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Ms. Debra A. Carr
Director, Division of Policy and Program Development
Office of Federal Contractor Compliance Programs, Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

Re: DOL OFCCP - Functional Affirmative Action Programs
OMB Control 1250-0006

Dear Ms. Carr:

Littler Mendelson, P.C. ("Littler") submits these comments in response to the Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP") Paperwork Reduction Act ("PRA") pre-clearance consultation regarding OFCCP's Agreement Approval Process for Functional Affirmative Action Programs ("FAAP") which was published in the Federal Register (83 Fed. Reg. 45977) on September 11, 2018.

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

Littler is the largest global employment and labor law practice with more than 1,500 attorneys in over 75 offices worldwide, representing clients across virtually every industry in all aspects of employment and labor law. Littler is a single source solution provider to the global employer community, consistently recognized in the industry as a leading and innovative law practice. Littler also has a separate practice group of attorneys dedicated to representing and assisting clients in matters with the OFCCP. The Firm's OFCCP client base ranges from Fortune 100 companies to small-business owners. The ICR is highly relevant to the Firm's OFCCP practice as some of our clients have existing FAAP agreements and others are contemplating seeking FAAP approval.

Recommendations for Revisions to OFCCP's FAAP Directive

As a general matter, we want to commend OFCCP for taking some very positive steps with FAAP Agreements that decrease the regulatory burden, increase transparency, and ensure consistent application of its policies and procedures. Many Littler clients benefit from the ability to prepare affirmative action plans by function or business unit rather than establishment. 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.

Eliminating the Preapproval Requirement

Littler encourages OFCCP to make the process of implementing a FAAP more efficient and less burdensome for all parties. Contractors seeking to implement a FAAP do so out of a desire to better ensure equal employment opportunity and harmonize their affirmative action program structure with the way they operate.

In particular, as employers increasingly rely on employees that work from home or at other remote locations (including other employers' facilities) the utility and relevance of establishment based plans has diminished.¹ At the same time, for very large employers, establishment based plans often become unwieldy. By reflecting actual lines of authority, FAAPs make it easier for contractors to assess the effectiveness of their affirmative action efforts, including identifying individual managers that are performing well and those managers that have been less successful in their affirmative action efforts.

For these reasons, we believe that there is a broad consensus that employees, employers, the public, and OFCCP all benefit when contractors are permitted to develop FAAPs.

Accordingly, Littler respectfully suggests that OFCCP permit contractors to implement FAAPs without having to obtain preapproval from OFCCP just as contractors have always been permitted to determine the structure of an establishment based affirmative action program without having to first obtain OFCCP's approval of that structure.

Permitting contractors to adopt FAAPs without having to seek OFCCP's approval in advance would substantially reduce the costs to contractors of compliance and remove a substantial obstacle to adopting FAAPs. At the same time, eliminating the pre-approval requirement would free up OFCCP resources that could be used for better purposes such as supporting contractor outreach and training efforts and reviewing contractor compliance.

¹ As just one example, under 41 CFR §60-2.1(d) an establishment based contractor with a large remote sales force is often required to roll all of its sales workers up into its headquarters plan. Adding a large number of remote employees to a headquarters plan generally increases the work involved in maintaining the affirmative action program for that establishment. It also results in more complicated and less effective compliance reviews.

We do recognize that in order for OFCCP to be able to audit FAAPs, it must have information regarding contractors' adoption of FAAPs. We also recognize that without pre-approval, a contractor that is selected for an audit might be tempted to try to limit the scope of that audit by moving employees between establishments and FAAP units. However, we believe that these issues can be resolved by simply requiring contractors to periodically report on their plan structure; *i.e.*, identify each FAAP unit and plan establishment with its headcount. This is not very different from what is currently required by OFCCP as part of the FAAP approval process, but would reduce the time and expense involved in having to obtain OFCCP's approval of the structure. Such a report could be submitted every five years to track OFCCP's proposal to move to a five year certification process. On the other hand, should OFCCP implement some kind of annual certification requirement for all contractors as contemplated by Directive 2018-07, this reporting could perhaps be provided annually.

We believe that the reporting should be kept simple so that a contractor that is satisfying its obligation to annually prepare affirmative action plans can also satisfy the reporting requirement with very little additional effort or burden.

With the benefit of the reported information, OFCCP would be able to verify that the FAAP structure is reasonable and appropriate when conducting compliance reviews just as establishment based compliance reviews currently consider whether the contractor has properly followed OFCCP's rules for determining who is included in affirmative action programs.

In the event that OFCCP has concerns with this suggestion, then as an alternative, Littler respectfully requests that OFCCP at least consider granting conditional approval to every contractor with a complete and timely FAAP request, much in the same way that contractors can continue to operate under expired FAAP agreements as they await OFCCP's approval to renew those agreements. The rest of the FAAP approval process could remain essentially the same and the contractor's proposed FAAP structure could be adjusted if necessary through the existing approval process. Under this approach, OFCCP would still retain the ability to deny FAAP requests.

Such a conditional approval approach would serve OFCCP's efforts to encourage the use of FAAPs and make the request process "simple, fluid, and collaborative." And, of course, adopting such a conditional approval approach, would leave OFCCP with discretion to permit contractors to maintain a FAAP without explicit OFCCP approval when the agency determines that its resources could be better applied elsewhere. In such situations, OFCCP would always be able to later review the FAAP through a properly scheduled compliance evaluation or when it becomes due for renewal.

Proof of Federal Contracts

Littler requests OFCCP remove from Attachment A the requirement that contractors submit "specific information on at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor."

While this request seems straightforward, as a practical matter the compliance personnel responsible for managing the FAAP request process likely do not have access to the company's federal contract information. OFCCP, on the other hand, already possesses this information from the Federal Procurement Data System-Next Generation (FPDS-NG) that is used to develop the Supply and Service scheduling lists. Therefore, it seems repetitive and burdensome to request the same information from contractors at the outset of the FAAP approval process.

Additionally, from a purely practical standpoint, the submission of this information is simply unnecessary in the FAAP approval process. First, no business would submit to this process and disclose confidential business information to OFCCP if they did not believe themselves to be a federal contractor. This is not a process that a non-federal contractor company would understand. Second, OFCCP carries out its enforcement responsibilities every day without this information from contractors, including conducting compliance evaluations without asking for this information. If a company believes it is not a covered-federal contractor at the start of an OFCCP compliance evaluation, it will raise that issue through appropriate channels. Lastly, for those entities that move on and off the covered federal contractor list, this requirement is problematic if they want to maintain voluntary Affirmative Action Programs during gaps as a covered federal contractor. Based on the above, Littler submits that it is unnecessary to request information related to federal contracts at the beginning of the FAAP process.

Copies of Unit-Specific Personnel Policies and Procedures

As discussed above, Littler respectfully suggests elimination of the FAAP pre-approval process.

However, to the extent that OFCCP chooses to continue to require pre-approval, Littler appreciates that OFCCP has narrowed the required information that must be submitted in Attachment A to "unit-specific personnel policies relevant to evaluating the proposed functions or business units, including policies related to recruitment, hiring, promotion, compensation, and termination where different from the corporate policies." Nonetheless, Littler requests that OFCCP remove the submission requirement in Attachment A and maintain the provision in Attachment B that requires their discussion of policies during the FAAP negotiation process.

Littler does not discount that it's important for a functional unit to effectively manage and monitor its personnel actions and that this is relevant to an assessment of a company's FAAPs. However, that ability is not found in company documents and asking a company to copy and print hundreds of pages of confidential company policies is unduly burdensome and risky for the company.

Removing the submission requirement found in Attachment A doesn't prohibit OFCCP from reviewing company policies related to recruitment, hiring, promotion, compensation, and termination. Instead it moves the potential review process to a later point in the FAAP process where the documentation request is likely to be "situation specific" rather than an all-out "policy dump" at the start of the approval process.

Accordingly, Littler respectfully requests that Attachment B's provision requiring discussion of personnel policies be retained, but that Attachment A be modified to remove the submission of personnel policies.

Definition of a Functional or Business Unit

Littler encourages OFCCP to revise the requirements that a functional or business unit operate autonomously, have its own managing official, and have the ability to track and maintain its own personnel activity. These requirements do not exist for establishment-based Affirmative Action Programs and add an unnecessary burden on contractors seeking FAAP approval. Moreover, continuing to require a functional unit have the ability to track and maintain its own personnel activity ignores the economies-of-scale that exist with enterprise-wide HRIS and applicant tracking systems.

Initial FAAP Agreement Approval Timeline

OFCCP has set a specific deadline for contractors to request an initial FAAP agreement.² However, under both the existing and proposed Directives, OFCCP does not have a deadline for its approval of the initial FAAP agreement request. Additionally, both Directives require contractors seeking an initial FAAP agreement to develop, implement, and maintain AAPs for each establishment until the FAAP agreements become effective. Given that the initial FAAP approval process can take months, contractors are burdened by the requirement to develop, implement, and maintain establishment-based AAPs during the lengthy FAAP approval process. Therefore, if OFCCP is unwilling to consider the conditional approval process outlined above, Littler respectfully requests OFCCP set a 90-day approval deadline for an initial FAAP request and, if the deadline is not met by OFCCP, then the initial FAAP agreement receives conditional approval and the contractor can discontinue its establishment-based AAPs and move to its proposed FAAP structure.

Eliminating the Requirement that FAAP Contractors Undergo Compliance Evaluations

Littler greatly appreciates OFCCP's proposal to eliminate the requirement that FAAP contractors undergo at least one compliance evaluation during the term of their agreement and expanding

² OFCCP must receive the request for a FAAP agreement no later than 120 calendar days prior to the expiration of the contractor's current corporate headquarters AAP. If the contractor making the request is a first-time contractor, OFCCP must receive the request within 120 calendar days from the award of the Federal contract.

the exemption period for FAAP units that have undergone a compliance evaluation from 24 months to 36 months from the date OFCCP closed the previous evaluation.

As many establishment based contractors often go many years without being audited by OFCCP, requiring every FAAP contractor to be audited at least once – and often multiple times – every three years has long been seen as a punishment for choosing to adopt a FAAP structure and has discouraged many contractors from even considering implementation of a FAAP even when FAAPs offer other significant advantages. Punishing contractors for choosing a FAAP structure seems especially perverse as the companies that choose to implement FAAPs are very often among those contractors that are most deeply committed to compliance and equal employment opportunity.

Accordingly, we applaud OFCCP for proposing to remove a policy which has tended to unreasonably burden the most proactive contractors and creates an obstacle to a broader use of FAAPs

FAAP Rulemaking

OFCCP's regulations governing FAAPs are limited to one section, 41 CFR 60-2.1(d)(4), which provides:

If a contractor wishes to establish an affirmative action program other than by establishment, the contractor may reach agreement with OFCCP on the development and use of affirmative action programs based on functional or business units. The Deputy Assistant Secretary, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

In other words, the entire FAAP approval process is found in the form of Directives which can change at any time. This creates incredible uncertainty for both existing FAAP contractors and those considering a FAAP request, particularly as OFCCP's attitude toward FAAPs has, in fact, varied over time.

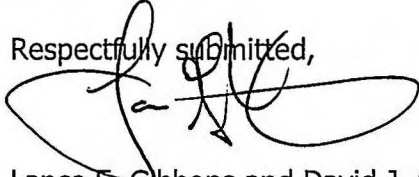
Implementing a FAAP requires substantial investments in organizational design and infrastructure. These are investments that many contractors are unwilling to make without some assurance that OFCCP's expectations regarding compliance will remain relatively fixed over an extended period. In order to create greater certainty and encourage contractor investment in FAAPs, Littler urges OFCCP to consider engaging in a formal rulemaking process to make the FAAP implementation and maintenance process a part of the regulations enforced by OFCCP.

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In closing, Littler commends OFCCP for striving to make continued improvements to the FAAP process. We also ask that OFCCP give due consideration to the proposed changes that Littler is requesting to the FAAP approval process.

We appreciate the opportunity to share our views, and welcome any questions that you may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to be a cursive combination of the names Lance E. Gibbons and David J. Goldstein.

Lance E. Gibbons and David J. Goldstein

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