



**DirectEmployers
Association**

January 20, 2023

Via electronic posting to www.regulations.gov or (<http://www.regulations.gov>)

Ms. Tina T. Williams

Director, Division of Policy and Program Development

Office of Federal Contract Compliance Programs (OFCCP)

200 Constitution Avenue, N.W.

Room C-3325

Washington D.C. 20210

RE: Submission of Comments of DirectEmployers Association

"Supply and Service Program; Proposed Approval of Information Collection Requirements; Comment Request"

Dear Tina:

Please find enclosed the Comments of DirectEmployers Association in response to OFCCP's Supply and Service Program; Proposed Approval of Information Collection Requirements; Comment Request.

Should you have any questions, please do not hesitate to contact me at my below-referenced contact information.

Sincerely,

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Enc.

Cc: Jenny Yang, Director, OFCCP



January 20, 2023

COMMENTS OF DIRECTEMPLOYERS ASSOCIATION, INC.

Filed in response to OFCCP's Information Collection Request to OMB seeking approval to extend and substantially change OFCCP's audit Scheduling Letter and attached Itemized Listing for Supply & Service Contractors

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PART I: Summary of DE Member Comments and DE's Requests to OMB

OFCCP's Cost Estimates for Both the Current Requirements and the Proposed New Requirements are Wildly Unrealistic

Background: DirectEmployers Association ("DE") conducted a confidential SurveyMonkey Survey of its Member companies in early January 2023. We asked our Member companies to comment about costs they had already expended responding to OFCCP's existing audit Scheduling Letter and attached Itemized Listing for Supply & Service contractors. We also asked about the costs our Member companies projected that they would incur were OMB to approve OFCCP's proposed ICR.

We report the results of our Survey, below, and include for your reference the complete and unaltered questions we asked our Member companies. We also disqualified almost four dozen Survey responses from companies that were not federal contractors (almost 10% of our Member companies are not federal contractors) and all construction contractors. We did not extend our Survey to the public but rather delivered it only to our authorized Member company representatives.

Summary: The Table of Contents for our Comments appearing on the two prior pages provides a quick "view at a single glance" overview of our Comments. In sum, our Member company Survey responses provide a VERY different and consistent report of substantially greater costs being spent to respond to OFCCP's current ICR and as to OFCCP's estimates of costs for its proposed ICR than OFCCP has estimated. The difference in cost estimates is both stark and very large. Many of the costs our Member companies are currently enduring and project to endure should OFCCP go forward with its proposed ICR, reveal costs that exceed for a single-tasking OFCCP's costs estimate for ALL (15) additional cost burdens OFCCP seeks to impose. We discuss each one of these cost estimates, by new or additional OFCCP compliance taskings.

NOTE: The existing ICR is an important starting point because OFCCP's proposed ICR builds costs from the current ICR OMB approved in 2020. The cost estimates OFCCP suggested to OMB then and which OMB approved, are very understated against actual expenditures our Member companies report.

OFCCP's asserted **total increase** in monetized burden costs to respond to the proposed changes in OFCCP's Scheduling Letter and attached Itemized Listing (per our calculations) meter out to about **\$950** per contractor per audit. (Curiously, OFCCP did not display its cost estimates associated with each of its additional proposed burdens. That is quite unfortunate since it appears that the costs of individual, discrete parts far exceed the cost of the whole OFCCP is suggesting). The agency proposed roughly 15 substantive changes to its Itemized Listing (see the [November 2022 Supporting Statement](#) at pages 11-19) along with other changes to its audit process. Our Member

Survey addressed only a portion of these multiple changes. Yet, even examining the total costs of the sampling of items we priced in our Member survey, the lowest total cost to a contractor, taking cost estimates from the Member companies, EXCEED the TOTAL of all costs for all 15 proposed changes. In other words, 100% of our Member companies believe they will spend more on one proposed change than OFCCP predicts our Member companies will spend on ALL 15 changes the agency is proposing.

The lowest cost any of our Member companies expect to incur—just as to the sampling of changes we price-tested—ranged from **\$1,501 - \$9,001**. The lowest number in that range is more than 1.6 times the approximately **\$950** in cost increases we calculate the OFCCP has estimated will ensue.

Moreover, looking at the total costs of the sampling of a limited number of OFCCP's proposed changes we priced in our Member Survey, the highest total amount to respond to OFCCP's new ICR based on just our sampling was greater than **\$53,000** – a number almost 56 times the approximately **\$950** OFCCP cost estimate for all 15 proposed changes in its bundle!

Significantly, because we surveyed only the costs for a handful of all the proposed additional burdens OFCCP is proposing, our cost numbers are a conservative indicator, rather than a measure of the total cost increase of all the additional burdens OFCCP included in its proposal. There are multiple other new tasks in OFCCP's proposed ICR that we have not even commented on or priced. Accordingly, our numbers are "Best Case for OFCCP" figures.

Recommendations:

- 1) We believe OMB has no choice but to reject outright the entirety of OFCCP's proposed ICR. OFCCP's proposals lack credibility and justification given the very large cost differences OFCCP estimates versus the on-the-ground empirical reports from our Member companies of both: (a) the out-of-pocket costs to pay people to respond to an OFCCP audit Scheduling Letter and attached Itemized Listing, and (b) the number of hours actually spent in fact and billed against those known and true costs.
- 2) Apart from the OFCCP's cost estimates our Member company Survey results convincingly demonstrate are not credible (non-starters...not "near misses"), there are two more reasons for OMB to simply outright reject the entirety of OFCCP's proposed ICR: OFCCP has nowhere in its Supporting Statement justified the need for the changes and costs associated with those changes. Second, OFCCP proposals to change "longstanding" enforcement practices at OFCCP must be submitted to formal Rule Making pursuant to the Administrative Procedure Act ("APA") as we discuss in detail in PART III, below, of our Comments. These proposed expansions of OFCCP's cost burden are not only too costly relative to the gain (50 years of prior OFCCP managers have not felt the need to push an unprecedented 40% increase in costs on federal contractors to

achieve enforcement results far less grand than the more handsome enforcement results prior managers of OFCCP achieved with the same enforcement tools which remain available to this OFCCP), but the changes will be unenforceable, as a matter of law. OMB should use its PRA authority to disapprove OFCCP's proposed changes which are not otherwise in accordance with law. We have also cataloged in PART III five different discrete additional burden proposals OFCCP has made but which seek to install Legislative Rules without the benefit of formal APA Rule Making to authorize any of those seven discrete proposals.

- 3) We believe OMB should simply approve the current, in place, OFCCP ICR from 2020, perhaps without change so OFCCP may get on and forward with its important mission to conduct an enforcement program and not be stalled without an audit Scheduling Letter and attached Itemized Listing for Supply & Service contractors.
- 4) We make a recommendation, and the grounds therefore, in PART V of our comments (OMB Should Order OFCCP to Extend the Time for Contractors to Respond to OFCCP's Audit Scheduling Letters).

PART II. OFCCP already greatly underestimates current time and costs

(A) OFCCP's Overall Baseline Cost to Respond to OFCCP's Current Audit Scheduling Letter & Itemized Listing Substantially Underestimates the True Costs of Compliance to Federal Contractors

OFCCP already greatly underestimates both the amount of time and the cost of that time to respond to OFCCP's current audit Scheduling Letter & attached Itemized Listing, as we document below. The two implications of this observation are that OFCCP's cost estimates come to OMB in the pending ICR with a presumption against their validity. Moreover, any FY 2023 to FY 2025 cost estimates using OFCCP's FY 2020 cost estimates as a "baseline" are now infected by the highly inaccurate cost estimates made in 2020 and create artificially understated projections for OFCCP's 2023 ICR.

In its [April 1, 2020, Supporting Statement](#) for the current requirements (on pages 27-28), OFCCP states that it estimated it would take about 28 burden hours per contractor to assemble and submit the documents requested in OFCCP's audit Scheduling Letter and Itemized Listing. The 2020 approved collection burden hours – 28 hours – multiplied by the then estimated \$70.78 per hour for labor costs (see [OFCCP April 2020 Supporting Statement](#), page 30, footnote 54) came to **\$1,981.84** of monetized burden costs per contractor audited.

Yet, our Member Survey reports that OFCCP's estimate is far off the mark based on their actual experience of these Members in responding to OFCCP's audit Scheduling Letter and their actual experience paying personnel to respond to OFCCP's audit Scheduling Letter. OFCCP's "estimates" of time spent and associated costs are not founded on empirical evidence but are rather based on guesswork and surmise.

While OFCCP's estimate of the current burden costs is **\$1,981.84**, NONE of our responding Members reported their costs to have been less than **\$5,000** (2 ½ times greater than OFCCP's "estimate" of average costs burdens) in OFCCP audits of Supply and Service contractors. Moreover, 90% of our responding Members reported that their costs to respond to OFCCP's audit Scheduling Letter were over **\$7,500**, and 77% of our responding Members reported that they had incurred costs in excess of **\$10,000!** (5 times OFCCP's estimate of costs) and a full one-third (33%) reported spending more than **\$50,000** (25 times OFCCP's estimated average cost) to respond to OFCCP's current audit Scheduling Letter and Itemized Listing.

We asked: "When previously responding to an OFCCP Compliance Review Scheduling Letter and Itemized Listing, what was the cost to your organization to procure and produce the documents OFCCP requested? INSTRUCTIONS: If you responded to more than one audit, please report the average cost to respond across all the audits you defended. Be sure to report all costs or reasonable cost estimates (we understand that you do not have this precisely calculated), including the value of salaries/benefits and estimated overhead costs attributed to those employees in addition to any legal department, outside counsel, and/or vendor/consultant costs. If you relied upon multiple responders, inside and outside of your company, please take into account the varying costs of all responders in your calculation of total costs to your company."

OFCCP's estimate	33% of our responding Members reported	23% of our responding Members reported	21% of our responding Members reported	13% of our responding Members reported	11% of our responding Members reported	0% of our responding Members reported
\$1,981.84	>\$50,000	>\$25,000	>\$10,000	\$7,501 - \$10,000	\$5,001 - \$7,500	\$0 - \$5,000

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(B) OFCCP's Proposed Hourly Costs to Respond to its Current Audit Scheduling Letter & Itemized Listing Substantially Underestimates the Actual Cost of Contractor Personnel

As noted above, in its [April 1, 2020, Supporting Statement](#) for the current requirements (on page 30), OFCCP states that the cost per burden hour for federal contractors to assemble and submit the documents requested in the current OFCCP Supply & Service Scheduling Letter and attached Itemized Listing is **\$70.78** per hour (28 hours multiplied by \$70.78 = **\$1,981.84**).

Our Member Survey reported actual data from Supply & Service contractors which had been subjected to OFCCP audit under OFCCP's current audit Scheduling Letter that demonstrate that OFCCP's 2020 estimate for the hourly labor costs is also far from the reality of what federal contractors pay their audit Scheduling Letter response teams, in fact.

While OFCCP's estimate in 2020 was that contractor labor costs averaged **\$70.78** per hour, only 14% of our responding Members reported that their labor costs were less than

\$86.10 per hour. (To adjust OFCCP's 2020 estimate for inflation, we generously increased the hourly labor costs (to OFCCP's advantage) by over \$16/hour to roughly capture the increased costs of labor the last three years (2020, 2021 & 2022) have brought).

Moreover, 85% of our responding Members said their costs were **more than even \$86.10** per hour (let alone \$70.78 per hour), and over half (51%) of our responding members said their expended costs exceeded **\$110** per hour to respond to OFCCP's audit Scheduling Letter and attached Itemized Listing! Slightly more than one-fourth (27%) reported that they had expended in excess of \$150/hour to respond to OFCCP's audit Scheduling Letter and attached itemized Listing.

We asked: "What is the average hourly compensation cost (including benefits and overhead costs) your organization is currently paying to procure and produce documents and information in response to an OFCCP Compliance Review Letter and attached Itemized Listing?"

OFCCP's estimate	34% of our responding Members reported	27% of our responding Members reported	24% of our responding Members reported	14% of our responding Members reported
\$70.78	\$86 - \$110/hour	> \$150/hour	> \$110/hour	< 86.10/hour

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(C) OFCCP's Proposed Increased Burden Hours and Cost Increases Set Out in Its Proposed ICR Are Substantially Understated...Nowhere Close to Reality

(1) Overview

OFCCP's burden and cost estimates are so understated that they have brought OFCCP's reputation and integrity into question in the minds of hundreds of prominent federal contractors, most of them long-term supporters of the agency who felt in partnership with OFCCP and which are now left in doubt. Our Members reported that OFCCP's proposed changes would add significant costs to their compliance budgets far beyond those OFCCP concedes to respond to OFCCP Supply & Service audits. It is our judgment, too, that absent a serious pullback of OFCCP's proposed ICR that it will do long-term damage to OFCCP's relationship with the federal contractor community...a community on which OFCCP has relied for decades to partner with the agency in joint mission. OFCCP's burden and cost estimates are simply not credible. They are a non-starter and everybody knows it.

Since the current ICR builds costs on top of the current ICR, it is necessary to start the current ICR analysis by remembering the understatement of burdens and costs of the current ICR upon which the proposed ICR proposes to build. Again, in its [April 1, 2020, Supporting Statement](#) for the current requirements (on pages 27-28), OFCCP estimated that it would take contractors about 28 burden hours per contractor to assemble and submit the documents requested in its audit Scheduling Letter and attached Itemized

Listing. In its [November 2022 Supporting Statement for the current proposal](#) (on pages 26-27), OFCCP estimates that it would take each audited contractor **39 burden hours** (a 40% increase in burden hours) to assemble and submit the documents requested in the proposed OFCCP audit Scheduling Letter and attached Itemized Listing. Accordingly, the difference in OFCCP's asserted individual burden per contractor hours because of the proposed new Scheduling Letter and Itemized Listing requirements is merely an additional **11 hours**: 28 hours currently versus 39 hours in OFCCP's proposed ICR.

Also, OFCCP only increased its (already substantially low) 2020 hourly labor costs estimate from **\$70.78** per hour to only **\$75.10** per hour (only a 9.4% increase). OFCCP puts forward this modest increase in labor costs despite a general inflation of 8% or more in each of the last two years alone (2021 & 2022), even ignoring the inflation of costs in 2020. From OFCCP's estimate of conceded total burden hours of 9,022,416 for contractors to comply with its new audit Scheduling Letter, OFCCP then calculated that total annual contractor burden costs to comply with its proposed ICR would come to approximately **\$677,583,442** (**9,022,416** estimated burden hours x **\$75.10** per hour in estimated labor costs).

The [November 2022 Supporting Statement for the proposal](#) did not contain a comparison to the 2020 ICR approval reporting OFCCP's proposed increase in monetized burden costs for federal Contractors to respond to the agency's proposed OFCCP audit Scheduling Letter and Itemized Listing. Nonetheless, we believe OFCCP is in fact suggesting to OMB that the agency has estimated that its current proposed ICR would impose only approximately **\$2,928** of burden cost per contractor. When one subtracts out **\$1,981.84** burden costs per contractor (to which OFCCP admits from its 2020 approved collection), those data result in a proposed increase in estimated costs of only about **\$947** that OFCCP seeks to impose on each audited Supply & Service contractor.

(Apparently, OFCCP's math was this: 49,062 total estimated burden hours x an estimated **\$75.10** per hour = **\$3,684,556.20** total projected cost burden that OFCCP's proposed ICR would force. Based on the 1,258 annual OFCCP Supply & Service audits OFCCP projects in each year to which the proposed ICR would apply, and during which audits OFCCP would deploy the subject audit Scheduling Letter for Supply & Service contractors and attached Itemized Listing, the contractor cost per review would be only **\$2,928**. Another way to arrive at this number might be to take OFCCP's estimated 39 burden hours per contractor and multiply it by OFCCP's estimated burden cost per hour of **\$75.10**. That math generates the same **\$2,928** in total burden costs per Supply & Service contractor under audit.)

OFCCP's apparent estimated costs increase for its pending ICR of only about **\$947.06** per contractor is substantially different from what our Members report. IN FACT, our Member Survey responses report that the anticipated costs to contractors for several of the **individual** proposed new requirements, each and alone, will swell contractor costs well beyond OFCCP's estimates of *total estimated increased costs* to contractors for ALL the many changes OFCCP proposes to its audit Scheduling Letter and attached Itemized Listing. In other words, the cost of EACH of the below noted proposed changes will EACH cost more to contractors than OFCCP's estimate of the TOTAL of all cost increases for all the many proposed changes OFCCP identified in its proposed ICR.

The following results from our Member Survey detail the anticipated costs of several of OFCCP's proposed additional requirements.

(2) OFCCP's Estimated Costs to Its Proposed Increases to Section 503 & VEVRAA Outreach and Recruitment Documentation Burdens Are Substantially Understated: Nowhere Close to Reality

Ninety-Five percent (95%) of the Members which responded to our Survey said their cost as to this one proposed new requirement alone would be over **\$1001**, and 87% of our responding Members said that cost alone would exceed **\$2,000!**

Compare the total cost increase (we calculate from OFCCP's cost data) in monetized burden costs to respond to ALL OFCCP's many different proposed audit Scheduling Letter and Itemized Listing changes of only about **\$947** per contractor. Significantly, only 5% of our responding Members stated that their costs for OFCCP's proposed new Section 503 & VEVRAA outreach and recruitment documentation requirements (pages 12-14 of the [November 2022 Supporting Statement](#)) would cost less than **\$1,001**.

We asked: "OFCCP proposes to now require Supply & Service contractors undergoing an OFCCP Compliance Review to: itemize documentation of outreach and recruitment activities as to individuals with disabilities and veterans; assess the effectiveness of those activities; list the criteria used to evaluate the effectiveness of those activities; document those activities which are ineffective; and describe the actions the contractor may take to implement alternative outreach and recruitment activities. What do you anticipate your cost would be, on average, to respond to the above-referenced proposed changes?"

Anticipated Costs for Proposed Additional Section 503 Outreach and Recruitment Documentation	46% of our responding Members reported	41% of our responding Members reported	8% of our responding Members reported	5% of our responding Members reported
	> \$5,000	\$2,001 - \$5,000	\$1,001 - \$2,000	< \$1,001

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

And remember: OFCCP's estimated TOTAL costs for a contractor to respond to all 20+ requests for documents in OFCCP's 2020 ICR were under **\$2,000**, even before one adds in an additional **\$900+** (for ALL additional increased burden hours) contractors would incur as a result of the proposed ICR for 2023-2025. Again, while OFCCP declined to identify its estimated costs for this particular increased burden, one might reasonably assume, given the numerous other changes to the existing ICR OFCCP is proposing, that perhaps 10% of OFCCP's estimated approximately **\$950** increase in TOTAL additional burden costs might be attributable to this particular increased burden (perhaps about only \$95 in OFCCP's view).

(3) OFCCP's Estimated Costs to Provide More Specificity on Section 503 Utilization Analyses Documentation Are Substantially Understated: Nowhere Close to Reality

Only 2% of our responding Members reported that their costs to comply with just OFCCP's proposed new audit Scheduling Letter and Itemized Listing requirements to describe steps taken if the contractor determines a Section 503 underutilization has occurred (pages 13-14 of the [November 2022 Supporting Statement](#)) would be between **\$0 - \$1,000**. Compare OFCCP's estimated approximately **\$947** cost to cover ALL its many proposed changes in the proposed ICR.

Moreover, 90% of our responding Members reported that their cost as to this proposed new requirement alone would be over **\$2001**, and 56% of our responding Members said it alone would exceed **\$5,000!**

And remember, OFCCP's estimate of costs for ALL the many proposed changes it seeks to implement together in its proposed ICR would come to approximately only **\$950** (in round numbers). While OFCCP failed to break out its estimated costs for each newly proposed task, given the many proposed changes, one would reasonably surmise that OFCCP would allocate perhaps 10% of its estimated **\$950** total increased burden estimate to this single change (perhaps about \$95 = less than an hour of a contractor's time at the pay rate OFCCP ascribes to contractor personnel responding to the agency's audit Scheduling Letter and attached Itemized Listing).

We asked: "OFCCP's proposal also seeks to require those Supply & Service contractors undergoing an OFCCP Compliance Review to document the following information for each Job Group in which the contractor failed to achieve its "Utilization" Goal for Individuals with a Disability: steps the contractor took to evaluate whether impediments to equal employment opportunity existed; assessments of its personnel processes; assessments of the effectiveness of its outreach and recruitment efforts; results of internal audits of those efforts; and action-oriented programs developed and executed to correct identifiable problem areas. What is the average cost your company would incur to comply with these new requirements?"

Anticipated Costs to Provide More Specificity on Section 503 Utilization Analysis Documentation	56% of our responding Members reported	34% of our responding Members reported	8% of our responding Members reported	2% of our responding Members reported
	>\$5,000	\$2,001 - \$5,000	\$1,001 - \$2,000	\$0 - \$1,000

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(4) OFCCP's Estimated Costs Seeking to Require Customized "Action-Oriented Program" Narratives Are Substantially Understated: Nowhere Close to Reality

Ninety-Seven percent (97%) of our responding members said their cost as to this proposed new requirement alone would be over **\$1001**, and 69% of our responding Members said this new audit response task alone would exceed **\$5,000!**

Compare OFCCP's asserted **total increase** of only about **\$950** per contractor per audit in monetized burden costs to respond to ALL the many changes OFCCP proposes to its audit Scheduling Letter and attached Itemized Listing. Moreover, only 3% of our responding Members reported that their costs for the proposed new requirement for contractors to provide a customized narrative discussing their action-oriented programs (pages 11-12 of the [November 2022 Supporting Statement](#)) would be between **\$0 - \$1,000**.

And again, OFCCP failed to identify the particularized additional cost it estimates for this additional audit response task, even though OFCCP must have those data to create a bottom-line cost estimate across all the many audit response changes it proposes. It would not be unreasonable to assume, though, that perhaps even 20% of its seeming approximately **\$950** in proposed increased cost burdens to respond to its proposed audit Scheduling Letter might be fairly attributed to this new proposed task (or about **\$190** of contractor expense per audit). While we did not survey how many Members, if any, could accomplish this new additional audit response task for \$200 or less, the response would obviously be fewer than 3% of responding Members, if any.

We asked: "OFCCP's proposal also seeks to require Supply & Service contractors undergoing an OFCCP Compliance Review to include a new customized narrative description of all action-oriented programs the contractor designed to analyze and correct problem areas related to the hiring, promotion, involuntary termination, and compensation of minorities and women. What do you anticipate your company's average cost would be to comply with this new requirement?"

Anticipated Additional Costs Related to Customized Action-Oriented Programs Narrative	36% of our responding Members reported	33% of our responding Members reported	28% of our responding Members reported	3% of our responding Members reported
	\$5,001 - \$10,000	>\$10,000	\$1,001 - \$5,000	\$0 - \$1,000

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(5) OFCCP's Estimated Costs for Supply & Service Contractors to Produce to OFCCP Their Employment Policies & Employment Practices Documentation and Narratives Are Substantially Understated: Nowhere Close to Reality

Ninety-five percent (95%) of our responding Members reported their cost as to this proposed new requirement alone would be over **\$1001**. Sixty-Nine percent (69%) of our responding Members reported that the cost of this new proposed task alone would exceed **\$1,500!** And well over one-third (39%) of responding Members reported it would cost them in excess of **\$3,000** to comply with this new proposed OFCCP audit Scheduling Letter response task.

As previously noted above, OFCCP's asserted **total increase** in monetized burden costs for contractors to respond to ALL OFCCP's many proposed changes to its audit Scheduling Letter and Itemized Listing Changes is only about **\$950** per contractor per

audit. However, only 5% of our responding Members reported that their anticipated costs for the proposed new requirement to create and produce documentation of its employment policies and practices, including copies of current written policies and a narrative description of their employment practices (pages 15 and 19 of the [November 2022 Supporting Statement](#)), would be between **\$0 - \$1,000**.

Again, OFCCP has not particularized the added cost for contractors to respond to this new request. One might reasonably assume, however, that the cost for this new task is only approximately 5% of OFCCP's total estimated burden cost of approximately **\$950** per contractor per audit to accomplish ALL OFCCP's many changes it seeks in its proposed ICR (or perhaps about **\$42.50** for this task according to OFCCP's estimate of additional burden costs).

We asked: "OFCCP's proposal also seeks to require Supply & Service contractors undergoing an OFCCP Compliance Review to produce to OFCCP all employment policies and a narrative description of all practices regarding: recruiting; screening and hiring; employment; promotion; arbitration agreements; anti-harassment and equal opportunity rights; and the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures What would be the average cost for your organization to first create and thereafter produce this documentation in an OFCCP Compliance Review?"

Anticipated Additional Costs to Produce Employment Policies & Employment Practices Documentation and Narrative	38% of our responding Members reported	31% of our responding Members reported	26% of our responding Members reported	3% of our responding Members reported	2% of our responding Members reported
	>\$3,000	>\$1,500	\$1,001 - \$1,500	\$501 - \$1,000	\$0 - \$500

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(6) OFCCP's Estimated Costs for Contractors to Document & Explain Promotions & Terminations Are Substantially Understated: Nowhere Close to Reality

Sixty percent (60%) of our responding Members reported that their cost to comply with proposed new requirement alone would exceed **\$5,001**. Moreover, 34% of our responding Members reported that their increased audit response costs for this new task alone would be **between \$501 and \$5,000!**

Compare: OFCCP's presumed **total increase** in monetized burden costs of only about **\$950** per contractor per audit to respond to ALL OFCCP's many proposed new changes to its audit Scheduling Letter and attached Itemized Listing.

While OFCCP did not report its estimated additional burden hours costs for this new audit response task, assuming this task owns as much as a 10% share of OFCCP's hoped-for total burden hours increases, it would be worth about \$95 of contractor time

and costs to comply with it. However, only 5% of our responding Members reported that their anticipated costs to comply with this proposed new requirement to provide documentation and explanations regarding promotions and terminations (pages 15-17 of the [November 2022 Supporting Statement](#)), would be less than \$501. While unknown, it is likely that few or none of our Members could accomplish this task for \$95 since only 5% of them could perform the task for some unknown amount under \$500.

We asked: "OFCCP's proposal also seeks to require Supply & Service contractors undergoing an OFCCP Compliance Review to: identify every promotion as either "competitive" or "non-competitive;" include information related to compensation rates and the identities of previous and new supervisors following each promotion; record and maintain the reasons for each termination; record the gender and race/ethnicity information for each terminated employee; and the gender and race/ethnicity of each employee at the start of the prior AAP year for each job title or job group (to allow the contractor and OFCCP to track termination and promotion data rather than just the gender and race/ethnicity data for the current AAP year). What would be the average cost to your company to gather and produce documentation in response to these above-proposed requirements?"

Anticipated Additional Costs Related to Documentation & Explanations of Promotions & Terminations	34% of our responding Members reported	31% of our responding Members reported	29% of our responding Members reported	5% of our responding Members reported
	\$501 - \$5,000	\$5001 - \$10,000	>\$10,000	\$0 - \$500

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

(7) OFCCP's Estimated Costs for Contractors to Undertake and Provide to OFCCP Two Compensation Data Snapshots_Are Substantially Understated: Nowhere Close to Reality

Eighty-six percent (86%) of our responding Members reported that their cost as to this proposed new requirement alone would be **over \$5,001**. Moreover, 62% of our responding Members reported this new task alone would cost **in excess of \$10,001!**

OFCCP's presumed **total increase** in monetized burden costs for contractors to respond to the agency's proposed audit Scheduling Letter and attached Itemized Listing is only about **\$950** per contractor per audit. However, NONE of our responding members stated that their anticipated costs to accomplish this proposed new requirement to provide two compensation data snapshots (pages 17-18 of the [November 2022 Supporting Statement](#)), would be less than **\$1,500**.

Again, OFCCP did not provide an estimated burden cost for contractors to accomplish this task among the many proposed new audit response tasks which comprise its assumed approximately **\$950** of increased burden costs. However, the cost for this one new task would exceed by 50% the ENTIRETY of OFCCP's estimated **\$950** increased burden budget for all OFCCP's proposed changes according to 100% of our responding Members.

We asked: "OFCCP's proposal also seeks to require Supply & Service contractors undergoing an OFCCP Compliance Review to provide: compensation data for two (2) snapshot periods of time, rather than the one (1) snapshot period OFCCP currently requires; compensation information including temporary employees, factors the contractor considers to set compensation, all policies and documentation related to compensation for each employee (such as offer letters, commission plans, internal factors used to set wages, etc.); and documentation of in-depth statistical analysis and assessment of the contractor's compensation data, including, among other items, "The method of analysis employed by the contractor (e.g., multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.)." What do you estimate the average cost would be to your organization to (1) develop, (2) maintain, and (3) produce all the above information and reports to OFCCP in an audit?"

Anticipated Additional Costs For Two Compensation Data Snapshots	34% of our responding Members reported	28% of our responding Members reported	24% of our responding Members reported	14% of our responding Members reported	0% of our responding Members reported
	>\$20,000	\$10,001 - \$20,000	\$5,001 - \$10,000	\$1,501 - \$5,000	\$0 - \$1,500

*Note: Because the percentages are rounded to the nearest whole number, the numbers listed do not always add to exactly 100%

PART III: All OFCCP's Proposed Enforcement Practice Changes Together First Require OFCCP To Undergo Final Administrative Procedure Act Rulemaking In Addition to Four Specific Changes OFCCP Requests Which Independently Also So Require

(A) OFCCP Must, as a Matter of Law, Submit the Entirety of Its Many Proposed Changes to Its Longstanding Enforcement Practices and Policies to Formal Administrative Procedure Act Rulemaking

(B) OFCCP Must First Seek Notice and Comment Pursuant to the Administrative Procedure Act ("APA")

OFCCP's collection of audit enforcement practices and policies it now seeks to change operate as a de facto "Legislative Rule." Legislative Rules (as opposed to "Interpretive Rules") only allow federal agencies to change them and any "longstanding" practices and policies if first preceded by formal "rule making" via public notice and comment pursuant to the APA.

-See, *Vencor, Inc. v. Shalala*, 988 F. Supp. 1467 (N.D. Ga. 1997) [federal agency may not adopt a new practice that reverses or departs radically from its own prior longstanding policies and practices without invoking the APA's Notice and Comment process].

-See also, *Jean v. Nelson*, 711 F.2d 1455, 1476 (11th Cir. 1983) ["policy announced by government in this case, reversing the long-standing old policy and instituting

the new policy is 'clearly a rule'"); *American Trucking Assoc., Inc. v. United States*, 688 F.2d 1337, 1348 (11th Cir. 1982) [decision to reverse a longstanding and uniform practice is clearly a Legislative Rule].

New requirements affecting a federal contractor's substantive rights and interests require OFCCP to comply with the APA to make those new requirements enforceable against the contractor.

-See *Batterton v. Marshall*, 648 F.2d 694, 707-8 (while a rule of agency organization, procedure, or practice is an exception to APA requirements, a rule that alters the rights or interests of parties precludes a finding that an agency's action is merely organizational, procedural, or a change to agency practice; such exemption to the APA cannot apply where the agency action trenches on substantial private rights and interests).

-See also *National Mining Assoc. v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014) ("An agency action that purports to impose legally binding obligations or prohibitions on regulated parties—and that would be the basis for an enforcement action for violations of those obligations or requirements—is a legislative rule . . . As to interpretive rules, an agency action that merely interprets a prior statute or regulation and does not itself purport to impose new obligations or prohibitions or requirements on regulated parties, is an interpretive rule").

OFCCP repeatedly admitted to OMB in OFCCP's "Supporting Statement" that it seeks to impose new obligations on federal contractors (amounting to approximately 40% more burden hours of obligation than previously if you take OFCCP's assertions to OMB even at only face value). Failure of a covered federal Government contractor to comply with OFCCP's new hoped-for enforcement procedures that are the subject of its proposed ICR, should OMB approve them in whole or in part, would clearly provoke OFCCP to seek a debarment sanction to prevent the contractor from continuing to contract with federal procurement agencies. OFCCP's proposed new audit response taskings manifestly trench on the substantive private rights and interests of federal contractors.

OFCCP's proposed ICR seeks to set new legal standards (four types of which we highlight below, with the fourth type itself consisting of four different proposed OFCCP changes to its audit Scheduling Letter and attached Itemized Listing all requiring APA notice and comment periods) and seeks to impose (many) new requirements on federal contractors departing radically from OFCCP's past practices over the last 40 years.

Indeed, OFCCP's proposal does not merely explain how OFCCP intends to enforce Executive Order 11246 differently because of its proposed changes. Rather, taken as a collective whole, OFCCP's sweeping proposed changes to its longstanding audit procedures constitute a general statement of enforcement policy now no longer, if ever, reserved to its discretion.

-See *Catawba County v. EPA*, 571 F.3d 20, 33-34 (D.C. Cir. 2009) [the APA expressly exempts policy statements from notice-and-comment

requirements. See 5 U.S.C. § 553(b)(A) (specifying that, except when required by statute, the section 553 requirements for notice and comment do not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice").

Here, however, OFCCP requests OMB's permission to go beyond a statement of its policies or its practices. Rather, OFCCP admits in its Supporting Statement to OMB that it seeks to enforce new and heightened compliance obligations on covered federal Government Supply & Service contractors the agency has selected for an OFCCP Compliance Review.

Public Notice and Comment Pursuant to the PRA Does Not Suffice or Substitute for Notice and Comment Pursuant to the APA

OFCCP's publicly published *Federal Register* Notice lacked any of the details of its proposed new enforcement obligations but did announce that the agency was seeking comment in accordance with (only) the Paperwork Reduction Act of 1995 ("PRA"). OMB PRA approval of an agency Rule pursuant to OMB's authority under the Paperwork Reduction Act does not suffice or replace the requirement that OFCCP submit Legislative Rules for notice and comment pursuant to the APA. Rather, OFCCP needs both APA and PRA approvals when its rule making also otherwise implicates not just a Legislative Rule, but also seeks to impose common paperwork burdens on 10 or more members of the public.

On behalf of its Members, DirectEmployers Association thus requests that OMB withhold its approval of the additional new burdens OFCCP seeks permission to impose on covered federal Government contractors. Rather, OMB should simply renew OFCCP's 2020 ICR that implements (and has implemented for several decades) OFCCP's longstanding Supply and Service audit protocols, practices, and procedures to access contractor documents.

OMB May Order OFCCP To First Finalize Notice and Comment Pursuant to the APA

Pursuant to its PRA authority to ensure that federal agencies seeking OMB's approval for new regulatory actions do not seek to proceed in conflict with applicable law, OMB should also instruct OFCCP to first seek and implement public notice and comment pursuant to the APA concerning any new enforcement procedures it wishes to inaugurate.

The APA provides that regulations and/or substantive rules require "[g]eneral notice of proposed rulemaking shall be published in the *Federal Register*." 5 U.S.C. § 553(b). After publication of such a notice, an agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.* at § 553(c). After consideration of the relevant matter presented, the agency must then incorporate in the rules adopted a concise general statement of their basis and purpose. *Id.*

To date, OFCCP has not complied with its obligations under the APA. Furthermore, OFCCP's current ICR, with its attendant notice and request for comments pursuant to the PRA does not provide for the required incorporation of public comment and revision the APA requires.

It cannot be disputed that OFCCP's proposal is subject to the requirements of the APA. Attempts to supplement a statute by intending a regulation to be an exercise of power is a "Legislative Rule" subject to APA notice and comment requirements. *Chamber of Commerce of United States v. OSHA*, 636 F.2d 464, 468-9 (D.C. Cir. 1980). In other words, a substantive rule is one which "effect[s] a change in existing law or policy." *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1974). Even interpretive rules that create a substantial impact on those regulated require notice and opportunity for comment pursuant to the APA. *Brown Express, Inc. v. United States*, 607 F.2d 695, 702 (5th Cir. 1979). The particular label by the agency as to whether an action is a legislative rule or merely an interpretive rule is not necessarily conclusive, for it is the substance of what the agency has purported to do and has done which is decisive. *Columbia Broadcasting System, Inc. v. United States*, 316 U.S. 407, 416 (1942). Thus, the inquiry is on the rule itself. *Alcaraz, supra*, 746 F.2d at 613.

The substance of OFCCP's proposed ICR is, as OFCCP confesses in its Supporting Statement to OMB, to impose new compliance obligations and substantial and substantive new compliance burdens on covered federal Government Supply & Service contractors subject to OFCCP Compliance Reviews.

(C) OFCCP Has Also Proposed Four Independent Substantive Changes in OFCCP's Proposed ICR Which Each, Independently, Require OFCCP to Comply with the APA Before Being Authorized to Seek OMB PRA Authority to Then Enforce Them

1. New Substantive Compliance and Enforcement Definition of the Term "Promotion"

First, OFCCP's proposed ICR seeks to create a new definition of the term "promotion" without the benefit of APA rule making. OFCCP nonetheless seeks to compel covered federal Supply & Service contractors to comply with OFCCP's emerging definition. OFCCP's current audit Scheduling Letter merely requires federal to provide the total number of promotions by gender and race/ethnicity, as well as specifically requesting the federal contractor's definition of the term "promotion." OFCCP now seeks to change this existing longstanding enforcement practice and policy to defer to the contractor's definition of the term "promotion," and now rescind, in effect, OFCCP's historic practice.

OFCCP now proposes in its ICR, however, for contractors to identify whether a promotion is "competitive" or "non-competitive," and further seeks to impose its own definition of what constitutes a "competitive" or "non-competitive" promotion. Creation of a new definition not found in 41 C.F.R. § 60 is a substantive alteration that OFCCP has (appropriately) historically submitted for notice and comment pursuant to the APA. For example, just three years ago, OFCCP submitted for notice and comment pursuant to the APA its creation of new definitions for the terms "nonstatistical

evidence" and "statistical evidence." See 84 FR 71875, 71879 col. 2 (December 30, 2019).

The definition of the term "promotion" is clearly the subject of necessary APA rulemaking because of its substantive nature and also because a differing definition a contractor may use could potentially subject that contractor to Affirmative Action Plan sanctions (i.e., "debarment" from federal Government contracting) and/or to unlawful discrimination remedies.

2. New Proposed Substantive Compliance and Enforcement Obligation as to Compensation Data and a Proposed Change to OFCCP's Rule Regarding Contractor Self-Evaluations of Compensation Data Also Triggered the Need for Formal APA Rulemaking

Second, OFCCP's proposal adds a so-called second compensation data request, doubling the obligation currently imposed on federal contractors. More importantly, by OFCCP's own standard, any revision to the self-evaluation of compensation data requires compliance with the notice and comment requirement the APA imposes. For example, OFCCP's existing Rule requiring contractors to "evaluate" their compensation system(s) was a result of notice and comment to a proposed Rule in the Clinton Administration (65 FR 26088 (May 4, 2000)), resulting in the eventual publication of a Final Rule. See 65 Fr 68021 (November 13, 2000).

Furthermore, OFCCP previously recognized its APA obligation as to compensation-related issues when it undertook rulemaking to create the format OFCCP sought to suggest to contractors to further incent compensation self-evaluations. See 69 FR 67252 (November 16, 2004). As such, the imposition of a second snapshot as to compensation data and the proposed alteration to OFCCP's Rules specifying how federal contractors might undertake self-evaluations, must be subject to the same procedural APA rule making standards to which OFCCP previously submitted in the Clinton and Bush Administrations.

3. OFCCP's New Proposed Statistical Compensation Analyses Requirement Runs Afoul of OFCCP's Existing Written Interpretation of the Very OFCCP Compensation Rule the Agency Now Suddenly Seeks to Subvert

Third, OFCCP's proposed ICR seeks to require federal Supply & Service contractors to undertake newly described and fashioned statistical compensation analyses. As the U.S. Chamber of Commerce previously noted in its response to OFCCP's publication of Directive 2022-01 as to OFCCP's attempted imposition of "pay equity" audits, OFCCP has historically made clear that it did not mandate a specific method for contractors to evaluate their compensation systems. However, OFCCP's current proposal seeks to suddenly remove that discretion and seeks to require contractors to now suddenly produce statistical analyses OMB has never previously allowed to occur because of their frightful cost, rarity in the corporate marketplace, and complexity. As OFCCP noted in 2006 in finalizing the guidelines for federal contractors as to self-evaluation of compensation practices for compliance with Executive Order 11246:

“OFCCP agrees that the contractor need not have relied on quantitative or statistical techniques to comply with 41 CFR 60-2.17(b)(3), as OFCCP has repeatedly noted that the contractor has the discretion to comply by using any self-evaluation technique it deems appropriate.” (Emphasis added).

OFCCP's proposed ICR now proposes to not only suddenly “reverse course” and off-the-cuff re-interpret the meaning of its compensation Rule at 41 CFR Section 60-2.17(b)(3) but seeks to do so without even the formality of APA rulemaking. As further evidence of how far OFCCP now seeks to stray from previous legal and regulatory guidance from the Solicitor's Office and OMB, OFCCP proposed in 2019 to amend its audit Scheduling Letter by including a requirement to compel federal contractors to produce the results of “the most recent analysis of compensation systems.” In response to concerted opposition from the federal contractor community, OFCCP later withdrew its proposal. Now, OFCCP attempts to revisit this requirement and impose a much more expensive and controversial new obligation in its current ICR, even without the benefit of proper APA rule making.

OFCCP's historical written interpretation of its compensation Rules is very powerful evidence that OFCCP does NOT interpret its Rule the way OFCCP now seeks to do in its proposed ICR. Clearly, to change its substantive, existing Rule, OFCCP must make resort to formal rule making, and further must justify the change both to OMB pursuant to the PRA and pursuant to the APA's differing legal standards and requirements.

4. OFCCP Seeks Four New Contractor Compositions, Analyses, and Documents All of Which Require APA Rule Making to Enforce

Fourth, OFCCP's proposed ICR seeks to add a new “Item 7” to its Itemized Listing requiring contractors to compose a list identifying all “action-oriented programs” a federal contractor may design to correct any purported problem areas.

OFCCP also proposes a new “Item 19” to its Itemized Listing requiring federal contractors to compose writings describing all policies and practices regarding recruiting, screening, and hiring mechanisms.

In addition, OFCCP seeks to add a new “Item 20(c)” to its Itemized Listing to compel federal contractors to compose and produce written policies and practices related to promotions.

Finally, OFCCP seeks to add a new “Item 24” to its Itemized Listing requiring copies of all employment policies, including arbitration agreements.

The above four new items are all new obligations that OFCCP seeks to impose on federal contractors. Again, underscoring the mandatory need for OFCCP to undergo formal APA rule making, a contractor's failure to comply with any one or more of these four new substantive requirements would cause OFCCP to issue a Notice of Violations and thereafter seek the imposition of debarment from federal contracting if the contractor continued to resist complying.

Each of the four items discussed above would impose a substantial impact on federal Supply & Service contractors when responding to an OFCCP Compliance Review, both in terms of cost, redeployment of contractor Human Resources and Compliance staff and operational processes and given the threat of enforcement for any failure of compliance OFCCP may believe it perceived. As DE Members noted in DE's Survey as to the new obligations OFCCP proposes to impose, these new requirements would create substantial financial and staffing burdens.

The objections to OFCCP's proposed changes to its audit Scheduling Letter and attached Itemized Listing are backed and supported by OFCCP-specific administrative law case decisions. The objection DE Member companies put forward relies on, among other things, the legal limits imposed on OFCCP by the case law holding in *Firestone Synthetic Rubber & Latex Co. v. Marshall*, 507 F. Supp. 1330 (E.D. Tx. 1981).

In *Firestone*, the Secretary of Labor issued a Decision and Final Order (prior to the time Secretary of Labor Reich created and appointed the first members to the Administrative Review Board). Secretary Ray Marshall (Carter Administration) held that OFCCP's Technical Guidance Memo No. 1 ("TGM No. 1"), defining the term "underutilization," was an "interpretive statement," only, and not subject to public notice and comment under the APA. *Firestone* appealed to the federal District Court for the Eastern District of Texas in Arlington. That court ruled that the definition of "underutilization" contained in TGM No. 1 created a new obligation for federal contractors. *Id.* at 1335. That new obligation was an exercise of the Secretary of Labor of his delegated power to make a rule having the force and effect of law, and as such was subject to the APA. *Id.* Furthermore, the Court held even if TGM No. 1 were only an "interpretive" rule, notice and opportunity for comment pursuant to the APA were still required because the interpretation had a "substantial impact" on the regulated community. *Id.*

Chamber of Commerce of the United States v. U.S. Dept. of Labor, 174 F.3d 206 (D.C. Cir. 1999), is also instructive. In *Chamber of Commerce*, OSHA attempted to argue its Directive regarding the criteria OSHA would follow to determine which employers would be subject to inspection was merely a procedural rule. However, the Court found that the Directive was not a mere suggestion to undertake voluntary action, but rather a mandate for participation in OSHA's Cooperative Compliance Program. Otherwise, the employer would be subject to an OSHA inspection.

The possibility of OSHA imposition of adverse consequences to the employer made the Directive different from a mere policy statement. This was because employers would be subject to search under the Directive. Nor was the Directive only a procedural rule since it placed the burden of inspection on the employer. Similarly, OFCCP's new standards and requirements set forth in its proposed ICR would cause a federal contractor to be found in violation of Executive Order 11246 if the federal contractor chose not to comply with the new information requests OFCCP seeks to impose.

Similarly, numerous federal courts have found where data-gathering methods an agency promulgates to implement a statutory provision, then the action is a substantive rule requiring compliance with the APA. See *Batterton, supra*, 684 F.2d at 704-5 (passage of the Comprehensive Employment and Training Act made the gathering of unemployment statistics a critical factor in the allocation of monies. Thus, the Department of Labor's selection of statistical methodology to help determine the allocation of unemployment monies was within the APA's broad definition of a rule designed to implement a federal enabling statute); see also *Pharmaceutical Manufacturers Assoc. v. Finch*, 307 F. Supp. 858, 863 (D. Del. 1970) (new specifications for clinical investigations necessary to establish the effectiveness of drug products prior to FDA approval required compliance with the notice and comment obligation in the APA).

Given the foregoing, OFCCP's entire proposal and numerous subparts of its proposed ICR are legally deficient under the APA disqualifying OFCCP for OMB's approval pursuant to PRA. It is axiomatic that the PRA forbids OMB from approving regulatory requirements not otherwise in accordance with law.

PART IV: OMB Must Remove from OFCCP's ICR those Requests to Contractors which Duplicate Data Already in the Possession of the Federal Government

DE and its Members further request that OMB remove from OFCCP's ICR "Item 16" to its Itemized Listing. Item 16 requests EEO-1 Reports from federal contractors which are not post-secondary institutions. Item 16 also alternatively commands that post-secondary institutions to submit to OFCCP during audit copies of their Integrated Postsecondary Education Data System (IPEDS) Human Resources Survey Component data collection reports. However, that information is already in the possession of not just the federal Government but is also already within OFCCP's position or very readily accessible to OFCCP via interlocking Memoranda of Understandings. Because IPEDS data collection reports and EEO-1 Reports are already in the possession of the federal Government, it is burdensome and duplicative for OFCCP to request the same information in its audit Scheduling Letter and Itemized Listing.

In support of OFCCP's proposed Item 16, OFCCP also notes that post-secondary institutions do not submit EEO-1 Reports to EEOC. Rather, OFCCP notes the "IPEDS is the equivalent of an EEO-1 Report for post-secondary institutions." OFCCP thus includes such request with its request for EEO-1 Reports from non-post-secondary institutions.

However, OFCCP has previously entered into a Memorandum of Understanding ("MOU") with the U.S. Equal Employment Opportunity Commission ("EEOC"), the agency tasked with receipt of EEO-1 Reports from businesses. See <https://www.eeoc.gov/memorandum-understanding-among-us-department-labor-equal-employment-opportunity-commission-and-us>. Indeed, the MOU directs OFCCP, EEOC, and the U.S. Department of Justice's Civil Rights Division to "share any information relating to the employment policies and/or practices of employers known by EEOC or OFCCP to hold a Government contract or subcontract that supports the

enforcement mandates of each agency as well as their joint enforcement efforts." Such information includes "affirmative action programs, **annual employment reports**, complaints, charges, investigative files, and compliance evaluation reports and files." (Emphasis added). As such, OFCCP already has available to it access to the requested EEO-1 Reports of federal contractors which are not post-secondary institutions. DE and its Members contend OFCCP's proposal requesting production of EEO-1 Reports already available to it is burdensome and a waste of a federal contractor's resources.

Similarly, because OFCCP has set as precedent the use of a MOU for accessing data already within the Federal Government's possession, DE and its Members respectfully submit that the appropriate avenue for OFCCP's request for IPEDS data should follow the same procedural avenue available to OFCCP for accessing EEO-1 Reports. Specifically, because the data is already in the federal Government's possession, OFCCP should enter into a MOU with the U.S. Department of Education and access the IPEDS data within the Government's possession.

PART V: OMB Should Order OFCCP to Extend the Time for Supply & Service Contractors to Respond to OFCCP's Audit Scheduling Letters

Recommendations:

Recommendation #1: If OMB rejects OFCCP's expanded ICR out of hand and extends the current ICR on the same terms as the current 2020 ICR, OMB should direct OFCCP to expand the 30-day audit Scheduling Letter response period to 60 days. This is because the U.S. Government Accounting Office ("GAO") reported in 2016 that 85% of contractors do not submit their AAPs to OFCCP within 30 days of receiving OFCCP's audit Scheduling Letter demanding a response within 30 calendar days. Moreover, at the time of the GAO's 2016 report, OFCCP orally announced that it took an average of 67 days to receive AAPs from contractors to which the agency had sent an audit Scheduling Letter. Accordingly, the market has spoken. It takes a full week longer than 60 days for the average contractor to respond to the current OFCCP audit Scheduling Letter. By the way, GAO's 2016 report reported contractor response times remarkably close to the Carter OFCCP's report on contractor response time to its then-new audit Scheduling Letter in 1979, the historical ancestor to the current OFCCP audit Scheduling Letter.

Recommendation #2: If, however, OMB were to adopt OFCCP's proposed ICR in its entirety without change, OMB should direct OFCCP to extend the contractor response time from its current 30 days to 90 days. While OFCCP has conceded at least a (greatly understated) 40% increase in burden hours (from 28-39) that will impact federal contractors due to its proposed ICR, the agency has not proposed any increase in the number of days contractors might have to respond to OFCCP. Nonetheless, DE Survey respondents addressed this issue, as follows:

-100% of them wanted more time than the current 30 days to respond.

-Indeed, 100% of them wanted at least 20 more days of time to respond. (In other words, all DE Members responding to the Survey wanted at least 50 calendar days (30+20) to respond to an OFCCP's audit Scheduling Letter).

-However, 59% wanted 40-60 more days beyond OFCCP's current allowance of 30 days (for a total of 70-90 days to respond should OMB approve OFCCP's proposed ICR).

-Also, 8% of responding DE Members thought they would need 40 more days beyond OFCCP's current 30-day allowance to respond (70 days total: 30 + 40).

-Finally, however, 29% of DE's Survey respondents reported they would need 30 more days beyond the current 30-day allowance (i.e. 60 days: 30 + 30). This group (29% of the respondents), when combined with the 59% of the respondents who completed the Survey report and favor 40-60 days more to respond to OFCCP audits (together), creates a group comprising 88% of the Survey respondents (29% + 59%). This combined Group has in common, of course, that it would need at least 60 (calendar) days (30 + 30) to respond to OFCCP's proposed ICR. 59% of that group, of course, also report that they would prefer 10-30 more days to respond (for a total of 70-90 days) so they are not forced to become scofflaws turning in their responses to OFCCP predictably late relative to a short runway for the needed work effort.

NOTE: There is no harm in OFCCP extending the response date for contractors since OFCCP's interest in the response date is solely the certainty of receipt to stabilize work assignments based on expected work inflow. Providing more response time for the contractor simply requires OFCCP to dispatch its audit Letter a month or two earlier than it does now, but with a 60- or 90-day response date. Moreover, OFCCP is now well accustomed to audits with 2- and 3-year running times, and many which approach 8-10 years from start to closure. Certainty of response on an expected date is OFCCP's only bona fide objective concerning response dates, but it is an important objective to increase OFCCP's lagging efficiency and productivity (hence OFCCP's invention of the Corporate Scheduling Announcement List, or "CSAL").

PART VI: About DirectEmployers Association

DirectEmployers represents the largest consortium of federal Government contracting businesses in the United States. Established in 2001, DirectEmployers is a Member-owned and managed nonprofit consortium representing 1,000+ companies, most of them from within the Fortune 1,000. DirectEmployers is located in Indiana, with headquarters in Indianapolis, Indiana.

DirectEmployers specializes in talent acquisition and helping companies comply with the regulatory obligations the Office of Federal Contract Compliance Programs (OFCCP) imposes on covered federal Government contractors and subcontractors. As an Association, DirectEmployers seeks to bring compliance professionals together to cultivate labor market efficiencies and reduce costs for employers. DirectEmployers'

services assist contractors to comply with the OFCCP's VEVRAA (38 U.S.C. § 4212 (Section 4212)) mandatory job "listing" requirements and the outreach and positive recruitment requirements of both Section 503 of the Rehabilitation Act of 1973 (Section 503) and Section 4212. DirectEmployers' innovative outreach management tool, the Partner Relationship Manager (PRM), goes one step further to aid employers to track, record, and maintain partner outreach efforts with veteran, disability, diversity, female, and minority organizations. DirectEmployers also delivers daily over 3.4 million jobs its Members have available to state workforce (employment) agencies throughout the country through a labor exchange known as the National Labor Exchange (NLx). The NLx is widely viewed as the backbone of our nation's state employment offices.

DirectEmployers Association also convenes several weekly educational programs (Webinars/podcasts/DE Masterclasses) for Members and for members of the public free of charge on recruitment, EEO, Affirmative Action, discrimination law, and DE&I topics. DE also publishes every Monday a detailed Blog known as the DE Week In Review. The "WIR" has become the leading communication tool in the Affirmative Action community nationwide. The WIR has won back-to-back awards in each of the last two years for publishing the most widely read Blog out of 19,000 other Blogs JDSupra publishes in the Government contracting space. DE also has an active Member community tied together through a common private website hub known as DE Connect. Members daily exchange ideas through DE Connect and answer each other's affirmative action, discrimination law, and DE&I questions with a heavy emphasis on sharing "Best Practices" information and documents. In support of its educational mission, DE also hosts a three-day annual conference known as DEAMcon for DE Members and members of the public in a different major city each Spring. DEAMcons 2020, 2021, and 2022 were widely thought to be the most educational, fun, and professionally delivered EEO/Affirmative Action conferences in the country in those years.

SUBMITTED BY:



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*Recruit Rooster is a wholly-owned for-profit subsidiary of DirectEmployers Association