CENTER FOR WORKPLACE COMPLIANCE

1501 M Street, NW | Suite 1000 | Washington, DC 20005 TEL: (202) 629-5650 FAX: (202) 629-5651 www.cwc.org

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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: The Center for Workplace Compliance's Comments on the Office of Federal Contract Compliance Programs' Information Collection Request Revision, "Supply and Service Program" (OMB Control No. 1250-0003)

Dear Mr. Fort:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection request (ICR) regarding revisions to the agency's supply and service compliance evaluation scheduling letters, notice of which was published in the *Federal Register* on April 12, 2019.[1]

OFCCP is proposing a number of sweeping changes to the recordkeeping and reporting obligations imposed upon federal supply and service contractors that receive one or more of the agency's compliance evaluation scheduling letters. Notably, supply and service contractors selected for routine compliance reviews would now be required to submit to OFCCP a compensation analysis at the start of each audit, and provide a race- and ethnicity-specific availability analysis. To justify these changes, OFCCP indicates that its intent is "to clarify the scope of the information being requested and to reduce follow-up requests after the agency has received the requested information."

As discussed in more detail below, we respectfully submit that OFCCP's proposed changes do far more than "clarify" items in the desk audit scheduling letter. Indeed, requests such as an evaluation of "the utilization of men or women of any one particular minority group" not only go well beyond the scope of the current scheduling letter, but exceed the plain text and intent of OFCCP's regulations as well. In fact, we respectfully submit that the nature of the changes that OFCCP is proposing are more suited to Notice and Comment rulemaking as required by the Administrative Procedure Act, rather than through an information collection request.

[1] 84 Fed. Reg. 14,974 (Apr. 12, 2019).

Furthermore, while CWC appreciates OFCCP's stated interest in reducing requests for information, we believe that both federal contractors and OFCCP would be better served with a two-step evaluative process, in which aggregate information is furnished initially and additional detailed information is furnished only on an as-needed basis as the agency's audit proceeds.

Statement of Interest

CWC[2] 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 over 200 major U.S. corporations, collectively providing employment to millions of workers. 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, Section 503 of the Rehabilitation Act of 1973 (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), 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, particularly those triggered by the agency's compliance evaluation scheduling letters, efficiently and effectively accomplish their underlying policy objectives.

CWC members have developed a keen understanding and appreciation for the importance of objective and efficiently managed compliance evaluations as a precondition to implementation of effective corporate affirmative action programs. They also understand how compliance evaluations that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for affirmative action initiatives.

Summary of Recommendations

OFCCP's standard desk audit Scheduling Letter and Itemized Listing were overhauled in 2014, increasing from 11 to 22 the enumerated data and information items contractors submit in response to a supply and service compliance review. The agency is now proposing to make extensive changes to the Scheduling Letter and Itemized Listing once again, along with additional changes to OFCCP's brand new focused review letters. If ultimately approved by the White House Office of Management and Budget (OMB), these changes will have a significant added impact on the amount of data (and the associated burden of collecting and reporting the information) that federal contractors must submit to OFCCP:

- A compensation analysis at the start of each compliance review;
- An availability analysis that considers the incumbency and availability by job group for individual races and ethnicities, in addition to the availability of minorities in the aggregate;
- Promotion "pools;"

[2] Formerly the Equal Employment Advisory Council.

- "Updated" information (such as employment activity and goal progress) for each completed month of the current affirmative action program (AAP) year when the contractor is six months or more into the current plan year when it receives the Scheduling Letter and Itemized Listing;
- A list of the contractor's three largest subcontractors based on contract value; and
- Employee-level compensation data and employment activity "logs," rather than counts, during so-called focused reviews.

In its supporting statement, OFCCP states that these changes merely "clarify the scope of the information being requested," and will "reduce follow-up requests" following the desk audit submission. We respectfully disagree. As discussed in more detail below, OFCCP's proposed changes, such as requiring contractors to report on promotion "pools" or the availability of combinations of race, ethnicity, and sex, do far more than "clarify," they create entirely new reporting requirements not found in OFCCP's regulations implementing Executive Order 11,246, Section 503, or VEVRAA.

While CWC appreciates that such data *may* indeed become necessary in any given compliance evaluation, we fail to see how increasing the burden on *all* contractors is appropriate for the handful of compliance evaluations where, for example, promotions "pools" or race- and ethnicity-specific availability analyses may indeed be required to evaluate a contractor's compliance posture.

OFCCP's Proposed Changes Will Dramatically Increase the Administrative and Paperwork Burden on Federal Contractors

We respectfully submit that there is a consistent theme that runs throughout OFCCP's proposed changes, *i.e.*, the agency appears to believe that to effectively carry out its enforcement responsibilities, it must at the outset of a compliance evaluation have access to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

OFCCP's supporting statement does not articulate the rationale behind any one particular change, but rather generalizes that "OFCCP took into account contractor feedback related to reducing follow-up requests" and sought "to clarify the scope of the information being requested and to reduce follow-up requests after the agency has received the requested information." While surely both contractors and OFCCP have a mutual desire to normalize requests for additional information during compliance evaluations, we believe that OFCCP is misinterpreting the "contractor feedback" it has received.

For example, in the agency's *Town Hall Action Plan*, which was developed after conducting three Compliance Assistance Town Halls in 2017 and 2018, OFCCP committed to "develop policy guidance for creating greater transparency around the identification of indicators of a violation," as well as "explaining the basis for a supplemental data request."[3] The thrust of this statement is not that contractors want *fewer* requests for information, but rather more consistent ones.

In addition, under OFCCP's current enforcement regimen, OFCCP regions and districts often differ considerably on the basic principles underlying a compliance evaluation, including, but certainly not limited to:

[3] See https://www.dol.gov/ofccp/townhalls/files/TownHallActionPlan_CONTR508c.pdf.

- The use of appropriate tests of statistical significance to guide investigations into preliminary indicators of adverse impact;
- Evaluating employment activity based on race and ethnicity subgroups;
- The appropriate test(s) contractors may utilize in evaluating whether the incumbency of females or minorities is "less than would reasonably be expected";
- How job title and salary grade impact contractor compensation systems; and
- The role the Internet may play in engaging in outreach to local community organizations targeting individuals with disabilities and protected veterans.

To be sure, given the size of OFCCP's compliance staff and the sheer volume of compliance evaluations conducted each year, some variance in contractor experience is to be expected. However, the cure for such variances should not and cannot be that contractors must submit, in advance, volumes of additional data and information without justification. While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated – in fact, necessity and practical utility in light of the estimated burdens and costs must be the appropriate standards.

OFCCP Should Not Mandate Race- and Ethnicity-Specific Availability Analyses

OFCCP's proposed changes to the Scheduling Letter and Itemized Listing contain a number of <u>new</u> references to the race- and ethnicity-specific availability analyses, none of which is required by OFCCP's regulations:

- Proposed Item 4 (availability analyses) requests that the contractor "provide the availability for each job group by race/ethnicity used to determine whether there were substantial disparities in the utilization of specific minority groups such that separate goals for those groups may be necessary."
- Proposed Item 6 (goal summary) requests "information" on substantial disparities to determine whether individual race and ethnicity goals "are necessary."
- Proposed Item 16 (goal attainment) takes proposed Items 4 and 6 one step further, requiring contractors to provide a breakdown of job group incumbency and placements (hires plus promotions) not only by individual race and ethnicity, but in a manner that permits the agency to determine the "utilization of men or women of any one particular minority group."

In support of these sweeping new requirements, OFCCP cites 41 CFR § 60-2.16(d), which provides that while contractors must establish placement goals for minorities in the aggregate, "in the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor may be required to establish separate goals for those groups."

Importantly, however, there is no affirmative obligation on a *contractor* to conduct such an analysis in every instance. Moreover, in practice, OFCCP has rarely enforced this requirement, and only then in cases

where a "substantial disparity" is revealed during the course of a compliance evaluation.[4] In fact, in the event that OFCCP deems it necessary to conduct its own race- and ethnicity-specific availability analyses, the information presented by a contractor in response to the current Scheduling Letter and Itemized Listing should be more than sufficient, as contractors already submit:

- Employee-level data that will indicate each employee's race, ethnicity, sex, job title, and job group;
- An external availability analysis mapping each job title to a census occupational classification code and reasonable recruitment area; and
- A utilization analysis identifying the factors and feeders considered in assessing availability, and their relative weight.

Thus, the desk audit submission arguably already contains all of the data needed for OFCCP to conduct such an analysis, if the agency believes it is necessary to do so. To the extent that OFCCP's proposed changes simply reflect the agency's intent to conduct these analyses, no change to the Scheduling Letter and Itemized Listing is required, as OFCCP is fully capable of conducting such an analysis on its own accord.

Because such analyses are not part of the availability analyses that contractors prepare as part of their affirmative action programs, requiring them as proposed will dramatically increase the burdens associated not only with responding to the Scheduling Letter and Itemized Listing, but compliance with OFCCP's regulations in general.

OFCCP Should Request Either Employee-Level Compensation or a "Paragraph 11" Style Analysis, But Not Both

A new Item 7 would require contractors to submit the "results of the most recent analysis of the compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities as explained in 41 CFR § 60-2.17(b)(3)." In other words, OFCCP is seeking a contractor's self-critical compensation analysis. CWC respectfully submits that by requiring these analyses to be submitted during a compliance evaluation, the agency will actually deter contractors from conducting more sophisticated, reliable analyses, in favor of an "OFCCP-centric" analysis that will not fully control for or consider the factors that actually affect pay.

It is important to emphasize here that while OFCCP's regulations require contractors to analyze their compensation systems,[5] they do not require a specific type of analysis or schedule for these analyses. Indeed, OFCCP has made clear that "contractors have the ability to choose a type of compensation analysis that will determine whether there are gender-, race-, or ethnicity-based disparities."[6] These "analyses" can (and should) vary somewhat significantly based on occupation, industry, market, and employer size, among many other factors. While smaller contractors may elect to conduct a cohort analysis of employee-level compensation, larger contractors may elect to conduct a much more sophisticated statistical analysis.

[4] There is no definition of "substantial disparity," and any such definition should be subject to Notice and Comment rulemaking as required by the Administrative Procedure Act, rather than through an information collection request.
[5] 41 C.F.R. § 60-2.17(b)(3).
[6] 65 Fed. Reg. 68,021, 68,036 (Nov. 13, 2000).

Many federal contractors commit significant resources to evaluating compensation each year, which include – and go well beyond – OFCCP requirements. Such analyses are typically conducted under attorney-client privilege, and would not be submitted in response to OFCCP requests for information. The data necessary to do these analyses, however, often are submitted in response to Item 19 of the current Scheduling Letter and Itemized Listing. CWC believes that if contractors are required to submit a compensation "analysis," in addition to employee-level compensation data, it will detract resources away from conducting a full, self-critical evaluation of their compensation systems.

As a practical matter, if OFCCP moves forward with this change, it may also prompt a contractor to conduct more OFCCP-centric analyses (for example, by focusing on job group rather than salary grade or title), which typically do not align with how the company actually compensates its employees.[7] Put simply, the analyses contractors conduct in advance of an OFCCP audit often have little to do with their actual compensation systems. This is due in no small part to the fact that over the past five years, many (but not all) OFCCP field offices have demonstrated a genuine and repeated unwillingness to evaluate compensation in a manner consistent with how contractors actually pay their employees.[8]

These concerns are further exacerbated by OFCCP's "on again, off again" history with respect to analyzing private sector compensation practices. For example, prior to 2014, contractors submitted what was known as a "paragraph 11" compensation summary, in response to Item 11 of the Scheduling Letter and Itemized Listing. The analysis of this paragraph 11 submission was simply an administrative tool the agency used to identify those contractors worthy of additional investigation. While the paragraph 11 analysis was somewhat limited in its ability to identify actual compensation disparities, it nonetheless served an important purpose — contractors knew precisely how OFCCP would be analyzing compensation and would often replicate the analysis, promoting voluntary compliance. This is similar to the steps contractors still take today in evaluating their applicant, hire, promotion, and termination activity.

When the Scheduling Letter and Itemized Listing were overhauled in 2014, OFCCP abandoned the paragraph 11 submission in favor of a mandatory submission of employee-level compensation data, creating the dilemma that contractors find themselves in today, often choosing between conducting an OFCCP-centric analysis that doesn't necessarily control for the factors that affect compensation, or a proper self-critical analysis that will necessarily omit areas that OFCCP may evaluate during a compliance evaluation (such as compensation by job group).

In short, if OFCCP moves forward with this requirement, the agency should eliminate the requirement that contractors provide employee-level compensation data in every compliance evaluation, and formulate a standard compensation screening tool that both contractors and OFCCP can use to evaluate compensation in advance of a compliance evaluation.

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[7] We should also note that AAP assignments themselves typically do not align with compensation decisions. This is because AAPs usually contain employees from multiple physical locations, an outcome that is dictated by OFCCP rules for assigning employees to AAPs. See 41 CFR § 60-2.1(d).

[8] See, *e.g., OFCCP v. Analogic Corp.*, No. 2017-OFC-00001 (OALJ Mar. 22, 2019).

Promotion Pools Should Not Be Required at the Outset of Every Compliance Evaluation

A new Item 17 (employment activity) would require contractors to submit the "pool of candidates from which the promotions were selected by gender and by race/ethnicity." Depending upon a contractor's promotion system, the burden associated with this request could be enormous. For example, many promotions are "noncompetitive" in the sense that there are no formal candidate "pools." Such promotions are awarded to employees individually based upon their years of service, level of performance, and eligibility for a higher level of job responsibility.

Since not all employees in a job group or job title are equally ready for such advancement, requiring contractors to review and submit information on all other individuals who could have been considered for noncompetitive promotions would be an enormously burdensome task. Indeed, unlike OFCCP's Internet Applicant rule, which lays out the regulatory framework for recordkeeping with respect to external applicants, no similar rulemaking exists for promotions, and nothing in OFCCP's recordkeeping regulations can be interpreted so broadly as to require contractors to track this information.

To be clear, promotion candidate pools *may* become relevant at some point, which is why OFCCP should retain its existing two-step analytical framework, in which: (1) OFCCP will first evaluate promotions by job group or job title, against the incumbency for those job groups or titles; and (2) when preliminary indicators are found, OFCCP will request additional information about the competitive nature of the promotions in question, and whether other employees applied.

We should note that this is not the first time OFCCP has proposed to collect promotion "pools" data. In 2011, OFCCP sought OMB approval for changes to the Scheduling Letter and Itemized Listing that would have required contractors to track and report on the "actual pool of candidates who applied or were considered for promotion." CWC filed comments with both OFCCP and OMB noting that there would be significant burdens associated with such a proposal, and that promotion "pool" data was not required by OFCCP's regulations. OMB ultimately approved a version of the Scheduling Letter and Itemized Listing without this requirement, and nothing has changed that justifies its inclusion now.

OFCCP Should Retain the Existing Six-Month Update Requirement

Under OFCCP's current policy, if the scheduling letter is received six months or more into the current AAP year when the contractor receives the scheduling letter, the contractor must provide "updated" information (such as employment activity and goal progress) for the first six months of the current plan year. OFCCP is proposing to change this requirement from six months to "every completed month of the current AAP year."

Nothing magical happens at the six-month mark of the AAP year; it is simply an administrative tool used to place all contractors on the same page. To that end, the temporal limits of the scheduling letter serve an important purpose: to ensure that all contractors are treated the same with regard to initial requests for information. To be sure, OFCCP can (and frequently does) request additional data beyond the six-month mark, but those requests are generally limited in scope to those job groups or titles worthy of further review. There is simply no need to have these additional data at the outset of every compliance evaluation.

Further, modifying the six-month requirement as proposed will have the unintended effect of deterring contractors from voluntarily conducting their mid-year analyses. Over the years, the "six-month update" provision has produced an additional benefit for both OFCCP and contractors, in that many contractors voluntarily monitor their employment activity at the six-month mark, knowing full well that the very same mid-year analysis can be used if and when the company is audited.

In short, the six-month requirement is already an arbitrary one, but one that puts all contractors on the same page. It also has the added benefit of encouraging contractors to be diligent about voluntarily monitoring their employment activity. We respectfully submit there is no need to change it, nor any added benefit to be gained by imposing an additional burden on contractors.

OFCCP Should Work With Federal Agency Contracting Officers to Obtain Subcontract Information

OFCCP's proposal includes another new requirement that the contractor provide "a list of the three largest subcontractors based on contract value." While we appreciate OFCCP's interest in identifying subcontractors, we respectfully submit that this request ignores the fact that it is the government's – not the contractor's – responsibility to collect and retain this information. Nothing in OFCCP's regulations requires contractors to track or record this information.

Furthermore, as a practical matter, the human resources and compliance professionals with the responsibility of managing the compliance evaluation process rarely have access to the company's contract documents (federal or otherwise). Additionally, for subcontractors, it is quite possible that no documentation exists at all. OFCCP's broad definition of "subcontractor" is a legal term of art, and the human resources and non-attorney professionals responsible for OFCCP compliance have no obligation to determine, as a matter of law, which vendors and companies that the contractor does business with are "subcontractors."

OFCCP Should Retain the Current Provisions of the Focused Review Scheduling Letter

When OFCCP first announced its Section 503 focused review letter (less than one year ago), it was essentially an abridged version of OFCCP's standard desk audit Scheduling Letter and Itemized Listing. That letter appropriately focuses on contractors providing documentation and data already required under OFCCP's Section 503 regulations. OFCCP's proposed changes would require quite a bit more, including:

- Employee-level compensation data for all employees. This would be similar to the existing Item 19 in the current Scheduling Letter and Itemized Listing, except without the submission of race, ethnicity, and sex.
- Applicant- and employee-level employment activity data for the preceding AAP year**.** Here OFCCP is requesting not merely employment activity counts (as is the case with the regular Scheduling Letter and Itemized Listing), but rather employment activity "flow" or "logs."
- A "master self-identification log" that would allow OFCCP to identify applicants and employees across the various data submissions.[9]

[9] CWC's comments apply equally to both the proposed Section 503 and VEVRAA focused review letters.

We respectfully submit that these proposed changes go too far. While OFCCP, of course, can request any one of these items as part of the focused review, it should do so when the evidence suggests they are needed. This proposed change is further evidence of an erroneous assumption made by the agency that we described earlier – the assumption that in order to effectively carry out its enforcement responsibilities OFCCP must have access at the outset of a compliance evaluation to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit. At the outset of a compliance evaluation, there is no reason to assume that there exists a compliance issue that warrants requesting such a comprehensive list of personal, confidential information for the entire workforce.

There is also a very practical reality that these proposed changes ignore – that in most cases, the numbers and percentages of individuals with disabilities and/or veterans in any given title or job group are simply too small to conduct a meaningful analysis. OFCCP's supporting statement does little to explain precisely why such detailed and personal information is required in every instance, particularly given the limited utility of the data.

There is no question that potential discrimination in compensation or hiring on the basis of disability or protected veteran status is an appropriate area of inquiry for OFCCP during a compliance evaluation. Nor is there any question that at some point during the evaluation OFCCP may become entitled to access sensitive company records necessary to conduct such an inquiry. The issue for CWC members is not *whether* OFCCP is entitled to such access, but rather *when* OFCCP is entitled to such access, and on *what terms* such access shall be granted so as not to compromise unduly contractors' legitimate claims to confidentiality.

We should point out that a number of CWC members have also expressed deep concern over OFCCP's use of these data during the focused review's mandatory onsite evaluation. In its Frequently Asked Questions implementing the focused reviews, the agency states that it will conduct onsite "interviews with managers responsible for equal employment opportunity and Section 503 compliance (such as the ADA coordinator) *as well as employees affected by those policies*" (emphasis added).[10]

In an effort to encourage voluntarily participation in the disability self-identification survey, contractors have gone to great lengths to promise confidentiality, particularly given the fact that so many employees that identify as an individual with a disability have hidden disabilities that are not known outside of a few select individuals with the human resources function. If these employees are then to be chosen for interviews, both they and their managers will be forced to ask why, jeopardizing the confidential nature of this sensitive information.

Compliance Check Letters

OFCCP is proposing only minor clarifying changes to the compliance check letter for supply and service contractors, which if ultimately approved would request:

- Written AAPs prepared in accordance with Executive Order 11246, Section 503, and VEVRAA. (41 C.F.R. § 60-1.12(b), § 60-300.80, and § 60-741-80).

[10] See https://www.dol.gov/ofccp/regs/compliance/faqs/FocusedReviewFAQs.htm.

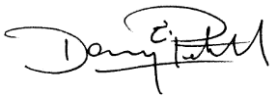
- Examples of job advertisements, including listings with state employment services (41 C.F.R. § 60-1.12(a), § 60-300.80, and § 60-741.80).
- Requests made for accommodations by persons with disabilities, and whether the requests were denied or granted (41 C.F.R. § 60-300.80 and § 60-741.80).

CWC supports the continued use of the compliance check letter. As drafted, the letter will serve dual purposes: (1) contractors that already satisfy OFCCP's requirements should be able to readily provide the information requested, demonstrating their compliance commitment;[11] and (2) for contractors not aware of OFCCP's requirements (or even aware they are a federal contractor), the letter will be a good opportunity to become familiar with OFCCP regulations.

Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's Supply and Service compliance evaluations. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,



Danny E. Petrella
Senior Counsel
Center for Workplace Compliance

[11] We should note, however, that contractors vary in their ability to retrieve accommodation records. While some contractors have developed robust recordkeeping systems, for other contractors, retrieving accommodation records remains a manual, resource-intensive task.