



January 20, 2023

Tina T. 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: Public Comment in Response to the Notice on Supply and Service Program; Proposed Approval of Information Collection Requirements; Comment Request [RIN 2022-25311]

Dear Ms. Williams,

On behalf of the Human Rights Campaign's more than three million members and supporters nationwide, we write in response to the request for public comment on the notice of the proposed reauthorization of a Scheduling Letter used in compliance reviews by the Office of Federal Contract Compliance Programs (OFCCP).¹ As the nation's largest civil rights organization working to achieve LGBTQ+ equality, we strongly support OFCCP's proposal that the Scheduling Letter—which provides contractors with initial notice and a preliminary list of required disclosures—be amended to seek more detailed and complete information at the outset of compliance reviews.

We applaud the Biden Administration for taking this essential step toward ensuring OFCCP can conduct more efficient, consistent, and effective reviews of federal contractors' compliance with their nondiscrimination and equal employment opportunity (EEO) obligations. The federal government has recognized that EEO is essential and has long adopted strong nondiscrimination protections for both federal employees and the employees of federal contractors. OFCCP is unique in its ability to conduct systemic compliance reviews under its enforcement authority related to those protections. Through its compliance reviews, OFCCP can assess contractors' satisfaction of their affirmative action obligations and can proactively identify, investigate, and remedy patterns of discrimination, even before the filing of an individual complaint.

OFCCP maintains jurisdiction over approximately 120,000 contractor establishments and 25,000 firms, who collectively employ one-fifth of the country's workforce.² Given OFCCP's role in enforcing important workplace protections against discrimination covering this growing sector of

¹ Supply and Service Program; Proposed Approval of Information Collection Requirements; Comment Request, 87 Fed. Reg. 70,867 (Nov. 21, 2022).

² Jenny R. Yang, *Advancing Pay Equity Through Compensation Analysis*, U.S. DEP'T OF LABOR BLOG (Aug. 18, 2022), <https://blog.dol.gov/2022/08/18/advancing-pay-equity-through-compensation-analysis>.

the workforce,³ bolstering its ability to ensure good jobs free from discrimination are available to all is critical. We therefore support OFCCP’s proposal in its entirety, as the information sought by the proposed Scheduling Letter would have practical utility by strengthening the effectiveness of OFCCP’s compliance evaluations, promoting greater contractor compliance, and ultimately protecting more workers. These benefits outweigh any increased burden on responding contractors, given decades of research on LGBTQ+ people and their lived experiences. LGBTQ+ communities have long faced disproportionate experiences with discrimination in all sectors of public life, including in employment, that the proposal would empower OFCCP to better address consistent with its compliance mission.

LGBTQ+ people live in every state and county and reflect the breadth of diversity and lived experiences of the communities in which they live. Using data collected through the U.S. Census Bureau’s Household Pulse Survey, we recently estimated that at least 20 million adults in the U.S. identify as LGBTQ+.⁴ Consistent with others’ research, we have also found evidence that younger people are more likely to identify as LGBTQ+.⁵ As discussed further below, LGBTQ+ people are a demographically diverse population, with the Williams Institute recently finding evidence that individuals belonging to certain communities of color appear more likely than their White counterparts to identify as transgender.⁶

Despite longstanding protections under the law, Americans from all walks of life continue to experience discrimination denying them employment opportunities, economic security, and dignity at work. LGBTQ+ people uniquely experience harassment and discrimination based on their sexual orientation and gender identity, which research demonstrates has often led to disparate experiences with discrimination when compared to their non-LGBTQ+ counterparts,⁷

³ See *A Snapshot of Government-wide Contracting for FY 2021 (Interactive Dashboard)*, GAO.GOV (Aug. 25, 2022), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard>; *A Snapshot of Government-Wide Contracting For FY 2020 (infographic)*, GAO.GOV (June 22, 2021), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic>.

⁴ HUMAN RIGHTS CAMPAIGN FOUND., *WE ARE HERE: UNDERSTANDING THE SIZE OF THE LGBTQ+ COMMUNITY* (2021), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/We-Are-Here-120821.pdf>.

⁵ SHOSHANA K. GOLDBERG ET AL., HUMAN RIGHTS CAMPAIGN & BOWLING GREEN STATE UNIV., *EQUALITY ELECTORATE: THE PROJECTED GROWTH OF THE LGBTQ+ VOTING BLOC IN COMING YEARS* (2022), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/LGBTQ-VEP-Oct-2022.pdf>. The Williams Institute has previously estimated that at least 2 million youth ages 13–17 identify as LGBT in the U.S., including approximately 300,000 youth who are transgender. JODY L. HERMAN ET AL., WILLIAMS INST., *HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES?* (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf>; KERITH J. CONRON, WILLIAMS INST., *LGBT YOUTH POPULATION IN THE UNITED STATES* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf>.

⁶ HERMAN ET AL., *supra* note 5, at 6.

⁷ See generally JOSEPH G. KOSCIW ET AL., GLSEN, *THE 2021 NATIONAL SCHOOL CLIMATE SURVEY* (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf> (experiences in K–12 schools); KATHRYN K. O’NEILL ET AL., WILLIAMS INST., *EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS* (2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Grad-School-May-2022.pdf> (experiences in higher education); ADAM P. ROMERO ET AL., WILLIAMS INST., *LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf> (experiences seeking emergency shelter and housing); Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 1126 PNAS 9293 (2019), <https://www.pnas.org/doi/pdf/10.1073/pnas.1903592116> (experiences seeking credit); Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People From Accessing Health Care*, CTR. FOR AM. PROGRESS

including in employment. Discrimination against LGBTQ+ communities takes many forms, and can become insidiously commonplace for those holding multiple marginalized identities experiencing the combined brunt of racism, colorism, misogyny, ableism, and other forms of hate.⁸ And sadly, transgender communities report significantly higher rates of discrimination and harassment,⁹ often even when compared to their cisgender LGB counterparts.¹⁰

Discrimination motivated by sex, race, and other protected characteristics persists in U.S. workplaces, and this of course includes discrimination motivated by sexual orientation and gender identity.¹¹ According to recent research by the Williams Institute, over 45% of surveyed LGBT employees reported experiencing unfair treatment at work at some point in their lives because of their sexual orientation or gender identity.¹² And despite much needed progress on issues related to LGBTQ+ equality in recent years, these trends continue. Even in the year after the Supreme Court's decision in *Bostock v. Clayton County*¹³ affirming that existing federal law prohibits workplace discrimination based on sexual orientation and gender identity, almost 9% of LGBT workers reported being fired or not hired due to their LGBT status.¹⁴

The costs of discrimination for LGBTQ+ communities and other marginalized groups are significant. For any impacted individual, workplace discrimination can prevent access to higher pay, a job, or a promotion, and can lead to a hostile working environment. Such unlawful practices inhibit economic security and opportunity and help to perpetuate disparities in health outcomes, housing, education, and more. Research on minority stress and related concepts indicates that this problem is particularly salient for LGBTQ+ people,¹⁵ and can often lead to the

(Jan. 18, 2018), <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/> (experiences seeking health care); NPR, ROBERT WOOD JOHNSON FOUND. & HARVARD T.H. CHAN SCH. OF PUB. HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS (2017), <https://legacy.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf> (experiences in variety of contexts).

⁸ See, e.g., BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 11 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> (noting that surveyed LGBT employees of color were more likely to report being not hired or experiencing verbal harassment at work because of their sexual orientation or gender identity at some point in their lives than white LGBT employees); cf. BIANCA D.M. WILSON ET AL., WILLIAMS INST., RACIAL DIFFERENCES AMONG LGBT ADULTS IN THE U.S.: LGBT WELL-BEING AT THE INTERSECTION OF RACE (2022) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Race-Comparison-Jan-2022.pdf>.

⁹ See generally SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (results of the largest sample of transgender adults in the U.S. to date).

¹⁰ See, e.g., SEARS ET AL., *supra* note 8, at 2 (noting that “over twice as many transgender employees reported not being hired (43.9%) because of their LGBT status compared to LGB employees (21.5%).”).

¹¹ See, e.g., OFCCP, FISCAL YEAR DATA TABLE – COMPLAINTS RECEIVED, BY BASIS, <https://www.dol.gov/sites/dolgov/files/ofccp/BTN/sheets/ComBasisQ42022.xlsx> (last visited Jan. 19, 2023).

¹² SEARS ET AL., *supra* note 8, at 5.

¹³ 140 S. Ct. 1731 (2020).

¹⁴ SEARS ET AL., *supra* note 8, at 13.

¹⁵ INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 20–21 (2011), <https://www.ncbi.nlm.nih.gov/books/NBK64806>; see HUMAN RIGHTS CAMPAIGN, MENTAL HEALTH AND THE LGBTQ COMMUNITY (2017), https://suicidepreventionlifeline.org/wp-content/uploads/2017/07/LGBTQ_MentalHealth_OnePager.pdf; see also JODY L. HERMAN & KATHRYN K. O'NEILL, WILLIAMS INST., SUICIDE RISK AND PREVENTION FOR TRANSGENDER PEOPLE: SUMMARY OF RESEARCH FINDINGS (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Suicide-Summary-Sep-2021.pdf>.

creation of hostile work environments that routinely deny them basic dignity and fairness merely for being who they are.¹⁶ For LGBTQ+ workers living in a state without explicit statutory protections against such acts of discrimination, the ability of OFCCP to monitor their contractor-employers' compliance with nondiscrimination and EEO guarantees is critical.

Entities contracting with the federal government are specifically prohibited from engaging in discrimination motivated by a variety of bases—including expressly an individual's sexual orientation or gender identity. They must also agree to take affirmative steps to promote employment opportunities for individuals belonging to groups that are underrepresented in their workplaces. Research on the experiences of LGBT people working for state and local governments shows that even those environments are not free from persistent anti-LGBTQ+ discrimination,¹⁷ in turn suggesting that OFCCP must engage in meaningful reviews to ensure the compliance of even the best-intentioned contractors with their legal obligations as described here. OFCCP's proposal to amend the Scheduling Letter to obtain crucial information at the beginning of the compliance review process is consistent with its role in overseeing federal contractors in this context and its existing authority on how it may conduct that oversight.¹⁸

Several parts of the proposed amended Scheduling Letter would provide information likely of particular benefit to LGBTQ+ communities. For example, OFCCP's proposal calls for contractors to provide more detailed information on promotions and terminations, including whether promotions were competitive and their reasons for a termination. Such information may help reveal instances or patterns of anti-LGBTQ+ discrimination, given the aforementioned research indicating that LGBTQ+ people are often fired merely because of who they are. Similarly, newly required information on contractors' usage of technology-based employment selection procedures, including artificial intelligence, algorithms, and automated systems, could empower OFCCP to detect bias and other flaws in those systems, consistent with a building body of research suggesting they are ill-equipped to work with LGBTQ+ people.¹⁹

Additionally, OFCCP's proposal would require that contractors provide greater detail about the number of qualified people of color and women available for employment in each job group. Notably, the Williams Institute has previously estimated that 58% of LGBT adults identify as female, and that 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, and 5% as more than one race.²⁰ Likewise, OFCCP's proposal calls for contractors to provide additional

¹⁶ See generally HUMAN RIGHTS CAMPAIGN FOUND., A WORKPLACE DIVIDED: UNDERSTANDING THE CLIMATE FOR LGBTQ WORKERS NATIONWIDE (2018), https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?_ga=2.171927072.1066797535.1674157036-1055970791.1669664582 (providing the results of a probability-based sample of 804 self-identified LGBTQ people and their experiences in the workplace, as well as a shorter survey to analyze perceptions and experiences of 811 non-LGBTQ people).

¹⁷ CHRISTY MALLORY ET AL., WILLIAMS INST., WORKPLACE DISCRIMINATION AND HARASSMENT AGAINST LGBT STATE & LOCAL GOVERNMENT EMPLOYEES 4 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Sector-Discrimination-Nov-2021.pdf>.

¹⁸ See, e.g., Equal Employment Opportunity, Exec. Order No. 11246 (Sept. 24, 1965, as amended) (permitting the adoption of "such rules and regulations and issu[ing of] such orders as are deemed necessary and appropriate to achieve the purposes" of the federal contractor EEO and nondiscrimination executive order).

¹⁹ See Sonia K. Katyal & Jessica Y. Jung, *The Gender Panopticon: AI, Gender, and Design Justice*, 68 UCLA L. REV. 692 (2021) <https://www.uclalawreview.org/the-gender-panopticon-ai-gender-and-design-justice/>.

²⁰ *LGBT Demographic Data Interactive*, WILLIAMS INST. (Jan. 2019), <https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic>.

information on their outreach and recruitment efforts to individuals with disabilities and veterans. Data from the Behavioral Risk Factor Surveillance System indicate that LGBTQ+ adults, and transgender adults in particular, were significantly more likely than non-LGBTQ+ adults to self-report having at least one disability.²¹ At least one million veterans are gay men or lesbians,²² and over 163,000 American veterans are transgender.²³ Proposals like these requiring a greater level of detail will ultimately allow for more than the current cursory summaries being produced by contractors, in turn empowering OFCCP to conduct more detailed analyses and engage in compliance activities as needed.

Given these points alone, we believe that OFCCP has tailored its proposed changes to the Scheduling Letter to reduce contractor uncertainty and minimize any additional response burden on those contractors, while simultaneously enhancing review efficiency for both contractors and OFCCP. This will likely lead to increased compliance with existing protections for LGBTQ+ and other employees by federal contractors nationwide, key given a patchwork of protections for LGBTQ+ workers across the country.²⁴ Accordingly, we enthusiastically support OFCCP's requested authorization of the enhanced compliance review Scheduling Letter and encourage that it be finalized without change as soon as possible.

Of course, enhanced data collection with questions related to LGBTQ+ identities remains necessary to ensure that OFCCP can better detect discrimination on the basis of sexual orientation and gender identity in violation of the legal authorities it enforces. We recommend that OFCCP consider updating its regulations—and associated collections like the Scheduling Letter—in the future to mandate the collection of that information by contractors consistent with its practices for monitoring other forms of impermissible discrimination and its legal authority. In doing so, OFCCP should consider following the lead of other federal agencies researching and already collecting information related to sexual orientation and gender identity,²⁵ including by ensuring that employees can opt out of providing such information to their employers if desired.

Thank you for the opportunity to submit comments in favor of this important step toward ensuring LGBTQ+ and all individuals can meaningfully access quality, taxpayer-supported jobs free from discrimination.

²¹ Human Rights Campaign Found., *Understanding Disability in the LGBTQ+ Community*, HRC.ORG (Aug. 12, 2022), <https://www.hrc.org/resources/understanding-disabled-lgbtq-people>.

²² URBAN INST., GAY VETERANS TOP ONE MILLION, <https://www.urban.org/sites/default/files/publication/59711/900642-gay-veterans-top-one-million.pdf> (last visited Jan. 19, 2023).

²³ Janelle Downing et al., *Transgender and Cisgender US Veterans Have Few Health Differences*, 37 HEALTH AFFAIRS 1160, 1163 (2018), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2018.0027>.

²⁴ Human Rights Campaign Found., *Workplace Discrimination Laws and Policies*, HRC.ORG, <https://www.hrc.org/resources/workplace-discrimination-policies-laws-and-legislation> (last visited Jan. 19, 2023); see also CHRISTY MALLORY ET AL., WILLIAMS INST., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Bostock-State-Laws-Jul-2020.pdf>.

²⁵ See generally NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED., MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION (2022), <https://nap.nationalacademies.org/catalog/26424/measuring-sex-gender-identity-and-sexualorientation> (summarizing agency practices and existing research; providing recommendations).