

November 13, 2018

Via Federal eRulemaking Portal: www.regulations.gov

Harvey D. Fort, Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
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 1250-0006)

Dear Mr. Fort:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' (OFCCP or the Agency) pre-clearance consultation regarding its Agreement Approval Process for Use of Functional Affirmative Action Programs, notice of which was published in the *Federal Register* on September 11, 2018. 83 Fed. Reg. 45,977.

OFCCP's proposal covers the recordkeeping and reporting obligations imposed upon federal contractors that seek to enter into an agreement with OFCCP by which the contractor is permitted to implement affirmative action programs based on business function rather than the standard location-based structure, as well as those that seek to update, modify, or certify existing functional affirmative action program (FAAP) agreements. While it would eliminate a number of current requirements that CWC's members have identified as barriers to entry to the FAAP program, CWC encourages OFCCP to consider additional measures outlined below to further encourage contractor participation.

STATEMENT OF INTEREST

CWC (formerly the Equal Employment Advisory Council), is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes nearly 250 of the nation's largest

employers. CWC's members are firmly committed to nondiscrimination and equal employment opportunity.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order 11,246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. As major federal contractors and subcontractors, CWC's 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.

CWC is an original proponent of permitting federal contractors to prepare functional based affirmative action programs (AAPs) when doing so can result in more meaningful analyses and therefore better advance and enhance the company's affirmative action efforts.¹ CWC's recommendations are aimed to further improve and streamline OFCCP's FAAP request-and-approval process in a manner that supports contractor compliance efforts and achieves OFCCP's policy aims.

SUMMARY OF RECOMMENDATIONS

OFCCP's ICR reflects the Agency's proposed changes to the current request-and-approval process federal contractors must follow in order to be permitted to structure their AAPs by function or business unit rather than physical location.² The ICR also describes the documents and information that OFCCP would require federal contractors to prepare and disclose to OFCCP, ostensibly to allow the Agency to determine whether the contractor's structure and business operations support approval of a FAAP program. CWC respectfully submits that while the proposed changes and accompanying reporting requirements would largely enhance the FAAP approval process, OFCCP still could do more to remove barriers to entry and encourage participation in the FAAP program without harm to OFCCP's policy objectives.

To that end, CWC's comments are intended to help OFCCP further enhance the FAAP request-and-approval process consistent with the Agency's stated goal of encouraging the use of FAAPs and

¹ See, e.g., Equal Employment Advisory Council, *Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Information Collection Request Revision Titled, "Agreement Approval Process for Use of Functional Affirmative Action Programs,"* OMB Control Number 1250-0006 (February 8, 2016); Equal Employment Advisory Council, *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 (September 14, 2015); and Equal Employment Advisory Council, *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. 30,327 (July 23, 2012).

² In the absence of an executed FAAP agreement, OFCCP's regulations require contractors to develop, implement, and maintain a separate AAP for each establishment, identified by physical location, with 50 or more employees.

making the process “simple, fluid, and collaborative.” Among other things, and discussed in more detail below, CWC recommends that OFCCP should:

- Extend the term of FAAP agreements from three to five years;
- Eliminate the mandatory audit requirement for FAAP participants;
- Extend the audit moratorium period to 36 months after a closed compliance evaluation;
- Eliminate consideration of contactors’ EEO compliance history as part of the FAAP approval process;
- Eliminate the reapplication period after the expiration of a FAAP agreement; and
- Eliminate the annual update requirement.

To further enhance OFCCP’s FAAP request-and-approval process, CWC also respectfully recommends that OFCCP:

- Eliminate or revise the requirement to report on employees included in FAAPs;
- Eliminate the requirement to provide information concerning federal contracts;
- Grant conditional approval to complete and timely FAAP applications; and
- Consider FAAPs for new contractor recognition awards.

FAAPs permit federal contractor employers to develop and implement AAPs that better align with their organizational structures. Establishing AAPs according to function or business unit can significantly strengthen an organization’s ability to develop meaningful and effective affirmative action efforts, while simultaneously being able to hold managers and stakeholders accountable for the AAP’s implementation.

OFCCP last revised the FAAP program in 2016 with the intention of making the approval process less onerous. Unfortunately, for many CWC member companies the barrier to entry is still too high. Further, for many of our member companies, the ongoing requirements under the 2016 revisions are burdensome, and at times, appear to be simply perfunctory. This has discouraged many CWC members from pursuing a functional AAP structure, despite strong desire to leverage OFCCP’s FAAP option to strengthen their equal employment opportunity and affirmative action efforts.

COMMENTS ON PROPOSED CHANGES

The Term of FAAP Agreements Should be Extended From Three to Five Years

CWC supports OFCCP’s proposal to extend the term of FAAP agreements from three to five years. This change, if implemented, will likely encourage more federal contractors to explore their FAAP options with additional assurance in the stability of their programs. CWC also supports requiring

federal contractors to renew a FAAP via electronic means, as it appears that this approach will streamline the renewal process.

The Mandatory Audit Requirement Should Be Eliminated

CWC supports OFCCP's proposal to eliminate the mandatory audit requirement during the term of a FAAP agreement. Contractors with FAAP agreements currently are required to undergo at least one FAAP compliance evaluation during the term of the agreement. Approval of FAAP agreement renewal requests currently are withheld until required audits are concluded. If the term of a FAAP agreement expires prior to OFCCP completing the required audit, the term of the existing FAAP agreement is automatically extended. During such extended periods, FAAP contractors are still responsible for updating OFCCP regarding substantive organizational changes that impact the FAAP structure and, should such changes occur, would also need to update the pending FAAP renewal request.

This is an unnecessary administrative burden on both the Agency and the contractor. Moreover, the prospect of "guaranteed" OFCCP audits has been cited as a barrier to participation by some CWC members. CWC is unaware of any evidence to suggest that FAAP contractors warrant more scrutiny than contractors with establishment-based AAPs, nor is CWC aware of any purpose served by the current mandatory audit requirement. CWC also notes that OFCCP has integrated FAAP units into the Agency's existing audit selection process, making FAAP units less likely to be overlooked. Accordingly, CWC submits that the elimination of this requirement is appropriate.

The Post-Audit Exemption Period Should Be Extended

CWC supports the proposed change extending the post-audit moratorium period from 24 to 36 months. CWC agrees that such change will "encourag[e] the use of functional or business unit based affirmative action programs." Under current OFCCP practice, both functional and establishment-based AAPs are exempt from review for 24 months after a compliance review ends.

The length of these post-audit moratoriums is somewhat arbitrary and serves mainly to avoid unnecessarily expending OFCCP resources reviewing functions or establishments that either have already been deemed compliant or brought into compliance under OFCCP's direction. However, they can be of great value to federal contractors, allowing them to focus limited time and resources on their equal employment opportunity and affirmative action efforts. Extending the moratorium period for functional AAPs an additional twelve months over the moratorium period for establishment-based AAPs sends a clear message that the Agency in fact encourages contractors to explore the FAAP option.

OFCCP Should Eliminate the EEO Compliance History Requirement as a Condition of Applying

CWC supports eliminating the consideration of ongoing or past EEO violations from local, state and federal agencies over the preceding three years from the FAAP approval process in every case. This current requirement appears to be a relic of the now-defunct Executive Order 13,673, "Fair Pay and Safe Workplaces," which would have required federal contracting agencies and federal contractors to take into account a bidder's labor law violation history when awarding federal contracts and subcontracts.

CWC recognizes that an organization's history with regard to various employment law violations can be relevant, and that OFCCP retains the authority to pursue such issues when circumstances warrant. However, organizations that apply for FAAP approval are typically doing so because of the company's sincere desire to comply with both the letter and the spirit of the law. Past EEO violations do not necessarily have any bearing on an employer's commitment to compliance and should not be a barrier to entry into the FAAP program except in extraordinary circumstances. Accordingly, CWC supports OFCCP's proposal to remove the requirement that contractors submit information regarding the organization's EEO compliance history when requesting FAAP approval.

OFCCP Should Eliminate the Reapplication Waiting Period

CWC also supports the elimination of the seemingly arbitrary requirement that a contractor must wait three years after a termination of a FAAP agreement before reapplying for a FAAP. It is unclear what this requirement attempted to accomplish. Organizations change, sometimes drastically, and sometimes rapidly. The purpose of the FAAP option is to allow federal contractors the flexibility to align their AAPs with the way their companies are actually organized and operated.

OFCCP simply cannot dictate to contractors the timetable by which such changes should occur and should allow contractors the flexibility to move from functional to establishment-based plans when appropriate without penalty. Accordingly, CWC fully supports the elimination of the current reapplication waiting period.

OFCCP Should Eliminate the Annual Update Requirement

The current FAAP directive requires participating contractors to update OFCCP with substantive organizational changes impacting the agreed-upon FAAP structure within 60 calendar days of the effective date of such changes. FAAP contractors are also required to submit a formal update report on an annual basis whether or not there are any "updates," *i.e.*, substantive organizational changes, to report. Failure to file a timely annual update report could trigger an OFCCP audit. While CWC recognizes that an update requirement of some form is necessary, both of these update forms are not. OFCCP has chosen to propose eliminating the annual update requirement.

Reporting updates soon after they occur, rather than waiting for an annual reporting anniversary, is likely more useful to OFCCP, particularly with regard to audit selection and scheduling. Eliminating the periodic update requirement and retaining the annual one would more likely result in OFCCP relying on outdated information when selecting FAAPs for review. Accordingly, CWC supports the elimination of the annual update requirement.

CWC also respectfully encourages OFCCP to examine whether and to what extent the Agency can make better use of the information contractors do provide when updating the Agency regarding FAAP-related organizational changes. CWC members regularly report that OFCCP regional and district offices appear to be unaware of their organizations' current FAAP structures and agreements, causing unnecessary confusion and delays during compliance reviews. For example, CWC members often report the receipt of Scheduling Letters based on outdated information, sometimes years old, despite having provided OFCCP with timely updates.

In conjunction with OFCCP Directive 2018-07 regarding the Agency's affirmative action program verification initiative,³ CWC recommends that OFCCP also explore developing the information technology infrastructure necessary to allow organizations with FAAP agreements to provide updates through an electronic, online portal. This could allow OFCCP to more easily provide up-to-date information regarding contractors' FAAP agreements to OFCCP regional and district office personnel for use during the audit scheduling process. This could also allow FAAP contractors to see what information currently is on file and provide updates as needed.

RECOMMENDATIONS FOR ADDITIONAL REVISIONS

While many of the revisions in the proposed FAAP directive are welcomed, in the spirit of making the FAAP program simple, fluid, and collaborative, and to further encourage participation, CWC respectfully recommends that OFCCP eliminate or revise the requirement to report on employees included in functional AAPs, eliminate the requirement that contractors provide information regarding federal contracts, conditionally approve timely and complete FAAP applications, and consider FAAP units for new OFCCP recognition awards. These recommendations are described in further detail below.

³ See https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_07.html.

OFCCP Should Eliminate the Requirement That All Functional Units Contain at Least Fifty Employees and Revise the Requirement To Report on Employees Included in FAAPs

Under the current FAAP directive, contractors must report the total number of employees in each proposed functional unit, and functional units with fewer than fifty employees will not be approved. CWC respectfully submits that these requirements are unnecessary and serve as potential barriers to entry.

OFCCP's proposed revised directive notes, "In the absence of an approved FAAP agreement, the regulations require contractors to develop, implement, and maintain separate AAPs for each physical location or establishment with 50 or more employees." While this statement is true insofar as it goes, it is potentially misleading in that it implies either that contractors are only required to prepare AAPs for establishments with 50 or more employees, or alternatively that contractors are not required to include employees in an AAP at all if they work at establishments with fewer than 50 employees. Contractors are permitted to prepare AAPs for establishments with fewer than 50 employees at their discretion.⁴

While the number of employees covered by a particular AAP might influence OFCCP's decision to review an AAP for compliance, it does not necessarily dictate how a company organizes and operates, nor should it be a factor in whether or not a functional unit is approved. Some CWC members have reported that the prospect of the employee headcount in an approved functional unit falling below the fifty threshold presents a serious dilemma and causes concern over the fear that OFCCP will terminate the organization's FAAP agreement. This can result in contractors combining functional units to meet the headcount threshold, even when doing so is at odds with the purpose of functional AAPs.

If OFCCP believes that a particular contractor has designed a FAAP structure with unnecessarily small units in an effort to diminish the Agency's ability to effectively review compliance, OFCCP still retains full authority to deny the FAAP application or demand changes to such proposed FAAP structures on a case-by-case basis. CWC respectfully recommends that OFCCP eliminate the requirement that all approved functional units contain at least 50 employees.

Further, under the current FAAP directive contractors are required to report the precise headcounts in each functional unit. CWC fails to see the utility in this requirement. CWC notes that some sense of headcount in functional AAPs could be useful to OFCCP in the audit scheduling process, as this information is not readily discernable through alternate sources of data such as EEO-1 reports as is often the case for establishment-based AAPs. To the extent that OFCCP decides to retain this requirement, CWC strongly recommends that OFCCP simply require contractors to note whether an AAP function includes headcounts above or below 50 employees (the threshold for the

⁴ See 41 C.F.R. § 60-2.1(d)(2).

requirement to prepare establishment-based AAPs under Executive Order 11,246) and require FAAP agreement holders to update that information as necessary.

OFCCP Should Eliminate the Requirement To Provide Information Concerning Federal Contracts

The proposed directive retains a provision that requires contractors to provide OFCCP with a copy of a qualifying federal contract during the application and renewal process. OFCCP has never explained the purpose behind this requirement, which ignores that it is OFCCP's, not the contractor's, responsibility to establish jurisdiction at the outset of a compliance review.

Providing such information can prove an onerous task, especially for larger, more complex organizations that typically benefit the most from the FAAP option. In such organizations, the human resources and compliance professionals with the responsibility of managing the FAAP process rarely have access to the company's contract documents (federal or otherwise).

Moreover, many federal contractors regularly fall in and out of OFCCP's jurisdiction, yet maintain voluntary AAPs during interim periods when their organizations might not technically be a qualifying federal contractor. Current non-contractor status should simply not be a barrier to FAAP approval. CWC strongly recommends that OFCCP eliminate this requirement.

OFCCP Could Significant Increase Ease of Entry by Granting Conditional Approval of Complete and Timely FAAP Applications

CWC encourages OFCCP to make the FAAP request-and-approval process as efficient as possible, both for the Agency and for the contractors seeking FAAP approval. In this spirit, and as it has in the past, CWC strongly recommends that OFCCP grant conditional approval to contractors that submit a complete and timely FAAP application. OFCCP added the FAAP option in 2000⁵ and issued the first FAAP directive in 2002.⁶ Since that time, CWC is unaware of any instances of abuse of the FAAP process and questions the extent to which extensive evaluation prior to approval remains necessary.

OFCCP's regulations provide contractors with establishment-based AAP structures considerable latitude with regard to locations with fewer than 50 employees. Contractors often avail themselves of the option to combine smaller locations with larger, related establishments, or into district or regional plans. These establishment-based AAP structures do not require advance approval by OFCCP. Rather, OFCCP has provided guidelines in the Agency's regulations.⁷

⁵ 41 C.F.R. § 60-2.1(d)(4).

⁶ OFCCP Directive Number 254, ADM Notice/Functional AAP (March 21, 2002).

⁷ 41 C.F.R. § 60-2.1(d)(1)-(3).

Establishment-based structures either meet those guidelines or they do not, in which case contractors may be cited with a violation and required to make changes to their AAP structure at that time. CWC sees no reason why FAAP structures should be provided any less latitude. In fact, due to the unique nature of the relationship between contractors with FAAP agreements and OFCCP, particularly the level of contact such contractors regularly have with the Agency, OFCCP has ample opportunity to provide contractors with feedback regarding their FAAP structure and require changes if necessary.

Further, many CWC members report that the time it took to receive FAAP approval ranged from 12 to 18 months, far more than the 60 to 90 days often cited by OFCCP. These members also report that the changes OFCCP negotiates to the initial FAAP application are typically minor. CWC is not aware of any circumstances that would justify a pre-approval requirement rather than a process that would permit issues to be addressed after general approval for a functional structure is given.

This process would be further improved if OFCCP provided more detailed guidance in the form of sample documents and templates demonstrating what a complete, accurate, and acceptable FAAP application should look like. This will assist both OFCCP and contractors in fully understanding and making known what is required and expected during the application process. Moreover, it would reduce the administrative burden associated with communicating with contractors about minor application errors. It could also signal to contractors the exact manner in which OFCCP prefers to receive the application package — making the review process more uniform and consistent.

Treat FAAPs Equally with Respect to Awards

OFCCP recently announced the creation of two new contractor recognition awards, the “Excellence in Disability Inclusion Award” and the “Leadership in Equal Access and Diversity Award.” CWC was surprised to see that both awards exclude FAAPs from eligibility. Whether an employer is operating under a functional or an established-based AAP structure, protecting workers, promoting diversity, and complying with the law is at the heart of either program. To that end, CWC recommends that OFCCP make functional affirmative action programs eligible for new contractor awards.

Harvey D. Fort
November 13, 2018
Page 10

CONCLUSION

CWC appreciates the opportunity to offer these comments on the instant ICR. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Matt A. D. Nusbaum

Senior Counsel

Center for Workplace Compliance