

September 14, 2015

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: Comments of the Equal Employment Advisory Council on the Office of  
Federal Contract Compliance Programs' Functional Affirmative Action  
Program Information Collection Requirements (OMB Control Number 1250-  
0006)**

Dear Ms. Carr:

The Equal Employment Advisory Council ("EEAC") respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP" or "the agency") Paperwork Reduction Act ("PRA") pre-clearance consultation regarding the agency's Agreement Approval Process for Use of Functional Affirmative Action Programs, notice of which was published in the Federal Register on July 16, 2015. 80 Fed. Reg. 42127.

This information collection requirement ("ICR") covers the recordkeeping and reporting obligations imposed upon those federal contractors that seek OFCCP's approval to implement a functional affirmative action program ("FAAP") structure, as well as those that seek to update, modify, and certify an existing FAAP agreement.

#### 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 270 of the nation's largest private-sector corporations, who collectively employ more than 10 million workers in the United States alone. Nearly all EEAC member companies are subject to the nondiscrimination and 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 major federal contractors and subcontractors, our members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those triggered by the agency's FAAP request-and-approval process, efficiently and effectively accomplish their underlying policy objectives.

## BACKGROUND

OFCCP announced major revisions to the FAAP program in June 2011 and thereafter elected to engage in the formal PRA clearance process for a new, FAAP-related ICR. After considering public comment, including comments submitted by EEAC, OFCCP made significant improvements to the new FAAP procedures. These improvements ultimately resulted in the agency's current FAAP directive (Directive 305) in effect today.

According to OFCCP's July 16, 2015 Federal Register notice, the agency currently is seeking comments on the renewal of these "standard procedures," although that notice also states that the agency is seeking a "revision of an existing OMB control number," perhaps because the agency is contemplating additional changes to the current information collection in light of public comment.

## RECOMMENDATIONS FOR REVISIONS TO OFCCP DIRECTIVE 305

Importantly, as a general comment, we want to commend OFCCP for reinstating and continuing the FAAP program. Many EEAC members benefit from the ability to prepare affirmative action plans by function or business unit rather than physical location. These companies have found that the FAAP structure allows for more meaningful, business-relevant analyses and improved monitoring of their equal employment and affirmative action efforts.

### **EASE OF ENTRY**

EEAC encourages OFCCP to make the process of requesting and securing approval of a FAAP structure more efficient and less burdensome for both contractors and the agency. Companies seeking approval for a FAAP structure do so out of a desire to better ensure equal employment opportunity. Beyond simply wanting to comply with OFCCP's regulations, these companies seek to harmonize their affirmative action program structure with the way their organizations actually operate. OFCCP, the contractors it regulates, and most importantly the applicants and employees that both parties seek to protect all benefit when contractors are allowed to develop functional affirmative action programs.

In this spirit, EEAC respectfully suggests that OFCCP grant conditional approval to every contractor with a complete and timely FAAP application (rather than simply an acknowledgement), much in the same way that contractors are allowed to continue operating under expired FAAP agreements as they await OFCCP's approval to renew those agreements (provided, of course, that the renewal was requested in a timely manner). The rest of the FAAP request-and-approval process could remain essentially the same. The proposed FAAP structure could be adjusted if necessary through the existing conference process, and OFCCP would retain the ability to deny FAAP applications should an agreement not be reached.

We believe this approach will better serve OFCCP's stated goal of making the FAAP request-and-approval process "simple and fluid," as contractors will no longer be required to maintain a fictional organizational structure for affirmative action purposes while the rest of the organization operates in a different manner.

#### **COPIES OF PERSONNEL POLICIES AND PROCEDURES**

EEAC renews its previous recommendation that OFCCP remove from Attachment B the required submission of personnel policies, while retaining the provision in Attachment C that would require their discussion. Attachment B currently requires that in advance of the FAAP conference, the contractor must prepare and submit "[c]opies 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." Attachment C requires that, during the FAAP approval conference, the contractor be prepared to discuss "[p]ersonnel 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."

EEAC agrees that each functional unit's ability to efficiently manage and monitor its personnel actions is certainly relevant to an assessment of a company's FAAPs. However, that ability rarely would exhibit itself through company documents, and we do not believe that copying and printing possibly hundreds of pages of confidential company policies would assist OFCCP in evaluating the suitability of a company's structure for a FAAP agreement simply because they might contain relevant information.

We also agree there could conceivably be a point in the FAAP request-and-approval process where OFCCP might need to see documentation to substantiate what is discussed during the FAAP approval conference. However, such documentation should be "situation specific" and requested by OFCCP only where it is directly relevant to questions that arise during the FAAP conference.

Accordingly, EEAC respectfully requests that Attachment C's provision requiring the discussion of personnel policies be retained, but that Attachment B be modified to eliminate the provision that would require their submission in advance.

#### **COPIES OF FEDERAL CONTRACTS**

EEAC also renews its previous request that OFCCP remove the requirement that contractors submit copies of federal contracts. Attachment B currently requires the contractor to submit "a copy of the qualifying federal contract or subcontract of \$50,000 or more." OFCCP reasons that this is a critical document during the approval process, in that "the submission of a Federal contract or subcontract substantiates the agency's regulatory authority to negotiate a FAAP agreement with a company requesting approval for a FAAP."

While this request sounds simple enough, as a practical matter the human resources and compliance professionals assigned the responsibility of managing the FAAP request-and-approval process rarely if ever have direct access to the company's federal contracts. Further, for the audience of federal contractors most likely to request a FAAP, there will often be several "qualifying" contracts, rather than just one, further complicating the process.

It is not unreasonable for OFCCP to assume that these contracts are readily available, just as it is not unreasonable for a company to assume that, as the agency responsible for enforcing federal contract provisions, OFCCP would already possess these documents or at least have access to them through the appropriate government channels. In reality, however, identifying and producing for OFCCP's review one or more "qualifying" federal contracts can be a burdensome and time-consuming task.

Moreover, from a practical standpoint, the submission of these documents simply is not a necessary component of the FAAP approval process. First, no company would submit to this process and disclose confidential business information to OFCCP if they were not already a federal contractor. Second, and perhaps most importantly, OFCCP carries out its enforcement responsibilities every day of the year without these documents, including conducting approximately four thousand compliance evaluations of federal contractors without asking them for a copy of a covered federal contract. We respectfully submit that it is both burdensome and unnecessary for the agency to continue to require their submission here.

### CONCLUSION

Again, EEAC commends OFCCP for continuing the FAAP program and striving to make continued improvements to the process. We also ask that OFCCP give due consideration to the relatively minor additional changes that EEAC is proposing to the agency's FAAP approval process.

We appreciate the opportunity to make our views known to OMB, and would welcome any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum", with a stylized flourish at the end.

Matt A. D. Nusbaum  
Senior Counsel and Director of  
OFCCP Compliance Policy