



October 16, 2020

**Via regulations.gov**

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

**Re: National Industry Liaison Group's Comment on OFCCP's Affirmative Action Program Verification Interface  
OMB Control No. 1250-New**

Dear Ms. Williams:

The National Industry Liaison Group ("NILG") welcomes the opportunity to comment on the New Information Collection Requirement, Affirmative Action Program Verification Interface (AAP-VI) published in the September 14, 2020 Federal Register.

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

As set forth in the Information Collection Request (ICR), the OFCCP seeks to develop an Affirmative Action Program Verification Interface that will accomplish two objectives: (1) require contractors to certify compliance on an annual basis; and (2) provide a mechanism for contractors to upload Affirmative Action Plans (AAPs) to the OFCCP during a compliance evaluation. The

platform interface is described as having five sections: (1) login.gov; (2) contractor verification; (3) account profile; (4) AAP upload; and (5) annual certification.

## **I. Login.gov**

The ICR provides that “[t]he designated user will be granted access to the AAP-VI system once Login.gov has validated the user through its two-factor authentication process.” (ICR, p. 6). The proposal fails to describe how users will be identified and validated. The OFCCP states that it will send an email “to every known federal contractor establishment” without explaining how it intends to obtain the appropriate email addresses. The NILG has concerns that individuals not authorized by the contractor may be able to become “validated” by the OFCCP without its knowledge. The NILG recommends that the process requires one person at each contractor organization to determine who its designated users are and to identify those persons to the OFCCP. The NILG recommends that the OFCCP contact the individual(s) who certifies a contractor’s EEO-1 Report and/or VETS-4212 Report or signers of the contractor’s Functional Affirmative Action Plan agreement, as those individuals are typically involved with a contractor’s affirmative action compliance. The contractor should also be able to designate which users have access to which establishments within the system. The OFCCP should then be authorized to communicate only with those persons so identified by the contractor. Otherwise, the NILG is concerned that unauthorized users could obtain access or that individuals not responsible for compliance will have unapproved communications with the OFCCP.

## **II. Contractor Verification**

This portion of the process description provides that individuals will be authorized after entering “their unique company identifier.” (ICR, p. 6). Presumably, this is a passcode that would be provided by the contractor to its authorized users; however, the ICR does not explain how this unique company identifier will be set up or communicated to the contractor or users. The NILG requests clarification on this portion of the process.

The ICR also states, “Users will also have the option to enter the system as a new user, whereby contractor verification is replaced with the creation of a new record.” (ICR, p. 6). Without further explanation, the NILG is uncertain as to the meaning or effect of this statement. Contractor verification should be necessary to allow anyone access to the confidential information regarding the organization. This statement creates confusion as to whether that will occur.

The NILG requests that the OFCCP anticipate the impact of changes in human resources information systems and/or mergers and acquisitions on the verification and certification processes and provide detailed instructions so that contractors do not have problems with incorrect, duplicate, or other issues related to such changes. The ICR does not address the issues related to these potential problems.

## **III. Account Profile**

According to the ICR, contractors will be required to verify information regarding their organizations, including “Establishment Name, Parent Name, Unit Number, Headquarter Number,

Establishment Address, Establishment Status, EIN, DUNS, NAICS, Employee Count, and contact information.” (ICR, p. 6). This further calls into question the OFCCP’s intent to send emails to “every contractor establishment.” Most contractors will not want this review process delegated to employees at each contractor location who may or may not have the requisite knowledge to confirm the information. The OFCCP should allow the headquarters location of the contractor to confirm the basic information and delegate, when appropriate, the review of subordinate establishment information to other personnel. The OFCCP’s description of the process is too vague for the NILG to understand the exact mechanisms of this procedure. For example, it is unclear whether the OFCCP will be relying on the unit numbers that the EEO-1 Report assigns to establishments or if there will be other identification process.

#### **IV. AAP Upload**

The OFCCP states that AAP-VI will provide a more secure mechanism for transmitting AAPs to the agency. While the NILG does not maintain to be technology experts or experts on information security, we applaud the OFCCP for its efforts to ensure that its process will be secure and decrease the possibility of data breaches. Many contractors utilize their own secure file transfer systems to transmit sensitive documents and to reduce the potential for content becoming accessible to unauthorized users. But for contractors that do not have access to such systems, the ability to upload directly to the OFCCP should accomplish a secure transfer. Assuming that the OFCCP’s AAP-VI system provides the most current technologically-advanced process, the NILG will not take issue with the system specifications. However, contractors should be assured that the system has been thoroughly tested and vetted prior to implementation. At a minimum, the OFCCP should confirm and explicitly state that the system is secure to the level of confidence that the National Academy of Sciences recommended for component 2 of the EEO-1 Report.

However, the NILG remains concerned about data security and breaches. The information that contractors provide to the OFCCP, such as compensation data for all employees and workforce size and distribution, is sensitive and could damage contractors if obtained by competitors or outside entities. The OFCCP should provide further assurances to contractors that data provided will be protected to the highest extent possible.

The IRC also does not address the length of time for which the OFCCP intends to retain the electronic information submitted by contractors. The contractor community should be provided information regarding the agency’s retention system, which should be limited to reduce potential damage to contractors should the system be breached.

#### **V. Annual Certification**

The NILG understands that the OFCCP is seeking to implement the Government Accountability Office’s recommendation to monitor compliance by more contractors on a more regular basis. We support any effort that will decrease burdens on contractors that ensure compliance by developing AAPs for all establishments every year. If the OFCCP’s annual certification requirement can be used as a mechanism for identifying contractors that are less likely to be in compliance and if the OFCCP relies on that information for scheduling contractors for a compliance evaluation, the NILG commends that ideal.

However, before implementing an annual certification requirement, further information must be provided to contractors. As set forth in the ICR, contractors will be required to certify to one of the following three options annually:

- (1) Entity has developed and maintained affirmative action programs at each establishment, as applicable, or for each function or business unit.
- (2) Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable.
- (3) Entity became a federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.

(ICR, p. 7) (citations omitted).

When the requirement becomes effective, contractors will have 90 days to certify. “After the initial certification year, OFCCP will set a date by which all existing contractors must renew their annual certification.” (ICR, p. 7).

The options are set up so that a contractor selecting option (1) will be certifying compliance; a contractor selecting option (2) will be certifying non-compliance; and contractor selecting option (3) will be certifying that it is not covered by the regulations at the time of certification.

These options are too simplistic, however, and fail to take into account the complicated nature of developing AAPs on an annual basis. Large contractors with dozens or even hundreds of establishments may face uncertainty regarding how to respond if some of its establishments are in the process of developing AAPs for establishments where the AAPs have expired. The proposal seems to ignore the practicalities of how AAPs are necessarily developed. Because an AAP requires data covering a one-year period, and because that data cannot even be pulled or prepared until an existing AAP technically expires on the plan date, *i.e.*, January 1st, there is automatically a period of time between when an AAP expires and when the new AAP is fully developed and in place. Significantly, OFCCP regulations do not specify any time period by which contractors must complete AAPs to replace expired AAPs. For contractors with establishments that have large numbers of employees, re-developing AAPs can take weeks or months. Further, some multi-establishment contractors stagger plan dates throughout the year for their different establishments and are thus in a constant state of renewing AAPs. The OFCCP’s proposal does not indicate whether contractors that are in the “in-between” stage of re-developing expired AAPs would be able to accurately certify that they have “developed and maintained affirmative action programs at each establishment . . .” for the applicable annual cycle. The NILG requests that the OFCCP provide clarification for contractors on this point or, alternatively and preferably, allow contractors to certify that they are in the process of preparing their AAPs and that they expect the AAPs to be completed within a reasonable time frame. In addition, because developing new AAPs each year takes this requisite time for contractors, we request that the implementation period after publication of the Final Rule be 180 days instead of 90 days.

The NILG also requests that the OFCCP provide specific information or guidance to contractors regarding the consequences of selecting option (2). There may be occasions when a contractor, for a variety of business or personnel reasons, falls temporarily behind on developing annual AAPs. While this is obviously not ideal, the realities of business and life (such as a worldwide pandemic) sometimes interfere with what is ordinarily a fully compliant process. Contractors who find themselves in these unfortunate circumstances should be apprised of what such a certification will mean to the organization.

In addition, the OFCCP should provide information regarding whom a contractor can designate to certify compliance and whether an employee at a certain level in the organization is necessary. The agency will also need to explicitly set forth the consequences for any false or incorrect certification – whether knowing or unknowing.

## **VI. Other Options**

The ICR seeks input on alternative options regarding the certification and upload requirements. These options are:

- (1) Contractors would be required to certify annually, but could submit AAPs via email or delivery.
- (2) Contractors would be required to certify annually and would have to upload AAPs on an annual basis.
- (3) Contractors would be required to certify every two years and could submit AAPs via email or delivery.

The NILG suggests that the AAP-VI upload be optional for contractors that wish to utilize that feature for submitting AAPs. However, contractors that prefer to submit AAPs by email or other delivery process should be allowed to continue submitting AAPs via those alternatives.

Regarding the frequency of certification, the NILG submits that the option requiring contractors to certify every two years would decrease the burden on contractors and, if the question is phrased appropriately, could also eliminate the concerns raised above regarding the dilemma contractors face if some AAPs are in the development phase, but are not yet completed by the time the certification is required. For example, the OFCCP could ask contractors to certify that they developed and maintained AAPs for all establishments at least once during the past twenty-four months.

The NILG does not believe that requiring contractors to upload AAPs on an annual basis would benefit the agency or contractors. The OFCCP estimates that there are 116,898 existing contractor establishments. (ICR, p. 11). Given the agency's limited budget and resources, there is no situation in which the OFCCP could review anywhere close to the majority of AAPs. The OFCCP typically schedules 5,000 contractors for some type of compliance evaluation each year (ICR, p. 11), and thus, there is no reason for requiring submission of AAPs from every contractor every year. If the OFCCP is concerned that contractors are not developing AAPs, the certification

requirement should substantially solve that issue. Further, if contractors are required to upload AAPs annually, the agency will likely be inundated with FOIA requests for contractors' AAPs. The NILG believes that contractors' AAPs are exempt from FOIA, but the volume of requests would overwhelm the agency. And contractors would be burdened with constantly filing objections to the requests.

## **VII. Burden Estimate**

The OFCCP's estimates of burden are difficult to confirm. The estimate for submitting AAPs for a compliance evaluation is estimated to be .2 hours for each AAP. The NILG believes that this only accounts for the time physically spent at the computer on the AAP-VI system. This fails to account for the time spent by contractors in converting the AAP to an electronic format or otherwise preparing the documents for uploading. The estimate also does not acknowledge that contractors will typically be required to submit additional information to the OFCCP during the course of a compliance evaluation. The OFCCP includes no burden estimate for the time involved in uploading those responses to the agency.

In addition, the annual verification process is estimated to take only .1 hour per establishment. The NILG submits that this evaluation does not envision the lengthy process that contractor representatives will have to undertake to request and to obtain the requisite approval before making the certification. Depending on the size of the contractor and number of establishments, this process could take a significant amount of time, especially if large uploads are required for multi-establishment contractors. The OFCCP's estimate seems to understate the time that will be involved for making a significant substantive certification to the federal government and how seriously contractors will take such attestation.

## **VIII. Conclusion**

The NILG appreciates the opportunity to provide feedback to the OFCCP regarding the AAP-VI process. While the ability to upload documents to OFCCP is appreciated, the NILG believes that the portal should be optional for contractors to use. The NILG also requests more detailed information regarding the log in, verification, and profile procedures to ensure that contractors are not unduly burdened and that the OFCCP is only communicating with authorized contractor representatives. The annual certification requirement must be clarified so that contractors are provided an appropriate leeway to redevelop expired AAPs without being classified as deficient or non-compliant. Finally, the NILG recommends that the OFCCP abandon any plans to require an annual upload of AAPs as too burdensome without sufficient utility and that contractors only be required to certify bi-annually instead of on an annual basis.

We thank the OFCCP for its consideration of our comments and suggestions. If the OFCCP should wish to discuss this comment, please contact Cara Crotty, NILG Legal Counsel, at [ccrotty@constangy.com](mailto:ccrotty@constangy.com), or NILG Chair Anthony Kaylin at [akaylin@aseonline.org](mailto:akaylin@aseonline.org).

Respectfully submitted,

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