



November 13, 2020

**VIA FEDERAL eRULEMKAING PORTAL:** <http://www.regulations.gov>

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

**Re: Comment on the Office of Federal Contract Compliance Programs' Proposed Agency Information Collection Request – Affirmative Action Program Verification Interface - by Berkshire Associates Inc.; Docket No. OFCCP-2020-0001**

Dear Ms. Williams:

Berkshire Associates Inc. ("Berkshire") submits the following comment in response to the proposal by the Office of Federal Contract Compliance Programs ("OFCCP") to seek approval under the Paperwork Reduction Act ("PRA") for a new information collection request, which the agency refers to as the Affirmative Action Program Verification Interface, or AAP-VI (referred to as "verification interface" in these comments).

### **BACKGROUND ON BERKSHIRE AND ITS CLIENTS**

Berkshire is a human resource consulting and technology firm specializing in affirmative action compliance and applicant data management. Berkshire's clients vary in size from small establishments with one affirmative action plan ("AAP") to nation-wide employers with thousands of employees covered by multiple AAPs. Berkshire's services are utilized by employers in a wide range of industries, including hospitality, food services, retail, information technology, manufacturing, professional services, health care, colleges, universities, and not-for-profit organizations.



In business since 1983, Berkshire was one of the first companies to provide an automated way of preparing AAPs for employers. Hundreds of Federal contractors and subcontractors, as well as other independent consultants, use Berkshire's proprietary software to prepare compliant AAPs on an annual basis. A certified small business enterprise, Berkshire also provides outsourcing and consulting services to employers, including Federal contractors and subcontractors. Berkshire consultants help employers prepare approximately 7400 AAPs every year and regularly assist employers during compliance reviews by the OFCCP. Over the past several years alone, Berkshire has assisted clients with preparing hundreds of responses to supply and service compliance reviews, including compliance checks and the agency's new focused reviews, in every OFCCP region.

Berkshire supports the OFCCP's efforts to provide a secure manner for transmitting AAPs to the agency during the compliance review process. We also support the agency's goal of developing an AAP verification process for the purpose of better monitoring compliance with the AAP requirements by all covered federal contractors and subcontractors. We believe this goal may be furthered by having contractors and subcontractors complete a periodic certification in OFCCP's new Affirmative Action Program Verification Interface (Option 1 or 3 in OFCCP's proposal). Our comments below request additional clarification on how contractors and subcontractors would use the verification interface to both upload AAPs during the compliance review process and to provide a periodic certification.

## **COMMENTS ON THE PROPOSAL**

### **I. AGENCY'S USE OF THE VERIFICATION INTERFACE TO PROVIDE SECURE TRANSMISSION OF AAPs TO OFCCP DURING COMPLIANCE REVIEWS**

Berkshire generally supports OFCCP's proposal to use the Affirmative Action Program Verification Interface to allow a secure method for federal contractors to submit AAPs and supporting documents electronically to OFCCP in response to a Scheduling Letter and Itemized Listing during a compliance evaluation.

Currently, many federal contractors submit their AAPs and other supporting documents to the OFCCP via email, often as password-protected zip files. Because many of our clients are uncomfortable submitting sensitive employee information in this manner, Berkshire also uses an encrypted transmission process to send materials to the OFCCP on behalf of our clients. However, over the years, we have found both processes to be somewhat cumbersome. For example, in some cases, the OFCCP compliance officer has misplaced the protected file password or has been unable to open the zipped files. In other cases, the encrypted transfers were initially placed in a compliance officer's spam folder, leading the compliance officer to incorrectly conclude that the



submission was not timely made. In addition, Berkshire clients have experienced instances where submission files have been misplaced or lost by the OFCCP. Most importantly, there have been concerns about the retention and security practices for such documents after they are forwarded to the OFCCP.

Given these experiences, Berkshire believes it will be helpful for OFCCP to use the Affirmative Action Program Verification Interface to allow contractors to upload (and presumably OFCCP to store) AAPs and supporting documents during a compliance review. However, the ultimate utility of such an upload feature greatly depends on the flexibility of the interface system, which is not fully explained in the agency's proposal.

As the OFCCP indicated in its proposal, contractors do not, and are not required to, use a particular format for preparing affirmative action programs. There are a variety of ways that contractors can present the information and data analyses required by the OFCCP's regulations. Indeed, to the extent a contractor uses a third-party vendor to prepare its AAP data analyses, the format of those reports will necessarily vary from provider to provider. For these reasons, we agree that the verification interface should **not** require that AAPs be uploaded in a prescribed format, such as is required for annual reporting under the Employer Information Report ("EEO-1 Report"). Requiring all contractors to upload documents in the same format or file type would significantly increase the burden associated with using the verification interface. Instead, we agree with the OFCCP's apparent decision to create an upload process that will accept the information requested in a compliance evaluation in a variety of different formats, including pdf and zip files, to account for differences in the way contractors might prepare and present their affirmative action programs to OFCCP. In addition, Berkshire recommends use of the interface be voluntary. If a contractor desires to submit its AAP and other supporting information in a different manner, the contractor should be permitted to do so, at least during the first few years the verification interface is available.

Berkshire's support for use of the verification interface during compliance reviews is also premised on the fact that the interface meets or exceeds current data security protocols. Based on the agency's supporting statement, we understand the verification interface was designed to be in compliance with the Federal Information Security Modernization Act of 2002 and the access controls and standards established by the National Institute of Standards and Technology (NIST). We believe contractors would benefit from further information about the agency's data security practices for the new verification interface, including specifically how long records will be maintained in the interface once uploaded, and any document destruction guidelines.



## II. PERIODIC CERTIFICATION BY CONTRACTORS USING THE VERIFICATION INTERFACE

The OFCCP also requested comment on its proposal to require contractors to submit a certification of compliance with the affirmative action requirements at 41 CFR Chapter 60 through the verification interface. The agency primarily created the proposed certification process to respond to a report by the Government Accountability Office (“GAO”), which expressed concern OFCCP was only able to “evaluate about 2 percent of federal contractor establishments annually” and recommended the agency “develop a mechanism to monitor AAPs from covered federal contractors on a regular basis.”<sup>1</sup> The agency’s proposal suggested three different options for addressing the concern identified by the GAO Report: (1) annual certification of compliance by all federal contractors and subcontractors; (2) annual uploading of an AAP for each covered contractor establishment; and (3) bi-annual compliance certification by all covered federal contractors and subcontractors. Under options one and three, each contractor would be required to certify whether it has developed and maintained affirmative action programs at each establishment or functional unit on either an annual or bi-annual basis. Under option two, each contractor would be required to certify and upload their AAPs on an annual basis.

Berkshire supports efforts by the OFCCP to develop better scheduling methodologies to identify contractors who are more likely to be non-compliant. Under the agency’s current scheduling methodologies, some contractors are repeatedly selected for multiple compliance reviews year after year, even when the contractor consistently receives a notice of compliance. For example, one Berkshire client has been scheduled for 38 different compliance reviews since 2018 (including the most recent scheduling list released in September 2020). Yet another Berkshire client was scheduled for 15 compliance reviews on the FY2019 Scheduling List, all of which have closed with a notice of compliance thus far. Similarly, another Berkshire client has had nearly 100 establishments selected for a compliance review in the past 8 years, with no significant violations found. These examples illustrate that OFCCP’s current compliance review scheduling process does not adequately prioritize review of contractors who are more likely to be non-compliant.

Of the options presented to address this concern, Berkshire supports either an annual or bi-annual certification by all contractors and subcontractors. Requiring an annual upload of an AAP for every contractor establishment would significantly increase the burden on contractors, without providing significant additional utility to the OFCCP. In particular, given OFCCP’s existing

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<sup>1</sup> Government Accountability Office, *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 11, 2020).



resources, it is not possible for OFCCP to audit, or even cursorily review, the thousands of AAPs that would be uploaded on an annual basis.<sup>2</sup> Moreover, we believe the periodic certification process adequately addresses the agency's stated goal of ensuring all covered contractors prepare annual AAPs, and thus, there is no reason for requiring submission of AAPs from every contractor every year.

### **III. CONTRACTORS COULD BENEFIT FROM CLARIFICATION REGARDING THE SPECIFIC STEPS REQUIRED BY THE VERIFICATION INTERFACE**

While Berkshire generally supports the notion of using the verification interface to better identify contractors who may be non-compliant through an annual certification process, we also believe that further information is needed to evaluate the benefits of a certification requirement against the potential burdens associated with a new information collection. More specifically, we recommend OFCCP provide further information about the following items in its proposal: (1) the contractor log-in and registration process; (2) the contractor information confirmation process; and (3) the certification process.

The proposal suggests OFCCP "will send an email invitation to every known federal contractor establishment within its jurisdiction that meets its AAP submission thresholds" to initially register contractors and subcontractors for the verification interface. Berkshire has some concerns about notices being sent to individual contractor establishments, especially for those contractors with more than one establishment. We believe sending notices to individual establishments of a single covered contractor may create significant confusion and lead to inconsistent reporting by the same contractor. Based on our experience in filing EEO-1 Reports for employers, we believe many companies would prefer to designate a single or primary user of the verification interface. Accordingly, Berkshire suggests OFCCP initially identify a single point of contact for each identified contractor and subcontractor, such as the point of contact who certified the organization's most recently filed EEO-1 Reports. The central point of contact at each covered contractor or subcontractor would then identify the user or users within their organization who will have responsibility for the contractor's registration, verification, and annual certification requirements in the verification interface.

Berkshire also requests further clarification regarding the agency's proposal to have users "confirm" certain populated contractor information as part of the verification interface. The proposal states that the contractor information to be confirmed generally includes "EEO-1 information on Establishment Name, Parent Name, Unit Number, Headquarter Number,

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<sup>2</sup> The OFCCP estimates that there are 116,898 existing contractor establishments. The agency currently reviews anywhere from 1500-5000 AAPs each year as part of its compliance evaluation process.



Establishment Address, Establishment Status, EIN, DUNS, NAICS, Employee Count, and contact information (Name, Title, Phone, Email).” Without additional detail about this conformation process, it is difficult to evaluate the utility of providing this information, or the burden associate with requiring confirmation of it in the verification interface.

We have some concerns “confirming” this information may be more difficult than OFCCP has anticipated, primarily because our experience is that the EEO-1 information to which OFCCP has access is often several years old. In the interim, many employers will have closed or opened establishments or acquired or sold establishments. In addition, the number of employees at each establishment is highly unlikely to be the same due to natural attrition, planned hiring or reductions in force, and transfers of employees between establishments or to remote work. For example, OFCCP currently has access to contractor EEO-1 Reports covering a period in 2018. If a contractor were to log into the verification interface today, it is very likely the number of establishments and employee counts, among other items, would be different than what was provided in the 2018 EEO-1 Report. As a result, the burden associated with “confirming” this information could be significant, especially if contractors are expected to update the data as part of the confirmation process, which is unclear from the summary of the proposed information collection request. Without more information about the perceived benefits to OFCCP’s enforcement activities of confirming this information, or more detail about the specific confirmation requirements, we cannot fully evaluate whether the utility of contractor confirmation of this data outweighs any burden associated with collecting this information, as required by the PRA.

In order to simplify this process, and if “confirmation” of this information is really needed in order to determine whether a contractor has developed and maintained AAPs, we recommend OFCCP consider requiring that contractors simply confirm that the EEO-1 information in the verification interface was accurate as of the snapshot date of the EEO-1 Report from which the information was pulled. Typically, because of the delay in OFCCP’s receipt of EEO-1 information from the EEOC, we expect that a contractor would be confirming the prior year’s EEO-1 information, if confirmation of this data in the verification interface is to be required on an annual basis. For example, assuming confirmation of the EEO-1 information is required in the verification interface in January 2022, contractors would “confirm” that the EEO-1 information in the verification interface was accurate as of the snapshot date used for the EEO-1 in the interface, which would most likely be the snapshot date used for the 2020 EEO-1 filing, which is to be submitted to OFCCP by March 31, 2021.

Berkshire also believes that contractors could benefit from further clarification regarding the certification process. First, more information about the timing of the annual or bi-annual certifications would be helpful. The agency’s proposal indicates that all contractors would be



asked to certify within the first 90 days of the interface being active or becoming a contractor, whichever occurs first. Thereafter, contractors would be expected to certify compliance by an unspecified date set by the OFCCP. We urge the OFCCP to release more details about the dates by which contractors would be expected to certify on an annual or bi-annual basis. We also ask that OFCCP consider aligning the certification period in the verification interface with the filing period for EEO-1 Reports. Aligning the two periods – so that a contractor is certifying its EEO-1 Reports and certifying that it has developed and maintained AAPs for each of its establishments at the same time – could potentially make it easier to embed this new data collection requirement into existing contractor compliance practices.

Second, further clarification is needed regarding how contractors should respond to the certification requirement based on the effective date of their AAPs. The OFCCP's proposal indicates that contractors will either indicate that they have or have not established and maintained AAPs at each establishment or functional unit. The proposal is silent on how a contractor should respond to the certification requirement if it is in the process of developing its annual update to its AAPs on the date certification is required. As OFCCP knows, it takes many contractors a significant amount of time to gather and analyze the data required for an annual update to an AAP. Given this, we believe such a contractor may still certify that it has established and maintained affirmative action programs at each establishment, even if the contractor is still working on finalizing its current year AAP update.<sup>3</sup> However, we recommend that the OFCCP clearly indicate that this approach is acceptable in its final proposal.

#### **IV. OFCCP'S BURDEN ESTIMATES**

The OFCCP has estimated that it will take each contractor 0.3 hours to create an account, 0.2 hours to upload their AAP to the verification interface during a compliance review and 0.1 hours to answer the annual certification question. Without more specific information about some of the questions raised herein, it is difficult to evaluate whether the agency's burden estimates are accurate or not. Of particular concern is the amount of time that might be needed to "confirm" the EEO-1 information in the verification interface, particularly if a contractor is expected to update any incorrect information. If some of the suggestions and clarifications in this comment are

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<sup>3</sup> Adopting a March 31 certification date (i.e. aligning the requirement with the current deadline for filing the required EEO-1 Reports) might alleviate some of these concerns since many contractors adopt a January 1 effective date for their AAPs. Obviously, there will still be some contractors who may be working on their annual update to their affirmative action program on March 31, such as those that have adopted a March 1 plan date. However, the number of contractors is likely to be far fewer than if a January 1 certification date was adopted.



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adopted, Berkshire believes that contractors should be able to complete the steps required by the verification interface in a reasonable amount of time.

**CONCLUSION**

Berkshire appreciates the opportunity submit these comments to the OFCCP. We would be happy to answer any questions you may have about our comments on the proposed Annual Affirmative Action Verification Interface.

Respectfully submitted,

A handwritten signature in blue ink that reads 'Lynn A. Clements'.

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