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VIA ELECTRONIC FILING

Ms. Debra A Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW, Room C-3325
Washington, D.C. 20210

Re: Request for Public Comments on the OFCCP's Proposal to Extend the OMB's Approval of the Non-construction Supply and Service Information Collection

Dear Ms. Carr:

We are writing on behalf of Littler Mendelson, P.C., to comment on the OFCCP's proposal to extend the OMB's approval of the non-construction supply and service information requested from federal contractors and subcontractors when OFCCP initiates a compliance evaluation under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, (the Rehabilitation Act); and the Vietnam Era Veterans' Readjustment Act of 1974, as amended, (VEVRAA) ("the Scheduling Letter and the Itemized Listing").

Founded over 60 years ago, Littler Mendelson is the nation's largest law firm dedicated exclusively to the practice of labor and employment law. With over 800 attorneys in 50 offices across the country, 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 with the OFCCP. The firm's client base ranges from Fortune 100 companies to small-business owners. The OFCCP's extension and revision of its compliance evaluation Scheduling Letter and Itemized Listing is highly relevant to the Firm's OFCCP practice and significantly impacts the Firm's clients.

OFCCP is seeking contractor comments on four separate documents: (1) its compliance review Scheduling Letter; (2) the Itemized Listing that accompanies the compliance review scheduling letter; (3) its Compliance Check Scheduling Letter; and (4) its burden and justification as to the basis for the first three items. We address the first three, in turn. Our burden arguments are addressed in the substance of our comments.

I. Scheduling Letter

We support the OFCCP's edits to the actual scheduling letter itself. In light of OFCCP's decision not to review I-9 forms any longer when it conducts a compliance review, OFCCP no longer needed to reference that language in its initial request. For years, OFCCP has asked contractors to produce their VETS-100 or VETS-100A reports during audits, and formalizing that request in this cover letter seems helpful.

We also support the OFCCP's apparent intent to notify companies whether its facility is being selected for what is commonly known as a "routine" compliance review or a corporate management compliance evaluation (CMCE). But we think the letter ought to go farther than just notifying the facility whether it is being selected for a routine compliance review or CMCE. Under OFCCP's Active Case Enforcement Directive, OFCCP has announced that 1 out of every 25 facilities will be subjected to an onsite audit, at random, and it knows ahead of time which facilities are the 1 in 25. We would support an additional sentence at the conclusion of the first paragraph that states: "This facility [is/is not] the 25th facility on the FCSS roster chosen randomly for a full onsite visit." That sentence in no way hinders OFCCP from deciding that it has other bases to come onsite, but it alerts the company, its managers and its executives up front as to whether this facility is or is not the 1 in 25 referenced in the ACE Directive. In the interest of transparency, we urge OFCCP to add the extra sentence. If OFCCP elects not to add the sentence, it ought to establish a uniform policy, adhered to across all districts and regions, that requires each assigned compliance officer to notify the company if it is the 1 in 25 at the same point in the audit for all companies. In that regard, Littler supports a very early notification point in the audit – before the desk audit submission materials are sent to OFCCP.

We also support the mandatory inclusion of the certified mailing number on the top of every scheduling letter issued. OFCCP's practice of addressing its scheduling letter to the CEO or President of nationwide, multi-location employers, is beyond frustrating for our clients. The letter is addressed to a name that does not work at that location, but is sent to the address of the facility that came up on OFCCP's audit list The mail room – seeing the CEO's or President's name – does not open the letter to see what it is. Instead, the mail room re-routes the letter to the physical location where the CEO or President sits. By the time it gets to the local HR person (who is at the audited location), it could be two or three weeks after the letter was sent. OFCCP's mailing process is far from perfect, and yet every time that a District Office includes the certified mailing number on the letter, we have the ability to go to usps.com and track the receipt date to mark the 30 day submission date. We fail to understand why all district offices are not required to include the certified number on the letter. It makes it so much easier to record the submission date, accurately, when it is on there. Towards that end, we also support a process that would encourage the compliance officer to contact the facility and determine the name of the appropriate person to whom the letter is sent, and address the scheduling letter to that designee, rather than someone who is not responsible for the initial audit response. We appreciate OFCCP's perspective

that the CEO or President ought to be aware, but that does not mean that the CEO or President ought to be the person to whom the letter is addressed, certified mail.

We appreciate OFCCP's willingness to accept electronic filing, but every time that the compliance audit file is bounced from one compliance officer to another, all the electronic files ought to be forwarded, too. In our opinion, there has been a marked decline in the government's ability to keep track of the correspondence exchanged with the contractor or its representative via email. OFCCP should not have to come back to the contractor or its representative on multiple occasions to have them re-forward the information already sent to OFCCP. If it would make it easier on OFCCP to have the contractor community use a consistent format in the email Subject Line, for example, tell us. We would be happy to label information better to make it easier for the compliance officers, if it meant that we were not being asked to re-send the same information because OFCCP has "misplaced" it.

II. The Itemized Listing

Despite what the OFCCP asserts in its Supporting Statement, OFCCP is seeking more than an extension of OMB's approval of the information previously requested in the Itemized Listing of its compliance evaluation scheduling letter. Instead, OFCCP is seeking to materially change the Itemized Listings of its scheduling letter by: (1) adding to the list of information requested and (2) significantly revising how information previously requested is to be submitted.

A. New Items in Itemized Listing

OFCCP is seeking to add three items to the information contractors are required to submit along with their initial response to the scheduling letter: (1) copies of leave policies, including FMLA leave, pregnancy leave, and accommodations for religious observances and practices (new Item 8); (2) copies of the Veterans' Employment Reports VETS-100 and/or VETS-100A for the last three years (new Item 13(a)); and (3) copies of accommodations policies and records of accommodations granted under the Rehabilitation Act and VEVRAA (new Item 13(b)). To be fair, the items the OFCCP is seeking to add to the Itemized Listing of the scheduling letter are not new to the compliance evaluation process. OFCCP practitioners know that OFCCP frequently will ask to see the same information at either the desk audit or on-site phases of the evaluations. In fact, Littler Mendelson has seen OFCCP request this information up front, during the initial 30-day response period, even before OFCCP sought to amend the scheduling letter.

We do not take issue with OFCCP's desire to request this information, up front, and we think that if OFCCP gives government contractors a reasonable amount of time to implement some new tracking capabilities on the "records of accommodations granted

under the Rehabilitation Act and VEVRAA,"[1] the eventual amount of time it will take facilities to include these additional items in their submissions is de minimis. Right now, though, contractors are not poised to be able to retrieve requests for accommodation and the contractor's responses within only 30 days after receiving a scheduling letter. The departments that tend to be involved in accommodations are not necessarily the same departments that are preparing the AAP audit submissions, and we are confident that our client base could benefit from some additional time in which to implement some record keeping changes. We would favor an implementation delay on the use of the new scheduling letter to afford contractors 120 days in which to implement more effective accommodation tracking capacity.

We do not support OFCCP's requirement in new Item 8 that "if these policies are a part of" the employee handbook or manual, the employer ought to be required to submit the entire document. On the one hand, OFCCP seemed genuinely interested in receiving information electronically, but on the other hand, this requirement of having the employer send the entire handbook or manual with its desk audit submission if it happens to have both an Intranet version and a "printed" version seems counter-productive and unnecessarily burdensome. OFCCP does not need the entire handbook, and its request is far broader than the specific information, leave policies, that it is requesting. Moreover, many of our clients tend to have the most updated versions of their policies on their Intranet, and it's more efficient to ask them to make pdf copies of the relevant policies than to have to go link by link, sub-policy by sub-policy, printing out an entire handbook or employee manual, then making one massive pdf of the entire stack. Even for our clients who have paper handbooks and manuals, it is often more efficient and more relevant for them to simply photocopy and send the relevant excerpts. OFCCP's request is not properly tailored to the specific information it needs—that is, the leave policies themselves.

B. Revisions to Items Previously Requested in Itemized Listing

There are three sections of the Itemized Listing that OFCCP is seeking to revise: (1) New item 9 requesting "any other documents" relating to the implementation of a collective bargaining agreement; (2) New Item 11, relating to data on applicants, hires, promotions and terminations; and (3) New Item 12, relating to compensation.

1. New Item 9 (Current Item 8)

Our unionized clients with collective bargaining agreements do not object to producing the CBA itself. They are concerned, however, with the very open-ended new language that would require them to "[i]nclude any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement." Perhaps the OFCCP does not

[1] Why not change "VEVRAA" to "Section 4212," here, too, as OFCCP has requested in its proposed edits to 41 C.F.R. Part 60-300?

appreciate the burdensome nature of that request, but in a multi-year contract for a large, unionized workforce, there could be thousands, if not tens of thousands, of pages worth of "other documents" that "implement, explain or elaborate on the provisions of the collective bargaining agreement." Is this subject to the two-year document retention period under 60-1.12? Could OFCCP narrow this request to issues relating to bidding, promotion, transfer, termination, training, or compensation (the core topics on which OFCCP has an interest in reviewing policies that supplement the original agreement)?

2. New Item 11 (Current Item 10)

The three most significant proposed revisions to New Item 11 are: (1) the proposed request for employment activity data (applicants, hires, promotions, and terminations) to be submitted by job group AND job title; (2) the proposed request for the "actual pool of candidates who applied or were considered for promotion"; and (3) the proposed request for the "actual pool of candidates considered for terminations."

First, the proposed request for employment activity data to be submitted by job group AND job title is a significant change from the current scheduling letter that permits contractors to submit this information by job group OR job title. This request is going to add a significant burden of time on the contractor community to put the request together by both job group AND job title because in anticipation of what OFCCP is going to do with the data – run adverse impact analyses – the contractor community is going to have to do the same. OFCCP has estimated the burden per contractor, but its estimates must be assuming that each contractor has only one facility or else they are substantially off their mark. Our nationwide clients with multiple affirmative action plans that are evaluating hundreds of thousands of rows of applicant flow data each year already are devoting far more than 153 total hours per year for their annual updates. Some multi-state companies and large employers have three- and four-person departments that are devoted **full-time** to administering the record keeping associated with OFCCP's Internet Applicant regulations in order to run annual, much less semi-annual, impact ratio analyses. If OFCCP expects companies to be running title-by-title impact ratio analyses for applicants to hires, promotions to and from, and terminations data, first by job group and then by job title in under 153 hours per large company, it has grossly underestimated the time burden.

OFCCP's compliance officers are expecting contractors to have run these analyses and followed up on any alleged "indicators" of discrimination by listing these "issues" in the Identification of Problem Areas section of the narrative AAP, and then in the Development and Execution of Action Oriented Program sections of the contractor's narratives, OFCCP is expecting at least one action oriented program.

Moreover, job title and job group will not necessarily give OFCCP more accurate reporting data for its analysis to identify gender and race discrimination indicators. For example, in the area of applicants and hires, many contractors use unique Requisition Numbers to track

applicants against specific positions. Running an analysis on applicants and hires using job titles will not present any more of an accurate picture of the selection process than running an analysis by job group, especially if there were different decision makers who participated in different steps of the process. We suspect that running impact ratio analyses by job title in the applicant and hire scenario will lead to unnecessary and burdensome information requests from OFCCP because of an inaccurate analysis. If a contractor's establishment has 10 job groups, and the contractor is running adverse impact analyses just on "minorities" (all together) and gender, statistically speaking we would normally expect at least one job group to show a statistically significant disparity. This is statistical reality—a statistically significant disparity at a 5% threshold, which is what OFCCP uses, does nothing more and nothing less than flag disparities that would occur by chance 1 out of every 20 times you analyzed it. This means that if you ran 20 analyses, it is expected that one would show a statistically significant disparity, which in turn OFCCP then uses as its cue to do a more detailed investigation. This means that a 10-job group AAP would typically have one job group with a statistically significant disparity in each analysis (hires, promotions, terminations) that is performed.

If OFCCP expands the number of analyses by reviewing the transaction data job title by job title, and race by race, the amount of audit follow up is going to magnify exponentially. It is going to lead to never-ending compliance reviews, creating an unmanageable burden on OFCCP and contractors alike. OFCCP and contractors need to have reasonable methods to triage their resources, and this is one of the great and helpful functions of job groups In short, this proposed request for employment activity data by job group AND job title is only going to add to the time burden contractors face in preparing the initial submission, it will greatly increase the burden on both OFCCP and contractors alike in the compliance review investigation itself, and it will not provide OFCCP with more accurate analyses related to identifying gender and race discrimination indicators.

Second, the proposed request for the "actual pool of candidates who applied or were considered for promotion" is a significant change from the current scheduling letter that simply requests only the number of promotions broken down by gender and minority status. Our clients tend to have two types of promotions: promotions that are applied for (competitive promotions) and promotions that are given at management's discretion (non-competitive promotions). While it theoretically would be possible for a contractor to provide this information for a competitive promotion where candidates are tracked in an applicant tracking system, the proposed request for the actual pool of candidates considered for a promotion in a non-competitive promotion process typically would be extremely difficult if not impossible to track.

We recommend that OFCCP alter its request to read as follows: "For each job group or job title, provide the total number of promotions by gender and race/ethnicity. For those promotions that were awarded after a competitive bid or application process, please supply the pool of candidates who applied and were considered for promotion by gender and

race/ethnicity. Also, include a definition of "promotion" as used by your company. If it varies for different segments of your workforce, please define the term as used for each segment." OFCCP also should consider allowing contractors to provide new hire and internal selection data together if the contractor considered combined applicant pools of both external and internal candidates when making the decisions. This approach would best match the reality of the contractor's decision-making process. The scheduling letter should state that contractors have the option to submit their data that way.

Although we believe that these alternations to the proposed request would yield information that is both more useful to OFCCP and easier for contractors to provide, it should still be noted that even with these alterations, this request will impose substantial additional burdens on contractors responding to the scheduling letter. It is not clear that any benefit to OFCCP or the contractor from compiling this information at the commencement of the desk audit justifies the additional burden. Continue to seek this information through tailored requests made after a review of more general information, as OFCCP has been doing, probably remains a more appropriate course.

Third, the proposed request for the "actual pool of candidates considered for terminations" is, again, a significant change from the current scheduling letter that simply requests total terminations broken down by gender and minority status. Moreover, this is a particularly problematic change because in most contexts, there is no "actual pool of candidates" who voluntary leave a company or are terminated for cause. We propose the following substitute language:

> For each job group or job title, provide the total number of voluntary terminations by gender and race/ethnicity. For each job group or job title, provide the total number of employees terminated involuntarily.

The rest of OFCCP's proposed language with regard to terminations would be rejected under our approach.

Finally, New Item 11 indicates that OFCCP intends to require that contractor use the following categories with regard to race/ethnicity: African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White. These categories are, of course, different from the categories used by the United States Census Bureau in collecting and reporting data and are different from the categories used in connection with Standard Form 100 (the Employer Information EEO-1 Survey). OFCCP's failure to conform its requirements regarding race and ethnic designations to the standards used by the rest of the United States government imposes massive burdens on contractors who are essentially being required to maintain two sets of data and who are often unable to obtain or develop software to satisfy simultaneously the different definitions. Moreover, this inconsistency confuses, and not infrequently offends, applicants and employees who are being invited to self-identify, undermining the accuracy of the data and reducing the rate of voluntary

disclosure. OFCCP should not be asking OMB to ratify the use of race/ethnicity categories different from the rest of the United States Government. Instead, OFCCP should be adopting consistent categories.

3. New Item 12 (Current Item 11)

The proposed changes to the compensation data submission that OFCCP is seeking to make in New Item 12 are momentous when compared to the current scheduling letter, which requires contractors to submit only annualized total compensation data on the same population as the Affirmative Action Plan by salary range, rate, grade or level, grouped by race/ethnicity and gender.

First, OFCCP proposes to require contractors to submit compensation data on an ENTIRELY DIFFERENT POPULATION than the one that is included in the Affirmative Action Plan that is part of the desk audit submission. Specifically, OFCCP proposes to require contractors to provide compensation data on all employees as of the arbitrary date of February 1st (i.e., the most recent February 1st date). Practically speaking, this means that a contractor who prepares a calendar year Affirmative Action Plan with an employee population snapshot taken as of December 31, 2011 would have to submit compensation on a completely different employee population as of February 1, 2012, if that contractor received a compliance evaluation scheduling letter in March 2012. The OFCCP would be analyzing one employee population for placement goal achievement and adverse impact analyses and a completely different population for compensation purposes and action oriented program development. The additional burden hours that the analyses of two different employee populations would put on a contractor were not properly factored into the OFCCP's estimation of time required to respond to New Item 12. OFCCP has failed to justify why it selected February 1, and it seems as if OFCCP arbitrarily picked that date so that it could appear to compromise by reverting back to the same date as the population snapshot. This is an unnecessary burden on contractors, which does not have any meaningful value to OFCCP's mission or investigative ability.

Second, OFCCP proposes to require contractors to include detailed individualized compensation information on all employees up front, including gender, race/ethnicity, hire date, job title, EEO-1 Category, and job group. Importantly, OFCCP also proposes to include in the compensation information contractors are required to provide up front, "other compensation or adjustments" such as bonuses, incentives, commissions, merit increases, locality pay, or overtime. This is a dramatic shift from the summary compensation data that contractors are currently required to provide with the initial desk audit submission. Moreover, OFCCP asserts that contractors will expend less burden responding to the revised Scheduling Letter. This assertion could not be farther from the true contractor experience. While an employee's annualized salary or wage rate is often maintained in the contractor's HRIS system that is used to prepare the Affirmative Action Plan, the additional information pieces that OFCCP proposes to have contractors provide – bonuses, incentives,

commissions, merit increases, hours worked, overtime, and locality pay – are often not maintained in the same system. Instead, they typically are maintained in the payroll system (which tends not to have race, ethnicity, or gender information in it) and thus, contractors are going to be required to run additional reports on all employees and not just, for example, those employees who have a comparator in the same job title or salary grade. These additional burden hours were not appropriately considered in the OFCCP's estimate of time required to respond to New Item 12. Moreover, in the dozens of audits in which OFCCP requested and our clients supplied this non-base pay information, we have yet to see any evidence that OFCCP actually is analyzing this information. Indeed, we are highly skeptical that OFCCP, or anyone else, has the ability to analyze non-base pay compensation data in a way that ensures it is comparing "apples to apples."

Lastly, the proposed changes to the compensation submission give contractors the opportunity to provide additional data on factors used to determine employee compensation such as education, past experience, duty location, performance ratings, department, and salary level. The proposed changes also give contractors the option to include documentation and policies related to compensation practices of the contractor. Assuming that a contractor provides all this information to the OFCCP with its initial submission, the time it takes to put the information together for OFCCP is an additional burden that OFCCP has not considered in its estimate of the time required to respond to New Item 12.

Given the new partnership between the Department of Labor's Wage and Hour Division and the American Bar Association for referral information to private attorneys when complainants are told their FLSA or FMLA complaints are not going to be pursued by the agency, the contractor community expects that all the information it provides OFCCP as part of a compliance evaluation will be kept confidential and not disclosed in any way that is inconsistent with the Freedom of Information Act. Given that an OFCCP compliance officer sent our client's confidential applicant and hire data out of the OFCCP's secure servers to her personal email account on Bell South's servers, we have legitimate cause to be concerned about confidentiality.

III. New Compliance Check Letter

Littler Mendelson views the return of the compliance check as an efficient use of OFCCP's limited resources.

As noted above, we believe that every compliance check scheduling letter ought to have the certified mailing number on it, and we do not believe that it ought to be sent to the CEO, especially for those companies where the CEO is not physically located at the establishment being audited. Instead, the letter ought to be sent to the facility or establishment top executive, with an indicated copy to the CEO, if necessary. If OFCCP continues to send the letter to the CEO – when the CEO is not physically located at the establishment being

audited – it is setting itself up for delays and contractor requests for extension. It is just not efficient to do business that way.

We also request more precision from OFCCP as to what it wants in response to the first of the three items in the letter. Insofar as AAP results for the preceding year are concerned, the citation to 60-1.12(b) is not helpful. Our clients are aware of the record keeping obligation to maintain a copy of the prior year's AAP and the back up data, but this seems to be a questionable and irrelevant means to enable OFCCP to gain access not just to goals and good faith efforts data, which is how the Bush Administration interpreted it, but to adverse impact analyses and compensation data, insofar as those items arguably are part of the company's affirmative action program under 60-2.17, "Additional required elements of affirmative action programs."

We propose the following language to substitute for the first item requested:

> 1. Your goals from the prior year's affirmative action program and a narrative explanation of the specific initiatives undertaken to make progress towards those goals in accordance with 41 C.F.R. Section 60-2.17(c).

The other two requested items are fine.

Thank you for the opportunity to comment on the OFCCP's proposal to extend the OMB's approval of the non-construction supply and service information requested from federal contractors and subcontractors when OFCCP initiates a compliance evaluation under Executive Order 11246, the Rehabilitation Act, and VEVRAA. We appreciate your consideration of our comments. Please do not hesitate to contact us should you have any questions.

Respectfully submitted,

Littler Mendelson, P.C.

cc: Littler Mendelson OFCCP Practice Group