



NATIONAL
INDUSTRY
LIAISON
GROUP

November 13, 2018

VIA ELECTRONIC SUBMISSION

Debra A. Carr
Director, Division of Policy and Program Development
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW
Room C - 3325
Washington, DC 20210

**Re: National Industry Liaison Group's Comment on
OFCCP's Agreement Approval Process for Use of
Functional Affirmative Action Programs**

To Whom It May Concern:

The National Industry Liaison Group (NILG) Board welcomes the opportunity to comment on the OFCCP's "Agreement Approval Process for Use of Functional Affirmative Action Programs," OMB Reference Number 1250-0006.

By way of background, the NILG was created over 30 years ago as a forum for the Office of Federal Contract Compliance Programs (OFCCP) and federal contractors to work together towards equality in the workplace. Throughout the country, local Industry Liaison Groups ("ILGs") have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size and large employers across the country, have reached out to the OFCCP and other agencies, such as the Equal Employment Opportunity Commission (EEOC), with mutual goals of fostering a non-discriminatory workplace. Therefore, in response to the Information Collection Request, the NILG seeks to present the views of well over 60 local ILGs and their members.

As a preliminary matter, we commend the OFCCP for, and share its commitment to, promoting equal employment opportunity. In our comments below, we offer observations and suggestions designed to enable federal contractors to continue to meet their compliance obligations while minimizing administrative burdens.

The NILG appreciates the Agency's flexibility to allow contractors the option of developing functional affirmative action plans (FAAPs). However, the NILG submits that contractors should be afforded the opportunity to prepare FAAPs without seeking prior written approval from the Agency. Given the changing structure of America's workforce, with fewer employees assigned to work at an employer's physical establishment, FAAPs will increasingly become the most logical option for many contractors. Further, the NILG encourages the OFCCP to consider allowing contractors to develop FAAPs as a matter of course, and the current regulations provide the OFCCP with the discretion to approve contractor requests to do so with a much simpler process than proposed. *See* 41 C.F.R. § 60-2.1(d)(4).

As the need to prepare FAAPs grows, the NILG is concerned the OFCCP will become overwhelmed with processing contractors' FAAP requests. As a result, not only will reevaluation of the proposed procedures enable employers to more readily prepare AAPs that more closely reflect their organizational structures, but such a regulatory change will also reduce the burden on the Agency to keep up with the likely increase in contractors seeking to prepare FAAPs.

The NILG is generally in favor of the changes that the OFCCP is proposing to the FAAP approval process. Increasing the certification period regarding changes to functional units from three to five years will decrease the burden on contractors. Eliminating the requirement that FAAP contractors be subject to at least one compliance evaluation during the term of the FAAP agreement decreases the burden on both the OFCCP and contractors and places FAAP contractors on a more even level with establishment-based contractors in terms of compliance evaluations. The NILG further agrees with the other proposed changes: (1) expanding the exemption period for FAAPs that have undergone a compliance evaluation from 24 months to 36 months; (2) eliminating consideration of EEO compliance history; (3) removing the three-year waiting period for reapplying for a FAAP agreement following the termination of a prior agreement; and (4) eliminating the annual requirement to modify FAAP agreements.

However, as proposed, the OFCCP's process for seeking approval to prepare FAAPs remains burdensome, complex, requires submission of overly detailed contractor information, and will require significant Agency resources to review and process. Our constituents advise us that many contractors decide not to seek agency approval to develop FAAPs because of the burdensome nature of the process and various other disincentives, even though FAAPs would be their preferred approach for developing AAPs and the best method for analyzing their workforces.

The proposed process creates substantial burdens for contractors. Pursuant to the proposal, a FAAP agreement will expire after five years, requiring the contractor to repeatedly seek approval for its FAAP structure. Although we agree with the OFCCP's proposal to expand this time period from three to five years, this repeated approval requirement creates uncertainty regarding how future AAPs will be developed, which can impede employer internal planning and procedures. This uncertainty places an undue burden on the contractor community. Thus, while the additional two years for the term of the agreement is favorable, it does not eliminate this concern for contractors.

Moreover, the proposed procedures require contractors to notify the OFCCP in writing of changes to the functional or business units, or structure or organization *within 60 days* of the

changes taking effect. Significant organizational changes, such as mergers and acquisitions, often cause great internal upheaval, and this proposed requirement would only increase the pressure on human resources personnel during such a turbulent time. If the contractor happens to overlook this requirement, the OFCCP has the right to automatically terminate the FAAP agreement. Our constituents feel this requirement would often be challenging for employers to satisfy. The NILG recommends the OFCCP provide more time - at least 120 days - for employers to report on these types of changes to organizational structures.

The proposal provides disincentives for contractors to enter into a FAAP agreement. The proposed FAAP agreement subjects contractors to measures not imposed on other contractors. For example, if a FAAP contractor does not provide sixty days' notice of a merger, acquisition, or "downsizing," the OFCCP has the right to schedule the contractor for a compliance review. The proposed Directive does not indicate if the compliance review scheduled outside of the Agency's typical, neutral process would focus on only one FAAP or all FAAPs and other AAPs covering establishments. Contractors preparing regular AAPs are not subject to this reporting requirement, nor should they be. Thus, this proposed requirement singles out FAAP contractors for additional reporting burdens that could serve to discourage the use of FAAPs, even for those employers for whom FAAPs are more appropriate given their organizational structures.

OFCCP's burden estimates are not truly reflective of the time necessary to provide the requested information. The NILG's constituents share the view that the OFCCP's estimated time burdens associated with the FAAP approval process are underestimated. The Agency's estimations seem to assume that one person in each organization has an infinite amount of knowledge, when in actuality, various people in various departments and fields must be engaged, informed, instructed, and involved in gathering the various documentation and information. This requires a significant amount of time for which the OFCCP has failed to account.

The OFCCP's estimates also seem to assume that all of the requested information already exists and/or is readily available at the touch of a button or pull of a file drawer. This, however, is often not the case. For example, obtaining detailed information regarding a federal contract will usually take several research hours by a procurement department that handles hundreds or thousands of contracts. The one-hour estimation by the Agency to satisfy this requirement is unrealistic. The OFCCP also estimates that preparation of an organizational chart that identifies all of the proposed functional or business units to be covered by the FAAP and how they relate to each other within the overall structure will take one hour. For contractors that have not yet developed FAAPs, this will be a significant undertaking, one on which their future FAAP structure will be based. Some of the NILG's constituents estimate that such a process would take weeks.

These are just two examples of the OFCCP's underestimation of time burdens in the FAAP approval process, but the NILG submits that most, if not all, of the estimates are not a true reflection of the actual amount of time needed to respond. This is not unusual, as most of the Agency's regulatory proposals fail to assess the "real world" practicalities of corporate structure, functions, and systems. Typically, numerous individuals will be involved in researching, developing, and approving the information for submission to the OFCCP. This is evidenced by the overwhelming lack of federal contractors (only 71) who have elected to utilize the FAAP

developing, and approving the information for submission to the OFCCP. This is evidenced by the overwhelming lack of federal contractors (only 71) who have elected to utilize the FAAP approval process. Thus, the NILG respectfully suggests that the OMB view the Agency's burden estimates with a healthy degree of skepticism.

Conclusion

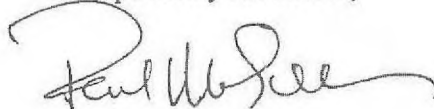
The NILG views the changes proposed by the OFCCP as favorable. However, for the reasons set forth above we do not think that the changes go far enough in easing the burden for contractors or making FAAP development a more logical and reasonable approach for contractors. Thus, the NILG respectfully requests that the OMB suggest additional modifications to the proposed Directive. Contractors should be afforded the option of deciding for themselves whether a FAAP would best serve the OFCCP and contractor community's shared goal of enhanced affirmative action compliance. Employers that want to develop FAAPs almost always do so because they sincerely believe the FAAPs will align with real world organizational structures and processes, thus making the AAPs more meaningful and, ultimately, successful. We encouraged the Agency to consider regulatory changes to make FAAPs a more viable and attractive option so contractors can achieve these important goals.

However, as the Agency has moved forward with this proposal, the NILG continues to respectfully request that the FAAP approval procedures be streamlined to require submission only of information that is relevant to an organization's structure and be reduced to eliminate unnecessary burden.

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We thank the OMB in advance for its consideration of our comments and suggestions. If the OMB should wish to discuss this request, please contact Cara Crotty, NILG Board Counsel, at 803.256.3200 or ccrotty@constangy.com.

Respectfully submitted,



Paul McGovern

Chair, National Industry Liaison Group