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**SUBMITTED VIA FEDERAL ERULEMAKING PORTAL:
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Director Tina Williams
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW, Room C-3325
Washington, DC 20210

Re: Comments on Notice and Comment Request, New Information Collection Requirements,
85 Fed. Reg. 56,635-36 (Sept. 14, 2020).

Dear Director Williams:

Please consider the following comments in response to the above-referenced Notice and Comment Request, New Information Collection Requirements, published at 85 Fed. Reg. 56,635-36 (Sept. 14, 2020). These comments are informed by the decades of experience of our OFCCP practice attorneys who have assisted hundreds of employers in virtually every industry and major geographic market across the United States. Our attorneys have represented a diverse array of employers over many years regarding compliance with the full spectrum of OFCCP regulatory requirements and during thousands of OFCCP audits.

I. Introduction

The following comments raise numerous points in support of our concerns about the proposed AAP certification and AAP submission alternative suggested in OFCCP's Supporting Statement, notably that: (1) OFCCP lacks regulatory authority for the proposals and must engage in rulemaking to authorize the same, which it has not yet done; and (2) the proposed AAP certification would violate federal contractors' and subcontractors' due process rights because it is too vague to understand and apply. Lastly, we would note that the US economy has been impacted substantially from the COVID-19 pandemic and any new AAP certification or submission requirement should not be implemented until the economy has fully recovered to 2019 levels of employment, unemployment and GDP. Based on prevailing estimates, this would likely be no sooner than 2023.

II. Detailed Comments

A. **OFCCP Has No Regulatory Authority for the Proposed Certification or Collection of AAPs.**

OFCCP has cited no regulation that authorizes the proposed information collection for which it seeks OMB approval. That is because no such regulatory authority exists that would allow OFCCP to forgo the rulemaking process.

E.O. 11246:

OFCCP's Supporting Statement suggests Executive Order 11246 itself as providing the necessary authorization, stating:

Furthermore, EO 11246 section 202(6) stipulates that contractors will furnish all information and reports required by EO 11246 for the Secretary of Labor and will permit access to books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with EO 11246 and its regulations.

However, Section 202(6) provides as follows:

The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

E.O. 11246, § 202(6).

Nowhere does Executive Order 11246 require covered contractors or subcontractors to provide any AAP compliance certification, nor does the Order require submission of AAPs outside of active OFCCP investigation. Indeed, the Order does not even mention the term affirmative action program.

OFCCP Regulations:

Instead of Executive Order 11246 directly requiring any contractor reports, OFCCP regulations expressly establish the particular reports and related format that the Agency may require generally from those federal contractors and subcontractors subject to its jurisdiction. *See* 41 C.F.R. §§ 60-1.7 and 60-2.31. These regulatory provisions indicate that OFCCP reporting mandates generally applicable to federal contractors and subcontractors must be adopted through rulemaking procedures. Further, nowhere in the existing regulatory authority is there any provision for the proposed annual AAP certification requirement applicable to all covered

contractors and subcontractors (i.e., old and new), nor the proposed alternative of an annual submission of AAPs to OFCCP.

With respect to what *is* included in current regulations:

- OFCCP regulations expressly include a narrow certification requirement, but it is *only* applicable to “bidders or prospective contractors.” 41 C.F.R. § 60-1.7(b). The FAR regulations cited by OFCCP in the Supporting Statement (at 14) also relates to bidders for prospective federal contracts. *See* FAR 52.212-3 (defining the affirmative action compliance certification as applicable to “offerors”: “The offeror represents that . . . ”); *see also* FAR 2.101 (defining “Offeror” as “mean[ing] offeror or bidder” and defining “offer” as a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract”).
- OFCCP’s AAP regulations authorize potential submission of a limited “program summary” and provide:

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be prescribed by the Deputy Assistant Secretary and published in the Federal Register as a notice before becoming effective. Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

41 C.F.R. § 60-2.31.

However, OFCCP never referenced this regulatory provision in the information collection request, nor has the Agency identified a program summary format or published it in the Federal Register for notice and comment, as required.

- Neither of the existing OFCCP regulatory provisions cited above would provide any authority for a general requirement that federal contractors and subcontractors annually submit their complete AAPs to OFCCP.
- The only regulatory authorization for an OFCCP request to submit a complete AAP to the Agency is the compliance evaluation regulations contained in 41 C.F.R. § 60-1.20. To the extent that OFCCP seeks to impose an annual certification or submission of AAPs outside of compliance evaluations, the Agency plainly must engage in APA rulemaking, which it has not done here.¹

¹ Further, in the absence of existing regulatory authority to mandate the proposed certification, OFCCP could not argue that the certification is voluntary, but subject those that do not submit any certification to compliance evaluations. *See Chamber of Commerce v. OSHA*, 174 F.3d 206, 211-13 (D.C. Cir. 1999) (invalidating OSHA directive that purported to afford employers

As OFCCP has explained in the Supporting Statement and as explained above, the proposed certification is markedly dissimilar from the existing certification through the System for Award Management (SAM). Unlike the proposed certification, OFCCP has not ever, and does not now, obtain or use the certification information from SAM. By contrast, in the proposed structure, OFCCP suggests that it will use the certification responses of those contractors that do not certify appropriately to target them for compliance evaluations or additional investigation of compliance. Accordingly, the proposed certification will have significantly greater consequences than the SAM certification.

In addition to the different consequences of the certifications, the AAP certification in SAM is one of literally dozens of other certifications related to various federal acquisition regulations contained in the same FAR clause. Further, the text of the FAR certification is both different than the proposed certification text and somewhat anachronistic:

“Affirmative Action Compliance. The offeror represents that - (i) It has developed and has on file, has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR parts 60-1 and 60-2).”

As discussed below, the FAR certification suggests that the AAP is a paperwork exercise that merely results in a document “on file,” a view of the AAP requirement that may have been applicable in the 1970s but one that the Agency expressly renounced in the 2000 and later revisions to the AAP regulations. Given the fact that the FAR certification has never been used for OFCCP compliance purposes, the SAM certification ambiguities did not have any practical importance. However, under the proposed OFCCP certification, the certification *will* have significant practical consequences, i.e., compliance evaluations for those that do not certify appropriately.

In sum, since E.O. 11246 and current OFCCP regulations do not authorize or envision the new information collection requirements proposed, OFCCP must engage in rulemaking to have authorization for the proposed AAP certification or the alternative generalized submission of AAPs outside of any compliance evaluation.

B. The Proposed Certification Requirement Would Violate Contractors’ Due Process Rights Because Is Far Too Vague.

Regulated entities have a due process right to “fair notice” under “the principle that agencies should provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (internal

forbearance from workplace inspections if they certified compliance with a comprehensive safety and health program because OSHA did not issue the directive through rulemaking procedures).

quotation marks and citations omitted). *See also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.”); *FABI Constr. Co. v. Sec’y of Labor*, 508 F.3d 1077, 1088-89 (D.C. Cir. 2007) (“announcing [a new interpretation] for the first time in the context of this adjudication deprives Petitioners of fair notice”) (citing *Martin v. Occupational Safety & Health Rev. Comm’n*, 499 U.S. 144, 158 (1991) and *Jones v. Flowers*, 547 U.S. 220, 226 (2006)). “[R]egulated parties should know what is required of them so they may act accordingly [and] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *Fox Television*, 132 S. Ct. at 2317. Due process further requires that any certification of compliance must be precise so that federal contractors and subcontractors are able to reasonably assess the exact scope and nature of the requested representation.

The proposed certification text (listed below) is far too vague to meet these due process requirements:

1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, or for each functional or business unit. *See* 41 CFR Chapter 60.
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. *See* 41 CFR Chapter 60.
3. Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. *See* 41 CFR Chapter 60.

This is because Part 1 does not define or explain the key concepts of “developed” or “maintained” and uses the term “establishment” in a way that appears to be inconsistent with OFCCP AAP regulations. In addition, Parts 2 and 3 require a reporting entity to determine whether it is in fact a covered federal contractor or subcontractor, which in turn requires a complex legal analysis exacerbated by OFCCP’s proposal to use the EEO-1 database as defining the universe of respondents to the certification requirement.

“Developed” and “Maintained”:

The OFCCP AAP regulations do not *define* the terms “developed” or “maintained” in any way. Instead, OFCCP regulations simply *use* the terms (*see*, e.g., 41 C.F.R. § 60-2.1):

Who is included in affirmative action programs. Contractors subject to the affirmative action program requirements must develop and maintain a written affirmative action program for each of their establishments.

The OFCCP AAP regulations provide many detailed requirements regarding the “contents” of AAPs and the “implementation” of AAPs and provide a general overview of their “purpose”. *See* 41 C.F.R. §§ 60-2.10-2.17. From this one may understand the undefined term “developed”

to suggest that at some point in time a contractor has *prepared a physical or electronic document* called an affirmative action program that meets some of the content requirements identified in OFCCP regulations. It appears that the Agency's proposal contemplates this interpretation as at least part of the proposed certification because the proposal also includes a specified timetable for certification, which suggests that a written document called an AAP has somehow been completed by a certain date.

However, notably many of the critical elements of an AAP under the OFCCP AAP regulations do not specify a timetable nor could they involve preparation of a document, making compliance "certification" as proposed practicably impossible. For example:

- 41 C.F.R. § 60-2.17(b): The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist.
- 41 C.F.R. § 60-2.17(c): The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60-2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.
- 41 C.F.R. § 60-2.17(d): The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:
 - (1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;
 - (2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;
 - (3) Review report results with all levels of management; and
 - (4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

The above considered, because many required components of an AAP do not involve the creation of some hard copy or electronic document, it is unclear what a contractor is exactly confirming when certifying that it has "developed" an AAP. Further, the lack of such specificity and detail violates due process.

The certification that an AAP is "maintained" by the contractor is equally vague and problematic. OFCCP AAP regulations call for ongoing efforts throughout the AAP year as identified in the regulatory provisions quoted above. Thus, what qualifies as an AAP having been "maintained" is unclear. Does that simply mean that a hard or electronic AAP document exists somewhere and has not been discarded? Presumably, OFCCP has something more in

mind, as the nature of AAP implementation under OFCCP regulations does not suggest any particular timetable but an *ongoing effort* throughout the AAP year.

Equally problematic, “maintained” suggests some *level* of adequate implementation which is nowhere defined. For example, in assessing whether a contractor can certify that they have “maintained” their AAPs, must it conduct mini-compliance evaluations on implementation of each AAP? Under this interpretation, the burden imposed by the certification requirement would be massive – and the timetable for certification would make no sense.

In addition, it should be noted that the proposed certification process is quite at odds with the very concept of an AAP articulated in the OFCCP AAP regulations:

An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination.

41 C.F.R. § 60-2.10(a)(3). (Emphasis added).

Rather than a mere policy or paperwork exercise that results in some completed document that a contractor could “certify” at a given point in time that it has completed (i.e., “developed”) and not discarded (i.e., “maintained”), the OFCCP regulations identify an AAP as an activity that the contractor engages in throughout a given AAP year. Or, put another way, an AAP is an affirmative action *program* by name and regulatory design – not merely a written “plan” or “policy”. Thus, OFCCP’s proposed certification must provide much greater explanation and definition of the nature and scope of the certification – and do so in a way that addresses the fundamental mismatch between some document that is completed at a point in time and the Agency’s regulations describing the more complete, active and living nature of an AAP.

“Establishment”:

In addition to the vagueness concerns outlined above, the use of “establishment” in Part 1 must be revised because OFCCP regulations do not require contractors to develop AAPs for each establishment. *See* 41 C.F.R. § 60-2.1(d)(2). Instead, OFCCP regulations identify somewhat complex, often inconsistent, and ill-specified rules for allocating employees to AAPs and then provide options for establishments that would not have at least 50 employees in an AAP after application of the allocation rules. *See* 41 C.F.R. §§ 60-2.1(d)(1)-(d)(3). Even with clarification that the certification applies only to AAPs required to be developed under the OFCCP regulations, contractors should not be forced to certify that they have applied these AAP

establishment rules accurately because those underlying rules themselves are too vague to permit such a certification request under due process.

“Contactor” and “Subcontractor” Status:

Lastly, Parts 2 and 3 of the proposed certification are too vague because they require a potential reporting entity to determine whether it is in fact a covered federal contractor or subcontractor, which itself is a complex endeavor.

Determining whether an entity is a covered federal contractor or subcontractor is notoriously confusing and difficult. This is especially the case with respect to subcontractor and single-entity jurisdiction, which involves uncertain legal standards that are fact-intensive and challenging to apply. Despite this, the proposed certification requirement suggests that it would extend to entities that are *not* covered federal contractors or subcontractors and would make those entities engage in a complex jurisdictional assessment. These problems are in turn exacerbated by OFCCP’s proposal to use the EEO-1 database as defining the universe of respondents to the certification requirement. However:

- EEO-1 instructions require parent corporations that own a majority of the ownership interest in another corporate entity to provide all of the reports for all such entities.
- The EEO-1 report structure, which limits reports to a parent-wide consolidated report, a parent Headquarters report, and individual establishment reports (and offers no report designated for majority owned subsidiaries) does not identify any of the intermediate corporate entities.
- OFCCP historically has assumed that any establishment linked through a common parent ID to another establishment that has identified itself as a federal contractor or subcontractor is presumptively also subject to the Agency’s jurisdiction.
- However, this is simply an assumption, and the legal analysis for determining OFCCP jurisdiction under the single-entity test is extensive.

In sum, the proposed AAP certification would violate federal contractors’ and subcontractors’ due process rights because it is too vague to be understood and applied – and much more than a “check-the-box” affirmation that can be completed upon simple inquiry. None of the actual and significant effort involved is captured in the Agency’s burden estimates.

III. Conclusion

For the above reasons, we respectfully request that the OFCCP reconsider and withdraw the AAP certification proposal. Should the Agency seek to impose a certification requirement or a general AAP submission requirement, it should use rulemaking procedures and address in the NPRM the many complex issues discussed above, which it has not yet done, so that interested parties will have an opportunity to comment on the Agency’s proposal and specific rationale.

We very much appreciate the opportunity to submit these comments.

Respectfully Submitted,

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