January 20, 2023

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

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

Re: Comments by The Institute for Workplace Equality, HR Policy Association, and the U.S. Chamber of Commerce in Response to OFCCP's Proposed Renewal of the Approval of Information Collection Requirements—Service and Supply Scheduling Program (OMB Control Number 1250-0003)

Dear Ms. Williams:

The Institute for Workplace Equality ("The Institute"), HR Policy Association ("the Association"), and the Chamber of Commerce of the United States ("the Chamber") submit the following comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP" or the "Agency") invitation for comments on its proposed Renewal of the Approval of Information Collection Requirements ("the proposal") published in the *Federal Register* on November 21, 2022.[1]

Background on The Institute for Workplace Equality

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

[1] *See*, Supply & Service Scheduling Program, Proposed Approval of Information Collection Requirements, OMB Control Number 1250-0003 (Nov. 21, 2022), available at https://www.regulations.gov/document/OFCCP-2022-0004-0001.

represent many of the nation's largest and most sophisticated federal contractors. The Institute's faculty are recognized as leading practitioners in the field.[2]

Background on HR Policy Association

HR Policy Association is a public policy advocacy organization representing the most senior human resources officers in more than 400 of the largest companies doing business in the United States. Collectively, member companies employ more than 10 million employees in the United States. Over two-thirds of the Association's member companies are federal contractors and are subject to the proposed scheduling letter. The Association's member companies are committed to fostering diverse and inclusive workplaces, and fully complying with OFCCP's requirements for federal contractors.

Background on the Chamber of Commerce of the United States

The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system. A significant component of its members includes many of the largest companies in the country, most of which are involved in federal contracting and are affected by OFCCP's actions. Nonetheless, more than 96% of Chamber member companies have fewer than 100 employees. The Chamber is therefore cognizant of the challenges facing both smaller businesses and those facing the business community at large.

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

INTRODUCTION

The Institute, the Association, and the Chamber are strong advocates for the OFCCP and committed supporters of the Agency's mission. In that spirit and our commitment to candor, we must advise OFCCP that the proposed revisions to the scheduling letter and itemized listing (hereinafter, the "scheduling letter") are widely off-the-mark and should not be implemented. In fact, the ill-advised changes proposed by OFCCP to the scheduling letter are wholly at odds with governing legal standards and would collect data that lack utility and impose undue burdens on federal contractors and the Agency. The proposed revisions undermine the stated goals of the Agency and are contrary to requirements of the Paperwork Reduction Act (Public Law 104-13 (May 22, 1995)) ("PRA") under which these changes are being proposed.

[2] The Institute faculty members include the leading subject matter experts on federal contractors' affirmative action, diversity, and equal employment opportunity responsibilities. The numerous faculty members who contributed to these comments are listed in Appendix A.

The fact that OFCCP is relying on the PRA clearance process to implement these changes is an additional legal impediment, as that process does not require the same levels of analysis and transparency as the rulemaking process under the Administrative Procedure Act (Pub. L. 79–404, 60 Stat. 237) ("APA"). Indeed, as detailed below, several of the proposed changes alter existing regulations, which can only be done through an APA rulemaking, not a PRA clearance procedure. In sum, the proposal ignores the requirements of the PRA and violate the mandates of the APA.

There is ample room to improve the Agency's auditing processes, and to collect focused, relevant data that supports the Agency's legitimate audit responsibilities and does not impose undue burdens on federal contractors. The proposed revisions to the scheduling letter fail to meet these goals.

In our comments below, we first review the legal and regulatory standards that apply to demonstrate the many ways the proposal fails to meet recognized legal requirements. We then address the specific problems inherent in the proposed changes in detail. We conclude with an analysis of the extraordinary burden the proposal places on federal contractors and OFCCP's failure adequately to assess that burden.

I. Overview of the Proposed Scheduling Letter in Light of the Regulatory Audit Process

In perhaps the greatest proposed expansion to the scheduling letter in the Agency's history, with 13 substantive proposed additions to an already extensive obligation, OFCCP is expanding the scope of its permissible reviews and vastly increasing the nature, scope, and range of the data it is demanding. These proposed changes are nothing less than an attempt by the OFCCP to act beyond the scope of its regulatory authority and to circumvent required rulemaking. With this fundamental re-drafting and expansion of the scheduling letter, OFCCP is essentially seeking to combine the desk audit and off-site review of records into one stage. This approach is ill-advised, as a practical matter, and, as will be shown, is legally unjustifiable.

A. The Proposed Scheduling Letter Abandons the Efficient "Triage" System Without Justification

OFCCP has limited resources and can only audit a small percentage of federal contractors per year. In recent years, to increase the efficiency of its compliance reviews, OFCCP has adopted a triage approach where it has committed to a 45-day desk audit, followed by an on-site review, when necessary, and an off-site analysis where necessary. Through this triage approach, OFCCP would seek to quickly close audits where there were no indicators of discrimination and focus its resources and supplemental information requests on the comparatively fewer situations where there is a more likely violator. This efficient use of resources has helped OFCCP achieve record years in terms of enforcement recoveries. This was also consistent with steps taken to address concerns raised by the Government Accountability Office ("GAO") and the DOL's

Inspector General's Office relating to the need for the Agency to focus its resources on likely violators.[3]

By means of this proposed expansion of the scheduling letter, OFCCP is now seeking to imbed what would typically be supplemental information requests into the scheduling letter at the outset of **all compliance reviews** for **every federal contractor**. This would be the opposite of an efficient approach and would effectively end OFCCP's successful policy of focusing its resources on more likely violators, also greatly increasing the burden on compliant companies. Indeed, the proposal would have the effect of entirely conflating the desk audit and off-site review of records, while also eliminating established OFCCP policy requiring a demonstrated need for supplemental information requests. As all the possible federal contractor information would be provided in the first instance, every audit would be unnecessarily bloated, and compliance evaluations would be needlessly attenuated by months and years.

B. The Current Desk Audit Process Is Effective and Efficient

1. Efficiency Should Remain a Guiding Principle

It does not need to be this way. Indeed, most recently in DIR 2022-02, OFCCP committed itself to the principle of efficiency, in stating the following:

> OFCCP reaffirms its commitment to providing transparency, efficiency, and clarity in its compliance evaluation process while rescinding and replacing four prior directives, DIR-2018-06, DIR 2018-08, DIR 2020-02, and DIR 2021-02.

Through DIR 2022-02, OFCCP explains the Agency's objective of advancing efficiency and avoiding unnecessary delay in the review process:

> In making these statements, the OFCCP Director was assuring the contractor community that even though she was stepping away from the four pillars of the prior administration (transparency, efficiency, certainty, and recognition), that she remained committed to the principles they enshrined, including specifically transparency, efficiency, and clarity.

However, with the proposed scheduling letter, OFCCP is now heading in a different direction, which will increase the burden and decrease the efficiency of its audits. This reversal will continue the trend of decreasing enforcement recoveries based on the clear math that longer audits lead to fewer audits, and that fewer audits lead to fewer opportunities to identify a more likely violator. OMB and OFCCP should reconsider this approach.[4]

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[3] GAO, Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance, September 22, 2016, at https://www.gao.gov/products/gao-16-750 and U.S. Department of Labor, Office of Inspector General, OFCCP Did Not Show It Adequately Enforced EEO Requirements on Federal Construction Contracts, March 27, 2020, at https://www.oig.dol.gov/public/reports/oa/2020/04-20-001-14-001.pdf.

[4] For additional data on OFCCP's decreasing rate of closing audits, *see* Section V, *below*.

2. OFCCP's Compliance Manual Demands a Different Approach

Likewise, OFCCP's Federal Contract Compliance Manual ("FCCM") is replete with provisions that are inconsistent with OFCCP's proposed scheduling letter. For example, Section 1A00 indicates that there are a variety of recognized approaches that OFCCP can take to a compliance evaluation, including a compliance review, off-site review of records, compliance check, and focused review. The expanded scheduling letter would effectively conflate the desk audit and off-site review of records. There would be no triaging or focusing on standardized records and then more extensive supplemental data requests only where needed. Instead, every federal contractor would be subject to a request for both standardized and more extensive records in every audit.

The proposed scheduling letter's inconsistency with OFCCP's FCCM is further illustrated by FCCM § 1C04, which states:

> The CO may find an indicator of discrimination at the desk audit and need to request additional data to perform refined analysis before going on-site. This supplemental records request must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond.

Notably, Director Yang recently included the same requirement in DIR 2022-02.

Typically, this supplemental request ***might*** include (i) a request for data going back into another affirmative action plan year, (ii) more information on job seekers or applicant flow, (iii) more information on outreach and recruitment efforts to meet diversity goals, (iv) more information on selection procedures such as artificial intelligence, or (v) more information on how a federal contractor determines compensation or makes promotional decisions. Of course, these are all categories of documents and information that would now have to be automatically provided under the greatly expanded scheduling letter in every audit.

In contrast, under OFCCP's current approach, this information would only have to be provided ***if*** there were indicators and ***if*** the information requests were reasonably tailored and a basis for the request was provided, all consistent with due process and good government principles. Unfortunately, OFCCP is eliminating these procedural safeguards (previously supported by both the current and prior OFCCP Directors). This is a significant mistake by OFCCP and should be reconsidered.

C. The Proposal Is Contrary to Applicable Regulations and Binding Case Law

More importantly (and as further discussed below), compliance evaluations are also governed by regulation, which clearly delineate a difference between a desk audit, an on-site review (which can follow a desk audit), and an off-site review of records. These are entirely different enforcement mechanisms. *See* 41 C.F.R. § 60-1.20(a)(1) and (2). If OFCCP wished to combine the desk audit and off-site review of records, it would need to amend these regulations, which it has not done. OFCCP cannot ignore a regulation or evade its regulatory meaning/effect

through an information collection under the PRA. Instead, the Agency must comply with the regulatory amendment process of the APA.

Finally, the Secretary of Labor recently issued an order in *OFCCP v. Convergys,* ARB No. 2022-0020,[5] which emphasized that when OFCCP requested records as part of an audit that it was required to comply with a reasonableness standard similar to a subpoena and that the Agency does not have unfettered authority to request documents and information. Respectfully, OFCCP's information collection request does not comply with the Secretary's own direction in the *Convergys* case. The proposed scheduling letter is **the** proverbial fishing expedition, asking for every piece of information that could conceivably show an issue even if the high likelihood based on experience and empirical data is that this information would ultimately be needed in only a tiny percentage of audits. The better approach, and the one consistent with the Secretary's order and the OFCCP Director's directives, would be to have a more reasonably tailored scheduling letter, followed up by supplemental requests for additional information under the current standard in those limited instances when there is a specific reason to do so.

II. Proposed Changes Are Beyond OFCCP's Regulatory Authority

Although the proposed revisions to the Agency's scheduling letter are presented as simply a change to an information collection request, they are, in fact, a substantive rulemaking that fundamentally alters the obligations of countless federal contractors. As such, the OFCCP's proposal is subject to the APA requirements.

A. OFCCP's Proposal Imposes Requirements Not in the Regulations and, Therefore, Violates APA Procedures

The APA establishes the procedures for federal administrative agency "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). "Rule," in turn, is defined broadly to include "statement [s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy." § 551(4); *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 95–96 (2015). The Agency's proposed data collection here exceeds its statutory and regulatory authority and, on that basis, violates the APA.

Federal agencies cannot impose new substantive requirements without engaging in appropriate notice and comment rulemaking. *See American Federation of Labor and Congress of Industrial Organizations v. National Labor Relations Board,* 466 F. Supp. 68, 93 (D.D.C 2020) (notice and comment rulemaking required "where the agency action trenches on substantial private rights and interests or where the agency action conclusively bind[s] the agency, the court, or affected private parties, or where the agency is changing the applicable substantive standards.") (citations and quotations omitted.)

Importantly, the APA provides the public with valuable protections, including the right to petition a federal court to review the Agency's rulemaking actions. These protections are not available under the PRA, the law under which OFCCP seeks approval for its proposed data

[5] *OFCCP v. Convergys Customer Mgmt. Group, Inc.,* ARB Case No. 2022-0020 (Sec'y of Labor July 1, 2022).

collection. And where agencies seek to impose obligations that conflict with the text of properly promulgated regulations, those actions are invalid. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000). In *Christensen*, the Supreme Court determined that an agency's action was substantively invalid because it conflicted with the text of the regulation the agency purported to interpret. The rule of *Christensen* applies with full force here.

The OFCCP's proposed revisions to its scheduling letter also are clearly intended to direct and facilitate "agency action," which falls squarely within the scope of the APA. 5 U.S.C. § 551(13). Indeed, the very purpose of this information collection is to outline the data OFCCP will seek when it schedules a federal contractor establishment for a compliance evaluation. The OFCCP's Supporting Statement (hereinafter "Supporting Statement") also makes clear the Agency will use the collected data to evaluate federal contractor compliance.[6]

When an agency has taken improper actions, Section 706(2)(A) of the APA compels a court to overturn the agency's actions where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(A)(2); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 41, (1983) (upholding judicial review of rulemaking under Section 706 of the APA.)

1. *New Requirements Exceed OFCCP's Regulatory Authority*

a. Data from Multiple Establishments is Not Authorized

In the proposal, the scheduling letter imposes new requirements that not only clearly exceed the scope of regulatory authority but also conflict with the existing regulations. Although the deficits of many of OFCCP's specific revisions will be discussed in detail below, one clear instance of OFCCP's overreach is its attempt to require federal contractors to provide affirmative action plans ("AAPs") in an entire city where one establishment is in a campus-like setting. OFCCP's Executive Order 11246 regulations unequivocally require *one* AAP for each establishment, and a properly initiated compliance evaluation reviews a *single* AAP. The regulations at 41 C.F.R. § 60-2.1 (b)(1) provide that federal contractors "must develop and maintain a written affirmative action program *for each of its establishments"* if it has 50 or more employees (emphasis added).

As for compliance evaluations, the regulations make clear that OFCCP's authority extends to an analysis of "*the* affirmative action program" (emphasis added). Each stage of the compliance evaluation is limited to the federal contractor's establishment. The desk audit

[6] Under the Agency's current regulations, the scheduling letter is used by OFCCP to initiate the desk audit phase of a compliance review. The desk audit is used to determine "whether all elements required by the [AAP] regulations" are included in a federal contractor's AAP. 42 C.F.R. § 60-1.20 (a)(1)(i). After the desk audit, the Agency may conduct further review "to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the federal contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination." The proposed revisions to the scheduling letter change how OFCCP will conduct compliance evaluations – collapsing what is currently three phases of review into one. *See* 42 C.F.R. § 60-1.20 (a)(1) (noting a "compliance may proceed in three stages").

reviews "the written AAP," the on-site review is conducted at the "contractor establishment" and the off-site review of records includes records covered by "the AAP." 41 C.F.R. § 60-1.20(a)(1).

Nowhere do OFCCP's regulations allow the Agency to discard an entire oversight system based on reviewing data from a single "establishment" and instead collect multiple AAPs as part of a compliance evaluation. For OFCCP to have such authority, it would need to engage in substantive notice and comment rulemaking to expand the definition of an establishment or widen the regulatory scope of its compliance review authority. As we discuss at length below, the Agency cannot propose such a change through the PRA approval process, as it has attempted to do here.

b. Additional Evidence of Action Oriented Plans Is Not Authorized

Another example of an unauthorized change is Proposed Item 7, which would require federal contractors to provide evidence of its action-oriented plans to resolve disparities. This represents another instance of OFCCP's attempting to increase federal contractors' obligations through an information collection request approval while ignoring its regulations. The regulations in Sections 2.10-2.16 provide clear and specific guidance to federal contractors as to the various aspects of their statistical and demographic analyses to be included in their AAPs.

In contrast, Section 2.17 includes a vague description related to "identification of problem areas" and "action-oriented programs." Rather than amending its regulations to provide additional specificity regarding the types of analyses federal contractors must conduct to meet these vague obligations, OFCCP has tried to detail the type of analyses through the information collection process. While OFCCP believes that it may seek to collect this data based on the current Executive Order 11246 regulations, it is notable that OFCCP chose to make the substantive requirements much clearer when it amended its Section 503 and VEVVRA regulations. Under those regulations, not only did OFCCP detail five required elements of an auditing and reporting system, the regulations also notably require that federal contractors "document the actions to comply" with such systems.

By taking the appropriate steps to amend its Section 503 and VEVRAA regulations to require that federal contractors document their action-oriented steps, the Agency clearly understands it must amend its Executive Order 11246 regulations before imposing new substantive requirements in the Scheduling Letter.

c. Numerous Other Proposals Are Unauthorized by Applicable Regulations

Numerous other proposed revisions in the scheduling letter reflect the Agency's desire to create new substantive obligations for federal contractors that require formal rulemaking. The Agency's proposed amendment of the scheduling letter to require federal contractors to provide documentation regarding screening mechanisms utilizing artificial intelligence has no basis in the regulations. Tellingly, the Agency provides no authority in the Supporting Statement to seek this information at the scheduling letter stage.

As noted above, the regulations provide for a review of the federal contractor's AAP at the scheduling letter stage but nothing in the OFCCP's current regulations require that documentation regarding recruiting, screening, and hiring mechanisms form part of a federal contractor's AAP. Similarly, OFCCP's addition of information related to promotional pools (proposed Item 20) and requirements that federal contractors provide two snapshot dates for employee-level compensation data (proposed Item 21), compensation systems documentation (proposed Item 22) and employment and arbitration agreements (proposed Item 24) fall outside of the AAP requirements set forth in Sections 2.10-2.16 of the current Executive Order 11246 regulations. Indeed, even the catchall provisions of Section 2.17 of the current regulations cannot be read to allow OFCCP to require this information to form part of the AAP.

The Supporting Statement to the proposed changes attempts to ground OFCCP's request to amend the scheduling letter in arguments that documentation is often requested in follow-up requests or on-site audits. This, however, does not avoid the regulatory requirement that constrains its initial review to the four corners of the AAP, as those components are currently prescribed in the OFCCP's current regulations. Where OFCCP seeks to expand its data requests beyond those four corners at the desk audit stage or seeks to change what must be included in an AAP, it must engage in formal rulemaking to amend its current regulations. Otherwise, the Agency's actions violate the APA.

III. Proposed Changes Do Not Meet the Standards of the Paperwork Reduction Act

The opening statement of the PRA states its main purpose is "…to have Federal agencies become more responsible and publicly accountable for reducing the burden of Federal paperwork on the public…" Section 3501 of the PRA expands upon the purposes of the Act to include a number of provisions. The following excerpts from the PRA are most relevant to the OFCCP's expansive requests under the proposed scheduling letter:

> (1) ***minimize the paperwork burden for*** individuals, small businesses, educational and nonprofit institutions, ***Federal contractors***, State, local and tribal governments, and other persons resulting from the collection of information by or for the Federal Government;
>
> (2) ***ensure the greatest possible public benefit from and maximize the utility of*** information created, collected, maintained, used, shared, and disseminated by or for the Federal Government;
>
> (3) coordinate, integrate, and to the extent practicable and appropriate, make uniform federal information resources management policies and practices to ***improve the productivity, efficiency, and effectiveness of Government programs, including the reduction of information collection burdens on the public*** and the improvement of service delivery to the public; …

> (5) ***minimize the cost to the Federal Government*** of the creation, collection, maintenance, use, dissemination, and disposition of information….[7]

The PRA's implementing regulations at 5 C.F.R. § 1320.5 further clarify the OFCCP's obligation to minimize the burden on federal contractors stating that OMB will approve a collection of information only where the Agency seeking the information "demonstrate[s] that it has taken every reasonable step to ensure that the proposed collection of information:

> (i) is the least burdensome necessary for the proper performance of the Agency's functions to comply with legal requirements and achieve program objectives;
>
> (ii) is not duplicative of information otherwise accessible to the Agency; and
>
> (iii) has practical utility."[8]

OFCCP's proposed scheduling letter runs counter to each of the relevant purposes of the PRA.

A. The PRA Bars the Burdens Imposed on Federal Contractors by the Proposed Scheduling Letter

The PRA governs the type, scope, and frequency of information and data collected by federal agencies from the regulated community. The central purpose of the PRA is to ensure that federal agencies consider the burden their requests for information impose on the regulated community. Therefore, burden estimates include the value of both the time and the effort required to comply with the data collection, as well as associated financial costs.

In calculating the total impact of the proposed scheduling letter on federal contractors, OFCCP must account for the burden associated with collecting and retaining required data and documents, developing initial and annual AAPs for each covered establishment and functional unit, and responding to any scheduling letters that may be issued. OFCCP must also give weight to the fact that it is common for a single federal contractor to receive multiple scheduling letters in the same year, resulting in multiple, active compliance reviews. Multiple reviews are particularly burdensome for federal contractors who centralize OFCCP compliance for all establishments in a single location.

In the case of the proposed scheduling letter, the burden calculation must include time and effort expended, and the costs incurred related to, all required activities. OFCCP's burden calculation of 39 hours, itself a 40% increase over current inadequate estimates, vastly underestimates the cost of compliance, particularly for those federal contractors with multiple pending compliance reviews. As will be set forth in greater detail below, the Agency's burden

[7] Paperwork Reduction Act of 1995, Public Law 104-13, Section 3501 (May 22, 1995) (emphasis added).
[8] 5 C.F.R. § 1320.5

estimate makes no attempt to articulate the basis for its arbitrary setting of hours. In doing so, the proposal violates the PRA.

B. The Scheduling Letter Seeks Information that Is Not Relevant or Necessary at the Initial Stage of a Compliance Review

The issuance of a scheduling letter triggers a "Compliance Review" of a federal contractor establishment or functional unit. A compliance review is 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." 41 C.F.R. § 60-1.20. The regulations and OFCCP's FCCM lay out a three-stage funnel approach to a compliance review - desk audit, on-site review, and off-site analysis.

The FCCM defines the desk audit as an evaluation "of the contractor's AAPs and supporting documentation provided by contractors" so that the compliance officers can "***begin[] to determine*** whether a contractor is complying with all relevant provisions of 41 CFR Chapter 60…" (emphasis added). Thus, the initial desk audit stage of a compliance review was never intended to be more than an initial assessment of baseline compliance. Where there are indicators of non-compliance (as defined by OFCCP), the Agency moves to the next stage, which may include a request to review documents and data off-site and/or an on-site investigation that may include multiple interviews with employees and managers as well as a review of additional data and documents.

OFCCP's proposed changes to the scheduling letter seek to drastically modify the purpose of the desk audit to eliminate the preliminary assessment and move directly into an obtrusive review regardless of whether the federal contractors have demonstrated baseline compliance. This is a waste of federal contractor resources, Agency resources, and taxpayer dollars. It also violates the PRA.

Moreover, the scheduling letter is not OFCCP's only opportunity to gather detailed information related to federal contractors' compliance with its regulations. The purpose of the PRA is to *reduce* the total amount of burden the federal government imposes on private entities, including federal contractors. Where a federal agency's data collection is excessive, as in the case of OFCCP's proposed scheduling letter, the agency must justify both the purpose and the need in its Supporting Statement. OFCCP has failed to do so. Indeed, the regulations underscore the fact that OFCCP may seek additional information and conduct an on-site investigation where the initial data submission indicates a potential violation.

The benefit of collecting the requested information must outweigh the cost to the regulated community. For this reason, OFCCP's regulations and compliance manual have, for decades, taken a funnel approach to a compliance review. OFCCP's request to materially expand that scope of information required at the initial stage of a compliance review is overly burdensome and is not supported by the Agency's request.

C. The Proposed Scheduling Letter Fails the PRA's Practical Utility Test

The PRA requires that agencies consider the burden its information collections impose on the public. This burden must be balanced against the "practical utility" of the information to be collected.[9] Practical utility refers to the actual rather than "theoretical or potential usefulness" of the information requested to the Agency. 5 C.F.R. § 1320.3(l). Relevant to the actual usefulness of the information sought is the OFCCP's ability to "process the information it collects in a useful and timely fashion." [10] The broad scope of the proposed scheduling letter will result in significant burden to federal contractors with little-to-no benefit to applicants and employees of federal contractors because there is limited practical utility to such an expansive data collection at the preliminary stage of an OFCCP compliance review.

As noted above, traditionally an OFCCP compliance review proceeds in three stages: desk audit, on-site review, and off-site review of records. The desk audit is intended to serve as a triage of sorts. The FCCM states that at the desk audit "a [Compliance Officer] begins to determine whether a contractor is complying with all relevant provisions of 41 CFR Chapter 60…" by reviewing "the contractor's AAPs and supporting documentation provided by contractors." FCCM, Chapter 1A02. If the Compliance Officer "finds no problem areas, no outstanding questions and no violations, then the evaluation is closed at the desk audit stage." *Id.* However, if the Compliance Officer identifies potential violations, substantive or otherwise, they may request additional information and/or conduct an on-site investigation.

OFCCP receives ample information in response to the current scheduling letter to complete the preliminary assessment required at the desk audit stage of a compliance review. The additional data and information requested in the proposed scheduling letter is more appropriately requested if, and only if, the Compliance Officer identifies a potential violation. Indeed, the regulations, applicable guidance, and current scheduling letter are drafted to encourage a funnel approach to compliance reviews. OFCCP provides no justification as to why it now seeks such a voluminous amount of data and other information before even conducting a baseline compliance assessment.

The less burdensome summary data provided by federal contractors under the current scheduling letter permits OFCCP to conduct high-level analyses of good faith efforts and hiring, compensation, promotion, and termination activity for at least a one-year period. Where OFCCP identifies alleged adverse indicators, it may seek additional detailed information and data needed to determine whether the contractor engaged in unlawful discrimination. After OFCCP has found adverse "indicators" in the summary data it may seek additional information from the contractor.

There is no practical utility to requiring all contractors selected for a compliance review to produce the voluminous amount of data and information OFCCP proposes to collect at the initial stage of a compliance review.[11] OFCCP's proposed expansive data and information collection at the initial stage of a compliance review is neither necessary nor authorized by

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[9] https://www.whitehouse.gov/wp-content/uploads/2017/11/Estimating-Paperwork-Burden-Oct14-1999.pdf.
[10] 5 C.F.R. § 1320.3(l).
[11] *See below* at V., for a discussion of the decreased rate of audit closures.

statute, regulation, or court order. Pursuant to 5 C.F.R. § 1320.8(a)(4), a review of each collection of information shall include "[a] specific, objectively supported estimate of burden, which shall include in the case of an existing collection of information, an evaluation of the burden that has been imposed by such collection and a plan for the efficient and effective management and use of the information to be collected, including necessary resources." OFCCP has failed to provide a reasonable justification for such detailed information at the initial stage of a compliance review, nor has it provided any indication as to how it intends to efficiently review this information so as to reduce the overall burden of a compliance evaluation.

For more than a decade, OFCCP has identified discrimination in only two-to-three percent (2%-3%) of all compliance reviews. This statistic has remained constant despite efforts by the OFCCP to dig deeper and undertake more expansive investigation of federal contractors' employment practices through requests for off-site review of information and multi-day on-site investigations. The proposed revisions to the scheduling letter seek to move the deep dive to the initial stage of a compliance review in the hope that a deeper dive up front will increase the OFCCP's chances of finding discrimination. There is no support for such an assumption. Moreover, this approach will have only one result – significantly increasing the burden on those contractors who are in compliance, all in violation of the PRA.

IV. Discussion of Specific Proposed Changes

A. General Overview of Changes

In the preceding comments, we have addressed the legal and practical deficits in the OFCCP's numerous proposed changes to the scheduling letter. In what follows, we will change the focus and discuss the failings of each of the major changes in detail. In doing so, the unprecedented and unjustified expansion in the scope and breadth of the proposed changes can more fully understood. As will be shown, individually and together, the changes impose undue burdens on federal contractors and fail to meet mandatory legal standards.

B. The Agency Has No Executive Order or Regulatory Authority to Review Multiple AAPs in a "Campus-like Setting," or Otherwise, in a Single Compliance Review

In the proposed scheduling letter, OFCCP seeks to significantly expand its enforcement authority by

> [c]larifying that post-secondary institutions and contractors with "campus-like settings," in which the contractor maintains multiple establishment AAPs for the same campus, **must submit the requested information for all AAPs for that campus** located in that city.

(Emphasis added). This proposed expansion is flawed and unlawful for several reasons. The first issue is the term "campus-like setting" which is purely sub-regulatory – it appears nowhere in EO 11246 or the regulations that prescribe, and limit, OFCCP's authority. Thus, OFCCP has offered no legally substantive definition at all. Might a "campus-like setting" consist of two

establishments, three, four, ten – is there any limit? Does the term require the establishments to have some functional connection or unity of human resources procedures? We simply do not know, other than OFCCP's implied assertion that it will know one when it sees one. As detailed below, the proposed standard of a "campus-like setting" is wholly unauthorized and cannot be used.

Executive Order 11246 does not grant OFCCP authority to require submission, or to conduct reviews, of more than one AAP in a single compliance review. Moreover, OFCCP's current regulatory authority limits OFCCP to selecting, and conducting, a single establishment AAP for a compliance review, or a single review of a functional AAP ("FAAP"). Thus, OFCCP's current proposal to audit, in a single compliance review, multiple establishment AAPs in an undefined "campus-like setting" is nothing less than a sub-regulatory "end-run" around its clearly defined, and limited, regulatory authority.

At root, the Agency's proposal is an attempt to inappropriately and unlawfully expand its authority to conduct FAAP-like reviews of all federal contractors, including contractors that have not voluntarily sought OFCCP approval to develop FAAPs. Indeed, the vast majority of federal contractors that could have applied for FAAP approval have opted to not seek a FAAP. OFCCP's proposal would unilaterally abrogate the right of a federal contractor to voluntarily choose not to prepare FAAPs and not to be subject to audits of FAAPs covering multiple establishments. If the Agency seeks to expand its authority, to conduct such broader multiple AAP compliance reviews, it must follow the required process for proposing changes to its enforcement regulations.

1. OFCCP Only has Regulatory Authority to Review a Single AAP – "the written AAP" – Not Multiple AAPs

Since its inception, the Agency has limited its compliance reviews to single establishment AAPs for good reason: that is what the regulations prescribe. The only exception is the FAAP review covering multiple establishments where a contractor has opted to request and OFCCP has approved a FAAP structure. 41 C.F.R. § 60-2.1(d)(4).

The regulatory provisions at Subpart B - General Enforcement; Compliance Review and Complaint Procedure – repeatedly provide for a review of "**the** written AAP" or "**the** AAP" covering the single establishment (or FAAP) selected for review according to the neutral selection strictures of the Fourth Amendment to the United States Constitution.

> A compliance evaluation may consist of any one, or any combination of, the following investigative procedures: …
>
> (1) Compliance review. A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, ***the*** written affirmative action program… A compliance review may proceed in three stages:
>
> > (i) A desk audit of ***the*** written AAP and supporting documentation to determine whether all elements required by the regulations in this part are included, whether ***the*** AAP meets Agency standards of

> reasonableness, and whether ***the*** AAP and supporting documentation satisfy Agency standards of acceptability. The desk audit is conducted at OFCCP offices…
>
> (ii) An on-site review, conducted at ***the contractor's establishment*** to investigate unresolved problem areas identified in ***the AAP*** and supporting documentation during the desk audit, to verify that the contractor has implemented ***the AAP*** and has complied with those regulatory obligations not required to be included in ***the AAP***, and to examine potential instances or issues of discrimination.

41 C.F.R. § 60-1.20(a) (emphasis added).

Based on these regulations, the reference to "the" AAP in the singular can only be reasonably interpreted to mean a specific establishment AAP, or a single FAAP. It simply cannot reasonably include authority to review multiple establishment AAPs or multiple FAAPs. If "the AAP" is misread to mean the review of multiple AAPs, statutory construction is turned on its head.

These regulations clearly prescribe – and clearly limit – the Agency's authority to conduct reviews. The fact that OFCCP's rules explicitly require preparation of a separate written AAP for each establishment, and that the Agency's authority regarding compliance reviews repeatedly refers to "the AAP" in the singular, means OFCCP's authority is limited to the selection and review of a single establishment AAP in any establishment compliance review. If the regulations intended otherwise, they would grant OFCCP the authority to review "the AAPs" or "AAPs." They do not and, thus, the Agency has no such authority.

2. Federal Contractors Have Long Been Required to Prepare AAPs and Submit EEO-1 Reports by a Single "Establishment"

The "establishment" as the basis for AAP development and EEO-1 reporting is well founded in the law. OFCCP's governing regulations require federal contractors to prepare a separate written AAP for each of its establishments with 50 or more employees.

> Each nonconstruction (supply and service) contractor must develop and maintain a written affirmative action program for **each** of its establishments, if it has 50 or more employees.

41 C.F.R. § 60-1.40(a)(1) (emphasis added).

Nowhere in the regulations is there reference to any exception for "campus-like settings" or to combining establishments within a geographic proximity. The term "campus-like setting" is a sub-regulatory term coined (but not defined) by OFCCP for its own purpose: to unilaterally expand the scope of its compliance review authority for colleges and universities, as well as other federal contractors that have large settings with proximate establishments, such as is often the case for corporate headquarters, health care institutions, and research and development facilities.

Nothing in the regulations treats colleges, universities, or federal contractors with proximate establishments differently from other federal contractors when it comes to compliance reviews of individual establishment AAPs. That is true despite OFCCP's sub-regulatory *Technical Assistance Guide for Educational Institutions* ("TAG"). Neither OFCCP's TAG, nor changes to OFCCP's scheduling letter, can serve as a replacement for the required process of regulatory changes.

Similarly, OFCCP and U.S. Equal Employment Opportunity Commission ("EEOC") require federal contractors to report demographic information for each establishment with 50 or more employees via EEO-1 Reports. Establishment data cannot be combined for reporting, as reflected in the EEO-1 definition of "establishment."

> "Establishment" is generally **a single physical location** where business is conducted or where services or industrial operations are performed (*e.g.*, factory, mill, store, hotel, movie theater, mine, farm, airline terminal, sales office, warehouse, or central administrative office (definition adapted from the North American Industry Classification System, 2012). **Units at different physical locations, even though engaged in the same kind of business operation, must be reported as separate establishments.**

EEOC, *2021 EE0-1 Component 1 Data Collection Instruction Booklet* at 10 (emphasis added), https://www.eeocdata.org/pdfs/2021_EEO_1_Component_1_InstructionBooklet.pdf.

There is no reference to, or allowance for, reporting establishments in a "campus-like setting" or otherwise combining establishments for reporting purposes. It is clearly left to the contractor to decide how many establishments are in an AAP for a campus-like setting.

OFCCP regulations do not include any specific definition of "establishment." The only FCCM definition provided by OFCCP is both sub-regulatory and contradicts the OFCCP's current proposal:

> A facility or unit that produces goods or services, such as a factory, office store, or mine. In most instances, the unit is a physically separate facility at a single location. **In appropriate circumstances**, OFCCP may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area. The determination as to whether it is appropriate to group facilities as a single establishment will be made by OFCCP on a case-by-case basis.

(Emphasis added).

As with the term "campus-like setting," the term "appropriate circumstances" is not defined in the FCCM and does not appear anywhere in OFCCP's regulations. Likewise, there is no regulatory authority for OFCCP's sub-regulatory assertion that it "may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area." With this language, the Agency has unlawfully sought to grant itself far broader and undefined authority to audit multiple distinct establishments in a single

compliance review.

Accordingly, it is well established that the basis for federal contractor affirmative action plan development, and OFCCP's authority to audit such AAP, is a single "establishment" AAP, unless the federal contractor has elected to seek Agency approval to prepare functional AAPs. OFCCP's proposal is an unlawful attempt to disregard the foundational principle of "establishment" reporting in favor of a sub-regulatory, vague, and standardless, material expansion of the Agency's authority to audit "campus-like" settings as OFCCP chooses to define the term on a case-by-case basis, outside the scope of the regulations.

3. OFCCP's Proposal Runs Afoul of Its Own FAAP Procedures

FAAPs are the only regulatory exception to the establishment AAP. By attempting to expand its review authority to encompass review of multiple establishment AAPs, the Agency is running afoul of FAAP regulations and its own rules. The Agency is essentially forcing contractors into functional AAPs by requiring submission of multiple AAPs where (by OFCCP's unilateral and undefined judgement) there exists a "campus-like setting," regardless of whether there exists any functional or personnel activity unity between those establishments. However, there are preconditions to FAAPs, chief of which is the fundamental requirement that a federal contractor voluntarily elect to prepare FAAPs, with Agency approval. The regulation at 41 C.F.R. § 60-2.1(d) and (d)(4) provides:

> Who is included in affirmative action programs. Contractors subject to the affirmative action program requirements must develop and maintain a written affirmative action program ***for each of their establishments***.
>
> If a ***contractor wishes to establish*** an affirmative action program other than by establishment, the contractor may reach ***agreement with OFCCP*** on the development and use of affirmative action programs based on functional or business units. The Director, or … designee, must approve such agreements.

(Emphasis added).

It is clear from its recent FAAP Directives that the Agency now favors FAAPs over the default establishment AAPs. *See* Directive 2013-01 Revision 3. OFCCP's proposal to audit multiple establishment AAPs appears to be an attempt to impose FAAPs upon an unwilling federal contractor simply because, in OFCCP's unfettered estimation, the contractor has a "campus-like setting" with multiple establishments.

However, given this regulatory framework – the establishment AAP default and the FAAP exception – the regulatory reference to "the written AAP" encompasses both single establishment AAPs and FAAPs, which may in fact cover a "campus-like setting." Thus, the only current regulatory avenue for OFCCP to conduct a compliance review of an AAP that covers multiple establishments is for a contractor to have previously voluntarily requested to prepare FAAPs, and for OFCCP to have approved FAAPs in advance of an audit.

In summary, if OFCCP wants either to compel contractors to prepare FAAPs as the default AAP, or to audit multiple establishment AAPs in a single compliance review, it must seek amendment of the Agency's regulations, not via changes to its scheduling letter.

C. Itemized Listing Promotions Item 20(c)

Proposed Item 20(c) would require contractors to report on information that is not readily available in the HRIS system, not required by the regulations to be collected or maintained as part of the AAP, and thus, burdensome to collect with little to no apparent utility. Further, OFCCP's explanation and justification as to why it needs this information demonstrates OFCCP's continued misunderstanding of the competitive promotion process and does not justify the burden the proposal imposes on contractors to collect and report on information not required by the regulations.

1. Types of Promotions

As background, we think it would be helpful to recap the two primary types of promotions that could be analyzed: non-competitive and competitive promotions. The first type is commonly referred to as a natural progression promotion, or "in-line" or "step" promotion.[12] In this instance, an internal employee is considered to be "in line" for a promotion due to a natural progression of the job. As such, there is no posted requisition and the employee does not formally apply for the promotion. It is important to note that with an "in line" promotion there are **no pools** of candidates.

For competitive promotions, unlike a natural progression promotion, in the normal course, a requisition is created, and the opening is formally posted within the applicant tracking system ("ATS"). It is important to note, that depending upon the need of the organization and the federal contractor's policies, this requisition may be open exclusively to internal applicants or it could be open both internally and externally. Thus, a requisition may have a mix of both internal and external job seekers. In addition, a requisition could have more than one opening so that once the requisition is filled, there would be multiple individuals selected for a position. Therefore, the requisition could have both internal and external applicants selected within a requisition. Listed below are the five possible scenarios that happen when federal contractors open and list a requisition:

- Requisition 1: **Internal** applicants only – **internal** applicant(s) selected and fills the position
- Requisition 2: **External** applicants only – **external** applicant(s) selected and fills the position
- Requisition 3: **Internal** and **external** applicants – **interna**l applicant(s) selected and fills the position
- Requisition 4: **Internal** and **external** applicants – **external** applicant(s) selected and fills the position

[12] *See* page 16 of OFCCP Justification (discussion of changes to Item 20).

- Requisition 5: **Internal** and **external** applicants – **external** and **internal** applicants selected and fill the positions

It is important to note that it is not always possible to identify those individuals within a requisition that are internal. For example, if an internal employee applies from a home computer and uses his/her personal email, there would not be a way to systematically differentiate between an internal and external job seeker. Therefore, in many situations it would not be possible to generate a definitive database of applicants that are internal.

Finally, those successful applicants (both internal and external) are recorded in the HRIS. The internal applicants are recorded as a promotion, while the external applicants are recorded as a hire. As such, OFCCP's intent to create the appropriate pool at the outset of the audit by simply requesting a competitive or non-competitive promotion designation along with the request for "the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year" is inadequate to identify the proper pool of candidate for a competitive promotion.

2. Submission of Additional Data Points Not Required By the Affirmative Action Regulations

In connection with the promotion data, OFCCP is also proposing to request federal contractors submit data on:

- previous supervisor,
- current supervisor,
- previous compensation; and
- current compensation.

This information is not required as part of the AAP. In the absence of this authority, the only justification OFCCP provided for requesting this information as part of the initial submission at the outset of every audit is that it causes delay during the course of an audit when OFCCP determines that the information is necessary and then may request it from a contractor. That sequencing, in and of itself, is not sufficient justification to request federal contractors undertake the burden associated with collecting and preparing this data for submission in all audits (which is not otherwise required to be collected or included in the AAP reporting). Further, the delay that may be experienced by OFCCP in response to these requests highlights the burden on contractors (even when narrowed to a particular group during the course of an audit) to collect this information. These data typically are not maintained in an ATS system and may not be in an HRIS system. To this point, we estimate it would take untold hours to collect this information. This is an additional burden OFCCP has not justified.

Further, OFCCP has failed to satisfactorily articulate the utility of this information in the absence of a selection indicator, or the relevancy of the information in investigating a selection indicator. For example, how is someone's previous supervisor pertinent to a competitive hire into another role for which they have applied? Additionally, what is the relevance of compensation in a selection analysis?

D. OFCCP's Proposed Itemized Listing Would Require Contractors to Submit Detailed Terminations Data that Is Burdensome to Collect and Ignores a More Useful and Less Burdensome Alternative (Item 20(d))

The burden associated with OFCCP's proposed request for detailed termination information outweighs the utility of collecting the information at the outset of the audit.

1. Termination Reasons

In its Supporting Statement, OFCCP offers only a portion of one statement justifying the expansion of the request for additional termination information, stating that in order

> . . .to create accurate pools for the promotion and termination impact ratio analyses, OFCCP needs information on the type of promotion or termination and the number of employees in each job group or job title as of the start of the immediately preceding AAP year.

There is no further discussion of why a request for voluntary versus involuntary terminations, which is what the Agency now requests during the desk audit stage of reviews, would not be sufficient. If OFCCP currently relies on voluntary and involuntary designations to run sufficient adverse impact analyses once there is an initial indicator, why would they now need individualized termination reasons for an entire AAP in the absence of any indicators? Given the myriad reasons an employee can leave employment, it seems unlikely that requiring employers to spend the time tracking down individualized termination reasons at the outset of the audit will produce more meaningful pools for OFCCP's statistical analyses.

E. Itemized Listing Compensation Data (Item 21 – Previously Item 19)

1. Scope

Item 21, covering compensation data, would now require two years of snapshot data, under the proposed changes. This new requirement is unwarranted and burdensome.

a. Requiring Two Years of Snapshot Data Is Unwarranted and Unduly Burdensome

Existing guidance only allows OFCCP to request a second year of snapshot data for any groupings among which indicators are found for the current year's snapshot data. *See* FCCM § 1C04 Additional Data Requests. OFCCP states that it needs the additional year to identify "whether the potential discrimination was ongoing prior to the first snapshot," OFCCP Supporting Statement 1250-0003 60-day FINAL, OFCCP-2022-0004-0002, OMB Control No. 1250-0003, at *17 (Nov. 21, 2022), but this rationale only makes sense if you *assume* that discrimination will be found in the first snapshot. In fact, for the vast majority of audits, no compensation discrimination is found.[13] Given the minimal number of audits in which OFCCP

[13] For example, in 2022, among the 866 service violations OFCCP completed in FY 2022, only 26 or 3% resulted in a finding of *any* type of discrimination violation, so the percentage of compensation discrimination violations found

finds compensation discrimination, there is no compelling justification requiring this information from **all** contractors and for **all** their employees at the outset of an audit, particularly given how burdensome it would be to collect.

Adding a second year of data stands to *double* the burden of time and expense for gathering compensation data for many, if not most, contractors. Collecting the second year of data is not simply a matter of re-running the reports or queries generated for the first year of snapshot data. Data must often be pulled from multiple systems (not simply one report for one year), and the set of employees involved in a given year—and in the data pull from each system—will inevitably be different due to hires, departures, acquisitions, reorganizations, and other internal changes.[14] Such changes also impact existing departments, job codes, types of data, data descriptions, and how data is recorded and maintained—all of which further impacts the way the relevant reports or queries for each system must be coded and generated.

Currently, this double burden is not imposed even on contractors for whom indicators are found. Rather, contractors currently need to provide a second year of data *only* for employee groupings **with indicators**, whereas the new scheduling letter seeks to require that this second year of data be pulled for *all* jobs and *all* employees.

b. OFCCP lacks authority to require the compensation data of staffing agencies' employees

OFCCP lacks the authority to require contractors to provide compensation data on staffing agencies' employees. It has no jurisdiction over non-employees as Executive Order 11246 applies to non-discrimination against the contractors' (not the staffing agencies' or vendors') *employees* and *applicants* for employment, and OFCCP provides no basis for presuming temporary staffing agency employees to be "employees" of the contractor.

Moreover, even assuming there was some basis to conclude that staffing agency employees were contractors' employees, collecting pay data for such individuals presents a host of practical problems. As non-employees, such individuals are not generally in contractors' HRIS systems, and might even work for multiple different staffing agencies and/or at multiple clients of such staffing agencies. It is entirely unclear how contractors or even temporary staffing agencies would be required to calculate the wages, bonuses, or portions thereof applicable to OFCCP's analysis for a specific contractor.

F. Pay Factors Item 21(b)

OFCCP proposes revising the scheduling letter to require the provision of "relevant data on the factors used to determine employee compensation such as education, experience, time in

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appears to be even lower. *See* OFCCP By the Numbers, U.S. Dep't of Labor (last visited Jan. 6, 2023), https://www.dol.gov/agencies/ofccp/about/data/accomplishments (select link for "Supply and Service Compliance Evaluations Conducted").

[14] Indeed, to the extent OFCCP desires to compare populations between the earlier and later snapshot, such a goal would often be futile. There will be many instances where there is little overlap in the populations from one year to the other—in particular for *per diem*, day labor, and temporary employees, but for some workforces, among part-time and full-time employees as well.

current position, duty location, geographical differentials, performance ratings, department or function, job families and/or subfamilies, and salary level/band/range/grade." It is unclear what is meant by "data." Moreover, requiring the provision of such factors is problematic for multiple reasons.

As an initial matter, the factors that are relevant to compensation are often different for each line of business and will often also vary within jobs or job families. Indeed, pay factors will generally also be different for each form of compensation (base pay versus bonus versus starting salary versus merit increase versus long-term incentives). Thus, this requirement would often involve the collection of multiple different types of data that vary across jobs, departments, and types of business—a collection process that would be exceedingly burdensome in terms of dollars and personnel hours. Factors affecting pay also vary by decision points; for example, starting pay, performance increases, and promotions all involve different factors.

Further complicating the burden and confusion that this requirement would cause is that many of the factors related to pay, such as experience, expertise, qualifications, and specializations, are not reducible to simple values in a spreadsheet and are not maintained as such in an HRIS or ATS system or elsewhere. For example, "experience" requires a detailed assessment for each individual employee of what prior experience the individual had before hire and what experience was gained during employment that is "relevant" to their job as of the snapshot date, which may require reviewing job requisitions, job descriptions, resumes, new hire documentation, performance appraisals and/or self-appraisals, and/or holding discussions with managers regarding "relevant" experience of particular employees. Similar issues arise with respect to many other factors that are relevant to pay, such as employee skills, qualifications, and specialization. Even factors such as performance ratings, which are scored or graded at some companies, are solely narrative evaluations at others.

OFCCP fails entirely to explain how these vague categories (for example, "experience") should be defined, let alone reported on. For example, should contractors report on experience relevant to a particular job or line of business or experience relevant to a particular merit increase, or some other type of experience entirely? And should experience be reported in terms of the number of years, or in a narrative description or in some other manner?

Even factors that *can* be reduced to a data field are not necessarily maintained in the way that OFCCP envisions. For example, "education" data is often incomplete in HRIS systems and might require a review of job applications and/or resumes, and even if an HRIS system includes data on time in current position, that data might not include relevant information, such as time in a role pre-acquisition. Education might also include employee trainings, certifications, licenses, and more.

Finally, the fundamental shortcoming to these proposed data collections that OFCCP cannot overcome is that there exists no regulatory requirement that factors related to pay must be maintained in a certain manner or must otherwise be reducible to easily analyzed data; and OFCCP cannot now conjure such a requirement under the guise of the PRA. *Cf.* Recommended Decision and Order, *OFCCP v. Oracle*, ALJ No. 2017-OCF-00006 ("*OFCCP v. Oracle* ALJ Order"), *slip op.* at 237 (Sept. 22, 2020) ("OFCCP seems to operate under a presumption that if

there is no easily analyzed evidence that directly pertains to a factor, it cannot matter for compensation. But that is not a plausible presumption to make …").

G. Documentation and policies related to compensation (Item 21c)

OFCCP proposes revising the scheduling letter to require federal contractors to provide documentation and policies "that explain the factors and reasoning used to determine compensation." This new requirement is especially problematic due to the confusion of identifying job- and decision-specific pay factors as discussed above under Item 21b.

Moreover, not all federal contractors have formal documentation of pay policies, such as those listed ("policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments, the use of salary history in setting pay, job architecture, salary calibration, salary benchmarking, compensation review and approval, etc."), nor do the regulations require such documentation.

Even where contractors do have these types of policies and documents, the requirement for their submission is unwarranted. OFCCP states that it desires this information so that it can "understand the contractor's specific pay policies and can conduct a more meaningful pay analysis." OFCCP Supporting Statement at 18. But contractors' compensation policies and documents rarely (if ever) include the level of detail regarding pay factors that matter to specific employees' compensation as anticipated by Item 21b. After all, as discussed above, pay factors often vary widely between lines of business, job families, departments, and even particular jobs. Thus, it would make little sense to enact companywide policies or guidance setting out such specific pay factors, and the provision of such documentation would be unlikely to provide any tangible assistance to OFCCP for purposes of compensation modeling. The new requirement thus increases the paperwork burden on contractors without materially increasing any utility for OFCCP at the initial desk audit stage.

H. Evaluation of Compensation System(s) (Item 22)

Under the new proposal, Item 22 will require "[d]ocumentation that the contractor has satisfied its obligation to evaluate its 'compensation system(s)" as required by 41 C.F.R. § 60-2.17(b)(3). OFCCP baselessly converts the express term of the regulation ("evaluate . . . system") into a different term entirely ("compensation analysis"). In particular, the list of required documentation appears to assume that quantitative and statistical analyses are required by the current regulation, as documentation must include:

- The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;

- Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (*e.g.*, base pay alone, base pay combined with bonuses, etc.);

- That compensation was analyzed by gender, race, and ethnicity; and

- 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.).

The issue is that the regulations do not require any particular type of analysis—let alone the quantitative and/or statistical compensation analyses listed above that OFCCP now seeks to create through the desk audit notice revisions.[15] The regulations require only that a contractor "[e]valuate . . . [c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities[.]" 41 C.F.R. § 60-2.17(b)(3). **Evaluating a system** does not entail analyzing compensation data between or among specific individuals or groups of individuals. Rather, an evaluation of compensation systems might involve consideration and assessment of methodologies that range from looking at hiring systems, to how starting pay is set, how pay ranges are decided, systems for pay increases and awarding bonuses, training, guidance on pay determinations, industry benchmarking best practices, internal checks and balances, pay decision processes to ensure fair and equitable systems and decisions, oversight or involvement of human resources, and more.

Indeed, OFCCP has acknowledged as much. In 2016, it explained that "[b]ecause the regulation does not specify any particular analysis method that contractors must follow to comply with this regulation, contractors have substantial discretion to decide how to evaluate their compensation systems" and are "free to choose the assessment method that best fits with their workforces and compensation practices to accomplish the self-evaluation of compensation systems required by paragraph 60–2.17(b)(3)." 81 Fed. Reg. 115, 39125-26 and n.116.

Evaluation of compensation systems came up in the context of OFCCP proposing new regulations. Commenters were explicitly concerned that new 41 C.F.R. § 60-20.4, which provides that compensation may not be based on gender and contains a non-exhaustive list of examples of factors employers may use to determine whether employees are similarly situated for purposes of evaluating compensation differences, would "establish new, mandatory assessment techniques for the self-evaluation of compensation" under Section 2.17. *Id.* at 39125. OFCCP responded to these concerns by explaining that, contrary to the commentators' worries, "§ 60–20.4 does not create any new obligations with regard to the self-evaluation of compensation systems required by paragraph 60–2.17(b)(3)." *Id.* at 39,126. OFCCP emphasized that "[e]ach contractor may continue to choose the assessment method that best fits with its workforce and compensation practices." *Id.*

Thus, the new Item 22 proposal conflicts with and is not authorized by the regulations in requiring that documentation of quantitative and/or statistical compensation analyses be provided. To the extent that OFCCP wishes to amend the regulation to require a quantitative compensation analysis, it must do so through the regulatory process (allowing the regulated community to comment on proposed changes pursuant to the APA). As noted above, the PRA cannot be used to circumvent APA requirements or amend substantive Agency regulations. *See* 5 U.S.C. § 553(b)(3)(A) (only rules of "Agency organization, procedure, or practice" are exempt from the APA's notice and comment requirements); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302

[15] We note that a "cohort analysis" is not a statistical analysis.

(1979) (substantive rules are those "affecting individual rights and obligations" and are subject to the APA); *see also, e.g.*, *Mutasa v. U.S. Citizenship & Immigr. Servs.*, 531 F. Supp. 3d 888, 894 (D.N.J. 2021) (Agency rulemaking subject to APA unless a rule is "properly classified as an 'information collection' *mechanism*" (emphasis added)).

Additionally, it would be burdensome and expensive to require regular statistical compensation analyses of the type anticipated by the proposal. These types of analyses typically require substantial time for data analytics and technology teams to collect, validate, and process the relevant data, often from multiple sources, and then the cost of labor economists to run various statistical analyses. The annual compensation of an analyst at the OFCCP is a conservative estimate of the costs a contractor would incur to review, validate, and conduct a statistical compensation analysis. As of January 2023, the base salary of a mid-level GS-14 employee of the federal government (Step 5) is $113,228, not including benefits or locality pay.[16]

A conservative estimate of the number of federal contractors who would now be required to conduct the regular statistical analysis is 25,000. Thus, using the base salary of a single mid-level GS-14 employee as an estimate of the costs for a federal contractor to conduct the statistical analyses for the entire company (separate analysis for each establishment), in year one, a conservative estimate of financial burden on federal contractors is approximately $2.8 billion for the first year only. These costs would be higher for contractors who need to retain a team of analysts.

However, even if the costs were only 25% of this amount in subsequent years (which is likely understated due to data changes, mergers and acquisitions, etc.), the ongoing recurring costs after year one would be over $700 million on a recurring annual basis. Even using these understated conservative estimates, the requirement to conduct regular statistical analyses is overly burdensome and expensive to the contractor community.

I. VEVRAA and 503 effectiveness (Item 8 and 12)

Items 8 and 12 relate to federal contractors' evaluation of the "effectiveness" of their efforts under VEVRAA and Section 503 respectively. However, effectiveness is not defined in the current regulations and the proposal to implement new requirements in the scheduling letter offers no guidance. This is yet another example of how the Agency seeks to modify contractor requirements without complying with the notice and comment requirements under the APA.

Moreover, the current 44(k) data, which federal contractors already submit, were intended to provide information to OFCCP for the Agency to evaluate whether a contractor's efforts were effective. The suggestion that federal contractors have the obligation to opine on whether it "believes" its efforts were effective is a totally subjective standard that is arbitrary and capricious. Finally, since its promulgation in 2013, OFCCP has lowered the hiring benchmark

[16] https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2023/saltbl.pdf.

under VEVRAA each year,[17] so it is impossible for a contractor to even know whether its efforts were effective given the moving target of the hiring benchmark.

Similarly, the single 7% representation goal under Section 503 that applies to every job group in every establishment fails to acknowledge that the likely representation of individuals with disabilities differs depending on the types of jobs in a job group. Again, the current regulations are vague and ambiguous and do not provide an "effectiveness" standard, and the Agency is precluded from amending the regulations via its proposed scheduling letter and itemized listing.

J. 503 Utilization Analysis

Item 11 requires the audited contractor to provide a description of all steps taken to determine if there are impediments to equal employment opportunity if any underutilization of individuals with disabilities is identified. Again, the more accurate burden estimate for this requirement is more extensive than OFCCP's estimate. From a practical perspective, given the flat 7% utilization goal for individuals with disabilities as prescribed by the Section 503 regulations, most contractors are still finding underutilization for this population across most, if not all, job groups. Unlike identifying underutilization for minorities and females which is based on availability estimate comparisons, the flat 7% goal may or may not be indicative of a barrier to equal employment opportunity. As it stands, the current requirements noted in 41 CFR § 60-741.45(e) and (f), are vague. It is unclear what OFCCP will accept as a narrative description of the assessment of processes or how effective an outreach program may be.

As noted above, whether or not efforts are "effective" is a subjective standard. Additionally, most organizations conduct this type of overarching review of impediments to equal employment opportunity and assessment of outreach and recruitment at a corporate or organization level, and not necessarily at an establishment level. Asking federal contractors to write a detailed description for every underutilized job group for individuals with disabilities without clearer guidance will create more undue burden on the federal contractor than outlined by OFCCP in the proposal.

[17] National Annual Veteran Hiring Benchmark:https://www.dol.gov/agencies/ofccp/vevraa/hiring-benchmark.

National Percentage of Veterans	
Effective Date Range	**National Percentage of Veterans in the Civilian Labor Force**
03/31/2022 -	5.5%
03/31/2021 - 03/30/2022	5.6%
03/31/2020 - 03/30/2021	5.7%
03/31/2019 - 03/30/2020	5.9%
03/31/2018 - 03/30/2019	6.4%
03/31/2017 - 03/30/2018	6.7%
03/31/2016 - 03/30/2017	6.9%
03/31/2015 - 03/30/2016	7%
03/31/2014 - 03/30/2015	7.2%

K. Action Oriented Program (Item 7, 9 & 13)

The proposed changes to the scheduling letter through Items 7, 9, and 13 will increase the burdens on federal contractors well beyond the burden estimates included in the Agency's proposed scheduling letter. Even though only federal contractors selected for a compliance evaluation will be required to submit the required documentation of actions undertaken, all federal contractors will be required to create such documentation as part of preparing their annual narratives. Moreover, because the Agency's compliance plan program is based on each establishment creating its own AAP, a federal contractor will now be responsible for evaluating the representation and transactional results for each job group for each plan and describing the efforts made with respect to each.

L. Documentation of Policies and Practices regarding All Employment Recruiting, Screening, and Hiring Mechanisms, including the Use of Artificial Intelligence, Algorithms, Automated Systems or Other Technology-Based Selection Procedures (Item 19)

The Institute, the Association, and the Chamber understand the Agency's desire to better understand the employment practices of covered contractors. However, as noted above, there are both legal and practical limits to what the OFCCP can, and should, request in the initial audit submission. With regard to Item 19, we have serious concerns about its vagueness, overbreadth, and burden.

First, the proposed scheduling letter would require contractors to produce documents related to recruiting, screening and hiring "mechanisms." However, it is wholly unclear what "mechanisms" means in this context. "Mechanisms" is not a term typically used by employers to describe how they accomplish employment actions. This is an unusual choice of language for the OFCCP, and not one it has historically used (preferring instead terms like federal contractor "systems," "processes," "practices," "actions," etc.). The non-exhaustive illustrative list that follows this term includes only what we would describe as technology-based tools, and thus is no help in discerning the full meaning or intent of the word ("including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures"). Because the term "mechanism" is ambiguous, contractors cannot know when or whether they have compiled the appropriate responsive materials. Given this reality, we suggest that (1) the word "mechanism" be more carefully and precisely defined or (2) OFCCP use more common phrase that is well-defined and understood.

The term "practices" is also confusing in this particular request. While a recruiting policy would likely refer to a particular document, a recruiting "practice" could be broadly interpreted to encompass every overture made to a recruiting source. For instance, wouldn't attending a college job fair be a recruiting "practice"? And yet, this level of detail does not seem contemplated by the remainder of proposed Item 19.

It is also puzzling that "recruiting" is categorized with "screening" and "hiring" activities. A federal contractor's recruiting activities bear on the good faith actions it takes in response to placement goals. Recruiting strategies do not involve employment decision-making. Screening

and hiring decisions, on the other hand, typically represent employment decisions and are evaluated as part of an adverse impact analysis of those decisions. Having said that, it is unclear what the difference between screening and hiring is in this context. Grouping these three activities together conflates different substantive areas. We suggest that OFCCP more precisely define these "activities," and reconsider whether all three should be included in this item.

This request should also make clear that it is not imposing any requirement for contractors to *create* documentation related to recruiting, screening, or hiring. To the extent the request can be understood, it only seeks pre-existing records.

Additionally, this request appears to seek a host of materials to which the OFCCP is not entitled at the outset of an audit. For instance, a validation study of an automated pre-employment assessment could constitute documentation of screening or hiring processes. And yet, the Uniform Guidelines on Employee Selection Procedures ("UGESP," 29 C.F.R. §1601 *et seq.*) specify that validation is not required unless, and until, a particular selection tool is shown to have adverse impact. 29 C.F.R. § 1607.3(A). OFCCP would impermissibly hurdle this legal prerequisite in requiring federal contractors to provide validation studies before hiring activity has even been analyzed.

The request as written could also be read to require production of *draft* documents, since it is not limited to policies and practices as *actually implemented* by the federal contractor (*i.e.*, the request seeks all documents "regarding" recruiting, screening and hiring mechanisms). Draft documents have no bearing on the OFCCP's review of a given federal contractor. Only documents actually approved or used by the contractor are relevant. In addition, draft documents often contain attorney-client privileged information.

Finally, the request as written would pose a significant burden on federal contractors. OFCCP often fails to appreciate the time and cost associated with compiling the documentation it requests. The Agency seems to believe that employment documents are maintained in some central repository, where one person can search and retrieve all that is needed. That is not the case. In reality, federal contractors frequently consult numerous staff and review many files to respond comprehensively to even a single request like this (much less all the remaining Items in the scheduling letter).

Depending on the scope of the unclear terms questioned above, a federal contractor might need to examine its candidate management system ("CMS") and third-party vendor sites for "recruiting;" its applicant tracking system and drug testing, background check, and testing steps for "screening;" its human resources information system for "hiring;" and its employee handbook and policy bank for all. For larger federal contractors this may include documentation for hundreds of processes, many of which may be complex and multi-faceted. It is wholly unrealistic and likely infeasible for a company to do all of this within thirty days, while simultaneously responding to the other twenty-plus scheduling letter items.

This burden becomes even more out of proportion when one considers that the OFCCP **has not yet even reviewed** a single piece of information submitted by the federal contractor. Much of this information may prove wholly irrelevant after the desk audit stage. For instance, if

a federal contractor met and exceeded every placement goal from the prior year, why does the Agency need documentation of all recruiting efforts? If there is no adverse impact in a company's hiring, why does the Agency need extensive records on its screening and hiring strategies?

The Institute, the Association, and the Chamber submit that it is improper for the Agency to put federal contractors through such a time-consuming and burdensome exercise, only to learn that much of that information was not needed in the first place.

V. OFCCP's Burden Estimate Is Unreliable and Unjustified and Cannot Provide a Basis for the Proposal

The central purpose of the PRA is to ensure that federal agencies consider the burden their requests for information impose on the regulated community. Therefore, burden estimates must include the value of both the time and the effort required by federal contractors to comply with the data collection, as well as associated financial costs.[18] In the proposal, OFCCP makes no effort to explain or justify its burden estimate, nor does it attempt to calculate the cost of the changes to the scheduling letter it seeks to impose; it simply states a number of hours as if it is imposed by statute. It is not. As detailed below, *and based on empirical evidence*, the OFCCP's burden estimate is untethered from reality and cannot provide the required basis for the changes the Agency proposes.

A. History of Scheduling Letter and Burden Hours

1. 2003 – 4.5 Hours; 2011 – 26 Hours; 2015 – 27.9 hours; Proposed – 39 hours

The scheduling letter represents the beginning of an OFCCP compliance evaluation. This OMB-approved letter standardizes the data and information federal contractors must provide to OFCCP within 30 days of receipt. As has been demonstrated above, many of the required items in the itemized listing are not readily available and are not required to be compiled by federal contractors in a "ready to submit" format. Therefore, a federal contractor must prepare, collate, organize, and provide this information if, and when, it receives the audit notification letter. OFCCP and OMB acknowledge this additional burden by providing a burden estimate associated with the scheduling letter listing. The proposed scheduling letter estimates that responding to all items in the scheduling letter would require a total of 39 hours in addition to the annual costs and burden associated with compliance. This represents an additional **11** hours over the previous estimate OFCCP provided in regard to hours required to provide AAPs and supporting data requested in a scheduling letter. In other words, even OFCCP projects it will take a company

[18] At a minimum, a burden estimate must assess and aggregate the number of hours and associated costs of at least:

- collecting and maintaining voluminous employment records and data points;
- developing annual Affirmative Action Plans for each establishment or functional unit;
- reviewing and comprehending the new scheduling letter;
- searching relevant data sources and compiling the voluminous amounts of data and documents requested;
- reviewing data and documents to be submitted to ensure the information is both accurate and complete;
- compiling and forwarding the data and documents to the relevant OFCCP office; and complying with other required third-party disclosures.

representative an entire week to prepare and respond to OFCCP's initial scheduling letter and itemized listing, including almost two full days to respond to the new requests. It is common for a federal contractor to receive multiple scheduling letters at once. Yet OFCCP provides no explanation or justification for its estimate. The PRA does not permit such arbitrary and capricious actions.

In 2003, the estimated burden of responding to OFCCP's scheduling letter and itemized listing was **4.5** hours. In 2011, with significant additions and requests added to the letter and itemized listing, the burden estimate jumped to **26** hours. The current OMB-approved scheduling letter and itemized listing have a burden estimate of **28** hours. Once again, it is important to note that the additional burden associated with both the current and proposed scheduling letters is above and beyond what is required of federal contractors to comply with OFCCP's rules on an annual basis. The proposed changes to the scheduling letter and itemized listing increase the burden estimate to **39** hours – an astounding **40%** increase. The proposal is not mere paperwork burden creep – this is a wholesale geometric expansion of data collection that is not grounded on any regulation, Executive Order or statutory changes. Such an unjustified effort should not be implemented.

However, it is certain that the actual burden will be even higher, as OFCCP's 39-hour estimate appears to significantly underestimate the work associated with collecting and delivering information required by the proposed scheduling letter and itemized listing. OFCCP's proposal failed to consider the difficulties of generating and compiling the data the Agency is requesting. For example, the proposed scheduling letter requests "relevant data on the factors used to determine employee compensation." Our members indicated that some factors in the proposed revisions, such as education and experience, are not captured in a HRIS or that the HRIS does not easily report on these items. Consequently, federal contractors will need to manually pull this information for each employee covered by the compliance evaluation.

B. Results of The Institute Survey on Burden

In order to bring real-world experience into this process, The Institute surveyed its members – all federal contractors – to assess the time expended complying with the current scheduling letter and to then extrapolate from that experience how much additional time would be needed to comply with expanded request in the proposal. *A survey of The Institute's members indicates that the actual burden will be approximately **89** hours. This is over **125% higher** than OFCCP's estimate.*[19] In particular, the vast majority of the respondents to The Institute's survey indicated that their HRIS does not capture all the information OFCCP is requesting pertaining to virtually every new area of inquiry. As a result, federal contractors would need to either engage in time-consuming data collection to respond to the scheduling letter or pay for costly changes to the HRIS to be able to respond to the proposed scheduling letter.

[19] For the details of the Survey, *see* attached Appendix B.

C. OFCCP Closed Audits Trend

1. 2010 – 5,000; 2015 – 2,603; 2022 – 800

a. With a 40% Increase in More Information OFCCP Can Expect to Close Roughly 480 Audits Per Year. This Would Be One Audit Per OFCCP Staff Member

This increased burden will affect not only federal contractors but OFCCP as well. The additional data and information that the OFCCP is proposing to collect will increase the burden on OFCCP's compliance officers conducting a desk audit. There will be a significant number of additional hours to catalogue, analyze, evaluate, and report on the additional information requested in the proposed scheduling letter and itemized listing. This increased burden could be catastrophic for OFCCP's enforcement efforts. As the chart below demonstrates, OFCCP's current audit closure rate is the lowest in the history of the Agency. Audit closure rates have been steadily declining since 2010. One contributing factor to the decrease in compliance evaluations involves the ongoing changes associated with the scheduling letter and itemized listing requirements. In requesting additional information, OFCCP lengthens the time to complete any given review, and limits its ability to find contractors that may be out of compliance with the Agency's regulations.

As the chart shows, prior to the implementation of the expanded scheduling letter in 2014, OFCCP closed at least 4,000 compliance evaluations per year. This number has steadily declined as OFCCP has requested additional information. As noted above, compliance officers must expend additional time to compile, analyze, and otherwise deal with additional data. The proposed scheduling letter and itemized listing would only exacerbate this issue.

In federal fiscal year 2022, OFCCP closed only 898 compliance evaluations.[20] If OMB approves and OFCCP implements the proposed scheduling letter, it would be reasonable to conclude that the number of reviews that OFCCP closed would decrease by 40%. (As noted above, the OFCCP's estimated burden hours in responding to the proposed scheduling letter and itemized listing are increasing by 40%. These burden hours would likely translate to a concomitant decrease in review closures.)

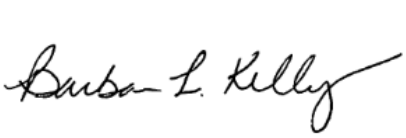
If OFCCP's review closures decrease by 40% from their fiscal year 2022 level, OFCCP would be closing approximately **538** (60% of 898) audits per fiscal year. OFCCP has indicated that there are approximately 92,000 federal contractor establishments that must develop affirmative action plans. If OFCCP closes 538 compliance reviews, it will have reached 0.6% of the federal contractor universe. Even in a best-case scenario, where the number of reviews remains the same despite the increased burden on federal contractors and OFCCP, OFCCP will only reach less than 1% of the contractor universe. Such outcomes would drive OFCCP's output below the historically low level it already has reached.

Even though the OFCCP estimate is seriously understated and unreliable, the increased burden associated with proposed scheduling letter and itemized listing will be a serious drain on federal contractors, OFCCP, and the public OFCCP is meant to serve. As it is arbitrarily imposed, without explanation or justification, it does not begin to meet the requirements imposed by the PRA.

CONCLUSION

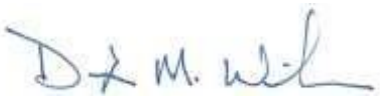
Thank you in advance for your consideration of the comments by The Institute, the Association, and the U.S. Chamber of Commerce. We are happy to provide any additional information you may need or to answer any questions you may have.

Respectfully,



Barbara L. Kelly
Director

The Institute for
Workplace Equality



D. Mark Wilson
Vice President, Health &
Employment Policy

HR Policy Association

Marc Freedman
Vice President, Workplace Policy
Employment Policy Division

U.S. Chamber of Commerce

[20] U.S. Department of Labor Data Enforcement - https://enforcedata.dol.gov/views/data_summary.php.

APPENDIX A

Faculty Contributing to Comments Addressing OFCCP's Proposed Renewal of the Approval of Information Collection Requirements

The Institute for Workplace Equality

Faculty Contributing to Comments Addressing
OFCCP's Proposed Renewal of the Approval of Information Collection Requirements

The Institute for Workplace Equality gratefully acknowledges the following members of The Institute's faculty who contributed to comments addressing OFCCP's Proposed Renewal of the Approval of Information Collection Requirements, OMB Control Number 1250-0003 (Nov. 21, 2022), available at https://www.regulations.gov/document/OFCCP-2022-0004-0001

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APPENDIX B

Summary Results of Survey of Federal Contractors

SUMMARY RESULTS OF SURVEY OF FEDERAL CONTRACTORS

Total Time to Respond:

Average: **89 hours**

Item 7: Action-Oriented Programs

Only 24% of respondents lists action-oriented programs beyond what is listed in the AAP.

Of those who list action-oriented programs beyond what is in the AAP, 80% maintain lists for each location/functional unit. On average, it would take 28.6 hours to collect action-oriented programs for each establishment/functional unit.

Item 8: Outreach and Positive Recruitment Activities

67% track outreach and positive recruitment for IWDs at an establishment level. On average, it would take 16.9 hours to compile a list of outreach activities per establishment/functional unit.

61% evaluate outreach and positive recruitment for IWDs at an establishment level. On average, it would take 20.1 hours to compile the evaluations per establishment/functional unit.

Item 11: Underutilization of Individuals with Disabilities

Only 16% of respondents track steps taken to determine whether and where impediments to EEO exist for IWDs at an establishment level. On average, it would take 25 hours to compile per establishment.

Item 16: IPEDS

No responses that knew if IPEDS matched AAP structure.

Item 19: Policies and Practices Documentation

On average, this would take 39 hours to compile and all documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures?

For 44% of respondents, this information varies by establishment. For these respondents, it would take an additional 20 hours to gather this information for a specific establishment/functional unit.

Item 20: Promotions Data

Only 36.8% of respondents have all information listed for promotions in their HRIS. Additionally, multiple respondents indicated that this data cannot be pulled in an existing report and would need to be pulled manually.

Item 20: Terminations Data

95% of respondents indicate that their HRIS captures specific reason for termination. It would take an average of 9.5 hours per AAP to pull this information.

Item 21: Compensation Data

Only 15.8% of respondents have access to compensation data provided through staffing agencies.

Multiple respondents stated that not all factors are captured in HRIS. On average, it would take 57 hours to generate.

26% of respondents were unsure if they had written policies, guidance, or trainings regarding initial compensation decisions; compensation adjustments; the use of salary history in setting pay; job architecture; salary calibration; salary benchmarking; and compensation review and approval. The rest indicated they did have written policies. On average, it would take 46 hours to gather this information.