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200 Constitution Avenue NW, Room C-3325
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Submitted via regulations.gov

Re: Comments on Supply and Service Program; Proposed Approval of Information Collection Requirements; FR Doc. 2022–25311

The National Partnership for Women & Families appreciates the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP's) request for reauthorization of its compliance review scheduling letter.¹ The proposed revisions to the information-collection requirements will bolster OFCCP's ability to protect workers from discrimination and promote equal employment opportunity in the workplace—twin goals that are at the core of our mission and work.

The National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combatting barriers to opportunity for women workers, such as sexual harassment and other forms of sex discrimination and gender-based violence. The National Partnership works for a just and equitable society in which all women and families can live with dignity, respect, and security; every person has the opportunity to achieve their potential; and no person is held back by discrimination or bias. In light of our particular expertise, our comment focuses on the proposed changes' benefits for combatting racial and gender pay discrimination.

In the nearly 60 years since the passage of the Equal Pay Act, costly gender-race pay gaps continue to persist, and are especially severe for women of color. OFCCP's ability to conduct efficient, consistent, and effective reviews of federal contractors' compliance with nondiscrimination and affirmative-action requirements is a critical tool in the fight against workforce inequality. OFCCP has jurisdiction over approximately 120,000 contractor establishments and 25,000 firms, which altogether employ approximately 20 percent of the American workforce -- and given the federal government's recent historic investments in infrastructure and the economy in the wake of the COVID-19 pandemic, those numbers only

¹ OMB Control Number 1250-0003.

stand to increase as the opportunity for federal contracts grows in the coming years.² There has never been a better time for OFCCP to revise its compliance tools in a way that strengthens and safeguards its ability to carry out meaningful compliance reviews in service of enforcing civil rights protections for workers. OFCCP has drawn on its substantial authority to propose sensible changes to the scheduling letter that are tailored to improve the quality and completeness of the information it collects at the outset of a compliance review without imposing too great of a burden on contractors.

In this comment, we highlight the harm persistent workplace discrimination creates, OFCCP's broad authority and critical role in combatting workplace discrimination, and an analysis of how the proposed changes will support OFCCP's obligations to ensure compliance with civil rights mandates in the least burdensome method available.

I. The persistence of workplace disparities illustrates and underscores the continued need for data-driven assessments of hiring and employment practices.

Working people across the United States continue to experience employment discrimination that robs them of employment opportunities, economic security, and dignity on the job. This exclusion also causes harm to our economy broadly. OFCCP, together with the U.S. Equal Employment Opportunity Commission (EEOC), received more than 130,000 charges of employment discrimination in fiscal years 2020 and 2021.³ The actual number of workers experiencing discrimination is likely much higher, owing to the fact that the threat of retaliation prevents many working people from ever reporting discrimination.⁴ Retaliation accounted for 73,378 of those charges filed, or over half⁵ and according to the EEOC, “retaliation is the most frequently alleged basis of discrimination in the federal sector and the most common discrimination finding in federal sector cases.”⁶ The pressure on workers to not report discrimination⁷ can make it difficult to determine the prevalence, but an online survey conducted in 2019 found that as many as 60 percent of working people in the United States have experienced or witnessed workplace discrimination based on age, race, sex, gender identity, or sexual orientation.⁸ A recent nationally representative study from the Center for American Progress found that half of LGBTQI+ adults reported experiencing some form of workplace

² See OFCCP, FY 2023 Congressional Budget Justification 9, <https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf>.

³ Office of Federal Contract Compliance Programs, OFCCP By the Numbers. Fiscal Year Data Tables: Complaints Received by Employment Practice, *available at*, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last visited Jan. 20, 2023); U.S. Equal Employment Opportunity Commission, Charge Statistics (Charged filed with EEOC) FY 1997 Through FY 2021, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> (last visited Jan. 20, 2023).

⁴ See generally, Deborah L. Brake, *Retaliation*, 90 Minn. Law. Rev. 18, 36-42 (2005), *available at*, https://www.minnesotalawreview.org/wp-content/uploads/2011/12/Brake_Final.pdf (last visited Jan. 20, 2023).

⁵ *Id.*

⁶ U.S. Equal Employment Opportunity Commission, Facts About Retaliation, <https://www.eeoc.gov/facts-about-retaliation> (last visited Jan. 20, 2023).

⁷ See Brake, *supra* note 5 at 32-36 (discussing research on the social costs of reporting discrimination, in particular for “low-power or stigmatized social groups.”).

⁸ Glassdoor, *Diversity and Inclusion Study 2019*, *available at* <https://www.glassdoor.com/blog/new-study-discrimination/> (last visited Apr. 18, 2022).

discrimination or harassment in just the past year because of their sexual orientation, gender identity, or intersex status and these experiences are even higher for LGBTQI+ people of color.⁹

Discrimination has tremendous costs for people of color, women, LGBTQ+ people, people with disabilities, veterans and other individuals who face multiple forms of bias. Workplace discrimination can mean not having access to a job or a promotion, being forced to endure a hostile working environment, or being paid less, which is devastating to economic security and helps perpetuate disparities in health outcomes, housing, education, and more.

The impact of discrimination is well-documented in national statistics, showing significant disparities in earnings by gender and race. In 2022, women working full-time, year-round were paid 84 cents for every dollar paid to men, with women of color paid significantly less than non-Hispanic white men.¹⁰ When comparing the wages of all workers — including full-time, year-round, part-time, and part-year workers — gender and race wage gaps are even larger. Using this comparison, all women workers were paid 77 cents for every dollar paid to all men. All Black women workers were paid just 64 cents,¹¹ all Latina workers were paid only 54 cents¹², and all Native American women were paid a meager 51 cents for every dollar paid to a white, non-Hispanic man.¹³ Further, people with disabilities face a pay gap of about 37%.¹⁴

Factors such as differing levels of education, work experience, and occupation fail to fully explain these large gender and race wage disparities. Although not every pay difference is the result of discrimination, for too many workers, the pay that they receive is influenced, at least in part, by biases and/or perceptions about their worth and value that are unrelated to the work they actually perform.¹⁵ Employer pay practices are often hidden from view with little ability to determine how pay decisions are made and whether discrimination was a factor.

Unequal pay means having far less money to cover basic necessities or to withstand a financial emergency, as well as having lifetime ripple effects for access to credit, education, retirement savings and other investments that help build intergenerational wealth. In a society where women's economic contributions are increasingly important for families, the persistent gap

⁹ Caroline Medina and Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, Center for American Progress, available at <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>

¹⁰ National Partnership for Women & Families, *America's Women and the Wage Gap* (Oct. 2022), available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/americas-women-and-the-wage-gap.pdf>

¹¹ National Partnership for Women & Families, *Black Women and the Wage Gap* (Oct. 2022), available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/african-american-women-wage-gap.pdf>

¹² National Partnership for Women & Families and UNIDOS US, *Addressing the Latina Wage Gap: A Necessary Step for Our Nation's Economic Prosperity* (Dec. 2022) available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/latinas-wage-gap.pdf>

¹³ National Partnership for Women & Families, *Native American Women and the Wage Gap* (Nov. 2022), available at <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/native-american-women-wage-gap.pdf>

¹⁴ Michelle Yin et al., *An Uneven Playing Field: The Lack of Equal Pay for Workers with Disabilities*, Am. Inst. Res. 3 (Dec. 2014).

¹⁵ See generally Francine D. Blau and Lawrence M. Kahn, "Gender Differences in Pay" (Cambridge, MA: National Bureau of Economic Research, 2000), available at https://www.nber.org/system/files/working_papers/w7732/w7732.pdf; Francine D. Blau and Lawrence M. Kahn, "The Gender Pay Gap: Have Women Gone as Far as They Can?", *Academy of Management Perspectives* 21 (1) (2007): 7–23, available at https://www.jstor.org/stable/4166284?seq=1#page_scan_tab_contents.

between women's and men's wages erodes the economic stability of families in both the short and long term. These disparities cause harm to our economy as a whole, one study estimating racial discrimination has cost the US economy \$16 trillion over the last 20 years and the Organization for Economic Cooperation and Development estimates gender discrimination costs OECD countries \$6.116 billion annually.¹⁶

Occupational segregation also contributes to wage gaps and economic insecurity. Workers of color, women, and people with disabilities continue to be concentrated in low-paid occupations because of structural barriers to entry as well as discrimination on the job.¹⁷ For example, research shows that women who experience sexual harassment at work are more likely to leave their jobs.¹⁸ A majority of women in male-dominated workplaces report that sexual harassment is a problem in their industry, and women in male-dominated workplaces are more likely to report having personally experienced sexual harassment on the job than women in more balanced or women-dominated workplaces.¹⁹ Fear of harassment and concern for personal safety may also prevent women from entering male-dominated occupations, which are often better paying and more likely to offer benefits.²⁰ At the same time, occupational segregation adds to the devaluation of work largely performed by women and marginalized groups, keeping wages low and perpetuating wage gaps.²¹

II. OFCCP has broad authority to collect data to assess contractors' compliance with equal employment opportunity authorities.

OFCCP administers and enforces three equal employment opportunity authorities: Executive Order 11246, as amended (EO 11246); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA). Collectively, these sources of law prohibit federal contractors from discriminating in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. They further prohibit contractors from retaliating against applicants or employees for engaging in protected activities and protect employees' and applicants' ability to discuss their compensation. These laws also require that federal contractors provide equal employment opportunity through affirmative action, when necessary to correct the problem. Contractors

¹⁶ Dana M. Peterson and Catherine L. Mann, Citi GPS, *Closing the Racial Inequality Gaps: The Economic Cost of Black Inequality in the US*, (2020) available at https://ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D; Gaelle Ferrant and Alexandre Koley, OECD Development Centre, *The Economic Cost of Gender-Based Discrimination in Social Institutions* (2016) available at https://www.oecd.org/development/gender-development/SIGI_cost_final.pdf

¹⁷ Marina Zhavoronkova, Matthew Brady, and Rose Khattar, Center for American Progress, *Occupational Segregation in America* (Mar. 29, 2020), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

¹⁸ See Lauren Haumesser and Melissa Mahoney, AAUW, *Factory Flaw: The Attrition and Retention of Women in Manufacturing*, available at <https://www.aauw.org/resources/research/factory-flaw/> (last visited Apr. 18, 2022).

¹⁹ Center for American Progress, *Gender Matters: Women Disproportionately Report Sexual Harassment in Male Dominated Industries*, (Aug. 2018) available at <https://www.americanprogress.org/article/gender-matters/>

²⁰ Glynn, S. J., & Boesch, D. (2022, March 14). *Connecting the Dots: "Women's Work" and the Wage Gap*. Retrieved 19 January 2023 from the U.S. Department of Labor website: <https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap>

²¹ See Zhavoronkova et al., *supra* note 13.

above certain employment thresholds must develop and maintain written affirmative action plans (AAPs), regarding both their nondiscrimination and affirmative action obligations.

These laws are effective. Employers that are federal contractors subject to these requirements have better records when it comes to diversity and compliance with equal employment opportunity laws than employers that are not federal contractors.²² However, discrimination and disparities remain: From 2012 to 2022, OFCCP obtained monetary relief totaling \$218 million for 267,000 job seekers and employees who were discriminated against.²³ In the past five fiscal years, it entered into conciliation agreements or consent decrees -- which indicate that there was sufficient noncompliance for OFCCP to pursue -- with 14% of contractors following their supply and service compliance evaluations.²⁴ But the laws are only as good as contractors' compliance with them. As OFCCP Director Jenny Yang has explained, "OFCCP will positively impact more workers by increasing federal contractor compliance with nondiscrimination and affirmative action responsibilities."²⁵

These laws and their implementing regulations confer significant authority on OFCCP to collect and review data to determine contractors' compliance with nondiscrimination and affirmative-action requirements, conduct compliance evaluations to gauge contractors' compliance and take enforcement measures against contractors when necessary. Through the compliance review process, OFCCP may undertake a "comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor."²⁶ As courts have held, this regulatory scheme confers broad authority on OFCCP to conduct its compliance reviews.²⁷ Moreover, OFCCP can conduct such compliance reviews without allegations of discriminatory practices. OFCCP's focus on proactively rooting out systemic discrimination is designed to "(1) [p]rioritize enforcement resources by focusing on the worst offenders; (2) [e]ncourage employers to engage in self audits of their employment practices; [and] (3) [a]chieve maximum leverage of resources to protect the greatest number of workers from discrimination."²⁸

These authorities put OFCCP in a critical position to address discrimination that otherwise might go undetected.²⁹ For one, even if a worker knows that she has been discriminated against—

²² See, e.g., Conrad Miller, *The Persistent Effect of Temporary Affirmative Action*, *American Economic Journal: Applied Economics*, 9 (3): 152-90 (2017), <https://www.aeaweb.org/articles?id=10.1257/app.20160121>, (affirmative action requirements of EO 1126 significantly increases an establishment's black share of employees, with the share continuing to increase over time); KURTULUS, F.A. (2012), *Affirmative Action and the Occupational Advancement of Minorities and Women During 1973–2003*. *Industrial Relations: A Journal of Economy and Society*, 51: 213-246. <https://doi.org/10.1111/j.1468-232X.2012.00675.x>, (more women and minorities in higher skill jobs at federal contractors compared with non-contractors between 1973 and 2003).

²³ <https://www.dol.gov/agencies/ofccp/about/data/accomplishments>.

²⁴ *Id.* at Supply and Service Compliance Evaluations Conducted.

²⁵ <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

²⁶ *Id.* § 60-1.20(a)(1).

²⁷ See, e.g., *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011) (accepting OFCCP's interpretation of § 60-1.20(a) as granting it broad authority to obtain supporting documentation from contractor in course of desk audit).

²⁸ *Id.*

²⁹ See Examining the Policies and Priorities of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs Before the Subcomm. on Civ. Rts. & Human Servs. of the Comm. on Educ. & Labor, (2022) (Statement of Jenny R. Yang, Director, U.S. Dep't of Labor OFCCP, https://edworkforce.house.gov/uploadedfiles/dol_ofccp_director_yang_testimony_final_4.27_ed_labor_civil_rights_subcommitt

something that is far from a given—legal recourse is sometimes hard to come by. Such was the case for Lilly Ledbetter, who did not learn she was underpaid compared to her male coworkers until she received an anonymous note. On an individual worker level, trying to prove discriminatory hiring or pay practices is nearly impossible since workers lack access to data about other employees. An expert panel study from the National Academies posits that “the relatively low number of pay-discrimination charges filed with the EEOC is likely misleading: some employees may be unaware that they are experiencing discrimination; some may be afraid of retaliation; and some may lack the data to substantiate a complaint. Thus, there is a need for better and more complete data.”³⁰ The proposed revisions to the scheduling letter will provide OFCCP with data that is critical to its enforcement of equal opportunity laws and is information individual workers lack access to, so OFCCP would otherwise likely not receive complaints based on this information.

III. The revisions to the scheduling letter will strengthen and safeguard OFCCP’s ability to ensure compliance with civil rights mandates.

Strengthening the effectiveness of contractors’ compliance evaluations is part of OFCCP’s strategic enforcement plan.³¹ Obtaining complete information at the outset of a compliance review is particularly important given OFCCP’s limited resources. Despite overseeing employers of approximately 20 percent of the American workforce, the agency only has about 420 employees. The agency requested a substantial budget increase in the most recent budget, expanding its staff to more than 600, in order “to strengthen its enforcement of civil rights protections and affirmative action requirements.”³² Congress allocated only enough funding to keep OFCCP operating at its current capacity.³³

Meanwhile, significant new investments such as the Bipartisan Infrastructure Law (BIL), the Inflation Reduction Act (IRA), and Creating Helpful Incentives to Produce Semiconductors and Science Act of 2022 (CHIPS Act) will significantly increase OFCCP’s enforcement responsibilities as these investments are translated into many new federal contracts, contractors, and subcontractors particularly new supply and service contractors and contracts. The agency will continue having to fulfill its mission with inadequate resources, meaning that it must maximize efficiency in its enforcement efforts in order to fulfill its enforcement obligations. Obtaining complete and detailed information at the outset of a compliance review, as the revised scheduling letter would request, will enable staff to assess compliance promptly and reduce the

ee_hearing.pdf (explaining that OFCCP “play[s] an important role in rooting out pay inequities” because it “can identify problems that would not otherwise come to light since workers are often unaware of their colleagues pay”).

³⁰ See, National Academies of Sciences, Engineering, and Medicine (2022), *Evaluation of Compensation Data Collected Through the EEO-1 Format* at 15.

³¹ <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

³² <https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf>.

³³ <https://www.congress.gov/117/bills/hr2617/BILLS-117hr2617enr.pdf>; see also <https://www.jdsupra.com/legalnews/ofccp-week-in-review-january-2023-1680486/#:~:text=OFCCP%3A%20FY%202023%20allocation%20is,.%20of%20the%20CBJ>.

need for time-consuming follow-up requests for information and delayed resolution of the review.

The scheduling letter, which OFCCP now proposes to revise, is the agency's tool for notifying contractors that they have been selected to undergo a compliance review and identifies the initial information those contractors must provide. OFCCP proposes that its scheduling letter request more detailed and specific information from contractors at the outset of compliance reviews.

We support OFCCP's efforts to obtain a more comprehensive picture of contractors' compliance with nondiscrimination and affirmative action requirements through this additional data collection, and we highlight some of the most important revisions below.

A. Collecting more information regarding “minority and female availability” for each job group (Item 4)

“Availability” indicates the approximate number of “qualified minorities or women” among the pool of all qualified people for a given job group; it offers a point of comparison against a contractor's own workforce. OFCCP's current scheduling letter already requires contractors to determine availability; this proposal clarifies that contractors must hew to all the requirements for determining availability that are set out in OFCCP regulations, *see* § 60-2.14 (requiring contractors to, among other things, “use the most current and discrete statistical information” and explain how they chose their recruitment areas and pools). This measure simply extends to the scheduling letter the regulatory requirements by which contractors are already bound, in an effort to generate as accurate data as possible. It is thus both reasonable and should not impose a significant burden. Furthermore, given the significant investments from BIL, OFCCP will be responsible for an increased number of construction contracts so clarity on availability of qualified minorities or women at the outset is important for OFCCP to support contractors in complying with availability requirements. As we noted in our analysis of occupational segregation and key industries funded by BIL, if this funding is not implemented with a deliberate focus on increasing women's footholds in these industries, women will lose out on these historic investments. For example, under the status quo women will only account for 29% of jobs created by the BIL, Black women will account for less than 4%, Latinas less than 5%, and AAPI women less than 2%.³⁴

B. Identifying “action-oriented programs” (Item 7)

OFCCP proposes to collect information related to contractors' self-analyses undertaken to identify and remediate compliance problems relating to their nondiscrimination and affirmative-action requirements. Contractors are already required by OFCCP regulations to conduct “in-depth analyses” to identify problem areas as part of their affirmative-action programs, *see* § 60-2.17(b). This information request requires only that contractors list the programs that they have

³⁴ Sharita Gruberg, Jessica Mason, and Katherine Gallagher Robbins, *Historic Investments in Good Infrastructure Jobs Can't Leave Women Behind*, National Partnership for Women & Families (2022) available at https://www.nationalpartnership.org/our-work/economic-justice/reports/infrastructure-investment-jobs-act.html?utm_source=listserv&utm_medium=email&utm_term=ej_iija

already undertaken—programs that they are required by regulation to have carried out—and thus furnishing this additional information is not overly burdensome.

OFCCP’s desire to collect information on contractors’ self-assessments at the initial information-gathering stage is consistent with the importance of self-assessment tools in weeding out discrimination and ineffective affirmative action measures. The Office has properly prioritized self-assessment measures both because they are effective tools and because they are a vital component of a compliance regime that does not have unlimited financial and personnel resources. Among Director Yang’s strategic enforcement objectives is “[p]romoting a proactive approach to compliance where federal contractors actively self-audit employment systems.”³⁵ And to that end, OFCCP has prioritized “compliance assistance and providing practical resources to help federal contractors conduct effective self-audits.”³⁶

C. Requiring more specificity on the documentation a contractor must submit regarding their Section 503 outreach and positive recruitment efforts (Item 12)

OFCCP proposes adding language to ensure contractors submit documentation addressing whether they believe the totality of their 503 outreach and positive recruitment efforts have been effective. Section 503 requires affirmative action in hiring, promotion, and retention of disabled employees by contractors and subcontractors who meet a certain threshold. Outreach and positive recruitment are key to fulfilling obligations under affirmative action and providing employment opportunities for disabled individuals, including disabled women and disabled people of color. This change will allow for consistent accountability and eliminate confusion about contractors’ affirmative obligations. It will also provide clearer insight as to contractor and subcontractor efforts to fulfill their legal obligations.

D. Requesting documentation of contractors’ recruitment and hiring policies and practices—including the use of artificial intelligence and other automated or technology-based selection processes (Item 19)

OFCCP proposes to collect information regarding contractors’ recruitment and hiring policies and practices, and specifically those surrounding the use of automation and artificial intelligence. This revision is sensible in light of the increased use of these technologies in hiring processes accompanied by concerns raised by diverse stakeholders regarding the fact that these technologies can lead to unlawful hiring practices. For example, the Department of Justice and the EEOC earlier this year each released guidance cautioning employers that artificial intelligence used in hiring practices may lead to discrimination against workers with disabilities.³⁷ The guidance cautions that automated decision-making tools may unlawfully screen out individuals with disabilities by, for example, setting a metric without providing a reasonable accommodation, or by detecting, and thus making an employer aware of, an

³⁵ Directive 2022-02.

³⁶ *Id.*

³⁷ See U.S. Dep’t of Justice Civ. Rts. Div., *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring* (May 12, 2022), <https://www.ada.gov/resources/ai-guidance/>; EEOC, *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees* (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

applicant’s disability, in violation of the ADA.³⁸ Others have pointed out that the use of automation in recruitment might lead to targeting of specific people or audiences in ways that run afoul of nondiscrimination requirements.³⁹

As the use of automated technologies in hiring proliferates, understanding whether and how contractors are using these technologies is a vital step toward ensuring that the technologies are not being put to unintentionally discriminatory ends. The revision here is a sensible one, and one that will not carry a heavy burden. OFCCP’s request is modest—it merely asks contractors to explain in narrative form the technologies that they are relying on in their recruiting, screening, and hiring practices. It is not requesting proprietary technology information. It thus places a small burden on contractors in exchange for much-needed transparency about how a given contractor is screening candidates or making other hiring determinations.

E. Requiring contractors to supply more detailed applicant-flow data (Item 20)

OFCCP requires contractors to supply data on employment activity, including applicant and hiring data disaggregated by gender, race, and ethnicity. Although the proposed changes do not include modifying its requirements concerning contractors’ obligations to supply applicant data under Item 20(a), we encourage OFCCP to update this provision to require contractors to explain how they are refining their applicant flow data for each job group or job title according to the definition of “Internet Applicant” as set out in §60-1.3. We encourage OFCCP to request information concerning contractors’ data-refining practices at the outset. This would increase transparency by allowing OFCCP to better understand contractors’ applicant data and in turn better assess whether contractors may be concealing potential indicators of adverse impact by refining their data in ways that are arbitrary, inconsistent, or at odds with their recordkeeping obligations. This also increases efficiency by allowing OFCCP to more quickly identify discriminatory hiring practices without requiring the additional step of a follow-up request for this information, which can cause delays in the overall compliance review.

F. Requiring contractors to supply additional compensation data upfront (Item 21)

OFCCP proposes to expand the information that it collects upfront regarding compensation data. First, it proposes to require contractors to provide compensation data spanning a period of two years, rather than the single year of data that it currently requires during the initial information-gathering stage. Contractors are already obligated to retain compensation records for this period.⁴⁰ Second, OFCCP will require contractors to provide upfront documentation of the additional factors that affect compensation. Having additional data on employee pay is a critical tool for OFCCP’s ability to uncover systemic pay disparities and fulfill its equal opportunity requirements. Finally, the revised scheduling letter clarifies that contractors must provide compensation data for temporary workers supplied by staffing agencies. This revision not only

³⁸ *See id.*

³⁹ Keith E. Sonderling, Bradford J. Kelley, and Lance Casimir, *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1 (2022).

⁴⁰ *See* § 60-1.12.

provides contractors with greater clarity on the meaning of “temporary employees,” but also ensures that compensation data will be collected about a category of workers that is uniquely susceptible to pay inequity and other poor working conditions, which research has demonstrated disproportionately impact women of color.⁴¹

G. Requiring additional data on contractors’ compensation analyses (Item 22)

Currently, as part of the self-audits that they are required by regulation to undertake,⁴² contractors must complete compensation analyses that evaluate gender, race, and other disparities in employees’ pay. OFCCP now proposes to require contractors also to provide certain additional information regarding their compensation analyses—for example, when the analysis was conducted, the number and categories of employees included and excluded, and the method of analysis employed. Existing regulations already require contractors to “maintain and make available to OFCCP documentation of their compliance with” the provisions obligating contractors to conduct compensation analyses.⁴³ This revision therefore requires only that they supply such information to OFCCP at the outset of a desk audit.

Contractors often contend that their compensation analyses are protected by attorney-client privilege. But OFCCP has carefully crafted its information-collection requirements to ensure that contractors are able to supply information necessary for OFCCP to evaluate their compliance without requiring them to produce privileged information. Indeed, the revised scheduling letter does not ask for the entire contents of contractors’ compensation analyses; instead, it enumerates five discrete kinds of information that it requires contractors to supply, none of which touch on privileged information. Rather, OFCCP is seeking factual information about the *type* of analysis and *how* the analysis was conducted—not the contents of the analysis itself. That information is not privileged.⁴⁴

More generally, Director Yang has offered assurances that OFCCP’s assessment of contractors’ compensation analyses is not intended to force contractors to turn over privileged materials.⁴⁵ The recent directive on compensation analyses offered several means by which contractors could fulfill the requirements of § 60-2.10: providing redacted versions of the compensation analysis, conducting a separate analysis that removes any concerns about privilege, or submitting an affidavit setting forth the specific underlying facts required to establish compliance.⁴⁶ In its

⁴¹ See, e.g., Nat’l Emp. L. Project, *Temp Workers Demand Good Jobs: Survey Reveals Poverty Pay, Permatemping, Deceptive Recruitment Practices, and Other Job Quality Issues* (2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

⁴² § 60-2.17(b)(3).

⁴³ § 60-2

⁴⁴ See, e.g., *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 805 (E.D. La. 2007) (“[W]hen a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it.”); *Stout v. Ill. Farmers Ins. Co.*, 150 F.R.D. 594, 611 (S.D. Ind. 1993) (“The attorney-client privilege is not so broad as to cover all of a client’s actions taken as a ‘result[] of communications between attorney and client.’”).

⁴⁵ See U.S. Dep’t of Labor, Office of Federal Contract Compliance Programs, *Directive (DIR) 2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis* (Aug. 18, 2022), <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1#ftn.id6>.

⁴⁶ *Id.*

revised scheduling letter, OFCCP prescribed the last—a carefully tailored request for contractors to supply only the underlying factual information necessary for OFCCP to determine whether the contractor is fulfilling its legal obligations concerning pay practices.

H. Clarifying that post-secondary institutions and contractors with “campus-like” settings in which the contractor maintains multiple AAPs for the same campus must submit the requested information for all AAPs for that campus located in that city

This is a commonsense update that OFCCP has already clarified for post-secondary institutions. This proposed change clarifies for contractors that OFCCP expects all AAPs, not only those for a particular building associated with the address that received the scheduling letter. This change improves efficiency by not putting OFCCP in the position of having to follow up with a separate request for each building that a contractor has an AAP for in the same city but makes the requirement clear at the outset.

IV. OFCCP’s proposed changes to the scheduling letter are not overly burdensome.

Some contractor commentators have claimed that the new requirements are overly burdensome and will require significant expenditures of time and money.⁴⁷ This argument overstates the burden since this is information that contractors are supposed to have already compiled and available. These arguments also fail to take into account the ways in which the changes will reduce the need for time-consuming follow-up requests for information. Obtaining more complete information in response to its initial request is necessary for OFCCP to effectively fulfill its functions in a timely manner. The scheduling letter changes simply clarify what information should be submitted and when to improve efficiency and ensure OFCCP has the information it needs to protect America’s workers by ensuring those who do business with the federal government fulfill their equal opportunity obligations.

Obtaining complete information at the outset of a compliance review is particularly important given OFCCP’s limited resources. Despite overseeing employers of approximately 20% of the American workforce, the agency only has about 420 employees. The agency requested a substantial budget increase in the most recent budget, expanding its staff to more than 600, in order “to strengthen its enforcement of civil rights protections and affirmative action requirements.” At a time when the federal government is investing trillions of dollars, much of which will go into contracts, the agency will accordingly continue having to fulfill its mission with inadequate resources, meaning that it must maximize efficiency in its enforcement efforts. Obtaining complete and detailed information at the outset of a compliance review, as the revised scheduled letter would request, will enable staff to assess compliance promptly and reduce the need for time-consuming follow-up requests for information and delayed resolution of the review.

⁴⁷ See, e.g., <https://www.fisherphillips.com/news-insights/ofccp-expand-its-reach-more-data-upfront-audits.html>.

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For these reasons, we strongly support OFCCP's requested authorization of the enhanced compliance review scheduling letter. If you have any questions about this comment, please feel free to contact Vasu Reddy (vreddy@nationalpartnership.org), Senior Policy Counsel for Economic Justice at the National Partnership for Women & Families.