

July 23, 2012

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

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

Re: **Pre-clearance Consultation for OFCCP's Proposed "Agreement Approval Process for Use of Functional Affirmative Action Programs" (OMB Control Number 1250-XXXX), 77 Fed. Reg. 30327 (May 22, 2012)**

Dear Ms. Carr:

The Equal Employment Advisory Council ("EEAC") respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP") pre-clearance consultation regarding OFCCP's proposed standard procedures for obtaining, updating, modifying, and renewing functional affirmative action program agreements, notice of which was published in the *Federal Register* on May 22, 2012. 77 Fed. Reg. 30327.

As discussed in more detail below, OFCCP's announced intent to submit this information collection requirement ("ICR") to the Office of Management and Budget ("OMB") for formal Paperwork Reduction Act ("PRA") clearance represents a significant departure from the "simple and fluid" process instituted by OFCCP in 2002 — and subsequently suspended in May 2012 — for federal contractors to request and secure agency approval of affirmative action programs ("AAP") based on company-specific functions and business units, rather than by individual physical location. In place of that process, OFCCP has issued a new functional affirmative action program ("FAAP") directive¹ (the "Directive") that establishes an unnecessarily complicated and burdensome FAAP request-and-approval process, which now forms the basis of this ICR.

By all accounts, including direct feedback provided to OFCCP itself through hundreds of functional affirmative action program compliance evaluations, the agency's prior "simple and fluid" process was an unambiguous success. Under that process, more than 120 federal contractors — including many EEAC members — sought and obtained OFCCP approval to align their affirmative action programs with how they ran their business and held their managers

¹ OFCCP Order No. 296, ADM Notice/Functional AAP (June 14, 2011).

accountable. That process has allowed these contractors to demonstrate a willingness to *voluntarily and proactively engage* OFCCP on important compliance-related issues, and to significantly increase the effectiveness of their affirmative action efforts.

We respectfully submit that the complex and burdensome process set out in OFCCP's current Directive, and for which OFCCP intends to seek formal OMB approval, will effectively discourage federal contractors from continuing to seek FAAP approvals. Indeed, EEAC's members have told us that the process outlined in the Directive — and the paperwork requirements associated with that process — will *not* promote an efficient use of their resources, and they seriously question whether it will promote an efficient use of OFCCP's.

We seriously question whether the extensive recordkeeping and reporting requirements established by Attachments B and C of the Directive are necessary for OFCCP to determine whether a contractor's proposed FAAP structure is appropriate and deserving of the agency's formal approval. We therefore urge OFCCP to withdraw its intent to seek OMB approval of the instant ICR, to revise the Directive that serves as the basis for the ICR, and to resubmit an ICR modeled on the pre-existing FAAP process that simplifies the steps federal contractors must take to request and secure agency approval of a FAAP structure.

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership includes approximately 300 of the nation's largest private-sector corporations, who collectively employ more than 19 million workers in the United States alone. Nearly all EEAC member companies are subject to the affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. As the nation's largest federal contractors and subcontractors, our members have a significant stake and interest in ensuring that OFCCP's regulations efficiently and effectively accomplish their underlying policy objectives, which in the instant case is simply an efficient process for requesting and securing OFCCP approval of a mutually beneficial FAAP agreement.

THE FAAP APPROVAL PROCESS SHOULD BE SIMPLE, FLUID, AND SHOULD NOT RAISE THE COST OR STANDARDS OF COMPLIANCE

OFCCP's ICR appears to be based on two erroneous assumptions: (1) that the very nature of a functional affirmative action program is somehow inherently less effective at achieving OFCCP's affirmative action and nondiscrimination objectives than a location-based AAP, thus requiring a higher level of scrutiny; and (2) that to determine *whether* to allow such a program, OFCCP must possess, in advance, the materials necessary to determine *future* compliance with OFCCP's laws and regulations under a FAAP structure that has not yet been approved. Both of these assumptions are fundamentally flawed.

THERE IS NO RATIONAL REASON TO SUBJECT FAAP CONTRACTORS TO INCREASED COMPLIANCE STANDARDS AND PAPERWORK BURDENS

Arguably, FAAP contractors from the beginning have been subject to a higher standard than other contractors, in that they must seek the agency's approval to prepare the same programs and compliance reports required of those federal contractors that structure their AAPs by individual physical location. OFCCP's first FAAP directive was designed to alleviate at least some of that burden, stating that OFCCP intended the FAAP approval process to be "simple and fluid," one that would be a "collaborative effort" aimed at processing FAAP requests "in an expeditious manner."²

After carefully reviewing the current Directive and the recordkeeping and reporting requirements it establishes, however, we submit that OFCCP has strayed from that goal by replacing the prior "simple and fluid" process with a set of intensive and unnecessary paperwork requirements that will not further the agency's objective of making an informed decision about whether the structure of a contractor's business and the nature of its employment practices support formal approval of the FAAP structure the contractor is seeking to implement. In fact, the standards set forth in OFCCP's Directive border on the punitive by treating the existence of a FAAP agreement as a contracting privilege that must be justified, rather than acknowledging the FAAP as a sign that the contractor shares OFCCP's vision of promoting and ensuring affirmative action and equal employment opportunity, and is willing to work with OFCCP to make that happen.

FAAP contractors are among the employers most experienced and dedicated to ensuring compliance with Executive Order 11246, Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("Section 4212"), and Section 503 of the Rehabilitation Act ("Section 503"). Indeed, by seeking to implement FAAPs, these contractors *voluntarily* engage OFCCP on an annual basis and disclose precisely how it is that they run their business and implement, manage, and monitor their compliance with OFCCP-enforced requirements. It is thus curious to us that, after years of collaboration between OFCCP and FAAP contractors on the successful implementation of these programs, OFCCP now is electing to single out these contractors and make it harder for them to engage in effective compliance.

EEAC's concerns are perhaps best summarized by one of the comments received by a member company in response to OFCCP's intended ICR:

"I have never understood why OFCCP treats Functional Affirmative Action Plans differently than traditional location-based plans and requires a special agreement to authorize federal contractors to create these plans. In today's global business environment, it just makes sense to recognize that many companies are not organized by location, but by function, and it doesn't make sense to penalize federal contractors who want to follow the spirit of Affirmative Action Programs by creating plans that follow the true hierarchy of their organization The new

² OFCCP Order No. 254, ADM Notice/Functional AAP (March 21, 2002).

FAAP guidelines place an additional burden on federal contractors who are simply trying to create plans that reflect the way their business is organized and in a manner that provides appropriate accountability which reflects the spirit of Affirmative Action Programs. I fail to see the justification for a larger burden on federal contractors who develop [FAAPs].”

We do not need to remind OFCCP that the affirmative action expectations and compliance standards are the same for all contractors, regardless of whether their AAPs are structured by location or function. Each contractor is evaluated under the same three laws that OFCCP enforces, and each is subject to the same regulatory requirements that dictate how compliance is to be achieved. Not one of the laws or regulations enforced by OFCCP suggests or requires that FAAP contractors be held to a higher standard.³ And it makes little sense to impose on these particular employers compliance costs and burdens that are significantly higher than those of other federal contractors.

ATTACHMENTS B AND C SHOULD BE SIMPLIFIED TO REQUIRE ONLY THE MATERIALS
NECESSARY TO DETERMINE WHETHER THE PROPOSED FAAP STRUCTURE IS APPROPRIATE

With respect to the Directive itself, we maintain that much of the information and documents requested in Attachments B and C are not necessary for OFCCP to determine *whether* to approve a FAAP agreement. Attachment B, for example, calls for the submission of “workforce analyses” and “job group analyses” for each business unit, as well as a description of the reasonable recruitment area for each job group. Having audited hundreds of FAAPs over the past 10 years, OFCCP knows that each of these reports can run into the hundreds of pages for a single FAAP, and into the thousands or even tens of thousands of pages in the aggregate for all of a federal contractor’s functional plans.

We acknowledge that an evaluation of a FAAP workforce analysis, job group analysis, and availability analysis would assist OFCCP in auditing an *existing* FAAP. But that is not the issue here. OFCCP will have that opportunity each and every time it conducts a FAAP compliance evaluation, and nothing in the approval process relieves a FAAP contractor from its compliance obligations. Forcing a contractor to prepare these documents before the FAAP agreement is even approved, however, is burdensome, excessive, and abuses the cooperative relationship between OFCCP and FAAP contractors, in effect requiring them to develop and submit to OFCCP every functional AAP report before the contractor’s functional AAP structure has even been approved.

Similarly, Attachment C seeks comprehensive information on the contractor’s good faith efforts, personnel policies, and past EEO violations, all of which OFCCP typically requests and receives during a compliance evaluation, and little if any of which we submit is relevant to a determination as to whether the contractor’s *structure* is suitable for a FAAP.

³ OFCCP’s regulations only state that the existence of a FAAP must not “limit or restrict how the OFCCP structures its compliance evaluations.” 41 C.F.R. § 60-2.1(d)(4).

For these reasons, we respectfully urge OFCCP to revise its current Directive by at minimum removing the following documents and information from Attachments B and C:

- An organizational chart and workforce analysis of the contractor's organization that identifies the major operational units and a narrative description of the "business or function" of each proposed FAAP unit and how it meets the definition of a functional or business unit set forth above;
- For each proposed functional or business unit, identification of the major job groups to be included in the FAAP, representative job titles included in that job group, the current number of employees by race and gender in each group, and the relevant recruitment area, *e.g.*, local, regional, national for each job group;
- Copies of personnel policies relevant to evaluating the proposed functions or business units, including organizational and unit-specific policies related to recruitment; hiring; promotion; compensation; and termination.
- Personnel procedures including recruitment; hiring; promotion; compensation; termination; record retention and data analysis as they apply to each functional or business unit, including identification of units that have differing personnel or compensation practices;
- Any ongoing or past EEO violations from local, state and federal agencies (over the last three years); and
- Samples of past outreach that falls under Section 503 of the Rehabilitation Act of 1973, as amended, and under 38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 as amended, and a description of how the contractor plans to conduct its outreach under the functional format.

OFCCP SHOULD RECONSIDER WHETHER NOW IS THE APPROPRIATE TIME TO LEVY
ADDITIONAL BURDENS ON THE CONTRACTING COMMUNITY

In providing us with input on OFCCP's intended ICR, many of our members questioned the need for *any* increase in the burdens associated with applying for and maintaining a FAAP agreement. By all accounts, OFCCP's existing FAAP program has been a successful, collaborative partnership between the agency and the contracting community, precisely the intent of the program in the first place. OFCCP has not identified any deficiencies in the existing program, or indicated that contractors with functional plans were somehow not meeting their affirmative action and nondiscrimination obligations. FAAP contractors thus are left to wonder why, only months after OFCCP proposed extraordinarily burdensome regulations under Section 4212 and Section 503, the agency has decided to impose yet more paperwork burdens on a substantial segment of the federal contractor community.

We respectfully submit that the changes OFCCP wants to make to the FAAP approval process are fundamentally inconsistent with President Obama's January 18, 2011 Executive Order on Improving Regulation and Regulatory Reform (Executive Order 13563), which among other things requires federal agencies to use the best, most innovative, and *least burdensome* tools for achieving regulatory objectives.⁴ Accordingly, we strongly urge OFCCP to reconsider the instant ICR, and to simplify the FAAP approval process so that committed contractors can dedicate their limited resources to achieving the important goals that both they and OFCCP are striving to achieve.

CONCLUSION

Based on the foregoing, we respectfully request that OFCCP withdraw its intent to seek OMB approval of the instant ICR, revise the Directive that serves as its basis, and resubmit an ICR that simplifies the steps federal contractors must take to request and secure agency approval of a FAAP structure. As always, we remain available at the agency's convenience to further discuss these matters and promote the long, cooperative relationship FAAP contractors historically have maintained with OFCCP.

Sincerely,



Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jeff Weiss, Office of Management and Budget
Margaret Malanoski, Office of Management and Budget
Brenda Aguilar, Office of Management of Budget

⁴ 76 Fed. Reg. 3821 (January 21, 2011).