



November 13, 2020

**VIA ELECTRONIC UPLOAD**  
**FEDERAL RULEMAKING PORTAL**

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

**Re: Comments by The Institute for Workplace Equality and Circa in Response to OFCCP's Proposal to Implement the Affirmative Action Program Verification Interface**

Dear Ms. Williams:

The Institute for Workplace Equality (“IWE” or “The Institute”) and Circa submit the following comments in response to the U.S. Department of Labor’s Office of Federal Contract Compliance Programs’ (“OFCCP” or the “Agency”) invitation for comments regarding its Notice of Proposal to Implement the Affirmative Action Verification Interface (“AAP-VI”).<sup>1</sup>

**Background on The Institute for Workplace Equality and Circa**

The Institute is a national non-profit employer association based in Washington, D.C. The Institute’s mission includes the education of federal contractors regarding their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation’s largest and most sophisticated federal contractors.

Circa (formerly LocalJobNetwork), with offices in Milwaukee and Minneapolis, is the industry leader providing federal contractors with a fully outsourced solution to comply with OFCCP enforced obligations. The company was founded in 1996, has 3800+ customers, and

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<sup>1</sup> Affirmative Action Program Verification Interface, 85 *Fed. Reg.* 56635 (Sept. 14, 2020); available at <https://www.federalregister.gov/documents/2020/09/14/2020-20105/affirmative-action-program-verification-interface-new-information-collection-requirements-comment>.

posted 5M+ jobs in 2019. Circa also offers diversity outreach management through its relationships with 20,000+ community organizations, outsourced recruiting, and delivers diversity candidates through its 600+ online employment websites.

The Institute and Circa recognize the responsibility of all employers, including federal contractors subject to the nondiscrimination and affirmative action obligations that OFCCP enforces, to create a nondiscriminatory workplace. We support efforts to make the workplace free from all forms of unlawful discrimination. To that end, we fully support OFCCP's significant role in well-designed and effective enforcement efforts and policies.

## **I. Overview of Comments Regarding OFCCP's Affirmative Action Program Verification Interface**

The Institute and Circa applaud OFCCP's efforts to establish a proposed Affirmative Action Program Verification Interface or AAP-VI. The proposal will enable OFCCP to develop and maintain a database of all covered contractors and subcontractors so that the Agency can focus its limited resources on those contractors that are most likely to not be in compliance. In addition, the proposal creates a secure portal through which contractors can provide OFCCP with data when a contractor is selected for a compliance evaluation.

The Institute and Circa believe that the OFCCP proposal to authorize an annual Affirmative Action Program online verification process for federal contractors, and a secure method for federal contractors to submit AAPs electronically to OFCCP *when scheduled for a compliance evaluation*, would improve OFCCP's efficiency and effectiveness and encourage federal contractor compliance.

## **II. The Proposal Is in Response to Concerns Raised by the GAO and Federal Contractors**

### *A. GAO Report Recommendation*

On September 22, 2016, the U. S. General Accountability Office ("GAO") issued a report on OFCCP entitled *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*.<sup>2</sup> The report assessed how OFCCP conducts supply and service compliance evaluations, including the methodology, resources, and results, and (2) evaluated OFCCP outreach, assistance, and guidance efforts to assist contractors in complying with the requirements it enforces.

The report found OFCCP's process for selecting contractors for audit did not ensure that contractors most likely to be violating the equal employment and affirmative action requirements were being selected, finding that "since 2010, about 78 percent of evaluations found no violations and about 2 percent had discrimination findings (see figure below)."<sup>3</sup>

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<sup>2</sup> US Gov't Accountability Off., GAO-16-750, EQUAL EMPLOYMENT OPPORTUNITY: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance (2016); available at <https://www.gao.gov/products/GAO-16-750>.

<sup>3</sup> *Id* at Highlights.



Source: Office of Federal Contract Compliance Program data. | GAO-16-750

The GAO also found that as a result of OFCCP’s inability to conduct audits for the “tens of thousands of establishments in its jurisdiction,”<sup>4</sup> the agency relied “significantly” on voluntary compliance which did not ensure compliance with its regulations.<sup>5</sup> Finally, the report noted that after a 30-day scheduling letter was sent to a contractor, nearly 85 percent of contractors did not submit their affirmative action plans to OFCCP within 30 days of receiving the audit scheduling letter. As a result of these findings, the GAO made a recommendation<sup>6</sup> that OFCCP:

[d]evelop a mechanism to monitor AAPs from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates.

#### B. *The Institute’s 2017 White Paper*

Prior to the Trump Administration taking office on January 20, 2017, The Institute (then The OFCCP Institute) was asked to submit a white paper to the new administration regarding its recommendations concerning OFCCP. In response, The Institute submitted a white paper entitled *Charting the Course for OFCCP for 2017 and Beyond*.<sup>7</sup> In the white paper, The Institute recommended that OFCCP create a non-burdensome compliance certification program that enabled the agency to focus its enforcement efforts on those contractors that are overtly out of compliance. Specifically, The Institute recommended:

Simple certification program consistent with the requirements of §60-2.35. The certification would require that contractors, on an annual basis, certify on OFCCP’s website that they have developed affirmative action plans consistent with the requirements of EO 11246, Section 503, and VEVRAA. This will allow OFCCP to build a database of contractors and then *focus a majority of its audit resources on those contractors that did not certify* [emphasis added].<sup>8</sup>

<sup>4</sup> *Id.* at p. 17.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at p. 37.

<sup>7</sup> A copy of The Institute’s White Paper is attached as Exhibit A.

<sup>8</sup> *Id.*

*C. Directive 2018-07*

On August 24, 2018 OFCCP issued Directive 2018-07<sup>9</sup> indicating plans to implement a verification process “with the objective of ensuring that all covered federal contractors are meeting the most basic equal employment opportunity (EEO) regulatory requirement, namely, the preparation of a written affirmative action program (AAP) and annual updates to that program.”<sup>10</sup>

**III. The AAP-VI Proposal Would Reduce Burden on Contractors while Increasing OFCCP Efficiency and Effectiveness**

*A. OFCCP currently audits the same contractors over and over*

One of the major findings of the 2016 GAO Report was that only 2 percent of all compliance evaluations between 2010 and 2015 resulted in a finding of discrimination.<sup>11</sup> What the report does not highlight is that the OFCCP has only a limited database of covered contractors and as a result the agency selects the same contractors over and over for compliance evaluations. In an effort to determine whether the current scheduling process fails to focus on the entire federal contractor community, we conducted a review and comparison of both the OFCCP audit scheduling lists and Department of Labor’s (DOL) public enforcement database.<sup>12</sup> Both sources and our findings are described below.

Based on a review of the OFCCP Corporate Scheduling Announcement Lists (CSAL) from 2012 through 2020, there were 21,951 establishments scheduled for compliance evaluations. This roughly equates to OFCCP scheduling approximately 2,439 reviews per year. To put this in perspective, OFCCP has estimated that there are approximately 26,514<sup>13</sup> covered **prime** contractors (this does not include subcontractors). Those covered contractors have approximately 116,898 establishments eligible to be selected for audit<sup>14</sup>. Therefore, OFCCP only reviews approximately 2% of covered contractor establishments on annual basis. This calculation does not account for the universe of covered subcontractors.

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<sup>9</sup> U.S. Dep’t of Labor, OFCCP, Directive 2018-07 (Aug. 24, 2019), available at <https://www.dol.gov/agencies/ofccp/directives/2018-07>.

<sup>10</sup> *Id.* at p. 1.

<sup>11</sup> GAO-16-750.

<sup>12</sup> [https://enforcedata.dol.gov/views/data\\_summary.php](https://enforcedata.dol.gov/views/data_summary.php).

<sup>13</sup> <https://www.federalregister.gov/documents/2020/11/10/2020-24858/rin-1250-aa10>.

<sup>14</sup> <https://beta.regulations.gov/document/OFCCP-2020-0001-0001>.

As summarized in Table 1 below, only 6,212 unique parent companies appeared in the OFCCP Scheduling lists over the nine-year period we reviewed. This represents 23% of the estimated 26,514 prime contractors, at most; parent company name was used to develop a unique list, so the actual percentage is likely lower. Of the 6,212 companies, 37.5% (2,327) of companies appeared multiple times, with over 100 companies appearing 30 or more times.

**Table 1. Summary of 2012-2020 OFCCP Scheduling Lists**

Total establishments	21,951	
Unique parent companies	6,212	
# of companies appearing once	3,885	62.54%
# of companies appearing two+ times	2,327	37.46%
# of companies appearing 10+ times	475	7.65%
# of companies appearing 20+ times	214	3.44%
# of companies appearing 30+ times	121	1.95%
# of companies appearing 40+ times	72	1.16%
# of companies appearing 50+ times	45	0.72%
# of companies appearing 60+ times	28	0.45%
# of companies appearing 70+ times	21	0.34%
# of companies appearing 80+ times	15	0.24%
# of companies appearing 90+ times	9	0.14%
# of companies appearing 100+ times	3	0.05%

**The twenty contractors scheduled most frequently for audits were each on the CSAL list at least 75 times between 2012-2020.** These “top 20” contractors make up less than 0.1% of contractors, yet were scheduled for 8.34% (1,831 out of 21,951) of all audits during this time.

The OFCCP maintains an enforcement database which summarizes OFCCP compliance evaluations closed during each year and whether the review resulted in one of four options: (1) notice of closure, (2) conciliation agreement (with only non-financial settlements), (3) consent decrees, or (4) financial settlements (i.e., findings of alleged discrimination).

Using data from OFCCP enforcement database<sup>15</sup> and the data above of the “top 20” companies (i.e., most CSAL appearances), Table 2 below describes and contrasts the “top 20” companies with the enforcement database appearances and results.<sup>16</sup>

<sup>15</sup> We were able to obtain enforcement database records for those evaluations that closed in 2010 through August 2020 to utilize as the reference. Again, parent company name was used to identify unique companies within the enforcement database, as well as match companies between the enforcement database and the 2012-2020 CSALs. At times, establishment name and address columns (when available) could be utilized to improve matches across lists.

<sup>16</sup> Note—parent company name is masked.

**Table 2. OFCCP Enforcement Database from 2010-2020**

Parent Company	2012-2020 CSAL Appearances	2010-2020 Closures	Enforcement Database (2010-2020)				% Notice of compliance
			1:Notice of compliance	2:Conciliation Agreement	3:Consent Decree	4:Financial Agreement	
Company1	142	173	165	8	0	0	95.38%
Company2	136	156	149	4	0	3	95.51%
Company3	115	92	87	5	0	0	94.57%
Company4	97	110	110	0	0	0	100.00%
Company5	94	92	91	0	0	1	98.91%
Company6	92	86	79	6	0	1	91.86%
Company7	91	88	88	0	0	0	100.00%
Company8	91	55	44	10	0	1	80.00%
Company9	90	73	71	2	0	0	97.26%
Company10	87	103	96	7	0	0	93.20%
Company11	86	131	121	6	0	4	92.37%
Company12	84	122	96	21	0	5	78.69%
Company13	83	98	96	2	0	0	97.96%
Company14	82	64	62	2	0	0	96.88%
Company15	81	79	78	1	0	0	98.73%
Company16	78	76	74	1	0	1	97.37%
Company17	76	67	56	10	0	1	83.58%
Company18	76	103	96	6	0	1	93.20%
Company19	75	63	63	0	0	0	100.00%
Company20	75	85	83	2	0	0	97.65%
	<b>1831</b>	<b>1916</b>	<b>1805</b>	<b>93</b>	<b>0</b>	<b>18</b>	94.21%
			94.21%	4.85%	0.00%	0.94%	

Over the 11-year period, the “top 20” companies had a combined total of 1,916 compliance evaluations close. Over 94% of these evaluations closed with Notices of Compliance with less than 1% of these audits resulted in findings of discrimination, no consent decrees, and less than 5% resulted in Conciliation Agreements.

Further, two of these “top 20” contractors accounted for half of the findings of discrimination summarized in Table 2. If we remove these from consideration, the findings of discrimination drop to 0.5%, and fewer than 4% resulting in Conciliation Agreements. Three of the “top 20” have a 100% success rate in receiving Notice of Compliances at the end of each evaluation.

The comparison of data provides a clear picture that although these “top 20” companies were routinely scheduled for audits over a decade, there was rarely a finding of discrimination.<sup>17</sup>

As found by GAO’s 2016 Report and confirmed by a review of OFCCP’s 2012-2020 CSAL as well as 2010-2020 enforcement data, OFCCP’s current scheduling process focuses on an extraordinarily minute subset of the federal contractor community and fails to review the compliance by the additional contractors that are most likely to be in violation of their obligations. The AAP-VI would assist OFCCP in focusing on the large portion of the contractor that are not currently being reviewed by OFCCP to determine whether there is compliance with their AAP obligations. Clearly, such an approach would enhance OFCCP enforcement; encourage compliance by federal contractors and subcontractors; and potentially lessen the recurring audit burdens being disproportionately borne by a small segment of the contractor community that is overwhelmingly compliant.

*B. The proposal would reduce the audit burden on specific contractors by broadening the universe of contractors subject to OFCCP compliance evaluations*

One limitation OFCCP currently has is that it does not have a complete list of federal contractors and subcontractors. Initially, under Directive 2018-07,<sup>18</sup> OFCCP planned to use existing mechanisms to ensure that federal contractors were complying with affirmative action requirements, including the System for Award Management (“SAM”), database.<sup>19</sup> However, as described in OFCCP’s ICR Supporting Statement,<sup>20</sup> OFCCP and GSA were unable to reach an agreement on the sharing of the data. As a result, OFCCP is proposing to implement AAP-VI to verify contractor compliance and has agreed that it will share the resulting data with GSA.<sup>21</sup> For purposes of these comments, we accept the conclusion that the GSA is not able to share data with

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<sup>17</sup> Note, the number of CSAL appearances in Table 2 will not match the enforcement database closures as the CSAL represents those establishments that will be *scheduled* for a compliance evaluation, whereas the enforcement database summarizes those already *closed*.

<sup>18</sup> Directive 2018-07, p. 2. *See fn. 4*.

<sup>19</sup> Prior to being awarded contracts by the federal government, potential vendors are required to register in SAM. To remain active in the federal procurement and awards process, SAM registration must be updated or renewed annually. There are an estimated 25,000 prime contractors in the SAM database.

<sup>20</sup> *U.S. Dep’t of Labor, OFCCP, Affirmative Action Program Verification Interface Justification* (Sept. 2020); available at <https://www.regulations.gov/document?D=OFCCP-2020-0001-0001>.

<sup>21</sup> *Id.* at p.8.

OFCCP, and therefore we conclude that OFCCP has a legitimate interest in securing information on the identity of the federal prime and subcontractors.

The proposed AAP-VI would require contractors to log in annually to certify whether an AAP was developed and maintained. As the 2016 GAO report noted, federal contractors are not currently required to verify to OFCCP that they develop and maintain their AAPs on an annual basis. In a manner similar to that required by SAM, contractors would select one of the following response options:

- The entity has developed and maintained AAPs at each establishment, as applicable, or for each functional or business unit.
- The entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained AAPs at each establishment, as applicable.
- The entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable AAPs.

As stated above, this type of verification is already required on the SAM procurement website, so this is not a new requirement. This proposal would meet the recommendation of the 2016 GAO report without unduly burdening contractors. In addition, as OFCCP will share the AAP verification data file with the GSA, the proposal would also allow both agencies to have better oversight of federal contractor compliance.

*C. The proposal would also provide a secure portal for contractor submission of AAPs during compliance evaluations*

In addition to the annual verification, the AAP-VI interface will include a section devoted to AAP upload as a means of submission *during compliance evaluations*. Currently contractors are required to submit data to OFCCP through email, or a delivery, courier or postal service. Institute members have experienced issues during audits with lost or mismanaged data files or documents, raising information security concerns. Our members' preference is to avoid using email to transmit sensitive information, yet until now have not had more secure electronic options offered by OFCCP during audits. Note, however, that the only point at which there is a justification for the collection and submission of the AAPs is in responding to the OFCCP's properly noticed compliance evaluations – there is no basis for the contractors to bear the burden of uploading their AAPs as part of the verification process, nor would such an upload be necessary because of the verification.

The Institute and Circa support this proposal as presented, and applaud OFCCP for developing a secure method of providing these sensitive documents during a compliance review. The AAP Upload section of the interface does not increase the burden for contractors and will improve security as they must submit these documents during a compliance evaluation.



#### IV. Proposed ICR is Best Option for OFCCP and Contractors

In an effort by OFCCP to receive constructive comments and ensure an efficient timeline, OFCCP provided three additional options<sup>22</sup> to the ICR proposal that we have been discussing for commenters to consider and on which to provide feedback:

1. Certification annually only, no electronic uploads;
2. Certification annually and upload of AAPs annually, rather than compliance evaluation submissions only; or
3. Certification every two years.

Given that contractors are already certifying annually through the SAM database (assuming AAP-VI replaces this), and the increased security that the AAP upload provides for compliance evaluation AAP submissions, the current ICR is the best of the four available options that OFCCP has proposed.

Overall, the proposed ICR should improve current processes and enhance OFCCP efficiency and effectiveness. AAP verification is already happening through SAM; this merely shifts where contractors are verifying and goes further to provide OFCCP with improved information regarding those contractors who are, and are not, developing AAPs. Access to this information would allow OFCCP to focus its scheduling methodology to select those contractors who are not developing AAPs (or also not registering) for audits rather than the same contractors over and over.

In particular, we want to point out that the option for an annual upload of AAPs is ill-advised and would impose significant burdens on the federal contractor community and the OFCCP with no demonstrated justification or benefit.

We have some questions and concerns regarding the structure of company (or establishment) accounts and workflow of the interface system, and the related burden, that will need to be addressed by OFCCP after the initial 60-day comment period. To limit burden, we encourage OFCCP to consider verification by **contractor**, rather than **establishment**. Assuming OFCCP is able to streamline the process to ensure the burden is low, we think this is an important step forward for the agency and regulated community.

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<sup>22</sup> *Id.* at 9-10.

**Conclusion**

Thank you in advance for your consideration of the comments by The Institute and Circa. We are happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,

The Institute for Workplace Equality



David B. Cohen



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Patrick Sheahan