

December 28, 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' Proposed Renewal of the
Recordkeeping and Reporting Requirements – Supply and Service
Information Collection Request (OMB Control Number 1250-0003)**

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 Recordkeeping and Reporting Requirements – Supply and Service information collection request ("ICR"), notice of which was published in the Federal Register on October 29, 2015. 80 Fed. Reg. 66572.

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, Section 503 of the Rehabilitation Act of 1973, Section 4212 of 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 efficiently and effectively accomplish their underlying policy objectives.

BACKGROUND

This ICR covers OFCCP's standard Scheduling Letter, Itemized Listing, and Compliance Check Letter, which are used to initiate compliance evaluations of supply and service contractors and request from them a standard set of information, reports, and

analyses for initial review. OFCCP's October 29, 2015 *Federal Register* notice indicates that the agency is seeking to renew the PRA clearance for this ICR, which is due to expire on March 31, 2016. The supporting statement submitted in conjunction with this proposed renewal states that OFCCP is proposing to make "minor" revisions to this ICR's covered components, including revisions which are intended to "clarify the information that is the subject of this renewal."

EEAC is pleased to offer the following comments and recommendations in response to OFCCP's PRA pre-clearance solicitation for this ICR.

COMMENTS AND RECOMMENDATIONS REGARDING PROPOSED CHANGES TO THE SCHEDULING LETTER

OFCCP is proposing four changes of note to the current Scheduling Letter:

- (1) inclusion of "functional affirmative action program (FAAP) compliance review[s]" on the list of types of reviews;
- (2) separate requests for the disability and protected veteran affirmative action "plan" documents;
- (3) modified confidentiality and Freedom of Information Act (FOIA) statements; and
- (4) a new interagency information sharing statement.

Notably, despite the fact that the number of items requested by the Scheduling Letter and accompanying Itemized Listing doubled with OFCCP's last revision in 2014, the timeframe in which contractors must respond remains the same.

FAAP Reviews

EEAC supports OFCCP's effort to further specify for contractors the type of compliance review being initiated by the Scheduling Letter. Indeed, the current Scheduling Letter allows the agency to signal whether it is initiating an audit of a physical establishment (including the corporate headquarters) or a contractor's "functional unit" under an approved functional affirmative action program (FAAP) agreement. However, we respectfully submit that OFCCP's proposed change may confuse, rather than clarify.

When OFCCP initiates a review of a contractor's physical establishment, the current Scheduling Letter provides for the following statement:

"The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), selected your establishment located at [address] for a compliance evaluation."

The address of the establishment under review is obviously necessary for contractors with multiple physical locations, particularly if the address to which the Scheduling Letter is mailed is not the same as the establishment under review.

However, when OFCCP initiates a review of a contractor's functional unit, the formats of both the current and the proposed Scheduling Letter do a poor job of specifying the specific function under review. Both the current and proposed Scheduling Letter provide for a description of a functional unit "located at" a specific address. However, functional units are not necessarily "located" at any particular address. Rather, one address could house employees from several different functions. A physical address designation is simply inadequate to put the contractor on notice as to the specific function under review. OFCCP's proposed changes do not address this deficiency.

Rather than add "functional affirmative action program (FAAP) compliance review" as a type of review, EEAC respectfully recommends that OFCCP specifically identify the function under review by its description provided by the contractor and available to OFCCP in the FAAP agreement.

One way to accomplish this is to modify the first paragraph of the Scheduling Letter to read as follows: "The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), selected your [suggested options below] for a compliance evaluation." For the suggested options, we recommend the following:

- "corporate headquarters";
- "establishment located at [address]"; or
- [functional unit name or description].

In the above options, text in quotes represent options for insertion of approved text, and text in brackets describe information to be filled in by OFCCP. With such a change, OFCCP could eliminate "located at _____" from the body of the letter altogether and would not have to change the current compliance review type options.

We believe this change would greatly enhance the clarity of the Scheduling Letter and be more efficient for both the agency and the contracting community.

Disability and Veteran AAPs

OFCCP's proposed change here is unnecessary and potentially confusing. EEAC respectfully submits that the Scheduling Letter would be clearer, and the federal contractor community better served, with current language.

The current Scheduling Letter simply requires contractors to supply a copy of their "current Section 503 and Section 4212 AAPs." OFCCP has historically allowed contractors to prepare and maintain one combined AAP document to satisfy their Section 503 (disability) and Section 4212 (protected veteran) affirmative action obligations under OFCCP's regulations. In fact, prior to the publication of OFCCP's final revised disability and protected veteran regulations in 2013, the agency's own sample AAP documents published on OFCCP's website provided *only* a combined 503/4212 AAP template.

The agency has since replaced the combined sample 503/4212 AAP on its website with separate template documents. The agency has not, however, released new guidance suggesting that the creation and maintenance of separate disability and protected veteran AAPs is necessary or expected. Many EEAC member companies report that they are able to continue to prepare a single 503/4212 AAP document to meet OFCCP's revised regulations. In fact, this continued practice can be an efficient way to satisfy many of the new obligations such as the "data collection analysis" requirements by avoiding duplication of effort.

Unless OFCCP intends to require contractors to prepare and maintain separate 503 and 4212 AAP documents going forward, the request for these documents in the current Scheduling Letter is sufficient and does not need to change. If OFCCP nonetheless decides to move forward with this proposed modification while still allowing contractors to prepare and maintain combined 503/4212 AAPs, we respectfully suggest that the Scheduling Letter state explicitly that submission of a combined document is acceptable.

Confidentiality

EEAC respectfully submits that OFCCP's proposed changes to the current confidentiality and FOIA statements are unnecessary and could lead to needless concern among contractors.

The information, reports, and analyses that federal contractors are required to submit to the federal government in the context of a compliance review contain a wealth of proprietary, confidential, and potentially sensitive information that contractors have a strong interest in protecting from public disclosure, on behalf of both the company and its individual employees. Public disclosure of this information could, for example, put companies at a significant economic disadvantage with their competitors. Additionally, public disclosure of individual employee information could create privacy risks for federal contractors and their employees.

EEAC recognizes that OFCCP has understood contractors' concerns in this regard and has made concerted efforts to notify contractors when their information is requested through a FOIA request (or other means). We also recognize that OFCCP historically has provided an opportunity for those contractors to register any objections to disclosure under FOIA and, to our knowledge, has withheld information from disclosure if the contractor demonstrates a valid reason for doing so under that law.

Despite this longstanding policy and practice, OFCCP is proposing to remove entirely the statement, "Rest assured that OFCCP considers the information you provide in response to this Scheduling Letter as sensitive and confidential."

If OFCCP intends to signal a change in policy regarding the confidentiality and handling of information provided by contractors, EEAC respectfully submits that modifications to the Scheduling Letter, characterized as "minor" and "clarifying" in nature, are not an appropriate way to accomplish such a goal.

EEAC does not, however, believe that OFCCP intends to signal a policy change with this modification. Accordingly, we respectfully suggest that OFCCP instead choose stronger

language, such as is found in the agency's own regulations implementing Section 503 and Section 4212, which contain model language for this purpose. Specifically, 41 C.F.R. §§ 60-300.81 and 60-741.81 provide that "OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552."

EEAC respectfully recommends that if OFCCP changes this ICR's current confidentiality and FOIA statements at all, the agency should simply adopt the above statement, substituting the term "section" with "letter." Such a statement would better reflect past OFCCP policy and practice, and send an appropriately strong, reassuring message to the federal contracting community.

Interagency Information Sharing

OFCCP also is proposing to insert a new statement in its Scheduling Letter notifying contractors that the agency may use the information provided in response in an enforcement action and may share such information with other federal government agencies. EEAC respectfully submits that this statement is simply unnecessary.

According to OFCCP's PRA supporting statement, this change is intended to address the fact that OFCCP may refer an enforcement action outside of the Department of Labor to the Department of Justice or share information with the Equal Employment Opportunity Commission (EEOC). If this is, in fact, the true purpose and scope of this proposed change, we respectfully submit that this language is unnecessary. OFCCP's regulations implementing Executive Order 11246 provide sufficient notice that enforcement actions can, in certain circumstances, be referred to the Department of Justice (41 C.F.R. § 60-1.26(c)). Further, OFCCP's memorandum of understanding with the EEOC regarding the sharing of information has been well publicized.

If, however, the scope of this notice goes beyond what is described above, EEAC respectfully submits that the agency should address the issue through a more appropriate, public, and transparent process and leave the current Scheduling Letter unchanged in this regard.

30 Day Deadline for Response

EEAC respectfully requests that OFCCP revise the Scheduling Letter to allow its personnel, under certain circumstances, to afford contractors with more than 30 days to submit the required information, data, reports, and analyses.

As you know, the current Scheduling Letter has long required federal contractors to provide OFCCP with their complete desk audit submissions within 30 days of receipt. Although EEAC recognizes that the agency has legitimate reasons to impose such a deadline under many circumstances, we submit that such a deadline is not always appropriate, and in some circumstances can hinder the agency's important policy goal of nondiscrimination and affirmative action compliance.

The current deadline is based on the regulations implementing Executive Order 11246 which state, "If a contractor fails to submit an affirmative action program and supporting documents, including the workforce analysis, within 30 days of a request, the enforcement procedures specified in § 60-1.26(b) shall be applicable" (41 C.F.R. § 60-1.20(e)). Arguably, these "supporting documents" refer to the quantitative analyses described in 41 C.F.R. § 60-2.10(b), which include the organizational profile (of which the "workforce analysis" is one of two types). While 30 days may be a reasonable deadline to produce the Executive Order AAP and *its* supporting documents, these regulations do not contemplate, much less reference, the information, data, reports, and analyses required for contractors who must also submit Section 503 and Section 4212 AAPs. We respectfully submit that if 30 days is an appropriate deadline to produce required documentation for one AAP, then 60 or 90 days is an appropriate deadline to produce documentation for two or three AAPs.

Further, some federal contractors are large and complex organizations with tens of thousands of employees and perhaps hundreds of locations. These contractors may at any given time be engaged in dozens of simultaneous OFCCP compliance reviews, and their resources are not unlimited. OFCCP has sufficient information to know the number of active audits each federal contractor has pending at any given time, as well as data giving the agency a reasonable idea of the size and complexity of the organization. Modifying the Scheduling Letter to allow OFCCP to set a deadline longer than the current 30 days would allow the agency to take such factors into account and set more appropriate deadlines when the situation warrants doing so.

Finally, when OFCCP initiates a compliance review, the agency is not simply asking contractors to demonstrate that they have prepared, compiled, and maintained all of the required information, reports, analyses, and data. The information submitted by federal contractors often is used by the agency to level serious allegations of non-compliance, , which can and do have serious consequences including loss of federal contracts, monetary relief to alleged victims, and damage to the company's reputation. Accordingly, our members find it prudent to carefully and thoroughly review their Scheduling Letter responses before submitting them, a practice which we believe the agency should encourage in both policy and practice.

EEAC respectfully requests that OFCCP open an honest dialogue with the federal contracting community about these issues, recognizing that this community includes real people who take tremendous pride in their efforts to provide equal employment opportunity and affirmative action. Whether OFCCP chooses to provide any contractor with more than 30 days to respond to a Scheduling Letter, EEAC submits that the agency can and should provide itself with the option to do so.

COMMENTS AND RECOMMENDATIONS REGARDING PROPOSED CHANGES TO THE ITEMIZED LISTING

EEAC supports OFCCP's proposed changes to the Itemized Listing. The rewording of paragraph 17(c) characterizes contractors' good-faith efforts in a way that is much more in

line with Title VII principles and does not suggest the implementation of illegal quotas. Further, separating the requests for data regarding hires and applicants is much clearer.

EEAC respectfully suggests, however, that OFCCP remove the “six-month update” language from paragraph 14. This paragraph requests documentation of the protected veteran hiring benchmark adopted and the methodology used to establish it (if appropriate). Once established, OFCCP’s regulations do not contemplate that the benchmark will change for the duration of the contractor’s AAP cycle. Therefore, the request for “information that reflects current year results” is simply confusing.

OFCCP has since published guidance to correct this language in the Scheduling Letter, notifying contractors that no additional information is required with regard to paragraph 14 if the contractor is six months or more into their current AAP year when they receive the Scheduling Letter. EEAC respectfully submits that removing this erroneous language in the Scheduling Letter’s Itemized Listing would be an appropriate, minor, clarifying change that would eliminate significant confusion.

COMMENTS AND RECOMMENDATIONS REGARDING PROPOSED CHANGES TO THE COMPLIANCE CHECK LETTER

EEAC has no comment on OFCCP’s proposed changes to the Compliance Check Letter.

CONCLUSION

EEAC appreciates the opportunity to file these comments on the instant ICR. If you would like to further discuss our comments and recommendations, please do not hesitate to let me know.

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