

November 13, 2020

VIA FEDERAL eRULEMAKING PORTAL: WWW.REGULATIONS.GOV

Tina Williams  
Director, Division of Policy and Program Development  
Office of Federal Contract Compliance Programs  
200 Constitution Ave., N.W., Room C-3325  
Washington, DC 20210

Re: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' Proposed Information Collection Request, *Affirmative Action Program Verification Interface* (Docket OFCCP-2020-0001-0001)

Dear Ms. Williams:

The Center for Workplace Compliance ("CWC") appreciates the opportunity to submit these comments regarding the Office of Federal Contract Compliance Programs' ("OFCCP") proposed Information Collection Request ("ICR"), *Affirmative Action Program Verification Interface*, notice of which was published in the *Federal Register* on September 14, 2020.<sup>1</sup>

OFCCP has developed a new online portal named the Affirmative Action Program Verification Interface ("AAP-VI"), the goal of which is to "increase contractor compliance by creating an annual certification process and to optimize the compliance review process by creating a tool for scheduled contractors to upload their AAPs electronically for OFCCP's review."

According to its supporting statement, OFCCP developed the AAP-VI in response to an observation contained in a report prepared by the Government Accountability Office ("GAO")<sup>2</sup> that OFCCP, through its compliance evaluations and complaint investigations, only evaluates approximately two (2) percent of all federal contractor establishments each year. The AAP-VI, the theory goes, will broaden OFCCP's reach to the remaining 98% of federal contractors.

As some of the nation's largest federal contractors, CWC's members represent a significant portion of the aforementioned "two percent," and many of their establishments are audited routinely every few years. Thus, to the extent that the AAP-VI would actually shift OFCCP's enforcement focus to a larger subset of federal contractors beyond these two percent, CWC generally supports the OFCCP's ICR.

As detailed below, however, we respectfully submit that OFCCP's historical focus on the 2 percent is a matter of policy, not lack of data sources. Indeed, there are a number of other data sources already available to the federal government, and OFCCP in particular, that weigh against a burdensome new information collection. CWC's comments thus offer a number of practical considerations OFCCP should weigh before proceeding, all of which make us question whether the instant ICR will actually achieve OFCCP's goal.

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<sup>1</sup> 85 Fed. Reg. 56,635 (September 14, 2020).

<sup>2</sup> Government Accountability Office, GAO-16-750, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance* (September 2016), available at <https://www.gao.gov/assets/680/679960.pdf> (last accessed November 13, 2020).

## Statement of Interest

CWC<sup>3</sup> is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers collectively providing employment to millions of workers. CWC's members are firmly committed to the principles and practice of equal employment opportunity and meaningful affirmative action.

Nearly all CWC members are subject to the nondiscrimination and affirmative action requirements of Executive Order ("E.O.") 11246, Section 503 of the Rehabilitation Act of 1973 ("Section 503"), Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant interest in ensuring that OFCCP's regulations efficiently and effectively accomplish their underlying policy objectives.

As noted earlier, as some of the nation's largest federal contractors, CWC's member organizations represent a significant portion of the aforementioned "two percent," and have a significant interest in OFCCP's ICR.

### AAP-VI Is Unlikely To Further OFCCP's Goal of Reaching More Federal Contractors

OFCCP states in its supporting statement that "[w]ithout the data collection being proposed in this ICR, OFCCP will continue to lack the ability and resources to ensure AAP compliance by all contractors." We respectfully disagree.

Federal contractors that are required to prepare affirmative action programs ("AAPs") under E.O. 11246, Section 503, and VEVRAA already engage in no less than three other compliance certifications. Indeed, these are the same contractors that:

- Identify themselves as federal contractors subject to E.O. 11246 on Section C, Question 3, of the Employer Information ("EEO-1") Report, which is filed each year with a federal "Joint Reporting Committee" consisting of OFCCP and the Equal Employment Opportunity Commission ("EEOC");
- File annually one or more VETS-4212 Reports with the Department of Labor's Veterans' Employment and Training Service ("DOL-VETS"); and
- Voluntarily affirm their compliance with these laws and regulations through the General Service Administration's ("GSA") System for Award Management ("SAM").

There is no reason to believe that OFCCP's new AAP-VI will reach an audience materially different than the federal contractors that already certify their compliance with federal laws and regulations each year through the means listed above. Indeed, we respectfully submit that if a covered federal contractor is *not* already complying with the certifications listed above, there is no reason to believe that it would voluntarily comply with the AAP-VI.

Furthermore, each of the databases that results from the compliance certifications listed above are either: (1) currently available to OFCCP (EEO-1 and VETS-4212); or (2) should be available through normal

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<sup>3</sup> Formerly the Equal Employment Advisory Council ("EEAC").

government channels (SAM). OFCCP does note in its supporting statement that GSA and OFCCP “were not able to come to an agreement on sharing [SAM] data.” To the extent that inefficiencies or burdens inherent to the federal bureaucracy produces this lack of sharing, those inefficiencies and burdens should not be passed off to federal contractors to resolve. In any event, contractor names, locations, and addresses are otherwise available through the EEO-1 and VETS-4212 databases, not to mention other publicly available data sources such as the Federal Procurement Data System (“FPDS”). That OFCCP has used these data to focus roughly on two percent each year — and we would submit to a large extent the same two percent — has been a matter of policy, and we recommend that OFCCP develop alternative policies that focus enforcement efforts on the broader contractor population already identified in these data sources.

**If OFCCP Proceeds with AAP-VI, It Should Choose the Least Burdensome and Most Secure Certification Option**

In the event OFCCP moves forward with the AAP-VI, CWC recommends that OFCCP adopt the least burdensome—and most secure—certification option. In its supporting statement, OFCCP describes four different AAP-VI alternatives:

<b>AAP-VI</b>	<b>Certification Requirement</b>	<b>AAP Submission Requirement</b>	<b>Estimated Contractor Cost</b>
<b>(As Proposed)</b>	All contractors would be required to certify annually.	Contractors that are scheduled for a compliance evaluation will submit their AAPs through the AAP-VI.	\$3,431,484 in the first year and \$936,996 each year thereafter.
<b>Alternative #1</b>	All contractors would be required to certify annually.	Contractors that are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service.	\$3,359,634 in the first year and \$865,146 each year thereafter.
<b>Alternative #2</b>	All contractors would be required to certify annually.	All contractors would be required to upload all of their AAPs through the AAP-VI on an annual basis.	\$5,039,487 in the first year and \$2,544,999 each year thereafter.
<b>Alternative #3</b>	All contractors would be required to certify every two years.	Contractors that are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service	\$3,011,521 in the first year and \$517,033 each year thereafter.

Given what we believe to be the limited practical utility of the system OFCCP is proposing, in the event OFCCP moves forward with some version of the AAP-VI, we believe adoption of Alternative #3 would pose the least burden to federal contractors.

### **AAP-VI May Have Unintended Security and Data Privacy Concerns**

Finally, in the event that OFCCP implements one of the above AAP-VI options, we are deeply concerned about the confidentiality and security of contractors' AAP data submissions, and strongly recommend that any AAP data submission should be voluntary rather than mandatory.

While we recognize and appreciate the security steps OFCCP has taken thus far regarding the development of the AAP-VI, we believe there are still practical considerations related to the submission and maintenance of contractors' personnel and employment data:

- Many contractors have their own policies and firewalls with respect to securing or disclosing Personally Identifiable Information ("PII") data, and they should not be forced to amend or alter these important standards simply to ease the burden on the government;
- Whether and how OFCCP can reconcile the proactive collection of AAPs and supporting data with the protections afforded by E.O. 11246 regulations,<sup>4</sup> which provide a mechanism for contractors to (1) challenge and object to OFCCP seeking out-of-scope personnel and employment information, and (2) utilize permissible coding to mask the disclosure of sensitive employee-level PII data and information to the agency; and
- Whether and how any contractor data and information submitted through the portal will remain confidential to the "maximum extent" to prevent public disclosure under the Freedom of Information Act ("FOIA"), and whether OFCCP is prepared to handle the influx of FOIA requests that would come from retaining these data in a central repository.

We should note that all of these concerns grow *exponentially* if OFCCP implements the most-burdensome option (Alternative #2), which would require all federal contractors to submit their AAPs on an annual basis, regardless of whether they are scheduled for a compliance evaluation. The result would require the agency to store no less than hundreds of thousands of AAPs each year covering millions of American workers—an unprecedented amount of information and data that the agency simply hasn't accounted for in its burden estimates.

Furthermore, while we recognize that OFCCP plans to limit access to the AAP-VI to no more than 10 agency personnel, there are still concerns regarding how this AAP data, which will be retained for multiple years, will remain confidential, secure, and free from cybersecurity attacks. Along these lines, we offer the following recommendations:

- If the AAP data in the portal is subsequently accessed for purposes of conducting a compliance evaluation, that OFCCP pledge and ensure that internal access to the data by its staff is limited to the

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<sup>4</sup> See 41 C.F.R. §§ 60-1.20(f)-(g).

greatest extent possible only to those on a need-to-know basis, which will limit the data's exposure to potential outside hacking events or through inadvertent spills of sensitive data by:

- Confirming to the contractor which OFCCP staff will have access to these data;
  - Prohibiting the sharing of these data with other staff within the agency via email, flash drive, hard copies, etc.; and
  - Confirming to the contractor that any additional OFCCP staff needing access to these data have been approved by the national office and are considered to be need-to-know individuals.
- That OFCCP provide the contractor with confirmation that any data that has been submitted or shared will be deleted after having served its purpose.

### **Conclusion**

CWC appreciates the opportunity to offer these comments regarding OFCCP's proposal. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny Petrella". The signature is stylized with a large, looping initial "D" and a long, sweeping underline.

Danny Petrella  
Vice President, Compliance and Assistant General Counsel