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Tina T. Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave., N.W. Room C-3325
Washington, DC 20210

Re: Comments on OFCCP's proposed collection of information, Supply and Service Program, OMB Number 1250-0003, as outlined in 87 Fed. Reg. 70,867-68 (Nov. 21, 2022).

Dear Director Williams:

Please consider the following comments in response to the above-referenced Notice of Proposed Information Collection, published at 87 Fed. Reg. 70,867-68 (Nov. 21, 2022). These comments are informed by the decades of experience of our OFCCP practice attorneys who have assisted hundreds of employers in virtually every industry and major geographic market across the United States. Our attorneys have represented a diverse array of employers over many years during OFCCP audits and with regard to resolution of Agency claims of systemic discrimination.

I. Introduction

OFCCP's proposed information collection request does not comport with the basic public participation requirements of the Paperwork Reduction Act. *See* 5 C.F.R. § 1320.8(b)(3) (requiring DOL designated office – the Office of Chief Information Officer – to "ensure that each collection of information . . . informs and provides reasonable notice to the potential persons to whom the collection of information is addressed of - (i) The reasons the information is planned to be and/or has been collected; (ii) The way such information is planned to be and/or has been used to further the proper performance of the functions of the agency.").

On the one hand, OFCCP requests the most significant expansion of burdens related to routine audits in Agency history, displacing specific, well-defined requests with open-ended requests for "[d]ocumentation of policies and practices regarding all employment recruiting, screening, and hiring mechanism" and "documentation and policies related to the contractor's compensation practices, including those that explain the factors and reasoning used to determine compensation (e.g., 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.)." On the other hand, OFCCP asserts a

30,000 hour *reduction* in burden hours based on a halving of the number of audits identified in the same OFCCP ICR in April 2020. Something is missing here: OFCCP must be considering some dramatic change in the way it conducts compliance reviews, which it has not disclosed in relation to this ICR. This makes it impossible to comprehend and comment reasonably on OFCCP's proposed collection. Under the current and historical audit practices, none of this, even remotely, makes any sense. Instead of the longstanding, tiered-review process, where OFCCP requests detailed information, records, policies, and materials only related to areas where the initial data shows preliminary indications of potential discrimination or non-compliance, the Agency now proposes to burden each and every contractor selected for an audit with all of these information requests across the entire AAP workforce without any suggestion of a preliminary concern in any area. OFCCP has pointed to no data, no study, no policy, literally nothing that would justify these requests given the Agency's historical audit practices. OFCCP leaders must have in mind some dramatic changes to the audit process. However, without any articulation of those changes, regulated entities and other stakeholders have no ability to comment on the utility of the proposed requests to OFCCP's compliance monitoring practices. The requests are completely unjustified under OFCCP's historical and current audit practices. If OFCCP leadership has in mind significant changes to the audit processes, those should be disclosed in relation to the proposed requests.

OFCCP's burden estimates both for the audit scheduling letter and for development and maintenance of AAPs are grossly underestimated. This ICR suggests that the numerous, burdensome additional audit requests will involve, on average, only an 11 hour increase in burden per audit. That is an underestimate by an order of magnitude, i.e., the actual average increase would be closer to 110 hours. In larger AAP workforces of 500 or 1000 or more employees, the actual burden imposed by the additional requests proposed by OFCCP could easily involve several hundred hours.

Similarly, OFCCP suggests a significant *reduction* of approximately 15% in burden hours associated with development, update and maintenance of AAPs. However, OFCCP has not accounted for the burdens associated with its radical change to longstanding Agency practice, announced in Directive 2022-01 Revision 1, with regard to the AAP requirement for contractor compensation self-evaluation. Those burdens are massive and could involve average costs exceeding $50,000 for AAP workplaces with 500 or more employees and average costs between $25,000-$50,000 for AAP workplaces with 250-500 employees. The costs include legal and statistical experts, and the time and effort of HR and compensation personnel to investigate potential pay differences and for the team to consider potential remedial measures. OFCCP's approach under Directive 2022-01 Revision 1 diminishes the critical role of counsel, ignoring the fact that Title VII disparate treatment provisions apply to evaluation of race or gender disparities and corrective actions such as pay adjustments targeted to female or minority employees. The entire process of developing an appropriate structure and parameters for analyses, interpreting the results, determining appropriate follow-up steps, and considering potential remedial actions are all highly imbued with legal determinations and require legal advice. All of these aspects are, and must be, governed by judicial interpretations of Title VII and it is counsel who apply those judicial standards.

Despite the massive increase in burden related to the proposed changes to the OFCCP scheduling letter, the Agency does not propose to afford contractors any more time to prepare the submission. Further, OFCCP provided in Directive 2022-02 (March 31, 2022) that "OFCCP will no longer delay scheduling contractors for 45 days after the issuance of a CSAL." Accordingly, neither the proposed Scheduling Letter nor the CSAL will provide any assurance that the contractor will have adequate time to prepare the audit submission.

Quite the contrary, OFCCP proposes to add text in the Scheduling Letter that, "[r]evising the language to clarify that OFCCP may initiate enforcement proceedings if the requested information is not provided within 30 calendar days of contractor receipt of the letter." OFCCP's requested statement is clearly intended to be understood by contractors as a threat designed to coerce compliance with the unreasonable 30-day requirement, but in context the proposed statement is deeply misleading and by omission suggests a broad abrogation of contractors' constitutional rights. If the statement is included in the Scheduling Letter, it must be supplemented with the following: "The Fourth Amendment of the United States Constitution affords contractors a 'right of refusal' to OFCCP's requests. *See United Space Alliance LLC v. Solis*, 824 F. Supp. 2d 68, 93-94 (D.D.C. 2011). The Fourth Amendment guarantees that a contractor cannot suffer any penalties for refusing to provide information in response to OFCCP requests. *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (employer has a right to 'question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.')." Of any entity, the Government should have the utmost respect for the Constitution.[1]

Moreover, OFCCP does not account for the massive burdens associated with its approach where the same contractor is subject to a number of simultaneous audits. OFCCP has suggested that it may target certain contractors for multiple audits: "Where an employer has multiple establishments scheduled for review pursuant to OFCCP's neutral scheduling methodology, OFCCP will coordinate evaluations of common policies and patterns across establishments. This coordination can benefit more workers where the contractor agrees to remedy violations and revise practices or policies company-wide or across a broader group of establishments that have similar practices to those identified during compliance evaluations of the scheduled establishments." OFCCP Directive 2022-01 at § 7.a.iii.

While there are many problems with OFCCP's proposed additional requests in the ICR, our comments below focus on a number of specific items in the following order: (1) Directive 2022-01 Revision 1 and the associated proposed Item 7 and 22 requests; (2) Directive 2018-05 and the associated proposed Item 21 requests; (3) the proposed Item 19 requests; and (4) the proposed

[1] In its 2016 Supporting Statement regarding the Supply and Service Program (at 19) OFCCP cited the above-referenced authority but asserted that the Scheduling Letter at that time categorically satisfied the Fourth Amendment standard. However, that claim misunderstands OFCCP's own positions: (1) submissions in response to the OFCCP scheduling letter are voluntary and waive contractors' Fourth Amendment rights, *see United Space Alliance*, 824 F. Supp.2d at 93-94; and (2) only a final DOL order constitutes something tantamount to a subpoena, *see United Space Alliance*, 824 F. Supp.2d at 92-93. Many of the new, broad requests proposed in the ICR would clearly not meet the subpoena standard requiring the request be "sufficiently limited in scope" and "specific in directive so that compliance will not be unreasonably burdensome." *Id.* at 91.

Item 20(c) requests. These requests would impose massive burdens on employers and OFCCP has not demonstrated a practical utility for the information that could in any way justify those substantial burdens. Equally problematic, OFCCP's intended uses of the requested information under Directive 2022-01 Revision 1 and under Directive 2018-05 are contrary to established law. Those directives should be rescinded and new proposals on those topics should be published for notice and comment so that all stakeholders have an opportunity to provide input on those important subjects, as OFCCP did in its 2006 Standards and Voluntary Guidelines. As to the other burdensome requests, OFCCP should either rescind the requests or provide a more realistic accounting of the massive burdens, along with a detailed justification of those burdens and the wholesale changes to the OFCCP audit process upon which the additional requests are predicated. After providing that expanded justification, which is nowhere to be found in the current ICR, OFCCP should afford contractors another 60-day comment period so that contractors can review OFCCP's responses to those additional comments to the Agency's expanded justification in its submission to OMB.

II. PRA Standards

The Paperwork Reduction Act (PRA) of 1995 requires that agencies obtain Office of Management and Budget (OMB) approval before requesting most types of information from the public. The purposes of the PRA include to (1) "minimize the paperwork burden for . . . Federal contractors . . resulting from the collection of information by or for the Federal Government," 44 U.S.C. § 3501(1); (2) "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, [and] used . . by . . . the Federal Government," 44 U.S.C. § 3501(2); and (3) "ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws," 44 U.S.C. § 3501(8).

Under the OMB regulations implementing the PRA, "[b]urden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency, including:

> (i) Reviewing instructions;
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> (ii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information;
>
> (iii) Developing, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information;
>
> (iv) Developing, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information;
>
> (v) Adjusting the existing ways to comply with any previously applicable instructions and requirements;

(vi) Training personnel to be able to respond to a collection of information;

(vii) Searching data sources;

(viii) Completing and reviewing the collection of information; and

(ix) Transmitting, or otherwise disclosing the information."

5 C.F.R. § 1320.3(b)(1). "Collection of information means . . . the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit." *Id.* at § 1320.3(c). "A 'collection of information' may be in any form or format, including . . . automated, electronic, mechanical, or other technological collection techniques . . . or any other techniques or technological methods used to monitor compliance with agency requirements." *Id.* at § 1320.3(c)(i). "Information means any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media." *Id.* at § 1320(h).

III. Detailed Comments

A. Directive 2022-01 Revision 1 and Related Proposed Items 7 and 22

OFCCP's proposed Items 7 and 22 are designed to coordinate with the Agency's issuance of Directive 2022-01 Revision 1, labeled, "Advancing Pay Equity Through Compensation Analysis" (Aug. 18, 2022). Directive 2022-01 Revision 1 was not issued through notice and comment procedures and purports to be a promulgation that "does not create new legal rights or requirements or change current legal rights or requirements." The purpose of Directive 2022-01 Revision 1 is "[t]o provide guidance on how OFCCP will evaluate federal contractors' compliance with compensation analysis obligations and clarify OFCCP's authority to access and review documentation of compensation analyses conducted pursuant to 41 CFR 60-2.17(b)(3)."

1. Historical Background on 41 C.F.R. § 60- 2.17(b)(3)

Since 2000, OFCCP's AAP regulations have required that each covered contractor "perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate ... [c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." 41 C.F.R. § 60- 2.17(b)(3). OFCCP has long interpreted this regulatory provision *not* to require any statistical analyses or other specific methodology but has left the specific review method entirely to contractors' discretion. *See* Final Rule, *Discrimination on the Basis of Sex*, 81 Fed. Reg. 39,108, 39,125 (June 15, 2016) ("Because 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.");

see also Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35114, 35,119 (June 16, 2006) ("OFCCP agrees that the contractor need not have relied on quantitative or statistical techniques to comply with 41 CFR 60–2.17(b)(3), as OFCCP has repeatedly noted that the contractor has the discretion to comply by using any self-evaluation technique it deems appropriate."); *Notice of Rescission*, 78 Fed. Reg. at 13,517 (Feb. 28, 2013) ("In the absence of the Voluntary Guidelines, contractors may continue to choose a self-evaluation method appropriate to assess potential pay disparities among their workforce. OFCCP will not be mandating any specific methodology.").

In the only litigated matter related to compliance with 41 CFR 60-2.17(b)(3), a DOL ALJ suggested that a contractor that had its immediate managers review the compensation of their subordinate employees for generalized fairness and compliance with company policies, even without review based on the race or gender of the employees, may have been sufficient to comply with OFCCP's regulatory self-evaluation requirement. *See OFCCP v. Oracle America, Inc.*, 2017-OFC-00006, at 207 (Sept. 22, 2020) ("The regulations do not contain the sort of specific requirements that OFCCP now represents and there are at least good-faith disputes about what compliance should look like, with Oracle finding support for its position in OFCCP's own representations. Oracle took OFCCP at its word about flexible case-by-case means of compliance, and I do not see this as evidence of generalized hostility to affirmative action or suspect intent.").

OFCCP has long understood that contractors sometimes comply with the agency's self-evaluation requirement through analyses that are protected by the attorney-client privilege and attorney work product doctrine. *See Notice of Rescission*, 78 Fed. Reg. at 13,516 (Feb. 28, 2013) ("In the experience of these commenters, contractors perform their compensation analysis under attorney-client privilege and wish to protect it from disclosure."); *see also Voluntary Guidelines*, 71 Fed. Reg. at 35,122 (June 16, 2006) ("OFCCP understands that some contractors may take the position, based on advice of counsel, that their compensation self-evaluation is subject to certain protections from disclosure, such as the attorney client privilege or attorney work product doctrine, and that these protections would be waived if the contractor disclosed the self-evaluation. OFCCP does not take any position as to the applicability of these protections in the context of a compensation self-evaluation. However, to avoid protracted legal disputes over the applicability of such protections, OFCCP will permit the contractor to certify its compliance with 41 CFR 60- 2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation to OFCCP during a compliance review."). With its understanding of contractors' assertions of privilege over such materials, OFCCP has not historically sought access to contractors' internal compensation review materials or otherwise seriously challenged assertions of privilege or work product protection over such materials.

2. OFCCP Does Not Explain How The Requested Information Will Have Practical Utility.

As discussed above, OFCCP's longstanding and continued interpretation of 41 CFR 60-2.17(b)(3) is that contractors have discretion to use any method whatsoever to comply with the

requirement. OFCCP has at times published guidance, such as the extant Directive 2018-05, designed to recommend an approach to compliance, but has not mandated such an approach. Because of the entirely open-ended nature of 41 CFR 60-2.17(b)(3), OFCCP's formal position has been to accept a certification of compliance without requiring disclosure of any of the self-evaluation details. *See* 71 Fed. Reg. at 35122 (June 16, 2006) ("OFCCP will permit the contractor to certify its compliance with 41 CFR 60–2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation to OFCCP during a compliance review.").[2] The content of the contractor's internal review was not necessary to determine compliance because there was no published standard informing the contractor about the required components of the internal review.

In Directive 2022-01 Revision 1, OFCCP explains that the new process will provide "documentation [that] allows OFCCP to accomplish its work more efficiently and to assess, among other things, whether a contractor has performed a *sufficient evaluation* and whether it 'has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.' 41 CFR 60-2.17(c)." [emphasis added]. OFCCP has not explained, however, how its review of the content of the contractor's internal review could ever be relevant to determining the sufficiency of the review. OFCCP's announced standard is literally "do something." It has published no standards by which sufficiency could be determined.

Under the Fifth Amendment, regulated entities have a due process right to "fair notice" under "the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (internal quotation marks and citations omitted). S*ee also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *FABI Constr. Co. v. Sec'y of Labor*, 508 F.3d 1077, 1088-89 (D.C. Cir. 2007) ("announcing [a new interpretation] for the first time in the context of this adjudication deprives Petitioners of fair notice") (*citing Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 158 (1991) and *Jones v. Flowers*, 547 U.S. 220, 226 (2006)). "[R]egulated parties should know what is required of them so they may act accordingly [and] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Fox Television*, 132 S. Ct. at 2317.

In this legal context, OFCCP could not allege an insufficient internal review process. Thus, OFCCP would only need the proposed Items 7 and 22 information if the Agency had some announced standard for compliance by which a contractor's actions could be compared. Of course, any such compliance standard would be a mandated methodology or methodologies that would impose PRA burdens that must be reasonably quantified and subject to OMB clearance.

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[2] OFCCP's regulatory position was based on full notice and comment rulemaking in which it considered comments and provided the Agency's rationale in detail. *See* 71 Fed. Reg. at 35,118-119. When OFCCP rescinded the Voluntary Guidelines in 2013, neither the Proposed Notice of Rescission nor the Final Notice of Rescission contained any discussion about this issue or these provisions. In the 2020 ICR for the Supply and Service Program, OFCCP proposed but rescinded a request for information similar to the proposed requests.

In the supporting statement, OFCCP did not relate the requested information to determining compliance with 41 CFR 60–2.17(b)(3) but explained that the requested information "will enable OFCCP to conduct a more efficient analysis of a contractor's compensation for systemic discrimination." Directive 2022-01 Revision 1 also suggested a connection between how the contractor complies with 41 CFR 60–2.17(b)(3) and "a more efficient compliance review," citing Directive 2018-05. The strong linkage between Directive 2018-05 and Directive 2022-01 Revision 1 raises a concern that OFCCP's proposed request to obtain significant information about the contractor's self-evaluation will inevitably result in Agency auditors evaluating the "sufficiency" of contractors' approach in comparison to the Agency's recommended approach outlined in Directive 2018-05. Auditors may "push" contractors to make changes toward the recommended approach, thereby converting what has been publicly asserted to be a voluntary methodology to become, effectively and in practice, a mandatory methodology. OFCCP has not provided for public review the instructions that will be given to auditors when evaluating whether the contractor "has performed a sufficient evaluation."

Strongly supporting these concerns are the many OFCCP statements in Directive 2018-05 that signify that the Agency views its recommended methodology as necessary for "meaningful," "sound" and "effective" employer self-assessments. That directive explains "OFCCP believes that fulsome guidance will further support contractors' ability to conduct meaningful self-audits so that they can proactively identify and address issues with their compensation practices." Indeed, OFCCP issued Directive 2018-05 to "support compliance and compensation self-analyses by contractors under applicable law, and OFCCP regulations and practices." The directive "is more transparent about the agency's practices and approaches to determining similarly-situated employees, creating pay analysis groups, conducting statistical analysis and modeling, and other analytical matters relevant to conducting sound, compensation compliance evaluations and contractors' self-audits. Ultimately, OFCCP believes that this new directive will provide clear guidance to contractors, which will result in more effective self-auditing, and benefit American workers by facilitating the elimination of pay discrimination." The final statement in Directive 2018-05 is that "[t]his document is intended only to provide clarity to the public regarding *existing requirements under the law or agency policies*." [emphasis added].

OFCCP is well-aware of contractor concerns that supposed "voluntary" standards would become de facto standards for compliance in this very context. Thus, OFCCP explained in the Preamble to the Voluntary Guidelines that many commenters were concerned about those Guidelines becoming such a mandatory standard: "OFCCP has added a provision in the final voluntary self-evaluation guidelines to make clear that the guidelines are entirely voluntary and to express OFCCP's formal policy that the contractor's declining to adopt the methods outlined in the voluntary guidelines will not be used as a basis for any negative or adverse inference about the contractor's compliance status." 71 Fed. Reg. at 35119 (June 16, 2006). By contrast neither Directive 2018-05 nor Directive 2022-01 Revision 1 contain any such statement or provisions.

Federal law well recognizes that investigations will pressure regulated entities to take actions otherwise labeled as "voluntary" in order to avoid a lengthy investigation or finding of non-compliance. *See MD/DC/DE Broadcasters Ass'n v. F.C.C.*, 236 F.3d 13, 22 (D.C. Cir. 2001) (finding that regulations induced employers to engage in even potentially unlawful conduct to

avoid regulatory investigations); *Lutheran Church v. F.C.C.*, 141 F.3d 344, 352-54 (D.C. Cir. 1998) (published guidelines pressured employers to engage in potentially unlawful conduct to avoid investigations); *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d 206, 209-11 (D.C. Cir. 1999) (court recognized that directive that did not require employers to do anything nonetheless expressly leveraged agency enforcement power and had practical effect of inducing employer conduct to avoid costly investigations).

If OFCCP used its substantive review of contractors' internal investigations to claim a lack of "sufficiency" and pushed contractors to the Directive 2018-05 methodology, OFCCP's proposed approach would effectuate an end-run of the PRA. To be sure, the voluntary methodology is subject to PRA burden and approval processes, for which OFCCP has not accounted in this ICR, but would require some estimate of the number of entities that utilize the voluntary methodology. OFCCP's approach of pushing contractors to adopt the "voluntary" methodology by claiming during audits that the contractor's approach was "insufficient" avoids the extensive PRA burdens of a mandatory adoption of the supposed voluntary methodology. OFCCP has identified no guardrails that would prevent this eventuality.

3. OFCCP's ICR Does Not Account for The PRA Burdens Associated with Voluntary Adoption of Recommended Directive 2018-05.

OFCCP has not accounted for the PRA burdens associated with voluntary compliance with OFCCP's recommended approach to self-analyses for the 41 CFR 60-2.17(b)(3) review as outlined in Directive 2018-05 and to voluntary reporting under Directive 2022-01 Revision 1. Voluntary data generation, review, recordkeeping and reporting obligations are subject to the same PRA requirements applicable to mandatory requirements. As noted above, the PRA burdens will be substantial and would involve substantial legal and expert fees. OFCCP should include a specific quantification of those burdens so that contractors can comment on the estimates.

4. OFCCP's ICR Is Contrary to Established Law.

As noted above, part of the PRA standard is to "ensure that the . . . use . . . of information by . . . the Federal Government is consistent with applicable laws." 44 U.S.C. § 3501(8). Here, the proposed approach under OFCCP Directive 2022-01 Revision 1 and Items 7 and 22 are contrary to established law.

a. OFCCP's Approach Diminishes the Role of Counsel, Which Is Critical In the Context of Evaluation of Gender-, Race-, or Ethnicity-based Disparities.

OFCCP's AAP requirement of a review of "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities" imposes on contractors an obligation in a highly sensitive area to which Title VII standards apply both as to the appropriate methodology for review and as to the appropriate context for consideration of potential remedial action such as targeted pay adjustments. Employers generally are not permitted to consider race and gender in

making employment decisions in the normal course of business. Title VII expressly prohibits overt consideration of gender, race and ethnicity when making employment decisions. *See Ricci v. DeStefano*, 557 U.S. 557, 585 (2009). Under the Supreme Court's analysis in *Ricci*, employers can consider race and gender as part of a legal review of whether employment decisions may have potentially violated Title VII and may consider remedial measures only where the legal review identifies a "strong basis in evidence" of a potential Title VII violation. In the context of review of compensation decisions, courts have expressed concerns about pay adjustments based on a regression analysis that was not properly structured and that did not account for important factors. *See, e.g.*, *Rudenbusch v. Hughes*, 313 F.3d 506, 515–16 (9th Cir. 2002) (regression analysis was not technically sufficient to justify gender-based pay adjustments); *Maitland v. Univ. of Minn*., 155 F.3d 1013, 1016-18 (8th Cir. 1998) (same); *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 676–77 (4th Cir. 1996) (criticizing regression for "an illogical comparison involving an inflated pool" and for failing to account for factors such as actual prior experience).

OFCCP understood these aspects of the sensitive legal context surrounding the compensation review requirements of 41 CFR 60–2.17(b)(3) in its 2006 Voluntary Guidelines:

> Similarly, male or non-minority employees may sue the employer alleging violation of Title VII because the employer gave salary adjustments to female or minority employees under the compensation self-evaluation. *See, e.g., Rudebusch* v. *Hughes,* 313 F.3d 506, 515–16 (9th Cir. 2002)(employer's self-audit, regression analysis was not technically sufficient to foreclose male professor's discrimination claim against the employer); *Maitland* v. *Univ. of Minn.,* 155 F.3d 1013, 1016–18 (8th Cir. 1998)(same); *Smith* v. *Virginia Commonwealth Univ.,* 84 F.3d 672, 676–77 (4th Cir. 1996)(same). OFCCP has attempted to provide voluntary guidelines that are technically sufficient to withstand judicial scrutiny, so that contractors do not face potential liability for implementing a robust and effective self-evaluation program.

Voluntary Guidelines, 71 Fed. Reg. at 35,120. OFCCP explained that the suggest self-evaluation approach was designed to be consistent with judicial interpretations of Title VII. *Id.* OFCCP did not take any position that sought to displace the critical role of counsel with regard to implementing a review consistent with those judicial interpretations. Indeed, OFCCP provided for a certification approach that did not require any disclosure of information or materials about the privileged pay review, designed expressly to preserve privilege protection of the review. *See* 71 Fed. Reg. at 35,122 ("OFCCP will permit the contractor to certify its compliance with 41 CFR 60–2.17(b)(3) in lieu of producing the methodology or results of its compensation self-evaluation to OFCCP during a compliance review. The certification must be in writing, signed by a duly authorized officer of the contractor under penalty of perjury, and the certification must state that the contractor has performed a compensation self-evaluation with respect to the affirmative action program or establishment at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation and results are subject to the attorney-client privilege and/or the attorney work product doctrine.").

Remembering that the general inquiry involves a "strong basis in evidence" standard, implementing judicial interpretations of Title VII regarding appropriate evidence of pay discrimination is a legally complex undertaking. Even more legally complex is implementing the judicial interpretations of Title VII as it relates to statistical evidence of pay discrimination. All of these aspects of the context call for the involvement of counsel and counsel's opinion work product as to the appropriate application of the Title VII standards to the particular factual background of the employer's compensation structures, policies, practices and other relevant features. Counsel is integral to the legality of the review process, but OFCCP's position that the self-evaluation cannot be privileged drives at the very heart of the fundamental role of counsel in our legal system.

b. OFCCP's Discussion of the Application of the Attorney Client Privilege and the Attorney Work Product Doctrine In the Context of Compensation Reviews Is Inconsistent With Both Controlling Authority and the Formal Position of the United States.

OFCCP has provided the following positions challenging the assertion that a privileged legal risk review could retain its privileged status if it was also used by the contractor as the basis to assert that it had complied with the 41 CFR 2.17(b)(3). OFCCP contends in Directive 2022-01 Revision 1 that:

- Documentation that contractors have complied with their regulatory obligations is not inherently privileged. Specifically, facts regarding what a contractor did to comply with 41 CFR 2.17(b)(3) are not "communications" covered by the attorney-client privilege. *See, e.g., In re Vioxx Prods. Liab. Litig*., 501 F. Supp. 2d 789, 805 (E.D. La. 2007) ("when a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it"); *Stout v. Illinois Farmers Ins. Co*., 150 F.R.D. 594, 611 (S.D. Ind. 1993), *aff'd*, 852 F. Supp. 704 (S.D. Ind. 1994) (citation omitted) ("[t]he attorney-client privilege is not so broad as to cover all of a client's actions taken as a 'result[ ] of communications between attorney and client.'").

- Likewise, a contractor may not withhold its compensation analysis documentation during a compliance evaluation by invoking the work-product doctrine. The work-product doctrine protects material that was prepared in anticipation of litigation. *See Allen v. Chi. Transit Auth.*, 198 F.R.D. 495, 500 (N.D. Ill. 2001); *In re Grand Jury*, 23 F.4th 1088, 1093 (9th Cir. 2021). It does not protect materials that would have been created in substantially similar form in the absence of litigation (e.g., because their creation is otherwise required by regulation). *See United States v. Adlman*, 134 F.3d 1194, 1195 (2d. Cir. 1998).

- Additionally, because contractors are aware, when they prepare documentation of their compliance with 41 CFR 60-2.17(b)(3), that they must make it available to OFCCP (*see* 41 CFR 60-2.10(c)), this documentation is not "confidential," and the privilege does not attach to it. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) (The attorney-client

> privilege attaches to confidential communications made between an attorney and client for the purpose of obtaining legal advice); *United States v. (Under Seal),* 748 F.2d 871, 874 (4th Cir. 1984) (A communication is not confidential if it is intended to be disclosed to a third party).

OFCCP's positions are contrary to controlling authority in the jurisdiction in which Directive 2022-01 Revision 1 was published, the DC Circuit. In *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 760 (D.C. Cir. 2014), the Court of Appeals reviewed the decision of a district court that an internal investigation conducted by counsel was not privileged "on the ground that KBR's internal investigation was undertaken to comply with Department of Defense regulations that require defense contractors such as KBR to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing. The District Court therefore concluded that the purpose of KBR's internal investigation was to comply with those regulatory requirements rather than to obtain or provide legal advice." *Id.* at 758. The Court of Appeals rejected the district court's analysis: "In our view, the District Court's analysis rested on a false dichotomy. So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion." *Id.* at 758-59. The Court of Appeals announced the generally applicable rule: "We agree with and adopt that formulation—'one of the significant purposes'—as an accurate and appropriate description of the primary purpose test. Sensibly and properly applied, the test boils down to whether obtaining or providing legal advice was one of the significant purposes of the attorney-client communication." *Id.* at 760. "In the context of an organization's internal investigation, if one of the significant purposes of the internal investigation was to obtain or provide legal advice, the privilege will apply. That is true regardless of whether an internal investigation was conducted pursuant to a company compliance program required by statute or regulation, or was otherwise conducted pursuant to company policy." *Id.*

OFCCP's regulatory requirement of a self-evaluation of potential race or gender disparities in compensation is an internal investigation as to whether there were potential discriminatory pay decisions. Accordingly, OFCCP's positions on these privilege issues are contrary to the established law in the Circuit in which the directive was issued. OFCCP's position is also at odds with the formal position of the United States. The Solicitor General has asserted in briefing to the Supreme Court that "*Kellogg* describes a sensible way of 'applying the primary purpose test' in certain contexts, like internal investigations, where a significant legal purpose, like assessing past liability and ensuring future compliance, would naturally predominate." Brief for the United States, at 32, filed in *In re Grand Jury*, No. 21-1397 (US). The Solicitor General explained that the context related to providing "legal advice about past events and recommendations for future action" provides a "typically a strong reason why internal investigations are specifically conducted by law firms, and courts already generally find such investigations to be predominantly legal." *Id.* at 38.

Accordingly, OFCCP's position, that a contractor's internal review could not be privileged, if it was in any way the basis for the contractor's assertion of compliance with 41 CFR 2.17(b)(3), is

fundamentally mistaken. In light of that error, OFCCP's ICR seeks to compel contractors to produce information that would likely constitute a waiver of privilege and abrogates the critical role of counsel in the review process. The proposed requests should be rescinded and the Agency should return to its longstanding position not to seek such privileged materials during a compliance review.

Similarly, OFCCP has no basis to contend that a contractor that asserts that it has conducted a privileged internal review of its compensation practices can be presumed not to be in compliance with 41 CFR 2.17(b)(3) because it refuses to produce information about the privileged review that may well, and likely would, constitute a waiver of the privilege. Contractors have a right to counsel, and it is the very definition of vindictive prosecution to seek to penalize them for exercising their rights. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982) (holding that government engages in vindictive prosecution in violation of due process when it acts against a defendant in response to the defendant's prior exercise of constitutional rights).

c. OFCCP's Directive 2018-05 Suggests Self-Evaluation Approaches Inconsistent With Judicial Interpretations of Title VII.

As discussed below, OFCCP's Directive 2018-05 is inconsistent with judicial interpretations of Title VII, including in its recommended approaches for conducting statistical analyses of compensation data.

B. Directive 2018-05 and Related Proposed Item 21

OFCCP proposes radical changes to the data, information and materials requests related to contractors' compensation practices that transform the initial scheduling letter into a wall-to-wall review of compensation without any inkling that there are potential pay disparities. This upends the historical audit process. The proposed requests will require contractors to pull two years of compensation data, data on all factors that may influence pay, and gather documents that address the policies and practices related to compensation outcomes for the entire AAP workforce. These many new requests will result in a profound increase in the burden imposed on contractors. For larger AAP workforces, of 500 employees or more, the burden estimate must be a hundred hours to develop a response to this proposed item alone.

Further, it is unclear how OFCCP could properly review all of this information and data in 1,250 audits in a year. OFCCP only has so many statistical experts and so many supporting attorneys and other relevant professionals. Contractors have already experienced significant bottlenecks where OFCCP has reviewed data for many months or even years after submission.

In addition to the massive burdens, OFCCP's approach to evaluating compensation during compliance reviews, outlined in OFCCP Directive 2018-05, "Analysis of Contractor Compensation Practices During a Compliance Evaluation," has never been subject to public comment. As noted above, part of the PRA standard is to "ensure that the . . . use . . . of information by . . . the Federal Government is consistent with applicable laws." 44 U.S.C. § 3501(8). Here the applicable law is Title VII of the Civil Rights Act of 1964 and OFCCP's

proposed use of the requested compensation data and information outlined in Directive 2018-05 is demonstrably inconsistent with judicial interpretations of Title VII. Under the PRA, the data request cannot be approved given the inconsistency with Title VII discussed below.

1. OFCCP Directive 2018-05 Is Inconsistent With Judicial Interpretations of Title VII.

OFCCP Directive 2018-05 conflicts with judicial interpretations of Title VII and should be rescinded. OFCCP should engage in a notice and comment process to develop an alternative approach to evaluation of compensation data and practices and publish revised guidelines that are consistent with judicial interpretations of Title VII, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes et al.*, 564 U.S. 338 (2011).

Among the many conflicts between Directive 2018-05 and judicial interpretations of Title VII are the following:

- Directive 2018-05 retains the concept of "Pay Analysis Groups," of "PAGs," which authorizes aggregate regression analyses without any reference to Title VII standards. Equally problematic, FAQs accompanying the directive specify that PAGs must contain at least 10 employees for each control factor in the model. OFCCP's definition of PAGs and its 10-employee criteria bears no relationship to the Supreme Court's discussion of statistical aggregation in systemic pay discrimination cases. In *Dukes*, 564 U.S. at 356-57, the Supreme Court explained that statistical aggregation in regressions designed to demonstrate pay discrimination must be structured (1) to evaluate pay decisions of a common decision-maker, 564 U.S. at 350, or (2) to assess whether a common pay decision-making criterion caused a disparate impact in pay, 564 U.S. at 353.

- Directive 2018-05 and accompanying FAQs indicate that OFCCP would combine job titles without at least five employees, grouping based on proximity of average pay, without regard to their actual job duties, responsibility levels, and requisite skills and qualifications required of the employees' positions. However, OFCCP purports to rely on the EEOC Compliance Manual, which makes no reference to combining employees based on average pay, and that approach is inconsistent with judicial interpretations of Title VII. *See, e.g.*, *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 262-63 (4th Cir. 2005); *Cooper v. Southern Co.,* 390 F.3d 695, 717 (11th Cir. 2004); *Coward v. ADT Security Systems, Inc.,* 140 F.3d 271, 274 (D.C. Cir. 1998); *see also Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination*, 71 Fed. Reg. at 35124-141 (collecting cases).

- OFCCP explained that it will "[t]est all variables for neutrality, and omit any variables that it determines from its evaluation are tainted by discrimination." Directive 2018-05, at 8. Courts generally reject this argument as an invalid "bootstrap" and require proof, independent of its statistical effect, that the factor actually was applied in a discriminatory manner. *See, e.g., Morgan v. UPS*, 380 F.3d 459, 466, 470 (8th Cir. 2004) (rejecting plaintiff's argument that past pay was a tainted variable that should not have been

included in the regression model, because the plaintiffs were unable to link past pay to any discrimination); *Smith v. Xerox Corp.*, 196 F.3d 358, 371 n.11 (2d Cir. 1999) ("Absent evidence tending to show that the CAF scores were tainted they should have been included in a multiple regression analysis in an effort to eliminate a relatively poor performer compared to coworkers as a cause of each plaintiff's termination."); *Ottaviani v. State Univ. of New York*, 875 F.2d 365, 372-73 (2d Cir. 1989) (noting that plaintiffs were required to show that academic rank was a "tainted" variable at trial by demonstrating that discrimination affected rank).

- Directive 2018-05 provides that "testimony about the extent of discretion . . . involved in making pay decisions" constitutes anecdotal evidence of pay discrimination. However, the Supreme Court explained that delegating discretion to managers to make employment decisions is "a very common and presumptively reasonable way of doing business – one that we have said 'should itself raise no inference of discriminatory conduct.'" *Dukes*, 564 U.S. at 355 (quoting *Watson v. Fort Worth Bank & Trust*, 487 U. S. 977, 990 (1988)).

- Directive 2018-05 provides that OFCCP may allege pay discrimination under a disparate impact theory and that the employer would have to justify the challenged pay practice under a business necessity standard. This position is contrary to Section 703(h) of Title VII, which incorporates the "any of factor other than sex" defense of the Equal Pay Act, a provision the Supreme Court has explained was designed by Congress to "prohibit all disparate impact claims." *Smith,* 544 U.S. at 239 n.11. None of the federal courts of appeals has applied a business necessity standard in this context. *See Wernsing v. Dep"t of Human Servs*., 427 F.3d 466, 470 (7th Cir. 2005) (discussing cases).[3]

a. Standards for Statistical Evaluation for Systemic Pay Discrimination

In the OFCCP's prior Standards, *Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination*, 71 Fed. Reg. at 35124-141, the basic framework involved a two-step process: (1) identification of similarly situated employees based on actual job duties and other factual criteria; and (2) regression analyses that compared the compensation of these similarly situated employees while controlling for legitimate factors affecting pay, such as time in job, time in grade, prior work experience and performance.

[3] Section 703(h) of Title VII provides the following defense: "[i]t shall not be an unlawful employment practice . . . for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act] section 206(d) of Title 29." 42 U.S.C. § 2000e-2(h). This provision incorporates the four affirmative defenses of the Equal Pay Act (EPA) into Title VII. *Cty. of Washington v. Gunther*, 452 U.S. 161, 170 (1981). In *Smith*, the Supreme Court explained, "[w]e note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(l), Congress barred recovery if a pay differential was based 'on any other factor'- reasonable or unreasonable-'other than sex.' The fact that Congress provided that employees [sic] could use only reasonable factors in defending a suit under the ADEA is therefore instructive." *Smith*, 544 U.S. at 239 n. 11 (2005).

In Directive 307, OFCCP dramatically changed the approach and introduced the concept of a "Pay Analysis Group" or "PAG," which was a collection of employees who were admittedly not similarly situated. OFCCP would conduct regression analyses by PAGs. By contrast, OFCCP's Compensation Standards did not favor aggregate or "pooled" regressions that combined across employees in many different jobs, business units and locations to achieve larger sample sizes. *See Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination*, 71 Fed. Reg. at 35,124-141. When the 2006 Standards addressed sample size concerns by allowing "pooled regressions," it did so only with safeguards that required inclusion of "interaction terms" if called for by the "Chow test." 71 Fed. Reg. at 35,140. In all events, the OFCCP Standards mandated that comparisons could be made only of similarly situated employees. *See* 71 Fed. Reg. at 35130 ("Under no circumstances will OFCCP attempt to combine, group, or compare employees who are not similarly situated under these final interpretive standards.").

Directive 2018-05 retains "Pay Analysis Groups" (and also retains the acronym "PAGs") and FAQs issued at the same time as the directive define PAGs nearly identically to the definition provided in Directive 307:

> 7. **What is a "pay analysis group" and how does OFCCP use it in the compensation analysis?**
>
> OFCCP defines a pay analysis group as a group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of analyzing a contractor's pay practices. A pay analysis group may be limited to a single job or title, and regression analysis may be performed separately on distinct units or categories of workers. Alternatively, a pay analysis group may aggregate employees from multiple job titles, units, categories and/or job groups in order to perform a regression analysis, with statistical controls added as necessary to ensure workers are similarly situated. (Statistical testing for practices that impact pay such as job assignment may require a different analytic grouping than testing for pay differences within a single job.)

These so-called "PAGs" are inconsistent with the Supreme Court's discussion of statistical aggregation in *Dukes*, 564 U.S. at 356-57. In *Dukes*, the Supreme Court explained that statistical aggregation in regressions designed to demonstrate pay discrimination must be structured (1) to evaluate pay decisions of a common decision-maker, 564 U.S. at 350, [4] or (2) to assess whether a

[4] In *Dukes*, Wal-Mart's expert statistician conducted regression analyses of decisions made by each store manager, which failed to show statistical disparities in pay for most stores. 564 U.S. at 356-57. By contrast, the plaintiffs' expert in *Dukes* showed statistical pay disparities based on analyses conducted by region or nationwide. *Id.* The Supreme Court determined that plaintiffs' analyses failed to raise a reasonable inference of disparate treatment by store managers:

> As Judge Ikuta observed in her dissent, "[i]nformation about disparities at the regional and national level does not establish the existence of disparities at individual stores, let alone raise the inference that a company-wide policy of discrimination is implemented by discretionary decisions at the store and district

common pay decision-making criterion caused a disparate impact in pay, 564 U.S. at 353. OFCCP's definition of Pay Analysis Groups makes no mention of these factors, nor does it bear any relationship to a recognized theory of discrimination.

While Directive 2018-05 indicates a preference to attempt to "mirror the contractor's compensation structure" when forming PAGs, the directive and FAQs impose several conditions on the PAGs that authorize Agency investigators to conduct analyses organized in a way that deviates substantially from the contractor's compensation structure. Two aspects of the directive and FAQs make this the case, both of which relate to maximizing sample sizes.

First, OFCCP explains that, when creating PAGs, "OFCCP's approach, however, is to first review each of the pay analysis groups to evaluate whether they contain at least 30 employees under a similar pay system performing broadly similar job functions. OFCCP then additionally tries to ensure that there are at least 10 observations (or employees) per control variables to be able to conduct a sound statistical analysis. For example, if a model evaluating pay had five control variables (e.g. sex, year in the job, other years in the company, years of prior experience, and required certification) that pay analysis grouping would ideally have at least 50 employees." In practice, this 10-observation criteria authorizes OFCCP to combine groups that are differentiated under the employer's compensation system, e.g., combine pay grades.

Second, Directive 2018-05 and the FAQs repeatedly suggest that the Agency would be reluctant to control for job title in its models. And when the Agency does control for job title, it will combine distinct titles in order to achieve larger sample sizes:

> 15. **Does OFCCP control for job title within a pay analysis grouping?**
>
> OFCCP will attempt to control for, or take in account, job title if pay legitimately varies by job title. In many instances controlling for factors like grade level, department, or business unit sufficiently distinguishes functional differences in job titles, so that additional controls for job title itself are not necessary. However, when OFCCP does control for job title, it does so by creating a series of component dichotomous (0-1) variables to be compared to a reference category. To capture meaningful pay differentials across the categories, OFCCP requires that each category contain at least five observations. If a category has fewer than five observations, OFCCP will join those

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level." 603 F.3d, at 637. A regional pay disparity, for example, may be attributable to only a small set of Wal-Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

564 U.S. at 356-57; *see also Bolden v. Walsh*, 688 F.3d 893, 896 (7th Cir. 2012) ("The sort of statistical evidence that plaintiffs present has the same problem as the statistical evidence in *Wal-Mart*: it begs the question. Plaintiffs' expert . . . assumed that the appropriate unit of analysis is all of Walsh's Chicago-area sites. He did not try to demonstrate that proposition. If Walsh had 25 superintendents, 5 of whom discriminated in awarding overtime, aggregate data would show that black workers did worse than white workers — but that result would not imply that all 25 superintendents behaved similarly . . .").

> observations with their ordinal counterpart (e.g. nearest grade or level) or to the category with the nearest average pay. With this approach, OFCCP meaningfully controls for pay differentials across job titles while minimizing the risk of saturating the model with low frequency employee controls.

Both of these criteria are entirely inconsistent with judicial interpretations of Title VII, which foreclose comparisons of employees who are not similarly situated simply to maximize statistical sample sizes. Nor are these approaches consistent with generally accepted techniques in labor economics *in the context of legal cases*. It appears that, in adopting these criteria, the Agency has confused techniques that might be used in a generalized research study designed to test some theoretical explanation of broad labor market dynamics. Those criteria are altogether misplaced in the context of statistical analyses designed to be the basis for a legal claim, which must follow legal standards designed to ensure that innocent employers are not falsely accused.

b. Standards for Anecdotal Evidence

In *Teamsters v. United States*, the Court affirmed the lower court's determinations that the Government met is burden of proof through a combination of statistical evidence and anecdotal evidence. The Court explained:

> The company's principal response to this evidence is that statistics can never, in and of themselves, prove the existence of a pattern or practice of discrimination, or even establish a prima facie case shifting to the employer the burden of rebutting the inference raised by the figures. But, as even our brief summary of the evidence shows, this was not a case in which the Government relied on "statistics alone." The individuals who testified about their personal experiences with the company brought the cold numbers convincingly to life.

431 U.S. 324, 339 (1977). The Court described the anecdotal evidence at issue in that case as follows:

> The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination. Upon the basis of this testimony, the District Court found that "[n]umerous qualified black and Spanish-surnamed American applicants who sought line driving jobs at the company over the years, either had their requests ignored, were given false or misleading information about requirements, opportunities, and application procedures, or were not considered and hired on the same basis that whites were considered and hired."

431 U.S. at 338.

In *Dukes*, the Supreme Court reaffirmed that anecdotal evidence is a critical component of the proof necessary to establish a pattern or practice of discriminatory treatment. The Court further explained that the sufficiency of the anecdotal evidence in support of statistical evidence should

be evaluated by how the anecdotal evidence relates to the scope and scale of the alleged affected class. 564 U.S. at 358 & n. 9.

In alignment with the Supreme Court's emphasis on the importance of anecdotal evidence, EEOC has been clear that "[a] cause finding of systemic discrimination rarely should be based on statistics alone." EEOC Compliance Manual on "Compensation Discrimination," EEOC Directive No. 915.003 (Dec. 5, 2000), at 10–13 and n. 30. OFCCP's Directive 2018-05 confirms that the Agency "will be less likely to pursue a matter" without anecdotal evidence. However, Directive 2018-05 contains two quite significant reservations that are inconsistent with the Supreme Court's analysis in *Dukes*. First, Directive 2018-05 defines anecdotal evidence broadly as any "non-statistical evidence" and including "testimony about the extent of discretion or the degree of subjectivity involved when making compensation discrimination." By contrast, anecdotal evidence has traditionally meant "individual testimony of specific instances of discrimination," *Valentino*, 674 F.2d at 68, and the Court in *Dukes* explained that delegating discretion to managers to make pay decisions is "a very common and presumptively reasonable way of doing business—one that we have said 'should itself raise no inference of discriminatory conduct." 564 U.S. at 355 (quoting *Watson*, 487 U.S. at 990).

Second, OFCCP notes in Directive 2018-05 that "there may be factors, applicable in a particular case, which explain why OFCCP was unable to uncover anecdotal evidence during its investigation despite the strength of the statistical evidence of systemic compensation discrimination." Going further, OFCCP asserts generally that there may be "other reasons (such as similar patterns of disparity in multiple years or multiple establishments) to pursue a particular case without anecdotal evidence." The Agency reserves its discretion "to pursue purely statistical cases, where appropriate." There is no basis in law for OFCCP's position. *Dukes*, 564 U.S. at 358 n.9.

C. Proposed Item 19

OFCCP proposes to add a request for "documentation of a contractor's 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." While OFCCP attempts to justify this request as it relates to "automated technologies," it is far broader and will require the contractor to pull together a voluminous submission of materials through a manual effort. Especially for larger AAP workplaces, there may be many dozens of different recruitment, screening and hiring practices, policies and mechanisms. Imposing this level of burden without any indication of concern about a particular set of applicant and hire data in a particular job or job group makes no sense and upends decades of OFCCP's audit approach. The burden imposed on contractors will be tremendous.

OFCCP's requests related to so-called "automated technologies" put the cart before the horse. OFCCP has conducted no public regulatory action, either in terms of developing regulatory guidance or changes to regulations, or even to seriously study the issue, regarding these technologies. That regulatory effort must be completed before the Agency can begin to collect information designed to evaluate compliance. *See* discussion of due process requirements at 7,

above. These technologies raise a host of nettlesome issues and the current legal regimes do not apply naturally or obviously in this context. For example, Title VII prohibits race-norming of employment tests. *See* 42 U.S.C. § 2000e-2(l). Similarly, the Supreme Court has ruled that efforts to avoid results that have a disparate impact must be based on a "strong basis in evidence" of a Title VII violation, which necessarily requires consideration of whether the mechanism that produced the impact is job related and consistent with business necessity. *Ricci*, 557 U.S. at 587. Do those legal standards preclude the inclusion of automated corrections within an AI or other technology application so that the results can never produce a disparate impact? Another important example, particularly challenging for OFCCP, is the concern about automated technologies in the recruitment process, where UGESP expressly does not apply to recruitment precisely because affirmative action programs rely on gender- and race-targeted recruitment activities. There are even automated or other technical tools marketed in the Diversity and Inclusion space designed expressly to identify and recruit diverse candidates. The are a host of other thorny issues that must be sorted and addressed with authoritative and comprehensive guidance before OFCCP can begin to enforce in this context. Nor should OFCCP use its audit process as a research tool to gather information about the nature and variation of the AI and other automated technologies to be studied. That could be accomplished through an appropriately designed survey.

OFCCP current requests for applicant and hire data afford the Agency access to data used to evaluate potential disparate impact in the selection process. OFCCP makes various follow-up request to investigate the disparate impact indications observed in the applicant/hire data, designed to identify the mechanism in the selection process causing the disparate impact. There is no reason that these same procedures would be ineffective at identifying disparate impact caused by an "automated technology." Given this existing framework and the lack of regulatory guidance, OFCCP should not upend the audit process to require blanket production of information on any automated technologies.

D. Proposed Item 20(c)

OFCCP proposes a significant expansion of promotion data that is similar to requests made twice over the past decade and in which the Agency has received extensive feedback from contractors that the proposed information would be time consuming and burdensome to develop. Based on those comments, OFCCP twice determined that this information was not necessary. In the current ICR, OFCCP has not identified any changed circumstances that would justify this change in position.

Further, the information on the previous and current supervisor of the promoted employee would not have relevance to analysis of promotions constructed to examine the promotion decisions of the same manager. Neither the prior supervisor, nor the current supervisor (given that the Scheduling Letter could be 20 months or more from the promotion decision) may have had anything to do with the promotion decision. Tracking down the relevant manager(s) who were involved in each promotion decision would be a time-consuming and manual effort. OFCCP has conducted no pilot study of this issue to evaluate the likelihood that either a prior or current supervisor was typically involved with a promotion decision. Without such an empirical basis,

OFCCP does not have adequate support for its assumption that collecting that information would lead to more accurate promotion analyses.

It is unclear, and OFCCP does not explain, how prior and current compensation data would relate in any way to more accurate promotion analyses. Again, the current compensation may have no relationship to the compensation for the promotional position given the time lag between the promotion and the scheduling letter. Presumably OFCCP means by "prior compensation" the compensation that the employee had prior to the promotion. Tracking down the compensation immediately before and immediately after each promotion would be a time-consuming manual effort.

OFCCP's proposed request for "documentation that includes established policies and describes practices related to promotions" is also massively burdensome. Depending on the size of the AAP workforce and the variation in the types of functions and levels, there may be many dozens of different promotion policies and practices. Indeed, some practices may be job-specific. Certainly, the promotion criteria, i.e., the skills and qualifications necessary for the job, would be specific to each promotional position. Requiring the contractor to expend the effort to pull all of this information and materials together without any indication of a potential concern makes no sense and completely inverts the historical OFCCP audit process.

IV. Conclusion

For the above reasons, we respectfully request that OFCCP significantly modify the proposed information collection request, including rescission of many of the burdensome requests, and adopt a final ICR consistent with these comments. We very much appreciate the opportunity to submit these comments.

Respectfully Submitted,

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