submits that these proposed information collection requests go well beyond the current regulatory requirements, are not accounted for in the agencies estimates of burden. Thus, they should only be implemented through a formal rulemaking process, with appropriate notice and public comment.

The current Executive Order 11246 regulations do not require that contractors prepare utilization analyses by individual race unless and until required to do so by the agency after the agency establishes a pattern of underutilization. The relevant section[14] of the regulations provide as follows:

> 41 CFR Section 60-2.14: The contractor must separately determine the availability of <u>minorities and women</u> for each job group . . .
> 41 CFR Section 60-2.15: The contractor must compare the percentage of <u>minorities and women</u> in each job group. . .with the availability for those job groups. When the percentage of minorities or women is less than would be reasonably expected given their availability in that particular job group, the contractor must establish a placement goal.

Another section of the agency's regulations makes clear that any placement goals are set as a "single goal for all minorities" in the annual plan development process, but that a contractor could be required, presumably by the agency, to establish separate goals for particular minority groups:[15]

> <u>The placement goal setting process described above contemplates that contractors will, where required, establish a single goal for all minorities</u>. 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, <u>a contractor may be required to establish separate goals</u> for those groups.

Taken together, the agency's current regulations contain absolutely no requirement that contractors gather availability data, evaluate utilization or set placement goals on anything but a total minority basis, unless and until the agency identifies a substantial disparity in the utilization of a specific minority group. Said another way, while the regulations contemplate that the OFCCP may ask a contractor to set placement goals for a particular minority group when a substantial disparity is identified, there is nothing in the regulations that otherwise requires contractors to collect availability data or perform utilization analyses by specific minority/ethnicity as part of their annual affirmative action planning. Indeed, the OFCCP's own sample Executive Order 11246 AAP does not include or evaluate

[14] 41 CFR Sections 60-2.14 and 60-2.15 (emphasis added).
[15] 41 CFR Section 60-2.16 (emphasis added).

availability data by particular minority/ethnicity group.[16]

Given that the current regulatory scheme clearly contemplates that utilization analyses will be performed on a total minority basis, and not by specific race/ethnicity group, the burden estimates for these regulatory requirements do not account for the additional time required to gather and prepare additional availability analyses by specific minority group or by gender and specific minority group. The current information collection also does not account for these increased burdens.

While the Supporting Statement for the proposed information collection revisions reflects a slight increase in the total burden hours for creating an initial AAP, preparing an annual update, and maintaining an AAP, the increase is solely "attributable to the higher number of contractor establishments used in the current ICR compared to the previous ICR."[17] The agency's burden estimates, therefore, do not include an increase in the number of hours to prepare these new utilization analyses, despite the fact that contractors will be required to gather, evaluate and maintain availability and utilization information for 5-7 different specific races, compared to the current, single analysis of total minority availability and utilization.

The ICR also does not include an increase in burden hours related to preparing availability and utilization analyses of men and women of a particular minority group, even though these analyses are not performed by contractors under the currently-approved supply and service program, or information collection requests. On a more practical level, it also is important to note that availability data for women and men of a particular minority group is not readily available. In order to provide the information requested by the OFCCP's proposed revisions, contractors would have to manually compile and create availability data for these populations.

For the above reasons, these proposed changes to the Scheduling Letter are more appropriately classified as substantive changes to a federal contractor's obligations under Executive Order 11246. Revisions of this nature should be promulgated through notice and comment rulemaking, and not through an information collection revision.

Recommendations to OFCCP

If the agency decides to move forward with its proposed revised information collection request, The Institute recommends the agency clarify the proposed information collection in several important ways.

First, the OFCCP should not require contractors to produce this information for affirmative action plans that are already completed, but not yet submitted to the agency for review. For example, the OFCCP should not expect a contractor with a January 1, 2019 AAP to produce this information to the OFCCP if the contractor is scheduled for a compliance review in 2019, or at any time after the effective date of the current year affirmative action plan when the Scheduling Letter is finalized. The reason for this is simple. Since the current regulations and Scheduling Letter do not require contractors to evaluate workforce representation and availability by particular minority group or for men or women of any one particular minority group, requiring production of this information after the beginning of a contractor's AAP year is inherently unfair. Contractors should not be required to go back and revise their current year AAP to

[16] *See Sample Executive Order AAP*, available on OFCCP's website at https://www.dol.gov/ofccp/regs/compliance/AAPs/Sample_EO11246_AAP_final_01.03.18_Contr508.pdf.
[17] *See, Note to Reviewer-Supporting Statement Supply and Service Program*, IMB No. 1250-003 (April 12, 2019) available at https://www.regulations.gov/document?D=OFCCP-2019-0002-0005.

evaluate requirements that were not in place at the time the AAP was completed. This is particularly true for placement goal analyses, which contemplate that a contractor will make good faith efforts during the plan year to address any areas of underutilization. Since these requirements would not have been in place at the beginning of the current AAP year for many contractors, these contractors will have had no opportunity to evaluate and develop action-orientated programs to address any substantial disparities in the utilization of any one particular minority group or the utilization of men or women of any one particular minority group.

In addition, if the OFCCP decides to move forward with this proposal, The Institute requests the agency explain through additional guidance to contractors how it will determine if a "substantial disparity" in the utilization of any one particular minority group exists. This term is currently undefined in the OFCCP's regulations and is not used in the regulatory sections related to total minority and female utilization analyses, which require that contractors set a placement goal when "the percentage of minorities or women employed in a particular job *group is less than would reasonably be expected* given their availability percentage in that particular job group." 41 CFR Section 60-2.15(b) (emphasis added). The Institute recommends that OFCCP provide flexibility for contractors to evaluate underutilization for particular minority races, as it does currently when contractors evaluate utilization for women and total minorities. The clear difference in language, however, requires that OFCCP recognize there must be a significant difference between representation versus availability (greater than that required to set a placement goal for total minorities or females) before the agency requests that a contractor set a placement goal for a specific minority group.

The Institute also requests that the agency clarify whether its current proposal contemplates that contractors will establish placement goals for particular minority groups or men or women of a particular minority group as part of its annual AAP process, or only when the agency determines that a substantial disparity exists. In addition, the OFCCP should clarify whether its proposal requires contractors to evaluate the utilization of Caucasians, when Caucasians are a "minority group" in the particular geographic area covered by the AAP. According to recent projections from the U.S. Census Bureau, the population of the United States will be "majority-minority" - majority people of color - in 2043. For the working-age population (those between the ages of 18 and 64), the U.S. Census Bureau estimates the shift will occur in 2039. In certain parts of the country, Caucasians are already the minority population. Contractors have not typically accounted for these changing demographics when performing the annual availability and utilization analyses required by the affirmative action regulations because the current regulations only require analysis by total minority status. Despite broadening the information to be provided to the agency during a compliance review, the OFCCP's current proposal is unclear as to the agency's expectations in such situations.

As the above discussion makes clear, these proposed changes to the Scheduling Letter and Itemized Listing are not mere revisions to an information collection request. These proposed revisions would alter the way most contractors prepare annual affirmative action plans. They also raise significant policy questions about the placement goal setting process, particularly in light of the changing majority/minority demographics in certain parts of the United States. Moreover, these changes go beyond the current regulatory requirements and are not accounted for in the burden estimates for the Executive Order 11246 regulations or the proposed Scheduling Letter and Itemized Listing. For these reasons, The Institute respectfully submits that changes of this nature should be proposed through formal rulemaking, with public notice and comment, where the additional burden can be properly estimated and evaluated, and not through the information collection approval process.

III. For the first time ever, citing to its long-standing regulation, 41 CFR 60-2.17(b)(3), OFCCP has included a request (No. 7 in the proposed itemized listing) for contractors to submit "Results of the most recent analysis of the compensation systems to determine whether there are ….disparities as explained in 41 CFR 60-2.17(b)(3)".

1. 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 CFR § 60-2.17(b)(3).[18]

However, a careful reading of the cited regulation reveals very different regulatory terminology. Rather than "results of the most recent analysis…"OFCCP's regulation specifies as follows:

> 41 CFR 60-2.17(b) *Identification of Problem Areas*:
> The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:
> … (b)(3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." (Emphasis added)

Thus, as part of their compliance obligations regarding the total employment process and specifically, compensation systems, contractors undertake a holistic approach to analyze their total employment process for impediments and to evaluate their compensation system(s). It is unclear what Item # 7 means by use of the term "results" since that term is not in the cited regulation.

We are concerned that this may be a disguised effort to request OMB approval for a new form of analysis - results of some form of statistical, pay analysis. It has been the collective experience of the undersigned that in numerous compliance reviews around the country in recent years, OFCCP staff have asked for a contractor's pay equity analyses, citing 41 CFR 60-2.17(b)(3). As noted above, the plain language of the regulation does not require contractors to perform any type of pay equity analysis, statistical or otherwise, in order to meet their obligations to conduct in-depth analyses for impediments or otherwise to evaluate their compensation systems. Indeed, while OFCCP approaches investigation of compensation almost exclusively through use of and reliance on statistical methodology, no such regulatory requirement exists for contractors to do so.

For many contractors, evaluating systems and analyzing processes, frequently involves non-statistical methods for assessing impediments to equal employment opportunity. This might include analyzing and evaluating safeguards contractors have in place to better ensure against bias in decision-making. Conversely, what impediments might exist to effective review and oversight to ensure unbiased decision-making? It might including valuating the training and guidance for decision-makers on EEO compliance; evaluation of objective and subjective factors that can impact pay decisions.

To be sure, in addition to what OFCCP regulations require for a compliant affirmative action program, contractors frequently undertake legal assessment of their compliance with a wide range of federal and state anti-discrimination and equal pay laws. As a result .such analyses, usually under legal privilege, or based on their attorneys' work product, allow contractors to further assess their overall legal risks regarding potential pay bias.

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[18] *See*, Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.

IV. OFCCP does not have regulatory authority to require submission of additional months of data under Section 503 and VEVRAA

Items 9, 12, 13 and 17 of the agency's Proposed Scheduling Letter and Itemized Listing[19] require contractor's to submit updated personnel activity for each month completed of the current AAP year.

1. Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this letter, provide the information for every completed month of the current AAP year.

2. Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this letter, provide the information for every completed month of the current AAP year.

3. Documentation of the hiring benchmark adopted, including the methodology used to establish it if using the five factors described in § 60-300.45(b)(2). If you are six months or more into your current AAP year on the date you receive this letter, please also submit current year hiring data to measure against your benchmark.

4. Data on your employment activity (applicants, hires, promotions, and terminations) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this letter, provide the information in (a) through (c) below for every completed month of the current AAP year. You should present this data by job group (as defined in your AAP) or by job title.

In letters of comment on October 10, 2014 and December 28, 2015, copies of which are attached, The Institute's predecessor pointed out that Section 503 and VEVRAA regulations (41 C.F.R. § 60-741.44(k) and 41 C.F.R. § 60-300.44(k)) only require contractors to document computations or comparisons pertaining to applicants and hires "on an annual basis" not on a monthly basis. Thus, the collection of an additional six months of data was beyond OFCCP's authority. Nevertheless, the Agency retained the requirement in the current Scheduling Letter and Itemized Listing.[20]

OFCCP now seeks—without justification other than it would make it easier for them—to expand the amount of data that contractors must turn over at the start of a compliance review. Specifically, under items 9, 12, and 17 of the proposed Itemized Listing, contractors more than 6 months into their current AAP year would be required to submit employment and summary data for "*every completed month* of the current AAP year"—not just the first 6 months. (Emphasis added.) As explained in detail below, this change is unsupported by the Agency's regulations, would be costly for employers, and is contrary to the agency's push for efficiency. Accordingly,

OMB should reject the agency's attempt to use the Paperwork Reduction Act[21] (PRA) to increase the burden on federal contractors without the proper regulatory authority.

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[19] *See,* Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.
[20] *Id.* See Itemized Listing numbers 9, 10, 13, and 14.
[21] 44 U.S.C. § 3501 et al.

A. OFCCP does not have the regulatory authority to require federal contractors to provide any additional data under E.O. 11246

The OFCCP has cited[22] 41 C.F.R. §§ 60-1.12; 60-2.11-12 as well as 60-2.17 (b)(2), (c) and (d)(1) as its basis for requiring federal contractors to provide an additional six months of personnel data if they receive the scheduling letter six months or more into their current AAP year. The Institute argues that nothing in these provisions allows OFCCP to collect the additional six months of data required by its current scheduling letter and itemized listing.

Assuming that the current regulations allow the OFCCP to request six months of current-year AAP data, nothing in these regulations supports the extensive, burdensome and inefficient data collection being proposed in the new scheduling letter. . Although the agency is attempting to characterize this new data request as supported by contractors, the requirement that contractors provide additional data for every completed month of the current AAP year is unreasonable, untenable and unsupported by the regulations.

Contractors currently have only 30 days upon receipt of the Scheduling Letter and Itemized Listing to provide the requested data[23]. This deadline is often difficult to meet given the complexity of gathering, analyzing, and submitting it to the agency. -. Under OFCCP's proposal, once contractors pass the 6-month mark of their current AAP year they will need to pull and prepare data monthly in order to submit a timely response. This would significantly increase the time, cost, and effort in preparing AAPs (whether done internally or externally), and may require a headcount increase to manage the additional compliance burdens. For contractors that receive a Scheduling Letter eleven months into their current AAP year would have a far greater compliance burden—turning over 23 months of data—than a contractor who received a Scheduling Letter less than six months into their current AAP year, and would only need to submit their prior year data. Clearly, this proposal would be unfair to those contractors.

Under the leadership of Director Craig Leen, OFCCP has strived to increase transparency and efficiency while minimizing unnecessary regulatory burdens on the contractor community. Indeed, OFCCP's Directive 2018-08, *Transparency in OFCCP Compliance Activities* (Sept. 19, 2018), directs the agency to "[c]onduct high quality, *consistent*, and *efficient* compliance evaluations" while "[e]nsur[ing] there is open communication, cooperation, and *intent to minimize unnecessary burden*." (Emphases added.) This proposal would make compliance evaluations increasingly and unnecessarily burdensome as well as unfairly inconsistent depending on the "luck of the draw" when the Agency issues a Scheduling Letter relative to a contractor's AAP year. The increased expense and burden associated with AAP development and administration also cuts against the goals of Directive 2018-08.

For the reasons above, IWE respectfully requests that OMB decline to require contractors to submit data for every completed month of the current AAP year. At a minimum, OFCCP should stay the course with its current requirement for contractors to provide data for "at least the first six months of the current AAP year." Better still, OFCCP should broadly revisit the legal foundations for requesting current-year AAP data at the outset of compliance evaluations.

To the extent that new request #7 in the proposed letter seeks more than a contractor's most recent evaluation of its compensation system(s); i.e. seeks some kind of statistical results of a recent "analysis",

[22] OFCCP also cites provisions of the Uniform Guidelines for Employee Selection, 41 C.F.R. §§ 60-3.4 and 60-3.15.
[23] Although the agency has attempted to mitigate the burden by allowing contractors to request an extension additional time to provide the supporting data. *See*, Requesting Extensions to Submit AAP(s) and Supporting Data, OFCCP FAQ which can be found at https://www.dol.gov/ofccp/regs/compliance/faqs/GrantingExtensions_faqs.htm.

the proposed scheduling letter #7 goes beyond the regulatory requirement.
Request #7 should be modified to comport with the express language of the cited regulation or should be amended to explain that the "results of the recent pay analysis" are not intended to ask for and do not require any form of statistical results.

V. OFCCP's Proposed Itemized Listing would require contractors to submit "pools" of promotions by gender and race/ethnicity.

> 17. (c) Promotions: For each job group or job title, provide the total number of promotions by gender and by race/ethnicity, and provide the pool of candidates from which the promotions were selected by gender and by race/ethnicity. Include a definition of "promotion" as used by your company and the basis on which they were compiled (e.g. promotions to the job group, from and/or within the job group, etc.). If it varies for different segments of your workforce, please define the term as used for each segment. If you present promotions by job title, include the department and job group from which and to which the person(s) was promoted.

Proposed Item 17[24] would require contractors to collect and develop promotion "pools" that most likely do not exist or would be incredibly difficult and burdensome to create. Based upon the new request in the Itemized Listing, it is clear that OFCCP has a basic misunderstanding of how contractors generally promote employees and maintain records of promotions and promotions data within its HRIS.

A. Types of Promotions

There are at least two types of promotions that could be analyzed either separately or together. The first type is commonly referred to as a natural progression promotion. In this instance, an internal employee is considered to be "in line" for a promotion due to a natural progression of the job. As such, there is no posted requisition and the employee does not formally apply for the promotion. It is important to note that with an "in line" promotion there are no pools of candidates to be produced. Therefore, for "in line" promotions it would not be possible for a contractor to submit a pool. For example, an employee that is an HR Generalist I may naturally progress to a HR Generalist II and there are no other employees considered for that promotion,

Due to the nature of natural progression promotions and lack of "pools", the agency and contractors have used the prior years' job group analysis as a proxy for a pool. However, this analysis is not accurate and produces results that are not very meaningful.

The other type of promotion is a competitive promotion. Unlike a natural progression promotion, a requisition is created and the opening is formally posted within the applicant tracking system (ATS). It is important to note, that depending upon the need of the organization and the contractor's policies this requisition may be open exclusively to internal applicants or it could be open both internally and externally. Meaning, a requisition may have a mix of both internal and external job seekers. In addition, a requisition could have more than one opening so that once the requisition is filled there would be multiple individuals selected for a position. Therefore, the requisition could have both internal and external applicants selected within a requisition. Listed below are the five possible scenarios that happen when contractors open and list a requisition:

-Requisition 1: **Internal** applicants only – **internal** applicant(s) selected and fills the position

[24] *See*, Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.

-Requisition 2: **External** applicants only – **external** applicant(s) selected and fills the position
-Requisition 3: **Internal** and **external** applicants – **interna**l applicant(s) selected and fills the position
-Requisition 4: **Internal** and **external** applicants – **external** applicant(s) selected and fills the position
-Requisition 5: **Internal** and **external** applicants – **external** and **internal** applicants selected and fill the positions

It is important to note that it is not always possible to identify those individuals within a requisition that are internal. For example, if an internal employee applies from a home computer and uses his/her personal email there would not be a way to systematically differentiate between an internal and external job seeker. Therefore, in many situations it would not be possible to generate a definitive database of applicants that are internal.

Finally, those successful applicants (both internal and external) are recorded in the HRIS. The internal applicants are recorded as a promotion while the external applicants are recorded as a hire.

B. Pulling Promotions Data from the HRIS

OFCCP is requesting that contractors include a definition of "promotion" as used by the company and the basis on which they were compiled (e.g. promotions to the job group, from and/or within the job group, etc.). The answer to the question depends upon the purpose of the promotions data being gathered,

When a contractor pulls data from the HRIS, it must set query parameters that define what constitutes a promotion. In setting these query parameters, the contractor must first consider the type of promotion of interest and the type of analysis that is going to be conducted. In general, federal contractors use promotion data for three separate purposes. They are as follows:

- **Promotions Disparity Analysis (aka Adverse Impact Analyses)**: A statistical analysis of promotion data is conducted to determine if there are meaningful differences in the rates of promotions between protected groups.
    - **Competitive Promotions**: This data would utilize the applicant flow data as described above that is contained within the ATS
    - **Non-Competitive Promotions**: A contractor could either use the traditional approach of evaluating all non-competitive promotions WITHIN a job group that occurred during the year divided by the prior year roster. The other and more accurate analysis of non-competitive promotions would be to conduct a simple timing analysis. For example, a contractor could evaluate the typical amount of time it takes females to be promoted versus the typical amount of time it takes a male to be promoted. This analysis would only utilize non-competitive promotions.
- **Goal Attainment Analysis**: In order to measure goal attainment, a contractor will evaluate the number of minorities and/or females that were promoted from one job group into another job group. This evaluation is conducted on those job groups where a goal was established during the prior year.
    - This analysis utilizes all promotions INTO a job group that occurred during the prior AAP year.
- **Availability Feeder Analysis**: As part of the determination of feeder jobs or job groups, a contractor may pull promotions data to look back over a historical period to determine which jobs/jobs groups are typical internal feeders to the job group of interest.

- This analysis utilizes all promotions INTO a job group that occurred during the prior AAP year.

C. Recommendation to OFCCP

As demonstrated above, it is not possible to develop a "pool" of applicants for the natural progression promotions, however, there are in fact "pools" of candidates for those requisitions that are competitive in nature and posted. Therefore, OFCCP should simply request that contractors pull data out of the ATS that included all requisitions that have been closed during that AAP period and be required to report the number of all applicants to include internal and external. In addition, OFCCP should adjust its analytics protocol from a "hires" analysis to a "selections" analysis. This analysis is more consistent with the UGESP and provides a more accurate analysis. By including both internal and external applicants and all of those individuals selected for the position makes for a more accurate analysis and accomplishes OFCCP's goal of analyzing competitive promotions.

VI. OFCCP should clarify what contractors required to submit to comply with first requirement of proposed compliance check scheduling letter

The OFCCP proposes to slightly revise its compliance check letter[25] to require contractors to submit as Item 1:

> Written AAPs prepared in accordance with Executive Order 11246, Section 503, and VEVRAA (41 CFR §§ 60-1.12(b); 300.80; 60-741.80).

Currently, the agency's compliance check letter requires contractors to provide "AAP results for the preceding year (41 CFR §§ 60-1.12(b); 300.80; 60-741.80)."[26] It is not clear based on this change what portion of the AAPs the agency is expecting contractors to provide in response to a compliance check scheduling letter.

In the spirit of transparency and efficiency, The Institute would ask the agency in clarify exactly what contractors are required to submit in response to the revised Item 1.

[25] *See*, Supply & Service Scheduling and Compliance Check Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at https://www.regulations.gov/docket?D=OFCCP-2019-0002.
[26] Compliance Check Scheduling Letter, OFCCP Website, https://www.dol.gov/ofccp/ComplianceChecks/SchedulingLetter.html.

Conclusion

The Institute recommends the OFCCP reassess its proposal to burden contractors with the increased demands proposed in this revision of scheduling letter and itemized listing in light of the agency's focus on transparency and efficiency and President Trump's push for deregulation.

Thank you in advance for your consideration and we appreciate your time to address The Institute's concerns. We are as always happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,

David B. Cohen | David S. Fortney | Mickey Silberman

October 10, 2014

VIA EMAIL: Carr.Debra@dol.gov

Ms. Debra A. Carr
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Ave., N.W., Room C-3325
Washington, D.C. 20210

Re: Revised Scheduling Letter, OMB No. 1250-0003

Dear Ms. Carr:

The undersigned organizations represent a broad cross-section of the federal contractor community. We are writing to you on behalf of our member companies to provide our views and recommendations for technical corrections to the recently issued revised Scheduling Letter and accompanying Itemized Listing. As you know, the revised Scheduling Letter and accompanying Itemized Listing were released by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP" or the "Agency") on October 1, 2014, designated and approved by the Office of Management and Budget ("OMB") as No. 1250-0003.

First, we want to express our appreciation for OFCCP's recognition and incorporation of the recommendations previously offered by the federal contractor community into the revised Scheduling Letter. The revised Scheduling Letter, however, does raise serious legal concerns because it includes additional data requirements beyond the approved obligations under previously issued regulations. We strongly recommend the Agency promptly undertake the necessary technical corrections to address these deficiencies before the Scheduling Letter and Itemized Listing is used. Such an approach will help minimize the bases for any legal challenges or disruptions in the Agency's future audits relating to the use of the Scheduling Letter and Itemized Listing.

Specifically, the revised Scheduling Letter and Itemized Listing requests, numbered nine (9), ten (10), thirteen (13), and fourteen (14), contain requirements to submit additional data beyond that which is required under regulations implementing Section 503 of the Rehabilitation Act of 1973 ("Section 503"), 41 CFR Part 60-741, and regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), 41 CFR Part 60-300, in potential violation of the Administrative Procedure Act ("APA").

Itemized Listing numbers nine (9) and thirteen (13) for documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) and 41 CFR § 60-300.44(k) states, in part, "if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year." However, both sections 60-741.44(k) and 60-300.44(k) only require that a contractor document computations or comparisons pertaining to applicants and hires "on an annual basis," not on a rolling basis, a six-month basis, or any other basis other than yearly. Therefore, requiring contractors to provide this same information for "at least the first six months of the current AAP year" is a requirement outside of the VEVRAA and Section 503 implementing regulations. In addition, this additional subset of requested data was not incorporated into the burden estimate of either the Section 503 or VEVRAA implementing regulations or the Scheduling Letter and accompanying Itemized Listing at OMB No. 1250-0003.

Itemized Listing number ten (10) for the utilization analysis evaluating the representation of individuals with disabilities under 41 CFR § 60-741.45 states, in part, "If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress." However, section 60-741.45 only requires that a contractor "shall annually evaluate its utilization of individuals with disabilities." *See* 41 CFR § 60-741.45(d)(3). Therefore, the requirement to submit information reflecting current year progress is outside of the Section 503 implementing regulations because the Section 503 regulations only require an annual evaluation, not ongoing progress evaluations. In addition, this additional subset of requested data was not incorporated into the burden estimate of either the Section 503 implementing regulations or the Scheduling Letter and accompanying Itemized Listing at OMB No. 1250-0003.

Itemized Listing number fourteen (14) for the documentation of the hiring benchmark under 41 CFR § 60-300.45 states, in part, "If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year results." However, section 60-300.45 only requires that a contractor set the hiring benchmark annually and document the hiring benchmark it has established each year. *See* 41 CFR § 60-300.45(b);(c). There are no results required to be calculated or composed, and the requirement to set and document the benchmark is an annual one, not a semi-annual one. This issue is further complicated by the statement in the Supporting Statement for OMB No. 1250-0003 that during a compliance evaluation, OFCCP reviews "documentation of the hiring benchmark adopted, the methodology used to establish it if using the five factors, and the results of its ***comparison to incumbent*** workforce as described in 41 CFR 60-300.45." (Emphasis added.)

Therefore, the issue with the fourteenth (14^{th}) itemized listing is two-fold: it asks for information reflecting current year results even though the VEVRAA implementing regulations only require an annual selection and documentation of the hiring benchmark; and requests "results" even though the VEVRAA implementing regulations do not require a calculation or a composition that would yield a "result" to be reported pursuant to this request. In addition, in its review of OMB No. 1250-0003, the OMB has relied upon the statement that a compliance evaluation includes a review of a comparison of the hiring benchmark to an incumbent workforce, even though that effort is not included within the VEVRAA implementing regulations and the computation of this additional subset of requested data was not incorporated

into the burden estimate of either the VEVRAA implementing regulations or the Scheduling Letter and accompanying Itemized Listing at OMB No. 1250-0003.

We strongly urge the OFCCP to immediately issue a technical conforming guidance to change the Scheduling Letter and accompanying Itemized Listing to remove the data requests that are as outside the scope of the Section 503 and VEVRAA implementing regulations pending review and approval by the OMB. This would enable the OFCCP to use the modified Scheduling Letter and Itemized Listing to initiate audits in the near future, in accordance with the previously announced schedule, and eliminate potential litigation over this issue.

We believe that technical conforming changes can be made and a properly revised Scheduling Letter and accompanying Itemized Listing can be issued in a manner that will not delay the implementation of a Scheduling Letter and Itemized Listing in future compliance evaluations.

Thank you in advance for your consideration and we appreciate your taking the time to address these legal concerns and the technical conforming changes we have requested. As always, we would be happy to provide any additional information you may need or to answer any questions that you or your office may have.

Respectfully submitted,

By: _____
David Fortney
David Cohen
Mickey Silberman
On Behalf of The OFCCP Institute

By: _____
D. Mark Wilson
Vice President, Health and
Employment Policy HR Policy Association
On Behalf of the HR Policy Association

By: _____
Michael Aitken
Director, Government Affairs
On Behalf of The Society for Human
Resources Management

By: _____
Randel Johnson
Senior Vice President
Labor, Immigration and Employee Benefits
On Behalf of The U.S. Chamber of Commerce

December 28, 2015

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Debra A. Carr
Director
Division of Policy and Program Development
OFCCP
Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Letter of Comment of The OFCCP Institute on Proposed Renewal of Information Collection Requirements (OFCCP-2015-0003-0001)

Dear Director Carr:

The OFCCP Institute ("The Institute") submits the following Comment in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP" or the "Agency") invitation for comments on its Proposed Renewal of Information Collection Requirements, published in the Federal Register on October 29, 2015. The renewal sets forth proposed changes to OFCCP's Scheduling Letter and Itemized Listing.[1] The Institute appreciates the opportunity to provide our Comment.

Background on The OFCCP Institute

The Institute is a national nonprofit employer organization that assists and educates federal contractors and subcontractors (collectively "contractors") in understanding and complying with their affirmative action and equal employment obligations. The Institute is not affiliated with the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

The Institute recognizes the responsibility of all employers, including contractors, to create a nondiscriminatory workplace. We applaud and support all efforts to make the workplace free from all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

[1] *See* Scheduling Letter and Itemized Listing, Office of Management and Budget Control #1250-003 (October 29, 2015), available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0003.

I. The OFCCP Should Clarify Its Intentions and Authority to Share Information Amongst Other Agencies and the Public

In its most recent proposed renewal of its Scheduling Letter, OFCCP has added the following paragraphs to the end of the letter, citing 41 CFR § 60-1.20(g) and the Freedom of Information Act, as amended, 5 U.S.C. § 552 (2009):

> Please also be aware that OFCCP may use the information you provide during a compliance evaluation in an enforcement action and may share such information with other federal government agencies to promote interagency coordination and collaboration.
>
> Finally, the public may seek disclosure of the information you provide during a compliance evaluation. In response, OFCCP will make any public disclosure consistent with the provisions of the Freedom of Information Act.[2]

In its Note to Reviewer,[3] OFCCP provides the following explanation for the need of the additional language:

> Of note for this clearance request, OFCCP inserted language into the Scheduling Letter to provide enhanced transparency to contractors about OFCCP sharing information with other federal government agencies to promote interagency enforcement of equal employment opportunity and related laws. This new language emphasizes OFCCP's regulatory mandate to refer some enforcement actions to DOJ as well as OFCCP's longstanding Memorandum of Understanding ["MOU"] with the EEOC. The new language also clarifies that OFCCP may use information collected during a compliance evaluation in an enforcement action.[4]

OFCCP currently has the authority to share contractors' information with EEOC, on the basis of the MOU, and with the Department of Justice, as provided in 41 CFR §60-1.26(c). This is a limited exception to contractors' Fourth Amendment protections for a limited purpose.[5] The Institute is concerned that the proposed language seeks to expand OFCCP's ability to share and disclose information without appropriate legal authority.[6] The rationale and intent of the proposed language is not fully explained and, as a result, the proposed language adds ambiguity to what was a settled matter. We believe that there can be no ambiguity when bed-rock Constitutional rights are at issue.

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[2] *Id.* at 2.
[3] *Note to Reviewer- Supporting Statement Supply and Service Program*, OMB No. 1250-003 (October 29, 2015) available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0002.
[4] *Id.* at 16.
[5] *See* U.S. Const. IV (2013); *see also* 41 CFR §60-1.26 (c).
[6] Section 207, Executive Order 11246- Equal Employment Opportunity, Office of Federal Contract Compliance Programs, U.S. Department of Labor available at http://www.dol.gov/ofccp/regs/statutes/eo11246.htm.

Federal contractors are currently required by Executive Order 11246 to provide information to the OFCCP, which is authorized then to share the information ***only*** with the EEOC and the DOJ.[7] Unless agreed to by a contractor, the OFCCP cannot share information with other agencies without violating contractors' Fourth Amendment protections against the unauthorized collection of contractor information. The Institute does not agree that OFCCP can simply include a self-generated, unauthorized, overly broad statement and, thus, expand the Agency's authority to share collected information with any "other federal government agencies."[8] We do not believe that a contractor can be deemed to have voluntarily consented to an expanded disclosure of information when the information at issue must be provided to the OFCCP ***solely*** for OFCCP's limited use as authorized by EO 11246.[9]

As a result, The Institute seeks clarification on whether the proposed statement in the Scheduling Letter is being added to inform contractors that the Agency intends to share information more broadly with other federal government agencies, in addition to EEOC and DOJ. Contractors have a right to know if the intent of OFCCP is to share contractor data and information with other agencies within the Department of Labor, with other agencies of the federal government, or even with agencies *outside* the federal government (*e.g.*, State agencies). If the intent is to share information solely with the EEOC and DOJ, as stated in the OFCCP's supporting statement,[10] then the proposed language should be revised to state in relevant part that OFCCP "… may share such information with ~~other federal government agencies~~ the Equal Employment Opportunity Commission and the U.S. Department of Justice to promote interagency coordination and collaboration."

On the other hand, if OFCCP intends to share contractor information with any other federal or State agency, then such a sweeping expansion of the OFCCP's use of information collected from contractors must, at a minimum, be subject to formal rulemaking, with the changes codified in the substantive regulations governing the OFCCP's program, and not simply included in a letter initiating a compliance evaluation.[11] Notice and Comment are particularly required when, as in the proposed language, an ambiguous, expanded *public* disclosure of contractor information is contemplated.[12] The Institute is similarly concerned that the proposed language seeks to expand

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[7] *Id.*
[8] *See* footnote 6, supra.
[9] *Id.*
[10] *See Note to Reviewer- Supporting Statement Supply and Service Program*, OMB No. 1250-003 (October 29, 2015) available at http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0002 at p.16.
[11] Executive Order 11246 does not authorize the broad sharing of contractor information by the OFCCP with other agencies. Only information involving labor organizations engaging in work under federal contracts may be shared with federal agencies for limited purposes involving possible violations of Titles VI and VII of Civil Rights Act of 1964 or federal law. In relevant part, EO 11246 states: "[t]he Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any *such labor organization or agency violate* Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law." EO 11246 Sec. 207. The limitations on the OFCCP's authority to share contractor information can be addressed if the OFCCP decides to address these matters through the comments addressing a proposed rulemaking.
[12] *See* footnote 1, supra.

OFCCP's authority to disclose information protected by FOIA.[13] The Institute believes the agency's intent should be fully articulated.

Furthermore, if the OFCCP intends to share contractor data with any other federal and state agencies, The Institute respectfully requests that the OFCCP meet with all stakeholders to understand the concerns about the impact of the proposal to share information supplied by federal contractors with "other federal agencies." OFCCP could then use the feedback from the stakeholder meetings to develop an official directive that will be shared with the public. The directive should set forth in detail how, and under what circumstances, the information collected from contractors can be shared with other federal agencies.

As noted above, we do not believe federal contractors give up the right to protect and control access to their data just because they are obligated to submit the data to the OFCCP during the course of a compliance evaluation. Thus, it is The Institute's recommendation that the directive include a specific process for notifying contractors when the OFCCP intends to share information with other agencies as well as setting forth a mechanism for contractors to challenge the sharing of the information. Finally, this directive should specifically address data security and how the Agency intends to ensure that contractor data will remain secure if it is released to another agency. The current shortcomings in the federal government's ability to secure confidential information collected from employers were specifically raised by the National Academy of Sciences Report "Collecting Compensation Data from Employers," and corresponding recommendation.[14] Until the OFCCP addresses the concerns identified by the National Academy of Sciences, the OFCCP's proposal to expand the number of federal agencies that may receive contractor information is, at a minimum, premature.

II. The OFCCP Should Remove the Additional Requirements Included in the Itemized Listing To Provide Data Every Six Months Because It Is Not Consistent with the Requirements Under Section 503 and VEVVRA To Provide Annual Data.

1. Section 503

The current version of the Agency's Itemized Listing reflects obligations derived from OFCCP's recent revisions to Section 503 of the Rehabilitation Act ("Section 503") and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA").

With respect to Section 503, Item 9 of the revised Itemized Listing requires contractors to provide documentation of the computations or comparisons described in 41 CFR §60-741.44(k) for the immediately preceding AAP year.[15] The listing also requires contractors " **if you are six months or more into your current AAP year when you receive this listing, provide the**

[13] 5 U.S.C. § 552(b) (6) (2009).
[14] The National Academy of Sciences' Report: "Collecting Compensation Data from Employers" (August 15, 2012) available at https://download.nap.edu/catalog.php?record_id=13496.
[15] *See* footnote 1, supra.

information for at least the first six months of the current AAP year."[16] (emphasis added). However, Section 741.44(k) requires analysis *only on an annual basis*.[17] As a result, the obligation to provide six-month data is beyond the requirements of the regulations and is improperly included in the Itemized Listing.[18] As a result, the collection and analysis of the additional six months of personnel activity data was not factored into the burden estimates of both the regulations and in the revised Itemized Listing, which does even address this issue.[19]

More specifically, in the Supporting Statement, the Agency stated, "OFCCP estimates that the assembling and submitting of the documentation of the computations and comparisons of employment activity described in 41 CDR 60-741.44(k) will take contractors **20 minutes."**[20] (emphasis added). Clearly, this burden estimate does not take into account the significant amount of time necessary to query the required information out of the Applicant Tracking System "ATS" and Human Resource Information System "HRIS" nor does it take into account the time needed to prepare the required computations.

Similarly, Item 10 of the current Itemized Listing asks contractors to provide the utilization analysis for individuals with disabilities for the first six months of the current AAP year if a contractor is more than six months into its current AAP year at the time of scheduling of a compliance review.[21] As is the case with a contractor's obligations under 741.44(k), the revised Section 503 regulations addressing utilization, requires that contractors conduct utilization analyses on an annual basis.[22] The collection and analysis of six months of this personnel activity data was also not factored into the burden estimates either of the regulations or in the revised Itemized Listing.

The fact that OFCCP did not take the additional six months analysis into account in determining the burden on contractors is clearly shown in the Agency's 2014 Supporting Statement for the Scheduling Letter. In this previous Supporting Statement, the Agency stated that "OFCCP estimates that the assembling and submitting of the documentation of the utilization analysis evaluating the representation of individuals with disabilities described in 41 CFR 60-741.45 will take contractors **15 minutes.**"[23] (emphasis added). Clearly, this burden estimate does not take into account the significant amount of time needed to query the required information out of the HRIS nor does it take into account the time needed to prepare the required computations.

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[16] *Id.*
[17] 41 C.F.R. §60-741.44(k) (March 2014).
[18] *See* 41 C.F.R. §60-741.44(k) (March 2014); s*ee also* footnote 1, supra. at p.2.
[19] *See* footnote 1, supra.
[20] Note to Reviewer, Scheduling Letter and Itemized Listing Supporting Statement Supply and Service Program, OMB No. 1250-0003 (September 11, 2014) at p.14.
[21] *Scheduling Letter and Itemized Listing*, Office of Federal Contract Compliance Programs, U.S. Department of Labor available at https://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter_ItemizedListing_508c.pdf.
[22] 41 C.F.R. §60-741.44(k) (March 2014).
[23] *See* footnote 22, supra.

As a result, like the requirement to provide interim 44(k) analytic data, the Agency's requirement for submission of six-month utilization analyses is improper and The Institute requests that should be removed from Items 9 & 10 of the Itemized Listing.[24]

2. VEVRAA Requirements

The same circumstances discussed above in reference to Items 9 and 10 under Section 503 apply to Items 13 and 14 under VEVRAA. As with Items 9 and 10 of the Itemized Listing, with respect to Item 13, OFCCP estimates that the annual and six month collection and computation of this information will take contractors 20 minutes. [25] Further, Items 9 and 10 require that contractors provide an additional six months of data on their computations "pertaining to applicants and hires"[26] even though the regulations at 300.44(k) only require contractors to do this analysis on "an annual basis."[27] Similarly, Item 14 asks for documentation of the contractors' hiring benchmark not only "annually" as required by 60-300.45(b). [28] In addition, the Supporting Statement adds:

> If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year results.

As it is with the improper requests under Section 503, OFCCP's request for this information pursuant to the revised VEVRAA regulations is misplaced.

As a result, The Institute recommends that OFCCP remove the six month reporting obligations in Items 13 and 14 to reflect the regulatory requirements of VEVRAA that contractors perform annual analyses.

Conclusion

As detailed above, The Institute recommends that OFCCP reassess the purpose of its proposed confidentiality language. Instead, the Agency should develop a regulation and a public directive based on input from its stakeholders to address the circumstances surrounding any contemplated data sharing outside of the OFCCP.

The Institute also recommends OFCCP revise Items 9, 10, 13 and 14 of the Itemized Listing to eliminate the requirement that contractors provide the Agency with six month update data so that it will be consistent with current regulatory requirements.

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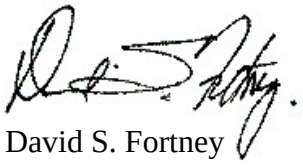
[24] *Id.*
[25] *Id.*
[26] *See* footnote 1, supra. at p. 5.
[27] 41 C.F.R 60-300.44(k) (2014).
[28] As stated in the Supporting Statement, OFCCP estimates that the annual and six month collection and computation of this information will take contractors 15 minutes. *See* footnote 22, supra.

The Institute again thanks the OFCCP for this opportunity to comment on the proposed revisions to the Scheduling Letter and Itemized Listing and would be pleased to provide the OFCCP with any additional information or clarification it may require or request. We look forward to continuing to work with the OFCCP to effectuate the successful promulgation of regulations that are reasonable, enforceable, and efficient for both the Agency and the federal contractor community while achieving the goal of eliminating all forms of unlawful discrimination where it may exist.

Respectfully submitted,

By: The OFCCP Institute Co-Chairs (on behalf of The OFCCP Institute)

David B. Cohen



David S. Fortney

Mickey Silberman