



April 21, 2022

**VIA ELECTRONIC UPLOAD**  
**FEDERAL RULEMAKING PORTAL**

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

**Re: Comments by The Institute for Workplace Equality and the HR Policy Association in Response OFCCP's NPRM on Pre-Enforcement Notice and Conciliation Procedures**

Dear Ms. Williams:

The Institute for Workplace Equality ("The Institute") and the HR Policy Association ("HR Policy") submit the following comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP" or the "Agency") invitation for comments on its Notice of Proposed Rulemaking on Pre-Enforcement Notice and Conciliation Procedures (the "NPRM" or "proposed rule").<sup>1</sup>

**BACKGROUND ON THE INSTITUTE FOR WORKPLACE EQUALITY**

The Institute is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors regarding their affirmative action, diversity, and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal, and staffing functions who represent many of the nation's largest and most sophisticated federal contractors, with more than over 2.7 million employees. The Institute's Board and Faculty are recognized as leading practitioners in the field; a listing of their names is attached hereto as Appendix A.

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<sup>1</sup> Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. 16138 (March 22, 2022); available at <https://www.govinfo.gov/content/pkg/FR-2022-03-22/pdf/2022-05696.pdf>.

The Institute recognizes the responsibility of all employers, including federal contractors subject to the nondiscrimination and affirmative action obligations that OFCCP enforces, to create a nondiscriminatory workplace and currently has a memorandum of understanding with the OFCCP. We support efforts to make the workplace free from all forms of unlawful discrimination. To that end, we fully support OFCCP's significant role in well-designed and effective enforcement efforts and policies.

### **BACKGROUND ON THE HR POLICY ASSOCIATION**

HR Policy Association represents the most senior human resource executives in more than 400 of the largest companies in the United States. Collectively, these companies employ more than 10 million employees in the United States, nearly nine percent of the private sector workforce. Over two-thirds of the Association's member companies are government contractors and as such, they will be directly impacted by the proposed rule. Since its founding, HR Policy members have recognized the responsibility of all employers, including federal contractors, to create a nondiscriminatory workplace. To that end, it is important for OFCCP to have fully transparent standards and requirements, notice to the regulated community, and consistent adherence to the rule of law.

### **INTRODUCTION**

In the Comment that follows, The Institute and HR Policy will present their views on the NPRM. In so doing, we will be drawing on the decades of experience with Executive Order 11,246 our members have gained. Thus, this Comment reflects practical and legal concerns rooted in settled law and hard-won familiarity.

In sum, our view is that in its NPRM OFCCP seeks to reverse course on prudential matters of evidence and notice without sufficient regard for the requirements of the Administrative Procedures Act ("APA") and for basic notions of due process. As will be presented in greater detail below, the NPRM ignores the bases for the existing Regulation (hereinafter "the 2020 Rule"),<sup>2</sup> that took effect in December 2020 – only 15 months before the pending NPRM was published – and provides no factual basis for the wholesale revision of the articulated standards and procedures therein, nor does it seek more modest and appropriate revisions to the existing regulation. This inability to provide a substantial factual record subverts OFCCP's authority to make the sweeping changes it proposes. Further, by excising stated evidentiary standards, OFCCP undermines the very Title VII principles it claims to be upholding. It is insufficient simply to assert that meeting evidentiary standards are inconvenient or too difficult without providing the basis for such an assertion. Further, by eliminating articulated evidentiary standards, compliance is reduced to hitting a vague, arbitrary, moving target. The Institute and HR Policy also believes that the Agency's decision to exclude practical significance will significantly undermine OFCCP's

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<sup>2</sup> 85 Fed. Reg. 71553 (Nov. 10, 2020) which took effect on December 10, 2020, and was entitled *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination*.

ability to identify disparities that actually “harm . . . the disfavored group,”<sup>3</sup> which is supposedly its stated goal. Finally, OFCCP seems indifferent to making the required burden estimates under the APA and PRA.

As a result, and in the spirit of cooperation that has been the hallmark of the relationship between The Institute, HR Policy, and OFCCP, we propose that the Agency address only those standards it claims are beyond what is required by Title VII, while retaining the practice of providing contractors and compliance officers the clear, articulated standards by which affirmative action programs will be judged and with the fair notice that lies at the core of due process. Federal contractors deserve to know the standards by which they will be judged.

**I. BY ELIMINATING ALL EVIDENTIARY STANDARDS AND REDUCING NOTICE TO CONTRACTORS, THE PROPOSED NPRM UNDERMINES OFCCP’S CONTINUED COMMITMENT TO CERTAINTY, EFFICIENCY, RECOGNITION, AND TRANSPARENCY.**

**A. OFCCP has a longstanding commitment to transparency, efficiency, and clarity in its compliance evaluation process.**

The current administration recently reaffirmed OFCCP’s longstanding “commitment to providing transparency, efficiency, and clarity in its compliance evaluation process.”<sup>4</sup> This commitment is reflected in both the Federal Contractor Compliance Manual (“FCCM”) as well as numerous OFCCP directives, spanning multiple administrations and changes in OFCCP leadership.<sup>5</sup> Indeed, despite changes and variations in OFCCP’s practices and approach to compliance reviews over the years, its commitment to transparency, efficiency, and clarity has remained consistent. And as part of that longstanding commitment, in 2018, “OFCCP adopted the four principles of Certainty, Efficiency, Recognition, and Transparency (the CERT principles) as a basis for good governance and better services to the public.”<sup>6</sup>

**B. Before the 2020 Rule, OFCCP faced harsh criticism from GAO for lacking transparency, efficiency, and clarity in its audit processes.**

In the years leading up to the adoption of the 2020 Rule, OFCCP was repeatedly criticized for failing to meet its core principles of transparency, clarity, and efficiency in compliance reviews. The Agency’s inability to meet these core goals resulted in a stern reproach from the U.S. Government Accountability Office (“GAO”) and in costly and embarrassing losses in judicial

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<sup>3</sup> Practical Significance in EEO Analysis Frequently Asked Questions, Question #1 (last updated Jan. 15, 2021), available at [www.dol.gov/agencies/ofccp/faqs/practical-significance](https://www.dol.gov/agencies/ofccp/faqs/practical-significance) (last accessed Dec. 5, 2021). *See also* 85 Fed. Reg 71553, 71559.

<sup>4</sup> OFCCP DIR 2022-02, *Effective Compliance Evaluations and Enforcement* (Mar. 31, 2022).

<sup>5</sup> *See, e.g.*, OFCCP, FEDERAL CONTRACT COMPLIANCE MANUAL, Introduction (last updated Jan. 7, 2021), <https://www.dol.gov/agencies/ofccp/manual/fccm/introduction> (stating that revised FCCM can “provide covered contractors and subcontractors more transparency, certainty, and clarity about basic OFCCP procedures and processes”).

<sup>6</sup> OFCCP DIR 2021-02, *Certainty in OFCCP Policies and Practices* (Dec. 11, 2020).

tribunals.

In the years leading up to the adoption of the 2020 Rule, OFCCP was repeatedly criticized for failing to meet its core principles of transparency, clarity, and efficiency in compliance reviews. The Agency's inability to meet these core goals resulted in a stern reproach from the U.S. Government Accountability Office ("GAO") and in costly and embarrassing losses in judicial tribunals.

OFCCP's conduct during audits and the Agency's habit of issuing administrative findings of discrimination based on faulty statistics were common sources of criticism from many quarters. In light of this and not surprisingly, in December 2010, OFCCP changed its compliance evaluations to embody a more comprehensive auditing process that sought, among other ends, to uncover indicators of discrimination through imprecise statistical and ill-defined anecdotal evidence.<sup>7</sup> The new process proved inefficient and time consuming, leading the U.S. Government Accountability Office ("GAO") to find that OFCCP lacked the oversight necessary to improve nondiscrimination compliance.<sup>8</sup> Among other findings, the GAO concluded that regional compliance evaluation activities were inconsistent across offices, making contractors uncertain about how to comply with the law.<sup>9</sup> Although the regulations governing OFCCP audits were the same nationwide, interpretations of them varied depending on the region or office.<sup>10</sup> And OFCCP was not providing clear guidance to contractors about its requirements.<sup>11</sup> The GAO also found that compliance officers lacked necessary training.<sup>12</sup>

The GAO's findings were shared by the contractor community. Too many contractors faced Notices of Violation ("NOV") without the benefit of OFCCP's evaluations or unique statistical methodologies. More critically, OFCCP's inability to satisfy its core principles led to widely-publicized losses against contractors in the three years leading up to the adoption of the 2020 Rule.<sup>13</sup>

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<sup>7</sup> See OFCCP DIR 2019-01, *Compliance Review Procedures*, <https://www.dol.gov/agencies/ofccp/directives/2019-01>. See also, *Frito-Lay v. U.S. Department of Labor*, 3:12-cv-1747-B-BN, Dkt. No. 72 at 11 (2014) (Where, at the culmination of an attenuated audit, the Department reviewed the analysis cited in the Administrative Complaint and discovered potential dispositive errors in its analysis growing from its flawed statistical methodologies, Ultimately, both parties agreed that an error existed.).

<sup>8</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, GAO-16-750 (Sept. 22, 2016), <https://www.gao.gov/assets/gao-16-750.pdf>.

<sup>9</sup> *Id.* at 21.

<sup>10</sup> *Id.* at 21-22.

<sup>11</sup> *Id.* at 22-23, 34; and see U.S. CHAMBER OF COMMERCE, OFCCP: Right Mission, Wrong Tactics—Recommendations for Reform (Sept. 21, 2017), [https://www.uschamber.com/assets/documents/chamber\\_ofccp\\_report\\_2017.pdf](https://www.uschamber.com/assets/documents/chamber_ofccp_report_2017.pdf) (In 2017, the U.S. Chamber of Commerce made similar findings after investigating OFCCP's auditing process for contractors.).

<sup>12</sup> See U.S. GOV'T ACCOUNTABILITY OFF., *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, GAO-16-750, at 22-23 (Sept. 22, 2016), <https://www.gao.gov/assets/gao-16-750.pdf>.

<sup>13</sup> See, e.g., Recommendation Decision and Order, *OFCCP v. Google*, ALJ No. 2017-OFC-0004, at 20 (July 14,

### **C. The PDN and 2020 Rule aimed to address criticisms and effect CERT.**

In response to these criticisms, OFCCP sought to improve its evaluation processes. One of the first steps was providing guidance that established a greater role for the Predetermination Notice (“PDN”) by creating a uniform approach that required compliance officers to issue PDNs to identify preliminary discrimination findings identified during compliance evaluations.<sup>14</sup> OFCCP explained, “The use of the PDN encourages communication with contractors and provides them an opportunity to respond to preliminary findings prior to OFCCP deciding to issue an NOV.”<sup>15</sup> This change was explicitly part of OFCCP’s broader “ongoing efforts to achieve consistency across regional and district offices, increase transparency about preliminary findings with contractors, and encourage communication throughout the compliance evaluation process.”<sup>16</sup>

The culmination of OFCCP’s effort to respond to the GAO was the 2020 Rule, which OFCCP designed to “increase clarity and transparency for federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal opportunity laws.”<sup>17</sup> To realize OFCCP’s goals, the rule focused on resolving cases with stronger supporting evidence, facilitating early resolution through a clear and mutual understanding of the issues, and pursuing and closing these cases efficiently and as early in the compliance evaluation process as possible.<sup>18</sup> The 2020 Rule was also designed to “increase the number of contractors the Agency evaluates.”<sup>19</sup> Establishing consistent criteria for findings of discrimination was key to realizing these objectives and enabling OFCCP to focus its “resources on those cases with the strongest evidence.”<sup>20</sup> A key part of the rule was laying the groundwork for making preliminary findings of discrimination that were to be issued in PDNs and NOVs.<sup>21</sup> As OFCCP explained, “[c]odifying the use of PDNs, NOVs, and an early conciliation option promotes predictability, efficiency, and timeliness.”<sup>22</sup> The concrete and detailed groundwork required to issue PDNs became an important “guardrail” to protect OFCCP resources by providing “clear evidentiary standards” upon which compliance officers could proceed.<sup>23</sup>

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2017) (“Had OFCCP made its disclosures and had Google presented [ ] information earlier, it might have made the present litigation unnecessary.”); Recommendation Decision and Order, *OFCCP v. Analogic Corp.*, ALJ No. 2017-OFC-00001, at 35 (Mar. 22, 2019) (finding OFCCP failed to identify any employment practice that caused the asserted wage disparity and therefore failed to establish a case of disparate impact); Recommendation Decision and Order, *OFCCP v. Oracle America, Inc.*, ALJ No. 2017-OFC-00006, at 254 (Sept. 22, 2020) (finding against OFCCP where the statistical evidence aggregated across job functions and lines of business such that it potentially obscured “important differences in the relationships that matter for compensation”).

<sup>14</sup> See OFCCP DIR 2018-01, *Use of Predetermination Notices (PDN)* (Feb. 27, 2018), <https://www.dol.gov/agencies/ofccp/directives/2018-01>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination, 85 Fed. Reg. at 71554.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 71562-65.

<sup>22</sup> *Id.* at 71555.

<sup>23</sup> *Id.*

Specifically, the 2020 Rule articulated clear standards that required OFCCP to demonstrate the following in any PDN and NOV alleging intentional disparate treatment:

- quantitative evidence of a standard deviation of two or more based on a statistical analysis of similarly situated groups and controlling for legitimate job-related factors;
- the identified disparity is practically significant; and
- qualitative evidence supports a finding of discriminatory intent on the part of the contractor.

The 2020 Rule also permitted OFCCP to issue a PDN or NOV without satisfying the above requirements only if (1) the qualitative evidence alone is sufficient to establish a violation; (2) the statistical disparity by itself is “extraordinarily compelling” or (3) the contractor has denied OFCCP access to employees or records.

With respect to disparate impact claims, the PDN and NOV must include:

- quantitative evidence as described above;
- a showing that the disparity is practically significant; and
- the specific policy or practice causing the adverse impact unless the OFCCP can demonstrate that the elements of the selection process are incapable of separation.<sup>24</sup>

The 2020 Rule promoted consistency across the Agency’s nine regional offices and more than 40 district and area offices and focused its limited investigative resources on those contractors most likely to be out of compliance. This strategy proved fruitful. As OFCCP has recognized, the CERT framework that informed the 2020 Rule led to “the best year for compliance assistance and the second highest year for monetary settlements” in OFCCP history, and enabled OFCCP to recover approximately \$117 million in remedies for employees and applicants between Fiscal Year 2017 and Fiscal Year 2020.<sup>25</sup> These results conclusively demonstrate, contrary to the current assertions by OFCCP in the NPRM, that the detailed PDN standards imposed by the 2020 Rule do not constrain OFCCP enforcement efforts, but instead create a valuable filter that moves OFCCP toward its goal of efficiency by identifying and focusing the Agency’s efforts on cases with comparatively stronger evidence.

Furthermore, the failure to share qualitative and quantitative evidence of disparate treatment, or the specific policy or practice causing disparate impact, frustrates the contractor from being able to correct problem areas going forward. If the contractor is just shown a preliminary indicator but not why this indicator is there, the contractor is hampered in providing prospective relief. This undermines the purpose of the audit itself and is one of the most beneficial aspects of PDN. Ultimately, the auditor should share the results of the audit to help the audited entity achieve

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<sup>24</sup> See 41 CFR 60-1.33; 300.62; and 741.62.

<sup>25</sup> See U.S. DEP’T OF LABOR, News Release: *U.S. Department of Labor Announces Best Year for Compliance Assistance by Office of Federal Contract Compliance Programs*, 20-1924-NAT (Oct. 19, 2020), <https://www.dol.gov/newsroom/releases/ofccp/ofccp20201019-0>.

compliance.

**D. The primary reasons offered for the rescission of the 2020 Rule are *prima facie* inaccurate.**

The NPRM proposes eliminating the evidentiary standards for issuing a PDN and NOV set forth in the 2020 Rule. Specifically, in a disparate treatment case, OFCCP seeks to eliminate the obligation to include quantitative evidence of a statistically and practically significant disparity and supporting qualitative evidence. In the case of a disparate impact claim, the NPRM also proposes doing away with the obligation to identify the specific policy or practice the Agency alleges supports any disparate impact claim.

OFCCP's reason for eliminating all evidentiary requirements from the PDN and NOV process is that these evidentiary requirements are difficult to meet at the early stages of a compliance review.<sup>26</sup> However, PDNs and NOVs are typically issued *only after* OFCCP has reviewed the contractor's initial submission in response to a scheduling letter, issued at least two requests for information and conducted a multi-day onsite investigation which typically includes numerous interviews with management and non-management employees, all of which should provide OFCCP with ample material to meet the evidentiary standards in a meritorious enforcement case.

The NPRM further asserts that the 2020 Rule should be rescinded because it prescribed evidentiary standards for the issuance of a PDN and an NOV that exceeded what courts have required and run counter to established Title VII principles. The Agency proposes to rescind these evidentiary standards because they "impede OFCCP's ability to tailor the pre-enforcement process to the specific facts and circumstances of each case, delay information exchange with contractors, and create obstacles to remedying discrimination."<sup>27</sup> The NPRM would replace the standards with an obligation for OFCCP to provide contractors with vague and undefined "preliminary indicators of discrimination."<sup>28</sup>

However, OFCCP's assertion that the 2020 Rule prescribed evidentiary standards that exceeded what courts have required is misleading, at best. Not only do the evidentiary requirements for PDNs set forth in the 2020 Rule underscore OFCCP's commitment to transparency, consistency, and efficiency, but they align more closely to established standards of proof for claims of systemic discrimination, including both disparate treatment and disparate impact claims under Title VII. Because Executive Order 11,246 follows Title VII law, OFCCP will be held to those standards in enforcement actions, further underscoring why OFCCP should abide by these same standards at the administrative stage of the process as well.<sup>29</sup>

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<sup>26</sup> See Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16139-16142.

<sup>27</sup> *Id.* at 16139.

<sup>28</sup> *Id.* at 16152.

<sup>29</sup> See e.g., *Analogic Corp.*, ALJ No. 2017-OFC-00001, at 35 (OFCCP did not appeal the ALJ's ruling, in which the ALJ rejected the Agency's pattern and practice claims based on Title VII principles).

Establishing a *prima facie* case of disparate treatment entails showing “a disparity in the relative position or treatment of the minority group” and eliminating “the most common nondiscriminatory reasons for the observed disparity.”<sup>30</sup> Because such proof challenges “a host of employment decisions over time,” the statistical evidence must focus on eliminating nondiscriminatory explanations by showing, at a minimum, statistically significant disparities in treatment between those who are comparable in all relevant respects.<sup>31</sup> And, as OFCCP’s own regulations acknowledge, Title VII prohibits discrimination only among employees who are “similarly situated.”<sup>32</sup>

In a disparate impact case, Title VII requires OFCCP to show “a particular employment practice that causes a disparate impact [on the basis of race or sex].”<sup>33</sup> Thus, OFCCP must first identify a specific practice that it contends caused a disparity.<sup>34</sup> Once such a practice has been identified, OFCCP must prove that the practice caused an adverse impact on a protected group.<sup>35</sup> Causation is crucial; a bottom-line statistical disparity alone does not prove a disparate impact.<sup>36</sup>

Put simply, coming forward, as OFCCP proposes, with a statistical model that shows bare-bones statistically significant disparities is not enough for OFCCP to prove *either* disparate treatment or disparate impact discrimination. While statistics *can* be probative of disparate treatment or disparate impact discrimination in certain cases, that does not mean they always *are* for the bulk of the audits undertaken by OFCCP. As a result, any statistical models used must be consistent with Title VII standards in order to be meaningful and to support even an *initial* inference of discrimination. Furthermore, as articulated by the U.S. Supreme Court, statistics “come in infinite variety,” meaning that “their usefulness depends on all the surrounding facts and circumstances.”<sup>37</sup> For this reason, parties claiming systemic discrimination generally buttress statistical evidence with other support, including anecdotal evidence from individuals who can “testify about their personal experiences” and bring “the cold numbers convincingly to life.”<sup>38</sup>

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<sup>30</sup> *Segar v. Smith*, 738 F.2d 1249, 1273 (D.C. Cir. 1984), cert. denied sub nom., *Meese v. Segar*, 471 U.S. 1115 (1985) (internal quotations omitted).

<sup>31</sup> *Id.* at 1274.

<sup>32</sup> 41 C.F.R. § 60-20.4; and see e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 (1977) (statistical evidence in pattern-and-practice must be based on appropriate comparators).

<sup>33</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i); see also *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) (disparate impact involves “policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group”).

<sup>34</sup> See *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989) (plaintiff must identify “a specific or particular employment practice” causing the alleged disparate impact); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 992, 994 (1988).

<sup>35</sup> *Id.*; *Analogic Corp.*, ALJ No. 2017-OFC-00001, at 32.

<sup>36</sup> See *Google*, ALJ No. 2017-OFC-0004, at 25.

<sup>37</sup> *Teamsters*, 431 U.S. at 340.

<sup>38</sup> *Id.* at 339; see also *Hazelwood Sch. Dist.*, 433 U.S. at 307-08 (only “gross statistical disparities” could alone constitute *prima facie* proof of intentional discriminatory patterns or practices).



To the extent that the NPRM seeks to minimize the need for anecdotal evidence in PDNs, it appears to misapply the concept of anecdotal evidence by narrowly construing it as encompassing only victim or witness statements. But anecdotal evidence can include a range of factual information, such as compliance officers' observations, documentation detailing facts about similarly situated workers, or managers' statements revealing inconsistent treatment.<sup>39</sup>

As noted above, OFCCP undisputedly will be – and has been – held to these recognized standards in litigation.<sup>40</sup> Requiring disclosure of quantitative and qualitative evidence that would support a Title VII claim early in the process through the PDN helps to ensure the audit and conciliation process will do what it should: determine whether a contractor has engaged in systemic discrimination and afford OFCCP and the contractor community the opportunity to resolve such situations short of protracted, costly, and often contentious litigation. Only through the early disclosure of these facts can OFCCP and contractors ensure a mutual understanding of the indicators of alleged discrimination and any nondiscriminatory explanations that may modify the findings. Only through this mutual exchange of information can *both* sides determine whether conciliation is necessary.

**E. OFCCP's proposed changes will undermine its commitment to CERT by creating arbitrary audits that frustrate due process and consistency in the law.**

Requiring OFCCP to provide in the PDN the facts it believes support a Title VII claim also enables OFCCP to best use its resources by proceeding only in cases where the evidence is strong and convincing. Ultimately, compliance officers must “disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond.”<sup>41</sup> The current framework defining the quantitative and qualitative evidence that must be identified and disclosed makes clear to both OFCCP and contractors the specific details required. First, it requires OFCCP to consider and frame facts in terms of a specific theory under which a Title VII violation may be found—*i.e.*, disparate treatment or disparate impact. Second, it sets clear parameters for bringing cases under either theory. Third, it gives detailed and practical definitions of quantitative and qualitative evidence so that both OFCCP and the contractor know what needs to be proffered in order to pursue systemic claims.<sup>42</sup> Clear

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<sup>39</sup> See, e.g., *OFCCP v. Enterprise Rent-a-Car*, ALJ No. 2016-OFC-00006, at 113-14 (July 17, 2019) (inferring discriminatory intent where statistical evidence was “buttressed by anecdotal evidence that included the testimony of African-American applicants that Enterprise had rejected, the testimony of Enterprise personnel involved in the screening applications and interviewing applicants, and comparisons of applications that led to inconsistent outcomes”). *OFCCP v. Enterprise RAC Company of Baltimore, LLC*, ARB Case No. 2019-0072; ALJ Case No. 2016-OFC-00006, Order of Remand (November 3, 2021) [https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB\\_DECISIONS/OFC/19\\_072\\_OFCCP.PDF](https://www.dol.gov/sites/dolgov/files/OALJ/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/OFC/19_072_OFCCP.PDF)

<sup>40</sup> See, e.g., *Analogic Corp.*, ALJ No. 2017-OFC-00001; *Oracle America, Inc.*, ALJ No. 2017-OFC-00006. Reversed and remanded.

<sup>41</sup> 85 Fed. Reg. at 71571.

<sup>42</sup> See *id.* at 71555 (explaining that definitions of qualitative and quantitative evidence were added to the 2020 Rule to “give greater clarity as to the types of evidence that OFCCP collects and how it uses the different types of evidence to support the issuance of pre-enforcement notices”).

standards allow OFCCP to create a streamlined, efficient process that devotes resources to the appropriate areas. Removing clear processes and standards prevents both OFCCP compliance officers and contractors from focusing resources on true problem areas, which will only result in longer, less efficient reviews. Finally, by deleting these standards wholesale, OFCCP subverts the efforts at reform and returns OFCCP and the regulated community to a regime of ambiguous, variable assessments that leads only to protracted, costly, and – for the agency – embarrassing losses at trial.<sup>43</sup>

The NPRM seeks to expand OFCCP’s authority by relying on the proposition that Title VII gives OFCCP wide latitude to conciliate in pursuit of voluntary compliance. But in doing so, OFCCP prioritizes its own “flexibility” over the concepts of due process and consistency in the law (in particular, Title VII). By eliminating any articulated evidentiary standards to which OFCCP must hold itself, the NPRM deprives federal contractors of the ability to evaluate alleged indicators of discrimination and meaningfully respond. This scheme reverts OFCCP’s compliance evaluation process back to its pre-CERT days when compliance officers had unfettered discretion in deciding whether to issue PDNs and whether to give contractors a chance to respond to specific factual allegations. Before OFCCP required their use, compliance officers rarely used PDNs, leaving contractors in the dark about OFCCP’s assessment of their practices until they were served with NOV. Although OFCCP may believe that the current standards for issuing a PDN and an NOV are too constraining, some clearly articulated standard for issuing violations, preliminary or otherwise, is necessary. Without guardrails, compliance is an arbitrary, moving target.

Although the NPRM technically still requires PDNs, they will be of little value if they are not supported by details about how compliance officers arrived at alleged indicators of discrimination. Without a framework detailing what must go in a PDN, contractors can once again expect the unexpected from the auditing process and contractors operating in multiple OFCCP regions will be subject to different compliance standards. A compliance officer who provides only a cursory summary of facts or superficial summary of statistical results cannot reasonably expect a detailed or meaningful response from a contractor. In such a situation, not only will the contractor lack valuable information to make informed decisions about potential conciliation, but so will OFCCP. Such a system reduces transparency and clarity and wastes time and resources.

Further, meaningful notice through the PDN and NOV provides an opportunity for the contractor to address indicators and potentially resolve any concerns before both the Agency and the contractor expend significant resources proceeding with a lengthy review, conciliation process, and possibly litigation. The plan to reduce the required response period to a PDN for contractors to 15 calendar days is in bad faith and will not increase efficiency. The need to issue a PDN indicates there has been a lengthy investigation and, possibly, could be the first time that the contractor learns of OFCCP’s findings and analyses. The 30-day period that the 2020 Rule afforded was reasonable. Consistent standards that align with legal precedent and efficient use of OFCCP’s limited resources also benefit the workers OFCCP is charged with protecting.

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<sup>43</sup> See e.g., *Oracle America, Inc.*, ALJ No. 2017-OFC-00006; *Analogic Corp.*, ALJ No. 2017-OFC-00001, at 35.

In an even more significant derogation of due process, the NPRM would allow OFCCP to add new claims to an NOV that were not included in the PDN *without prior notice to the contractor and without any opportunity to rebut the new findings*. But this practice would eviscerate the point of the PDN, which is presumably to allow OFCCP and federal contractors to engage in meaningful discussions of whether and to what extent any violation exists.<sup>44</sup> If OFCCP will continue using PDNs as part of its process (and the NPRM contemplates it will), at a minimum, OFCCP should be limited to pursuing only those claims articulated in the PDN. Allowing OFCCP to sidestep the procedural requirement it imposed on itself is the antithesis of clarity, transparency, and efficiency. It creates unnecessary hardship for the applicants and employees OFCCP seeks to protect and for contractors, introduces arbitrariness into the process, and increases the cost of doing business with the federal government. Under this scheme, no one wins. It is the very model of an arbitrary and capricious process.

Lastly, there simply has not been enough time for the Agency to reach the conclusion that the 2020 Rule has led to an inefficient, inflexible process that must be discarded, out of hand. The consistency of standards that the 2020 Rule provided did not take effect until December 10, 2020. The current administration has not had enough time and experience to make an informed decision on the efficacy of the rule, and, significantly, does not attempt to explain the need for such a hasty change of mind.<sup>45</sup>

In exchange for doing business with the federal government, federal contractors agree to comply with Executive Order 11,246 and its implementing regulations. In this sense, OFCCP enforces not only the law, but also the agreement between each contractor and the federal government. Stripping the compliance evaluation process of the safeguards that ensure contractors receive fair notice of alleged violations and an opportunity to rebut them not only frustrates notions of due process under the law, but also subverts the implied covenant of good faith and fair dealing underscoring contractor agreements with the government.<sup>46</sup>

The proposed rule also misunderstands the scope and limits of the government informant privilege. Although protecting informants from retaliation in investigations is a legitimate and laudable concern, procedural fairness requires that OFCCP must strike a balanced approach that also affords contractors fair notice of the allegations against them and the opportunity to meaningfully respond. OFCCP can legitimately protect an informant's identity, while still implementing a transparent system that allows contractors to examine the facts that OFCCP seeks to use against them. In the *Oracle* case, the ALJ found that OFCCP's refusal to provide anecdotal

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<sup>44</sup> It is also counterintuitive and counterproductive that OFCCP could indicate that it may regularly add to its claims after the PDN, such as during a Conciliation process. As noted above and made clear in Sections 1Q and 2O of the FCCM, by the time the PDN is issued, at least according to the regulations and FCCM, OFCCP has all the information it needs and the audit itself is essentially over.

<sup>45</sup> The NPRM places no deadlines or obligations on the COs. One stated reason for the extensive amendments is that contractors delayed the compliance review process arguing over whether the "proof" in the PDN actually established a violation. If the agency wants less delay, at what point does it impose internal deadlines on the COs and their supervisors and take action to ensure COs understand the law?

<sup>46</sup> See *Centex Corp. v. United States*, 49 Fed. Cl. 691, 708 (2001) ("In a government contract, the implied covenant of good faith and fair dealing requires that the Government not use its unique position as sovereign to target the legitimate expectations of its contracting partners.").

evidence supporting its allegations unacceptable because the government informant privilege is qualified and the contractor “is entitled to notice of the allegations and evidence against it and a fair opportunity to defend itself.”<sup>47</sup>

OFCCP purports to remain committed “to providing transparency, efficiency, and clarity in its compliance evaluation process.”<sup>48</sup> But the NPRM entails a complete reversal of directives and regulations designed to accomplish these professed goals and fails to reflect a reasonable middle ground that benefits not only contractors but also OFCCP.

The cornerstone of good government is known standards, notice to the regulated community, and adherence to the rule of law. OFCCP’s NPRM violates these basic tenants.

**F. NPRM should continue employing practical significance in its assessments of contractor compliance.**

**1. *An introduction to practical significance***

The Institute and HR Policy strongly recommend that OFCCP continues to evaluate practical significance as an evidentiary standard for disparity analyses. As stated above, the current NPRM would modify the 2020 Rule by rescinding the requirement of evaluating practical significance in this context.<sup>49</sup> This potential modification would harm OFCCP’s ability to (1) assess the strength of agency allegations based on quantitative analyses, and (2) to strategically prioritize effort, time, and staff resources for compliance evaluations. This potential modification would also unnecessarily undermine evidentiary standards and put OFCCP policy directly at odds with accepted scientific practice.

**2. *The 2020 Rule and OFCCP FAQ***

As part of the 2020 Rule describing specific requirements for issuing a PDN, OFCCP must “*demonstrate that the unexplained disparity is practically significant*” under both disparate treatment and disparate impact theories of discrimination.<sup>50</sup> OFCCP’s 2020 Rule was logical, transparent, supported by case law, and consistent with accepted scientific practice. This part of the rule allows OFCCP to differentiate allegations impacting disfavored groups from unfounded ones, and as such is an important metric for considering which compliance evaluations warrant more time, effort and staff. In 2021, OFCCP released a FAQ on practical significance that defined the concept, provided exemplar measures, described a continuum of reasonable rules of thumb in

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<sup>47</sup> See Order Granting in Part and Denying in Part Defendant’s Motion to Compel OFCCP to Comply with the Court’s Discovery Orders, *OFCCP v. Oracle America, Inc.*, ALJ No. 2017-OFC-00006, 3-4 (Oct. 7, 2019).

<sup>48</sup> OFCCP DIR 2022-02.

<sup>49</sup> See Practical Significance in EEO Analysis Frequently Asked Questions, Office of Federal Contract Compliance Programs, <https://www.dol.gov/agencies/ofccp/faqs/practical-significance#Q1> (OFCCP defines practical significance as “whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group. The concept focuses on the contextual impact or importance of the disparity rather than its likelihood of occurring by chance.”).

<sup>50</sup> Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination, 85 Fed. Reg. at 71571 (emphasis added).

the hiring and compensation context, explained how those rules drive enforcement likelihood, and reiterated why it is strategic and important for the Agency to consider practical significance.<sup>51</sup> OFCCP's cursory dismissal of practical significance in the NPRM (in a mere 600 words) as a requirement in assessing compliance before issuing a PDN, is both counter-productive and lacking a sound factual base. As noted below, an agency must provide a sound, substantive factual basis for making sweeping changes in a regulation. No such basis is found in the NPRM.

### ***3. Scientific research requires practical significance***

Much has been written on practical significance in disparity analyses in the last two decades. The scientific community has endorsed the concept and judges have considered it in a wide variety of circumstances. We focus on two simple reasons why practical significance must continue to be an evidentiary standard that OFCCP evaluates as part of quantitative analysis:

- practical significance is a necessary consideration in scientific research; the Agency would be at odds with the scientific community if it decided to ignore it.
- practical significance measurement aids OFCCP in differentiating when to pursue enforcement and when not to pursue enforcement, which allows the Agency to strategically allocate its limited time, effort and staff to the compliance evaluations that warrant the prioritization.

Many scholarly articles have discussed the important role that practical significance measurement plays in disparity analyses, particularly in situations when statistical significance tests, which evaluate the incompatibility of observed data relative to a hypothesized model, provide little utility. The scientific community, experts in litigation, courts, and technical advisory committees have all recommended that statistical tests be paired with practical significance measures when assessing disparities in employment outcomes.

The limited value of statistical significance testing is not new. Oswald, Dunleavy and Shaw noted “[F]or over 60 years and across a raft of journal articles it has been heartily acknowledged that significance testing is limited in how it can inform any analysis.” This notion was most recently and directly demonstrated by a formal statement published in 2016 by the American Statistical Society (ASA), which stated “[T]he widespread use of statistical significance (generally interpreted as  $p < \text{or} = .05$ ) as a license for making a claim of scientific finding (or implied truth) leads to considerable distortion of the scientific process.” It is for this reason that the ASA statement included as a guiding principle the following “[N]o decision, scientific, business, legal or otherwise, should be based solely on  $p$  values passing a cutoff value.” This would include decisions to make allegations of discrimination in compliance evaluations. Statistical significance alone is not enough. As its prior publications make clear, OFCCP understands the importance of science and law being aligned. It is unexplained why the Agency would elect to use evidentiary standards at odds with established statistical principles.

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<sup>51</sup> Practical Significance in EEO Analysis Frequently Asked Questions, Office of Federal Contract Compliance Programs, <https://www.dol.gov/agencies/ofccp/faqs/practical-significance#Q4>.

**4. *Practical significance aids OFCCP in determining the strength of an allegation and whether to pursue enforcement***

In the context of compliance evaluations, the value of practical significance is frequently apparent. For example, in today's internet driven application environment, it is not uncommon for applicant pools to include thousands of job seekers. In these situations, even nearly identical employment outcomes across groups may produce a statistically significant result simply because of the role sample size plays in the math of significance testing. In other situations, reasonably sized applicant pools may include a small number of selections. Once again, a significance test may obtain a statistical threshold, yet the shortfall, or difference between the actual number of selections for a group relative to what would be expected in a random process, may only be 1 or 2 people. Considering practical significance using a simple shortfall metric and/or effect size in this context may dramatically change the persuasiveness and strength of an allegation of discrimination. This notion was clearly noted in the recent OFCCP FAQ on the topic: "*OFCCP will use the measures above to make an informed decision on the potential strength of the case and whether, in light of the quantitative and qualitative evidence, the size of an observed disparity justifies moving forward with enforcement procedures.*"<sup>52</sup>

Requiring practical significance as an evidentiary standard allows OFCCP to separate potential allegations of discrimination with strong quantitative evidence of disparity from those with little to no persuasive evidence of disparity. It is in the best interest of OFCCP and the federal contractor community to evaluate practical significance in compliance evaluations to understand the strength of evidence before an allegation of discrimination is made in a PDN. It is also consistent with scientific practice. More than the Agency's "beliefs" are required to produce more effective, more precise measures of contractor conduct upon which PDN's and other forms of enforcement are based.

**II. THE NPRM IS ARBITRARY AND CAPRICIOUS UNDER THE APA**

**A. OFCCP has not provided the substantive factual justifications required by the APA for revising existing regulations.**

The NPRM does not satisfy the requirement under the APA that revisions to existing regulations be firmly based on a substantial factual record. When an agency decides to revise an existing regulation, it must do more than merely state its wish to do so; in fact, it is settled law that "the agency must show that there are good reasons for the new policy."<sup>53</sup> The APA requires that "the agency . . . examine the relevant data and articulate a satisfactory explanation for its action."<sup>54</sup>

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<sup>52</sup> Practical Significance in EEO Analysis Frequently Asked Questions, Question #5, Office of Federal Contract Compliance Programs (last updated January 15, 2021), available at <https://www.dol.gov/agencies/ofccp/faqs/practical-significance> (last accessed April 19, 2022)(emphasis added).

<sup>53</sup> *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

<sup>54</sup> *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30 (1983).

This standard is even more stringent in some circumstances. Relevant to our purposes, the Supreme Court has held that “the APA requires an agency to provide more substantial justification when ‘its new policy rests upon factual findings that contradict those which underlay its prior policy’” and that “[i]t would be arbitrary and capricious to ignore such matters.”<sup>55</sup> As Justice Kennedy wrote,

an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so. An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.<sup>56</sup>

In place of providing a factual basis for the sweeping changes in the NPRM, the Agency provides instead a collection of unsupported assertions, unverified complaints, and unsubstantiated claims. Indeed, there is rarely even an attempt at meeting the required legal standard of basing the proposed changes on a solid and extensive factual record.<sup>57</sup> This is particularly problematic given that the NPRM must meet the higher standard required when an agency reverses policy through drawing the opposite factual conclusions underlying its prior rule.

Less than two years ago (16 months), OFCCP issued the final rule it now proposes to rescind with the NPRM. In the preamble to that 2020 Rule, OFCCP explained that “the Department believes this rule is needed to increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhances the efficient enforcement of equal employment opportunity laws . . .”<sup>58</sup> As described above, the factual justification given for the 2020 Rule was extensive and well in line with the Agency’s obligations under existing precedent to “articulate a satisfactory explanation for its actions.”<sup>59</sup>

This NPRM seeks to reverse course and rescind almost the entirety of the 2020 Rule, in large part by erasing the evidentiary standards the 2020 Rule instituted for Predetermination Notices (“PDNs”) and Notices of Violation (“NOVs”).<sup>60</sup> The NPRM asserts – without substantiation -- that the 2020 Rule had the effect of undermining the very goals it sought to achieve and that rescinding it will “promote the efficient and effective enforcement of laws and

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<sup>55</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 106 (2015) (quoting *Fox Television Stations, Inc.*, 556 U.S. at 515.); see also *Fox Television Station, Inc.* at 535 ((Kennedy, J., concurring in part and concurring in judgment) (“Where here is a policy change the record may be much more developed because the agency based its prior policy on factual findings.”); *Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (Writing that a when a new USDA policy “plainly rests upon factual findings that contradict those which underlay its prior policy. . . . The Department was required to provide a reasoned explanation . . . for disregarding the facts and circumstances that underlay its previous decision . . . .”) (internal citation and quotations omitted).

<sup>56</sup> *Fox Television Stations, Inc.*, 556 U.S. at 535 (Kennedy, J., concurring in part and concurring in judgment).

<sup>57</sup> *Id.*

<sup>58</sup> Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination, 85 Fed. Reg. at 71554.

<sup>59</sup> *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 30.

<sup>60</sup> Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16139-16140.

regulations applicable to Federal contractors and subcontractors. . .”<sup>61</sup> OFCCP is, of course, permitted to change policies. After all, the 2020 Rule was issued under a prior Administration and “[e]lections have policy consequences.”<sup>62</sup> But the requirement to provide a substantial justification for the policy reversal remains, whatever the election outcome: “[E]ven when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation.”<sup>63</sup> The “agency cannot flip-flop regulations on the whims of each new administration. The APA requires reasoning, deliberation, and process.”<sup>64</sup>

The failure to provide substantial justifications for the new policy positions is evident throughout the NPRM. For example, the 2020 Rule instituted a requirement in most instances that the Agency put forth qualitative evidence in support of disparate treatment claims when it issues a PDN.<sup>65</sup> The NPRM proposes to rescind this requirement out of concern that “the disclosure of qualitative evidence creates **a risk** that an employer will uncover identities of those who experience or report discrimination . . . which **may** have a chilling effect on the willingness of victims and witnesses to participate in OFCCP’s investigation and also potentially lead to retaliation against those who report discrimination.”<sup>66</sup> Conjecture is mounted on supposition: a “risk . . . may” have a presumed undesired result. But the NPRM offers no examples or statistics demonstrating that the qualitative evidence requirement has chilled **any** protected speech or resulted in **any** retaliation. Moreover, the NPRM even concedes that OFCCP has the authority to withhold personally identifiable information for complainants, which should obviate any concerns about retaliation.<sup>67</sup> Yet the NPRM asserts, again without any evidence, that “even in those circumstances where OFCCP may withhold an individual’s identity, witnesses **may** remain concerned about the employer’s ability to ascertain their identity from the anecdotal information provided at this pre-determination stage.”<sup>68</sup> To put it bluntly, the NPRM proposes a substantial policy change based upon pure speculation.

To give another example, the NPRM would eliminate **all articulated** evidentiary requirements for the PDN, and replace them with an obligation for OFCCP to provide contractors with vague and undefined “preliminary indicators of discrimination.”<sup>69</sup> One of the justifications offered for this change is that “mandating the same heightened and inflexible evidentiary requirements for both the Predetermination Notice and the Notice of Violation creates inefficient and duplicative processes. . . .”<sup>70</sup> Again, there is also no mention in the NPRM of instances where this supposedly burdensome requirement has created inefficiency in contractor audits. The NPRM even fails to explain how requiring the same standard to be met for the PDN and NOV **could** create inefficiency. Presumably, if the Agency can satisfy the evidentiary standards for the PDN, it

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<sup>61</sup> *Id.* at 16138.

<sup>62</sup> *Organized Village of Kake*, 795 F.3d at 968.

<sup>63</sup> *Id.*

<sup>64</sup> *California v. Bernhardt*, 472 F.Supp.3d 573, 600–01 (N.D. Cal. 2020) (on appeal).

<sup>65</sup> See 41 C.F.R. § 60-1.33.

<sup>66</sup> Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16139 (emphasis added).

<sup>67</sup> *Id.* (“While the 2020 Rule provided that OFCCP may withhold personally identifiable information . . .”).

<sup>68</sup> Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16143 (emphasis added).

<sup>69</sup> *Id.* at 16152.

<sup>70</sup> *Id.* at 16139.



should not need to do additional and duplicative work to meet the exact same standard before issuing a NOV.

As a final example, the NPRM would remove the evidentiary standards created by the 2020 Rule because these standards have led contractors to bring “collateral challenges” to pre-enforcement proceedings instead of dealing substantially with OFCCP’s initial indicators of discrimination.<sup>71</sup> The first problem is that the NPRM does not bother to define what constitutes a “collateral challenge.” Second, the NPRM once again provides no specific examples of how these “collateral challenges” created a problem in pre-enforcement proceedings. If this practice was truly creating distracting and time-consuming collateral challenges, then the NPRM should provide a great deal more than bald assertions, such as statistics supporting the assertions, or at the very least specific examples based on the PDNs the Agency has issued since the enactment of the 2020 Rule.

This overt and repeated failure to meet the basic requirement of providing a sound factual basis for its proposed changes marks this hasty effort as a capricious attempt to “flip-flop regulations on the whims of [the] . . . new administration.”<sup>72</sup>

**B. In contravention of APA requirements OFCCP failed to consider more focused revisions to the regulation within the scope of the existing policy.**

As discussed above, the NPRM would rescind most aspects of the 2020 Rule, including the specific evidentiary requirements needed to issue PDNs and NOVs and the thirty (30) day window for contractors to respond to the PDN.<sup>73</sup> The NPRM proposes these sweeping rescissions without meeting the basic requirements of the APA to consider less disruptive alternatives. As the Supreme Court recently explained, “when an agency rescinds a prior policy its reasoned analysis must consider the ‘alternative[s]’ that are ‘within the ambit of the existing [policy].’”<sup>74</sup> Policy changes implemented by an agency are “arbitrary and capricious when the agency considers only the binary choice of whether to retain or rescind a policy, without also ‘considering less disruptive alternatives.’”<sup>75</sup>

For example, this NPRM removes the evidentiary standards put in place by the 2020 Rule, claiming (without any attempt at providing a factual basis) that the standards require OFCCP to meet a higher burden of proof than Title VII and that the standards impede the pre-enforcement process because they are “overly particularized and confusing.”<sup>76</sup> The problem with these declarations is that nowhere in the NPRM does the agency consider “‘alternative[s]’ that are

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<sup>71</sup> See *id.* at 16139 (“Moreover, the 2020 Rule attempted to codify complex evidentiary issues, many of which are inherently open to debate, thus encouraging contractors to raise collateral challenges to OFCCP’s pre-enforcement notice procedures, rather than providing a substantive response to the indicators and findings of discrimination.”).

<sup>72</sup> *California v. Bernhardt*, 472 F.Supp.3d 573, 600–01 (N.D. Cal. 2020) (on appeal).

<sup>73</sup> See *id.* at 16139-16140.

<sup>74</sup> *Dep’t of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 51).

<sup>75</sup> *Coalition for Workforce Innovation v. Walsh*, No. 21-130, at \*36 (E.D. Tex. Mar. 14, 2022) (quoting *Texas v. Biden*, 20 F.4th 928, 988 (5th Cir. 2021)).

<sup>76</sup> See Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16139.

‘within the ambit of the existing [policy].’<sup>77</sup>

The Institute and HR Policy strongly believe that the existing 2020 Rule better serves the needs of the agency and the contractor community, while at the same time, more securely protects the rights established by Title VII.

### **III. THE NPRM TOTALLY IGNORES REQUIRED BURDEN ESTIMATES UNDER THE APA AND THE PRA.**

The NPRM rescinds the 2020 Rule and suggests that the burden to any given federal contractor or subcontractor to comply with the proposed Rule will be approximately 30 minutes to “read the proposed rule or read the compliance assistance materials provided by OFCCP.”<sup>78</sup> This is fatuous on its face. While reading time for the NPRM *per se* may be 30 minutes for the fastest of readers, it will be impossible to understand the background, history, and practical implications of the new rule. That the cursory and incomplete burden estimate fails to meet its duty to calculate and advise the regulated community of the burdens it is imposing – as required by law -- is yet another reason for rejecting this NPRM.

Even more significant is that OFCCP ignores that the NPRM will dramatically increase the burden on federal contractors undergoing compliance reviews by removing key provisions of the 2020 Rule. Prior to the 2020 Rule, it was common for OFCCP and contractors to enter into disputes when a PDN was issued. In the past, before the 2020 Rule was in place, PDNs rarely provided sufficient background to allow for a meaningful response by a federal contractor. Instead, the federal contractor was left to guess at the evidence OFCCP had used to raise an inference of discrimination. This resulted in hours of internal review on what OFCCP might be seeking, and prolonged, often ineffective interactions between OFCCP and the federal contractor about specific findings. These types of protracted and unhelpful negotiations often resulted in (minimally) thousands of dollars in costs to federal contractors and hundreds of hours of time for OFCCP. OFCCP’s own statistics make it clear even after going through the onerous process of using PDNs and NOV’s, only a small number of compliance reviews end with a discrimination finding.<sup>79</sup>

The 2020 Rule relieved burdens on both contractors and OFCCP by providing information to federal contractors at the time a PDN is issued that can be used to research and resolve potential findings of discrimination. When federal contractors can more effectively respond to a PDN, OFCCP can use its scarce resources to focus its attention on federal contractors that are unable to rebut a finding of statistical and/or practical significance. This results in cost savings and reduction in burdens for both OFCCP and federal contractors.

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<sup>77</sup> *Regents of the Univ. of California*, 140 S. Ct. 1891, 1913 (2020) (quoting *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 51.

<sup>78</sup> Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. at 16150.

<sup>79</sup> See OFCCP By the Numbers, Office of Federal Contract Compliance Programs, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments>.

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The NPRM will recreate an environment where there is neither certainty nor efficiency, thus exacerbating the burdens on both the Agency and on federal contractors. By refusing to address these issues, the NPRM fails to meet its legal responsibility of properly outlining the costs of its needlessly rushed proposal.

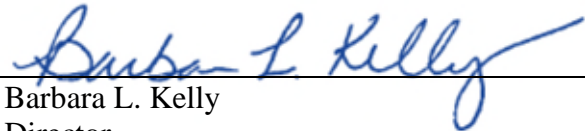
### **CONCLUSION**

Taken together, the proposals in the NPRM are arbitrary because they are unfounded in fact or law, and unsupportable because they will reduce agency efficiency and attenuate compliance evaluations. As a result, and in the spirit of cooperation that has been the hallmark of the relationship between The Institute, HR Policy, and OFCCP, we propose that the Agency address only those standards it claims are beyond what is required by Title VII, while retaining the practice of providing contractors and compliance officers the clear, articulated standards by which affirmative action programs will be judged and with the fair notice that lies at the core of due process. Federal contractors deserve to know the standards by which they will be judged.

Thank you in advance for your consideration of these comments. We are happy to provide any additional information you may need or to answer any questions you may have.

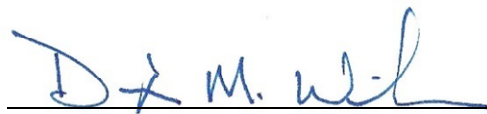
Respectfully,

The Institute for Workplace Equality  
The HR Policy Association



Barbara L. Kelly  
Director

The Institute for Workplace Equality



D. Mark Wilson  
Vice President

Health & Employment Policy  
The HR Policy Association

# **APPENDIX A**

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