NATIONAL INDUSTRY LIAISON GROUP

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

**Re: National Industry Liaison Group's Comment on OFCCP's Proposed Approval of Information Collection Requirements**
**OMB No. 1250-0003**

Dear Ms. Williams:

The National Industry Liaison Group ("NILG") welcomes the opportunity to comment on the Information Collection Request published in the November 21, 2022 edition of the *Federal Register* regarding the OFCCP's "Proposed Approval of Information Collection Requirements" ("Proposal").

By way of background, the NILG was created over thirty years ago as a forum for the Office of Federal Contract Compliance Programs ("OFCCP" or "Agency") and federal contractors to work together towards equality in the workplace. Throughout the country, local Industry Liaison Groups ("ILGs") have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size, and large employers across the country, have reached out to the OFCCP and other agencies, such as the U.S. Equal Employment Opportunity Commission, with mutual goals of fostering a non-discriminatory workplace. Therefore, in response to the Proposal, the NILG seeks to present the views of well over sixty local ILGs and their members.

We commend the OFCCP for, and share its commitment to, promoting equal employment opportunity and non-discrimination for applicants and employees based on race, color, religion, sex, sexual orientation, gender identity, national origin, and veteran and disability status. In our comments below, we respectfully offer observations and suggestions designed to ensure the OFCCP is able to carry out its duty to review contractor practices and evaluate the opportunities

and treatment these individuals are afforded while, at the same time, balancing the contractor community's legitimate interest in ensuring the Agency receives data reflective of the employer's actual workplace policies and workforce and minimizing administrative burdens.

The NILG has reviewed the Agency's proposed changes to the Scheduling Letter and Itemized Listing. As set forth in more detail below, many of the changes significantly increase the burden for federal contractors, while providing little, if any, benefit to the OFCCP's stated mission. The NILG respectfully requests that the OFCCP give careful consideration to the "real world" practical consequences of the OFCCP's Proposal. More significantly, and as addressed in more detail below, the Agency's estimated burden on federal contractors is specious, unsupported by empirical evidence, and fails to take into account real world practicalities. In an effort to provide meaningful and concrete feedback to the OFCCP, the NILG surveyed its ILG constituents on a variety of issues raised by the Proposal, and we received responses from over 100 contractors. The feedback regarding the estimated time for responding to the additional items contained in the Proposal differs substantially from that espoused by the Agency. We respectfully request the OFCCP to heed the actual burdens that the Proposal will place on contractors.

The OFCCP's proposed changes represent a marked expansion of the already burdensome reporting requirements faced by contractors. If adopted, the Proposal would render every compliance evaluation a full-blown pattern or practice investigation, rather than a reasonable focus on general compliance and areas where indicators show that a problem may exist. The OFCCP's desire to incorporate every phase of an audit, *i.e.*, desk audit, request for information, onsite discovery, etc., in every compliance evaluation is untenable both for contractors and the Agency (which, frankly, does not have the resources to effectively manage the volume of data that such audit requests would generate). Further, to propose this degree and scope of change without a concomitant increase in the time afforded to contractors to respond demonstrates that the OFCCP is completely out of touch with contractors' resources, how compliance is managed, the burden these requirements would place on contractors, and/or is abusing its authority as an enforcement agency of the federal government. The NILG strongly encourages the OFCCP to revisit the impetus and rationale for the Proposal and to adopt a more grounded and commonsensical approach for both contractors and the Agency. Such methodology would limit the desk audit to a review of information likely to identify areas of concern. If those concerns arise, the Agency could delve more thoroughly with targeted follow-up requests for information.

## I. RESPONSE TO PROPOSED CHANGES TO SCHEDULING LETTER AND ITEMIZED LISTING

### A. Service by Email

The NILG and its constituents do not object to the concept of serving the Scheduling Letter and Itemized Listing by email. However, this proposal raises practical and logistical concerns that should be addressed prior to the Agency instituting such a process. In particular, the OFCCP should confirm the appropriate email address *before* sending the Scheduling Letter and Itemized Listing. This essentially reflects the current process where the Agency contacts the contractor to confirm contact and address information prior to mailing the documents. *See Federal Contract Compliance* Manual, Section 1B00, Initial Contact with the Contractor. This step would help to

avoid situations where the documents are emailed to a person who is no longer with the company or whose responsibilities do not involve affirmative action compliance. Contractors are concerned that an unsolicited email may sit unopened in an individual's in-box if the OFCCP has not confirmed to whom the documents should be delivered and advised that they are forthcoming. Because a contractor would be prejudiced if the OFCCP directs an email to an individual who is not an appropriate point of contact by reducing its time to respond, the NILG requests that the OFCCP specifically state that its process will include this important step prior to adopting service by email.

In addition, the NILG notes that the person identified on an organization's EEO-1 Report is not always the person responsible for affirmative action compliance. Although that person may provide the Agency with a starting point for determining the appropriate contact, we urge the Agency not to assume that the official listed on the EEO-1 Report is the correct point of contact. Contractor information in the OFCCP's Contractor Portal would likely provide a more accurate starting point for the Agency in making this determination.

The Agency should also acknowledge that emails sent while the organization's chosen representative is away from work are not counted as delivered until that individual returns to work. For example, if the representative is on vacation or away from work for several days, the Scheduling Letter and Itemized Letter should not be considered as received until that person is in a position to actively respond to emails, and therefore, the time period to respond should not begin until that person responds and confirms receipt of the email. The OFCCP surely recognizes the importance of work-life balance in today's culture and that individuals necessarily take time away from work for a variety of personal and professional obligations. An organization should be not penalized when the OFCCP chooses to send an email during such an absence. Indeed, the OFCCP's inclusion of "READ RECEIPT REQUESTED" in the delivery portion of the Proposal indicates that this is the Agency's anticipated approach. Thus, the NILG respectfully requests that the OFCCP affirmatively state that the response time would begin when the contractor's point of contact confirms receipt of the email.

B. Compliance Reviews of Contractors with Campus-Like Settings

The NILG objects to the proposal to require organizations with campus-like settings to submit more than one AAP per compliance evaluation. The Proposal would require such contractors to submit all AAPs for any part of the organization located in the same city. This proposed change ignores two very important facts.

First, the OFCCP has authorized contractors to develop separate AAPs in appropriate circumstances, such as when "employees located across several buildings on a campus are operationally distinct."[1] The OFCCP advises contractors to consider a variety of factors involving the interrelationship of operations. Thus, where a contractor develops separate AAPs for different parts of the organization – as permitted by the OFCCP – those different components are sufficiently distinct that reviewing one AAP would *not* assist the OFCCP with reviewing another

[1] *Developing and Maintaining Establishment-Based Affirmative Action Programs for Campus-Like Settings Frequently Asked Questions* (https://www.dol.gov/agencies/ofccp/faqs/campus-settings).

AAP. The OFCCP's stated justification that this change would "promote the prompt production of relevant AAPs" is therefore inaccurate. (OFCCP's Supporting Statement, p. 10).

Second, the OFCCP's Contractor Portal allows contractors to enter detailed information regarding its individual AAP establishments. Thus, contractors with campus-like settings that have chosen to develop separate AAPs for its different establishments may inform the OFCCP of this information. The OFCCP has previously stated that it intends to use the information submitted in the Portal for purposes of selecting contractors for compliance evaluations, and the OFCCP can harvest the information regarding an entity's unique establishment structure for that same purpose. Accordingly, the OFCCP has no justification to deviate from its long-standing procedures in evaluating one establishment at a time based on its neutral scheduling methodology. To do otherwise renders the OFCCP's scheduling process suspect and overreaching.

Moreover, the OFCCP does not clarify a discrepancy between its current scheduling methodology and the Proposal. As noted by the OFCCP in footnote 17 of its Supporting Statement, a compliance review of institutions of higher education "will *not* include the university's other campuses in another city, medical school and/or its affiliated hospital." (OFCCP Supporting Statement, p. 10) (emphasis added). However, the Proposal "clarifies that contractors with campus-like settings, such as hospitals and information technology companies, are similarly required to produce all AAPs for the campus located in that city." (OFCCP Supporting Statement, p. 10). These statements are internally inconsistent as one states that the hospital AAP would not be required, but the other states that it must be submitted.

The OFCCP also does not explain to what extent the other campus-like AAPs would be evaluated during the compliance review. OFCCP is required to select contractors for review pursuant to a neutral selection process, and the establishments or functional affirmative action plans must be scheduled in the order they appear on the list. Any attempt to review the AAP or FAAP of any establishment not on the list, or out of order, would be a violation of the Fourth Amendment. Contractors have the right to understand – and the OFCCP has the obligation to inform – whether these additional AAPs will be scrutinized as any other AAP subject to a compliance evaluation would be. If the OFCCP intends to conduct compliance reviews of these additional AAPs, analyzing the data and/or aggregating the information with other AAPs, this would constitute action that the OFCCP is not authorized to take. The OFCCP has provided no justification for requiring contractors to provide AAPs or FAAPs for establishments beyond those neutrally selected and scheduled for a compliance review.

Finally, the requirement to submit all AAPs for any part of the organization located in the same city as the establishment being audited would include other separate establishments that are not part of the campus-like setting. Specifically, the OFCCP proposes:

> If you are a post-secondary institution or federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, *or other parts of your institution, or company* located in [city and state only].

(Emphasis added).

This provision is not limited to those other portions of the campus under the review. A contractor with a campus-like setting could have other "non-campus-related" establishments in the same city. It does not appear that the OFCCP intends to include the AAPs for such separate establishments in its Proposal, but the proposed language is so broad that such separate establishments could be interpreted to be included. Thus, if the OFCCP declines to eliminate this requirement altogether, the NILG suggests that this language be modified to clarify that the submission requirement only applies to other components of the same campus-like setting.

The NILG respectfully requests that the OFCCP withdraw its proposal to require contractors selected for a compliance evaluation to submit more than one AAP per compliance review.

C. Time Period to Respond to Proposed Scheduling Letter and Itemized Listing

The NILG and the contractor community respect the OFCCP's investigative authority and desire to comply with the obligations to provide information to the Agency in furtherance of that objective. However, as set forth in detail below, the information requested in the Proposal is significantly more than what the Agency currently requests from contractors. Despite these significant substantive changes, the OFCCP does not propose any additional time beyond the current thirty days for contractors to respond. Notable, when the OFCCP updated the regulations and Scheduling Letter in 2014, effectively doubling compliance requirements, the Agency failed to increase the time to respond to the Scheduling Letter. After those changes, the OFCCP noticed that some contractors were not submitting their AAPs in a timely manner and assumed that was because they were not preparing their AAPs. In reality, the burden on contractors increased significantly, but the timeframe to respond did not. Compounding that burden yet again without increasing the time to respond will not benefit the Agency, contractors, or equal employment opportunity efforts.

If even only some of the proposed changes are adopted, the NILG suggests that the response time be enlarged from thirty days to at least ninety days. Over 26% of NILG survey respondents stated that sixty to ninety days would be a more appropriate time period; less than 12% of our survey respondents believe that thirty days would represent a reasonable time period for responding to the proposed Scheduling Letter and Itemized Listing. Over a quarter of survey respondents believe that more than ninety days would be needed. An enlargement of time would increase the likelihood contractors would be able to timely respond, decreasing the flood of extension requests the OFCCP will invariably receive under the Proposal.

The NILG would also request that the OFCCP refrain from using the revised Scheduling Letter and Itemized Listing for at least 180 days after it is approved to give the contractor community time to prepare for the impending changes. The NILG does not believe this suggestion burdens the Agency in any way and would greatly benefit the contractor community and aid the furtherance of equal employment and affirmative action compliance.

D. Proposed Item 4 – Availability Determination

The NILG does not object to this proposed change.

E. Proposed Item 7 – List of Action-Oriented Programs

The Proposal would require, "[p]ursuant to 41 CFR 60-2.17(c), . . . a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b)." In contrast, the regulations require a contractor to "develop" and "execute" action-oriented programs where problem areas are identified in various components of its affirmative action plan. 41 C.F.R. § 2-17(c). The NILG does not dispute that the OFCCP is entitled to documentation demonstrating that a contractor has complied with this provision; however, the NILG submits that the requirement to "develop" and "execute" action-oriented programs is an entirely different task than listing and identifying those action items. Thus, to comply with the Proposal, a contractor would be obligated to go beyond its normal AAP development process to prepare the desired list.

As is the case with much of the OFCCP's Proposal, the information sought is only truly relevant for a small number of contractors. The vast majority of contractors do not have compliance deficiencies, and the more detailed information sought by the OFCCP will end up burdening those contractors disproportionately. Significantly, the OFCCP's Supporting Statement does not identify any inadequacy created by conducting compliance evaluations without submission of this information at the desk audit stage.

The NILG submits that proposals such as this one – where the information sought is only needed in a small number of compliance evaluations – should be removed to avoid overburdening organizations that already face overwhelming compliance obligations from ever-increasing sources and regulators. Significantly, more than half of the NILG survey respondents indicate that this item alone would take more than ten hours to prepare.

F. Proposed Items 8 and 12 – Recruitment Efforts Toward Individuals with a Disability and Protected Veterans

Currently, contractors are required to evaluate whether recruitment and outreach efforts toward individuals with a disability and protected veterans are effective and to provide the results of those evaluations to the OFCCP. Now, the Agency proposes to mandate that contractors submit the following:

- documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified individuals with a disability and protected veterans;
- an assessment of the effectiveness of these efforts as provided in 41 C.F.R. §§ 60-300.44(f) and 60-741.44(f);
- documentation of all activities undertaken to comply with the obligations at 41 C.F.R. §§ 60-300.44(f) and 60-741.44(f);
- criteria used to evaluate the effectiveness of each effort;
- whether each effort was found to be effective;

- whether the totality of the efforts are believed to be effective; and
- in the event the totality of the efforts was not effective in identifying and recruiting qualified individuals with a disability and protected veterans, detailed documentation describing the actions in implementing and identifying alternative efforts, as provided in 41 C.F.R. §§ 60-300.44(f)(3) and 60-741.44(f)(3).

The regulations at 41 C.F.R. § 60-300.44(f) provide:

> External dissemination of policy, outreach and positive recruitment.
> (1) Required outreach efforts.
>
> (i) The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit protected veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.
>
> (ii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.
>
> (2) Examples of outreach and recruitment activities. Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section. This is an illustrative list, and contractors may choose from these or other activities, as appropriate to their circumstances.
>
> (i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for veterans, in order to fulfill its commitment to provide meaningful employment opportunities for such veterans:
>
> (A) The Local Veterans' Employment Representative in the local employment service office (i.e., the One-Stop) nearest the contractor's establishment;
>
> (B) The Department of Veterans Affairs Regional Office nearest the contractor's establishment;
>
> (C) The veterans' counselors and coordinators ("Vet-Reps") on college campuses;
>
> (D) The service officers of the national veterans' groups active in the area of the contractor's establishment;
>
> (E) Local veterans' groups and veterans' service centers near the contractor's establishment;
>
> (F) The Department of Defense Transition Assistance Program (TAP), or any subsequent program that, in whole or in part, might replace TAP; and
>
> (G) Any organization listed in the Employer Resources section of the National Resource Directory

(http://www.nationalresourcedirectory.gov/), or any future service that replaces or complements it.

(ii) The contractor should also consider taking the actions listed below, as appropriate, to fulfill its commitment to provide meaningful employment opportunities to protected veterans:

(A) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor's affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(B) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are protected veterans.

(C) An effort should be made to participate in work-study programs with Department of Veterans Affairs rehabilitation facilities which specialize in training or educating disabled veterans.

(D) Protected veterans should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(E) The contractor should take any other positive steps it deems necessary to attract qualified protected veterans not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for any of the classifications of protected veterans.

(F) The contractor, in making hiring decisions, should consider applicants who are known protected veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(G) The contractor should consider listing its job openings with the National Resource Directory's Veterans Job Bank, or any future service that replaces or complements it.

(3) Assessment of external outreach and recruitment efforts. The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified protected veterans. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts must be reasonable as

determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified protected veterans, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

The regulations at 41 C.F.R. § 60-741.44(f) have corresponding requirements for individuals with a disability.

The purpose of incorporating the regulation here in its entirety is to emphasize the extensive nature of this regulatory provision and the expansive scope that this request would necessarily create for every single compliance evaluation that the OFCCP conducts. The NILG submits that the current Scheduling Letter and Itemized Listing appropriately balances the burden on the contractor and the needs of the Agency. In those limited instances where a contractor either has not evaluated its recruitment efforts or where its efforts were patently inadequate, the OFCCP could appropriately seek further documentation of compliance. However, where a contractor's evaluation is compliant and demonstrates reasonable good faith efforts, the Agency lacks sufficient justification for delving into the minutiae of a contractor's compliance endeavors. Doing so would unnecessarily and substantially increase the burden on contractors, while providing limited utility to the Agency in the majority of compliance evaluations. This point applies equally to most of the OFCCP's proposed changes. Significantly, more than half of the NILG survey respondents indicate that this item alone would take more than ten hours to prepare for each AAP. Therefore, the NILG submits that this proposed change should be rejected.

G. Proposed Item 11 – Utilization of Individuals with a Disability

The OFCCP seeks to exponentially expand the amount of information addressing utilization of individuals with a disability and the contractor's assessments of its recruitment efforts. Currently, contractors must provide the utilization analysis of its current workforce by job group (or workforce if it has 100 or fewer employees) to determine if the national utilization goal of seven percent has been met. Now, the Agency proposes to mandate that contractors submit the following additional information:

- If any underutilization of individuals with disabilities is identified, a description of the steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 C.F.R. § 60-741.45(e), including:
    - the assessment of personnel processes;
    - the effectiveness of outreach and recruitment efforts;
    - the results of the affirmative action program audit;
    - any other areas that might affect the success of the affirmative action program; and
    - a description of action-oriented programs developed and executed to correct any identified problem areas.
- This information must be provided for the immediately preceding AAP year, and if the contractor is six months or more into its current AAP year, it must also provide the information that reflects its progress for at least the first six months of the current AAP year.

In addition to requesting more information than is reasonably necessary, this proposal is duplicative of other items already contained in the Itemized Listing:

- Current Item 21 requires submission of the most recent assessment of personnel processes;
- Current Item 9 requires submission of the evaluation of the effectiveness of outreach and recruitment efforts (*see* 41 C.F.R. § 60-744.44(h)(i)); and
- Current Item 9 requires submission of the audit and reporting system requirements.

Including duplicative reporting obligations will only sow more confusion among contractors, not reduce it as the Agency is ostensibly attempting.

With respect to the proposal that contractors more than six months into their current AAP year be required to submit "information that reflects . . . progress for at least the first six months of the current AAP year," the NILG submits that this is inapplicable. The seven percent utilization goal for individuals with a disability is only performed on an annual basis and is based on a static workforce snapshot, not evolving employment activity. 41 C.F.R. § 60-741.45(d)(3). The regulations do not require contractors to run a mid-year snapshot report for purposes of analyzing utilization of individuals with a disability; thus, the OFCCP is attempting to impose an additional burden on contractors that has no foundation in the regulations. In addition, there is no regulatory requirement that contractors assess personnel processes, the effectiveness of their recruitment efforts, audit their programs, or develop action-oriented programs more frequently than on an annual basis. Accordingly, the request for year-to-date information should not be approved.

Significantly, more than half of the NILG survey respondents indicate that this item alone would take more than ten hours to prepare. Based on all of this information, the NILG encourages the OFCCP to reconsider the revision to this item.

H. Proposed Item 19 – Information on Employment Screening

The OFCCP seeks to include a new request for all information relating to a contractor's recruiting and screening processes, including hiring mechanisms, the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures. The wording of this proposal is incredibly broad in scope and would basically include any part of the recruitment and selection process that is not done solely by a human being. In today's world, most components of the recruitment and selection process involve some type of "technology-based" process.

Again, the OFCCP seems to be putting the cart before the horse. As stated in the Agency's Supporting Statement, "Use of these technologies may lead to instances of screening or selection bias. . . . Addition of this requirement will allow OFCCP to access the contractor's use of such technology to determine whether these tools are creating barriers to equal employment opportunity." (OFCCP's Supporting Statement, p. 15). This, however, overlooks the Uniform Guidelines on Employee Selection Procedures, which provide that:

> If . . . the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, *will not expect a user to evaluate the individual components*, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection.

41 C.F.R. § 60-3.4(C) (emphasis added).

Thus, it would only be the unusual event where a contractor had unexplained adverse impact in its overall selection process that the OFCCP would have any justification for seeking this type of information. The OFCCP's statistics show that it finds discrimination in only approximately two percent of all compliance evaluations. In light of the extremely low likelihood that information of this nature would be relevant to the Agency, it is not practical for the OFCCP to request it at the outset of *every single* compliance evaluation. It places unnecessary burden on the contractor with no meaningful utility for the Agency. The OFCCP has the authority to pursue this information *if and when* an individual contractor's data and practices indicate relevance to that specific compliance evaluation. To require a wholesale submission of this information without such a basis, however, would slow down the process and lead to even longer compliance evaluations. This is confirmed by the NILG's survey respondents, 56% of which report that gathering this information would take well more than ten hours. Therefore, the NILG recommends that the Agency remove proposed Item 19 in its entirety.

I. Proposed Item 20(c) – Promotions

Item 20(c) of the Proposal requires contractors to "identify whether each promotion was competitive or non-competitive" and to "[p]rovide documentation that includes established policies and describes practices related to promotions in the submission. Also include the previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which the person(s) was promoted."

The NILG's constituents are concerned that this request does not reflect the reality of most Human Resources Information Systems because the type of promotion, *i.e.*, competitive or non-competitive, is not regularly or easily collected or tracked by most HRIS. To comply with this request, contractors would need to reconfigure their systems and/or employ personnel to identify and manually input this individualized information for each promotional activity. Both are costly and burdensome tasks. In our constituent survey, almost 62% of respondents indicated that their organizations do not currently collect this data, and the majority of these respondents stated that compiling the data for this request would take more than ten hours.

Moreover, while contractors are required to maintain records "pertaining to" promotions, 41 C.F.R. § 60-1.12(a), maintaining records related to promotions does not equate to a requirement that contractors track whether promotions are competitive or not. It simply means that contractors must keep records of all promotions awarded to employees. The OFCCP is seeking to add a new recordkeeping requirement that does not currently exist in any of its regulations. *By doing so, the*

*OFCCP apparently seeks to do an end-run around the rule-making process.* This is inappropriate and should not be allowed. The NILG opposes this proposed change to the Itemized Listing.

Furthermore, the request for data regarding previous supervisor, current supervisor, previous compensation, and current compensation would necessarily entail the creation of a list or spreadsheet containing each promotion event during the AAP year, a task that goes well beyond the existing requirements of this provision in the current Itemized Listing.[2] As with tracking the competitive nature of promotions, tracking the individual's supervisor before and after the promotion (which we assume is what the OFCCP actually seeks – as opposed to "current" supervisor) will result in many contractors performing manual research and data entry to gather and report this information. Many HRIS simply do not retain this information such that contractors can readily retrieve it at the press of a button, and it is essential for the OFCCP to understand that supervisory structure and personnel will change throughout the year as well, complicating any effort to identify the specific supervisor for a specific promotional activity. The Agency does not comprehend the time-intensive nature of this data request, nor does it explain how this data component would provide any meaningful value. In most organizations, an individual manager makes very few promotion decisions during any given year; thus, this would not be a worthy data component for the Agency.

The NILG opposes this addition to the Itemized Listing and requests that the OFCCP maintain the *status quo* with respect to the information provided on promotion activity. Just as with other components discussed herein, if and when a particular contractor's data demonstrates actual deficiencies or concerns in promotions, the OFCCP may seek this additional data from that contractor at the appropriate time. However, burdening each and every contractor with this detailed data requirement is counterproductive.

J. Proposed Item 20(d) – Terminations

The proposed changes to this section of the Itemized Listing would require contractors to indicate not just whether a separation was voluntary or involuntary, but the discrete reason for each and every termination during the AAP year. Almost 30% of NILG survey respondents indicate that their organizations utilize more than 25 different termination codes or reasons, with almost 10% using more than 50 different termination codes. This would therefore morph the current response from one exhibit showing all terminations to potentially 50+ exhibits to document each termination reason. The OFCCP provides no basis in its Supporting Statement for seeking termination information at this level of detail.

The NILG submits that the additional burden that such a requirement would impose is far outweighed by a minimal (if any) benefit to the Agency. In instances where termination data indicates potential patterns of meaningful statistical significance, the OFCCP may be warranted in requesting additional detail – but only about the terminations in the specific job title or job group at issue. Requiring contractors to expend unnecessary time and effort in parsing out the myriad of different types of separation decisions will serve only to increase the burden on contractors. It is

[2] The wording of Proposed 20(c) would create confusion because, on the one hand, it would request "the total number" of promotions, but on the other hand, it would seek specific information about each individual promotion. This would create uncertainly regarding what information the OFCCP actually expects to receive.

unimaginable that any compliance review would generate the need for this level of detail *for an entire workforce.* Thus, the NILG recommends that this portion of the Itemized Listing remain unchanged.

K. Proposed Item 20(e) – Prior Year Workforce Demographics

The OFCCP proposes to require contractors to provide the specific racial categories of its prior year workforce. This request is duplicative of and contradicts proposed Item 18(a), which would mandate submission of the prior year workforce data by minority and non-minority status only. Contractors have routinely provided this information by minority and non-minority status, generally, and the OFCCP provides no basis in its Supporting Statement for seeking information at this level of detail. The NILG submits that the additional burden that such a requirement would impose is far outweighed by only minimal benefit to the Agency.

L. Proposed Item 21 – Compensation Data

The OFCCP proposes to double the amount of information -- and corresponding work to compile that information – by mandating that contractors produce an additional snapshot of employee-level compensation data corresponding to the contractor's workforce in the prior year. The Agency describes this as "*only* seeking an additional snapshot," minimizing the extraordinary burden that this task would place on contractors. (OFCCP's Supporting Statement, p. 17) (emphasis added). The OFCCP likely does not understand that compiling and preparing the information for each employee's individual components of compensation for a one-year time period typically involves extracting data from multiple systems, as payroll data is generally not housed in the same system as confidential self-identification demographics and employment information. Indeed, approximately 67% of NILG survey respondents reported that this exercise would exceed ten hours of time.

Proposed Item 21(b) would require that contractors provide all relevant factors that determine compensation, such as education, experience, performance ratings, etc. However, most contractors do not store this information electronically, and it is not easily accessible at the touch of a button as the OFCCP appears to assume. Information regarding education, experience, and performance ratings, in particular, are not usually housed in an HRIS. Thus, the OFCCP's use of mandatory instead of permissive language here would, for most contractors, necessitate untold hours of manual research and data entry for each employee in the workforce, not just for one snapshot of employees, but for two. This is untenable and, at most, should only be expected of those contractors with unexplained compensation disparities. Again, burdening each and every contractor with this detailed data requirement is an abuse of the Agency's power.

The OFCCP also proposes that contractors be required to provide compensation data for "all employees . . . including those provided by staffing agencies." This provision is confusing and will only generate uncertainty for contractors. On the one hand, the request only seeks information for "employees," yet on the other hand, it includes individuals working for staffing agencies. Because most workers provided by staffing agencies are not considered a contractor's "employee," the scope of this request becomes unclear. Moreover, contractors do not have access to compensation information of individuals who are not their employees, nor are they responsible

for setting compensation rates for these individuals. In addition, staffing workers are not similarly situated to a contractor's workforce because their compensation is determined by another entity; the OFCCP would find no value in analyzing the compensation of these separate and distinct workers. Therefore, the NILG strongly encourages the OFCCP to delete that additional language from proposed Item 21. It provides no further clarity to the information sought and only increases the likelihood of confusion. The current request is clear that data on all "employees" must be submitted; the wording is already precise and needs no amplification.

Finally, the OFCCP proposes that contractors provide all policies relating to compensation, "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.). Gathering this much information would be a monumental task involving multiple personnel and departments for most contractors where compensation decisions and policies can vary by department or other organizational factors. Approximately 75% of NILG survey respondents indicate that this venture would take more than five hours to accomplish. The NILG also believes that the OFCCP would likely refer to this detailed information in only a small minority of compliance evaluations where a contractor had unexplained pay disparities. Thus, burdening every contractor with the feat of gathering this detailed information is unreasonable. The NILG urges the OFCCP to remove this provision from the proposal to avoid unnecessary delays and costs.

M. Proposed Item 22 – Evaluation of Compensation System

The OFCCP seeks to require contractors to submit information in accordance with its recent Directive 2022-01 (Revision 1), *Advancing Pay Equity Through Compensation Analysis*. However, the OFCCP's Directive:

> does not create new legal rights or requirements or change current legal rights or requirements for contractors. Executive Order 11246, Section 503, VEVRAA, OFCCP's regulations at 41 CFR Chapter 60, and applicable case law are the official sources for contractors' compliance responsibilities. Nothing in this Directive is intended to change otherwise applicable laws, regulations, or other guidance or to restrict or limit OFCCP's ability to perform compliance reviews, request data, or pursue enforcement of any issue within its jurisdiction. Noncompliance with voluntary standards will not, in itself, result in any enforcement action. This Directive is not intended to have any effect on pending litigation or alter the Agency's basis for litigating pending cases.

(Directive 2022-01 (Revision 1), Section 8, Interpretation).

Despite these limits of a Directive, the OFCCP proposes to require contractors to submit information that it has no regulatory authority to collect or to require contractors to maintain. This, again, appears to be an attempt to perform an end-run around the formal rulemaking process, and the NILG believes that such a request would have no force of law and would be an inappropriate executive agency action. Contractors should not be forced to provide information that the

regulations do not contemplate that they create and/or maintain. This request would also lead some contractors to believe that they have to provide the actual evaluations, assessments, or analyses performed. To alleviate that misunderstanding, the provision should specifically reference Directive 2022-01 (Revision 1), which outlines the options contractors have for demonstrating compliance with 41 C.F.R. § 60-2.17(b)(3).

The OFCCP suggests that "[h]aving this information at the outset of a desk audit will enable OFCCP to conduct a more efficient analysis of a contractor's compensation for systemic discrimination, rather than waiting to request the documentation only if the desk audit reveals disparities in pay or other concerns about the contractor's compensation practices." (OFCCP's Supporting Statement, p. 19). However, this is exactly the NILG's point – the OFCCP rarely finds evidence of discrimination, and burdening every contractor with needless requests for information is unfair and creates pointless busy-work for contractor personnel already overwhelmed with compliance responsibilities. (The vast majority of NILG survey respondents report that preparing this information would easily exceed ten hours). The NILG respectfully requests that the OFCCP remove this proposed item.

N. Proposed Item 23 – Requests for Accommodation

Proposed Item 23 would require contractors to provide records of requests for accommodations. The proposal does not cite the regulatory basis or scope of this request. For example, it does not specify whether it seeks requests for accommodations for religious, disability, or other reasons. For example, accommodations are often made for individuals who do not meet the definition of a disability; many contractors will make accommodations that go beyond the statutory and regulatory requirements. It is not clear what information must be reported. Further, many accommodations are made as a matter of course and may not be recorded by the manager involved, such as late arrivals, meal breaks, a new chair, etc.

While much of proposed Item 23 is not new, the NILG believes that the OFCCP miscalculates the burden imposed by this item. The NILG's constituents continue to express concern about the feasibility of this item and the significant burden of compliance. Tracking accommodations requested and granted is not currently a requirement of the laws or regulations enforced by the OFCCP (or of the Americans with Disabilities Act). As a result, the OFCCP's proposed requirement will impose an obligation on contractors not mandated under any federal law, which may expose the Agency to challenges to the scope of its authority.

The NILG acknowledges that contractors are required to keep records of accommodations afforded to disabled employees. However, just because contractors have a "record" of an accommodation does not mean that providing these records to the OFCCP is not burdensome. There is a significant difference between placing a note in an employee's file to record an accommodation and the maintenance of a single database to record all accommodations. For those contractors that have created a method for tracking accommodations, this request would not be as significant. However, for those contractors that have not adopted such a mechanism, reviewing every employee's file to determine whether an accommodation has been requested would create a substantial burden. As discussed in conjunction with other aspects of the Proposal, this proposed request attempts to impose recordkeeping obligations not currently required by the regulations.

Requiring contractors to provide records reflecting accommodations will necessitate the development of a universal process by which they can obtain this information from all of their locations, which will be burdensome. Furthermore, this process would very likely need to be automated into the contractor's HRIS, thereby causing the contractor community additional time and expense. Overall, the requirements set forth in proposed Item 23 will require the contractor community to expend significant time and resources – *all for a requirement that goes beyond anything currently mandated by any federal law*.

O. Proposed Item 24 – EEO-Related Policies

The OFCCP's proposal would require contractors to provide a plethora of policies that could potentially have no implication on equal employment opportunity, such as employment agreements and arbitration agreements. The NILG submits that this request is overly broad and would place a significant burden on contractors. Preliminarily, it is unclear what the OFCCP means by "employment agreements." Does the OFCCP actually want contractors to produce any and all agreements that it has with existing employees, regardless of whether they include provisions relating to EEO? The NILG suspects that is not the OFCCP's intent and that more precise language could limit the scope of this inquiry to a more reasonable parameter. The NILG further objects to the Agency's request for arbitration agreements, over which it has no authority or enforcement power. The OFCCP provides no regulatory citation for the basis for its authority to request information in proposed Item 24.

Further, the proposed demand for additional information if a contractor is more than six months into its AAP is perplexing. The other areas where year-to-date data is sought involve just that – data. This request is for policies, so it is uncertain exactly what the OFCCP would be seeking for that time period.

Regardless, the time needed to gather and prepare this type of information would easily exceed six hours for many of the NILG's survey respondents. For these reasons, the NILG requests that the OFCCP either eliminate or drastically reduce the scope of this proposal.

P. Proposed Item 25 – Assessment of Personnel Processes

The OFCCP proposes that contractors be required to provide the "most recent assessment of its personnel processes, as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b). This assessment shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment."

However, once again the OFCCP proposes to create duplicative reporting obligations. The applicable regulations provide:

> ***Review of personnel processes.*** The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees who are known protected veterans for job vacancies filled either by hiring or promotion, and for all training opportunities

> offered or available. The contractor shall ensure that when a protected veteran is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype protected veterans in a manner which limits their access to all jobs for which they are qualified. The contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. *A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part.* The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government (Appendix C of this part is an example of an appropriate set of procedures. The procedures in appendix C are not required and contractors may develop other procedures appropriate to their circumstances.)

41 C.F.R. § 60-300.44(b) (emphasis added). The regulations at 41 C.F.R. § 60-741.44(b) have corresponding requirements for individuals with a disability.

The information delineated in this portion of the regulations is a required component of the contractor's affirmative action programs. 41 C.F.R. §§ 60-300.44 and 60-744.44. Thus, the information relevant to compliance with this provision is also required to be submitted by the Scheduling Letter. This is not "support data" separate and distinct from a contractor's affirmative action program. Thus, this request is duplicative and unnecessary.

## II. RESPONSE TO OFCCP'S BURDEN ANALYSIS

Amazingly, despite all of the proposed additional data reporting requirements, the OFCCP concludes that the burden on contractors will increase only eleven hours – from 28 hours to 39 hours. The NILG believes the proposed changes would not only dramatically increase the time burden on contractors, but that the estimated increased burden should not be based on the Agency's current 28-hour estimate. This is a woefully underestimated amount of time for responding to the current Scheduling Letter and Itemized Listing.

Further, it strains logic and credulity to new lengths to determine that the proposed changes would only increase the burden by eleven hours. It is unclear to the NILG how the OFCCP arrived at this conclusion. As detailed above, the requirements contained in the Proposal are undeniably more detailed and more burdensome than the obligations of the current Scheduling Letter and Itemized Listing. Although the amount of time involved necessarily varies by contractor, establishment, and individual AAP, the majority of NILG survey respondents state that these proposed changes would substantially increase the amount of time needed to respond to the Scheduling Letter and Itemized Listing, with more than half stating that ***sixty to ninety days*** would be necessary to prepare the submission. This should be abundantly clear to the OFCCP, which has repeatedly recognized that contractors are already frequently unable to meet the current 30-day deadline for submission.

While the OFCCP may believe this delay is due to contractors being non-compliant, the NILG submits that, in the vast majority of cases, the need for additional time is a result of the large volume of data and information mandated by the Itemized Listing that goes far beyond what is required to have compliant AAPs. Gathering this information, ensuring its accuracy, having it reviewed by various levels of management and counsel, and preparing it for submission to the Agency is not something that can reasonably be performed in thirty days. Over the years, numerous stakeholders have commented on the difficulty that contractors have in meeting the current 30-day response deadline. Reasons for this difficulty include, but are not limited to, the increase in the complexity of the desk audit requests over time, the availability of internal personnel critical for finalization of the submission, the difficulty in crafting submissions near the beginning of a contractor's plan year, competing priorities requiring attention during the short window of time, the strain in responding to overlapping audit requests, and the difficulty in responding to one scheduling letter while working on requests for information relating to other compliance reviews.

The time expended to respond to the Proposal will necessarily surpass current effort levels. Some of the proposed requests would require contractors to develop new systems, implement new processes, and revise existing data collection and analysis methods, while others will require contractors to collect, manually enter, and synthesize information from multiple sources. Thus, in light of the extraordinary burdens, the NILG requests the OFCCP review and reevaluate the obligations imposed by the Agency's Proposal to address these concerns.

In addition, the OFCCP estimates that it takes between 18 and 105 hours to develop an annual renewal of an AAP, depending on the size of the establishment. The amount of time needed to develop an AAP is influenced by the number of employees in the establishment, but that is only one of many factors that affects the amount of time needed. The amount of employment activity, *i.e.*, applicants, hires, promotions, and terminations, whether remote workers or employees from other establishments are included, the number of job groups, etc., also have a tremendous effect on the complexity of an AAP and its analyses and the amount of time needed to prepare a complete AAP. Moreover, the OFCCP's assessment does not appear to take into account the number of employees involved in completing an AAP or the actual cost per employee hour; rather, the Agency seems to have selected a random number with no explanation regarding how it was derived. The contracting community would appreciate more transparency regarding the basis for the OFCCP's calculations in this regard. Perhaps with that information, we could provide additional information to bridge this disconnect.

Based on our constituents' anecdotal responses, the NILG estimates that a small AAP (approximately 50 to 80 employees) would require at least forty hours of total headcount time. A large AAP (500 to 1,000 or more employees) could take at least four times that to complete. Further, assuming that most contractors use a senior HR professional-level employee to complete the AAP, market survey data shows that the general salary without benefits would be more than $75,000 per year. The annualized cost of completing an updated AAP would range anywhere from $1,442 to $5,769 for a single AAP. This cost assumes only a single employee's time. It does not reflect the time of other employees gathering and reviewing data or of legal counsel review as well. It also does not include preparing all of the additional, non-required components that the OFCCP is anticipating be provided to the Agency during a desk audit.

We respectfully disagree with the Agency's conclusion that a contractor with more than 1,000 employees will spend the same amount of time developing an AAP as a contractor with 500 employees. Our constituents report that the more employees at an establishment, the more time it takes to prepare an AAP, and there is no point where this "drops off" based on size. After all, an establishment that has twice as many employees is likely to have twice as many job groups and twice as many job titles, requiring twice as many analyses.

The OFCCP's burden estimate for developing AAPs, on which it continues to rely despite the NILG's numerous prior comment submissions calling out the speciousness of this approach, is patently unrealistic. The majority of our survey respondents stated that the OFCCP's estimates are woefully short.

In addition, the OFCCP estimates that the cost to the federal government is based on the approximate 32 hours of staff time involved in reviewing the contractor's documentation submitted in response to the proposed Scheduling Letter and Itemized Listing. (OFCCP's Supporting Statement, p. 29). Significantly, however, this is *exactly the same amount of time* that the OFCCP estimated its staff would spend reviewing documents submitted in accordance with the *current* Scheduling Letter and Itemized Listing.[3] Either the OFCCP is disingenuous with its burden estimates, or it has no intention of actually reviewing all of the information that it would mandate contractors produce during the desk audit of a compliance evaluation. It is undisputed that the Proposal would drastically increase the amount of data and information that contractors would be forced to produce to the federal government. The Agency's failure to accurately reflect a realistic burden on its own workforce underscores the speciousness of the estimated burden on contractors.

Moreover, if the Agency were forthright in assessing the toll that gathering this much information would take on its compliance officers and the effect on compliance evaluations in general, it would be apparent that years-long compliance evaluations would continue to be the norm. The OFCCP would only be serving to make every single compliance evaluation a long and drawn-out affair instead of streamlining those with no complicating factors. This runs counter to the Agency's purpose of ensuring equal employment opportunity for a maximum number of contractor employees. If the Proposal advances in its current form, the OFCCP will audit fewer and fewer contractors (and fewer and fewer contractor employees), thus reducing its overall impact and effectiveness.

## III. CONCLUSION

The NILG survey provides real-world responses with meaningful insight into contractors' views and expectations. The NILG submits that the results of its survey are much more reliable than the vague premises upon which the OFCCP's estimates are based. The OFCCP continues, as it has in its past burden analyses, to drastically underestimate how much time various tasks require to be completed by contractors. The contracting community understands that the OFCCP itself is not generally faced with responding to such detailed and excessive requests for information regarding its applicants and employees and, therefore, may not possess the background and

[3] https://www.regulations.gov/document/OFCCP-2019-0002-0005 (p. 19).

experience relevant to formulating such estimates. However, the Agency's repeated refusals to consider the contracting community's real-world assessments and our repeated protests against such underestimations appear at odds with the Agency's stated commitment to further greater engagement with the contractor community.

The Proposal seems unlikely to result in more comprehensive compliance by contractors, but rather will increase the burden of compliance without actually promoting non-discrimination. For these reasons, and all the reasons stated above, the NILG respectfully requests that the Proposal be viewed through a lens of compliance and practicalities and that the Agency reconsider those changes that are overly burdensome, go beyond regulatory authority, and/or provide no real benefit to the OFCCP. All of the additional data and information requested in the proposed amendments can and should be requested through follow-up requests for information from only those contractors for whom the desk audit shows indicators of potential non-compliance.

Further, where noted above, the OFCCP's Proposal would create obligations for contractors that exceed the requirements of the existing regulations on which the OFCCP's authority is based. While the OFCCP must certainly obtain approval for changes to the Scheduling Letter and Itemized Listing through the standard Paperwork Reduction Act process, when such changes amount to *de facto* revisions to the enforcement scheme for contractors, the OFCCP must also comply with the Administrative Procedures Act ("APA"). The NILG submits that the Agency's failure to follow the formal rule-making process pursuant to the APA will doom the Proposal (should it be adopted) to lengthy disputes and litigation challenging the Agency's authority to collect this information. Therefore, the NILG strongly encourages the OFCCP to withdraw the Proposal and provide a valid APA notice and comment period for the changes to contractor obligations.

We thank the OFCCP in advance for its consideration of our comments and suggestions. If the OFCCP should wish to discuss this request, please contact Cara Crotty, NILG Counsel at ccrotty@constangy.com.

Respectfully submitted,

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