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VIA REGULATIONS.GOV

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, D.C. 20210

Re: Comments on Proposed Approval of Information Collection Requirements (OMB Control Number 1250-0003)

Dear Director Williams:

We are writing on behalf of Littler Mendelson, P.C. to comment on the Office of Federal Contract Compliance Program's (OFCCP) request for reauthorization of the compliance review scheduling letter with proposed revisions. This letter supplements and revises our January 19, 2023 letter in order to take into account OFCCP's discussion of the previously submitted public comments and the resulting (minor) modifications to OFCCP's proposals, which were posted for public viewing on or around April 18, 2023 in connection with the 30-day notice (the "New Supporting Statement").

Founded 80 years ago, Littler Mendelson is the world's largest law firm dedicated exclusively to the practice of labor and employment law. With approximately 1,200 attorneys in 57 offices across the United States, Littler Mendelson is devoted to representing management in employment, employee benefits and labor law matters. Littler Mendelson also has a group of attorneys dedicated to representing and assisting clients in matters before the OFCCP. The firm's client base ranges from Fortune 100 companies to small business owners. We have represented our clients in connection with hundreds of OFCCP compliance reviews. The OFCCP's compliance review scheduling letter is highly relevant to the Firm's OFCCP Practice and significantly impacts the Firm's clients.

As discussed below, OFCCP continues to substantially underestimate the burden involved in responding to the scheduling letter in its current form and substantially underestimates the additional burdens that would result from its proposed revisions to the letter. Of particular concern is OFCCP's expectation that contractors respond to the scheduling letter within 30 days, notwithstanding the fact that the letter demands the production of information that contractors are not required to maintain in the ordinary

course of their operations, and which can be extremely time consuming and burdensome to compile.

Equally concerning is the fact that OFCCP is unable to show that all the requested information has value or, even in instances where additional information may have value, that the agency is able to make good use of this information that contractors are required to maintain and produce at great cost. The documentation that contractors are required to produce in response to the scheduling letter often goes unreviewed for months and sometimes appears to never get reviewed by the agency. Although audits frequently last for years,[1] only a small percentage of audits result in outcomes that are even arguably meaningful. It is clear that OFCCP's compliance process is very broken. This is a concern that is not only shared by most of the contractor community, but which has also been articulated by the U.S. Government Accountability Office in a series of reports published between 2016 and 2022. Under the circumstances, it is time for the scheduling letter to be scrutinized and completely overhauled.

The workplace has changed dramatically since OFCCP last engaged in rulemaking in 2000. Rather than attempting to respond to these changes in a piecemeal fashion through revisions to the scheduling letter, OFCCP should instead revise its rules to reflect the realities of the modern workplace. Until it does that, the information requested through the scheduling letter should be limited to what is consistent with OFCCP's current rules and what OFCCP has the ability to use in a meaningful way.

A primary reason why OFCCP's audits are so burdensome to contractors and of such limited value to anyone is that OFCCP has largely eschewed rulemaking for over 20 years. During this period OFCCP has attempted – through non-regulatory processes – to radically change its processes and procedures. Unfortunately, without the discipline of formal rulemaking, including the obligation to hear and respond to constructive feedback from contractors and employees and their representatives, OFCCP is unable to recognize the extent to which its existing requirements have become irrelevant or unworkable given changes in business and employment models, fails to appreciate the immense burden which its requirements impose on contractors, and squanders the opportunity to promote diverse workplaces that provide good jobs and opportunities to all Americans.

In November 2000, OFCCP completed a process of formal rulemaking that substantially revised its prior rules. The revisions were intended to "refocus the regulatory emphasis from the development of a document that complies with highly prescriptive standards, to a performance-based standard that effectively implements an affirmative action program into the overall management plan of the contractor." 65 Fed. Reg. 68021 (November 13, 2000). Since then, OFCCP's expectations have changed with every change in presidential administration, with OFCCP often seeking to return to highly prescriptive standards with little regard for their practical value, while at other times taking a more results-oriented approach. The result of this constant change through sub-regulatory means is that OFCCP regularly takes positions and makes demands for which there is no legal support, compliance officers and regional managers often act in a manner that is inconsistent with the agency's (current) official positions, and contractors waste time and resources trying to comply with technical requirements which serve no purpose. OFCCP should abide by its obligations under the Administrative Procedure Act and the Paperwork Reduction Act, abandon its attempt to regulate through FAQs, information collection tools, and other sub-regulatory means, and conduct a serious review and revision of its rules so as to bring them into alignment with the workplace as it exists in 2023. Only in this manner will OFCCP support contractors

[1] OFCCP's FY 2024 Budget Justification includes a Workload and Performance Summary at p. 26 which reveals that the median days to process supply service cases without discrimination violations is 312 and to process supply service cases with discrimination violations, prior to enforcement referral is an astounding 1,294.

in providing great employment opportunities to women, minorities, veterans, individuals with disabilities, and all American workers.

In the context of these overarching concerns, we have the following comments regarding specific components of OFCCP's proposals.

The 30-Day Response Period

It is reasonable and appropriate to require contractors to produce within 30 days of receipt of the scheduling letter those documents that contractors must prepare and maintain in the ordinary course of their operations. The problem with the 30-day response period is that, in the ordinary course, contractors are not required to maintain much of the information requested by the scheduling letter. As discussed below, OFCCP's rules do not require contractors to maintain some or all the data sought by Items 7-15 and 18-24 of the proposed scheduling letter either for the time periods and/or in the format in which the letter requires that data to be produced. For many employers producing the data that OFCCP wants to require may not be possible within 30 days and will be unreasonably burdensome even if additional time is provided. OFCCP should exclude from the 30-day production requirement those data which the rules do not require contractors to maintain in the normal course of their business.

OFCCP references, but fails to meaningfully address, this issue on page 36 of the New Supporting Statement by claiming that it is only under "extraordinary" circumstances that contractors may be prevented from meeting the 30-day period.

That contractors routinely struggle to meet the 30-day period is, in fact, well known. The problem is that OFCCP cynically assumes that this problem results from contractors failing to maintain their required affirmative action plans in the ordinary course of their operations rather than recognizing that the problem is caused by OFCCP's demand that contractors produce documentation in addition to the plans that either is not required to be created in the ordinary course or that may already exist but not align to the time period that OFCCP has decided to audit.

There was a period of time during which the agency recognized these concerns and reached an appropriate balance by requiring submission of the affirmative action plans within 30 days of receipt of the scheduling letter and then automatically granting, upon request, an additional 30 days in which to produce the support data. This approach was fair and efficient and should be formally incorporated into the Scheduling Letter.

OFCCP's purported concern that providing contractors an additional 30 days or so to respond to the scheduling would "delay remedies for victims of discrimination" is simply ridiculous. First, contractors know from experience that their desk audit submissions often go unreviewed by OFCCP for weeks or even months after being submitted. Second, in its FY 2024 Congressional Budget Justification, OFCCP discloses that the "[m]edian days to process Supply Service Cases with Discrimination Violations, Prior to Enforcement Referral" is an astounding 1,294 days. Under these circumstances, allowing contractors an extra 30 days to prepare and submit the support data would in no way delay the course of an audit but might actually increase overall efficiency by allowing contractors a fair opportunity to identify and correct errors before data is submitted and to better organize and explain their submissions.

OFCCP's recently implemented practice of commencing multiple audits on the same day multiples the burden imposed by the 30-day requirement. And should OFCCP be permitted, as it is requesting, to require contractors with campus-like settings to 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" within a city, the burden will again, be substantially multiplied.

Contractors should not have to rely on an ad hoc exercise of Compliance Officer's discretion to avoid a finding of non-compliance due to the failure to produce all requested items within 30 days. The Scheduling letter should provide realistic and reasonable time periods for the submission of a response.

The Scheduling Letter

Page One: Adding in an option for the scheduling letter to be issued via email with a read receipt requested.

> In our response to the 60-day notice we stated that we have no objection to permitting OFCCP to transmit the scheduling letter by email. However, the time for responding should not begin until after affirmative acknowledgment of receipt by the contractor. Absent such an acknowledgment, the letter should have to be transmitted by certified mail pursuant to OFCCP's prior practice. This is necessary because OFCCP often fails to identify the correct person to whom communications should be directed. The fact that an email has beensent to someone and "read" is not sufficient to establish that the email was delivered to the appropriate person.
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> OFCCP's only response to this reasonable concern is that it is taking measures to "ensure that OFCCP is emailing an appropriate point of contact, and that the contractor will have the full 30-day period to respond." Such a representation is not the same as incorporating into the Scheduling Letter a requirement that OFCCP take appropriate steps to make sure that the letter was received by the appropriate point of contact and that the time to respond shall be measured from the time of actual delivery to the appropriate person. The need for such protections will be even greater if OFCCP is going to permitted, as requested below, to initiate enforcement proceedings if requested information is not provided within 30 calendar days of contractor receipt of the letter.
>
> Although not discussed in our response to the 60-day notice, we also note here that another problem with email delivery is that messages from OFCCP may be blocked by email security programs. We are also aware of many instances in which emails from OFCCP were ignored by recipients based on a concern that they could be malicious.
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> For these reasons, the time for responding should not begin until after affirmative acknowledgment of receipt by the contractor and, absent such an acknowledgment, the letter should have to be transmitted by certified mail pursuant to OFCCP's prior practice.

Page Two: Clarifying that post-secondary institutions and contractors with "campus-like settings," in which the contractor maintains multiple AAPs for the same campus, must submit the requested information for all AAPs for that campus located in that city. OFCCP made this clarification already for post-secondary institutions in a recent Scheduling Methodology. OFCCP would like to align its approach in the scheduling letter to clarify this issue for employers, promote the prompt production of relevant

AAPs, and avoid dispute over the compliance obligations of contractors with campus-like settings. The change to the scheduling letter makes clear that at the outset of a compliance review for post-secondary institutions, contractors must submit all their AAPs for campuses, schools, programs, buildings, departments, or other parts of the institution located in that city. With this revised compliance review scheduling letter, OFCCP also 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. Collecting all AAPs for a campus provides a more efficient use of agency resources and promotes a broader understanding of an organization's equal opportunity programs through a holistic review of the campus. OFCCP acknowledges that contractors may have additional questions on the requirements of post-secondary institutions and contractors with "campus-like settings" and welcomes public comments on what additional guidance OFCCP can provide on this topic.

OFCCP's rules require affirmative action programs to be implemented either by establishment or, upon the agency's agreement by functional unit. Under its rules, OFCCP may conduct a compliance review of an affirmative action program, meaning the review of either an establishment or a functional unit. The only exception to this limitation was created through rulemaking. 41 CFR §60-2.30 permits OFCCP to expand a compliance evaluation beyond a headquarters establishment in the context of a corporate management compliance evaluation if certain conditions are met. Otherwise, an audit must be limited to the establishment that was selected for review. In attempting to require contractors to prepare and submit plans by campus, OFCCP is seeking to fundamentally change its existing rules regarding plan preparation and the conducting of compliance reviews. Such fundamental and far-reaching changes to OFCCP's requirements can only be made through formal rulemaking. *See*, 65 Fed. Reg. 68021, 68025.

OFCCP's proposed change should be rejected not only because it could only be made following appropriate rulemaking but also because it is simply a bad idea.

First, in a campus setting, responsibility for the different plans will often rest with different individuals such that coordinating responses to such broad requests would be extremely difficult.

Second, as shown by audits of institutions of higher education (which already tend to be extremely complicated), both OFCCP and contractors struggle when audits cover very large complex workplaces. *See, In the Matter of OFCCP v. Google Inc,* ALJ No. 2017-OFC-00004 (Recommended Decision and Order July 14, 2017) at n. 24 (OFCCP asserts that audit challenges arising from the size and complexity of an affirmative action plan including over 21,000 employees would have been avoided if the contractor had divided its headquarters plan into multiple establishments associated with different campus addresses).

Implementation of this proposal would exponentially increase the burden on contractors that are being audited as well as the burden on the government. As OFCCP has, for decades, struggled to close even simple audits within reasonable time frames, it is clear that OFCCP would either end up having to ignore the additional documentation that this proposal would require contractors to produce at great expense or would see further increases in the length of audits.

Before making such a fundamental change in its requirements and processes, OFCCP should explain why additional information will be relevant and show that the agency will be able to process and use the information in a meaningful way and that the value of obtaining this information is sufficient to support the additional burden on contractors. It has thus far failed to

do so.

OFCCP's response to these concerns is to argue that this proposal does not exceed its regulatory authority or require rulemaking because OFCCP's regulations "state that '[c]ontractors subject to the affirmative action requirements must develop and maintain a written affirmative action program for each of their establishments. Each employee in the contractor's workforce must be included in an affirmative action program." However, this response does not make any sense. OFCCP admits that its rules require that affirmative action programs be developed *by establishment*. Therefore, when 41 CFR §60-1.20 requires OFCCP to conduct compliance evaluations of affirmative action programs, this means that the evaluations must be conducted *by establishment*. That this has always been OFCCP's own understanding of its regulations was confirmed in the testimony of its Regional Director (Pacific Region) in *OFCCP v. Google,* Case No. 2017-OFC-00004 (14 July 2017) at n. 24.

Page Two: Revising submission instructions to request contractors submit their AAPs and itemized listing information electronically. Contractors will be provided with an email address where they can send their submission. An OFCCP point of contact will be provided with instructions to contact this POC if the contractor wants to discuss a different electronic submission method. The option to submit via the United States Postal Service (USPS) or via other delivery services is also available.

This is largely consistent with the agency's present practice and contractor preferences. However, contractors have many legitimate concerns about confidentiality and security. OFCCP should explain in a transparent fashion what safeguards the agency is taking to ensure the confidentiality and integrity of data it receives from contractors.

Page Two: Revising the language to clarify that OFCCP may initiate enforcement proceedings if the requested information is not provided within 30 calendar days of contractor receipt of the letter.

As discussed above, 30 days does not provide contractors with sufficient time in which to respond to some portions of the proposed scheduling letter.

In addition, the agency's obligation to proceed with a show cause before moving to enforcement is necessary to protect contractors' rights to due process and to avoid wasting taxpayer funds by precipitously pursuing ill-advised enforcement actions. In 2000, OFCCP correctly recognized that removing the show cause obligation from its rules required formal rulemaking and also decided after notice and comment not to remove the requirement. 65 Fed. Reg. at 68025-6.

To the extent that OFCCP would argue that its proposed revision is consistent with 41 CFR §60-1.26(b)(1), which sets forth exceptions to the general rule that a show cause notice must be issued whenever administrative enforcement is contemplated, we note that the proposed change to the language of the scheduling letter misleadingly implies the existence of an exception that is far broader than that set forth in the rules.

OFCCP has offered no meaningful response to these concerns.

The Itemized Listing

Item 4

Expanding the scope of Item 4 to include all of 41 CFR § 60-2.14. This item, as proposed, would read as follows:

> **For each job group, a determination of minority and female availability pursuant to 41 CFR § 60-2.14.**

This change would ensure that OFCCP can verify contractors are meeting all their obligations under 60-2.14. As written in the previous version, OFCCP only requested a determination of minority and female availability that considered the factors given in 60-2.14(c)(1) and (c)(2). However, 60-2.14 includes other requirements that were disregarded in the previous itemized listing. For example, the expansion of scope now requires the contractor to provide documentation to OFCCP demonstrating the consideration of the most current and discrete statistical information available, its reasonable recruitment area, and the pool of promotable, transferable, and trainable employees. This change allows OFCCP to better assess whether the contractor is in full compliance with all provisions of 41 CFR § 60-2.14.

In general, we have no objection to the new language that the agency is proposing but strongly disagree with OFCCP's stated belief that this change in language would require contractors to produce, as part of their desk audit submission, any more information than is currently produced by contractors that are in compliance with the agency's rules.

In our opinion, this proposed change would make no difference as to what contractors are required to produce in response to the scheduling letter – which is the availability analysis that the contractor has in place as part of its current affirmative action plan, which is already subject to all the requirements of Section 60-2.14. If OFCCP wishes to further review the sufficiency of the contractor's compliance with this section, that should properly be done after the agency has reviewed the desk audit submission and determined that it has reasons to believe that the contractor's availability analysis is not compliant.

In it very brief response to these concerns, OFCCP fails to offer an explanation as to how the new language would make any difference as to what contractors are required to produce in response to the scheduling letter. In seeking to justify the change, OFCCP claims that the existing request only relates to §60-2.14(c)(1) and (c)(2) while ignoring other elements of §60-2.14. This argument ignores the fact that these other elements simply provide direction for the calculations required by §60-2.14(c)(1) and (c)(2) and are, therefore, already included within the existing request. Furthermore, OFCCP ignores the fact that Itemized listing Nos. 1 through 6 are already duplicative of the request in the Scheduling Letter, itself, for " a copy of your current Executive Order 11246 Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR §§ 60-1.40 and 60-2.1 through 60-2.17". OFCCP is simply adding length and complexity to the Itemized listing without making any substantive change.

Item 7

Adding a new item requesting a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).

OFCCP's regulations at 41 CFR § 60-2.17(b) require contractors to perform in-depth analyses of their total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum, the contractor must evaluate whether there are problems with minority or female utilization; selection disparities; gender-, race-, or ethnicity-based compensation disparities; disparities in the employment or advancement of minorities or women; and any other areas that might impact the success of the AAP. By proactively conducting this self-analysis, contractors can determine whether impediments to equal employment opportunity exist and develop action-oriented programs to address these problems, as required by 41 CFR § 60-2.17(c). OFCCP does not currently collect information about a contractor's action-oriented programs with the current compliance review scheduling letter. Adding this item to the letter will allow OFCCP to more thoroughly review contractors' compliance in this important area, as well as enable OFCCP to understand the action-oriented programs that a contractor is undertaking as part of its AAPs at the beginning of a compliance review.

As originally proposed by OFCCP, this item did not require contractors to produce information regarding identified problem areas or the methodologies or analyses used to identify problem areas. We had no objection to a request for the production of a list of action-oriented programs.

OFCCP has now revised its proposal to require documentation demonstrating the development and execution of action-oriented programs. This change imposes new burdens on contractors. It is also unclear what such documentation would be. We object to OFCCP's further revision of this language.

<u>Item 8 (Previously Item 7)</u>

Revising Item 8 to provide more specificity on the documentation a contractor must submit regarding their Section 503 outreach and positive recruitment efforts. Specifically, OFCCP proposes adding "The documentation should also indicate whether you believe the totality of your efforts were effective" to the current language. Inclusion of the proposed language will result in the following proposed Item 8:

> **Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified individuals with disabilities, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60-741.44(f). This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-741.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective. The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified individuals with disabilities, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60-741.44(f)(3).**

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. This addition will promote uniformity in contractors' submissions and ensure consistency in what OFCCP is requesting across field offices as well as allow OFCCP to more efficiently assess whether the contractor is in full compliance with 41 CFR § 60-741.44(f).

In our experience, the problem with this item is that compliance officers have been very

inconsistent in determining what documentation is acceptable. Simply adding in a requirement that the contractor address the totality of its efforts seems unlikely to result in any greater consistency. This additional burden is not linked to an identification of a problem area but rather as written requires more data production even if or in areas where the benchmarks have been met.

OFCCP's response failed to clarify what documentation would be acceptable. We have no objection to OFCCP requesting a description or discussion of the contractor's activities and its evaluation of those activities. However, to the extent that OFCCP is seeking documentation to prove that such activities actually took place (e.g. emails, memos, marketing materials), such a request would be unnecessary and overly burdensome as part of the desk audit.

Item 11 (previously Item 10)

Revising Item 11 to provide more specificity on the documentation a contractor must submit regarding their Section 503 utilization analysis. The current scheduling letter request reads as follows:

> **The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR § 60-741.45. If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress.**

OFCCP proposes revising this item to the following:

> **The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR § 60-741.45. If any underutilization of individuals with disabilities is identified, provide a description of the steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 CFR § 60-741.45(e). Per 41 CFR § 60-741.45(e) and (f), this description shall include your assessment of personnel processes, the effectiveness of your outreach and recruitment efforts, the results of your 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. Provide this information for the immediately preceding AAP year. If you are six months or more into your current AAP year on the date you receive this listing, provide the information that reflects your progress for at least the first six months of the current AAP year.**

Through this proposed language, OFCCP is including a request for a more detailed description of contractors' compliance, as required in 41 CFR § 60-741.45(e) and (f). Requiring the submission of these additional items will promote uniformity in contractors' submissions and ensure consistency in what OFCCP is requesting to review across field offices. Also, contractors have expressed confusion over what documentation is sufficient for their Item 11 submission, and the more detailed request provides greater specificity about what information contractors must provide regarding their utilization analysis.

There has never been any confusion regarding old Item 10 which only required production of the utilization analysis and did not require any additional documentation. New Items 8 and 11 are

duplicative (or at least overlapping). The proposed changes to New Item 11 should be rejected.

In its response, OFCCP notes that seven comments were submitted in response to this proposal. Although all of these comments were presumably prepared separately, they all concluded that this proposal is duplicative. In spite of the consistency of this opinion and the absence of any apparent public support for the proposed change, OFCCP offers no further rationale in defense of its own proposal but only baldly asserts that "OFCCP disagrees that this proposal is duplicative of other AAP requirements."

Item 12 (previously Item 11)

Revising Item 12 to provide more specificity on the documentation a contractor must submit regarding their VEVRAA outreach and positive recruitment efforts. Specifically, OFCCP proposes adding "The documentation should also indicate whether you believe the totality of your efforts were effective" to the current language. Inclusion of the proposed language will result in the following proposed Item 12:

> **Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified protected veterans, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60-300.44(f). This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-300.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective. The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified protected veterans, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60-300.44(f)(3).**

Contractors have expressed confusion over what documentation is sufficient for their Item 12 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. This addition will promote uniformity in contractors' submissions and ensure consistency in what OFCCP is requesting to review across field offices as well as allow OFCCP to more efficiently assess whether the contractor is in full compliance with 41 CFR § 60-300.44(f).

Our concerns with this proposed revision are the same as were discussed in connection with proposed Item 8 (Previously Item 7).

Again, OFCCP's response failed to clarify what documentation would be acceptable. We have no objection to OFCCP requesting a description or discussion of the contractor's activities and its evaluation of those activities. However, to the extent that OFCCP is seeking documentation to prove that such activities actually took place (e.g. emails, memos, marketing materials), such a request would be unnecessary and overly burdensome as part of the desk audit.

Item 15 (previously Item 14)

Adding language that clarifies that OFCCP is seeking information regarding the VEVRAA hiring benchmark that the contractor establishment is using for the current AAP year. This is consistent with

the current requirements, but OFCCP is adding this language for clarity.

Based on OFCCP's response, we understand that this item is only seeking documentation regarding the calculation of the veteran hiring benchmark for the current plan year and, if the contractor is six or more months into its current AAP year on the date that it receives this listing, then also current year hiring data to measure against its benchmark. In other words, as explained by OFCCP this request does not seek any information at all regarding the prior AAP year.

With this clarification from OFCCP, we no longer have any objection to the proposed revision.

Item 16 (previously Item 15)

Adding in a request for post-secondary institutions to submit copies of their Integrated Postsecondary Education Data System (IPEDS) Human Resources Survey Component data collection reports for the last three years.

Post-secondary institutions do not submit EEO-1 Reports to EEOC. The IPEDS is the equivalent of an EEO-1 Report for post-secondary institutions. Having this information from post-secondary institutions at the beginning of a compliance review will allow OFCCP to conduct more efficient analyses.

OFCCP should cease to accept either EEO-1 reports until it has obtained legislation eitherholding OFCCP to the same standards of confidentiality that apply by statute to the Equal Employment Opportunity Commission or establishing the standard that is to apply.

We also respectfully suggest that OFCCP does not have authority to require educational institutions to submit IPEDS. Although OFCCP's legal authority to obtain EEO-1 reports may be subject to question, the agency has at least engaged in rulemaking relating to this purported requirement. See 41 CFR § 60-1.7. The filing of IPEDS is not required by Executive Order 11246 and the IPEDS include data that is not relevant to the laws that OFCCP enforces.

Finally, OFCCP offers no explanation as to how obtaining IPEDS would result in more efficient analyses.

Item 19 (new item) (renumbered to Item 21 in the 30-day Notice)

Adding a new item requesting documentation of a contractor's policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures.

Increasingly, contractors are adopting automated technologies within their hiring and recruitment processes. Use of these technologies may lead to instances of screening or selection bias, for example, assigning lower ratings to minority or women candidates in a screening process. Individuals with disabilities are also at risk of exclusion from the use of these tools. Addition of this requirement will allow OFCCP to assess the contractor's use of such technology to determine whether these tools are creating barriers to equal employment opportunity.

The new request for documentation relating to artificial intelligence, algorithms, automated systems, or other technology-based selection procedures is problematic. These terms mean different things to different people, states, and vendors. Vendors do not disclose their algorithms

within a dynamic or static AI tool so the company would not be able to provide much other than what is on the box. Compliance officers have little to no understanding of these new technologies and do not have any methodology or tools to evaluate them. The terms are also too generic and vague, and more clarification would be needed before we could accurately respond to this one. Moreover, if the data produced in an audit does not indicate possible disparate impact, there is no reason to delve into the use of technology-based selection procedures. Where there are indicators of disparate impact, OFCCP may, of course, then conduct further discovery.

OFCCP's response completely ignored the substance of the comments which focused on the burden imposed by this request, its lack of clarity, and OFCCP's inability to explain how it will be able to use the documentation that it obtains.

We do not dispute the existence of public policy issues regarding the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures and agree that there is a role for OFCCP to play in studying the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures and their potential impact in the workplace. However, OFCCP's inquiries into the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures must first be conducted through hearings and rulemaking (or else directed by Congressional action). Seeking to collect information on artificial intelligence, algorithms, automated systems, or other technology-based selection procedures through the scheduling letter before OFCCP has made any effort to define through rulemaking what is meant by these terms or what standards apply to contractors regarding the use of such selection procedures is inappropriate.

Item 20 (previously Item 18) (renumbered to Items 18(c) and 18(d) in the 30-day Notice)

- **Modifying Item 20(c) to require contractors to identify whether a promotion is "competitive" or "non-competitive," as well as including the previous supervisor, current supervisor, previous compensation, and current compensation.**

- **Adding a requirement to Item 20(c) for contractors to provide documentation of their established policies and practices related to promotions.**

- **Modifying Item 20(d) to require contractors to break down the number of terminations by reason for termination (*e.g.*, retirement, resignation, conduct, etc.) and to provide the gender and race/ethnicity information for each.**

- **Adding Item 20(e) to request the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year for each job title or job group.**

This additional information is vital in ensuring that OFCCP has all the necessary data to conduct a thorough and timely desk audit. Specifically, to create accurate pools for the promotion and termination impact ratio analyses, OFCCP needs information on the type of promotion or termination and the number of employees in each job group or job title as of the start of the immediately preceding AAP year. Additionally, OFCCP requires information on previous supervisors, current supervisors, previous compensation, and current compensation. These additional factors provide OFCCP information necessary for thorough analysis. Under the current compliance review scheduling letter, contractors are not required to provide this information. As a result, OFCCP often submits a follow-up

request to the contractor requesting this information. This additional step in the process causes delays in the overall compliance review. Additionally, contractors have expressed concerns that OFCCP does not understand a contractor's promotion or termination policies at the outset of the review and does not differentiate between "competitive" and "non-competitive" promotions and voluntary and non-voluntary terminations when conducting their analyses. Adding in this new language will address these concerns and promote the timely and efficient exchange of information.

For purposes of this proposed collection, OFCCP defines a "competitive promotion" as a promotion of a candidate who was considered amongst a pool of other candidates. OFCCP defines a "non-competitive promotion" as a promotion of a candidate who was not considered amongst a pool of other candidates (*e.g.*, "in-line" and "step") promotions.

OFCCP is not including its proposed definitions of "competitive promotion" and "non-competitive promotion" within the compliance review scheduling letter. These definitions will be included in future FCCM updates and in an FAQ, available on OFCCP's website.

OFCCP acknowledges that it may be difficult for some contractors to determine which of their promotions are "competitive" and "non-competitive," even with the clarification above as to how OFCCP interprets these terms. OFCCP welcomes public comments on the proposed definitions for the terms "competitive promotion" and "non-competitive promotion" as well as on what additional guidance OFCCP can provide on this topic to provide greater clarity to contractors.

> We recognize that OFCCP has addressed some of the concerns raised with regard to this proposed revision.
>
> However, OFCCP has not addressed our concern regarding the handling of job openings for which both internal and external candidates are considered. Such situations are common and cause confusion when OFCCP tries to force contractors to identify such situations as either external hires or promotions. As noted in our comments in response to the 60-day Notice, the better practice is usually to look at all competitive selections as a group rather than trying to distinguish between promotions and hires. Revising the Scheduling Letter to dispense with the concept of "promotions" and to instead focus on competitive and non-competitive selections, would result in the production of more meaningful data and simplify the analysis of the data.
>
> With regard to terminations, we recognize that OFCCP has acknowledged the concerns that were expressed and has decided to leave the existing language in place.

<u>Item 21 (previously Item 19) (renumbered to Item 19 in the 30-day Notice)</u>

- **Updating the employee-level compensation data request to require two (2) snapshots of data. The first snapshot is as of the date of the organizational display or workforce analysis and the second snapshot is as of the date of the prior year's organizational display or workforce analysis.**

Under the current compliance review scheduling letter, contractors are only required to provide one compensation snapshot, as of the date of the current organizational display or workforce analysis. However, OFCCP has the authority to review employment activity data covering a period beginning two years before the date the contractor received the compliance review scheduling letter.

Under current procedures, OFCCP is only seeking an additional snapshot, data as of the date of the prior year's organization display or workforce analysis, when the desk audit reveals a potential disparity. This approach is inefficient because requesting additional data delays the compliance review process.

Further, reviewing more data during the desk audit will allow OFCCP to better identify whether there is systemic pay discrimination happening at a contractor's workforce and whether the potential discrimination was ongoing prior to the first snapshot, but within the two-year period for which OFCCP can seek documents. This change will benefit employees who may have been subject to pay discrimination that OFCCP is able to remedy and will provide OFCCP with more information to determine which cases are worth pursuing for further investigation. OFCCP will update subregulatory guidance, including but not limited to the FCCM and FAQs, as needed based on the final outcome of this proposed revision.

- **Revising Item 21 to clarify that temporary employees include those provided by staffing agencies.**

Under the current compliance review scheduling letter, OFCCP requests compensation on temporary employees. This clarification will reduce the number of follow-up requests that OFCCP makes to contractors to conduct a desk audit, to improve the efficiency of the agency's compliance evaluations.

- **Revising Item 21(b) to list the additional compensation factors contractors must include it its submission.**

Requiring information on additional factors that affect pay will ensure OFCCP is conducting a meaningful compensation analysis in a manner that aligns with contractors' pay practices. This additional information will help OFCCP better understand a contractor's pay policies, thereby conducting a more accurate and efficient compensation analysis at the desk audit. While contractors have expressed concerns of OFCCP not fully understanding their pay policies during the desk audit, contractors often fail to provide the necessary information at the desk audit stage and are not required to do so under the current compliance review scheduling letter. Obtaining more information at the desk audit stage will also reduce the number of additional data requests sent to contractors.

- **Revising Item 21(c) to require the submission of documentation and policies related to compensation. Also, adding in more details as to what a contractor must submit (*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.).**

Like the compensation factors in Item 21(b), having these additional items will ensure that OFCCP has the information necessary to understand the contractor's specific pay policies and can conduct a more meaningful pay analysis.

The OFCCP is looking to double the burden on contractors again before any indicators have been identified with the compensation practices. Requesting a second snapshot does not better the statistical models that are created to analyze a contractors compensation practices. In fact, with employee changes from year to year it will not be an apple-to-apple comparison and could expand the audit to include employees outside the scope of the AAP under audit. In addition to increasing the burden, this will also add the countless hours to document production that will inevitably come from Compliance officers who already struggle to understand the complexities of

compensation systems.

Moreover, for companies that have undergone mergers, recent system conversions or those that have dynamic systems, pulling compensation data as of a previous date can be very challenging and costly.

21(b): Compensation systems are very complex, and pay is determined by many different variables depending upon prior experience, market, hot skills, job title and industry just to name a few. Often this information is not maintained electronically and requires a great deal of resources to research and gather together for an entire submission. The agency is now looking to increase an already very burdensome process from 1 year to 2 years. Again, all this information is being requested before any areas or indicators have been identified. The burden should be on the OFCCP to identify areas where more clarification is needed before asking a contractor to spend countless hours and resources identifying the factors for each job title.

In its response, OFCCP disagrees with the assertion that an additional snapshot will not improve OFCCP's statistical analysis but offers no technical support. The fact is that OFCCP is simply wrong. The compensation data contained in two snapshots taken 12 months apart will be autocorrelated. The second snapshot will rarely, if ever, increase the power of the statistical analysis, but it can be easily misinterpreted to support an appearance of discrimination. OFCCP's requested change should be rejected because of the burdens it imposes and the confusion and delay that it will cause.

OFCCP is seeking to require contractors to provide information on staffing agency employees. These are employees of a separate unrelated company in which the contractor has no say with regard to pay decisions. Contractors generally do not have access to information on these individuals who are employed by a third party and certainly have no authority to share information on such individuals with the government. Nor does OFCCP have jurisdiction over employees of a staffing agency unless the agency is, itself a federal contractor or subcontractor and OFCCP has properly selected the agency for a compliance review in accordance with constitutional standards.

In addition, OFCCP has clarified that it is only seeking information on individuals that are employed by the contractor that is the subject of the compliance evaluation. In other words, individuals that are employees of staffing agencies are not included within the scope of this request. While we still think that OFCCP's language will be confusing to some contractors, there is no disagreement with OFCCP's assertion that an individual employed by a contractor should be included in the compensation data even if such employment is on a temporary basis.

Item 22 (new Item)

Adding language that requests contractors submit documentation that the contractor has satisfied its obligation to evaluate its "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities," as part of the contractor's "in-depth analyses of its total employment

process" required by 41 CFR 60-2.17(b)(3). This documentation must demonstrate at least the following:

- **When the compensation analysis was completed;**

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

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

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

- **The method of analysis employed by the contractor (*e.g.*, multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, comp-a-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, *etc.*).**

Having 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 is trying to bootstrap sub-regulatory guidance into requirements. OFCCP's stated purpose for requesting this information ("to conduct a more efficient analysis of a contractor's compensation for systemic discrimination") shows that the agency is not seeking this information to determine compliance with a regulatory requirement (to "evaluate" compensation) but is rather seeking to have contractors reveal substantive information that may be properly subject to attorney client privilege. This proposal is not only extremely burdensome but will actually discourage contractors from performing meaningful analyses.

OFCCP has responded to this concern by misrepresenting its own regulations. OFCCP states that "the regulations at 41 CFR 60-2.17(b) already require contractors to self-audit their compensation systems." In fact, this section only requires contractors to "*evaluate* Compensation *system(s)* to determine whether there are gender-, race-, or ethnicity-based disparities". The language of the scheduling letter seeks to mislead contractors into believing that they are required to conduct a quantitative and more formal analysis than what is required by the rules. That §60-2.17(b) does not require a formal analysis is not only clear from the language of the rule but from OFCCP's past history of having promulgated (and later rescinded) rules regarding compensation standards and self-audit guidelines. *See* 78 Fed. Reg. 13508 (Feb. 28, 2013).

OFCCP's request to add this new Item 22 should be rejected until such time as OFCCP has engaged in appropriate rulemaking to set standards for self-auditing and addressed the many issues and problems created by OFCCP's interest in dictating standards and obtaining documentation that is often protected by attorney-client privilege or as attorney work product.

<u>**Item 24 (new Item)**</u>

Adding Item 24 to request copies of existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees' equal opportunity rights and complaint processes, in place for the immediately preceding AAP year. If contractors are six months or more into the current AAP year at the time of scheduling, contractors are to provide this information for at least the first six months of the current AAP year.

This additional item will allow OFCCP to better assess a contractor's EEO compliance.

Reviewing employment policies such as anti-harassment policies and arbitration agreements at the onset of a compliance review will help OFCCP understand the systems in place for employees to raise concerns. An early review of this documentation will also help OFCCP ascertain whether there are any provisions in these employment policies and agreements that limit or interfere with employees' rights under antidiscrimination authorities, including E. O. 11246, Section 503, and/or VEVRAA. OFCCP will be better able to determine where to focus its inquiries to have the greatest impact.

> We have no objection to OFCCP requesting polices relating to equal employment opportunity, anti-harassment policies, or complaint procedures. However, the demand for the production of agreements between the contractor and individual employees is unreasonable. Identifying and producing all individual agreements would be tremendously difficult and burdensome and would also violate individual employees' privacy.

<u>**Item 25 (previously Item 21)**</u>

Revising Item 25 to provide more specificity on the documentation a contractor must submit regarding its review of personnel processes. The current compliance review scheduling letter request reads as follows:

> **Your most recent assessment of your personnel processes, as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b), including a description of the assessment and any actions taken or changes made as a result of the assessment.**

OFCCP proposes revising this item to the following:

> **Your most recent assessment of your 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.**

OFCCP proposes adding a requirement for a description of any impediments to equal employment opportunity identified through the assessment to the Item 25 request. OFCCP did not previously require this description be included as part of the itemized listing. Requiring the submission of this additional item will promote uniformity in contractors' submissions and ensure consistency across field offices in

what OFCCP is requesting to review. Also, contractors have expressed confusion over what documentation is sufficient for their Item 25 submission, and the more detailed request provides

greater specificity about what information contractors must provide to document their compliance and allows OFCCP to more efficiently assess whether the contractor is in full compliance with all provisions of 41 CFR §§ 60-300.44(b) and 60-741.44(b).

As written, this item will not ensure consistency because it is still unclear what they agency is expecting. The agency should focus on driving consistency with its 350 compliance officers so as to address the current situation in which what is acceptable for one auditor is not acceptable for another.

OFCCP responded to the concerns raised with regard to this item as follows:

> To address confusion about what documentation is required, the proposal includes specific information on what OFCCP is requesting to review. It specifically states that the "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."

According to OFCCP, "[t]his additional language provides clear guidance on what contractors must submit to demonstrate their compliance." We disagree. This language does not explain what OFCCP means by an "assessment", and we remain concerned that this request is going to increase existing inconsistencies in how compliance evaluations are conducted from one compliance office to another.

Additional Issues

10. Confidentiality of Information

Some of the information contractors submit to OFCCP during a compliance evaluation may be considered business confidential information or personally identifiable information. OFCCP will treat records provided by the contractor as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act (FOIA), 5 USC 552. OFCCP will evaluate all information requests pursuant to the public inspection and disclosure provisions of FOIA and DOL's implementing regulations at 29 CFR part 70.

OFCCP safeguards and protects personally identifiable information it receives from contractors to the maximum extent allowable under the law in accordance with the Privacy Act of 1974, as amended (5 USC 552a). In addition, the regulation at 41 CFR 60-1.20(f) allows a contractor that is concerned with the confidentiality of personally identifiable information such as lists of employee names, reasons for termination, or pay data, to use alphabetic or numeric coding or an index. The coding or index for pay and pay ranges must be consistent with the ranges assigned to each job group for purposes of the compliance evaluation.

As discussed above, OFCCP should ask Congress to either adopt the same strict protections on submitted information that currently apply to the EEOC under Title VII or else clearly establish the standards that will apply to information collected from OFCCP.

12. Information Collection Hour Burden

The OFCCP is significantly underestimating the burdens associated with its rules and collection requirements. The heavy burden these additional items would place on a contractor add up to much more than the stated 39 hours.

Based on our experience in preparing affirmative action plans and in assisting contractors in responding to OFCCP compliance reviews, we know that the time required to prepare responses to all the proposed items will vary depending on the size of the establishment being audited and the complexity of the contractor's organization. However, based on our experience, we are able to confidently state that preparing responses to all the proposed items will almost always require at least 100 hours and will generally require between 100 and 480 hours.

In addition, the proposed changes would be particularly problematic for small and medium size contractors that do not have the resources to comply with the new obligations that OFCCP is seeking to impose through its revisions to the scheduling letter. Clearly, OFCCP should have develop a separate letter and have a different set of expectations for small employers and employers with small government contracts. The burdens that OFCCP imposes often exceed the value of doing business with the government and dissuade many employers from accepting this work.

Thank you for the opportunity to comment on OFCCP's request for reauthorization of the compliance review scheduling letter, including proposed revisions We appreciate your consideration of our comments. Please do not hesitate to contact us should you have any questions.

This continues a pattern of seeking to change the rules of the game without engaging in required rulemaking. Last year the Contractor Portal was plagued by problems that could have been mitigated had OFCCP respected the requirements of the Administrative Procedure Act and implemented the new requirements through rulemaking. This year, there will be new problems should OFCCP change the scheduling letter without engaging in rulemaking to address existing issues and to identify and address the issues that arise from OFCCP's proposals.

Respectfully submitted,

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David J. Goldstein, Chair

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