

October 31, 2014

The Honorable Howard Shelanski  
Administrator, Office of Information and Regulatory Affairs  
Office of Management and Budget  
New Executive Office Building  
725 17th Street, NW  
Washington, D.C. 20503

**RE: Meeting Request Concerning DOL/OFCCP Final Rule on Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors (RIN: 1250-AA07)**

Dear Dr. Shelanski:

On October 20th, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) sent to the Office of Management and Budget a final rule concerning Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors. I am writing to request a meeting with you and your staff to discuss the Association's concerns regarding the rulemaking. While the Association has repeatedly expressed its interest in working with the Department on the rulemaking and was assured we would be contacted when listening sessions were scheduled, thus far the Department has not accepted our offer.

HR Policy Association represents the most senior human resource executives in more than 360 of the largest companies in the United States and the overwhelming majority of them are federal contractors. Collectively, these companies employ nearly nine percent of the private sector workforce, and their chief human resource officer is responsible for finding, hiring, retaining and developing the talent needed to staff their organizations. Our members believe in and cultivate a diverse and inclusive workforce and have long been pioneers for equality and nondiscrimination on the basis of sexual orientation and gender identity. However, we are very concerned that OFCCP has inappropriately truncated the normal rulemaking process by proceeding with a final rule and has failed to seek input and comments from the federal contractor community on important enforcement issues and affirmative action requirements. These include collecting information from job applicants and employees, determining availability, setting placement goals, and comparing incumbency to availability for minorities.

Although Section 3 of Executive Order (EO) 13672 instructs the Department to "prepare regulations" within 90 days, it does not require OFCCP to start the regulatory process with a "final" rule and bypass the informal rulemaking requirements under the Administrative Procedures Act (APA). Moreover, the EO does not require the Department to "publish" a final rule by any particular date.

Nor is it plausible for OFCCP to claim it has "good cause" pursuant to Section 553(b)(B) of the APA to publish a final rule without notice and comment on the basis that it directly tracks the President's amendments to EO 11246. Unlike the final rule implementing EO 13279 in 2002, any final rule implementing EO 13672 has significant implications for a number of other important regulatory sections including, but not limited to, 41 CFR §60-2.10, §60-2.11, §60-2.12, §60-2.13, §60-2.14, §60-2.15, §60-2.16, and §60-2.17 that must be addressed through notice and comment rulemaking. For example, if the final rule amends 41 CFR §60-2.35 so that "each contractor's compliance with its nondiscrimination obligations will be determined by analysis of statistical data and other non-statistical information which would indicate whether employees and applicants

are being treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin,” then that raises serious questions about what data federal contractors are suppose to use to set placement goals for “minorities” as required by 41 CFR §60-2.16. Moreover, unlike the final rule implementing EO 11375 in 1967, the determination of a job applicant’s or employee’s sexual orientation or gender identity cannot, and should not, be determined visually. Moreover, in 1967, workforce data for setting placement goals was more readily available.

Although in signing EO 13672 President Obama said that it was a reaction to the failure of Congress to enact the Employment Non-Discrimination Act (ENDA), it is important to note the Senate passed version of the Act (S. 815) does not contain an affirmative action requirement and precludes the establishment of quotas or collection of data. Specifically, Section 4(f) of S. 815 states “Nothing in this Act shall be construed or interpreted to require or permit any covered entity to grant preferential treatment . . . on account of an imbalance which may exist, . . . or the adoption or implementation by a covered entity of a quota. . .”, and Section 9 states “the Secretary of Labor shall neither compel the collection of nor require the production of statistics on actual or perceived sexual orientation or gender identity from covered entities pursuant to this Act.”

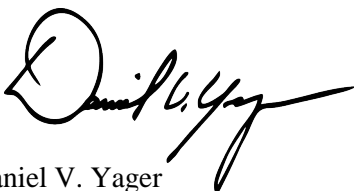
The inclusion of affirmative action requirements in EO 13672 (see Section 2(b)) raises a number of critical questions for federal contractors that must be addressed through notice and comment rulemaking under the APA, including:

- How will federal contractors determine the availability of the new protected class?
- Whether and how the OFCCP will enforce the rule by requiring contractors to collect data on the sexual orientation and gender identity of employees and applicants?
- If the final rule implicitly includes hiring goals, will contractors determine the goals for themselves, or will OFCCP set a hiring goal as the agency did for its recently updated disability rule?
- Whether and how contractors would be required to evaluate their compensation systems to determine if there are sexual orientation or gender identity-based disparities?

The difficulties raised by these issues could likely be avoided if federal contractors only had to demonstrate they have made good faith efforts to expand employment opportunities.

Please call me if you have any questions. Thank you for your consideration in this matter and we sincerely hope that we can meet with you and your staff to discuss these concerns further.

Sincerely,



Daniel V. Yager  
President & General Counsel

cc: Secretary Thomas Perez