



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 of The Institute for Workplace Equality on Proposed Renewal of the Approval of Information Collection Requirements for Section 503/VEVRAA Focused Review Letters (OMB No. 1250-003)

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 Information Collection Requirements, published in the *Federal Register* on April 12, 2019. The renewal sets forth proposed changes to OFCCP’s Section 503¹ Focused Review Scheduling Letter and the addition of a VEVRAA² Focused Review Scheduling Letter.³

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

¹ Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793.

² Vietnam Era Veterans’ Readjustment Assistance Act of 1974, 38 U.S.C. § 4212.

³ See Section 503 and VEVRAA Focused Review Letters, Office of Management and Budget Control #1250-003 (April 12, 2019), available at <https://www.regulations.gov/docket?D=OFCCP-2019-0002>.

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.

Overview of Focused Reviews

A focused review according to the OFCCP regulations is “an on-site review restricted to one or more components of the contractor’s organization, or one or more aspects of the contractor’s employment practices.”⁴ However, the proposed scheduling letter would impose substantial new requirements beyond those outlined in OFCCP regulations.

The OFCCP under Director Craig Leen has consistently touted transparency and efficiency as primary objectives. In accordance with those transparency and efficiency objectives, the IWC respectfully recommends that the agency follow those objectives by not requiring contractors to provide the additional data proposed in this proposal.

1. The proposal to revise the focused review letter is premature

The OFCCP noted in the Supporting Statement that the Office of Management and Budget (“OMB”) approved the Section 503 focused review letter on November 26, 2018.⁵ As of the date of this letter, the OFCCP has not conducted any Section 503 focused reviews. OFCCP is proposing substantially increasing the data required without determining what data is actually necessary for a focused review.

The Institute respectfully suggests that the Agency first conduct Section 503 results to determine if the additional burden placed on contractors is justified.

2. The requirement in proposed request 11 to provide applicant and employee level employment activity for all applicants and employees under Section 503 and VEVRAA violates the commitment the Agency made in finalizing Section 503 and VEVRAA regulations.

When the OFCCP finalized its new regulations for Section 503⁶ and VEVRAA⁷ in the *Federal Register* on September 24, 2013, the Agency stated in the preamble to each final rule the following:

OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with, and without, disabilities in this data. Rather, Compliance

⁴ 41 C.F.R. § 60-1.20(a)(4).

⁵ 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>.

⁶ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, 78 Fed. Reg. 58682, 58702 (Sept. 24, 2013)(to be codified at 41 C.F.R. pt. 60-741).

⁷ Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58614, 58637 (Sept. 24, 2013)(to be codified at 41 C.F.R. pts. 60-250 and 60-300).

Officers will look to see whether the contractor has fulfilled its various obligations under § 60–741.44, including its obligation, pursuant to § 60–741.44(f)(3), to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) and any other reasonable criteria the contractor believes is relevant, and has pursued different or additional recruitment efforts if the contractor concludes that its efforts were not effective.

Request 11 of the proposed focused review scheduling letter would require contractors to provide the Agency with individual applicant and employment activity data for all applicants and employees, at the outset of the audit – before any analysis has been conducted by OFCCP, and thus, before the agency had any indicators warranting the need for additional review. OFCCP appears to be poised to use individual level data to perform adverse impact analysis for protected veterans and individuals with disabilities. This would violate the commitment made by the Agency in the preamble to both Section 503 and VEVRAA.

3. The requirement in footnote 2 to proposed request 8 creates an unjustifiable burden on contractors.

Footnote 2 to request 8 of the proposed scheduling letter states:

All applicant and employee level data provided in response to this letter 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).

This requirement may be far beyond the ability of many contractors to provide as not all HRIS systems and applicant tracking systems assign the same numbers to applicants and employees. For example, when an employee accesses an external portal to apply instead of an internal portal then the applicant may appear to be an external candidate instead of an internal existing employee. Conversely, an applicant may forget their login information and create a new applicant profile and have a different identifier assigned. As a result, contractors' system capabilities have constraints which may make it impossible to comply and meet the agency's requests. OFCCP has overlooked errors in human element in considering the systems burden estimate and contractors' ability to provide this data. This footnote also reinforces the belief that OFCCP is planning to do adverse impact analysis in violation of the commitment in the final rules discussed above.

4. The requirement to provide employee level compensation data for all employees is excessively burdensome and is not likely to produce meaningful results.

The OFCCP is proposing in request 12 to require contractors to provide employee level compensation data for all employees, as it currently requires under Item 19 of its Executive Order 11246 Scheduling Letter and Itemized Listing.⁸ It appears OFCCP is planning to analyze

⁸ See Scheduling Letter and Itemized Listing, Office of Management and Budget Control #1250-003 (October 29, 2016), available at https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201602-1250-001&icID=13735.

the compensation of individuals with disabilities (“IWD”) and protected veterans just as it has been analyzing compensation for women and minorities. The Institute is certainly in favor of advancing fair pay for IWDs. However, as the OFCCP is aware, applicants and employees must voluntarily identify as IWDs or as protected veterans. As a result, significant numbers of applicants and employees do not identify themselves, despite contractor best efforts. Absent a mandate for non-voluntary disclosure and without more complete data, such compensation analyses on the entire workforce is likely to be skewed and provide false indicators of pay disparities.

Rather than collect the compensation data for all the employees at an establishment for the focused review, The Institute respectfully suggests the OFCCP limit the scope of such a review to the compensation of those who have identified as IWDs or protected veterans and those who are similarly-situated employees.

5. The regulations for Section 503 and VEVRAA do not allow the OFCCP to collect data during a plan year

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.⁹

The OFCCP’s current proposal improperly extends OFCCP’s authority even further. The OFCCP proposes in Item 4 and 11 that contractors who are six months or more into their current AAP plan year provide documentation on applicants and hires for every completed month of the current AAP year.¹⁰ This would require contractors to do monthly data pulls, outside the scope of their regulatory obligations. Not only does this requirement exceed OFCCP’s authority, OFCCP does not include this burden in its estimate for the focused review letter. For most contractors this requirement represents an increase in time and resources and possibly headcount to meet the increased statement of work. As a result, the Institute respectfully requests OFCCP re-evaluate its authority for, and the associated burden on contractors, and ultimately maintain the existing data collection done annually.

6. The requirement that contractors submit EO 11246 AAP is unclear and burdensome

The OFCCP in Item 1 proposes that contractors submit “a copy of your current Executive Order 11246 Affirmative Action Program (AAP) prepared in accordance with the requirements

⁹ *Id.* See Itemized Listing numbers 9, 10, 13, and 14.

¹⁰ See Section 503 and VEVRAA Focused Review Letters, Office of Management and Budget Control #1250-003 (April 8, 2019), available at <https://www.regulations.gov/docket?D=OFCCP-2019-0002>.

of 41 CFR § 60-1.40 and 41 CFR § 60-2.1 through § 60-2.17.”¹¹ What is not clear from this requirement is what exactly contractors are supposed to submit to OFCCP. In addition, since this letter is supposed to be for Section 503 and VEVRAA focused reviews, it is unclear what exactly OFCCP will do with the Executive Order 11246 AAP.

If OFCCP requires contractors to provide their current EO 11246 AAP, the Agency in the spirit of transparency and efficiency should clarify what portions of the EO 11246 AAP contractors should submit and what it will do with the AAP and data.

7. The OFCCP does not take the additional data being requested into account in its burden estimate

President Trump has made deregulation a major focus of his administration. In the first few days of his administration, he issued a Presidential Executive Order on reducing regulation and controlling regulatory costs.¹²

In the Supporting Statement, the Agency estimates the reporting burden of a focused review to be approximately 10.5 hours.¹³ Given the Agency has not yet performed any focused reviews, it is unclear how it could estimate the reporting burden for a focused review. Further, the estimate is very low considering all the information the Agency is requiring contractors to provide.

As suggested above, the OFCCP should first pilot a significant number of focused reviews to properly determine any need for additional information, and to accurately assess the burden on contractors.

Conclusion

The Institute recommends the OFCCP reassess its proposal to revise the as-yet untested focused review scheduling letter 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.

¹¹ *Id.*

¹² Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017) available at <https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf>.

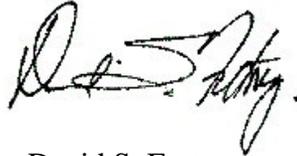
¹³ *Note to Reviewer-Supporting Statement Supply and Service Program*, IMB No. 1250-003 (April 8, 2019) available at <https://www.regulations.gov/document?D=OFCCP-2019-0002-0005>.

Mr. Harvey D. Fort
June 11 2019
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Respectfully,

A handwritten signature in black ink, appearing to be 'D. B. Cohen', written in a cursive style.

David B. Cohen

A handwritten signature in black ink, appearing to be 'D. S. Fortney', written in a cursive style.

David S. Fortney

A handwritten signature in blue ink, appearing to be 'Mickey Silberman', written in a cursive style.

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 (14th) 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

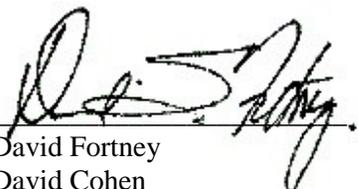
into the burden estimate of either the VEVRAA implementing regulations or the Scheduling Letter and accompanying Itemized Listing at OMB No. 1250-0003.

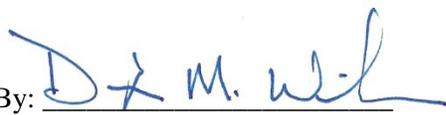
We strongly urge the OFCCP to immediately issue a technical conforming guidance to change the Scheduling Letter and accompanying Itemized Listing to remove the data requests that are as outside the scope of the Section 503 and VEVRAA implementing regulations pending review and approval by the OMB. This 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.

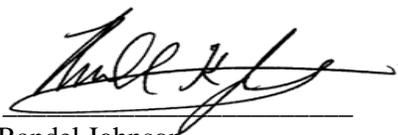
Thank you in advance for your consideration and we appreciate your taking the time to address these legal concerns and the technical conforming changes we have requested. As always, we would be happy to provide any additional information you may need or to answer any questions that you or your office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

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

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.

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); see 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.

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.*

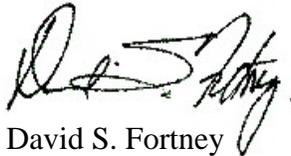
The Institute again thanks the OFCCP for this opportunity to comment on the proposed revisions to the Scheduling Letter and Itemized Listing and would be pleased to provide the OFCCP with any additional information or clarification it may require or request. We look forward to continuing to work with 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



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