

**ROFFMAN HORVITZ, PLC**  
**LEGAL COUNSELING**  
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

January 20, 2023

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

Re: Proposed Changes to OFCCP's Supply and Service Scheduling Letter and Itemized Listing  
(OMB Control Number 1250-0003)

Dear Ms. Williams:

We are writing on behalf of Roffman Horvitz, PLC and its clients, to comment on OFCCP's Proposed Changes to its compliance review scheduling letter and itemized listing.

Roffman Horvitz is a boutique law firm founded by the former shareholders and OFCCP compliance practice group managers at the nation's largest employment law firm. Our team focuses on assisting federal contractor employers to comply with Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) and OFCCP's implementing regulations. The firm's client base ranges from Fortune 100 companies to small-business owners.

Our fundamental concern with the proposed letter is that OFCCP takes a very long time to conclude existing audits based off the current 22-question itemized listing, and by adding 14 new requests (including subparts), but not extending the amount of time OFCCP is affording employers to submit the materials, there will be less time in which to proof the submission, more employer data mistakes, and thus audits are going to take even longer to get through. This does not benefit either the contractor being audited or OFCCP.

The contract compliance oversight approach and philosophy embodied in this proposed revised scheduling letter and itemized listing are moving OFCCP further in the direction of the three problems that have plagued this agency's ability to monitor compliance. OFCCP's burden estimate justification documentation counts approximately 91,913 contractor establishments, and yet its most recent Corporate Scheduling Announcement List that it released on January 20, 2023, identifies only 500 employers. That's half of 1 percent of all government contractors. As we recall during the George W. Bush administration, OFCCP was conducting 4000 audits per fiscal year in some years and more than 6000 audits in at least one year. OFCCP's compliance reviews now take too long to complete; OFCCP is not doing enough audits to ensure that a broad spectrum of employers are complying with the regulations; and those employers that are being selected for audits are spending an exorbitant number of hours preparing for these submissions above and

beyond OFCCP's burden estimates. OFCCP should be shortening the amount of information it needs to verify compliance and scheduling more employers for audit. The way to do that is to streamline the scheduling letter, not expand the scope of what the OFCCP asks for up front.

In addition, OFCCP's mindset appears to be that the information it proposes to request is information that the employer already should have prepared as part of its affirmative action plan. While that is the case for some of OFCCP's requests, it's not the case for all of them. Moreover, any time an employer is being compelled to submit data and documents to an enforcement agency of the federal government, the employer is going to apply a heightened level of scrutiny to the data and documents; and that takes a lot more time than OFCCP is allocating. Also, for employers who need to gather an additional six months of data because they have received OFCCP's letter in the back half of their data year, the vetting process is even more compressed for time and accuracy.

Below we address OFCCP's burden estimates, followed by comments on some of the specific new or revised itemized listings. Our lack of comment on some of the itemized listings should not be interpreted as an endorsement of those particular items.

### OFCCP's Burden Estimates

OFCCP is not realistic about the burden that these modified and new requests will add to the time and cost for contractors to reply to OFCCP's scheduling letter and itemized listing. OFCCP states that the burden hours for assembling and submitting the requested documents is approximately 39 hours per contractor. We reiterate that "assembling and submitting" are not the only tasks that contractor undertakes in order to reply to the scheduling letter. There is querying, validating, coding, formatting, analyzing, revising, perfecting, gathering, reviewing, and then assembling and submitting. We relay below some of the feedback that our clients have sent us:

1. One client has to pull information from as many as four different systems and databases, just to prepare a routine affirmative action plan as a result of mergers and acquisitions. It is not on one simple system with pre-existing queries. If this employer were to receive an audit letter in the back half of its AAP data cycle, it estimates that it would take upwards of three weeks to pull and validate that supplemental six-month data before it even starts to put the data in OFCCP's required formats. The OFCCP's total burden estimate of an additional 11 hours to respond to these new requests is grossly below actual hours for an employer that is receiving the letter in the second half of the year.
2. OFCCP's declaration that establishments with 501 or more employees will take only 105 hours to prepare an annual update of an AAP is wrong. An employer such as a major metropolitan health care center with 12,000 employees in one "establishment" needs more than 105 hours to prepare its annual AAP. Having 501 employees is just not the same burden as having 12,000 in one establishment. Our client estimates that it takes six weeks of multiple FTEs to prepare their annual plan. Moreover, the last time they were audited, during the Trump Administration, they received a modest extension of time (for which they were grateful and appreciative) because they could not complete their data integrity validation on the supplemental six months of data in just 30 days. It was very important that the data be right, and that takes more time to ensure than OFCCP is budgeting.
3. A regulated utility informs us that \$136,000 is the annual cost of compliance personnel necessary in order to respond to the current 30-day scheduling letter. If they have to provide the information being asked for in the promotions section of the letter, they will

need to spend another \$1,500 for system/reporting changes and personnel hours, and another 33 hours to respond to the “new” itemized listing proposed requests. Moreover, it is unable to increase rates to account for the extra time and cost that these changes will prompt. All of these costs in system changes and personnel demands will erode their bottom line.

4. Another medical institution thought about each query it runs to prepare the AAP, who runs those queries, and all the work that goes into tying each hire with the correct applicant pools, and it estimates that it would take almost two full weeks to ensure that it has pulled the correct applicant data if it received an audit letter in the last six months of its AAP year. In 2022, it hired 5000 employees across its system, and it would not be able to hire temporary help in order to vet and validate this information. It would take 2-3 weeks just to onboard temporary help. Finally, it has a decentralized reasonable accommodations process. Its HR Business Partners facilitate requests for accommodation, and there are many of them; if it had to respond to an OFCCP audit letter sent to one of its larger facilities, it would need to send out a request for this information, afford each HRBP the opportunity to compile it, send it to the person who is taking the lead on preparing the audit letter response, validate and verify the information, and then prepare the response. OFCCP’s burden estimates are not factoring in the decentralized way in which many records, like these, are maintained.
5. One of our software development clients reviewed the amount of time it took to prepare an audit submission in 2018 in the back half of its AAP data cycle. It needed resources from multiple departments, including Talent Acquisition, HR, and Compensation. Based on who helped it from within the organization, and the hours that Roffman Horvitz recorded to ensure the accuracy of the data in the second half of the year, it took a total of 250 hours of internal and external support to compile and submit the responses. It further calculated that the cost to respond to OFCCP’s letter for a facility of less than 500 employees was somewhere between \$18,000 -\$20,000. Finally, there are data system issues that would need to be addressed going forward in order to respond to OFCCP’s new proposed paragraphs. It would have to pull data from multiple systems (such as compensation from a payroll system and transaction data separately from its HRIS), and there would be more time needed than OFCCP is allocating in order to validate the data from the two systems.

We turn now to the letter and itemized listings.

Page 2 of the Scheduling Letter, OFCCP’s Request That Post-Secondary Institutions or Contractors with Campus-Like Settings Submit the Requested Information for “all AAPs developed for campuses, schools, programs, building, departments, or other parts of your institution or company located in [city and state only.]”

We understand why OFCCP is asking for this information. When a university files an IPEDS report, the report lists one physical address (perhaps the address of its administrative offices). The institution may in fact choose to prepare multiple AAPs, one each for various schools, colleges, and departments within the university, as envisioned by OFCCP’s Educational Technical Assistance Guide. But, if the employer has multiple AAPs, and they are not reflected in the IPEDS report, OFCCP has no way to know which of the many AAPs the post-secondary education employer will submit in response to OFCCP’s scheduling letter because OFCCP sent the letter to the IPEDS

address. There is no mechanism for OFCCP to know that the employer has multiple AAPs from looking only at an IPEDS submission. If OFCCP intends to audit the entire campus, but the employer has chosen to divide the campus into multiple AAPs, and it decides to send OFCCP the AAP comprised only of non-faculty, there is a disconnect between what OFCCP wanted to audit and what the employer gave OFCCP to audit.

The solution is not to command universities and a campus-like employer (such as a major metropolitan hospital) to produce every AAP that it prepares for the entire campus within 30 days of receiving OFCCP's scheduling letter. That is not realistic. The solution is to have these campus-like institutions certify in OFCCP's Contractor Portal and list each AAP that the organization prepares, no different than how employers with functional AAPs (FAAPs) certify their plans. Then, OFCCP can download the contractor's certification list to feed the randomized program that it uses to achieve a neutral selection audit list.

This approach seems best aligned with OFCCP's policy decision to allow campus-like settings to prepare multiple AAPs for the campus.

#### Itemized Listing #7, Requesting All Action-Oriented Programs Designed to Correct Problem Areas Identified in 60-2.17(b)

OFCCP's regulations state that employers must include the development of action-oriented programs in their written AAPs. If OFCCP wants the employer to include the list of these action-oriented programs in a separately-numbered itemized listing response, as opposed to simply reading the employer's AAP and reviewing that section of the written plan that complies with the regulation, that seems relatively easy to do. (But why impose the obligation to do it twice?)

We are concerned, however, about what some OFCCP compliance officers are going to do with the list. OFCCP should not be acting as a super-personnel office, evaluating or judging whether an action-oriented program is sufficient to address or correct the problem areas that the employer has identified. Many "action" items take a long time to achieve results.

#### Itemized Listings #8 and #12, Documentation on the Totality of Disability and Veteran Outreach Efforts

Roffman Horvitz does not oppose having employers determine whether "the totality" of their efforts were effective, but that sentence is not going to solve OFCCP's stated concern. OFCCP's justification for the change states:

Contractors have expressed confusion over what documentation is sufficient for their Item 8 submission. Adding in a requirement that the documentation indicate whether the contractor believes the totality of its efforts was effective provides for greater specificity of the information contractors must provide to document their outreach and recruitment efforts and their assessment of the effectiveness of these efforts.

We predict that employers are going to add a sentence at the bottom of their outreach tracking charts that says, "We conclude that the totality of our veteran and disability outreach efforts were effective." That doesn't address OFCCP's desire for "greater specificity."

OFCCP ought to use its role as a compliance assistance agency to upload three or four different examples of acceptable assessments on its website instead of adding a sentence to a scheduling letter, to help contractors with their “confusion.” It could upload examples here:

<https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/resources/assessment-tools>

Or it could supplement its Section 503 or VEVRAA FAQs with a better description of what an acceptable assessment should include.

#### Itemized Listing 11, Description of Steps to Determine Whether and Where Impediments to EEO Exist for Individuals with Disabilities

So long as the American workforce remains reluctant to self-identify for disability, most employers are going to have at least one job group with a 7% disability utilization goal. It is challenging to develop action-oriented programs to address the lingering stigma from applicants and employees about why my employer wants to know about my disability. Applicants and employees view this information to be medically private and do not want to share it with their employer. So, they don't answer the voluntary survey, and the employer is left to develop initiatives based on the absence of hard data.

If OFCCP is trying to highlight the fact that the regulation requires employers to develop action-oriented programs geared towards individuals with disabilities, it should hone in on that requirement.

If OFCCP wants to leave the personnel processes assessment and outreach assessment here in proposed #11, then remove paragraphs 8 and 25. Just because 60-741.45 is duplicative of other regulatory requests, doesn't mean that the itemized listing needs to be similarly duplicative. We do not understand why new #11 needs to ask for a separate assessment of personnel processes (which duplicates #25) or the effectiveness of outreach (which duplicates #8).

It would be a welcome change for OFCCP to eliminate the duplication in this next iteration or for OFCCP to reply explicitly to these comments and explain to the contractor community how these requests are different from each other.

#### Itemized Listing #16, Asking Post-Secondary Institutions to Submit their IPEDS

OFCCP has no regulatory authority to request the IPEDS. OFCCP has the legal authority under 41 CFR Section 60-1.7 to require the filing of the EEO-1 forms as part of a government contractor's compliance obligation, but its regulations are silent vis-à-vis the IPEDS forms. The Executive Order and current regulations do not include submission of the IPEDS report, and IPEDS data includes data that is not relevant to the laws and regulations that OFCCP enforces.

If OFCCP were to amend its regulations to address the IPEDS report, and OFCCP limited its request to the sections of the IPEDS report that are relevant to OFCCP's equal opportunity, non-discrimination and affirmative action mission, Roffman Horvitz would not oppose OFCCP's subsequent request for these forms.

Itemized Listing #19, Documentation of Policies and Practices Regarding All Employment Recruiting, Screening, and Hiring Mechanisms, including the use of Artificial Intelligence Algorithms, Automated Systems or Other Technology-Based Selection Procedures

This is one of the vaguest and broadest information requests ever drafted and is going to require the employer to spend precious time making PDFs of electronically-stored intranet policies or creating a download file instead of vetting and proofing data, the accuracy of which always has held a higher priority for OFCCP in audits. It assumes a level of centralization that does not exist in many employer workplaces.

First, many employers do not have documentation regarding practices; just policies.

Second, in the absence of any statistical indicators that the employer is not complying with its equal opportunity obligations, OFCCP's decision to request all of this information prophylactically makes no practical sense. "Please gather and send us 35 MB of policies just in case you have a statistical indicator somewhere in your data."

OFCCP should withdraw this request from the scheduling letter and leave its current practice in place: issue the request in subsequent audit phases if statistical indicators suggest that the employer is not following principles of equal opportunity in its hiring and selection processes.

To the extent that OFCCP is concerned that employers are excluding from their applicant tallies individuals who are screened out using any AI methodologies, the way to remedy that is for OFCCP to remind employers what should be counted in the tallies, not issue a vague information request. Doing so will ensure that employers and OFCCP alike have visibility into whether these selection procedures impose barriers to equal opportunity.

Employers already are required to include Internet Applicants and as well as any individuals screened out by an employer selection procedure that assesses anything beyond candidate interest and basic qualifications (prongs 2, 3, and 4 of the Internet Applicant definition) in their applicant tallies under Itemized Listing 20(a). Instead of imposing this broad request, OFCCP should clarify the scope of the employer's applicant records that are required to be included in the employer's adverse impact analyses and therefore in the tallies provided under Itemized Listing 20(a). From there, OFCCP can assess whether there are statistically meaningful differences in selection rates by gender, race or ethnicity. In those such instances, OFCCP then can inquire about and evaluate the use of these practices.

Itemized Listing 20(c) Promotions

OFCCP is asking for inconsistent information in the promotions request. OFCCP asks for total number of promotions (for each job group or job title) by gender and race/ethnicity – which is a summary table. But in the next sentence, OFCCP asks for "previous supervisor, current supervisor, previous compensation, current compensation, department, job group, and job title from which and to which the person(s) was promoted." Those are not fields that employers can present in a summary table. That's a line-item list and is incongruous with the other summary data that OFCCP is requesting in paragraphs 20(a), (b), and (d).

OFCCP first should evaluate the summary promotions data. If there are statistical indicators inferring that the employer is not following principles of equal opportunity in its promotion decisions, OFCCP can ask for this line-item data in subsequent phases of the audit – the same as it will do under its proposed itemized listing for hires and terminations. It is too burdensome to have to provide the line-item data within 30 days of receiving the scheduling letter.

#### Itemized Listing 21, Compensation

1. OFCCP's justification in asking for a second compensation snapshot is that asking for only one snapshot up front, and having to ask for a second snapshot later in the compliance review process, "delays the compliance review process." Just the opposite. The fact that OFCCP is asking for a second snapshot, at all, is the major contributing reason for OFCCP's delays in moving these audits along in a timely manner.

OFCCP has audit submissions that it received in 2018 that it still has not finished processing in 2023. Many months often elapse in between OFCCP's contact with employers being audited, and we understand and appreciate that OFCCP is juggling several audits at the same time. But, in the meantime, employers are losing decision makers as the workforce changes and evolves. These delays are highly prejudicial to the employer being audited. The notion that what is delaying OFCCP from conducting an efficient audit is the lack of a second compensation snapshot – without any preliminary indication that there is something discriminatory in the contractor's pay from the first snapshot – is completely unsupported. OFCCP cannot complete audits that began using the old version of the scheduling letter in a rational amount of time, as it is. Our clients ask for status updates and the response on multiple occasions is that the district office "sent the compensation data over to the statisticians in the Branch of Expert Services office in Washington DC and are waiting for them to give us their feedback."

Please withdraw this request and issue a request for this data in later audit phases, once OFCCP has demonstrated how and why the contractor's first snapshot raises issues of discrimination.

2. When OFCCP selects an employer in the back half of the year, the compensation data already is outdated, and asking for an even more outdated snapshot will delay the audit, not shorten it. Let's say an employer implements pay raises on October 1 of each year. If an employer prepares its AAPs on a calendar year basis, and receives its audit letter on October 5, 2024, it is producing a workforce analysis based on a data capture as of December 31, 2023. Now, OFCCP wants another snapshot as of December 31, 2022, and when the employer submits its response 30 days later on November 4, 2024, that second snapshot of data (a) is approaching three years old, (b) is not going to "benefit employees who may have been subject to pay discrimination," and (c) does not reflect the employer's latest compensation adjustments. What benefits employees who might be subject to pay discrimination is for OFCCP to identify any potential discrimination in the first 30 days after the employer submits this information to OFCCP. It does not benefit the impacted employee for OFCCP to take five years to resolve audits.

3. Temporary employees provided by staffing agencies are not employees of the employer. The employer cannot pull payroll data and other compensation fields on the employees of staffing agencies because there is no data to pull. They are not in the employer's HRIS. If the employer has temporary employees on its payroll, it can pull that data. This request makes no practical sense to any of our clients that use temporary agencies to help them with intermittent staffing needs.
4. Providing two snapshots that have completely different populations at two different data capture points will confound OFCCP any time there has been a reorganization, merger, spinoff, or acquisition. Even if there has not been a merger or acquisition, the snapshots will look vastly different. Job groups are different, job titles are different, departments are different, the workforce is fluid. Instead of focusing on issues related to current compensation "disparities," the OFCCP is going to waste time trying to understand how and why the snapshots could be so different.
5. In sum, asking for the second snapshot, at all, is what causes delays.

#### Itemized Listing 22, Documentation of Compensation Analyses

In Directive 2022-01 (Revision 1) OFCCP stated that it would seek this information only under certain scenarios. It will serve the interests of enabling OFCCP to conduct more audits more efficiently and with less burden on the contractor if the information is sought only in the circumstances that OFCCP lists in the directive and not automatically as part of the initial desk audit submission.

#### Itemized Listing 23, Reasonable Accommodations

Many of our clients have very decentralized tracking mechanisms for reasonable accommodations. When OFCCP issues a scheduling letter, it's not as simple as going into a database and querying it with a date restriction to produce a report that lists all reasonable accommodation requests. Many HR Managers will have to contact HR Business Partners or supervisors to collect this information, compile it, and prepare the response to the itemized listing. This task alone can take one person an entire day to finalize. OFCCP is not realistic about the burden hours required for employers to "compile" this information for an audit.

#### Itemized Listing 24, EEO and Harassment Policies, Arbitration Agreements, Employment Agreements, EEO Complaint Procedures

If OFCCP will amend this request for a "sample" of an employment agreement with redactions for name and compensation and a sample arbitration agreement with redactions for name, and not require every employment agreement and arbitration agreement that the employer entered into, Roffman Horvitz does not object to this request.



We also think the request should say, “If you are six months or more into your current AAP year when you receive this listing, and any of these policies have been changed or amended since last year, provide this information for at least the first six months of the current AAP year, or state in your response that the policies remain in effect through the date of your submission.”

Asking for a limited number of policies (EEO, Harassment, Complaint and some sample agreements) is a much more rational ask than #19.

It is rare in our experience, though, that these policies and documents are being maintained by the people in charge of OFCCP compliance. OFCCP (again) underestimates the burden involved in compiling this information.

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Roffman Horvitz and its clients are committed to ensuring equal opportunity in employment. We respect OFCCP’s mission to enforce that, but we urge OFCCP to take a more practical approach in how it begins and manages the audit process. It is neither in OFCCP’s nor the employer’s best interest to set unrealistic and artificial response deadlines for these materials. We urge OFCCP to drop some of these requests, modify others, and afford employers at least 60 days in which to submit the materials.

Thank you for the opportunity to comment on OFCCP’s compliance review scheduling letter and itemized listings.

Respectfully submitted,

Roffman Horvitz, PLC

cc: Alissa A. Horvitz  
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