



NATIONAL  
INDUSTRY  
LIAISON  
GROUP

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**VIA INTERNET SUBMISSION: [www.regulations.gov](http://www.regulations.gov)**

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

**Re: National Industry Liaison Group Comment on  
OFCCP's Proposal to Implement Standard  
Procedures for Supply and Service Contractors  
Seeking Approval to Develop Functional AAPs**

Dear Director Carr:

The National Industry Liaison Group ("NILG") Board welcomes the opportunity to comment on the OFCCP's Proposal to Implement Standard Procedures for Supply and Service Contractors Seeking Approval to Develop Functional Affirmative Action Plans, Control Number 1250-XXXX.

By way of background, the NILG was created over 30 years ago as a forum for the Office of Federal Contract Compliance Programs ("OFCCP") and federal contractors to work together towards equality in the workplace. Throughout the country, local Industry Liaison Groups ("ILGs") have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size and large employers across the country, have reached out to OFCCP and other agencies, such as the Equal Employment Opportunity Commission ("EEOC"), with mutual goals of fostering a non-discriminatory workplace. Therefore, in response to the Information Collection Request, the NILG seeks to present the views of well over 100 local ILGs and their members.

As a preliminary matter, we commend the OFCCP for, and share its commitment to, promoting equal employment opportunity. In our comments below, we offer observations and

suggestions designed to enable federal contractors to continue to meet their compliance obligations while minimizing administrative burdens.

The NILG appreciates the Agency's flexibility to allow contractors the option of developing functional AAPs. However, NILG submits that contractors should be afforded the opportunity to prepare functional affirmative action plans (FAAPs) without seeking prior written approval from the Agency. Given the changing structure of America's workforce, with fewer employees assigned to work at an employer's physical establishment, FAAPs will increasingly become the most logical option for contractors. The NILG encourages the OFCCP to consider allowing contractors to develop FAAPs as a matter of course.

As the need to prepare FAAPs grows, NILG is concerned the OFCCP will become overwhelmed with processing contractors' FAAP requests. As a result, not only will reevaluation of the proposed procedures enable employers to more readily prepare AAPs that more closely reflect their organizational structures, but such a regulatory change will also reduce the burden on the Agency to keep up with the likely increase in contractors seeking to prepare FAAPs.

As proposed, the OFCCP's process is burdensome, complex, requires submission of overly detailed contractor information and will require significant Agency resources to review and process. Our constituents advise us that many contractors decide not to seek agency approval to develop FAAPs because of the burdensome nature of the process and various other disincentives, even though FAAPs would be their preferred method of analyzing their workforces.

The proposed process creates substantial burdens for contractors. Pursuant to the proposal, a FAAP agreement will expire after three years, requiring the contractor to repeatedly seek approval for its FAAP structure. This repeated approval requirement creates uncertainty regarding how future AAPs will be developed that can impede employer internal planning and procedures. This uncertainty places an undue burden on the contractor community.

Moreover, the proposed procedures require contractors notify OFCCP in writing of "significant changes" to corporate structure *within 30 days* of the changes taking effect. Significant organizational changes often cause great internal upheaval, and this proposed requirement would only increase the pressure on human resources personnel during such a turbulent time. If the contractor happens to overlook this requirement, the OFCCP has the right to automatically terminate the FAAP agreement. Our constituents feel this requirement would often be challenging for employers to satisfy. NILG recommends OFCCP provide more time - at least 120 days - for employers to report on "significant changes" to organizational structures.

The process requires submission of overly detailed contractor information. Much of the information employers must submit before negotiating a FAAP agreement provides little, if any, insight into whether the employer's development of a FAAP is appropriate. For example, to obtain approval, contractors must submit such items as:

- (1) *A copy of a federal contract or subcontract.* The individuals conferring with OFCCP during the FAAP approval process will likely be Human Resources personnel that have limited access to a company's contractual agreements. A company's request to develop FAAPs should be considered evidence of its status as a federal contractor.
- (2) *A copy of the contractor's most recent VETS-100/100A reports.* There is no explanation in the proposal regarding how these reports are relevant to determining whether FAAPs are appropriate.
- (3) *The race and gender of employees within each functional unit.* The total number of employees should provide OFCCP with enough information to determine whether the units are of sufficient size. The Agency provides no explanation regarding why it needs race and gender information at this stage of the process.
- (4) *The major job groups in each FAAP, the job titles in the job groups, including the number of employees by race and gender.* Again, such detailed data seems intrusive in light of the fact the data requested likely should have no bearing on the ultimate issue of whether a contractor should be preparing a FAAP.
- (5) *Copies of personnel policies relevant to evaluating the proposed functional units relating to recruitment, hiring, promotion, compensation, and termination.* This information is not relevant to whether FAAPs are appropriate.
- (6) *Samples of recruitment efforts.* OFCCP has not identified how this information is relevant to the determination of whether the creation of a FAAP is appropriate.
- (7) *The proposed Directive also states the OFCCP will consider prior EEO violations, which "may impact the approval of the contractor's functional AAP agreement request."* The OFCCP offers no explanation regarding what it would consider an "EEO violation," i.e., filing of charge vs. administrative or judicial determination. The Agency also does not explain why such a factor is relevant in its review of a FAAP request. Contractors are legally required to develop AAPs, whether in facility-specific or functional format. The OFCCP's consideration of, and possible reliance on, past EEO "violations" as part of the reason for potentially rejecting an employer's FAAP application is irrelevant and unnecessary.

The NILG respectfully submits the above requirements seem more akin to a desk audit of an already complete affirmative action program than a process to obtain approval to prepare a FAAP.

If the Agency determines contractors need to seek pre-approval before developing a FAAP, NILG recommends the OFCCP should look only to request information and data that is directly relevant to whether an organization's structure makes it a candidate for a FAAP. The NILG and its constituents have difficulty understanding how a contractor's internal processes

that are wholly unrelated to its organizational structure are relevant to this determination. Our constituents have communicated that the requirement that such detailed and unrelated information be submitted discourages employers from requesting approval to prepare FAAPs (even though the FAAP structure more closely aligns with their business structure) out of concern the Agency is seeking the data for some type of enforcement reason.

The proposal provides disincentives for contractors to enter into a FAAP agreement. The proposed FAAP agreement subjects contractors to measures not imposed on other contractors. For example, if a FAAP contractor does not provide an annual update to the OFCCP regarding “minor” changes, such as the name of a managing official, the OFCCP has the right to schedule the contractor for a compliance review. The proposed Directive does not indicate if the compliance review scheduled outside of the Agency’s typical, neutral process would focus on only one FAAP or all FAAPs and other AAPs covering establishments. Contractors preparing regular AAPs are not subject to this reporting requirement, nor should they be. Thus, this proposed requirement singles out FAAP employers for additional reporting burdens that could serve to discourage the use of FAAPs, even for those employers for whom FAAPs are more appropriate given their organizational structures.

As another example, before the OFCCP will approve a request to renew a FAAP agreement, contractors “must have had at least two functional units undergo a compliance evaluation during the three-year term of the agreement.” The NILG has received feedback from its constituents that this provision creates a disincentive for contractors to enter into a FAAP agreement because the likelihood of being subject to two or more expensive and time-consuming compliance reviews changes from a matter of odds to a certainty. Moreover, the proposal provides no description of the required neutral process to be employed by OFCCP for scheduling such compliance reviews.

In addition, a FAAP agreement would require contractors to “submit, at a minimum, its personnel activity, i.e., applicant flow, hire, promotion, and termination, and compensation data in a readable and usable electronic format, when so requested during a compliance evaluation.” The NILG is not suggesting that contractors should not submit this data electronically if requested to do so during a compliance review but instead proffers that, given the uniqueness of each audit, contractors should be able to decide at the time of the request the most appropriate method of submission. The proposed requirement places FAAP contractors at a disadvantage by requiring the contractor to arguably limit options which it could otherwise avail itself.

### **Conclusion**

For the reasons set forth above, the NILG respectfully requests that the OFCCP reconsider the proposed Directive. Contractors should be afforded the option of deciding for themselves whether a FAAP would best serve the OFCCP’s and contractor community’s shared goal of enhanced affirmative action compliance. Employers that want to develop FAAPs almost always do so because they sincerely believe the FAAPs will align with real world organizational structures and processes, thus making the AAPs more meaningful and, ultimately, successful. We encourage the Agency to consider regulatory changes to make FAAPs a more viable and attractive option so contractors can achieve these important goals.

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We thank the OFCCP in advance for its consideration of our comments and suggestions. If the Agency should wish to discuss this request, please contact Mickey Silberman, NILG Board Counsel, at (303) 225-2400 or [silbermanm@jacksonlewis.com](mailto:silbermanm@jacksonlewis.com).

Respectfully submitted,

The National Industry Liaison Group Board