

**ROFFMAN HORVITZ, PLC**  
**LEGAL COUNSELING**  
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

Via Regulations.Gov

June 11, 2019

Mr. Harvey D. Fort

Acting Director, Division of Policy and Program Development, OFCCP  
200 Constitution Avenue, NW, Room C-3325  
Washington, DC 20210

Re: Supply and Service Scheduling Letters

Dear Mr. Fort:

Roffman Horvitz, PLC submits these comments in response to OFCCP's April 12, 2019 Notice in The Federal Register (84 Fed. Reg. 14974) regarding proposed changes to the letters that OFCCP intends to use to schedule different types of supply and service audits. First, we discuss some general comments that apply to all of the proposed letters; second, we discuss specific comments relevant to each of the letters.

Roffman Horvitz, PLC

Roffman Horvitz, PLC is a McLean, Virginia law firm focusing on federal contractor compliance and employment law data analytics. Its principals – Joshua S. Roffman and Alissa A. Horvitz – each have been practicing in this field for more than two decades. We have extensive experience assisting federal contractor employers in responding to OFCCP's various audit types and knowing how OFCCP evaluates data during OFCCP audits. Among the firm's client base are several hundred supply and service government contractor employers.

General Comments

Several of the items being requested in the new letters are not currently required under the regulations in 41 CFR Chapter 60. To the extent OFCCP wants to require additional analyses, the proper way to do so is through a Notice of Proposed Rulemaking and Comment process, not through a routine information collection. Moreover, OFCCP's estimate of an additional compliance burden of 1.1 hours from 27.9 to 29 hours is

grossly inadequate to accommodate the additional requirements sought. The additional race by race analyses proposed by OFCCP in just paragraphs 16 and 17 of the Itemized Listing will more than double the amount of time involved in compiling those elements of the desk audit submission that go beyond what is done as a matter of course as part of the contractor's annual affirmative action plan.

**COMMENTS ON OFCCP'S PROPOSED 503 FOCUSED REVIEW SCHEDULING  
LETTER**

- A. Request #8 asks for "applicant and employee level information on self-identification maintained for individuals with a disability, as required by 41 CFR § 60-741.42(e)."
  - a. COMMENT: Please confirm that OFCCP will accept a database export showing the self-identification answer that the applicant or employee provided in response to the self-identification solicitation. Please confirm that OFCCP does not intend for the employer to supply a PDF of each completed form or electronic images of each self-identification form.
- B. Request #9 asks for "Your most recent assessment of your personnel processes, as required by 41 C.F.R. § 60-741.44(b), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment."
  - a. COMMENT:
    - i. The regulations do not require that the contractor establish a date for this assessment. The regulations require only that "[t]he contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part." The current regulations do not require an annual assessment. When the Obama Administration proposed these regulations initially, the proposal was for an annual review. In response to contractor comments, the Administration retracted this requirement and adopted the looser "periodic" requirement.

- ii. The notion that employers in fact are setting a specific date for the next scheduled assessment is a fiction. Most of our clients are engaged in a continual and ongoing process to ensure that their personnel processes are fair and do not create barriers for individuals with disabilities. Given that the regulations do not mandate a specific frequency and instead merely call for a “periodic” review, and many contractors engage in an ongoing, continuous process, we believe that the phrase “including the date the assessment was performed, any actions taken or change made as a result of the assessment, and the date of the next scheduled assessment” should be stricken from the letter.
- C. Request #10 asks for “Your most recent assessment of the physical and mental qualifications, as required by 41 CFR § 60-741.44(c), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.
- a. COMMENT:
    - i. The regulations do not require the date the assessment was performed. The regulations require that the contractor provide in its affirmative action program a schedule for the review of all physical and mental job qualifications.
    - ii. Most employers engage in a continuous process of evaluating the physical and mental qualifications of jobs as the jobs become vacant and are being filled. A recruiter or hiring manager might look at the job description or the advertisement before it is publicized externally and confirm that the requirements being advertised or being used to evaluate candidate qualifications do not impose physical or mental qualifications unless they are job-related and consistent with business necessity. The notion that the employer is going to “set a date when the next assessment is performed” suggests a misperception of how employers perform these evaluations.
    - iii. The phrase “including the date the assessment was performed, any actions taken or change made as a result of the assessment, and the

date of the next scheduled assessment” should be stricken from the letter.

- D. Request #11 is an extensive request seeking vast information on applicants and employees, including applicant data, hires, promotions and terminations.
- a. COMMENT: There is nothing in the Section 503 implementing regulations that require OFCCP to analyze information on applicants and hires beyond the .44(k) counts, and there is nothing in the Section 503 regulations requiring OFCCP to evaluate information on promotions or terminations. We do not understand why OFCCP is requesting this data in a Section 503 Focused Review.
  - b. OFCCP’s letter does not request race, ethnicity, gender, or disability status. OFCCP does not explain what it intends to do with this data in the absence of any demographic information.
  - c. We vehemently oppose any request in a Section 503 review for disability-identifying information and remind OFCCP that the agency emphatically denied during the Proposed Rulemaking in 2013 that it would use any information about disability to conduct adverse impact analyses. 78 Fed. Reg. 58702 (September 24, 2013)(“OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with and without disability in this data.”) We fear that this administration will try to get approval for the collection of this transaction data, marry in the information collected in response to proposed paragraph 8, and then conduct adverse impact analyses.
  - d. The Uniform Guidelines on Employee Selection Procedures do not include any analysis based on disability status.
  - e. If OFCCP is not intending to conduct adverse impact analyses, we do not understand why it needs to know the pool of candidates from which competitive promotions were made.
  - f. We also fail to understand OFCCP’s rationale behind the need for individual, line item data rather than the summary data it currently receives. We lack accurate, meaningful assurances as to OFCCP’s ability to protect the confidentiality of line-item applicant and employee data.

- E. Footnote 2 commands employers to provide applicant and employee data using “name or identifier unique to each applicant and employee. The unique identifier must be consistent across databases (i.e., self-identification information, compensation information, and employment activity data).”
- a. COMMENT: Most of our clients do not maintain one unique identifier that spans across all those databases. They will be able to pull employee self-identification data, compensation data, and employment activity data by employee identification number, but they often do not use the same unique identifier in their applicant database and would not be able to retrieve applicant self-identification information using a “unique identifier across databases.” OFCCP should change the second sentence of the footnote to say, “The unique identifier must be consistent across all employee databases. It is permissible to use a different identifier in the applicant data than the identifier used in the employee database.”
- F. Paragraph 12 seeks compensation data but does not ask for disability status. OFCCP could merge it with the response to Itemized Listing 8. If that is what OFCCP intends to do, it should say so.
- a. COMMENT: We oppose using a 503 Focused Review to examine compensation based on disability status and ask OFCCP to modify the letter to remove this request. Nothing under the current Section 503 regulations calls for the contractor to evaluate its compensation practices through a disability lens. If this is something that OFCCP wants to evaluate, the proper way to do this is through revisions to the underlying regulations via Notice and Comment and not via a routine information collection request to begin a Section 503 Focused Review.

**COMMENTS ON OFCCP’S PROPOSED VEVRAA FOCUSED REVIEW  
SCHEDULING LETTER**

- A. Request #8 asks for “applicant and employee level information on self-identification maintained for individuals with a disability, as required by 41 CFR § 60-300.42(e).”
- a. COMMENT: Please confirm that OFCCP will accept a database export showing the self-identification answer that the applicant or employee

provided in response to the self-identification solicitation. Please confirm that OFCCP does not intend for the employer to supply a PDF of each completed form or electronic images of each self-identification form.

B. Request #9 asks for “Your most recent assessment of your personnel processes, as required by 41 C.F.R. § 60-300.44(b), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.”

- i. COMMENT: The regulations do not require that the contractor establish a date for this assessment. The regulations require only that “[t]he contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part.” The current regulations do not require an annual assessment. When the Obama Administration proposed these regulations initially, the proposal was for an annual review. In response to contractor comments, the Administration retracted this requirement and adopted the looser “periodic” requirement.
- ii. The notion that employers in fact are setting a specific date for the next scheduled assessment is a fiction. Most of our clients are engaged in a continual and ongoing process to ensure that their personnel processes are fair and do not create barriers for individuals with disabilities. Given that the regulations do not mandate a specific frequency and instead merely call for a “periodic” review, and many contractors engage in an ongoing, continuous process, we believe that the phrase “including the date the assessment was performed, any actions taken or change made as a result of the assessment, and the date of the next scheduled assessment” should be stricken from the letter.

G. Request #10 asks for “Your most recent assessment of the physical and mental qualifications, as required by 41 CFR § 60-300.44(c), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.

- a. COMMENT:
  - i. The regulations do not require the date the assessment was performed. The regulations require that the contractor provide in its affirmative action program a schedule for the review of all physical and mental job qualifications.
  - ii. Most employers engage in a continuous process of evaluating the physical and mental qualifications of jobs as the jobs become vacant and are being filled. A recruiter or hiring manager might look at the job description or the advertisement before it is publicized externally and confirm that the requirements being advertised or being used to evaluate candidate qualifications do not impose physical or mental qualifications unless they are job-related and consistent with business necessity. The notion that the employer is going to “set a date when the next assessment is performed” suggests a misperception of how employers perform these evaluations.
  - iii. The phrase “including the date the assessment was performed, any actions taken or change made as a result of the assessment, and the date of the next scheduled assessment” should be stricken from the letter.
- C. Request #11 is an extensive request seeking vast information on applicants and employees, including applicant data, hires, promotions and terminations.
  - a. COMMENT: There is nothing in the VEVRAA implementing regulations that require OFCCP to analyze information on applicants and hire beyond the .44(k) counts, and there is nothing in the VEVRAA regulations requiring OFCCP to evaluate information on promotions or terminations. We do not understand why OFCCP is requesting this data in a VEVRAA focused review.
  - b. OFCCP’s letter does not request race, ethnicity, gender, or protected veteran status. OFCCP does not explain what it intends to do with this data in the absence of any demographic information.
  - c. We vehemently oppose any request in a VEVRAA review for veteran-identifying information and remind OFCCP that the agency emphatically denied during the Proposed Rulemaking in 2013 that it would use any



information about veteran status to conduct adverse impact analyses. 78 Fed. Reg. 58637 (September 24, 2013)(“OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under the Executive Order, and enforcement actions will not be brought solely on the basis of statistical disparities between veterans and non-veterans in this data.”) We fear that this administration will try to get approval for the collection of this transaction data, marry in the information collected in response to proposed paragraph 8, and then conduct adverse impact analyses.

- d. If OFCCP is not intending to conduct adverse impact analyses, we do not understand why it needs to know the pool of candidates from which competitive promotions were made.
  - e. The Uniform Guidelines on Employee Selection Procedures do not include any analysis based on veteran status.
  - f. We also fail to understand OFCCP’s rationale behind the need for individual, line item data rather than the summary data it currently receives. We lack accurate, meaningful assurances as to OFCCP’s ability to protect the confidentiality of line-item applicant and employee data.
- D. Footnote 2 commands employers to provide applicant and employee data using “name or identifier unique to each applicant and employee. The unique identifier must be consistent across databases (i.e., self-identification information, compensation information, and employment activity data).”
- a. COMMENT: Most of our clients do not maintain one unique identifier that spans across all of those databases. They will be able to pull employee self-identification data, compensation data, and employment activity data by employee identification number, but they often do not use the same unique identifier in their applicant database and would not be able to retrieve applicant self-identification information using a “unique identifier across databases.” OFCCP should change the second sentence of the footnote to say, “The unique identifier must be consistent across all employee databases. It is permissible to use a different identifier in the applicant data than the identifier used in the employee database.”



- E. Paragraph 12 seeks compensation data but does not ask for protected veteran status. OFCCP could merge it with the response to Itemized Listing 8. If that is what OFCCP intends to do, it should say so.
- a. COMMENT: We oppose using a VEVRAA Focused Review to examine compensation based on protected veteran status and ask OFCCP to modify the letter to remove this request. Nothing under the current VEVRAA regulations calls for the contractor to evaluate its compensation practices through a veteran lens. If this is something that OFCCP wants to evaluate, the proper way to do this is through revisions to the underlying regulations via Notice and Comment and not via a routine information collection request to begin a VEVRAA Focused Review.

**SUPPLY AND SERVICE ESTABLISHMENT REVIEW SCHEDULING LETTER AND  
ITEMIZED LISTING**

- A. Page 2 of the Scheduling Letter, #4: OFCCP requests a list of the contractor's "three largest subcontractors based on contract value, excluding those expiring within six months of receipt of this letter."
- a. COMMENT: Many employers with federal contracts or subcontracts do not engage subcontractors to assist with the performance of their direct federal contract work. In addition, many employers engage vendors to supply a good or service that supports both commercial and government contract work simultaneously. It is not always clear if the portion of those agreements that support the federal work meet the jurisdictional thresholds for EEO and affirmative action obligations under Executive Order 11246, Section 503 and VEVRAA. Stated differently, determining which of its vendors are engaged in subcontract work and the specific dollar value of such contracts is often quite difficult. Because of these pragmatic challenges, OFCCP should remove the new sentence.
- b. There is no support in OFCCP's regulations that would require a government contractor to divulge its three largest subcontractors based on contract value. This seems like an end-run around the rescinded Fair Pay

- & Safe Workplaces Executive Order. If the three largest subcontractors based on contract value are performing work that is not necessary to the performance of a government contract, then OFCCP has no jurisdiction.
- B. Page 2 of the Scheduling Letter, first full paragraph. OFCCP states: "All information must be submitted in an electronic format."
- a. COMMENT: Please confirm that an email with a PDF attachment is acceptable.
- C. Page 2 of the Scheduling Letter, third paragraph. OFCCP states: "Please also be aware that OFCCP may use the information you provide during a compliance evaluation in an enforcement action. We may also share that information with other enforcement agencies within DOL, as well as with other federal civil rights enforcement agencies with which we have information sharing agreements."
- a. COMMENT: In the interest of transparency, OFCCP should be required to make public all information sharing agreements it has with other agencies.
- b. COMMENT: OFCCP should be required to notify the contractor in advance of sharing the information with any other agency and afford the contractor an opportunity to object, correct, or supplement the information before it is shared.
- D. Page 2 of the Scheduling Letter, footnote 5 states: "All information must be submitted in a format that can be processed or interpreted by a computer or similar electronic device. If data includes acronyms or codes, include an index that explains the terminology. Additionally, pursuant to 41 CFR Sections 60-741.81 and 60-300.81, OFCCP reserves the right to request information in any of the formats, including specific electronic formats, in which it is maintained."
- a. COMMENT: OFCCP should not have the right to dictate to the contractor an electronic format that is not the most efficient or inexpensive way in which to supply the data. At all times, the contractor should retain discretion to provide the data in a format that causes the least amount of time, expense, and burden. OFCCP especially has no legal right to demand that the contractor supply the information in a format that will require it to hire software development engineers or outside consultants to provide the data in a format not maintained by the contractor.
- E. Page 2 of the Scheduling Letter, Last full paragraph regarding FOIA:

- a. COMMENT: There is only a short list of information that OFCCP is required to disclose pursuant to the mandatory disclosure regulations at 41 CFR Section 60-40.2(b). Everything else is permissive. 41 C.F.R. Section 60-40.3. OFCCP should exercise its discretion to withhold all information that has any unique identification numbers in it, including employee ID numbers, full social security numbers and even truncated social security numbers.
- F. Itemized Listing, Paragraph 3: The OFCCP is seeking the “specific race for each employee contained within each job group” and cites 41 C.F.R. Section 60-1.12(c).
  - a. COMMENT: OFCCP cannot re-write the job group regulation at 41 C.F.R. Section 60-2.13, which does not require contractors to submit the information by separate races. The fact that employers are required to maintain race and gender for all employees and solicit the information from applicants where possible does not entitle OFCCP to command employers to produce the job group display in a new and un-approved format. OFCCP should revert to the existing requirement simply to supply the statement of the percentage of minority incumbents all together, and female incumbents, as the existing regulation requires.
  - b. If OFCCP wants to require employers to prepare job group analyses on a race by race basis, the proper way to do so is through revising the underlying regulations via Notice and Comment, not through an Information Collection Request.
- G. Itemized Listing, Paragraphs 4 and 6: OFCCP is asking contractors to 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 are necessary,” citing 41 C.F.R. Section 60-2.16(d).
  - a. COMMENT: The regulation does not mandate race by race utilization analyses. The regulation is permissive. The regulation says “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.” (emphasis added). Moreover, this is not something that currently is done by most affirmative action plan vendors or as part of the available

affirmative action software packages. If OFCCP wishes to make the evaluation of race by race “substantial disparities” an unambiguous mandatory requirement, it should publish a Notice of Proposed Rulemaking which is subject to Notice and Comment. Using an Information Collection Request to transform this into a proactive, mandatory requirement is inappropriate.

- b. COMMENT: We strongly discourage OFCCP from moving from setting goals by all minorities to setting goals by race. This is going to move employers from the mindset of setting goals to a mindset of using race in decision making like a quota. When an employer is told that it has a goal for a particular race, it is only a matter of time before employers will evolve to using race in the selection process.
- H. Itemized Listing, Paragraph 6: In addition to asking for potential goal-setting on a race by race basis, OFCCP also is asking employers to “provide information sufficient to determine whether there were substantial disparities in the . . . utilization of men or women of any one particular minority group, such that separate goals for these groups may be necessary.”
- a. COMMENT: Title VII does not prohibit discrimination against the subset combination of particular race and gender pairings. If OFCCP pursues this analysis, employers are going to have to evaluate, for example, whether their employment of Black Males is statistically significantly lower than Asian Females; this will exponentially magnify the number of separate analyses in every affirmative action plan. Most employer software applications are not set up to perform this analysis.
  - b. COMMENT: This is going to shift employer mindsets from goals to quotas to racial-gender-subgroup parity. To impose such a requirement would create a massive increase in the burdens associated with preparing and maintaining affirmative action plans – a burden that for most contractors already is well above the dollar thresholds that impose these requirements. We strongly oppose changing the scheduling letter to command production of this type of annual analysis for each AAP.
- I. Itemized Listing, Paragraph 7: OFCCP is asking for the “[r]esults 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 Section 60-2.17(b)(3).”

- a. COMMENT: OFCCP should permit employers to engage counsel to advise it regarding its evaluation of compensation under the protection of attorney-client privilege. If a contractor elects to engage counsel to conduct its 2.17(b)(3) analyses, OFCCP should permit such an employer to submit affirmation of this obligation by declaration or certification. The employer should not be required to submit the underlying analysis.
  - b. OFCCP can and should continue to collect contractor compensation data. It should continue to do its own analysis and not put a chilling effect on the rigor with which contractors currently perform their own self-analyses by mandating its submission as part of a compliance review when done by counsel.
- J. Itemized Listing, Paragraph 16: OFCCP is asking for information on progress towards goals, including progress towards utilization goals of each individual race. Please see our prior comments on OFCCP’s proposed edits to paragraphs 4 and 6 of the Itemized Listing.
- a. COMMENT: Most software applications are not able to perform these analyses. The software application developers will need lead time to re-configure the software, and employers will need lead time to implement the systems or integrate them with existing HRIS applications.
  - b. COMMENT: The dollar threshold that triggers the need to prepare affirmative action plans has not shifted from \$50,000 set in 1965, but the amount of additional analysis work required for each affirmative action plan if OFCCP’s proposed Itemized Listing letter changes are put in place will double the amount of time it takes to run all of these equations and analyses. This is going to prove to be a substantial barrier to entry to small and medium size government contractors.
- K. Itemized Listing, Paragraph 17(b) Hires
- a. COMMENT: Many of our clients allow both internal and external candidates to apply to their job openings simultaneously. In such scenarios, the analysis that best matches the employer’s selection process would combine hires with those internal selections chosen via an application process. Moreover, such a requirement is implied under

- OFCCP's Internet Application Regulations. Accordingly, we request that OFCCP add a footnote that permits employers to submit selections data inclusive of both internal and external hires rather than only hires data.
- b. In doing so OFCCP likewise should instruct employers who elect to present their data this way to limit their promotions tallies to those promotions that were not filled via the employer's comingled application process.
- L. Itemized Listing, Paragraph 17(c) Promotions: OFCCP is asking for "the pool of candidates from which the promotions were selected."
- a. COMMENT: Most employers have two type of promotions: competitive promotions where an internal employee is required to apply for or compete for an open vacancy in the workplace, and noncompetitive promotions, which are made at management's discretion. There is no pool for the latter type of promotions.
  - b. Per our comment above regarding Itemized listing paragraph 17(b), many employers do not separate internal candidates from external candidates in making their employment decisions. In such instances, the most accurate way to present the employer's data is by evaluating all selections (both external and internal) against applicants.
  - c. If an employer is unable to identify a specific pool for some or all of its promoted employees, OFCCP should give the employer the option of providing its workforce representation at the start of the plan year for job groups from which such employees were promoted. This will enable OFCCP to run race by race impact ratio analyses on promotions without adding a requirement for race by race data related to placement goals in itemized listing 16, which goes beyond current regulatory requirements.

Respectfully submitted,

Roffman Horvitz, PLC

cc: Alissa A. Horvitz, Member Attorney  
Joshua S. Roffman, Managing Attorney