

Writes' Direct Dial:

NANCY V. HOLT
202-719-2010
nholt@fordharrison.com

CONSUELA PINTO
202-719-2055
cpinto@forharrison.com

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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: FordHarrison's Comment on OFCCP's Proposed Approval of Information Collection Requirements – OMB No. 1250-0003

Dear Ms. Williams:

FordHarrison is a labor and employment law firm with a national practice serving employers in all areas of labor and employment law including traditional labor, employment, business immigration, employee benefits and litigation. Our Affirmative Action/OFCCP Compliance Practice Group represents federal government contractors and subcontractors across industries and jurisdictions. Our attorneys advise contractors on compliance with OFCCP regulations and guidance, provide AAP development services, assist with audit preparation and represent contractors in all stages of a compliance review.

On January 20, 2023, FordHarrison, on behalf of its Federal Contractor clients, submitted objections to the Office of Federal Contract Compliance Programs' (OFCCP) proposed scheduling letter. On April 18, 2023, the OFCCP issued a slightly revised version of the November 21, 2022 proposed scheduling letter.¹ That version rejected, without explanation, the vast majority of substantive comments received from the contractor community. For this reason, FordHarrison

¹ The OFCCP eliminated a few minor proposed changes to information and data requested in the November 21, 2022 version of the proposed scheduling letter. The eliminated items include: (i) providing *documents* demonstrating the "development and execution" of action-oriented program rather than providing a list of all action-oriented programs designed to correct any problem areas identified pursuant to a 2.17(c) assessment; (ii) reporting promotion data broken out by competitive and non-competitive movements; (iii) identifying, for each promotion, each employee's previous and current supervisors and previous and current compensation; and (iv) providing the reason for each termination.

resubmits its original comments modified to take into account the limited changes accepted by the OFCCP.

I. OFCCP Compliance Reviews & Implications of Expanded Scheduling Letter Scope

A compliance review is a “comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor.” 41 CFR 60-1.20. OFCCP initiates a compliance review by sending the selected contractor a scheduling letter.

OFCCP’s regulations and Federal Contractor Compliance Manual (FCCM) lay out a three-stage funnel approach to a compliance review - desk audit, onsite review, and off-site analysis. The issuance of an OMB-approved scheduling letter commences the desk audit stage of a compliance review. During a desk audit, the compliance officer “*begins to determine* whether a contractor is complying with all relevant provisions of 41 CFR Chapter 60” (emphasis added).² The initial desk audit stage is intended to be an assessment of baseline compliance.

- Does the contractor have a compliant affirmative action plan?
- Has the contractor taken affirmative action to recruit a diverse pool of applicants?
- Has the contractor made progress toward its Affirmative Action Goals?
- Are there any preliminary indicators of systemic discrimination in hiring, promotion, termination and compensation?

Where OFCCP identifies potential areas of non-compliance, the agency moves to the next stage, which may include a request to review documents and data off-site and/or a multi-day on-site investigation that includes multiple interviews with employees and managers. OFCCP typically requests additional documents and data during, or as a result of, the onsite.

The proposed scheduling letter significantly expands the scope of information contractors will be required to provide to the OFCCP at the outset of a compliance review. The breadth of documentation, information and data requested in the current scheduling letter is more than sufficient for OFCCP to make a determination as to whether a contractor is likely to be in compliance.

Moreover, it is unlikely that OFCCP will have the resources to conduct a deep-dive compliance assessment at the initial stage of every compliance review. The Agency’s FY 2023 Budget

² FCCM, Section 1A02.

Justification requested \$147,051,000 to fund among other priorities, 208 **additional** FTE.³ However, OFCCP received only \$110,976,000 in the 2023 Omnibus Appropriation Bill.⁴

In FY 2021, the most recent year for which information is available, OFCCP completed only 1,236 compliance reviews, of which only 39 or 3% resulted in discrimination findings. In its FY 2023 Congressional Budget Justification, OFCCP reported that Supply & Service compliance reviews with no findings were processed in “under 250 days” or approximately eight months. Supply & Service compliance reviews with discrimination findings took approximately 1,150 days or three years to complete.⁵

Given the expanded scope of the proposed scheduling letter coupled with a very modest increase in resources, OFCCP’s rate of review closures will decrease and the amount of time needed to complete just the desk audit will increase. Under the proposed scheduling letter, OFCCP will receive more information earlier in the audit. However, with limited resources the agency is likely to complete fewer compliance reviews, while adding to the burden imposed on compliant contractors and extending the time to complete the initial desk audit. The end result will be fewer completed compliance reviews, which will mean that OFCCP’s FY 2021 3% rate of finding discrimination will decrease. At best OFCCP will return to the 2% discrimination rate, which held steady for several years. The more likely scenario, however, is that OFCCP’s closure rate and rate of discrimination findings will drop dramatically.

II. OFCCP’s Proposed Scheduling Letter Does Not Comply with the Spirit or the Letter of the Paperwork Reduction Act

The main purpose of the Paperwork Reduction Act of 1995 (PRA) is “to have Federal agencies become more responsible and publicly accountable for reducing the burden of Federal paperwork on the public...” Section 3501 of the PRA states that the federal government should minimize the paperwork burden for “Federal Contractors” (among others). Moreover, any information collection should ensure the greatest possible public benefit by maximizing the utility of the information collected and implementing policies and practices to improve the productivity, efficiency, and effectiveness of Government programs, while minimizing the cost to the Federal Government.⁶ OFCCP’s justification for the proposed expansion of the Scheduling Letter fails on all counts.

³ www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf

⁴ Consolidated Appropriations Act, 2023.

⁵ www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf

⁶ Paperwork Reduction Act of 1995, Public Law 104-13, Section 3501 (May 22, 1995).

(A) *The Scheduling Letter Seeks Information that is neither Relevant nor Essential at the Initial Stage of a Compliance Review*

The purpose of the PRA is to reduce the total amount of burden the federal government imposes on private entities, including federal contractors. Where a federal agency's data collection is excessive, as in the case of OFCCP's proposed scheduling letter, the agency must justify both the purpose and the need in its supporting statement. OFCCP has failed to do so. Indeed, the regulations underscore the fact that OFCCP may seek additional information and conduct an onsite investigation where the initial data submission indicates a potential violation.

OFCCP has multiple opportunities during the course of a compliance review to seek additional information necessary to determine whether the contractor is in compliance with the applicable regulations. The scheduling letter is simply OFCCP's first opportunity to collect data from contractors under review to determine baseline compliance and/or identify areas of concern. Indeed, as noted above, the regulations and the Federal Contractor Compliance Manual allow for additional requests for records to be reviewed off-site or on the contractor's premises if a potential issue of non-compliance is identified at the desk audit stage. As is clear from the regulations and the FCCM, the information collected in the scheduling letter should be limited to the data and documents needed to make a preliminary assessment of compliance with OFCCP's regulations. Only where there are indicators of a violation should contractors be asked to provide the more robust data and documentation sought in the proposed scheduling letter.

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

(B) *OFCCP's Burden Estimate is not Realistic*

The burden calculation for the revised version of the proposed scheduling letter must include the time and effort expended, and the costs associated with responding to the letter, including:

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

The OFCCP originally estimated the burden associated with responding to the proposed scheduling letter as 39 hours, which was only 11.1 hours more than the burden hours associated with the current scheduling letter. The slightly revised scheduling letter proposes a decrease in the total burden hours to 37.5. Our clients estimate the actual burden to respond to the revised scheduling letter is approximately 85 hours. Thus, OFCCP's estimated burden constitutes less than half the hours reasonably estimated by federal contractors, whose estimates are based on their experience annually collecting and maintaining records and data, and in responding to the current scheduling letter when neutrally selected for audit.

(C) *The Proposed Scheduling Letter Fails the PRA's Practical Utility Test*

The PRA requires that agencies consider the burden that their information collections impose on the public. This burden must be balanced against the "practical utility" of the information to be collected.⁷ Practical utility refers to the actual rather than "theoretical or potential usefulness" of the information requested to the agency.⁸ Relevant to the actual usefulness of the information sought is the OFCCP's ability to "process the information it collects in a useful and timely fashion." The broad scope of the proposed scheduling letter will result in significant burden to contractors with little to no benefit to applicants and employees of federal contractors because there is limited practical utility to such an expansive data collection at the preliminary stage of an OFCCP compliance review.

As noted above, traditionally, an OFCCP compliance review proceeds in three stages: desk audit, onsite review, and offsite review of records. The desk audit is intended to serve as a triage of sorts. The Compliance Manual states that at the desk audit "a [Compliance Officer] begins to determine whether a contractor is complying with all relevant provisions of 41 CFR Chapter 60" by reviewing "the contractor's AAPs and supporting documentation provided by contractors."⁹ If the Compliance Officer "finds no problem areas, no outstanding questions and no violations, then the evaluation is closed at the desk audit stage."¹⁰ However, if the Compliance Officer identifies potential violations, substantive or otherwise, they may request additional information and/or conduct an onsite investigation.

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

⁷ <https://www.whitehouse.gov/wp-content/uploads/2017/11/Estimating-Paperwork-Burden-Oct14-1999.pdf>

⁸ 5 CFR 1320.3(l)

⁹ FCCM, Chapter 1A02.

¹⁰ Id.

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

There is no practical utility to requiring all contractors neutrally selected for a compliance review to produce the voluminous amount of data and information OFCCP proposes to collect at the initial stage of a compliance review. Indeed, OFCCP compliance reviews that result in no discrimination findings currently average 250 days.¹¹ OFCCP’s proposed expansive data and information collection at the initial stage of a compliance review is neither necessary nor mandated by statute, regulation, or court order. Pursuant to 5 CFR 1320.8(a)(4) and (7), a review of each collection of information shall include “[a] specific, objectively supported estimate of burden, which shall include, in the case of an existing collection of information, an evaluation of the burden that has been imposed by such collection; and a plan for the efficient and effective management and use of the information to be collected, including necessary resources.” OFCCP has not provide a reasonable justification for such detailed information at the initial stage of a compliance review and has failed to provide any indication as to how it intends to efficiently review this information so as to reduce the overall burden of a compliance evaluation.

For the past several years, OFCCP has identified discrimination in only 2% of all compliance reviews. In 2021, the rate increased 1% to a mere 3%. These limited findings persist despite efforts by the OFCCP to dig deeper and undertake more expansive investigations of contractors’ employment practices through requests for offsite review of information and multi-day onsite investigations. The proposed revisions to the scheduling letter seek to move the deep dive to the initial stage of a compliance review in the hope that a more expansive review at the initial stage of an audit will increase the likelihood of finding discrimination. There is absolutely no support for such an assumption. Indeed, this approach will have only one result – significantly increasing the burden on those contractors who are in compliance.

III. 30-Days is not a Reasonable Amount of Time to Respond to the Proposed Scheduling Letter and Itemized Listing

The current scheduling letter allows contractors 30-days to respond. In 2022, OFCCP issued a new Directive stating that extensions will only be granted to contractors in extraordinary circumstances, such as the death of the person responsible for responding to the letter or natural disaster. The slightly revised draft of the proposed scheduling letter represents a significant expansion of OFCCP’s current scheduling letter, which cannot realistically be collected, reviewed and submitted within 30 days. Rather, our clients estimate, at a minimum, 60-90 days will be needed to provide a complete and accurate response to the proposed scheduling letter.

¹¹ www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf

IV. Conclusion

The OFCCP has offered no justification for its initial proposal to significantly expand the scope of the scheduling letter. Moreover, OFCCP's extremely limited changes to the proposed scheduling letter in conjunction with a decrease in the estimated burden hours is still not reflective of the amount of time contractors will realistically expend responding to the proposed scheduling letter. As the OFCCP well knows, the scheduling letter is not the only vehicle through which it can request information from a contractor during the course of a compliance review. Indeed, OFCCP's regulations, the FCCM, and standard practice over the past several decades has been to seek data and documents through targeted requests for information once preliminary indicators of a violation are identified at the desk audit stage. Year after year, the 98-97% of contractors scheduled for a review are found to be in compliance. The OFCCP has offered no legitimate justification for imposing such a significant burden on contractors neutrally selected for audit at the initial stage of a compliance review.

Sincerely,

FORDHARRISON LLP



NANCY V. HOLT
Partner & Chair, Affirmative Action & OFCCP
Compliance Practice Group



CONSUELA A. PINTO
Partner