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May 17, 2023

Via the Office of Information and Regulatory Affairs: www.reginfo.gov

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-OFCCP
Office of Management and Budget, Room 10235
725 17th Street NW
Washington, DC 20503

Re: The Center for Workplace Compliance's Comments on Proposed Revisions to the Office of Federal Contract Compliance Programs' "Supply and Service Program" (OMB Control No. 1250-0003)

Dear OMB Desk Officer:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor, Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection request (ICR) regarding revisions to the agency's Supply and Service Program, which was submitted to the White House Office of Management and Budget (OMB) for review on April 17, 2023.¹

OFCCP proposes significant revisions to the recordkeeping and reporting obligations imposed upon federal supply and service contractors that receive a compliance review Scheduling Letter and accompanying Itemized Listing. OFCCP avers these changes—which the agency acknowledges will increase the per-audit burden on contractors by more than 30%—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.”

As set forth below, and as detailed in our original comments to OFCCP, CWC strongly disagrees with OFCCP's position that these changes will improve the efficiency of the agency's compliance reviews. While the existing Scheduling Letter and Itemized Listing is limited largely to those records and data that contractors are *already required to develop and maintain under OFCCP regulations*, OFCCP's proposal is not similarly constrained. The majority of OFCCP's proposed changes are speculative, vague, or solicit records not required by OFCCP's regulations. In one instance the agency even demands data and records from employers that are not federal contractors, and thus are outside of OFCCP's jurisdiction.

Moreover, aside from our concerns with the Scheduling Letter itself, CWC urges OMB to withhold final approval of Control No. 1250-0003 until the agency can reconcile its burden calculations. The majority of OFCCP's burden estimates are based on the agency's position that there are, on average, 104,303 “contractor establishments that meet the threshold for developing and maintaining an E.O. 11246 AAP.” Recent data published by the U.S. Department of Labor reveal that that the actual figure is likely significantly higher, perhaps by tens or even hundreds of thousands of establishments.

¹ 88 Fed. Reg. 23,472 (April 17, 2023).

Statement of Interest

CWC² is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's members are firmly committed to nondiscrimination and equal employment opportunity.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order (E.O.) 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, particularly those triggered by the agency's compliance review Scheduling Letter and Itemized Listing, efficiently and effectively accomplish their underlying policy objectives.

CWC members have developed a keen understanding and appreciation for the importance of objective and efficiently managed compliance reviews as a precondition to implementation of effective affirmative action programs. They also understand how compliance reviews that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for affirmative action initiatives.

OFCCP Underestimates the Number of Federal Contractor Establishments

Before turning to the specifics of OFCCP's proposal, we urge OMB to withhold final approval of revisions to the Supply and Service Program (Control No. 1250-0003), pending further review of the agency's burden calculations. The majority of OFCCP's burden estimates are based on the agency's position that there are, on average, 104,303 "contractor establishments that meet the threshold for developing and maintaining an E.O. 11246 AAP." The "threshold" to which OFCCP refers are those federal supply and service contractor establishments with 50 or more employees.³

There are two primary data sources available to OFCCP to assist in this assessment: (1) the Employer Information (EEO-1) Report, which is administered each year by the U.S. Equal Employment Opportunity Commission (EEOC); and (2) the VETS-4212 Report, which is administered each year by the U.S. Department of Labor's Veterans' Employment and Training Service (DOL-VETS). According to OFCCP's supporting statement, the agency "obtained the average number of contractor establishments from the most recent EEO-1 Report data available, which is from FY 2020, FY 2019, and FY 2018."

More recent data published by OFCCP, however, call into question whether these figures are accurate and up to date. For example, on its Freedom of Information Act (FOIA) webpage, OFCCP recently published an electronic workbook, *EEO-1 historic submission data (FY2014 – FY2020)*, showing the total number of federal

² Formerly the Equal Employment Advisory Council.

³ 41 C.F.R. 60-2.1(b)(2).

contractor establishments subject to OFCCP’s jurisdiction, at least according to the EEO-1 Report.⁴ OFCCP published the following figures:

Fiscal Year	Facilities
FY2020	594,822
FY2019	629,785
FY2018	154,008
FY2017	133,676
FY2016	139,840
FY2015	135,730
FY2014	137,327

Based on the agency’s figures, the average number of establishments subject to OFCCP jurisdiction from fiscal years 2018-2020 is 459,538. While it stands to reason that at least some of these counts may include establishments with fewer than 50 employees (particularly FY 2019 and FY 2020), it is striking that in every year reported, the number of establishments is tens—and in some cases hundreds—of thousands of establishments higher than the 104,303 establishments offered in OFCCP’s supporting statement.

Moreover, the agency’s focus on establishments with 50 or more employees ignores the fact that hundreds of federal contractors do in fact prepare written AAPs for establishments with fewer than 50 employees, which is perfectly acceptable under OFCCP’s E.O. 11246 regulations. CWC consulted with a handful of our largest member organizations, who reported that even within their small cohort, they collectively prepare approximately 10,000 written AAPs each year, with the largest of these employers *alone* preparing more than 5,000 AAPs annually. If OFCCP’s estimate is accurate, it would mean that this one employer accounts for approximately one out of every twenty of the AAPs prepared by federal contractors each year. This calculation strains belief.

Data from DOL-VETS likewise cast doubt on OFCCP’s estimates. For example, in 2021 DOL-VETS requested—and OMB approved—the paperwork requirements associated with the administration of the VETS-4212 Report (OMB Control No. 1293-0005). Certain federal contractors file VETS-4212 Reports annually with the Labor Department, detailing the numbers of employees and new hires who belong to the specific categories of veterans protected under VEVRAA. In its supporting statement to OMB, DOL-VETS estimated that it would process approximately 378,000 reports annually, each of which would cover a minimum of *one* federal contractor establishment.⁵ It is worth emphasizing here that the number of contractor establishments that are required to file VETS-4212s each year is, by definition, *smaller* than the number of contractors subject to OFCCP’s Supply and Service Program under E.O. 11246.⁶

For OMB’s review and consideration, below is a summary of the VETS-4212 Reports filed in 2022, as reported by DOL-VETS:

⁴ See <https://www.dol.gov/sites/dolgov/files/OFCCP/foia/files/EEO-1historicsubmissiondata.csv>

⁵ Some reports contain more than one establishment and are referred to “state consolidated” reports.

⁶ The written AAP requirements under E.O. 11246 are triggered by contracts valued at \$50,000 or more, while the VETS-4212 requirements are triggered by contracts at the much higher threshold of \$150,000 or more.

Filing Cycle	Form Type	Reports
2022	Multiple Establishment - State Consolidated	7,030
2022	Multiple Establishment - Headquarters	7,408
2022	Single Establishment	8,379
2022	Multiple Establishment - Hiring Location	343,179
2022	Total Reports	365,996

While one could reasonably expect *some* deviation in the number of federal contractor establishments subject to these reporting requirements, the balance of the discrepancies above is simply too large to be ignored. As such, we urge OMB to withhold final approval of revisions to the Supply and Service Program (Control No. 1250-0003), pending further review of this important issue.

Background on OFCCP’s Scheduling Letter and Itemized Listing

OFCCP initiates a compliance review by sending a “Scheduling Letter” to the contractor, asking the contractor to submit its current Affirmative Action Programs (AAPs) for women and minorities, individuals with disabilities, and protected veterans, along with supporting materials listed in an “Itemized Listing” that accompanies the Scheduling Letter. The contractor generally has 30 days after receiving the letter to submit the requested data.

OFCCP’s standard desk audit Scheduling Letter and Itemized Listing were overhauled in 2014, increasing from 11 to 22 the enumerated data and information items contractors had to submit. The added items incorporated the new information, reports, and analyses required under the agency’s revised disability and veteran regulations, which were promulgated the preceding year. While OFCCP has considered making changes to the Scheduling Letter since that time (including some of the same changes currently proposed), the Scheduling Letter and Itemized Listing have largely stayed the same since they were overhauled in 2014.

OFCCP now seeks to increase from 22 to 26 the number of items it requests at the outset of a compliance review, thus increasing the already substantial administrative burden on a contractor flagged for an audit. The increased burden, however, is not simply four additional items, but rather a dramatic expansion of legacy items as well. Apart from the existing requirements—all of which would continue under OFCCP’s proposed letter—the agency is proposing that federal contractors *also* provide within 30 days the following *additional, new information*:

- Not one, but *two* snapshots of employee-level compensation data, both of which would include information on staffing agency employees not subject to OFCCP jurisdiction;
- A list of additional compensation factors related to pay, along with documentation and policies related to the contractor’s compensation practices;
- Documentation evidencing that the contractor evaluated its compensation systems for any race-, ethnic- or gender-based disparities;
- External and internal availability reports;

- 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;”
- Copies of “existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements,” including arbitration agreements; and
- A description of the steps taken to determine whether and where impediments to equal employment opportunity exist, including the assessment of personnel processes, the effectiveness of outreach and recruitment efforts, and the results of an affirmative action program audit for individuals with disabilities.

CWC, along with numerous other stakeholders, filed written comments on OFCCP’s proposed changes, arguing that they would have a significant added impact on the amount of data (and the associated burden of collecting and reporting the information) provided to OFCCP at the onset of each compliance review, with limited added benefit.⁷ While we align with OFCCP’s interest in efficiency and in reducing requests for information, we respectfully submitted, however, that *increasing* from 22 to 26 the number of items federal contractors must respond to, along with the estimated 34% increase in hours associated with that response, is not a blueprint for efficiency. Rather, we believe that both federal contractors and OFCCP would be better served with a two-step evaluative process, in which aggregate information is furnished initially, evaluated by the agency, and additional information is furnished only on an as-needed basis as the agency’s audit proceeds.

While the agency did make modest improvements in response to CWC’s concerns, regrettably the version of the Scheduling Letter and Itemized Listing currently before OMB is largely unchanged from the original provided last fall. The thrust of our concerns can be best described as pure overreach on OFCCP’s part. While the existing Scheduling Letter and Itemized Listing is limited, for the most part, to those records and data that contractors are already required to develop and maintain under OFCCP regulations, OFCCP’s proposal shows no such constraint. As set forth below, the majority of OFCCP’s proposed changes are either impossibly vague, solicit records not required by OFCCP’s regulations, and in some cases, exceed OFCCP’s authority and the plain language of OFCCP regulations.

OFCCP’s Request for Staffing Agency Compensation Data Exceeds Agency Authority

OFCCP regulations implementing E.O. 11246 “apply to nonconstruction (supply and service) contractors.”⁸ In other words, OFCCP has jurisdiction over certain supply and service contractors and subcontractors. And yet, Item 19 of the proposed Itemized Listing requests that a contractor provide the agency with “employee level compensation data for all employees . . . including those provided by staffing agencies.”

OFCCP has no authority to make such a request, and there is *nothing* in either E.O. 11246 or OFCCP’s implementing regulations that require federal contractors to collect or report the compensation data of *other employers’ employees*, including staffing agencies. OFCCP has jurisdiction over federal contractors alone. If

⁷ See Attachment 1.

⁸ 41 C.F.R. 60-2.1(a).

OFCCP has reason to believe that one or more staffing agencies are indeed federal contractors, then the agency is fully capable of auditing those staffing agencies under OFCCP's neutral scheduling system. Any responsibility for the collection and reporting of staffing agency data, however, rests with the staffing agency, not the client employer.

Furthermore, there is no definition of "employee" in OFCCP's regulations. E.O. 11246 does not delegate to OFCCP any explicit authority to define that term, nor does OFCCP claim any such authority. OFCCP's supporting statement simply acknowledges that the "agency already has guidance for determining whether an individual is an 'employee' and clarifies that this guidance would still apply when assessing the status of temporary employees." While we recognize and appreciate that OFCCP has drafted frequently asked questions (FAQs) and other sub-regulatory guidance on these issues, they of course are not binding on either OFCCP or federal contractors. An ICR is not the appropriate vehicle to explore these concepts—let alone collect data derived from them—until the agency has first gone through notice-and-comment rulemaking as required by the Administrative Procedure Act.

Indeed, DOL's Wage and Hour Division has *repeatedly* engaged in notice-and-comment rulemaking over the proper standard for classifying workers as employees or independent contractors,⁹ and similarly has used notice-and-comment rulemaking to determine whether two employers are joint employers of the same workers.¹⁰ The National Labor Relations Board (NLRB) has also resolved substantive questions about joint employment status by notice-and-comment rulemaking.¹¹ OFCCP cannot resolve these important issues through a simple ICR.

OFCCP Regulations Expressly Limit Compliance Reviews to a Single AAP and Establishment

In another example of overreach, OFCCP's proposed Scheduling Letter contains the following request: "If you are a post-secondary institution or Federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution, or company located in [city and state only]."

In other words, OFCCP is suggesting that once a single contractor facility has been identified for a compliance review, *all of a contractor's establishments in that campus or city are subject to review*. This statement directly conflicts with OFCCP's regulations.

OFCCP regulations require the creation and maintenance of written AAPs by establishment, with limited exception.¹² Contractors analyze their workforce by establishment,¹³ set affirmative action goals by

⁹ See 86 Fed. Reg. 1,168 (Jan. 7, 2021) (Trump Administration Final Rule) and 87 Fed. Reg. 62,218 (Oct. 13, 2022) (Biden Administration Proposed Rule)

¹⁰ See 85 Fed. Reg. 2,820 (Jan. 16, 2020) (Trump Administration Final Rule) and 86 Fed. Reg. 40,939 (July 30, 2021) (Biden Administration Rescission)

¹¹ See 85 Fed. Reg. 11,184 (Feb. 26, 2019) (Trump Administration Final Rule) and 87 Fed. Reg. 54,641 (Sept. 7, 2022) (Biden Administration Proposed Rule).

¹² 41 C.F.R. 60-2.1(d).

¹³ 41 C.F.R. 60-2.11.

establishment,¹⁴ and tailor their good faith efforts and action-oriented programs by establishment.¹⁵ OFCCP regulations provide a strict rubric for these requirements, and do not mention terms “city” or “campus,” let alone define them.

Likewise, OFCCP’s regulations governing the compliance reviews of these establishments expressly state that the review will consist of 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” (emphasis added).¹⁶ The regulations go on to state that the review may proceed in three stages: (1) a desk audit of **the written AAP**; (2) an on-site review, **conducted at the contractor’s establishment**; and (3) where necessary, an off-site analysis of data and records supplied by the contractor **during the on-site review**. Again, no mention of campuses, cities, or other aggregations.

In all instances, OFCCP limits the compliance review to the establishment and written AAP in question. OFCCP’s proposed Scheduling Letter disregards the agency’s own regulations and attempts to use a single scheduling instrument to arbitrarily expand the scope of a compliance review beyond a single establishment or written AAP. Any such deviation would require amending OFCCP’s regulations, and to date, the agency has not done so. OMB should strike this provision from the proposed Scheduling Letter.

In the event OMB retains this burdensome provision, it should also revise the Scheduling Letter to make clear that the deadline for submitting multiple AAPs (rather than one), is extended by 30 days for each additional written AAP requested by OFCCP.

OFCCP Should Retain the Scheduling Letter’s Existing Compensation Requests

In addition to our concerns regarding the inclusion of requests for compensation data of staffing agency employees, expressed above, the remainder of OFCCP’s proposed compensation items present a significant burden and concern to federal contractors, with little benefit to the agency. As noted earlier, these include:

- Not one, but *two* snapshots of employee-level compensation data, both of which would include information on staffing agency employees not subject to OFCCP jurisdiction;
- A list of additional compensation factors related to pay, along with documentation and policies related to the contractor’s compensation practices; and
- Documentation evidencing that the contractor evaluated its compensation systems for any race-, ethnic- or gender-based disparities.

OFCCP attempted to add similar items in 2019, which was the last time the agency revised the Scheduling Letter and Itemized Listing. However, after consulting with stakeholders, as well as OMB, the agency ultimately concluded that “in its attempt to tailor the information collection to those documents that will be most useful to the agency in effectively completing its desk audit, OFCCP withdraws the proposed

¹⁴ 41 C.F.R. 60-2.16.

¹⁵ 41 C.F.R. 60-2.17.

¹⁶ 41 C.F.R. 60-1.20(a)(1).

collection from the scheduling letter. However, the agency has the authority to and may still seek this in-depth analysis during a compliance review, for example, during the desk audit, onsite or off-site analysis if indicators of noncompliance are demonstrated, or during enforcement proceedings.”

In CWC’s view, OFCCP’s quote above strikes the appropriate balance—submission of a uniform compensation submission (in this case, a single employee snapshot), followed by tailored requests in the handful of compliance reviews that require follow-up requests for compensation information. CWC strongly recommends that OMB reject OFCCP’s proposal and retain the existing Item 19.

Our objections to OFCCP’s proposal are informed heavily by OFCCP’s varied history analyzing private sector compensation practices. While OFCCP’s regulations require contractors to analyze their compensation systems,¹⁷ they do not require a specific type of analysis or schedule for these analyses. Indeed, OFCCP has made clear that “contractors have the ability to choose a type of compensation analysis that will determine whether there are gender-, race-, or ethnicity-based disparities.”¹⁸ These “analyses” can (and should) vary somewhat significantly based on occupation, industry, market, and employer size, among many other factors. While smaller contractors may elect to conduct a cohort analysis of employee-level compensation, larger contractors may elect to conduct a much more sophisticated statistical analysis.

For example, prior to 2014, contractors submitted what was known as a “paragraph 11” compensation summary, in response to what was then Item 11 of the Scheduling Letter and Itemized Listing. OFCCP’s analysis of this paragraph 11 submission was simply an administrative tool the agency used to identify those contractors worthy of additional investigation. While the paragraph 11 analysis was somewhat limited in its ability to identify actual compensation disparities, it nonetheless served an important purpose — contractors knew precisely how OFCCP would be analyzing compensation and would often replicate the analysis, promoting voluntary compliance.

Not satisfied with the Item 11 “analysis” or the agency’s enforcement results, when the Scheduling Letter and Itemized Listing were overhauled in 2014, OFCCP abandoned the Item 11 submission in favor of a mandatory submission of employee-level compensation data, which has worked relatively well over the past 8 years. Now we arrive at a point where once again, not satisfied with its enforcement results, OFCCP is requesting *two* compensation snapshots (a revised Item 19 of the proposed Itemized Listing), *as well as* a compensation “analysis,” (Item 22 of the proposed Itemized Listing).

Many federal contractors commit significant resources to evaluating compensation each year, which include – and go well beyond – OFCCP requirements. Such analyses are typically conducted under attorney-client privilege and would not be submitted in response to OFCCP requests for information. The data necessary to conduct these analyses, however, often *are submitted* in response to Item 19 of the current Scheduling Letter and Itemized Listing. CWC believes that if contractors are required to submit a compensation “analysis,” in addition to two employee-level compensation data snapshots, it will detract resources away from conducting a full, self-critical evaluation of their compensation systems.

¹⁷ 41 C.F.R. § 60-2.17(b)(3).

¹⁸ 65 Fed. Reg. 68,021, 68,036 (Nov. 13, 2000).

OFCCP's Remaining Changes Will Dramatically Increase the Administrative and Paperwork Burden on Federal Contractors, With Little or No Benefit

As we noted in our original comments to OFCCP, while CWC supports OFCCP's stated goals of efficiency and reduced audit times, it is difficult to see how OFCCP's proposal will achieve either goal. To be clear, under its proposal, OFCCP seeks to: (1) *increase* from 22 to 26 the number of items gathered from federal contractors; (2) *increase* by 34% the number of hours that federal contractors must spend responding to the Scheduling Letter; and (3) keep the response time within which federal contractors must respond to the Scheduling Letter the *same* at 30 days. All of this comes at a time when OFCCP is completing fewer reviews on an annual basis, and with fewer compliance officers.¹⁹

OFCCP's burden calculations for the number of hours it would take for federal contractors and subcontractors to comply with its proposed Scheduling Letter are vastly understated. Under the current proposal, OFCCP has calculated an estimated burden of 37.5 hours per contractor to assemble and submit the requested AAPs and supporting data. Although this figure represents the largest increase proposed by the agency in nearly 20 years, CWC members reported to us that a reasonable estimate for responding to the proposed Scheduling Letter is at least double OFCCP's estimate. Numerous other stakeholders, including the National Industry Liaison Group, offered their own estimates as well.

Regrettably, OFCCP did not respond to these comments and specific burden estimates, other than to offer that "[t]he agency declines to make additional changes to the time burden estimates for contractors. OFCCP acknowledges that the precise amount of time each contractor will take to develop and maintain AAPs and respond to the scheduling letter is difficult to estimate, as contractors vary in terms of resources and procedures." We urge OMB to seriously consider the estimates provided by the contractor community.

OFCCP's Requests for "Documentation" are Impossibly Vague and Should be Voluntary for Contractors

The majority of OFCCP's remaining requests involve requests for "documentation" not found within OFCCP's regulations. These include, but are not limited to:

- A revised Item 18, including "documentation that includes established policies and describes practices related to promotions;"
- A revised Item 19, including:
 - "Data on the factors used to determine employee compensation such as education, experience, time in current position, duty location, geographical differentials, performance ratings, department or function, job families and/or subfamilies, and salary level/band/range/grade," or an explanation why such data do not exist;
 - "Documentation and policies related to the contractor's compensation practices, including those that explain the factors and reasoning used to determine compensation (e.g., policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments, the use of salary

¹⁹ For more information on OFCCP's recent enforcement activity, please refer to CWC's comments filed with OFCCP at the preclearance stage, which are attached for your information.

history in setting pay, job architecture, salary calibration, salary benchmarking, compensation review and approval, etc.);”

- A new Item 21, including “documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures;” and
- A new Item 24, including “copies of equal employment opportunity (EEO) policies, including antiharassment policies, policies on EEO complaint procedures, and policies on employment agreements that impact employees’ equal opportunity rights and complaint processes (e.g., policies on arbitration agreements).”

Viewed in their entirety, we respectfully submit that there is a consistent theme that runs throughout OFCCP’s proposed changes, *i.e.*, the agency appears to believe that to effectively carry out its enforcement responsibilities, it must at the outset of a compliance review have access to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit. We respectfully disagree with this position and submit that it is neither necessary nor efficient for OFCCP to insist that federal contractors include in their initial desk audit submissions the full array of sensitive and confidential employment data proposed by OFCCP. It is entirely appropriate for the agency to solicit summary data at the outset of a compliance review and then request additional, more detailed information when and if needed.

While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated — instead, necessity and practical utility considering the estimated burdens and costs are the appropriate standards. CWC respectfully submits that the agency’s proposal fails to meet these standards. The proposal places a disproportionate emphasis on requiring all covered federal contractors and subcontractors to routinely collect, maintain and submit to OFCCP upon 30 days’ notice a wide range of personal, sensitive, and commercially confidential employment information *prior to any indication of a compliance-related need for it*.

The issue for CWC members is not *whether* OFCCP is entitled to access these records, but rather *when* OFCCP is entitled to such access. Rather, we believe that both federal contractors and OFCCP would be better served with a two-step evaluative process, in which aggregate information is furnished initially, evaluated by the agency, and additional information is furnished only on an as-needed basis as the agency’s audit proceeds. As such, OMB should either strike these provisions from the Scheduling Letter and Itemized Listing, or make them voluntary.

OMB Desk Officer for DOL-OFCCP
May 17, 2023
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Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's Supply and Service Program. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny E. Petrella". The signature is fluid and cursive, with the first name "Danny" being the most prominent.

Danny E. Petrella
Senior Vice President, Compliance and Assistant General Counsel
Center for Workplace Compliance

January 20, 2023

Submitted Via Federal eRulemaking Portal: <http://www.regulations.gov>

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

Re: The Center for Workplace Compliance's Comments on the Office of Federal Contract Compliance Programs' Information Collection Request Revision, "Supply and Service Program" (OMB Control No. 1250-0003)

Dear Ms. Williams:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection request (ICR) regarding revisions to the agency's supply and service compliance evaluation Scheduling Letter and Itemized Listing, notice of which was published in the *Federal Register* on November 21, 2022.²⁰

OFCCP proposes significant revisions to the recordkeeping and reporting obligations imposed upon federal supply and service contractors that receive a compliance evaluation Scheduling Letter. Among the more notable changes that OFCCP is seeking are requests for a second employee-level compensation data "snapshot," one that would include data for staffing agency employees, along with proof that contractors evaluated their "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities," as well as significant changes to the submission of contractor promotion and termination activity. OFCCP notes that these changes—which the agency estimates will increase the per-audit audit burden on contractors by 35%—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."

CWC appreciates OFCCP's interest in efficiency and in reducing requests for information. We respectfully submit, however, that *increasing* from 22 to 26 the number of items federal contractors must respond to, along with the 35% increase in hours associated with that response, is not a blueprint for efficiency. We believe that both federal contractors and OFCCP would be better served with a two-step evaluative process, in which aggregate information is furnished initially, evaluated by the agency, and additional information is furnished only on an as-needed basis as the agency's audit proceeds.

As discussed in more detail below, we also submit that the nature of many of the changes that OFCCP is proposing, such as defining "employee" and "promotion," are better suited for notice-and-comment rulemaking as required by the Administrative Procedure Act, rather than the current ICR.

²⁰ 87 Fed. Reg. 70,867 (Nov. 21, 2022).

Statement of Interest

CWC²¹ is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's members are firmly committed to nondiscrimination and equal employment opportunity.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, particularly those triggered by the agency's compliance evaluation Scheduling Letters, efficiently and effectively accomplish their underlying policy objectives.

CWC members have developed a keen understanding and appreciation for the importance of objective and efficiently managed compliance evaluations as a precondition to implementation of effective corporate affirmative action programs. They also understand how compliance evaluations that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for affirmative action initiatives.

Background and Overview

OFCCP initiates a compliance evaluation by sending a "Scheduling Letter" to the contractor, asking the contractor to submit its current Affirmative Action Programs (AAPs) for women and minorities, individuals with disabilities, and protected veterans, along with supporting materials listed in an "Itemized Listing" that accompanies the Scheduling Letter. The contractor generally has 30 days after receiving the letter to submit the requested data.

OFCCP's standard desk audit Scheduling Letter and Itemized Listing were overhauled in 2014, increasing from 11 to 22 the enumerated data and information items contractors had to submit. The added items incorporated the new information, reports, and analyses required under the agency's revised disability and veteran regulations, which were promulgated the preceding year.

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²¹ Formerly the Equal Employment Advisory Council.

continue under OFCCP's proposed letter—the agency is proposing that federal contractors *also* provide within 30 days the following *additional, new information*:

- Not one, but *two* snapshots of employee-level compensation data, both of which would include information on staffing agency employees;
- A list of additional compensation factors related to pay, along with documentation and policies related to the contractor's compensation practices;
- Documentation that the contractor evaluated its compensation systems for any race-, ethnic- or gender-based disparities;
- Revised termination tabulations by termination reason;
- Revised promotion tabulations, identifying if the promotion was competitive or non-competitive, along with the previous supervisor, current supervisor, previous compensation, and current compensation and provide documentation of established promotions policies and practices;
- External and internal availability reports;
- A list of all action-oriented programs designed to correct any problem areas identified for women and minorities;
- 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;"
- Copies of "existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements," including arbitration agreements; and
- A description of the steps taken to determine whether and where impediments to equal employment opportunity exist, including the assessment of personnel processes, the effectiveness of outreach and recruitment efforts, and the results of an affirmative action program audit for individuals with disabilities.

Viewed in their entirety, it appears OFCCP's proposed changes are predicated upon the assumption that in order to effectively carry out its enforcement responsibilities, OFCCP must have at the outset of a compliance evaluation access to virtually every piece of employment data or policy that *might* become relevant *in case* a compliance issue surfaces during the audit. We respectfully disagree with this position, and submit that it is neither necessary nor efficient for OFCCP to insist that federal contractors include in their initial desk audit submissions the full array of sensitive and confidential employment data proposed by OFCCP. It is entirely appropriate for the agency to solicit summary data at the outset of a compliance evaluation and then request additional, more detailed information when and if needed.

Many of OFCCP's Proposed Revisions Are Not Supported By E.O. 11246 or Agency Regulations

Before turning to the specifics of OFCCP's proposal, it is important to note that the proposed Scheduling Letter introduces a variety of terms, concepts and definitions that go well beyond the scope of a typical ICR. Some terms, such as "competitive promotion" and "non-competitive promotion," connote one type of employment practice or understanding within certain industries, employment segments, or individual employers, but vary considerably *across* those industries or employers. This is

why OFCCP traditionally has allowed contractors to define “promotion” within their organization and communicate that definition to OFCCP during a compliance evaluation. Other terms, such as “campus” or “campus-like setting,” are impossibly vague and have no common meaning. Finally, the term “employee,” and in particular the issue of whether *staffing agency workers* can be considered an “employee” of one or more employers, is quite literally the source of countless litigations and thousands of hours of federal rulemaking efforts.

There are two things, however, that all of these terms share in common. First, *all* of them impose new requirements on federal contractors in either the development or defense of their AAPs. Second *none* of them are defined by Executive Order 11246 or OFCCP’s implementing regulations. We recognize and appreciate that OFCCP has drafted frequently asked questions (FAQs) and other sub-regulatory guidance on some of these issues, but these of course are not binding on either OFCCP or federal contractors. An ICR is not the appropriate vehicle to explore these concepts—let alone collect data derived from them—until the agency has first gone through notice-and-comment rulemaking as required by the Administrative Procedure Act.

With respect to the “employee” issue in particular, DOL’s Wage and Hour Division has repeatedly engaged in notice-and-comment rulemaking over the proper standard for determining classifying workers as employees or independent contractors,²² and similarly has used notice-and-comment rulemaking to determine whether two employers are joint employers of the same workers.²³ The National Labor Relations Board (NLRB) has also resolved substantive questions about joint employment status by notice-and-comment rulemaking.²⁴ OFCCP cannot resolve these important issues through a simple ICR.

OFCCP’s Proposed Changes Will Dramatically Increase the Administrative and Paperwork Burden on Federal Contractors

While CWC supports OFCCP’s stated goals of efficiency and reduced audit times, it is difficult to see how OFCCP’s proposal will achieve either goal. To be clear, under its proposal, OFCCP seeks to: (1) *increase* from 22 to 26 the number of items gathered from federal contractors; (2) *increase* by 35% the number of hours that federal contractors must spend responding to the Scheduling Letter; (3) keep the response time within which federal contractors must respond to the Scheduling Letter the *same* at 30 days; and (4) keep the time spent by OFCCP compliance officers reading, reviewing, and analyzing this information the *same* at 32 hours per evaluation, *7 hours less than it takes contractors to gather, tabulate, and provide the information in the first place*. All of this comes at a time when OFCCP is completing fewer reviews on an annual basis, and with fewer compliance officers.

OFCCP’s burden calculations for the number of hours it would take for federal contractors and subcontractors to comply with its proposed Scheduling Letter are vastly understated. Under the current proposal, OFCCP has calculated an estimated burden of 39 hours per contractor to assemble and submit

²² See 86 Fed. Reg. 1,168 (Jan. 7, 2021) (Trump Administration Final Rule) and 87 Fed. Reg. 62,218 (Oct. 13, 2022) (Biden Administration Proposed Rule)

²³ See 85 Fed. Reg. 2,820 (Jan. 16, 2020) (Trump Administration Final Rule) and 86 Fed. Reg. 40,939 (July 30, 2021) (Biden Administration Rescission)

²⁴ See 85 Fed. Reg. 11,184 (Feb. 26, 2019) (Trump Administration Final Rule) and 87 Fed. Reg. 54,641 (Sept. 7, 2022) (Biden Administration Proposed Rule).

the requested AAPs and supporting data. Although this figure represents the largest increase proposed by the agency in nearly 20 years, CWC members report to us that a reasonable estimate for responding to the proposed Scheduling Letter is at least double OFCCP’s estimate.

OFCCP’s Burden Calculation for Responding to the Scheduling Letter has Increased, But OFCCP’s Compliance Audit Activity Has Decreased

It is worth noting that despite the projected burden increases, the number of compliance evaluations conducted by OFCCP has continued to decrease year over year. Per the table below, while the estimated time burden for federal contractors to respond to the Scheduling Letter has generally increased, OFCCP’s annual compliance evaluation activity of federal contractors has significantly *declined* over the same time period (based on figures provided in OFCCP’s ICR Justification Statements for its non-construction Scheduling Letter). OFCCP’s trend of conducting significantly fewer, but more comprehensive compliance evaluations is directly at odds with the current proposal and its stated intent.

Year	2004	2008	2014 ²⁵	2015	2019	2022
Est. Response Burden (Hrs.)	28.35	28.35	27.9	27.9	29	39
Expected OFCCP Compliance Reviews	6,092	4,923	3,774	3,471	2,500	1,258
OFCCP Staff by FY	663	576	683	620	478	420

This trend will also exacerbate a weakness in OFCCP’s compliance evaluation activity that was uncovered in the Government Accountability Office’s (GAO) September 2016 Report, *“Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance.”* After reviewing six years of OFCCP compliance evaluation and enforcement data, the GAO concluded that OFCCP was only able to review “about 2 percent” of federal contractor establishments annually, and was conducting more comprehensive, but fewer compliance evaluations.²⁶ Increasing the number of items gathered from contractors in its proposed Scheduling Letter will only hinder this progress. Combined with fewer staff available than before, OFCCP will review less, not more, than 2 percent of federal contractors and will not be any closer to achieving its goals.

The Utility of OFCCP’s Proposed Changes are Not Supported by the Agency’s Burden Estimates

We respectfully submit that there is a consistent theme that runs throughout OFCCP’s proposed changes, *i.e.*, the agency appears to believe that to effectively carry out its enforcement responsibilities, it must at the outset of a compliance evaluation have access to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated — in fact, necessity and practical utility in light of the estimated burdens and costs are the appropriate standards. CWC respectfully submits that the agency’s proposal fails to meet these standards. The proposal places a disproportionate emphasis on requiring all covered federal contractors

²⁵ The Scheduling Letter & Itemized Listing was proposed earlier but was not approved until 2014.

²⁶ See U.S. GAO Report 16-750, *“Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance,”* pp. 15-16 (September 2016).

and subcontractors to routinely collect, maintain and submit to OFCCP upon 30 days' notice a wide range of personal, sensitive, and commercially confidential employment information *prior to any indication of a compliance-related need for it.*

OFCCP's Enforcement Data Cast Doubt on the Potential Utility of OFCCP's Requests

Many of CWC's concerns with OFCCP's proposal (and its added burdens) are based heavily on the fact that during any given audit cycle, the overwhelming majority of contractors will receive a notice of compliance. For example, according to OFCCP's most recent publicly-available enforcement database,²⁷ from fiscal years (FY) 2019-2022, the agency closed 4,792 compliance evaluations. Of those evaluations, 4,189 (87%) were closed with a notice of compliance. Of the remaining 601 evaluations closed with either a conciliation agreement, consent decree, or financial agreement,²⁸ zero (0) were closed with a promotion violation, two (2) were closed with a termination violation, nine (9) were closed with a selection or testing violation, and seventy-five (75) were identified for some type of "salary" violation.

In other words, the areas of OFCCP's proposal *most* likely to create additional burdens for both contractors and the federal government (promotions and termination requests, evaluation of selection or testing policies, and compensation issues), are all areas where the overwhelming majority of audited establishments and functions have experienced *no findings or violations over the past four years.* Indeed, based on the data above, 100% of all evaluations closed with no promotion violation, 99.9% of all evaluations closed with no termination violation, 99.8% of all evaluations closed with no selection or testing violation, and 98.4% of all evaluations closed with no compensation violation. It is worth emphasizing that OFCCP evaluated promotion, termination, selection, and compensation data and policies *in all of these evaluations,* regardless of the outcome.

We offer these numbers not to minimize the impact of OFCCP's important work in these areas, but rather to suggest that OFCCP's current Scheduling Letter and investigative techniques are more than capable of investigating and resolving violations as they occur. It seems counter-intuitive to increase the burden for all other contractors when these areas present such a small percentage of overall findings.

While CWC appreciates that such data *may* indeed become necessary in any given compliance evaluation, we fail to see how increasing the burden on *all* contractors is appropriate for the handful of compliance evaluations where, for example, items such as a second compensation snapshot, competitive or non-competitive promotion data, supervisor information, termination reasons, or written selection policies may become necessary. There is no dispute whether these data and policies *could* become relevant. OFCCP's own enforcement data, however, suggest these instances are relatively rare, and do not support shifting this burden to all contractors.

OFCCP Should Retain the Scheduling Letter's Existing Promotion and Compensation Requests

Apart from the technical arguments outlined above, OFCCP's proposed promotion and compensation requests present unique practical challenges the agency should also consider. With respect to promotions, it is worth noting that many contractors simply do not maintain a single

²⁷ See https://enforcedata.dol.gov/views/data_catalogs.php (last visited January 20, 2023).

²⁸ Two (2) evaluations were listed with no closure type.

employment activity called “promotion,” or track the difference between competitive and non-competitive promotions. For many contractors, the promotion is an *outcome*, one that must be calculated and derived from numerous data points. Neither E.O. 11246 nor OFCCP’s regulation require the tracking of competitive and non-competitive promotions. Indeed, unlike OFCCP’s Internet Applicant rule, which lays out the regulatory framework for recordkeeping with respect to external applicants, no similar rulemaking exists for promotions, and nothing in OFCCP’s recordkeeping regulations can be interpreted so broadly as to require contractors to track this information.

Furthermore, despite the fact that OFCCP is asking for the “number” of promotions, the granularity that OFCCP seeks (including previous supervisor and current supervisor, previous compensation and current compensation, and previous and current department, job group, and job title, etc.), is not simply possible without contractors turning over their raw, employee-level promotion data (data that OFCCP would then have to manually recompile to perform its analyses).

With respect to compensation, our objections to OFCCP’s proposal are informed heavily by OFCCP’s varied history analyzing private sector compensation practices. For example, prior to 2014, contractors submitted what was known as a “paragraph 11” compensation summary, in response to what was then Item 11 of the Scheduling Letter and Itemized Listing. OFCCP’s analysis of this paragraph 11 submission was simply an administrative tool the agency used to identify those contractors worthy of additional investigation. While the paragraph 11 analysis was somewhat limited in its ability to identify actual compensation disparities, it nonetheless served an important purpose — contractors knew precisely how OFCCP would be analyzing compensation and would often replicate the analysis, promoting voluntary compliance.

Not satisfied with the Item 11 “analysis” or the agency’s enforcement results, when the Scheduling Letter and Itemized Listing were overhauled in 2014, OFCCP abandoned the Item 11 submission in favor of a mandatory submission of employee-level compensation data, which has worked relatively well over the past 8 years. Now we arrive at a point where once again, not satisfied with its enforcement results, OFCCP is requesting *two* compensation snapshots, *as well as* an OFCCP compensation “analysis.”

CWC respectfully submits that by continuing to increase the burden of compensation information contractors must submit during a compliance evaluation, the agency will actually deter contractors from conducting more sophisticated, reliable analyses, in favor of an “OFCCP-centric” analysis that will not fully control for or consider the factors that actually impact pay.

Many federal contractors commit significant resources to evaluating compensation each year, which include – and go well beyond – OFCCP requirements. Such analyses are typically conducted under attorney-client privilege, and would not be submitted in response to OFCCP requests for information. The data necessary to do these analyses, however, often *are submitted* in response to Item 19 of the current Scheduling Letter and Itemized Listing. CWC believes that if contractors are required to submit a compensation “analysis,” in addition to two employee-level compensation data snapshots, it will detract resources away from conducting a full, self-critical evaluation of their compensation systems.

Ms. Tina T. Williams

January 20, 2023

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Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's Proposal. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny Petrella". The signature is written in a cursive style with a large, looped initial "D".

Danny Petrella

Senior Vice President, Compliance and Assistant General Counsel