

April 22, 2020

Submitted via the Office of Information and Regulatory Affairs Portal: <https://www.reginfo.gov>

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for EEOC
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: OMB ICR Reference No: 202002-3046-002; Comments of the Center for Workplace Compliance in Response to the EEOC's Notice of Information Collection—Request for a New Control Number for a Currently Approved Collection; Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2

Dear Sir or Madam:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit these written comments in response to the Equal Employment Opportunity Commission's (EEOC or Commission) Notice, published in the *Federal Register* on March 23, 2020, regarding the Employer Information Report (EEO-1).¹ As indicated in the Notice, the EEOC has submitted to the Office of Management and Budget (OMB) a request for a new OMB Control Number for Component 1 of the Employer Information EEO-1 Report, along with a three-year approval to use Component 1 without substantive change. The Notice also indicates that the EEOC does not intend to seek approval to renew Component 2.

As discussed in more detail below, and consistent with the written comments we filed last year with the EEOC,² CWC strongly supports the Commission's decision to seek renewal of Component 1 for an additional three years. We also strongly support the Commission's decision to not seek renewal of Component 2.

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)³ is the nation's leading nonprofit Association of major employers dedicated exclusively to helping its members better understand and manage their workplace compliance requirements and risks. CWC's membership includes approximately 200 large U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

¹ 85 Fed. Reg. 16,340 (Mar. 23, 2020).

² Our original comments are attached for your information.

³ Formerly the Equal Employment Advisory Council (EEAC).

As major employers, CWC members are subject to numerous compliance, recordkeeping, and reporting requirements imposed by federal laws prohibiting workplace discrimination, such as the obligations imposed by Title VII of the Civil Rights Act of 1964, Executive Order 11246, the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act, along with their implementing regulations.

CWC has a long track record of working closely with the EEOC to ensure that the EEO-1 Report maintains its relevance and utility to both the Commission and the employers who must file it. Indeed, over the years, CWC has many times been the only organization to submit public comments in response to the EEOC's invitations for stakeholder input on the burdens and utility of the EEO-1 Report under the Paperwork Reduction Act. And, for more than three decades, we have regularly communicated less formally with Commission staff in an attempt to resolve practical concerns regarding the EEO-1 reporting process in ways that have helped to facilitate timely and compliant reporting. CWC has also remained engaged with the Commission with respect to Component 2 of the EEO-1 Report.

In addition, CWC has a long history of engagement with respect to federal agency initiatives to collect compensation data from employers on a broad scale, including those implemented or proposed by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). These include OFCCP's discredited Equal Opportunity Survey, which collected summary compensation data from a sample of federal contractors during a five-year period between 2000 and 2004, as well as OFCCP's proposed Equal Pay Report.

Background

The EEO-1 Report is among the most fundamental and wide-ranging of all the federal EEO/AA reporting requirements, impacting both those employers that are federal contractors and those that are not. Since its genesis in 1966, the EEO-1 Report has reflected an annual "snapshot" of the racial, ethnic, and gender demographics of a filing employer's workforce at each of the employer's "establishments."

Each year, employers subject to the EEO-1 reporting requirement must extract from their systems, and report for each establishment having 50 or more employees, data showing the racial/ethnic and gender composition of the workforce distributed across ten EEO-1 job categories. Reports can be filed through a web-based form or through the data file upload method.⁴

In 2016, the EEOC implemented a significant (and controversial) new reporting requirement to collect pay and hours-worked data. This new requirement is referred to as Component 2, while the traditional reporting requirement is known as Component 1. Historically, the Component 1's structure, content, and filing options have worked well over the years, and as a general matter, CWC supports the continuation of the current structure. In contrast, Component 2 added significantly to employers' data collection and reporting obligations without any evidence that it would actually help identify or correct potential pay discrimination.

⁴ The Commission does have a process for employers to petition to use another method of reporting if electronic filing is an undue hardship.

Component 1 of the EEO-1 Report Should Be Renewed for Three Years Without Change

CWC supports the EEOC's proposal to seek a three-year extension of Component 1 of the EEO-1 Report under a new Control Number. The current Component 1 was implemented in 2007 and was the product of a thoughtful and deliberate consultation process that strikes the proper balance between producing useful demographic information while minimizing the reporting burden on employers. Accordingly, CWC supports its renewal. We also agree with the EEOC that approval would be appropriate under a new Control Number to avoid confusion with the recent Component 2 collection, which was completed under an existing OMB Control Number (3046-0007).

We also commend the EEOC's willingness to engage in a more meaningful review of the burden estimates associated with this collection. While we fundamentally disagree with the EEOC's assertion that multi-establishment employers will spend, on average, between 3.5 and 9.5 hours to complete Component 1 filing, for an overall average of less than 5 hours per employer, we appreciate the fact that the EEOC at least has acknowledged that the burden is in fact considerably higher by increasing the burden hours associated with the collection of EEO-1 data from 1,952,146 hours to 9,167,393. This is more than four and one half times the agency's estimates from past years, and appropriately focuses on the number of reports filed, rather than the number of respondents. In our experience, however, large employers spend significantly more time and expense in complying with Component 1 burdens than even these revised estimates assume, and we are not aware of any CWC member company that could complete Component 1 in only 9.5 hours. While we are aware that the Commission's estimates are averages, the burden estimates do not appear to reflect the true impact of Component 1 filing on large employers.

In the end, CWC supports renewal of Component 1. Employers know and have absorbed the costs associated with their own compliance obligations under this long-standing requirement and generally agree that Component 1 compliance is not unduly burdensome.

Component 2 of the EEO-1 Report Should Not Be Submitted for Renewal

CWC also supports the EEOC's decision not to seek renewal of Component 2 at this time, and agree with the agency's assessment that "utility of the current Component 2 collection does not justify the burden of the collection on employers." As we detailed in our attached comments to the EEOC, we respectfully maintain that Component 2 is a deeply flawed tool that is unduly burdensome on EEO-1 filers and, more importantly, is unlikely to be of any utility to the EEOC in enforcing pay discrimination prohibitions. While CWC strongly supports efforts by the EEOC and other workplace regulators to focus their limited resources in ways that promote effective pay discrimination law enforcement and facilitate discovery of so-called bad actors, the Component 2 collection does not satisfy either of these objectives.

Furthermore, to the extent that the EEOC may seek to implement a pay collection tool in the future, we agree with the EEOC's assessment—and have long maintained—that notice-and-comment rulemaking under Title VII and the Administrative Procedure Act (APA) is a more appropriate way in which to implement such a significant data collection requirement. Should the EEOC decide to consider proposing a pay data collection instrument in the future, we strongly recommend that it return to the 2012 recommendations submitted to the agency by the National Academy of Sciences (NAS). These recommendations, which were largely ignored by the EEOC in 2016, addressed some of the most

important challenges involved in collecting pay data from employers for the purpose of administering Title VII.

Conclusion

The Center for Workplace Compliance is pleased to support the EEOC's intent to seek a three-year approval of Component 1 of the EEO-1 Report under a new OMB Control Number. We also support the Commission's decision to not seek renewal of Component 2 at this time.

Thank you for your consideration of these comments. Please do not hesitate to contact me if CWC can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny E. Petrella". The signature is fluid and cursive, with the first name "Danny" being the most prominent.

Danny E. Petrella
Vice President, Compliance and Assistant General Counsel

Attachment

cc: Bernadette B. Wilson
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

November 12, 2019

Submitted Via Federal eRulemaking Portal: <https://www.regulations.gov>

Ms. Bernadette B. Wilson
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Re: OMB Docket ID: EEOC-2019-0003; Comments of the Center for Workplace Compliance in Response to the EEOC's Notice of Information Collection—Request for a new Control Number for a Currently Approved Collection; Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2

Dear Ms. Wilson:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit written comments in response to the Equal Employment Opportunity Commission's (EEOC or Commission) Notice, published in the *Federal Register* on September 12, 2019, regarding the Employer Information (EEO-1) Report.¹ As indicated in the Notice, the EEOC is seeking a new OMB Control Number for Component 1 of the EEO-1 Report along with a three-year approval to use Component 1 without substantive change. The Notice also indicates that the EEOC does not intend to seek approval to renew Component 2. For the reasons set forth below, CWC strongly supports the Commission's decision to seek renewal of Component 1 for an additional three years. We also support the Commission's decision to not seek renewal of Component 2.

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)² is the nation's leading nonprofit Association of major employers dedicated exclusively to helping its members better understand and manage their workplace compliance requirements and risks. CWC's membership includes over 200 large U.S. corporations, collectively providing employment to millions of workers.

CWC's directors and officers include many of industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

¹ Equal Employment Opportunity Commission, Notice of Information Collection-Request for a New Control Number for a Currently Approved Collection: Employer Information Report (EEO-1) Component 1; Revision of Existing Approval for EEO-1 Component 2, 84 Fed. Reg. 48,138 (September 12, 2019) (hereinafter "Notice").

² Formerly the Equal Employment Advisory Council (EEAC).

As major employers, CWC members are subject to myriad compliance, recordkeeping, and reporting requirements imposed by federal laws prohibiting workplace discrimination, such as those imposed by Title VII of the Civil Rights Act of 1964, Executive Order 11246, the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act, and their implementing regulations.

CWC has a long track record of working closely with the EEOC to ensure that the EEO-1 Report maintains its relevance and utility to both the Commission and the employers who must file it. Indeed, over the years, CWC has many times been the only organization to submit public comments in response to the EEOC's invitations for stakeholder input on the burdens and utility of the EEO-1 Report under the Paperwork Reduction Act.³ And, for more than three decades, we have regularly communicated less formally with Commission staff in an attempt to resolve practical concerns regarding the EEO-1 reporting process in ways that facilitated timely and compliant reporting. CWC has also remained engaged with the Commission with respect to Component 2 of the EEO-1 Report.⁴

In addition, CWC has a long history of engagement with respect to federal agency initiatives to collect compensation data from employers on a broad scale, including those implemented or proposed by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). These include OFCCP's Equal Opportunity Survey, which collected summary compensation data from a sample of federal contractors during a five-year period between 2000 and 2004,⁵ as well as OFCCP's proposed Equal Pay Report.⁶

Summary of Comments

CWC supports the EEOC's proposal to seek a three-year extension of Component 1 of the EEO-1 Report under a new Control Number. As described below, the current Component 1 was implemented in 2007 and was the product of a thoughtful and deliberate consultation process that strikes the proper balance between producing useful demographic information and minimizing the reporting burden on employers. Accordingly, CWC supports its renewal. We also agree with the EEOC that approval would be appropriate under a new Control Number to avoid confusion with the ongoing Component 2 collection under the existing Control Number.

³ See, for example, the supporting documents maintained by the Office of Management and Budget related to EEOC's 2014, 2011, and 2009 information collection requests for approval of the EEO-1 Report, *available at* https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201409-3046-001, https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-3046-003, and https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200901-3046-001, respectively.

⁴ Statement of Michael J. Eastman, Equal Employment Advisory Council, Before the Equal Employment Opportunity Commission Hearing on Proposed Revisions to the Employer Information (EEO-1) Report (Mar. 16, 2016); Comments of the Equal Employment Advisory Council on the EEOC's Proposed Revisions of the Employer Information (EEO-1) Report (Apr. 1, 2016); Comments of the Equal Employment Advisory Council on the EEOC's Proposed Revisions of the Employer Information (EEO-1) Report (Aug. 15, 2016).

⁵ OFCCP formally repealed the EO Survey in 2006. Office of Federal Contract Compliance Programs, Final Rule, Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors, Equal Opportunity Survey, 71 Fed. Reg. 53,032 (Sept. 8, 2006).

⁶ Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking, *Government Contractors, Requirement to Report Summary Data on Employee Compensation*, 79 Fed. Reg. 46,561 (Aug. 8, 2014).

While we support renewal of Component 1, we respectfully question the agency's estimate of the burdens imposed by this reporting obligation. In particular, the Notice explains that the EEOC has estimated that multi-establishment employers, on average, will spend between 3.5 and 9.5 hours to complete Component 1 filing for an overall average of less than 5 hours per employer. In our experience, large employers spend significantly more time and expense in complying with Component 1 burdens than estimated.

We also request that the EEOC consider providing additional guidance with respect to reporting data for employees who do not identify as male or female. While the agency has provided some initial guidance through its contractor, NORC, as part of the Component 2 filing, additional guidance from the Commission would be helpful.

CWC also supports the EEOC's decision not to seek renewal of Component 2 at this time. We respectfully submit that Component 2 has proven to be a deeply flawed tool that is burdensome on EEO-1 filers and more importantly is unlikely to be of any utility to the EEOC in enforcing pay discrimination prohibitions. Indeed, we submit this is a particularly poor time to seek renewal as the Component 2 data collection is ongoing and we do not know when it will end. At a minimum, the EEOC should not seek approval of a compensation data collection tool until it assesses the results of the ongoing Component 2 data collection.

Should the EEOC decide to consider proposing a pay data collection instrument in the future, we strongly recommend that it return to the 2012 recommendations submitted to the agency by the National Academy of Sciences (NAS). These recommendations, which were largely ignored by the EEOC in 2016, addressed some of the most important challenges involved in collecting pay data from employers for the purpose of administering Title VII. In addition, should the EEOC move forward with substantive additions to the EEO-1 Report in the future, it should consider using notice-and-comment rulemaking under the Administrative Procedure Act (APA) that will provide all stakeholders with adequate due process protections.

Background

The EEO-1 Report is among the most fundamental and wide-ranging of all the federal EEO/AA reporting requirements, impacting both those employers that are federal contractors and those that are not. Since its genesis in 1966, the EEO-1 Report has reflected an annual "snapshot" of the racial, ethnic, and gender demographics of a filing employer's workforce at each of its "establishments."

Each year, employers subject to the EEO-1 reporting requirement must extract from their systems, and report for each establishment having 50 or more employees, data showing the racial/ethnic and gender composition of the workforce distributed across ten EEO-1 job categories. Reports can be filed through a web-based form or through the data file upload method.⁷

In 2016, the EEOC implemented a significant (and controversial) new reporting requirement to collect pay and hours-worked data. This new requirement is referred to as Component 2, while the traditional reporting requirement is known as Component 1.

⁷ The Commission does have a process for employers to petition to use another method of reporting if electronic filing is an undue hardship.

Historically, the Component 1's structure, content, and filing options have worked remarkably well over the years, and as a general matter, CWC supports the continuation of the current structure. To ensure compliance, it is critical that employers have access to a consistent reliable means of achieving their reporting obligations, and the Component 1 reporting structure has met those criteria.

Component 1 of the EEO-1 Report Should Be Renewed for Three Years Without Substantive Change

Component 1 Strikes the Proper Balance Between Producing Useful Demographic Data and Minimizing the Reporting Burden on Covered Employers

Component 1 requires employers to report the race/ethnicity data of their workforce by sex and by job category. These categories were last substantively modified in 2007 following a lengthy and deliberative consultation process to determine how OMB's 1997 revised *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* would be incorporated into the report. As part of this process, the EEOC considered, but did not adopt, changes that would have dramatically expanded the reporting burden on employers with little utility from an EEO/AA perspective. CWC supported the approach adopted by the EEOC in 2007 as striking the proper balance between producing useful demographic data and minimizing reporting burdens on employers. We continue to agree with this approach.

The EEOC has not proposed any changes to the race/ethnicity categories or job categories used on the EEO-1 Report. However, in recent years there has been some dialogue as to whether the minimum categories used for collection of federal data on race and ethnicity should be expanded,⁸ and it is possible that the EEOC will receive comments to that effect as part of the information collection review process. CWC recognizes that the changing demographics of the U.S. population might, at some point in the future, merit further changes to the EEO-1's race/ethnicity classification system, but we respectfully submit that that time has not yet arrived.⁹ Accordingly, unless and until such time as the demographic diversity of the nation's working age population presents the Commission with a compelling reason to revisit the race/ethnicity classification system currently used in the EEO-1 Report, CWC sees no reason for this classification system to be revised again any time soon.

In addition, any modification to the data collection and reporting requirements related to race/ethnicity and job categories will have a collateral impact on a number of other federal recordkeeping and reporting requirements, not the least of which include the Uniform Guidelines on Employee Selection Procedures (OMB Control Number 3046-0017); OFCCP's Recordkeeping and Reporting Requirements – Supply and Service Contractors (OMB Control Number 1250-0003); and the DOL-VETS Federal Contractor Veterans' Employment Report VETS-4212 (OMB Control Number 1293-0005). Any changes to the EEO-1 classification systems would thus have far-reaching implications well

⁸ See, for example, Office of Management and Budget, Notice and request for comments; *Proposals From the Federal Interagency Working Group for Revision of the Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, 82 Fed. Reg. 12,242 (Mar. 1, 2017).

⁹ For a more detailed discussion of this issue, please see our comments to the Office of Management and Budget regarding OMB's statistical policy directive on standards for maintaining, collecting and presenting federal data on race and ethnicity, available at <https://www.regulations.gov/document?D=OMB-2016-0002-0348> and <https://www.regulations.gov/document?D=OMB-2017-0003-1504>.

beyond the EEO-1 report itself, and would again require private-sector employers, state and local governments, educational institutions, federal grant recipients, and the federal government itself to expand significant human, technical, and financial resources to reengineer countless numbers of systems, forms, reports, and processes that have been designed to accommodate them. In sum, we do not believe circumstances have changed sufficiently to justify revisions to race/ethnicity or job categories at this time.

The Burden Estimates Included in the Notice Appear To Understate the Actual Burdens of Compliance

As described above, CWC supports renewal of Component 1 and believes that the burdens imposed by the data collection requirement are justified. Having said that, it appears that the EEOC's current estimate of burdens imposed by Component 1 is too low.

Prior to the 2016 controversial revisions to the EEO-1 Report, the EEOC estimated the burdens imposed by the EEO-1 (Component 1) reporting requirement by simply multiplying the number of filers by an estimate of the time it would take to submit each report. At the time, the EEOC estimated that it would take employers an average of 3.4 hours to submit each EEO-1 Report that they were required to file.

The EEOC significantly departed from this methodology in 2016. In 2016, the Commission estimated that Component 1 burdens would include 8 hours of time at the firm level plus one hour per additional establishment report. For firms using the data file upload option, half an hour was subtracted. CWC strongly disagreed with this methodology and in our 2016 comments provided several examples of how the methodology resulted in artificially low burden hour estimates.

The Commission has now developed a new methodology that considers different burdens based on the types of EEO-1 reports employers file. For single-establishment employers that file a Type 1 Report, the Commission estimates an average burden of 45 minutes. For multi-establishment employers, the Commission estimates an average burden between 3.5 and 9.5 hours depending on the types of reports filed.¹⁰ According to the Commission, when combined with single establishment employers, the overall average is under 5 hours per employer.¹¹

It makes sense to utilize a methodology that recognizes that employers filing different types of EEO-1 Reports will have different burdens and it appears that this estimate is indeed more accurate than that used in prior years. However, the Commission has not provided enough detail to assess how it arrived at the average burden hour estimates that it utilized. Based on our experience, the estimates seem to understate the burdens of compliance. Indeed, we are not aware of any CWC member company that could complete Component 1 in only 9.5 hours. As we detailed in our 2016 comments, many large

¹⁰ The Commission estimates that Type 2 Reports (consolidated report) and Type 3 Reports (headquarter report) will also impose an average burden of 45 minutes each. The Commission also estimates that completion of Type 4 reports, for establishments with 50 or more employees, will add an average of two hours. For establishments with fewer than 50 employees, employers may file a Type 8 report or a Type 6 report, which does not include a full-grid of data, but simply lists the number of employees at the establishment. The Commission estimates that employers with Type 8 Reports will add an average of 3 hours while employers with Type 6 Reports will add an average of 8 hours.

¹¹ Notice at 48,142 n.21.

employers will spend hundreds of hours or more on Component 1 compliance each year. While we are aware that the Commission's estimates are averages, the burden estimates do not appear to reflect the true impact of Component 1 filing on large employers.

To be clear, CWC supports renewal of Component 1. Employers know the costs associated with their own compliance obligations under this long-standing requirement and generally agree that Component 1 compliance is not unduly burdensome. However, a more accurate understanding of the burdens would help the agency and stakeholders better understand the true costs of compliance.

The Commission Should Seek Approval of Component 1 Renewal Under a New Control Number To Avoid Confusion

In its Notice, the Commission states that it is seeking a new OMB Control Number for Component 1 to minimize confusion. We agree. OMB Control Numbers are an essential part of the Paperwork Reduction Act. However, there is nothing magical about a particular Control Number. The Control Number that has been used for years, 3046-0007, is currently associated with both Component 1 and Component 2. While Component 2 has been highly controversial, and is currently the subject of litigation, there is nothing particularly controversial about Component 1. Separating the two will allow the Commission to move forward with its traditional and well-accepted Component 1 data collection while matters related to the current Component 2 data collection play out.

The Commission Should Provide Further Guidance With Respect to Reporting Obligations Applicable to Employees Who Do Not Identify as Male or Female

The EEO-1 report requires classifying every employee by one race/ethnicity, one job category, and one gender. The preferred method of identifying demographic information necessary for the EEO-1 Report is self-identification. If an employee does not self-identify, then an employer must classify the employee using other information, such as employment records or observer identification.

The options for classifying individuals by gender on the EEO-1 Report are male and female. However, some employees do not identify as either. Some state and local jurisdictions have begun offering identification documents that recognize a non-binary option, including California, Oregon, and Washington, DC. The New York City Commission on Human Rights has issued guidance stating that employers "should not limit the options for identification to male and female only."¹²

Employers thus face challenges when employees do not wish to self-identify as male or female, but government recordkeeping and reporting requirements mandate that information be collected this way. To address this conflict, some employers may allow non-binary self-identification but then make an annotation of male or female in a separate document that they will use for reporting purposes.

This year, the EEOC addressed this issue for the first time in conjunction with Component 2 reporting. According to a frequently asked question posted on the website run by the EEOC's contractor,

¹² NYC Commission on Human Rights, *Legal Enforcement Guidance on Discrimination on the Basis of Gender Identity or Expression*: Local Law No. 3 (2002); N.Y.C. Admin. Code § 8-102, at 5, available at <https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf>.

NORC, employers may report data for non-binary gender employees by making a comment in the comment box made available as part of the on-line filing process. While many employers appreciated this guidance, we question whether this is the appropriate long-term solution. The Commission should consider adopting additional guidance regarding how employers should address reporting obligations with respect to employees who do not identify as male or female so that employers are not required to report employees in categories with which they do not identify.

Component 2 of the EEO-1 Report Should Not Be Submitted for Renewal

According to the EEOC's Notice, the agency currently does not intend to seek renewal of Component 2. Instead, the Commission has concluded that it should first consider information from the ongoing Component 2 data collection before deciding whether to submit a pay data collection to OMB for approval. CWC agrees that this makes good sense.

CWC strongly supports efforts by the EEOC and other workplace regulators to focus their limited resources in ways that promote effective pay discrimination law enforcement and facilitate discovery of so-called bad actors. However, we respectfully submit that Component 2 is not an effective and efficient enforcement tool. It would be irresponsible for the Commission to seek renewal of Component 2, particularly at this time while the data collection is still underway and before the Commission can properly assess any lessons learned from the data collection exercise.

Component 2 Is A Deeply Flawed Tool

Our objections to Component 2 are described in detail in the record for the 2016 information collection review process.¹³ The following summarizes our main substantive concerns with Component 2. In our view, the Commission:

- Failed to consider alternatives that are less burdensome than requiring employers to submit a minimum of nearly three billion fields of compensation-related data based on a total U.S. civilian workforce of approximately 159 million people, fewer than half of whom work for employers covered by the EEO-1 reporting requirement;
- Underestimated the burdens associated with longstanding Component 1 reporting requirements;
- Based estimates on Component 2 almost entirely on inappropriately low estimates of Component 1 burdens;
- Failed to appropriately account for the dramatic increase in data fields that employers must report;
- Underestimated the burdens associated with developing systems to communicate between payroll and HRIS platforms or otherwise query and report payroll data;
- Failed to adopt a comprehensive plan regarding how compensation data should be integrated into compliance programs;

¹³ See *supra* note 4.

- Failed to address questions regarding the agency's capacity to process and protect compensation data;
- Ignored the fact that compensation information based on W-2 wages is less likely to identify discriminatory practices compared to other measures; and
- Failed to address confidentiality concerns with respect to Component 2.

Now that we have some experience with Component 2 reporting, we can report that many, if not all, of these concerns were justified. Complying with Component 2 reporting indeed has been burdensome. While most of our information about these burdens is anecdotal at this time, our members have spent far more time and resources complying with Component 2 reporting than had been estimated by the Commission.

For many employers, complying with Component 2 has not been as simple as querying payroll and HRIS systems. Even after constructing queries to access payroll and HRIS data, often from multiple systems, employers have frequently had to take multiple steps to manually reconcile data. For example, reconciling employees who worked both FLSA-exempt and non-exempt jobs during the year, employees who worked in multiple EEO-1 categories during the year, identifying which pay codes in the payroll system were for "hours-worked," manually tabulating hours worked from paper records or in other systems not associated with payroll systems, such as occurred for some employers with respect to employees represented by a labor union and for employees who are drivers.

Even after Component 2 filers had collected data and built data files to upload, many were not able to easily identify errors in their data files that prevented certification. Some CWC members reported spending days checking and re-checking data files looking for inconsistencies with the agency's data file specifications.

In addition, as the EEOC now recognizes, "the unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers that must comply with the reporting obligation."¹⁴ This is buttressed by the testimony of Dr. Samuel C. Haffer, the EEOC's Chief Data Officer and Director of the agency's Office of Enterprise Data and Analytics, in the ongoing Component 2 litigation. At an April 16, 2019, hearing, Dr. Haffer testified that "there is a lot of evidence, information available, that collecting data, pay data, in pay bands is not a valid way of collecting pay data for purposes of enforcing discrimination laws."¹⁵

In short, Component 2 has imposed a significant and burdensome data collection obligation on employers that will likely have little to no utility whatsoever. In addition, the Commission has not adequately addressed data privacy concerns. Many of these concerns could have been addressed if the Commission had followed the recommendations of the National Academy of Sciences (NAS) panel report provided to the agency in 2012: *Collecting Compensation Data from Employers*, a report that the Commission itself requested, summarized in more detail below.¹⁶

¹⁴ 84 Fed. Reg. at 48,141.

¹⁵ Transcript of Hearing, *NWLC v. OMB*, No: 1:17-cv-02458-TSC, at 47 (D.D.C. Apr. 16, 2019).

¹⁶ National Research Council, *Collecting Compensation Data from Employers*, Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin, Committee on National Statistics,

Before Considering Another Pay Data Collection, the EEOC Should Reexamine the Recommendations Made In The NAS Report

In 2010, the Obama Administration's White House Equal Pay Task Force recommended that the EEOC engage the NAS to “conduct a study assessing how to most effectively collect pay data to support its wage discrimination law enforcement efforts.”¹⁷ This recommendation led to a NAS panel report that reviewed options and made several important recommendations regarding actions that the EEOC, OFCCP, and other agencies should take before implementing a new compensation data collection instrument. The report discussed numerous issues relevant to the development of any data collection tool that would collect compensation data from private-sector employers. Unfortunately, the EEOC largely disregarded the NAS panel’s recommendations.

The chart on the following page illustrates the NAS panel’s recommendations and the EEOC’s 2016 response.

NAS Recommendation	2016 Revisions
1. The EEOC should prepare a comprehensive plan for use of earnings data before initiating any data collection.	No comprehensive plan was presented. While the EEOC stated that its primary goal was to focus investigations and employer information requests when a charge of pay discrimination is raised, it did not address the NAS panel's primary concerns about use of pay data without a comprehensive plan.
2. After completing a comprehensive plan a pilot study should test the collection instrument and plan for the use of data. An independent contractor should conduct the study and measure the resulting data quality, fitness for use, cost, and respondent burden.	<p>While a "pilot study" was conducted, it was conducted before development of a comprehensive plan and did not test the plan for use of data. The study did not use actual data collected from employers, did not examine cost or respondent burden, and did not determine fitness for use.</p> <p>In 2016, the EEOC claimed that its use of "synthetic data" was "real." However, the EEOC could not assess whether its methodology would allow it to efficiently target enforcement resources, focus investigations, develop information requests, or assess respondent burden because synthetic data is not capable of measuring real-world impacts.</p>
3. The EEOC should enhance its capacity to summarize, analyze, and protect earnings data.	Not addressed.
4. The EEOC should collect data on rates of pay, not actual earnings or pay bands, in a manner that permits calculation of both central tendency and dispersion.	Rejected.
5. The EEOC should consider implementing data protection techniques to protect the confidentiality of the data.	Not addressed.
6. The EEOC should seek legislation that would increase the ability of the agency to protect confidential data.	Not addressed.

Had the Commission followed the recommendations of the NAS panel, many employer concerns with regard to Component 2 would have been alleviated. Unfortunately, the EEOC failed to do so. Should the agency decide to proceed to develop another pay data collection tool, we recommend that it strive to avoid the mistakes it made in 2016 by revisiting the NAS panel's recommendations and in particular the recommendation to conduct a meaningful pilot study that tests one or more proposed data collection tools among actual employers to assess both utility and burden.

This Is an Inappropriate Time To Seek Approval of a Pay Data Collection Tool

Even if the Commission were inclined to seek renewal of Component 2, this is an especially inopportune time to do so because the 2017 and 2018 data collection is still in process and we currently have no idea of when it will end. The Commission should first wait until the current data collection period has ended and then thoughtfully review the data collected to determine whether there is any utility to the data and whether there are lessons learned from the exercise that could improve the data collection, for example by decreasing employer burdens or by increasing the utility of the data collection.

In the time since the Component 2 filing requirement was established, the EEOC has significantly enhanced its capacity to evaluate data collection tools with the creation of the agency's Office of Enterprise Data and Analytics (OEDA). From our perspective, it appears that OEDA had been making good progress in modernizing the agency's approach to data analytics. Its expertise would likely be extremely helpful as the agency considers whether to seek approval of a pay data tool in the future. Unfortunately, OEDA is unlikely to be able to give the matter much attention during the ongoing Component 2 data collection process.

Notice-and-Comment Rulemaking Under Title VII Would Be a More Appropriate Process To Consider Any Future Pay Data Collection

The Commission's Notice provides that "if the EEOC seeks to pursue a pay data collection in the future it will do so using notice and comment rulemaking and a public hearing pursuant to Title VII of the Civil Rights Act of 1964."¹⁸ We agree that notice-and-comment rulemaking under Title VII and the Administrative Procedure Act (APA) is a more appropriate way in which to implement such a significant data collection requirement.

Title VII gives the EEOC the authority to compel employers to "make such reports ... as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of" Title VII.¹⁹ The Commission has promulgated those regulations at 29 CFR Part 1602. The regulations describing the EEO-1 reporting obligation are codified at Sections 1602.7 through 1602.11. The regulations do not describe the type of data to be collected on the EEO-1 report, but instead simply require that covered employers file the report "in conformity with the directions set forth in the form and accompanying instructions."²⁰

¹⁸ 84 Fed. Reg. at 48,141 n.11.

¹⁹ 29 U.S.C. § 2000e-8(c).

²⁰ 29 C.F.R. § 1602.7.

Historically, modifications to the EEO-1 Report have been made through the information clearance process required under the Paperwork Reduction Act. Until 2016, this process worked reasonably well. We submit that one of the reasons this process worked well was that all stakeholders had general agreement on the type of information to be collected, although several significant modifications were made over the years to job categories and race/ethnicity categories.

The modifications adopted in 2016 were much more substantial and controversial. Should the Commission again consider substantial and controversial additions to the EEO-1 Report, it would be far more appropriate to do so through notice-and-comment rulemaking, which provides additional procedural protections to all stakeholders. Among the procedural safeguards available through APA notice-and-comment rulemaking are standards for judicial review as well as additional protections afforded by Executive Order 12866, the Paperwork Reduction Act, and the Regulatory Flexibility Act, among others.

Using the notice-and-comment process under the APA to establish the framework for additional revisions, in conjunction with the hearing required under Title VII, would provide additional procedural safeguards to help minimize the chance that a deeply flawed data collection instrument – such as the current Component 2 report - is implemented.

Conclusion

The Center for Workplace Compliance is pleased to support the EEOC's intent to seek a three-year approval of Component 1 of the EEO-1 Report under a new OMB Control Number. We also support the Commission's decision to not seek renewal of Component 2 at this time.

Thank you for your consideration of these comments. Please do not hesitate to contact me if CWC can provide further assistance to the Commission as you consider these important issues.

Sincerely yours,



Michael J. Eastman
Senior Vice President, Policy and Assistant General Counsel