Pending OFCCP Initiatives

OMB/EEAC Discussion

September 12, 2012

OFCCP's Proposed Revisions to Supply and Service "Scheduling Letter" (1250-0003) and Proposed Rescission of its 2006 Compensation Guidelines and Standards (RIN 1250-ZA00)

Equal Employment Advisory Council Meeting with OMB

September 12, 2012

I. Objectives

- Discuss EEAC's concerns with two OFCCP proposals now pending before OIRA
  - Proposed revisions to OFCCP's *Recordkeeping and Reporting Requirements – Supply and Service* ("Scheduling Letter") Information Collection Requirement (OMB Number 1250-0003)
  - Proposed rescission of OFCCP's *Standards for Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination*, and of OFCCP's *Voluntary Guidelines for Self-Evaluation* (RIN 1250-ZA00)

II. OFCCP's Supply and Service Scheduling Letter

- Represents the single largest component of OFCCP's total PRA burden inventory
- Used to initiate between 3,000 and 6,000 compliance evaluations (audits) per year
- Revisions would require contractors to produce detailed, sensitive, and burdensome data on employee compensation and personnel transactions at the outset of each audit

A. Compensation Data

- Proposed changes to compensation data request would
  - Replace aggregate pay data with *employee-specific* pay data as of February 1st of each year
  - Define/redefine "employee" to include all full-time, part-time, contract, per diem or day labor, and temporary employees
- EEAC's concerns
  - Privacy | Burdens | Lack of Coordination with EEOC (NAS Study) | Utility | Ability of Agency To Protect Highly Sensitive Data | *Ultra Vires* Attempt To Redefine "Employee"

B. Personnel Transactions Data

- Proposed changes to employment transactions data request would
  - Require applicant, hire, promotion, and termination data be submitted by job group and job title, and by specific race category rather than for minorities in the aggregate
  - Force employers to manually construct distinct "candidate pools" of those who applied or were considered for promotion and, separately, those who were considered for termination
- EEAC's concerns
  - Burdens | Technology Does Not Support Instant Data Retrieval | "Eligibility Pools" Impractical

C. Other Changes

- Contractors also would be required to submit in all audits
  - Employment policies covering (1) FMLA, (2) pregnancy leave, and (3) religious observances and practice accommodations | 3 years of VETS-100/100A reports | documents that "implement, explain, or elaborate" on CBA provisions
- EEAC's concerns
  - "Blanket" Audit Approach Would Replace Traditional, and Efficient, "Sequential" Approach

III. OFCCP's 2006 Compensation Standards and Guidelines

- Separate subregulatory documents published in 2006 to provide both contractors and OFCCP with clear guidance on analyzing compensation to detect unlawful pay discrimination
- Ended decades of inconsistency and confusion around how federal contractor compensation data and practices should be evaluated, both proactively and in the context of an OFCCP audit
- Yielded voluntary compliance and aggressive proactive self evaluations by a broad sector of the federal contractor community

A. Interpretive Standards

- Serve as investigative guidelines for OFCCP compliance officers
- Consistent with Title VII, based upon three fundamental legal and statistical concepts
  - Pay should be evaluated in the context of "similarly situated employee groupings" (SSEGs), *i.e.*, employees in positions requiring similar responsibilities and skills
  - Gender- or race-based pay disparities must be statistically significant to be unlawful, as determined primarily through legally and statistically valid multiple regression analyses
  - Results of statistical analyses must, in most cases, be supported by anecdotal evidence
- OFCCP's proffered reason for rescission
  - Release agency from "rigid" procedures that "significantly undermined" OFCCP's ability to vigorously investigate and identify compensation discrimination
  - Enable OFCCP to reinstitute flexibility in its use of investigative approaches and tools to investigate pay discrimination while "adher[ing] to the principles of Title VII"
- EEAC's concerns
  - Standards Entirely Consistent With Statistical Practices and Title VII Precedent | Promote Predictability and Reduce Uncertainty | Promote Voluntary Compliance | Delay Rescission Until Replacement Standards Vetted Through Public Notice and Comment Process

B. Self-Evaluation Guidelines

- Intended to complement interpretive standards and provide federal contractors with specific, "voluntary" guidelines for satisfying self-critical analysis requirements
- Permitted contractors to seek "coordination" with OFCCP by adopting guidelines' approach and disclosing to OFCCP all related data and records
  - Step-by-step approach consistent with methods set forth in guidelines, but forced disclosure requirement resulted in few contractors electing this "coordination" option
- EEAC's concerns
  - Guidelines Provide Useful Blueprint for Legally and Statistically Valid Self-Critical Analysis| No Objection To Removal of "Coordination" Aspect

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October 28, 2011

VIA ELECTRONIC MAIL TO
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Re: Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Recordkeeping and Reporting Requirements for Supply and Service Contractors (OMB Control Number 1250-0003)

Dear Ms. Aguilar:

The Equal Employment Advisory Council ("EEAC") welcomes the opportunity to file these written comments on the Office of Federal Contract Compliance Programs' ("OFCCP" or "the agency") *Recordkeeping and Reporting Requirements for Supply and Service Contractors* (OMB Control Number 1250-0003). Our comments respond to the Department of Labor's ("DOL") September 28, 2011 *Federal Register* notice regarding this information collection request ("ICR") submission to the Office of Management and Budget ("OMB") for final review and clearance under the Paperwork Reduction Act of 1995 ("PRA"). 76 Fed. Reg. 60083.

The ICR deals with OFCCP's proposed changes — not merely an extension as the agency implies — to OFCCP's "scheduling letter" and "itemized listing." These two documents are sent to contractor establishments at the onset of an OFCCP compliance evaluation and require the submission to the agency of written affirmative action programs along with aggregate compensation data and summary employee transaction data. Importantly, the proposed changes will require contractors to submit additional documents, information, and data above that which is required under the existing scheduling letter and itemized listing.

OFCCP claims in its clearance request that its proposed changes will actually *reduce* the associated burdens on each contractor establishment that is scheduled for a compliance evaluation. For the reasons stated in our July 11, 2011 written comments to OFCCP, and as we further explain below, we respectfully disagree. Consistent with Executive Order 13563 and the White House's stated commitment to reducing the burdens levied on the contracting community, we respectfully request that OMB reject OFCCP's proposed changes and approve the current ICR for another three years.

Statement of Interest

EEAC is the nation's largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate workplace discrimination. Founded in 1976, EEAC's membership currently includes approximately 300 of the nation's largest private-sector employers, who collectively operate tens of thousands of individual establishments and employ more than 19 million workers in the United States alone.

All of EEAC's member companies are employers subject to the compliance, recordkeeping, and reporting requirements imposed by federal law and regulation prohibiting workplace discrimination, and nearly all of our members are federal contractors subject to the additional recordkeeping, reporting, and compliance requirements imposed by Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. Many thousands of our members' establishments have been subjected to one or more OFCCP compliance evaluations since 2000, when the agency began using the current version of its compliance evaluation scheduling letter and itemized listing.

Given this volume, EEAC members keenly understand and appreciate how objective, efficient, and well-managed compliance evaluations are to the overall implementation of their corporate affirmative action programs. They also understand how compliance evaluations that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for the important affirmative action initiatives set forth and regulated by OFCCP.

OFCCP's Proposed Changes Will Impose Substantial Additional Burdens on Federal Contractors

In its justification statement to OMB, OFCCP suggests that federal contractors are "masking" discrimination and "manipulating" data, an accusation presented without any evidence to support it. OFCCP further states that OMB's approval of the proposed changes will enhance its ability to monitor contractor compliance with the laws the agency enforces, again without providing any explanation as to why the existing scheduling letter and itemized listing are inadequate for this purpose. These purported "reasons" certainly do not provide justification for the significant additional burden that OFCCP now wants to impose on federal contractors, especially in light of our comments below.

Based on specific feedback provided by EEAC's member companies in response to OFCCP's pre-clearance solicitation for this ICR, our July 11, 2011 written comments to OFCCP provided the agency with specific burden estimates which contradict the two basic assumptions upon which OFCCP's proposed changes are based:

- the erroneous assumption that federal contractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly at the touch of a keystroke; and

- the erroneous assumption that in order to effectively carry out its enforcement responsibilities, OFCCP must, at the onset of each routine compliance evaluation, have access to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

We respectfully submit that OFCCP has not only failed to provide justification for the significant changes that it is proposing, but also that the agency has failed to meaningfully consider — and in some instances even acknowledge — these and other comments submitted by affected contractors that reflect the true burden that will be imposed if OFCCP's ICR is approved by OMB. Accordingly, we have attached a copy (Attachment 1) of EEAC's written comments submitted to OFCCP for OMB's consideration during this final clearance stage of the PRA request-and-approval process.

It is important to point out that the OFCCP ICR now under review comprises the single largest portion of the total paperwork burden imposed on U.S. employers by the federal government's equal employment opportunity and affirmative action ("EEO/AA") recordkeeping and reporting requirements. These burdens are both practically and economically significant. Indeed, even by OFCCP's own questionable estimates, the recordkeeping and reporting obligations that would be imposed by this ICR would require federal contractors to spend between roughly 11 and 12 *million* hours annually, and no less than $129 million in additional operations and maintenance costs, in order to comply.[1] Moreover, these estimates exclude the *additional* burdens associated with OFCCP's separately pending revisions to its affirmative action requirements for covered veterans, which if finalized as proposed would increase the economic impact of this ICR by $825 million to $1.09 billion in the first-year, and by $727 to $993 million each year thereafter.[2]

As we explained in EEAC's written comments to OFCCP, that agency is proposing far more than a simple "extension" of this ICR, as suggested by its PRA pre-clearance notice published in the *Federal Register* on May 12, 2011.[3] More specifically, OFCCP is proposing

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[1] Of particular note, OFCCP's original estimate of the annualized operations and maintenance costs associated with this ICR was $120,019.00. The agency's new estimate of $129,663,262.00 represents a more than one-hundred-fold increase. This astounding revision in the agency's cost estimate in and of itself calls into question the credibility of all of OFCCP's other cost estimates contained in its ICR. Moreover, it is a tacit admission that contractors will have significant start-up issues, changes that are likely to take months to bring them into compliance.

[2] *See*, Comments of the Equal Employment Advisory Council, the U.S. Chamber of Commerce, and the HR Policy Association on the Office of Federal Contract Compliance Programs' Notice of Proposed Rulemaking Pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00) (Attachment 2).

[3] 76. Fed. Reg. 27670. OFCCP's pre-clearance notice for this ICR was labeled as a "Proposed Extension of the Approval of Information Collection Requirements; Comment Request." The Summary section of that notice made no mention of *any* proposed revisions to this ICR, instead stating only that "the Office of Federal Contract

changes that would require federal contractors to provide OFCCP with more records, more data, and more information than has ever been required at the initial stage of a routine OFCCP audit, including, among other things, highly sensitive details on each employee's compensation and manual tabulations of potentially hundreds of individual "pools" of employees considered for promotion or termination during the period under review. Somehow, however, OFCCP reaches the conclusion that these proposed changes actually would *reduce* the overall burden on each audited federal contractor by roughly 1.34 hours per audit. This determination finds no support anywhere in the PRA record for this ICR, and it ignores the researched and reasoned comments submitted by EEAC and other federal contractor organizations during the pre-clearance stage of this ICR's PRA consultation process.

OFCCP's Burden Estimates Are Not Credible

For more than 30 years, EEAC's members have been providing us with practical, real-world feedback on the costs, burdens, and efforts of compliance with OFCCP-enforced requirements. In turn, these compliance cost estimates have helped public policy-makers understand the practical impacts of their proposed regulatory actions. Notably, since OFCCP's proposed revisions to this ICR were published in May, not a single EEAC member has indicated that the burdens associated with OFCCP's proposed scheduling letter and itemized listing changes would decrease their compliance burden as the agency now is representing to OMB.

OFCCP estimates, for example, that by revising its compensation data request to ask for numerous employee-specific data points, rather than summary compensation data, contractors will experience an average burden decrease of 3.36 hours. In fact, our members estimate that their burden will actually double, and in some cases *triple* (or more), given that most contractors do not maintain the new data that is being requested by OFCCP in a centralized, electronic format.

Further, OFCCP estimates that by asking for: (1) applicant, hire, promotion, and termination data by job group *and* job title (currently submitted by job group *or* job title), (2) race-specific applicant, hire, promotion and termination data (currently submitted by minority/non-minority status), and (3) promotion and termination candidate "pools," (a new requirement), contractors will experience an average increase of only two hours. Again, because OFCCP is asking for more than double the amount of data, our members estimate that their burden increase will be far more than two hours, and in some cases will increase as much three- or four-fold.

Compliance Programs is soliciting comments concerning its proposal to *extend* the Office of Management and Budget (OMB) approval of the Non-construction Supply and Service Information Collection." (Emphasis added.) Only in the last section of that notice did the agency state that it was seeking "the approval of the revision of this information [sic] in order to carry out its responsibility to enforce the anti-discrimination and affirmative action provisions of the three legal authorities it administers." The notice did not specify, or even generally describe, the nature of the significant revisions for which OFCCP now seeks OMB approval. 76 Fed. Reg. 27670, 27671.

Simply put, requiring each audited federal contractor to provide OFCCP with *more* data, *more* records, *more* manual tabulations, and *more* information at the outset of each review will not reduce overall burdens — to the contrary, it will substantially increase them. Indeed, it simply defies logic to conclude otherwise. The agency's estimates are further undermined by the fact that OFCCP actually estimates that it will take the agency nearly 20% *more* time to read contractors' responses to the expanded information collection (32 hours) than it will for contractors to gather, tabulate, draft, read, analyze, edit, and submit that information (27.01 hours).

Regrettably, a review of the "supporting statement" that OFCCP has provided to OMB reveals that OFCCP has failed to conduct any meaningful assessment of those comments critical to the agency's position. This failure runs contrary to the clear mandate of the PRA's implementing regulations, which among other things require an agency to: (1) evaluate public comments received in response to a proposed information collection; and (2) provide OMB with a summary of those comments and the actions taken in response to the comments.

OFCCP acknowledges that over *two thirds* of the comments submitted in response to its proposal questioned the agency's burden estimates as unrealistically low, in some cases by hundreds of hours per establishment. Nevertheless, the agency has added only *one* hour to its estimated *reporting* burdens, effectively ignoring the estimated burden estimates calculated by affected federal contractors. Incredibly, OFCCP also has further *reduced* the *recordkeeping* burdens associated with the information collection. For example, OFCCP's pre-clearance notice stated that the agency was seeking approval for 11,174,641 burden hours covering *108,288* contractor establishments, or roughly 103.19 hours per establishment. Since the original announcement of its proposed changes to its scheduling letter and itemized listing, OFCCP has now adjusted the number of covered contactor establishments to *171,275*, an increase of nearly 63,000 establishments.

Besides the obvious point that this significant adjustment further brings into question the reliability of any of OFCCP's burden estimates, the agency further exacerbates the point by contending that the increase in covered contractor establishments will not result in any increase in the total number of burden hours. Thus, the agency's adjustment of adding nearly 63,000 more contractor establishments without that adjustment resulting in an increase in its total burden estimate of 11,949,346 burden hours means that the agency now concludes that there will be a net reduction of more than 33 hours per establishment from its original estimate.

OFCCP also is proposing to require all contractors to submit compensation information as of the most recent February 1, regardless of the contractor's AAP year. Because most federal contractors typically set their AAP plan years on a calendar or fiscal year basis, this change will require the vast majority of contractors to run their workforce snapshot data and compensation data twice — once as part of the annual AAP update, and again on February 1, thereby effectively doubling the current burden. OFCCP's supporting statement does not address or even acknowledge this concern, however, other than to say that it "believes" that the new compensation request will result in a reduction in hours.

Last but not least, OFCCP does acknowledge the concerns expressed regarding candidate "pools" for promotions and terminations, which multiple commenters noted do not exist under normal circumstances. In response, however, the agency merely states that "[a]s to objections related to the actual pool of candidates, OFCCP concurs with the commenters supporting the proposed change." With all due respect, OFCCP cannot simply "agree" with its supporters of this proposed change without even addressing the empirical and anecdotal input it received from those commenters critical of the agency's proposal. Indeed, the PRA would be rendered effectively meaningless if an agency can simply "agree" with supportive comments and ignore critical ones.

In summary, we respectfully submit that OFCCP has failed to seriously consider, and in some cases outright ignored, most of the specific objections presented in more than two-thirds of the public comments submitted in response to its May 12, 2011 pre-clearance notice. President Obama's Executive Order 13563 requires federal agencies to "use the best, most innovative and least burdensome tools for achieving regulatory ends" and to "tailor [their] regulations to impose the least burden on society." EEAC respectfully submits that OFCCP's proposal fails to meet these standards.

Conclusion

For all of the reasons presented above, we respectfully urge OMB to reject OFCCP's proposed revisions to its Scheduling Letter and Itemized Listing, to approve the current version of this ICR without change for three years, and to condition approval of any future proposed changes on OFCCP's ability to produce accurate and objectively supported burden estimates.

We appreciate the opportunity to make our views known to OMB, and would welcome any questions you may have.

Sincerely,

Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
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July 11, 2011

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Ms. Debra A. Carr
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Re: Pre-Clearance Consultation Regarding Proposed Extension of Supply and Service Information Collection Requirements, Control Number 1250-0003, 76 *Fed. Reg.* 27670 (May 12, 2011)

Dear Ms. Carr:

The Office of Federal Contract Compliance Programs (OFCCP) has solicited pre-clearance public comment on its intention to seek approval from the Office of Management and Budget (OMB) to revise the Compliance Evaluation Scheduling Letter and Itemized Listing used to initiate routine compliance evaluations of federal contractor and subcontractor affirmative action programs. The Equal Employment Advisory Council (EEAC) appreciates the opportunity to comment, and is pleased to provide our views on the proposed revisions.

EEAC's Interest in the Proposed Scheduling Letter Revisions

EEAC is a nationwide association of employers organized in 1976 to promote practical approaches to the implementation of affirmative action initiatives and the elimination of employment discrimination in the workplace. EEAC's members are committed firmly to the principles of affirmative action, nondiscrimination and equal employment opportunity as indispensible prerequisites to a fair and inclusive workplace. Our membership includes approximately 300 major U.S. corporations, nearly all of whom are covered federal contractors or subcontractors. As such, the procedures and methodologies utilized by OFCCP in conducting compliance evaluations are of great importance to EEAC's member companies.

EEAC's directors, officers and member representatives include many of industry's most experienced practitioners in complying with OFCCP's affirmative action and nondiscrimination requirements. Collectively, an estimated 1,500 to 2,500 compliance evaluations are conducted each year at EEAC member establishments. Some

of our member companies routinely manage in excess of 20 compliance evaluations each year. Given this volume, EEAC members over the years have developed a keen understanding and appreciation for the importance of objective and efficiently managed compliance evaluations as a precondition to implementation of effective corporate affirmative action programs. They also understand how compliance evaluations that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for affirmative action initiatives.

OFCCP is proposing to expand the Itemized Listing of information required to be furnished by contractors to OFCCP at the outset of a compliance evaluation, particularly in the areas of compensation data and employment transactions (hires, promotions and terminations). In response to the May 12 *Federal Register* Notice, EEAC has evaluated the agency's proposed changes in terms of (1) their necessity for OFCCP's compliance and enforcement function, (2) their practical utility, and (3) the accuracy of the burden estimates.

Overview

OFCCP is proposing that federal contractors provide within 30 days of receipt of a Scheduling Letter initiating a compliance evaluation the following additional, new information:

- Employee-specific compensation data as of the most recent February 1 for all employees, ranging from the CEO to temporary and contract workers;
- Summary employment transaction data by job group and job title, broken out by gender and specific race and ethnic category;
- The actual pool of employees who applied or were considered for promotion;
- The actual pool of employees who were considered for termination, along with data on whether the termination was voluntary or involuntary;
- Copies of employment leave policies regarding accommodations for religious observances and practices; and
- Copies of VETS-100/VETS-100A Reports for the past three years.

When the scope of the new data requested by OFCCP is measured against the agency's estimates of contractor burden hours to produce it, it appears OFCCP's proposed changes are predicated upon two assumptions: (1) federal contractors and subcontractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly at the touch of a keystroke; and (2) in order to effectively carry out its enforcement responsibilities OFCCP must have access at the outset of a compliance evaluation to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

Neither of these assumptions is valid. OFCCP knows from past compliance evaluation experience that multiple electronic systems storing employment-related

information, mergers, acquisitions, system conversions, system upgrades, and user challenges all may inhibit a company's ability to generate desired employment data quickly. OFCCP thus cannot simply assume that technology will enable contractors to generate the new employment data with little or no time or cost burdens.

Nor is it necessary for effective enforcement for OFCCP to insist that federal contractors include in their initial desk audit submissions the full array of sensitive and confidential employment data that *might* at some point in the evaluation become relevant to a determination of compliance. It is entirely appropriate for the agency to solicit summary data at the outset of a compliance evaluation and then request additional, more detailed information when and if needed.

While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated — in fact, necessity and practical utility in light of the estimated burdens and costs are the appropriate standards. For the reasons set forth below, EEAC believes that several of OFCCP's proposed changes are fundamentally inconsistent with the principles set forth by President Obama earlier this year in Executive Order 13563 on Improving Regulation and Regulatory Review. That Executive Order requires federal agencies to "use the best, most innovative and least burdensome tools for achieving regulatory ends" and to "tailor [their] regulations to impose the least burden on society."

EEAC respectfully submits that the agency's proposal fails to meet these standards. The proposal places a disproportionate emphasis on requiring all covered federal contractors and subcontractors to routinely collect, maintain and submit to OFCCP upon 30 days' notice a wide range of personal, sensitive and commercially confidential employment information prior to any indication of a compliance-related need for it.

We now turn to the specifics of OFCCP's proposed revisions.

Scheduling Letters

EEAC does not have any concerns with respect to the proposed changes to either the standard supply and service Scheduling Letter or to the compliance check Scheduling Letter. Indeed, specifying in the standard Scheduling Letter itself the scope of compliance evaluation to be conducted — *i.e.*, establishment, functional unit, or corporate headquarters — is a welcome addition.

Itemized Listing

Item 11: Employment Transactions Data

OFCCP is proposing that the initial submission of applicant, hire, promotion and termination data be: (1) by job group and job title [rather than job group or job title], and (2) by individual race/ethnicity categories [rather than by minority/non-minority status]. The agency's estimated increase in burden per contractor for these changes is one hour — "given the widespread use of computer technology for Human Resources data entry and management."

Here is a clear illustration of the first erroneous assumption underlying OFCCP's proposed changes — the assumption that federal contractors and subcontractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly. Given the significant number and variety of job titles existing in many EEAC member companies, extracting accurate data on applicants, hires, promotions and terminations by job title is an enormously challenging and time-consuming task. One EEAC member company estimates that it will take approximately 200 hours to convert its human resource information system to one capable of generating employment data at the level recommended by OFCCP.

In addition to the increased burden, EEAC also questions the practical utility of conducting minority-subgroup statistical analyses at the individual job title level. It is true that the Uniform Guidelines on Employee Selection Procedures contemplate such analyses. To its credit, however, OFCCP over the years has elected to conduct its initial statistical analyses for all minorities and non-minorities in the context of affirmative action plan job groups. Only in cases where "indicators" of adverse impact are found at the job group level have the more refined analyses been performed at the job title level.

The reason for this traditional two-step process is based on the notion of practical utility: the vast majority of job titles in most EEAC member companies are too small to support a valid statistical analysis.[1] Accordingly, analyses are first conducted in broader job groups before moving, when and if appropriate, to job titles. At the job title level small numbers may again dictate use of non-statistical "cohort" analyses in lieu of statistical analyses.

There is no practical utility from a compliance standpoint to insist upon collecting *in all cases* employment data that is too granular to be included in most selection rate statistical analyses. Thus, there is no reason to change a process that has worked satisfactorily for many years. Allowing submission of employment transactions data by job group or job title allows contractors to submit data appropriate for the structure of

[1] Statisticians generally agree that in order to be reliable, statistical analyses of selection rates require a minimum of 30 individuals in the overall candidate pool and a minimum of 5 candidates for each of the two groups being compared. While some job titles may satisfy these minimum threshold standards, most do not.

their job titles. If as the compliance evaluation unfolds it becomes appropriate to conduct more refined analyses by job title and/or minority subgroup, additional information addressed to the potential problem areas can be submitted at that time.

While the above comments are applicable equally to hires, promotions and terminations, there are additional issues raised by OFCCP's proposed changes that are unique to promotions and terminations. With respect to promotions, OFCCP wants contractors to submit the "actual pool of candidates who applied or were considered for promotion." OFCCP also is asking contractors to provide all definitions of the term "promotion" used by the company.

Depending upon a contractor's promotion system, the burden associated with this request could be enormous. One EEAC member company indicates that the identification of promotion pools would be a manual task entailing more than a 1,000 hours annually.

The real challenge is with regard to promotions that are "noncompetitive" in the sense that there are no formal "candidate pools." Such promotions are awarded to employees individually based upon their years of service, level of performance, and eligibility for a higher level of job responsibility. Since not all employees in a job group or job title are equally ready for such advancement, requiring contractors to review and submit information on all other individuals who could have been considered for noncompetitive promotions would be an enormously burdensome task.

With respect to terminations, requesting contractors to differentiate between voluntary and involuntary terminations "where available" should not be a problem. On the other hand, requiring contractors to identify the "actual pool of candidates who were considered for terminations by gender and race/ethnicity" could be a problem in many circumstances. EEAC members estimate that identifying pools for reductions-in-force or similar restructurings would take between 25 and 50 hours annually depending upon frequency.

Aside from the reductions-in-force, contractors generally do not have "pools" of candidates they consider for termination. If OFCCP is simply suggesting that in such cases the termination "pools" be deemed to be the incumbent job group population at the beginning of the AAP year, that information already is included in the affirmative action plan requested in paragraphs 1-6 of the Itemized Listing.

Item 12: Compensation Data

OFCCP is proposing that the requirements for desk-audit submission of compensation data be changed in three ways: (1) the *date* the compensation "snapshot" is taken, (2) the *range of employees* for whom compensation information must be provided, and (3) the *scope and detail* of the compensation data requested. Each one of these changes imposes additional recordkeeping challenges and burdens on contractors.

Yet, inexplicably, OFCCP estimates that the cumulative effect of these changes will be a net reduction of 3.36 hours in the time required by contractors to collect compensation data for desk audit submission. To the contrary, one EEAC member estimates that the new requirements actually will triple the time required to prepare the compensation data for desk audit review.

Snapshot Date

Currently, many EEAC members perform their annual AAP updates and compensation analyses simultaneously at the beginning of the AAP year utilizing the same workforce information. OFCCP now wants to require all contractors to submit compensation information as of the most recent February 1 regardless of the contractor's AAP year. With the exception of those few contractors that begin their AAPs on February 1, the new requirement will require that contractors run their workforce profiles and compensation data twice — once as part of the annual AAP update and again on February 1, thereby effectively doubling the current burden.

Employees Covered

OFCCP is proposing that compensation data be provided for all employees including, but not limited to, "full-time, part-time, contract, per diem or day labor [and] temporary" employees. This too represents a significant extension of current requirements. Contractors currently are instructed to determine employee totals for inclusion in their compensation data using the same method "as that used to determine employee totals in the organizational profile for the AAP."

OFCCP's regulations do not define what constitutes an "employee" for purposes of inclusion in the organizational profile of contractors' AAPs. Many contractors exclude contract, per diem or day labor, and temporary workers from their AAPs because they are only working on the contractor's premises for a limited duration or set contract period, and are not subject to the contractor's personnel policies or compensation practices. Indeed, individual compensation for contract and temporary workers is often dictated by their employers, rather than the contractor.

The proposed change to "decouple" employee compensation coverage from the AAP organizational profile creates additional complexities and burdens in terms of extracting compensation data. Some EEAC members report that compensation information on contract and temporary employees often will be retained by their employer, or if retained by the contractor is retained in files separate and distinct from those used for regular employees. In addition, compensation on some categories of temporary employees and hourly workers are kept in a separate database because of differences in benefits.

Scope and Detail of Requested Data

Finally, OFCCP is proposing that contractors be required to submit for desk audit review not the high-level aggregate information mandated by current paragraph 11 of the Itemized Listing, but rather detailed employee-specific data including such sensitive and confidential information as base salaries and wage rates, bonuses, incentives, commissions, merit increases, locality pay, and overtime. The significance of this change to federal contractors cannot be overstated.

This proposed change illustrates the second erroneous assumption made by the agency that we described earlier — the assumption that in order to effectively carry out its enforcement responsibilities OFCCP must have access at the outset of a compliance evaluation to virtually every piece of employment (*e.g.,* compensation) data that *might* become relevant *in case* a compliance issue surfaces during the audit. At the outset of a compliance evaluation, there is no reason to assume that there exists a compensation compliance issue that warrants requesting such a comprehensive list of personal, confidential information for the entire workforce.

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

Compensation information can be highly sensitive. As one moves up the management ladder to the top of an organization, it becomes increasingly easy to associate compensation levels with specific jobs (and individuals), even in the absence of employee names. OFCCP's traditional willingness to code names, therefore, is of little comfort with respect to the compensation of a contractor's most valued employees. Disclosure of compensation information either externally to competitors, or internally to the workforce, can have significant adverse consequences. For this reason, compensation figures are among contractors' most sensitive employment information.

In paragraph 10 of the agency's justification statement — titled "Assurance of Confidentiality"— OFCCP in fact acknowledges that "much of the employment data that OFCCP collects as a result of the requirements within this activity is viewed by contractors who submit it as extremely sensitive." OFCCP then states, however, that the Labor Department's rules implementing FOIA protect contractors by permitting them to object to public disclosure of information and, if necessary, to seek administrative and judicial review of the agency's decision. But reliance upon the Labor Department's FOIA rules is not enough to assure nondisclosure because "Congress made clear both that the federal courts, and not the administrative agencies, are ultimately responsible for

construing the language of the FOIA ... and that agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality." Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

EEAC believes that the appropriate balance between the interests of OFCCP and federal contractors with respect to compensation lies in the two-step evaluative process that OFCCP has utilized in the past in which aggregate information is furnished initially and additional detailed information is furnished on an as needed basis as the investigation proceeds.

Item 13: VEVRAA Support Data

OFCCP proposes adding a new paragraph 13 to the Itemized Listing, requiring the submission of VETS-100 and/or VETS-100A Reports for the last three years. In its justification statement, OFCCP states that since contactors already are required to file these Reports, there will be no additional burden for complying with the new requirement. While it is true that contractors must complete these forms, OFCCP's proposal will create new recordkeeping obligations.

Specifically, the DOL's Veterans' Employment and Training Service, which is responsible for the VETS-100/100A forms, only requires contractors to keep VETS-100 forms for two years and VETS-100A forms for one year. Thus, under OFCCP's proposal, contractors would need to retain their VETS-100/100A Reports for three years, rather than the two or one. Accordingly, there is an increase in the recordkeeping burden imposed by OFCCP that is not accounted for under OMB Control Number 1293-0005 that should be accounted for in this information collection request.

Item 8: Employment Leave Policies

Requiring the creation and/or submission of employment leave policies does add a new compliance burden. OFCCP estimates that it would take 2 hours to prepare a religious accommodation policy. Our members estimate that it would take approximately 20 hours to create, approve and publish a religious accommodation policy; an additional 15 hours to create related processes for such things as education and monitoring of accommodations; and 5 hours per year to maintain the policy on an ongoing basis. Notwithstanding these additional burdens, the new item 8 is not duplicative of any current requirement and EEAC does not object to its inclusion in the Itemized Listing.

Item 9: Collective Bargaining Agreements

OFCCP proposes to modify the phrase "other information" so as to extend beyond the current focus on employee mobility and promotion, to include "any other documents ... that implement, explain, or elaborate on the provisions of the collective bargaining agreement." The justification statement indicates that the intent is to "clarify for contractors specific information requested." No change in burden hours is contemplated.

This proposed change converts a narrowly-focused request for information pertaining to employee mobility and promotions into an open-ended request for all documents that are in any way related to implementation of the collective bargaining agreement. It is hard to agree that this is a "clarification," much less one with no associated burdens.

EEAC recommends that only the collective bargaining agreement itself be required as part of the initial desk audit submission. If during the course of the evaluation specific provisions of the contract become relevant to a compliance issue (most typically the seniority and compensation provisions), additional documentation can be requested at that time.

Item 10: Goals Progress Reports

EEAC does not object to changing the time period for the goals progress reports from the preceding year to the "immediately" preceding year.

Conclusion

EEAC's comments articulate the practical impact OFCCP's proposed changes to the Scheduling Letter and Itemized Listing will have on federal contractors and subcontractors. We have described the operational impact the proposed changes are likely to have as well as the additional financial burden imposed. In addition, we have cautioned OFCCP against placing undue emphasis on technology as justification for unrealistically low burden cost estimates, and have questioned OFCCP's assumption that effective enforcement is dependent upon having access to comprehensive employment data at the earliest stages of a compliance evaluation. EEAC believes that OFCCP has significantly underestimated the burdens the new requirements will place on contractors, and overestimated the benefits to be derived by the agency.

Moreover, the proposed changes to the scheduling letter and itemized listing do not exist in isolation. They are part of a more comprehensive OFCCP effort to update all of its enforcement regulations, including those protecting the rights of covered veterans. In addition to this comment letter, EEAC today is also filing written comments on OFCCP's Notice of Proposed Rulemaking – Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00). As our comments on that proposal point out, the excessive and unnecessary paperwork requirements/inadequate burden estimates inherent in the proposed scheduling letter changes also are reflected in the veterans AAP proposal.

In addition, it is reasonable to assume that OFCCP's approach to regulatory reform reflected in the Scheduling Letter and covered veteran proposals is likely to carry over to the anticipated regulatory initiatives involving individuals with disabilities and women and minorities in the construction industry. EEAC believes that, taken

collectively, the new compliance responsibilities proposed for federal contractors and subcontractors will significantly undermine rather than further the objective of Executive Order 13563 to promote "economic growth, innovation, competitiveness and job creation."

We appreciate the opportunity to make our views known at the pre-clearance stage, and would welcome any questions you may have.

Sincerely,

Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget

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July 11, 2011

Via Federal eRulemaking Portal: http://www.regulations.gov

Debra A. Carr
Director, Division of Policy, Planning,
and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W., Room C–3325
Washington, DC 20210

Re: **Joint Comments of the Equal Employment Advisory Council, the U.S. Chamber of Commerce, and the HR Policy Association on the Office of Federal Contract Compliance Programs' Notice of Proposed Rulemaking Pertaining to Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00)**

Dear Ms. Carr:

The Equal Employment Advisory Council ("EEAC"), the U.S. Chamber of Commerce ("Chamber"), and the HR Policy Association respectfully submit these joint comments on the Office of Federal Contract Compliance Programs' ("OFCCP") Notice of Proposed Rulemaking ("NPRM") pertaining to the affirmative action and nondiscrimination obligations of contractors and subcontractors under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212, notice of which was published in the *Federal Register* on April 26, 2011. 76 Fed. Reg. 23358.

The signatories to this letter collectively represent the interests of most U.S. businesses subject to — and the human resources executives responsible for managing compliance with — OFCCP's affirmative action, nondiscrimination, and recordkeeping regulations. Our members are the nation's private-sector employers — job creators of every size, sector, and region that collectively employ in the United States tens of millions of workers, hundreds of thousands of whom are veterans protected by OFCCP's regulations, and many thousands more whose service does not qualify them for such protection.

Although we strongly support the mission of helping our nation's veterans successfully re-enter civilian employment, we respectfully submit that OFCCP's proposal is not a regulatory framework that will help us achieve that mission. Indeed, based on the research and analysis we have performed since the NPRM was published, and the extensive feedback we have received from hundreds of our

members on its likely real-world impact, we believe that the proposed rule's extraordinary costs and disproportionate emphasis on paperwork will have a substantial negative impact not only on veterans employment, but on employment in general.

It was these very reasons that led the three undersigned organizations, along with the National Association of Manufacturers ("NAM"), The Associated General Contractors of America ("AGC") and the Center for Corporate Equality ("CCE"), to submit to you on July 5, 2011 a letter urging OFCCP to withdraw its proposed rule and to begin working with the business community and other interested organizations and experts on crafting an alternative proposal that would meaningfully improve the employment situation for our nation's veterans. We reiterate that recommendation now.

As we stated in our July 5 letter, we believe that OFCCP's proposed rule is fundamentally inconsistent with President Obama's January 18, 2011 Executive Order on Improving Regulation and Regulatory Reform (Executive Order 13563), which among other things requires federal agencies: (1) to use the best, most innovative, and least burdensome tools for achieving regulatory ends; (2) to tailor their regulations to impose the least burden on society; (3) to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; and (4) to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.

These joint comments set forth in greater detail how and why we believe OFCCP's proposal falls well short of the requirements established by Executive Order 13563. They will attempt to convey the ardent feedback we have received from our respective members that OFCCP's proposal will do little to significantly increase employment opportunities for qualified protected veterans, and much to increase the costs and burdens of regulatory compliance at a critical time in the nation's, and their own, economic recovery. And it will set forth specific comments and recommendations that we urge the agency to consider in determining how, or even *whether*, to move forward with a final rule.

STATEMENT OF INTEREST

The members of EEAC, the Chamber, and HR Policy Association collectively comprise a significant portion, if not a majority, of the roughly 285,000 federal contractor establishments subject to OFCCP's affirmative action compliance requirements applicable to covered veterans. These companies and organizations value the service that our nation's veterans have provided to our country, and the skills they contribute each day as members of the civilian labor force. Indeed, many of our members engage in well-publicized, active and effective recruitment efforts for veterans, and many have established programs across the country that provide career-related support services not only to the veterans in their employ, but to their family members as well. Individually and collectively, our members thus have a significant stake and interest in ensuring that OFCCP's regulatory framework strengthens the employment situation for our nation's veterans, and facilitates the effective implementation and enforcement of OFCCP's nondiscrimination and affirmative action compliance requirements pertaining to covered veterans.

EQUAL EMPLOYMENT ADVISORY COUNCIL

EEAC is the nation's largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership now includes approximately 300 of the nation's largest private-sector corporations, who collectively employ more than 19 million workers in the United States alone. Nearly all EEAC member companies are subject to the affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations, and EEAC's directors, officers, and member representatives include many of the industry's most experienced practitioners in the field of OFCCP compliance.

U.S. CHAMBER OF COMMERCE

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. Significant portions of the Chamber's membership are federal contractors and subcontractors subject to OFCCP-enforced compliance requirements. In addition, the Chamber also represents many state and local chambers of commerce and other associations which, in turn, represent many additional contractors and subcontractors.

HR POLICY ASSOCIATION

HR Policy Association is a public policy advocacy organization representing the chief human resource officers of major employers. The Association consists of more than 325 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, the members of HR Policy Association employ more than 10 million employees in the United States, nearly 9 percent of the private-sector workforce. They have a combined market capitalization of more than $7.5 trillion. Most of the association's member companies are federal contractors subject to OFCCP-enforced recordkeeping and compliance requirements.

OVERVIEW

OFCCP's stated primary objective in the NPRM is to "facilitate the process" of connecting job-seeking protected veterans with those federal contractors who are hiring, and helping those veterans "succeed once they are employed." However, in the absence of a regulatory framework that will effectively and efficiently further those objectives we cannot support levying a minimum of $825 million in first-year, additional regulatory burdens on the contracting community, and a minimum of $727 million in additional annual costs thereafter. In its current form, the NPRM fails to adequately address either the need for new regulation, or the significant amount of additional contractor time and resources that would be required to comply.

For instance, thus far, OFCCP has not provided a meaningful assessment as to why, having just revised its Section 4212 regulations in 2007, contractors' affirmative action efforts with respect to

protected veterans are not achieving the desired results. The NPRM cites to unemployment statistics contained in a report published by the Department of Labor's Bureau of Labor Statistics (BLS), but fails to acknowledge BLS' conclusion in that report: that there is no statistical difference between the unemployment rates of non-veterans and Gulf War-era II Veterans (the group of veterans upon which the NPRM is based). Further, BLS determined that the unemployment rate for all veterans is actually lower than the unemployment rate of non-veterans. There is no question that the unemployment rates for both groups are regrettable, but that alone cannot justify the extraordinary costs of OFCCP's proposal.

To OFCCP's credit, it is seeking to create four broad categories of benefits: (1) connecting job-seeking veterans with contractors; (2) enabling contractors to better assess their affirmative action efforts; (3) ensuring that contractors understand and effectively communicate their affirmative action obligations to their workforces and third parties; and (4) permitting OFCCP to conduct and complete compliance evaluations more efficiently. After reviewing the proposed changes with our respective members, however, we believe that these benefits either are already accomplished through OFCCP's existing regulations or can be achieved through alternative, less burdensome means. We will address each in turn after setting forth our comments on the proposal's expected, and significant negative economic impact.

A Correct Analysis of the NPRM's Economic Impact Yields a Total First-Year Annual Cost to Private-Sector Employers of at Least $825 Million, and Yearly Costs Thereafter of at Least $727 Million

OFCCP's analysis of the proposal's economic impact conclude that it would impose additional annual compliance costs on covered contractors of slightly more than $60.6 million.[1] The agency's analysis, however, contains significant errors and omissions, which when corrected results in an annual compliance cost of at least $825 million and up to $1.09 billion in the first-year following the rule's effective date, and yearly costs thereafter of at least $727 million and up to $993 million.[2] We now turn to an explanation of why the agency's burden estimates significantly understate the true economic impact its proposal would have on employers.

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[1] OFCCP estimated the costs of the proposed rule in two components: (1) new items covered by the accompanying Paperwork Reduction Act (PRA) time burden calculation; and (2) additional compliance items not covered by the PRA notice. For the PRA items, OFCCP estimated the time burden to be 2,324,502 hours per year. The agency estimated that 52% of these hours would be spent by managerial and professional staff at a compensation rate of $48.74 per hour ($29,457,019), and that the remaining 48% of these hours would be spent by administrative support staff at a compensation rate of $23.25 per hour ($12,970,721). The agency also assumed an additional $418,129 for equipment and materials, for a total PRA cost estimate of $42,845,869 per year. For the non-PRA items, OFCCP estimated a total compliance time burden of 4.5 hours per contractor establishment, and further assumed that only 108,288 federal contractor establishments would be affected by the rule. The agency used the same allocation and rates of managerial/professional and administrative labor as it used for the PRA analysis. Based on the agency's assumption that only 108,288 contractor establishments would be affected by its proposal, the non-PRA component of OFCCP's cost analysis yields a total of $17,788,643 in annual employer compliance costs. The two cost components (PRA and non-PRA) estimated by OFCCP total $60,670,691 in annual employer compliance costs for the new or expanded requirements of the proposed rule, or roughly $560 per establishment assuming that only 108,288 establishments are covered.

[2] The higher end of the cost range reflects the higher end of the ranges for general staff training and managerial training as discussed below.

OFCCP Has Understated by More Than 175,000 the Number of Federal Contractor Establishments That Will Be Impacted by Its Proposal

The first fundamental error in OFCCP's economic impact analysis is the agency's estimate that only 108,288 federal contractor establishments are subject to its jurisdiction and thus would be impacted by the proposal. This figure, however, is inconsistent with the most recently available data on the number of federal contractor establishments operating in the United States. In 2010, the Department of Labor's Veterans' Employment and Training Service ("DOL-VETS") reported receiving individual VETS-100A Reports from 285,390 such establishments.[3] Moreover, OFCCP's own website "Facts on Executive Order 11246 – Affirmative Action," last revised on January 4, 2002 but which remains posted on OFCCP's website,[4] states that "OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments)," for a total of approximately 192,500 establishments. OFCCP's affirmative action requirements pertaining to covered veterans apply to both non-construction and construction contractors.[5]

The source of OFCCP's underestimate of the number of affected establishments appears to be the agency's improper reliance on Equal Employment Data System ("EEDS") data from the U.S. Equal Employment Opportunity Commission's ("EEOC") Employer Information Report (EEO-1). The NPRM states that 2009 data from EEDS "showed that there were 108,031 Federal contractor and subcontractor establishments under OFCCP jurisdiction," a figure which the agency then used throughout its analyses of the proposal's economic impact.[6] But as OFCCP should be aware, and as the agency itself acknowledges on its website, EEDS data exclude tens of thousands of *additional* federal contractor establishments that are in fact subject to the agency's jurisdiction, and which would be required to comply with the agency's proposal. These non-EEDS establishments include those with fewer than 50 employees and which therefore are permitted under EEOC rules to file a different "type" of EEO-1 Report generally not included within the EEDS database, as well as all of the establishments of those second and lower-tier federal subcontractors that do not employ at least 100 employees, for which no EEO-1 Report is required.

OFCCP's proposed rule, however, covers all subcontractors holding one or more single covered contracts valued at either $50,000 (if entered into prior to December 1, 2003) or $100,000 (if entered into on or after December 1, 2003). Since a separate VETS-100A Report is required for all establishments of a prime contractor or subcontractor at any tier holding at least one federal contract valued at $100,000 or more, the VETS-100A data serve as a much more accurate and reliable indicator of the number of establishments covered by OFCCP's proposal, and we find it curious that the agency chose not to use those data in its analysis of the NPRM's economic impact.

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[3] See DOL-VETS Annual Federal Contractor Reporting Comparison Table, January 31, 2011, attached as Exhibit A.
[4] See www.dol.gov/ofccp/regs/compliance/aa.htm, attached as Exhibit B.
[5] 41 C.F.R. §§60-250.2(i), 60-250.5, 60-300.2(i), and 60-300.5. See also OFCCP "Compliance Assistance – Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended," attached as Exhibit C.
[6] OFCCP added to this figure 257 post-secondary institutions it believes also are subject to its jurisdiction.

Correcting for just this one single error alone — even without accounting for all of the other errors and omissions in OFCCP's economic analysis — results in a total economic impact of $159.8 million, a figure significantly greater than the definition of an "economically significant" rule under Executive Order 12866, and one which would place the proposed regulation well within the definition of a "major rule" under the Congressional Review Act.[7] As explained in more detail below, however, accounting for the other errors in the agency's analysis results in a total cost impact that is several hundred million dollars higher than OFCCP's estimate.

Moreover, this fundamental error and the additional errors identified below raise serious questions about the quality and thoroughness of the Department of Labor's internal review process and the review conducted by the Office of Management and Budget's Office of Information and Regulatory Affairs.

OFCCP's Time Estimates Significantly Understate or Ignore the Actual Amount of Time That Federal Contractor Personnel Will Spend Complying With New Requirements

We also believe that OFCCP's estimates of many of the proposal's economic costs are largely based on hypothetical values of the amount of time federal contractors will be required to spend to comply. For many of the proposal's specific requirements, OFCCP has provided no source or empirical basis for its time estimates, and our members have told us that the agency's time burden estimates are implausibly, indeed even "laughably" low.

As the agency is well-aware, these time estimates are critically important to the computation of the total economic costs of the proposed rule. Each one hour variation in the annual compliance time burden for human resource management professionals in a typical covered establishment causes the estimated total annual economic impact to change by $13,909,908, based on the 285,390 establishments reported to DOL-VETS on its 2010 VETS-100A Report, and the average hourly compensation cost of managerial/professional labor at $48.74 per hour, as assumed by OFCCP.

OFCCP's failure to identify any empirical basis for many of its time burden assumptions has foreclosed meaningful stakeholder comment on these assumptions, largely because the agency has elected not to provide the public with an adequate amount of time to conduct independent experiments or statistically reliable surveys to determine the true amount of time that the agency's proposed compliance tasks would require. Indeed, the signatories to this letter requested reasonable comment deadline extensions of 60 or 90 days to allow us to perform such research, which we contend would have provided OFCCP with valuable information on exactly how much time human resources practitioners and others actually would need to do what the proposal requires. OFCCP instead elected to extend the comment period by only 14 days.

The additional 14 days did not provide us with sufficient time to conduct the surveys, interviews, and experiments we believe a rulemaking of this magnitude calls for, especially in light of OFCCP's failure to explain the basis for its own time burden estimates. However, in the limited time provided by the agency, EEAC was able to gather feedback from more than 50 of its member

[7] 5 U.S.C. §804(2).

companies, and the Chamber was able to conduct a number of structured interviews with experienced human resource managers to assess the likely time requirements for compliance with major elements of the proposed rule. Our comments and compliance cost computations presented below reflect the findings and conclusions of this research.

OFCCP Has Omitted Critical Compliance Requirements From Its Economic Impact Analysis

OFCCP failed to include in its economic impact analysis two important compliance cost items: (1) the cost that covered or potentially covered employers will incur to read and comprehend the new rules; and (2) the cost of conducting the mandatory all-employee and management meetings required by proposed sections 60-250.44(g)(2)(ii) and (iii), and proposed sections 60-300.44(g)(2)(ii) and (iii).

With respect to the first item, by its own terms, OFCCP's NPRM is a "major revision" of the compliance requirements regarding protected veterans. The explanatory preamble and regulatory text fill 67 pages of small print in the *Federal Register*, and federal contractor personnel will need time simply to read and understand their obligations under the rule if finalized as proposed. We acknowledge that this burden is one that would be incurred only in the first year following the rule's implementation, rather than a recurring annual cost.

To estimate the time needed to read and comprehend the rule, the Chamber conducted an experiment in which three college graduates were assigned to read the NPRM. The average reading time was three hours. BLS data from the Employer Cost of Employee Compensation series for the first quarter of 2011 show that the average compensation for managers in the private sector was $57.35 per hour (BLS Series ID CMU2010000110000D). Assuming that on average two managers in each covered establishment would need to become familiar with the new requirements, the initial familiarization cost per establishment would be $344.10. Based on 285,390 covered establishments, the total first year additional cost for this requirement would be $98,202,699. Moreover, prudent business practice in many cases (especially for publicly-traded companies) also would require that advice of legal counsel be obtained, which would further increase the initial familiarization cost. Therefore, the amount estimated here should be considered a lower bound on the potential compliance burden for initial familiarization.

With respect to the second item, OFCCP's proposed rule would require each federal contractor to conduct annual "all employee" meetings at all of its establishments "to discuss its affirmative action policies, explain contractor and individual employee responsibilities under these policies, and identify opportunities for advancement." 41 C.F.R. §§60-250.44(g)(2)(ii) and 300-44(g)(2)(ii). The proposal also would require separate meetings with all executive, management, and supervisory personnel "to explain the intent of the policy and individual responsibility for effective implementation." 41 C.F.R. §§60-250.44(g)(2)(iii) and 300-44(g)(2)(iii).

Complying with these proposed requirements involves both the development of the meeting materials and, obviously, conducting the meetings. Inexplicably, however, OFCCP's cost analysis included only the costs of developing the meeting materials and not the costs of holding the meetings themselves. The true cost of implementation is comprised of the cost of assembling and removing from regular productive work all of the contractor's personnel who must participate in these mandatory

Annual Review of Physical and Mental Qualifications

OFCCP also has underestimated the amount of time that federal contractors will need to comply with the proposed rule's requirement to annually review all physical and mental job qualifications. In its analysis, OFCCP states that the aggregate time burdens of complying with this requirement across all federal contractors would be 270,649 hours across 108,288 establishments, or roughly 2.5 hours per establishment. Correcting for the actual number of establishments affected by OFCCP's proposal yields a total aggregate time burden of 713,475 hours. Using OFCCP's composite hourly rate of $36.50 yields a total cost impact of this requirement of $26,041,838.

Based on feedback from EEAC members and the Chamber's structured interviews with experienced human resources practitioners, however, we believe that the actual amount of time each establishment will need to comply with this requirement is a minimum 4 hours per year. Using this time burden estimate, the total cost impact of this requirement is actually $41,666,940.

Annual Review of the Effectiveness of Outreach and Recruitment Efforts

OFCCP has also significantly underestimated the amount of time that federal contractors will need to comply with the proposed rule's requirement to annually review the effectiveness of each establishment's outreach and recruitment efforts. In its analysis, OFCCP states that such an analysis will take each establishment 20 minutes. In fact, based on feedback from EEAC members and the Chamber's structured interviews with experienced human resources practitioners, we believe that it will take a minimum of 1.5 hours to perform this review.

Using this time burden estimate and correcting for the number of establishments affected by OFCCP's proposal increases the compliance costs of this requirement from OFCCP's estimate of $1,383,379 to $15,625,103.

Annual Collection and Tabulating of Veterans-Related Applicant and Hire Data

OFCCP's proposal would require federal contractor establishments to collect, maintain, and in some cases tabulate or calculate eleven new veterans-related data elements. The agency estimates that each establishment will require one hour per year of non-paperwork time to comply with this requirement, and an additional 6 minutes per year of paperwork time. Here too, respondents to EEAC's member survey and participants in the Chamber's structured interviews stated that complying with these requirements would take much longer than OFCCP has estimated: a minimum of 6 hours per year, and in many cases much longer (for larger establishments with higher numbers of applicants and hires).

Using this time burden estimate and correcting for the number of establishments affected by OFCCP's proposal increases the compliance costs of this requirement from OFCCP's estimate of $4,347,763 to $62,500,410.

Annual Calculation of Veterans Hiring Benchmarks

OFCCP's NPRM estimates that it will take each contractor establishment 1 hour of non-paperwork time to perform a newly required assessment of five factors to calculate annual veterans hiring benchmarks. Based on responses to EEAC's member survey and the feedback from participants in the Chamber's structured interviews of experienced human resources managers, we believe that this requirement will take a minimum of 4 hours per year.

Using this time burden estimate and correcting for the number of establishments affected by OFCCP's proposal increases the compliance costs of this requirement from OFCCP's estimate of $3,952,512 to $41,666,940.

Space and time do not permit the critique and revision of each of the remaining items in the NPRM. In almost every case, however, our members have informed us that OFCCP's estimates are far too low. We hope that OFCCP will take seriously its obligation to provide the public with a fair and reasoned basis for the parameters used in its cost burden analysis. And we believe that a more careful consideration of the cost burdens should direct OFCCP to identify more cost-effective alternatives to many of the other provisions that we have not explicitly analyzed in these comments.

Economic Costs of the Proposal Significantly Outweigh Its Benefits

All told, the total economic cost of the proposed regulation, as revised to include items of compliance cost omitted by OFCCP and to correct some of the errors and incorrect assumptions underlying OFCCP's computations, is a minimum of $825 million for the initial year, and a minimum of $727 million for each successive year.

We do not believe that the rule's economically significant costs can be reduced to a point where they will be outweighed by its anticipated benefits, as required by Executive Order 13563. This conclusion led the undersigned on July 5 to formally request that OFCCP withdraw its proposal, and to begin working with the business community and other interested parties on crafting an alternative proposal that would meaningfully improve the employment situation for our nation's veterans. We reiterate that recommendation now. However, in the interests of conveying the additional substantive feedback we have received from our respective members on the proposed rule, we offer the following additional comments for the agency's consideration.

OFCCP'S GOAL OF CONNECTING VETERANS AND CONTRACTORS CAN BE ACHIEVED THROUGH MORE EFFECTIVE AND LESS BURDENSOME MEANS

According to OFCCP, the need for the NPRM is that the agency's current Section 4212 regulations have remained "largely unchanged" since their inception in 1976, while increasing numbers of skilled veterans are "returning from tours of duty in Iraq, Afghanistan, and other places around the world," but facing "substantial obstacles" in finding employment. OFCCP proposes three significant changes to the 4212 regulations to assist veterans in overcoming these obstacles and "connecting" them to employers. Specifically, contractors would be required to: (1) submit to the state or local employment service job postings in the "manner and format" required by the employment

service; (2) provide certain additional disclosures to the state employment service; and (3) enter into formal linkage agreements with a number of outreach groups. Each area is fully addressed below, but we first comment on OFCCP's justification for these changes.

OFCCP Has Not Demonstrated Sufficient Need for New Regulation

The Department of Labor tracks the unemployment rates for veterans "returning from tours of duty in Iraq, Afghanistan, and other places around the world," as part of a group called "Gulf War-era II Veterans," which is defined as those men and women who served in the Armed Forces from September of 2001 through the present. In support of the NPRM, OFCCP cites to a BLS report from March of 2010 indicating that: (1) the 2009 annual average unemployment rate for "veterans" 18 to 24 years old (21.1%) was higher than the unemployment rate for non-veterans (16.6%) in that age group; and (2) that the unemployment rate for "veterans" 25 to 34 years old (11.1%) was higher than the rate for non-veterans (9.8%) in the same age group. While accurate, these figures reflect the unemployment rates, by age group, for all of the veterans categories reported by BLS, not only Gulf War-era II veterans. OFCCP also omits from the NPRM several important BLS conclusions.

First, with respect to the unemployment rates of Gulf War-era II Veterans, BLS concluded that "[i]n general, Gulf War-era II veterans had unemployment rates that were *not statistically different from those of nonveterans of the same age group and gender*." (emphasis added) Second, BLS concluded that the overall jobless rate for veterans (8.1%) was actually lower than the rate for non-veterans (9.1%).

The updated BLS report containing these same data categories and employment rates for 2010, which was published in March of 2011, reached similar conclusions with respect to Gulf War-era II Veterans (there was no statistical difference in the unemployment rates by age group and gender) and the overall jobless rates of all veterans (8.7%) and non-veterans (9.4%). The report also states that the unemployment rate for Gulf War-era II Veterans who had served in Iraq at any time since March of 2003 or in Afghanistan at any time since October of 2001 had an unemployment rate of 14.3%, which was not statistically different from Gulf War-era II Veterans who had served elsewhere during that time (11.4%).

We bring these facts to OFCCP's attention not to marginalize the challenges our nation's veterans face when returning from overseas. Indeed, the statistics do not alleviate the fact that unemployment rates remain alarmingly high for veterans and non-veterans alike. However, the fact remains that if DOL has concluded there is no statistically significant difference in veteran and non-veteran unemployment rates, then OFCCP's current regulatory requirements are working as intended and the agency cannot justify costly changes to those regulations that we submit are little more than an enormous increase in paperwork burdens.

Ironically, by OFCCP's own estimation, the cost of creating and retaining the paperwork required under by the NPRM is roughly two-and-one-half times that of the non-paperwork costs. Put another way, OFCCP would have contractors expend two-and-a-half more times the resources documenting their good faith efforts for covered veterans than they would engaging in those efforts. This is particularly troubling, as Executive Order 13563 requires Federal agencies to reduce the

regulatory burden imposed on the public, and DOL only recently submitted to the White House a regulatory plan touting OFCCP's efforts to "minimize the burden on the regulated community." Contractors' already limited resources would be better spent on recruiting and engaging in good faith efforts to attract qualified veterans to the civilian workforce, rather than documenting linkage agreements and double-checking the work of the state employment services. As such, we propose the following alternatives.

Contractors Should Be Given the Discretion To Determine How To Best Reach Qualified Veteran Candidates

Connecting veteran job seekers with contractors requires two basic elements: (1) a published job vacancy of which qualified veterans are aware; and (2) qualified veterans to apply to the vacancy. Federal contractors, of course, are responsible under OFCCP's current Section 4212 regulations for the first part of that equation. We respectfully submit that contractors know best which recruitment sources are likely to lead to a successful "connection" with qualified veteran job seekers. While OFCCP's guidance in this area is welcomed, the NPRM is overly prescriptive, unnecessarily limits the options available to contractors, and constrains already limited resources by requiring contractors to submit postings in the "manner and format" required by state or local employment services and by establishing formal "linkage agreements" for each contractor establishment.

We urge OFCCP to reconsider its proposal on the "manner and format" of contractors' job listings with the state and local employment services, and stand by the compromise offered to the contracting community in the Final Rule of the current Section 4212 regulations published in 2007. As OFCCP may recall, the mandatory job listing clause was a source of significant concern to the contracting community four years ago when OFCCP last revised its Section 4212 regulations. During the rulemaking process for the agency's current veterans affirmative action regulations at 41 C.F.R. Part 60-300, OFCCP initially proposed that the mandatory job listing clause require each eligible position to be listed "with the appropriate employment service delivery system" (essentially, the local employment office), thereby eliminating the possibility of posting with America's Job Bank to comply with this requirement. Several employer associations, including EEAC, expressed significant concern that such a requirement would be unduly burdensome and challenging due to the "different protocols for listing jobs that exist in the various local employment services offices."

In response to these concerns, OFCCP offered the contracting community several compromises: (1) to permit contractors to post at the state or local employment office; and (2) to permit postings in a variety of ways, including via mail and electronic submissions. This was clearly articulated in OFCCP's final rule for 41 C.F.R. Part 60-300, which stated:

> However, OFCCP appreciates the difficulties contractors may face if they must list job openings with multiple employment service delivery systems, particularly if those systems maintain different methods for posting job openings or if the contractor must act to fulfill multiple job openings in different geographical locations in a short period of time.

> A contractor may satisfy the mandatory job listing requirement by submitting job listings to the appropriate employment delivery system in a variety of ways, including via mail, facsimile (FAX), electronic mail, or other electronic postings.
>
> OFCCP believes that this approach allows contractors the necessary flexibility to determine the most effective way to comply with the mandatory job listing requirement, depending on the number, timing, and location of the positions to be filled.

72 Fed. Reg. 44397. In addition to these statements, OFCCP published the following FAQ on its website:

> Is there a particular way contractors must list employment openings with the appropriate employment delivery system?
>
> A contractor may satisfy the mandatory job listing requirement by submitting job listings to the appropriate employment delivery system in a variety of ways, including via mail, facsimile (FAX), electronic mail, or other electronic postings. The vast majority of the state workforce agency job banks accept job listings via the Internet. Contractors may use third parties, such as private or non-profit sector job banks, Internet gateway and portal sites, and recruiting services and directories, to assist them with the transmission of job listings to the appropriate employment service delivery system.

Without any notice or opportunity for public comment, OFCCP has since changed the answer to that FAQ on its website. But the 2007 final rule makes clear that what OFCCP is now proposing is far more than a "clarification." The challenges that contractors faced in 2007 remain today. Without a centralized mechanism to submit these job postings — not unlike former offerings such as America's Job Bank or DOL's once-contemplated web portal, the Veterans' Job Clearinghouse — the true "burden" of this task is enormous, and frankly, incalculable. Moreover, OFCCP should make it clear that Federal contractors may use third-parties to assist them with the transmission of job listings to the appropriate employment service delivery system.

Indeed, to mandate that every federal contractor establishment post its jobs directly with the appropriate job service office in the manner and format the office requires is a monumental task, particularly when considering that there is no standard process across the states by which jobs can be submitted. This means that each state — and each local employment service office — could impose different requirements that may or may not be known by the contractor, with a simple misunderstanding of requirements yielding a violation of the regulations. As mentioned above, calculating the true economic impact of this proposal is almost impossible, as doing so would require a comprehensive inventory of each state and local agency's individual manner and format requirements, and then an application of the results of that inventory to more than 285,000 contractor locations across the country. Once more, the time and effort involved in staying abreast of state employment service nuances in submitting job postings requires an effort that simply has not been proven to be more effective than what is engaged in at the present.

Moreover, the NPRM cites statistics that call into question the usefulness of the state employment services as a source of attracting and retaining qualified veterans. According to OFCCP, state employment services referred 75,657 protected veterans to federal contractors between July 1, 2008 and June 30, 2009. Even assuming OFCCP's estimate of 108,288 federal contractor establishments is correct (which we have clearly demonstrated it is not), the agency's data indicate less than one protected veteran referral per establishment. This is not to suggest that the state employment services cannot or do not ever provide valuable veteran referrals. Such figures, however, simply cannot be used to justify the burden of posting in the "manner and format" required by each state employment service.[10] Rather, contractors should be given the discretion to utilize the resources most likely to produce qualified applicants.

This applies equally to OFCCP's proposed linkage agreements. 41 CFR 60-300.44(f) already requires contractors to engage in external outreach and positive recruitment for protected veterans. The current regulations also provide that contractors must assess the effectiveness of those outreach efforts. The contracting community, of course, welcomes any OFCCP guidance on possible recruitment sources, such as the National Resource Directory described in the NPRM. OFCCP should not presume, however, which sources will be effective in recruiting and retaining qualified veterans.

Indeed, the notion that contractors in 2011 and beyond will successfully generate greater numbers of veteran job applicants by signing more than 750,000 linkage agreements and posting their jobs with hundreds of state and local job services offices in the specific manner and format each office requires ignores the modern-day methods and mechanisms employers use to recruit qualified applicants, as well as the methods and mechanisms used by veterans to find and express interest in those jobs. It also ignores the fact that many contractors already actively utilize numerous resources to recruit veterans, including those currently mandated by the agency's existing regulations.

The recruitment efforts, as proposed by OFCCP, dictate a certain process that largely ignores today's technology and the far reach of the Internet. In our society today, a great deal of recruiting is conducted online, thus making a global community seem far more local. Therefore, to impose restrictions requiring "local" recruitment efforts seems to have the effect of limiting the contractor community to efforts aimed at small pockets of the veteran community. Our members prefer to continue to raise awareness of their commitment to the employment of veterans by utilizing resources that allow individuals access to all of their opportunities, not only those in their immediate geographic locale.

By allocating an employer's limited resources to this "one size fits all" solution, the proposal will restrict an employer's ability to make judgments about outreach avenues that will be most effective in particular localities. Moreover, the negotiation, drafting, and administration of hundreds of thousands of agreements also likely will overwhelm these agencies, who like federal contractors will spend their limited resources on these administrative tasks rather than on working with veterans (and others) to help them find and secure good jobs.

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[10] Likewise, these figures do not justify OFCCP's proposal that contractors provide the state employment services with additional information such as the names of contractor hiring officials and third-party search companies.

At a bare minimum, if OFCCP insists upon imposing this burden on the contracting community, we urge the agency to consider the impact it will have on those contractors that maintain multiple establishments. In its NPRM burden estimates, OFCCP uses the terms "contractor" and "establishment" interchangeably. While this distinction may be minimal (or even irrelevant) for many small contractors, it is huge for large contractors that maintain hundreds, or even thousands of establishments across the country. For example, one EEAC member company commented that it had approximately 1,200 physical establishments across the country. As written, the NPRM would require that contractor to enter into 3,600 "linkage agreements" each year. Another EEAC member company observed that the "nearest LVER" (Local Veterans' Employment Representative) would be the same person for several of its different establishments. As drafted, the NPRM would require that contractor to enter into multiple linkage agreements with the *same* LVER. We urge OFCCP to address this subtle, but important distinction, and adopt a final rule that permits contractors the flexibility to retain this compliance authority at a corporate level. At the very least, there should be one point of contact at the corporate level for these linkage agreements. From the perspective of the veteran job-seeker, it makes no difference whether the establishment or the contractor enters into these agreements, as they will be able to apply for positions either way.

As an alternative to these requirements, we strongly recommend that OFCCP develop and launch a successor service to America's Job Bank — a centralized job posting system which would serve as the federal government's clearinghouse of job opportunities for which employers are specifically recruiting veterans. The agency should then require all federal contractors to post their non-exempt open positions with this clearinghouse, and open connections to this nationwide federal contractor job bank that are available to all organizations that help veterans find employment.

Finally, consistent with the fact that OFCCP's proposed regulation changes do not take into consideration the vast reach of technology, the NPRM does not seem to consider how the agency's 2005 internet applicant rule would apply to the changes, and what complications could potentially arise to conflict with the proposed required analyses of benchmarks, assessments of impacts of recruitment efforts, and other aspects of the proposed rule. Many contractors have shifted from a paper application process to acceptance of applications via online sources as their primary means of recruitment and hiring. But OFCCP's proposed changes would require contractors to track and tabulate data on all expressions of interest, not just those meeting the agency's definition of internet applicant at 41 C.F.R. §60-1.3. The proposed rule, as written, is therefore inconsistent with OFCCP's internet applicant requirements, a fact which is especially troubling considering the major investments contractors have made to ensure that their applicant tracking systems are compatible with the agency's now five-year old internet applicant rule.

OFCCP'S NEW DATA COLLECTION REQUIREMENTS AND HIRING BENCHMARKS WILL NOT PROVIDE A MEANINGFUL ASSESSMENT OF VETERAN AVAILABILITY

We respectfully disagree with OFCCP's assertion that its proposed changes will enable contractors to better assess their affirmative action efforts. To achieve this goal, the NPRM details two new requirements in the Section 4212 regulations: (1) the creation of numerical hiring benchmarks for protected veterans; and (2) the collection of eleven data points on protected veterans. As set forth

below, it is unlikely that these figures will provide any meaningful assessment of contractors' affirmative action efforts.

OFCCP has long required contractors to prepare numerical placement goals for women and minorities in each AAP establishment. While factors such as contractor size, location, and lack of current census data somewhat limit the utility of these goals in determining the need for a benchmark, the benefit is that the "benchmark" against which contractors are measured can be tailored by EEO-1 category (AAP job group), general job type (census code), and location (specific census area) through the Census Bureau's Special EEO File. Unfortunately, no Special EEO File exists on veterans. The NPRM effectively ignores this "inconvenience" and proposes requiring contractors to maintain their own collection of "benchmark" data and weight them in their "discretion," only to be judged by OFCCP as to whether their weighting and calculation methods are "reasonable."

Essentially, OFCCP proposes that each establishment create its own "special EEO file" for veterans and perform a "five factor utilization analysis" for protected veterans using generic nationwide and statewide data, an "assessment" of each of the contractor's outreach activities, discretionary factors to be determined by the contractor, and eleven new data points that OFCCP will mandate that contractors collect. As set forth below, we urge OFCCP to consider the practical challenges contractors will face in trying to collect these data, along with the integrity of the data itself, before issuing such a major change to the existing regulations.

First, while the NPRM acknowledges that BLS does not maintain the data to calculate goals on specific veteran categories, it fails to acknowledge another critical shortcoming of the available data. While OFCCP offers to publish on its website two of the factors to be used (the statewide three-year average percentage of veterans in the civilian labor force and the number of veterans over the previous four quarters who participated in the state employment service delivery system), these data presumably will be for all veterans, a population that is necessarily different and larger than the four categories of veterans protected by OFCCP's regulations. BLS's most recent report on the Employment Situation of Veterans indicated that all veterans represented approximately 7.74% of the total civilian labor force (employed and unemployed combined), while Gulf War-era II Veterans represented only 1.17%.

Presumably, the percentage of the four protected veteran categories falls somewhere in between those two figures, but it is our understanding that this is a figure which OFCCP cannot produce. Even if the agency could calculate a representative figure, the number would be so small for so many contractor establishments that the practical result of this exercise will be a piece of paper stating that the contractor is "underutilized," if at all, by fractions of individuals. This hardly warrants the significant amount of time and resources involved in collecting eleven new data points and generating these goals.

Second, translating OFCCP's fourth and fifth factors, which are inherently non-numeric, into numerical percentages that can be weighted alongside the other factors will prove difficult for many contractors, if not impossible. This is particularly true with respect to the "assessment" of each of a contractor's outreach efforts. While contractors can ask applicants to identify where they learned of the job opening, there is no guarantee that the contractor can trace that source back to one of its outreach efforts. Contractors who utilize private online job search organizations, for example, often

have their job openings instantly cross-posted around the country to diversity organizations targeting women, minorities, veterans, and individuals with disabilities. The practical impact of this is that in many cases it will be impossible to assess where applicants are coming from, even if the original source of the job posting was a result of the contractor's outreach activity. Further, contractors cannot require applicants to disclose the source of their application. Thus, a true "assessment" of these recruitment efforts would require all or nearly all applicants to know and provide the contractor with the "original" source of their application. This simply is not feasible, and the results from "analyzing" these factors will almost certainly not be meaningful.

Lastly, we respectfully submit that the collection of OFCCP's eleven data points, which will be used as the third factor in OFCCP's hiring benchmark analysis, is unduly burdensome and is unlikely to produce a meaningful assessment of the contractor's outreach activities. OFCCP's proposal first requires that contractors collect and tabulate the referral ratios from state and local employment services which, as discussed above, would in most cases be an inefficient and ineffective use of resources. The practical utility of these "referral ratios" is undermined by OFCCP's own estimates (less than one referral per contractor establishment per year). For many establishments, this would introduce yet another percentage at or near zero into OFCCP's proposed five-factor analysis, further demonstrating that the burdens associated with the time and expense needed to make these calculations far outweigh any benefit that may come from setting such benchmarks.

Moreover, the proposed rule would require each contractor hiring location to collect and calculate the numbers and ratios of referrals and veteran referrals from each employment service office. But OFCCP cannot force these veterans to identify their referral source, nor can it require the employment services offices to compile and send to each federal contractor establishment data and reports on these referrals. Essentially, then, each and every federal contractor establishment will be required to collect, maintain, tabulate, and base its annual hiring benchmarks upon data over which it has absolutely no control, and for which it has no means of validating.

To add to our concerns, we note that many of the eleven data points are tied to OFCCP's proposed two-part self-identification process, where contractors will solicit generic veteran status at the pre-offer stage and specific veteran status at the post-offer stage. This "bifurcation" of the self-identification process is not significant in and of itself, as many contractors utilize a two-stage process already (pre-offer solicitation of race and gender and post-offer solicitation of veteran and disabled status). Likewise, standing alone, OFCCP's new label for "other protected veterans" is also not significant. Collectively, however, coupled with OFCCP's proposed data collection requirements these changes will impose a significant burden on some contractors due to the time and money it takes to update their human resources information and applicant tracking systems. Indeed, to record all of the options associated with OFCCP's two new self-identification forms, contractors will need the ability to retain and tabulate 21 different veterans options between the two self-identification forms (one each for declining to self-identify, self-identifying as a non-veteran, or a generic "protected veteran" at the pre- and post-offer stages, and 15 different permutations of the four protected veterans categories at the post-offer stage). Based on the feedback we have received from our members, it will take far longer than OFCCP's estimate of one minute per establishment to create the self-identification

forms, one minute per veteran to complete the form,[11] and one minute per establishment per year to retain the forms.

Further, two of these categories, the generic "protected veteran" and "active wartime or campaign badge veteran" are not found on the VETS-100/100A Reports. OFCCP states that it will work with DOL-VETS to make these changes, but DOL-VETS just submitted to OMB its request for an extension of the existing reports, unchanged. At an absolute minimum, the two DOL agencies responsible for regulating the collection and tabulation of veterans data should be able to agree and coordinate on the categories of veterans to be used before saddling contractors with the cost and expense of updating their information systems.

In addition, the NPRM includes an unprecedented requirement that employers retain veteran-related data for five years. This requirement does not align with other recordkeeping and retention periods in OFCCP's regulations. The requirement for employers — particularly large employers — will create significant additional costs in both the hiring process and elsewhere.

Finally, OFCCP's proposal that contractors would be required to ask whether disabled veterans require a reasonable accommodation is inconsistent with the Americans with Disabilities Act of 1990, as amended ("ADA"). The Equal Employment Opportunity Commission ("EEOC"), the agency responsible for administering the ADA, has issued clear guidance on this issue:

> If an employer asks post-offer disability-related questions, or requires post-offer medical examinations, it must make sure that it follows certain procedures: all entering employees in the same job category must be subjected to the examination/inquiry, regardless of disability; and medical information obtained must be kept confidential.

EEOC Notice Number 915.002, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, p. 17 (Oct. 10, 1995).

The EEOC also noted that at the post-offer stage, an employer may ask all individuals if they require a reasonable accommodation. Thus, OFCCP's proposal that contractors ask only those individuals who self-identify as disabled veterans is not consistent with the ADA. There is absolutely nothing about being a "disabled veteran" that, without more, would require a reasonable accommodation inquiry. To single out disabled veterans and presume an accommodation is necessary in this manner would be offensive and contrary to the intent of the ADA.

For these reasons, we do not agree with OFCCP's conclusion that hiring benchmarks will permit a meaningful assessment of contractors' affirmative action efforts. If, despite the costly and practical challenges listed above, OFCCP truly believes that a numerical hiring benchmark or goal will improve the employment situation for our nation's veterans, then we strongly recommend that OFCCP

[11] OFCCP also bases it burden estimate on a veteran count of 75,657, which is the figure OFCCP previously used for the number of veterans referrals from the state and local employment services. All applicants, however, must complete a self-identification form. Many contractors alone receive that number of applicants each year.

establish a nationwide hiring goal for all contractors, not unlike the standard goals OFCCP sets for women and minorities in the construction industry. This would allow OFCCP to set a single, universal goal for all contractors and remove the significant burdens detailed above.

THE COSTS OF THE PROPOSAL'S REQUIREMENTS FOR FEDERAL CONTRACTORS TO COMMUNICATE AND IMPLEMENT THEIR COMMITMENT TO AFFIRMATIVE ACTION FAR OUTWEIGH ANY BENEFITS REASONABLY EXPECTED FROM THESE REQUIREMENTS

OFCCP's proposal would require federal contractor establishments to take and document several new activities to communicate and implement their commitment to affirmative action for covered veterans. Several of these changes would impose significant additional costs and burdens with little if any direct benefit to veterans. Our comments focus on the two proposed changes that our members have told us would be the most burdensome and least effective among these proposed changes.

OFCCP's Required Annual Review of Personnel Processes

First, proposed §§ 60-250.44(b) and 60-300.44(b) would significantly alter the requirement that contractors review their personnel processes by mandating what for many years have been optional procedures. Under the regulations as proposed, contractors would, at a minimum, have to: (1) identify each known protected applicant and employee; (2) keep a record of every vacancy and training opportunity for which the protected applicant or candidate was considered; (3) keep a record of every promotion and training opportunity for which the protected employee was considered; (4) prepare a statement for each instance in which the protected applicant or employee was rejected for a vacancy, promotion or training, outlining the reason for the rejection and (if the individual were a disabled veteran) any reasonable accommodation considered; and (5) make the statement available to the protected applicant or employee upon request.

As with the other burden estimates in the proposal, OFCCP's estimates of the burdens that would be imposed by this section grossly understate the true burden of this proposal on federal contractors. Respondents to EEAC's member survey and participants in the Chamber's structured interviews stated that compliance with this proposed requirement would take several hours per year for each veteran, ranging from a low estimate of 4 hours per year per veteran to a high estimate of 20 hours per year per veteran, depending on the number of opportunities for which the veteran was considered.

OFCCP's cost analysis does provide a low estimate of 15 minutes per "vacancy" to comply with this requirement, but it does not address the burden associated with identifying promotions for which protected veterans were considered. We submit that this burden is significant and nearly impossible to quantify, as promotions include: (1) competitive promotions, such as those that would be followed through an applicant flow log of employees who sought promotion; (2) promotions — often temporary and incidental in nature — made under a collective-bargaining agreement; (3) non-competitive promotions; (4) temporary promotions to manage staff shortages; and (5) any number of promotions that could be highly individualistic in nature. Since all of these transactions could trigger the recordkeeping requirement, contractors would be required to establish elaborate "promotion flow"

tracking systems just to keep the records that would enable them to identify when each protected veteran was considered for any promotion.

The same is true for training programs, where OFCCP estimates that each federal contractor establishment would need only 15 minutes per year to identify training programs for which protected veterans were considered. This estimate seems to be based on the incorrect assumption that federal contractors maintain sophisticated training databases for tracking every instance in which an employee was considered for a training program, whether the employee sought participation or not, and the disposition of consideration of each employee for every training program. In fact, this provision alone would require an entirely new recordkeeping system that would entail a new "applicant flow" system just for training programs, including programs in which the contractor's sole participation is to provide financial support and programs such as self-improvement programs. The proposal assumes that contractors run training programs as if they were running a school curriculum, when in fact, training programs at most companies are multi-faceted, managed in many different ways, and usually managed by different parts of the organization. The costs to comply with this requirement would be extensive, and OFCCP has put forth no evidence that there exists any systemic discrimination against protected veterans in opportunities for training.

This section of the proposed rule also would require contractors to prepare statements that would be made available to protected veteran applicants and employees. OFCCP's estimate assumes that the statement would be prepared one time per year per establishment, when in fact, the regulation would require the development of such a statement each time an employment or training selection is made for anyone other than a protected veteran in the pool under consideration (including instances in which the protected veteran is the only one in the pool). Thus, rather a burden of 30 minutes for each establishment, the true burden, assuming the required statement could be prepared in 30 minutes, would be 30 minutes multiplied by potentially thousands of personnel transactions multiplied by the total number of establishments, plus the burden of setting up all of the systems necessary to identify the opportunities involved, the pool of protected veterans, the reasons for the disposition concerned, and the reasonable accommodations considered. On top of that, OFCCP has provided no estimate of the burden involved with informing and counseling unsuccessful job seekers, candidates for promotions, and individuals who were considered for training.

The Annual Review of Physical and Mental Qualifications

Second, proposed §§ 60-250.44(c) and 60-300.44(c) would require contractors to annually review their physical and mental qualifications and to document the completion of these reviews. The NPRM anticipates a list of all job openings in the prior year together with the requirements associated with each opening and an explanation of how the requirements are job related.

Here too, OFCCP's burden estimate understates the actual burden of this requirement. OFCCP estimates that the review could be accomplished just by evaluating jobs as they are classified in the 92 broad classifications set out in the Standard Occupational Classification (SOC) system. Qualifications apply to specific jobs and sometimes specific positions, so OFCCP's estimate that no contractor would have to analyze more than 92 jobs each year is false. Contractors almost always have hundreds, sometimes thousands, of separate jobs, and each would require an annual review. OFCCP's estimate

that each review could be accomplished in just 30 seconds defies logic, if not common sense. Respondents to EEAC's member survey and participants in the Chamber's structured interviews stated that compliance with this proposed requirement would take between 1 hour and 4 hours for each job opening, depending on the nature of each position.

THE AUDIT AND ENFORCEMENT PROCEDURES CHANGES PROPOSED BY OFCCP WOULD RESULT IN FEWER OBJECTIVE STANDARDS AND GREATER BURDENS ON FEDERAL CONTRACTORS

Finally, OFCCP's proposal would make a number of changes to the agency's procedures for auditing contractor compliance, ostensibly for the purpose of "benefit[ing] both protected veterans and the contractor" and "allow[ing] OFCCP to complete reviews far more efficiently." Despite more regulations, more prescriptive requirements for federal contractors to meet, and far more paperwork than currently is required, the thrust of these audit-related changes is fewer objective standards, increased agency discretion, and still additional compliance and paperwork burdens on contractors.

With respect to these changes, we recommend that OFCCP: (1) withdraw its proposal to grant agency compliance officers the authority to expand the temporal scope of any compliance evaluation beyond the date of the agency's scheduling letter; (2) preserve the discretion contractors currently have to undergo compliance checks either at their own location or offsite; (3) withdraw its proposal to grant agency compliance officers the authority to conduct focused reviews from anywhere, including the OFCCP's own offices; and (4) withdraw its proposal to grant agency compliance officers the authority to force contractors to provide OFCCP, offsite, with almost anything the agency requests in whatever specific available format the agency requests.

CONCLUSION

To be sure, OFCCP's stated overall goal of increasing employment opportunities for covered veterans is one we fully support. We do not and cannot, however, support a significant new regulatory program that places far greater emphasis on ineffective paperwork requirements than it does on practical programs to employ U.S. veterans. We therefore urge OFCCP to withdraw the NPRM, and to begin working with us and those we represent on crafting an alternative proposal that is consistent with the President's commitment to economic and job growth and which would meaningfully improve the employment situation for our nation's veterans.

Sincerely,

Jeffrey A. Norris
President
Equal Employment Advisory Council

Randel K. Johnson
Senior Vice President, Labor, Immigration
& Employee Benefits
U.S. Chamber of Commerce

Michael D. Peterson
Director, Labor & Employment Policy
HR Policy Association

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Patricia A. Shiu, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget

EXHIBIT A

ANNUAL FEDERAL CONTRACTOR REPORTING
COMPARISON TABLE
January 31, 2011

Category	2010 VETS-100A	2010 VETS-100	2009 VETS-100A	2009 VETS -100	2008 VETS -100
Total Federal Contractors	13,536	8,880	13,011	11,919	22,159
Single Establishments	9,664	6,461	10,618	9,717	18,943
Multiple Establishment Organizations	5,665	3,543	7,340	4,861	8,690
Multiple Establishment Hiring Organizations	208,435	85,998	144,896	76,631	46,903
Multiple State Consolidated Reports	61,626	17,099	26,684	13,964	10,177
Total Reports Submitted	285,390	113,101	190,190	105,251	84,713
Regular Vietnam Era Veterans		217,600	n/a	199,055	341,000
Regular Special Disabled Veterans		49,368	n/a	45,800	62,020
Recently Hired Vietnam Era Veterans		15,968	n/a	14,285	32,007
Recently Hired Special Disabled Veterans		8,131	n/a	7,436	15,466
Regular Other Protected Veterans	784,593		669,265	n/a	n/a
Regular Disabled Veterans	155,386		154,002	n/a	n/a
Regular Armed Forces Service Medal	161,759		142,677	n/a	n/a
Regular Recently Separated	124,523		118,263	n/a	n/a
Recently Hired Other Protected Veterans	133,333		116,769	n/a	n/a
Recently Hired Disabled Veterans	54,601		50,053	n/a	n/a
Recently Hired Armed Forces Service Medal	58,056		51,332	n/a	n/a
Recently Hired Recently Separated Veterans	52,118		49,194	n/a	n/a

EXHIBIT B

Office of Federal Contract Compliance Programs (OFCCP)

Facts on Executive Order 11246 — Affirmative Action

Revised January 4, 2002

A. **OFCCP Mission Description**

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces the Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act, as amended. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

- OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments). The Federal Government awarded more than $179 billion tax-payer dollars in prime contracts in Fiscal Year 1995.

- OFCCP requires a contractor, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. No other Government agency conducts comparable systemic reviews of employers' employment practices to ferret out discrimination. OFCCP also investigates complaints of discrimination. In Fiscal Year 1999, OFCCP conducted 3,833 compliance reviews. Moreover, OFCCP programs prevent discrimination. Further information about the OFCCP programs may be obtained from the Internet.

B. **Operation of the Executive Order Program. The EEO Clause**

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor's agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract.

A contractor in violation of E.O. 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future government contracts. However, a contractor cannot be debarred without being afforded the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order.

If a matter is not resolved through conciliation, OFCCP may refer the matter to the Office of the Solicitor of Labor, which is authorized to institute administrative enforcement proceedings. After a full evidentiary hearing, a Department of Labor Administrative Law Judges issues recommended findings of fact, conclusions of law, and a recommended order. On the basis of the entire record, the Secretary of Labor issues a final Administrative Order. Cases also may be referred to the Department of Justice for judicial enforcement of E.O. 11246, primarily when use of the sanctions authorized by the Order is impracticable, such as a case involving a sole source supplier.

The regulations implementing the Executive Order establish different affirmative action provision for non-construction (i.e., service and supply) contractors and for construction contractors.

C. **Executive Order Affirmative Action Requirements**

i. **For Supply and Service Contractors**

Non-construction (service and supply) contractors with 50 or more employees and government contracts of $50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The AAP identifies those areas, if any, in the contractor's workforce that reflect utilization of women and minorities. The regulations at 41 CFR 60-2.11 (b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonable recruit.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

ii. **For Construction Contractors**

OFCCP has established a distinct approach to affirmative action for the construction industry due to the fluid and temporary nature of the construction workforce. In contrast to the service and supply affirmative action program, OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. OFCCP issued specific national goals for women. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today. Construction contractors are not required to develop written affirmative action programs. The regulations enumerate the good faith steps construction contractors must take in order to increase the utilization of minorities and women in the skilled trades.

D. **Goals, Timetables & Good Faith Efforts**

i. The numerical goals are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and its supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 CFR 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals. In other words, discrimination in the selection decision is prohibited.

ii. **Examples of Affirmative Action Programs**

OFCCP federal affirmative action in action is exemplified by the EEO programs of the award recipients of the Department of Labor Secretary's Opportunity 2000 Award and Exemplary Voluntary Efforts (EVE) awards. Each year, these awards are given to contractors with outstanding affirmative action programs. Affirmative action refers to the aggressive recruitment programs, mentoring, training, and family programs that work to recruit and retain qualified individuals. Corporate programs nominated for a Secretary 2000 or EVE award

include innovative outreach and recruitment, employee development, management development and employee support programs. Past Secretary's Opportunity 2000 award recipients include:

- The Rouse Company (2001)
- Union Bank of California (2000)
- Eli Lilly and Company of Indiana (1999)
- United Technologies Corporation of Connecticut (1998)
- Pacific Gas and Electric of California (1997)

In addition, the Department recognizes other exemplary federal contractors through its EVE awards and exemplary EEO efforts of community organizations through the EPIC awards.

iii. **Successes**

OFCCP efforts benefit real people through systemic contractor investigations and through partnerships with private industry and state and local agencies.

- In general, OFCCP programs helped many Fortune 1,000 companies and other major corporations break the glass ceiling for women and minorities. In 1970, women accounted for 10.2 percent of the officials and managers reported on the Employer Information Report (EEO-1) form submitted by federal contractors. In 1993, women were 29.9 percent of all officials and managers, according to the EEO-1 data.
- Many minorities and women have gained access to employment on large construction projects because of the Department's construction mega-projects. For example, on the Oakland Federal Building project, eight percent of the hours worked on the site were by women. On the New York Federal Courthouse project, 35 percent of the hours were worked by minorities and approximately six percent by women. In addition, OFCCP has recognized the affirmative action efforts of award recipient construction contractors like the Hyman Construction of Manhattan, New York and the Law Company of Kansas.
- Working women moved from welfare to forklift operator jobs and other non-traditional construction jobs in Philadelphia and Chicago through OFCCP outreach efforts.
- Native Americans are now employed on federal highway construction projects in conjunction with the Council for Tribal Employment Rights and the Cheyenne River Sioux Tribe. Both received Department EPIC awards for their efforts.
- More than 70 individuals with disabilities have been employed in computer positions in Columbus, Ohio through a partnership between the department and Goodwill Industries. This cooperative agreement has resulted in prototypes of workplaces specifically designed to welcome persons with severe disabilities.
- After highly publicized cases in which veterans were unaware of job openings, a Seattle company hired a specialist to address Vietnam-era veterans' issues.
- Because of affirmative action requirements, federal contractors are reviewing their employment policies, including compensation systems, and training their managers and supervisors to identify and correct discrimination and harassment in the workplace.

Following are real people who have benefited from federal affirmative action, according to the Council of Presidents' **Women Speak Out: Affirmative Action Resource Guide:**

- Bernadette, of Washington, DC., works as a carpenter because of a federal affirmative action program. She is an African-American single parent with two children, who says "because the company had an affirmative action program, I got on the job site."
- Janice became an astronaut with NASA at the Johnson Space Center in July 1991,

because of NASA's affirmative action program. She has since logged over 438 hours in space. She describes the NASA equal employment opportunity policy: "Under NASA's developing equal opportunity and diversity policies, all hiring and advancement decisions are based on individual qualifications and merit, but recruitment and development programs are structured such that high-quality candidates are available to help achieve a representative workforce."

- Paulette is now an Officer of NYNEX, responsible for Marketing in Maine, New Hampshire, Rhode Island and Vermont. She says that "Without NYNEX's willingness to actively pursue affirmative action goals, my talents and skills would have never taken me this far in the business world."
- Lisa is a laborer in Hammond, Indiana, employed at an expansion project. Before she entered the trades, she worked for $5.00 an hour, without benefits as a seamstress. She now earns over $20 an hour with benefits. She says that without affirmative action, she would probably still be working for $5.00 an hour and have no opportunity for advancement.
- Judy is a journey structural ironworker and single parent of two teenage sons in Chicago, Illinois. Before entering the trades, she worked two jobs, with no room to advance. She credits her new job to affirmative action and says "employers will not hire without affirmative action." She was one of 20 women in her union of 2,321 members.
- Kathy worked in the skilled trades in Chicago, said "the affirmative guidelines allowed me to earn a higher wage than all of the service jobs that I had worked before. Working construction gave me the confidence and strength to know that I could excel in any field if given the opportunity."

OFCCP uncovers examples of discrimination every day during its compliance evaluations, including the following incidents:

- A hostile working environment at an aircraft maintenance facility, including racial slurs, sexually inappropriate statements, graffiti on bathroom walls, offensive drawings in the workplace, and racial jokes.
- Black professionals required to scrub toilets and subjected to racial harassment.
- An individual with a disability (Native American amputee) was subjected to verbal harassment because of his disability, physically assaulted, and denied benefits and opportunities provided his non-disabled colleagues.

Affirmative action is necessary to prevent discrimination and to address stereotypical thinking and biases that still impede employment opportunity.

Overall findings from a DOL survey found that women advanced more quickly in contractor firms than in non-contractor firms.

Federal contractors have changed the corporate climate in ways that are not statistically measurable because of the requirements of Executive Order 11246 and other laws enforced by OFCCP. For example, corporations now post job announcements and do not rely solely on word of mouth recruitment. Corporate sensitivity to issues like sex and race harassment and wage discrimination has increased, as has the awareness of the benefits of a family friendly environment. Employers now view ability, not disability.

Excerpts from Department's EVE awards:

"Equal employment opportunity is good for business."
United Technologies Corporation, Hartford, CT
October 1, 1998

Secretary's Opportunity 2000 Award Honoree

"When you do the right thing by people, it's usually the right thing for business."
Jim Adamson, Chief Operating Officer
United Space Alliance, Houston, TX
Oct. 1, 1998 EVE Awards

EXHIBIT C

Office of Federal Contract Compliance Programs (OFCCP)

Compliance Assistance — Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended

- The Law
- The Regulations
- Federal Register

Quick Links

Link to Compliance resources:

- OFCCP Compliance Assistance

Links to other Departmental compliance resources:

- Compliance Assistance
- Summary of Major DOL Laws
- Compliance Tools
- Employment Law Guide

Synopsis of Law

Covered contracts entered into by any department or agency for the procurement of personal property and non-personal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified special disabled veterans, veterans of the Vietnam era and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. The provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States.

There are currently two different coverage thresholds under VEVRAA.

- The VEVRAA regulations found at 41 C.F.R. part 60-250 generally apply to Government contracts of $25,000 or more entered into before December 1, 2003. The threshold amount for coverage is a single contract of $25,000 or more; contracts are not aggregated to reach the coverage threshold. If a Federal contractor received a government contract of at least $50,000 prior to December 1, 2003, an AAP must be developed in accordance with the 41 C.F.R. part 60-250 VEVRAA regulations. As explained below, some contracts that were entered into before December 1, 2003 will be subject to the regulations found at 41 C.F.R. part 60-300.
- The regulations found at 41 C.F.R. part 60-300 apply to Government contracts entered into on or after December 1, 2003. The threshold amount for coverage and AAP threshold coverage is a single contract of $100,000 or more, entered into on or after December 1, 2003; contracts are not aggregated to reach the coverage threshold.

Compliance Assistance Materials

- VEVRAA Fact Sheet
- Archives - Final Rules and Notices
- OFCCP Regulatory Agenda
- OASVET Fact Sheet 97-5
- Employment Law Guide
- VETS-100 Internet site
- VETS Staff Directory
- Frequently Asked Questions on Federal Contractor Programs page.
- Frequently Asked Questions - Veterans

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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

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Re: Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Proposed Rescission, 76 Fed. Reg. 62 (January 3, 2011) [1250-ZNE]

Dear Ms. Carr:

The Equal Employment Advisory Council ("EEAC") appreciates the opportunity to file these comments regarding OFCCP's proposed rescission of its 2006 systemic compensation discrimination interpretive standards ("interpretive standards") and voluntary self-evaluation guidelines ("voluntary guidelines"). While EEAC has no objection to rescission of the "coordination" feature of the voluntary guidelines, the remaining portions of the guidelines and the interpretive standards have served as useful blueprints for both OFCCP and federal contractors interested in monitoring compensation patterns for potential systemic discrimination.

The guidelines and standards have stimulated voluntary self-evaluation and compliance on the part of EEAC member companies. By adhering to those guidelines, it was possible for federal contractors to conduct compensation self-evaluations secure in the knowledge that the results would not be rejected out of hand by OFCCP. Prior to adoption of the standards there was no such assurance, and as a result corporate compensation self-audits with their corresponding pay equity adjustments were far less frequent than they are today.

EEAC trusts that the agency's intention to "reinstitute flexibility in its use of investigative approaches and tools" [62][1] does not signal a return to the pre-standards confusion that existed in nearly all compensation reviews. Such a result would constitute a huge step backwards in the encouragement and realization of pay equity. Accordingly, we recommend that

[1] The bracketed numbers refer to pages of OFCCP's *Federal Register* Notice, 76 Fed Reg. 62 (January 3, 2011).

the interpretive standards be retained. If they are rescinded, however, OFCCP must articulate in the clearest of terms exactly what it means to "adhere to the principles of Title VII ... in investigating discrimination [62]." In the absence of such guidance, federal contractors will be discouraged from conducting voluntary, proactive in-depth analyses of their compensation practices, and will instead simply await an audit to discover what particular "investigative approaches and tools" have been selected by OFCCP for that particular compliance review.

EEAC's Interest in the Proposed Rescissions

EEAC is particularly well-suited to comment on the potential adverse consequences of a rescission of the standards. It is a national nonprofit association of major employers formed in 1976 to promote sound approaches to the elimination of employment discrimination. EEAC's membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to more than 20 million people throughout the United States.

Nearly all EEAC member companies are federal contractors or subcontractors subject to OFCCP's nondiscrimination and affirmative action regulations. Members are committed firmly to the principles of equal employment opportunity, nondiscrimination, and affirmative action as indispensable prerequisites to a fair and inclusive workplace.

EEAC's directors, officers and member representatives include many of industry's most experienced practitioners in complying with the affirmative action and nondiscrimination mandates enforced by the OFCCP. Collectively, an estimated 1,500 to 2,500 compliance evaluations are conducted each year at EEAC member establishments.

As an organization, EEAC long has encouraged its members to conduct proactive self-evaluations of their compensation practices. A training course entitled "Conducting a Compensation Analysis" was introduced in 1995 and has been presented several times each year since then. In 1999, EEAC developed for members the CompAuditor® software that enables users to conduct a variety of statistical compensation analyses ranging from simple mean and median calculations, to tests of statistical significance and complex regressions. CompAuditor® has been updated several times since it was first introduced.

Introduction

In its January 3 Notice of Proposed Rescission, OFCCP claims that the current interpretive standards establish "a rigid procedure for investigating and analyzing systemic compensation discrimination" [63] by prescribing methodologies to "group employees whose compensation is to be compared in a discrimination analysis, requiring anecdotal evidence of compensation discrimination except in unusual circumstances, and requiring the use of multiple regression analysis when deciding whether wage differences between groups are discriminatory." [63]

OFCCP states that by rescinding the 2006 guidelines investigators will be released from what it characterizes as these rigid procedures, and will enable the agency to reinstitute the practice of exercising discretion to develop compensation discrimination investigation

procedures that parallel those used for other discrimination investigations. Thus far OFCCP has not furnished any specific guidance as to what these investigative procedures will be other than to say that the agency intends to continue "to adhere to the principles of Title VII." [62] In addition, OFCCP believes it is unnecessary to issue new *Federal Register* notices electing instead to establish its new procedures through such traditional means as the Federal Contract Compliance Manual, directives and other staff guidance.

EEAC agrees with OFCCP that compensation investigations and analytical procedures should be tailored "to the facts of [each] case based upon Title VII principles." [63] The standards that are proposed to be rescinded were, in fact, based upon legal principles and statistical concepts that long have been relied upon by the federal courts in deciding Title VII compensation discrimination cases. Formal rescission of the standards thus raises two obvious questions: what legal and statistical concepts will take their place, and does the plan to "reinstitute flexibility in [OFCCP's] use of investigative approaches and tools" signal a return to the inconsistency and confusion that led to enactment of the standards in the first place?

For the reasons set forth below, EEAC encourages OFCCP not to "throw the baby out with the bathwater" — do not discard the positive elements contained in the standards for the sake of giving itself greater investigative flexibility. In addition, EEAC believes that OFCCP's commitment to transparency in the development and implementation of compliance standards requires that the new guidelines be promulgated through the public comment and rulemaking process rather than through issuance of agency directives and other internal staff guidance.

OFCCP's Pre-Standards Evaluation of Compensation Was Confusing and Inconsistent

OFCCP's approach to investigating systemic compensation discrimination has been in a constant state of evolution since the early 1990s. It began in earnest with the so-called "pay grade" or "group comparisons" methodology. This approach (frequently referred to as the "DuBray analysis" after the Regional Director who initially developed it) simply compared median pay for men vs. women and minorities vs. non-minorities in the company's pay grades. If the median values disadvantaged women and/or minorities in a sufficient number of pay grades, and the differences could not be explained through seniority, systemic discrimination was alleged. In most cases, notions of statistical significance were given little, if any, consideration.

By 2000, things began to change. OFCCP was authorized by the federal Office of Management and Budget (OMB) to collect aggregate compensation data at the outset of a compliance evaluation through the addition of paragraph 8 (now paragraph 11) to the standard compliance evaluation Scheduling Letter. In that same year OFCCP modified its affirmative action regulations to require contractors to conduct annual in-depth analyses of their compensation systems to ensure that they were nondiscriminatory.

For the next several years OFCCP's approach to investigating compensation discrimination during compliance evaluations was characterized by significant inconsistencies both within and among the agency's regions. These inconsistencies related to such fundamental issues as:

- Whether to audit for individual or systemic discrimination;

- Whether to evaluate pay differences using median or mean values;

- Which employee groupings to use for statistical analyses ranging from individual job titles and codes, through pay grades, pay levels, salary bands, AAP job groups, to entire exempt/non-exempt employee populations;

- Whether pay disparities needed to be statistically significant to be actionable, and if so what tests of statistical significance were appropriate;

- Whether multiple regression analyses were appropriate for evaluating compensation patterns, and if so what pay variables could legitimately be included in the regression models; and

- Satisfying Title VII legal standards as a prerequisite for seeking remedies for compensation discrimination in a compliance evaluation (as opposed to an administrative enforcement proceeding).

The resultant confusion created a situation in which neither the OFCCP compliance officers nor federal contractors were ever entirely certain as to what statistical and legal principles should be applied in evaluating compensation practices. Not surprisingly then, the scope and content of compensation audits in any given compliance evaluation were determined as much by the preferences of the particular OFCCP field office and compliance officer conducting the audit than by any rational, legally-based investigative plan.

The Interpretive Standards Introduced Consistency and Predictability

In 2006, OFCCP adopted its systemic compensation discrimination interpretive standards and self-audit guidelines in an effort to bring some consistency to the process. These documents were based upon three fundamental concepts:

- Systemic compensation discrimination should be evaluated in the context of "similarly-situated employee groupings" (SSEGs) — employees who have positions requiring similar responsibilities and skills and who thus could reasonably be expected to be paid on the same basis;

- Gender- or race-based pay disparities must be statistically significant to be unlawful as determined primarily through multiple regression analyses capable of evaluating the impact of race and gender on pay levels; and

- In order to support issuance of a Notice of Violations, the results of the statistical analyses must, in most cases, be supported by anecdotal evidence of discrimination that can bring the "cold numbers convincingly to life."[2]

[2] *Teamsters v. United States*, 431 U.S. 324, 336 (1977).

The interpretive standards did not eliminate disagreements between OFCCP and federal contractors over the most appropriate way to evaluate compensation practices, but they did serve to narrow significantly the potential areas of disagreement. There might be disagreement, for example, over which specific employees to group together for purposes of statistical analysis, but there was no disagreement over the need for them to be similarly-situated to one another in terms of how they were paid. There might be disagreement over which specific pay variables to include in a multiple regression analysis, but there was no disagreement over the appropriateness of regressions as an analytical tool for monitoring compensation systems. There might be disagreement over what combination of statistical and anecdotal evidence is sufficient to support a *prima facie* case of compensation discrimination in a particular compliance evaluation, but there was no dispute over the need for OFCCP to satisfy that burden before issuing a Notice of Violations.

Armed with knowledge of the standards OFCCP would apply in its compensation investigations, federal contractors were incented to conduct compensation assessments proactively, enabling them to address voluntarily any pay equity issues that might surface. Rescission of the standards threatens to undermine such voluntary efforts because contractors will no longer know how their compensation practices will be evaluated by OFCCP.

For this reason, it is imperative that if OFCCP decides to rescind the standards, it quickly and concurrently articulate precisely what it means by adhering "to the principles of Title VII... in investigating compensation discrimination." As described below, EEAC believes those principles include several of the most helpful features in the interpretive standards.

Rescission of the Interpretive Standards Is Inconsistent With a Professed Commitment to Title VII Principles

In attempting to identify what investigative and analytical tools OFCCP might be referring to when it professes an intention to adhere to Title VII principles, EEAC reviewed the guidance provided by the Equal Employment Opportunity Commission (EEOC) to its investigators for investigating charges of pay discrimination under Title VII. That guidance is set out in Section 10 ("Compensation Discrimination") of the EEOC Compliance Manual.[3]

In a February 8, 2010 inter-agency meeting and webcast conducted jointly by OFCCP, EEOC and the Department of Justice, all three agencies committed to working cooperatively on compensation cases using consistent legal and statistical standards.[4] In many respects the guidance set out in the EEOC Compliance Manual mirrors the guidance contained in the interpretive standards now being proposed for rescission by OFCCP.

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[3] *Available at* http://www.eeoc.gov/policy/docs/compensation.html.

[4] In her prepared remarks, EEOC Chair Jacqueline Berrien stated that "we [*i.e.*, EEOC] are also collaborating with OFCCP to ensure that our approaches to the question of pay data collection *and analysis* are coordinated and consistent" [emphasis added].

Similarly-Situated Employees

OFCCP includes among the "rigid" procedures prescribed by the interpretive standards instructions to compliance officers on "how to group employees whose compensation is to be compared." [63] The interpretive standards' requirement for job similarity, however, mirrors instructions to EEOC investigators that in the course of investigating possible pay discrimination they identify similarly-situated employees both inside and outside of the charging party's protected class. The EEOC defines similarly-situated employees as "those who would be expected to receive the same compensation because of the similarity of their jobs and other objective factors."[5] Job similarity is determined by whether the jobs in question involve similar tasks, require similar skill, effort, and responsibility, working conditions, and are similarly complex or difficult.

According to the EEOC, the actual content of the jobs must be similar enough that "one would expect those who hold the jobs to be paid at the same rate or level."[6] The EEOC also instructs its investigators to evaluate such things as minimum objective qualifications (*e.g.,* specialized licenses or certifications) in defining similarly-situated employee groupings.

Once similarly-situated employees are identified, the EEOC investigators are encouraged to consider traditional individual-employee "cohort comparisons" of relative qualifications and experience to identify evidence of individual pay discrimination based upon race or gender.[7] But the EEOC also instructs investigators to look beyond individual employee comparisons for broad patterns of intentional pay discrimination through the use of statistics.

The EEOC Compliance Manual thus contemplates that all compensation comparisons — whether individual or systemic in nature — be conducted among similarly-situated employees. Adherence to Title VII principles would seem to require no less of OFCCP.

Statistical Analyses

In the rescission notice [63] OFCCP states that:

> The Standard's mandate to use multiple regression analysis to identify compensation discrimination is overly narrow and not required under Title VII principles. While multiple regression analysis may be a useful tool in identifying compensation discrimination, other statistical or nonstatistical analyses may be better suited, depending upon the facts of the case.

It is true that multiple regression analyses may not be the preferred statistical methodology in all cases — such as when individual employee compensation is at issue; when the employee population is too small; or the pay variables too incomplete to yield reliable results. But the interpretive standards acknowledge as much.

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[5] Section 10-III A.1.
[6] Section 10-III A.1.b.
[7] Section 10-III A.2.

In most systemic discrimination situations, however, multiple regression analyses are well-suited for identifying compensation patterns that disadvantage certain employee populations to a statistically significant degree. In this respect, they fall right in line with the EEOC guidance for Title VII enforcement which places heavy reliance upon the use of statistical methodologies in conducting compensation analyses.[8] The threshold for the EEOC — as it should be but has not always been for the OFCCP — is whether race- or gender-based differences in pay are "statistically significant."

The EEOC advises its investigators to start by computing the median pay for employees in the protected group and the non-protected group. Investigators are then instructed to determine whether "there is a statistically significant difference (*i.e.*, a difference unlikely to have occurred by chance) between the expected and actual number of employees in the protected class who earn less than or equal to the median pay of all comparators."

Significantly, the guidance goes on to say that "this test cannot tell an investigator what actually has caused an observed [pay] pattern." Instead, investigators are instructed to use the median analysis "only as an initial tool for determining whether a statistically significant pattern exists that warrants the use of more sophisticated and resource-intensive statistical techniques ...."[9]

The more sophisticated techniques the EEOC refers to are multiple regression analyses — the very analyses OFCCP characterizes in the rescission notice as "overly narrow" and "not required under Title VII principles." Indeed, to the contrary, multiple regression analyses are relied upon routinely by the federal courts in deciding cases involving allegations of sex and race discrimination.[10]

The possibility that the OFCCP may elect to use less sophisticated statistical analyses in its future compliance evaluations than the EEOC uses in Title VII charge investigations is of great concern to EEAC. A return to the days of using non-statistically significant differences in mean or median pay as a basis for leveraging monetary settlements will not advance the objectives of EO 11246, and certainly will not motivate federal contractors to undertake responsible self-evaluations of their compensation practices.

Anecdotal Evidence of Discrimination

In its rescission notice, OFCCP discounts the need for anecdotal evidence by citing cases where liability was predicated upon statistical analyses alone, and notes that "anecdotal evidence is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers." Nevertheless, such evidence has been relied upon extensively by the EEOC and the federal courts in systemic compensation cases for over 30 years.

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[8] Section 10-III A.3.

[9] Section 10-III A.3.b.

[10] See Rubinfeld, Reference Guide on Multiple Regression, p.182, fn. 5 printed in *Reference Manual on Scientific Evidence, Second Edition* (Federal Judicial Center, 2000).

The EEOC guidance underscores the value of anecdotal evidence of discrimination to supplement the results of statistical analyses. Relying upon the U.S. Supreme Court's decisions in *Teamsters v. United States*[11] and *Bazemore v. Friday,*[12] the EEOC states that "reasonable cause" findings of systemic compensation discrimination under Title VII "rarely should be based on statistics alone. Where possible, evidence of individual instances of discrimination should be used to bring the 'cold numbers convincingly to life.'"[13]

Prior to adoption of the interpretive standards, it was not unusual for OFCCP compliance officers to assert that the mere existence of unexplained statistically-significant differences in compensation between similarly-situated employees was sufficient to establish compensation discrimination. Statistically significant disparities in current base pay, however, do not prove that unlawful compensation discrimination *exists*. They may in appropriate circumstances create an *inference* of unlawful discrimination; but they do not in and of themselves prove that such discrimination *exists*.

It is possible, for example, for a contractor to rebut a statistical inference of discrimination based upon an analysis of current base pay. The statistical disparities giving rise to the inference may dissolve when the multiple variables that influence pay are analyzed through a regression analysis, or when bonuses, incentives or other elements of total compensation are considered. Moreover, it often will be possible for a contractor to establish through other evidence that the actual compensation *decisions* that gave rise to the perceived pay disparities were nondiscriminatory.

On the other hand, it also is unwise to rely exclusively upon anecdotal evidence to support a case of systemic compensation discrimination. Employee allegations about discrimination are sometimes based on rumor or on having heard only part of the story. Accordingly, EEAC believes the OFCCP interpretive standards and the EEOC Compliance Manual strike the right balance by stating that except in rare instances, systemic compensation discrimination claims should be predicated upon both statistical and anecdotal evidence.

Conclusion

Through this proposal OFCCP is striving to break free from what it believes to be overly restrictive investigative guidelines, and give itself the flexibility to evaluate contractor compensation practices from a number of different perspectives using a variety of analytical tools. At the same time, OFCCP commits to conducting its compensation discrimination investigations in accordance with Title VII principles. But these same Title VII principles serve as cornerstones of the interpretive standards now being rescinded, and also serve as the foundation for how many EEAC member companies regularly monitor their pay practices.

Whatever else might be said of the interpretive standards, they created an analytical framework that enabled many federal contractors to establish ongoing compensation monitoring

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[11] 431 U.S. 324 (1977).
[12] 478 U.S. 385 (1986).
[13] Section 10-III A.3, n.30.

programs secure in the knowledge that the results would not be rejected by OFCCP out of hand. If the standards are rescinded and OFCCP returns to the free-wheeling, inconsistent enforcement protocols of the past, voluntary compliance could suffer.

For these reasons, EEAC encourages OFCCP to retain the interpretive standards with instructions that they be applied on a case-by-case basis to the unique circumstances of each contractor. If they are rescinded, new guidelines should be established through a formal public rulemaking process that mirrors the EEOC's enforcement of Title VII.

We again thank OFCCP for permitting us to express our views on the proposed rescission. As always, we stand ready to provide any additional assistance that you may find helpful.

Respectfully submitted,

Jeffrey A. Norris
President

cc: Patricia Shiu, Director, OFCCP

12-161

August 24, 2012

To: EEAC Members

From: Jeffrey A. Norris
President

Re: **National Academy of Sciences Report to EEOC Raises Serious Questions Regarding Agency's Plans To Collect Detailed Compensation Data From Employers**

In 2010, the Obama Administration's "National Pay Enforcement Task Force" recommended that the Equal Employment Opportunity Commission (EEOC) begin collecting detailed compensation data from employers. The EEOC subsequently contracted with the National Academy of Sciences (NAS) to "review methods for measuring and collecting pay information by gender, race, and national origin" for purposes of administering Title VII of the Civil Rights Act of 1964. This initiative was but one of many recommended by the Task Force to focus government resources on eliminating pay discrimination.[1]

The NAS report, "Collecting Compensation Data From Employers," was recently submitted to the EEOC. Although the Commission might have been anticipating a roadmap for moving swiftly ahead with implementing a new compensation data collection tool, the NAS report instead concludes that the agency has yet to articulate how it would use such data, much less how it would collect, manage, and maintain its confidentiality. Importantly, the report also points to the efforts by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) to develop its own pay data collection tool,[2] and concludes that the OFCCP confronts the same issues that the EEOC does in any plans to move forward with its proposal.

The report does make six specific recommendations outlining the steps the EEOC should take if it indeed decides that it wants to collect compensation data, including articulating its specific intentions for using the data, developing a collection form, and commissioning an independent pilot study in order to justify what the NAS estimates will nearly double the current reporting burden on employers.

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[1] See EEAC Memorandum 10-136 (July 23, 2010).
[2] See EEAC Memorandum 11-153 (August 12, 2011).

This EEAC memorandum presents an overview of the NAS report's findings and recommendations. At this point, we do not know if the EEOC intends to seek public comments on the NAS report, but if it does, EEAC intends to submit a detailed response.

The text of the NAS report is available online at http://www.nap.edu/catalog.php?record_id=13496.

Background

Early on, the Obama Administration identified equal pay enforcement as a top priority. Not long after President Obama assumed office, he created the National Pay Enforcement Task Force which made a number of recommendations for carrying out this goal, including new initiatives for both the EEOC and the OFCCP.

Among other things, the Task Force reported that the EEOC had concluded that there currently is no federal data source that contains private sector employer-specific wage data broken down by demographic category, and that it would be commissioning an outside study "to determine which data it should collect to most effectively enhance its wage discrimination law enforcement efforts."

The project was awarded to the National Academy of Sciences (NAS), a private, non-profit group of scholars who conduct scientific research for the benefit of the public, and provides advice to the federal government on the scientific and technological issues that sometimes drive public policy decisions. The actual work was performed under the auspices of the National Research Council, which recruits the country's top scientists to conduct research and give independent advice.

The EEOC specifically contracted with the NAS to:

- evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data;

- consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues; and

- issue a report with findings and recommendations on what data the EEOC should collect to enhance wage discrimination law enforcement efforts, which will assist the EEOC in formulating regulations at the conclusion of an 18-month study.

The NAS report examines four specific topics: (1) existing alternative sources of wage data; (2) various concepts and definitions of "pay;" (3) possible survey designs and statistical methodologies; and (4) issues surrounding confidentiality, disclosure, and data access.

Overview of NAS Report Findings and Recommendations

If the EEOC was expecting a "full steam ahead" recommendation from the NAS Panel, it will be disappointed. The report concludes that the agency is simply not prepared to undertake a large-scale effort to collect compensation data at this time, and has much more work to do before it can even think about implementing such a requirement.

The report identifies a number of factors that must be addressed by the EEOC before proceeding with any effort to seek compensation data from employers, along with six specific recommendations designed to guide the agency through the process.

A Clear Purpose Needs To Be Articulated for Collecting Compensation Data Before Moving Forward

According to NAS, "there is ... no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies." Collecting compensation data would be "a significant undertaking for the EEOC," NAS says, and could nearly *double* the reporting burden on employers. Accordingly, NAS concludes, the EEOC cannot proceed forward with a requirement that employers report compensation data without fully justifying an enforcement need for the data collection.

While the EEOC (as well as OFCCP) have identified "targeting" of employers for investigation as one of the goals for collecting compensation data, NAS explains, neither agency has a plan for how to collect and use the data in a targeting operation. Pointing out that the EEOC's enforcement process is currently complaint-driven, with relatively few wage discrimination complaints, NAS says that the agency "would have to answer the fundamental question of how this data will be integrated into" the existing enforcement process.

In addition, NAS concludes that the agencies lack a fundamental understanding of the potential uses of pay data for enforcement purposes. While the agencies currently assume that pay data would enhance the enforcement process, NAS posits that they will not actually know for sure until they gain some actual experience.

Accordingly, the report's first recommendation is that the EEOC, in conjunction with OFCCP and the U.S Department of Justice, "should prepare a comprehensive plan for use of earnings data before initiating any data collection."

A Comprehensive Pilot Study Is a Must

NAS reports that there are no existing studies that adequately assess the cost-effectiveness of *any* method of collecting wage data from employers. Absent useful cost/benefit data, NAS concludes, it will not be possible to determine the additional burden that the EEOC would be placing on employers by collecting compensation data, although NAS estimates that the burden would nearly double.

Thus, the report's second recommendation is that, *after* preparing the comprehensive plan for use of compensation data contained in its first recommendation, including the form in which the data would be collected, the EEOC should commission an independent pilot study to test both the collection instrument and the plan for use of the data. As part of the study, the contractor should be required to measure the data quality, the fitness for use in the comprehensive plan, the cost of data collection, and the burden on employers.

EEOC Currently Lacks the Resources To Implement a Compensation Data Collection Requirement

The report next observes that the EEOC has only "a small and lightly resourced data collection and analytical program." Putting it bluntly, NAS says that if the EEOC were to start collecting compensation data at this time, its resources "would be severely strained," regardless of whether the agency merely modifies the existing EEO-1 Form to include compensation data, or develops an entirely new form. Accordingly, the report's third recommendation is that the EEOC, before trying to collect compensation data, adequately enhance its capacity to take on additional data collection and analysis.

If Data Is Collected, It Should Be on Rates of Pay Rather Than Actual Pay or Pay Bands

The NAS report points out that there are several different ways to collect wage data, including pay bands, which tend to coincide with the way employers actually look at compensation. NAS concludes, however, that data on rates of pay (*e.g.*, annual salaries, hourly wages, etc.) provide the "best data" for EEOC's purposes, and thus its fourth recommendation is that the EEOC collect compensation data expressed in terms of calculated rates of pay rather than actual earnings or pay bands.

Use OES Definition of Compensation

Based on a review of a number of different methods currently in use by other parts of the federal government for collecting wage data, NAS concludes that the EEOC should use the same definition of compensation as the Occupational Employment Survey (OES), which is conducted by the U.S. Department of Labor (DOL) Bureau of Labor Statistics (BLS). That definition includes straight-time gross pay, exclusive of premium pay, plus cost-of-living allowances;

guaranteed pay; hazardous duty pay; incentive pay, including commissions and production bonuses; and tips, but not overtime pay, severance pay, shift differentials, nonproduction bonuses, employer costs for supplementary benefits, or tuition reimbursements.

More than 1.2 million establishments already report earnings data by occupation using this definition, the report points out. Further, most employers that are required to complete the EEO-1 Form already are able to provide these data using their existing payroll and human resource systems, and at the rate technology is improving, will be able to do so even more easily in the future, according to NAS.

The Confidentiality of Any Compensation Data Collected Must Be Protected

The NAS report observes correctly that "employee compensation data are generally considered to be highly sensitive, even proprietary information, by most employers." Accordingly, NAS concludes, the EEOC must create and implement techniques for protecting those data.

For example, NAS notes, there is likely to be great demand for the aggregate data from other federal agencies, from outside researchers, and other potential end-users. Currently, the EEOC provides a large amount of aggregate data from EEO-1 Forms. Title VII contains confidentiality provisions, including penalties governing unauthorized releases of data. Accordingly, the EEOC uses "reportedly elaborate but unpublished rules" when it aggregates data in order to guard against revealing the identity of any particular employer.

The EEOC's existing data protection methods, NAS points out, are much more informal than those used by other federal agencies. Should the EEOC plan to release compensation data, NAS states, it will have to come up with ways to allow access while still protecting the underlying information. Thus, the fifth recommendation is that the EEOC, in anticipation of someday providing compensation data to the public, should start now to develop policies to "provide access in a protected environment."

The report also points out that a breach in the protection of data that employers have provided to the EEOC under a promise of confidentiality would be, "as other federal agencies have discovered, painful and of lasting consequence." The report's sixth and final recommendation addresses this concern, and counsels the EEOC to seek legislation that would increase its ability to protect confidential data, including authorizing data-sharing agreements with other agencies, and extending the existing Title VII penalties to nonagency employees.

Looking Ahead

The EEOC Commissioners were briefed on the NAS report prior to its August 15, 2012 public release. Thus far the Commission has not issued any statements regarding the report, nor

has it solicited public comment on the report's recommendations. Should the agency seek such public input EEAC intends to respond.

The NAS report does support several of the concerns expressed by EEAC in its comment letters to OFCCP regarding the agency's intention to develop a compensation data collection tool to replace the former EO Survey.[3] We intend to file a supplemental comment letter with OFCCP urging the agency to delay further development of a new data collection tool pending consultation and coordination with the EEOC in addressing the serious issues raised by the NAS report.

The Obama Administration can be expected to maintain its emphasis on pay equity and the NAS does recommend that the EEOC initiate a pilot program to further study the feasibility of developing a compensation data collection instrument. Nevertheless, the concerns raised in the report should postpone for quite some time the day that such a tool is approved and becomes operational.

We will keep members informed as events unfold.

Questions concerning this memorandum should be directed to Jeff Norris or Rae Vann at 202-629-5650 or Ann Reesman at areesman@eeac.org.

[3] See EEAC Memoranda 11-187 (September 30, 2011) and 11-197 (October 14, 2011).

Collecting Compensation Data from Employers

Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin

Committee on National Statistics

Division of Behavioral and Social Sciences and Education

NATIONAL RESEARCH COUNCIL
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Preface

The U.S. Equal Employment Opportunity Commission (EEOC) collects detailed information on employment by gender and race/ethnicity by job groupings from all employers, except small employers. The agency does not collect earnings data from private employers. The only earnings data collected by EEOC are collected for employees of state and local governments, excluding school systems and educational institutions, and these earnings data are limited to major gender and race/ethnic groups for eight salary ranges. As a byproduct of the agency's enforcement programs, EEOC collects pay information during investigations of complaints and litigation, but it does not use the information collected in this manner to monitor pay trends in any structured way.

The Paycheck Fairness Act of 2009 (H.R. 12), which did not pass during the 111th Congress,[1] would have required EEOC to issue regulations to mandate data from employers to EEOC on pay by the race, gender, and national origin of employees. If the legislation had become law, EEOC would have confronted issues regarding currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data.

At the suggestion of a White House Task Force, the EEOC asked the National Research Council, through its Committee on National Statistics (CNSTAT), to convene this panel to review methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964, as amended. The panel was asked to consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues.

In conducting this review, the panel held two workshops to gather information from data users and experts in survey methodology, wage and compensation concepts, and other methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers. We particularly benefitted from papers and presentations provided by leadership and staff of EEOC, the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor, and the U.S. Department of Justice. A paper on administrative sources of pay data was commissioned and is an appendix to this report.

[1]The legislation was reintroduced in both chambers in the 112th Congress. At this writing, the House version remains in committee while the Senate version failed to clear a procedural vote (to bring it up for floor consideration) on June 5, 2012.

The panel is grateful for the active participation of Sharon Alexander, Office of the Chair, EEOC, and Ronald Edwards, director, Program Research and Surveys Division, Office of Research, Information and Planning, EEOC, for their unhesitant cooperation with the panel during its work. Special thanks go also to Bliss Cartwright and Lucius Brown, who assisted in developing this study and in overseeing its progress on behalf of EEOC.

A large group of experts from government agencies, academia, and representing various other user organizations freely gave of their time to prepare presentations for the workshops and enter into a dialogue with the panel as it gathered information for this report.

The first workshop opened with statements by Stuart Ishimaru, commissioner, Equal Employment Opportunity Commission; Jocelyn Samuels, senior counselor to the assistant attorney general for civil rights, U.S. Department of Justice (DOJ); and Claudia Gordon, special assistant to the director of the OFCCP. Ron Edwards of EEOC and Pamela Coukos, senior program advisor, OFCCP, brought the panel up to date on currently available sources of equal employment opportunity and wage data. State and provincial programs that now collect earnings data by gender, race, and national origin were described by Martha Burk, formerly the senior adviser for women's issues to the governor of New Mexico; Faith Zwemke, director of the Pay Equity Office of Minnesota; and, in the second workshop, Stephanie McCleave, director of the Ontario, Canada Pay Equity Office. The general counsel of the EEOC, P. David Lopez, and three EEOC field office officials—Anna Park, regional attorney, and Rosa Viramontes, deputy regional attorney of the Los Angeles District Office, along with Marla Stern-Knowlton, director of the San Diego Local Office—summarized the current enforcement and litigation uses of the EEO-1 data currently gathered by the agency. Bliss Cartwright of the EEOC Program Research and Surveys Division gave a presentation on national office uses of the EEO-1 data. Overviews of compensation concepts and definitions were provided by Kevin Hallock, Cornell University, and Philip Doyle, assistant commissioner for compensation levels and trends, Bureau of Labor Statistics, Department of Labor.

In the second workshop, the panel heard from representatives of vendors who provide payroll and software products. Karen Minicozzi discussed the enterprise software offerings of Workday Solutions. Liz Balconi, consultant, and Michele Whitehead, manager of human resource services, Berkshire Associates, discussed the software that this firm uses to assist companies with understanding their equal opportunity profiles. A consultant to the panel, Nicholas Greenia, formerly of the Internal Revenue Service, gave a presentation on the availability of administrative data to yield earnings data useful for antidiscrimination purposes. A panel consisting of Ronald Edwards, EEOC; Gilberto Garcia, chief, Branch of Enforcement and Appeals, OFCCP; and Sharyn Tejani, special litigation counsel, DOJ, discussed issues of data confidentiality and data sharing.

The panel is grateful for the excellent work of the staff of CNSTAT for their support in developing and organizing the workshops and preparing this report. Tom Plewes, study director for the panel, ably supported the work of the panel. Michael Siri provided administrative support to the panel. We are especially thankful for the personal participation of Constance F. Citro, CNSTAT director, in the conduct of the workshops and in the preparation of this report.

This report has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with procedures approved by the Report Review Committee of the National Research Council. The purpose of this independent review is to provide candid and critical comments that assist the institution in making its reports as sound as possible, and to ensure that the reports meet institutional standards for objectivity, evidence,

and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the deliberative process.

The panel thanks the following individuals for their review of the report: Frank Dobbin, Department of Sociology, Harvard University; Jon A, Geier, Employment Law Department, Paul Hastings, LLC; Kevin F. Hallock, Institute for Compensation Studies, Cornell University; Alan F. Karr, Director's Office, National Institute of Statistical Sciences; Barbara F. Reskin, Department of Sociology, University of Washington; and John H. Thompson, NORC at the University of Chicago.

Although the reviewers listed above have provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations, nor did they see the final draft of the report before its release. The review of the report was overseen by Robert Michael, professor, Harris School, The University of Chicago, and Michael Goodchild, professor emeritus, University of California, Santa Barbara. Appointed by the National Research Council, they were responsible for making certain that the independent examination of this report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final content of the report rests entirely with the authoring panel and the National Research Council.

John M. Abowd, *Chair*
Panel on Measuring and Collecting Pay
Information from U.S. Employers by Gender,
Race, and National Origin

Summary

For identifying the possibility of discriminatory practices, the U.S. agencies with responsibilities for enforcing equal employment opportunity (EEO) laws have long relied on detailed information that is obtained from employers on employment in job groups by gender and race/ethnicity. The U.S. Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor, and the Civil Rights Division of the U.S. Department of Justice (DOJ) have developed processes that use these employment data as well as other sources of information to target employers for further investigation and to perform statistical analysis that is used in enforcing the anti-discrimination laws. The limited data from employers do not include (with a few exceptions) on-going measurement of possible discrimination in compensation.

The proposed Paycheck Fairness Act of 2009 (H.R. 12) would have required EEOC to issue regulations mandating that employers provide the EEOC with information on pay by the race, gender, and national origin of employees. The legislation was not enacted. If the legislation had become law, the EEOC would have been required to confront issues regarding currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data.

At the suggestion of a White House Task Force, EEOC asked the National Research Council through its Committee on National Statistics to convene a panel to review methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers. The Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race and National Origin considered suitable data collection instruments, procedures for reducing reporting burdens on employers, and issues of confidentiality protection and data access.

The panel concludes that the collection of earnings data would be a significant undertaking for the EEOC and that there might well be an increased reporting burden on some employers. We also conclude that there is, at present, no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies. In August 2011, OFCCP issued an Advance Notice of Proposed Rulemaking (ANPRM) to seek public comment on the development and implementation of a new compensation data collection tool. The APRM contained a set of 15 questions encompassing all aspects of the new tool. Questions put forth included which type of wage data to collect,

appropriate job categories, the possibility of submitting data on an establishment basis, electronic data submission, etc.[1]

The main purpose for which the wage data would be collected, as articulated to the panel by EEOC and OFCCP representatives, is for targeting employers for investigation regarding their compliance with antidiscrimination laws But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency. The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into the compliance programs, for which the triggers have primarily been a complaint process that has generated relatively few complaints about pay matters.

Furthermore, the panel concludes that existing studies of the cost-effectiveness of an instrument for collecting wage data and the resulting burden are inadequate to assess any new program. Unless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to determine, with precision, the actual burden on employers and the probable costs and benefits of the collection. Therefore, the first recommendation is to develop such a plan.

Recommendation 1: In conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor and the Civil Rights Division of the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission should prepare a comprehensive plan for use of earnings data before initiating any data collection.

The second recommendation stems from the panel's conclusion that existing evidence does not provide an adequate basis for determining the costs and benefits of the collection of wage data. Based on the data use plan, the panel recommends that a pilot study be conducted by an independent organization to provide much more reliable information about the costs and benefits of the proposed collection.

Recommendation 2: After the U.S. Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the date. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost, and respondent burden.

The panel offers two approaches to the recommended pilot study. The first pilot test—a microdata pilot approach—proposes collecting a number of core demographic variables (using the categories on the EEO-1 form) and adding an annual wage measure in order to test targeting firms for enforcement purposes. In addition, the pilot would test the collection of additional variables that are relevant to a firm's practices. For example, age and years-on-the-job variables could assist in controlling for the legitimate effect of these characteristics on wages.

[1] For the full set of questions in the APRM, see 76 *FR* 49398–49401.

The second approach—a simplified aggregated-data pilot—would develop and test an enhanced EEO-1 report that would include all the summary data required for the computation of test statistics comparing wage data within existing EEO-1 occupations. This pilot would use grouped data techniques that would produce standardize wage rates and other measures of interest. The end product would be a prototyped method for providing screening information about pay that is based on standardized information and audited test statistic formulas.

Both approaches to the pilot studies could also test various earnings definitions, such as those used in the Bureau of Labor Statistics' Occupational Employment Survey. The tests would assess the possibility of reducing employer response burden by using commercial electronic record-keeping systems in use in the larger companies. The quality of the data collected in the pilots would be independently verified by record checks or by comparison of aggregated results with administrative databases.

More needs to be done administratively to prepare the ground prior to commencing any data collection. EEOC has a small and lightly resourced data collection and analytical program that has traditionally been focused nearly exclusively on collecting employment data, developing summary statistics, and assessing individual employer compliance through the means of rather straightforward statistical tests. If data on compensation are added to an existing form, or collected in a new instrument, it is likely that the resources for both collection and analysis in the agency would be severely strained. Thus, it is important that EEOC (and its partner antidiscrimination agencies) assess their capacity to undertake any new data collection and, when necessary, enhance their capacities to take full advantage of new opportunities for analytics and compliance, using the more sophisticated measures that will be possible.

Recommendation 3: The U.S. Equal Employment Opportunity Commission should enhance its capacity to summarize, analyze, and protect earnings data.

There are several possible means of collecting earnings information, ranging from pay bands (the clustering of pay levels method now used in the EEO-4 reports) to rates of pay. Pay band data are attractive in that they align with the way that human resource managers tend to look at compensation, but the best data are collected from payroll records, and those are most likely to be rates of pay or average earnings as computed with information on total wages and hours. Data on rates of pay have the advantage of being more likely to provide valid measures of central tendency and dispersion, thereby affording an important quality check and analytical capability. Rates of pay collection would add rigor to the collection process.

Recommendation 4: The Equal Employment Opportunity Commission should collect data on rates of pay, not actual earnings or pay bands, in a manner that permits the calculation of measures of both central tendency and dispersion.

It is important to use a definition of compensation that is measurable, collectable, and, in the end, meaningful. There are a number of definitions that are currently in use, ranging from comprehensive measures of total compensation to simple straight-time hourly pay. We conclude that a measure such as that used in the Occupational Employment Survey would best illuminate earnings levels. This measure has the added benefit of being generally available because earnings data by occupation are now collected with use of this definition from more than 1.2 million establishments.

Most of the firms that fall within the scope of the EEO statutes and are now required to complete an annual EEO-1 report have the ability to provide these data from their existing payroll and human resource systems. The growing penetration of highly sophisticated software-as-a-service applications into the marketplace will further enhance the ability of establishments to provide earnings data by job group and gender, race, and national origin in the future. Finally, the sensitivity of the data that employers provide to EEOC will be heightened if earnings data are added to EEO data records, since employee compensation data are generally considered to be highly sensitive, even proprietary information, by most employers. Therefore, it will be important for EEOC to develop more sophisticated techniques for protecting data that are provided in tabular and microdata form to the public .

Recommendation 5: In anticipation of increased user demand for microdata on pay information by demographic detail for research and analytical purposes if such data are collected by the U.S. Equal Employment Opportunity Commission, the agency should consider implementing appropriate data protection techniques, such as data perturbation and the generation of synthetic data to protect the confidentiality of the data, and it should also consider supporting research for the development of these applications.

In order to assure reporting employers that their data are indeed protected from disclosure, it will be important to establish clear and legally enforceable protections for sharing the data that employers provide in confidence. The agencies should consider whether the protections, now insured through the mechanism of interagency memorandum-of-understandings (MOUs), should be incorporated in legislation.

Recommendation 6: The U.S. Equal Employment Opportunity Commission should seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.

1
Background

The U.S. Equal Employment Opportunity Commission (EEOC) has a significant and active data collection program, which primarily collects information about employment status. Except for some pay data currently collected in its periodic reports from state and local government agencies for antidiscrimination enforcement, the agency has not collected pay data from private-sector employers, except on a case-by-case basis as necessary to support specific investigations. With that exception, the agency has no experience in collecting pay information from the private sector.[1] In its annual collection of data from private employers (EEO-1), the EEOC collects only employment classified by job category, gender, race, and national origin.

In this chapter, we briefly summarize relevant employment discrimination laws and describe the data that are currently collected in support of EEOC's enforcement program. We also describe the current roles and responsibilities of the key federal agencies that enforce those laws and that now use the EEOC data.

LEGISLATION, AUTHORITIES, AND RESPONSIBILITIES

Discrimination in pay on the basis of sex has been outlawed by the federal government for almost 50 years, since the Equal Pay Act of 1963 (EPA). Enacted as an amendment to the Fair Labor Standards Act, the Equal Pay Act's coverage is very broad. It applies to any employer "engaging in commerce or in the production of goods for commerce" with an annual gross income of $500,000 or more (29 U.S.C. § 203(s)). Government entities and health and educational institutions are covered irrespective of size. There are narrow exceptions to coverage under the statute for certain kinds of employees (see 29 U.S.C. § 213(a)).

The Equal Pay Act requires that men and women in the same workplace be given equal pay for jobs "the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" (29 U.S.C. §206(d)(1)). Unequal pay between

[1]The terms *pay*, *wage,* and *earnings* are used interchangeably in this report, depending on the context. They are taken to mean remuneration for labor or services to a worker on an hourly, daily, weekly, or annual basis or by the piece. The terms *salary* and *compensation* are also used in this report: *salary* is a fixed form of pay, wages, or earnings; compensation is the total amount of the monetary and nonmonetary pay provided to an employee by an employer in return for work performed, including money, benefits, services, and in-kind payments.

men and women for jobs that are substantially equal violates the act unless the employer can show that the difference in pay is attributable to a bona fide seniority, merit, or incentive system or another factor other than sex. Although the U.S. Department of Labor (DOL) was initially given authority to enforce the act, that authority was transferred to the EEOC in 1978.

Originally enacted one year after the Equal Pay Act in 1964, Title VII of the Civil Rights Act (hereafter, Title VII) prohibits a wide range of discriminatory employment practices, including discriminatory pay practices, and addresses discrimination based on sex, as well as race, color, religion, and national origin. Title VII covers private-sector employers with 15 or more employees and state and local government employers.

Under Title VII, an employee challenging pay discrimination must show that he or she is paid less than another similarly situated employee because of race, color, religion, sex, or national origin. If he or she does so, then the employer must explain the reason for the disparity. The employer may assert any of the defenses in the Equal Pay Act or a different, nondiscriminatory reason for the pay disparity. If the employer is unable to provide a satisfactory explanation for the disparity, the employer will be liable for penalties for pay discrimination. If the employer does provide a satisfactory reason for the disparity, the employee would have to show that the employer's stated reason is a pretext in order to succeed in proving pay discrimination.

Even where an employer does not intend to discriminate, a practice that is, on its face, neutral but that has the *effect* of disproportionately excluding or adversely impacting members of a protected group can violate Title VII. In such "disparate impact" cases, the individual alleging discrimination must prove—usually through statistical evidence—that the challenged practice has a substantial and significant adverse effect on a protected group. If the individual proves this, the employer will be liable for discrimination unless it can show that the practice in question is job related and consistent with business necessity. If an employer can demonstrate that a practice is indeed justified, the individual will be given an opportunity to prove that there are other practices that would also serve the employer's purposes, but with less impact on the protected group.

Title VII's prohibitions on compensation discrimination are broader than those contained in the Equal Pay Act. For example, under Title VII, an employee can challenge not only unequal pay between men and women performing substantially equal work, but also discriminatory practices that lead to unequal compensation, such as steering women to lower paid jobs than men or maintaining "glass ceilings," artificial barriers to the advancement of women.

Title VII empowers the EEOC to accept and investigate charges of discrimination from persons who believe they have been subjected to employment discrimination and from those acting on their behalf. Title VII also allows for members of the commission itself to file charges of unlawful employment practices against employers. The EEOC is also empowered to open "directed investigations" under the Equal Pay Act, thereby allowing the EEOC to investigate the possibility of a violation of the act without having received a charge of discrimination from an aggrieved person.

Individuals must exhaust their administrative remedies through the EEOC prior to filing a lawsuit under Title VII. But under the Equal Pay Act, aggrieved persons may file charges of discrimination with the EEOC and are not required to do so in order to file a lawsuit under the act. Moreover, filing a charge under the act with the EEOC does not suspend the statute of limitations under the Equal Pay Act, as it does under Title VII. For this reason, and in light of the significant time it can take to exhaust administrative remedies through the EEOC, some

aggrieved individuals find it preferable to file a lawsuit under the EPA without filing a charge with the EEOC.

Under both Title VII and the Equal Pay Act, the EEOC investigates charges of discrimination and seeks to resolve them without litigation. However, the EEOC litigates a number of charges in which conciliation has failed each year. Under Title VII, the EEOC can litigate cases against private employers; charges against state and local governmental entities have to be referred to the U.S. Department of Justice (DOJ) for litigation. Under the Equal Pay Act, the EEOC may litigate against any covered employer, private, or public.

In fiscal 2010, a total of 99,922 charges were filed, many for multiple allegations of discrimination (U.S. Equal Opportunity Commission, 2010). Special tabulations developed for the panel indicate that about 1 in 7 of the charges were on the basis of wage discrimination: see Table 1-1. The majority of wage charges also involved other issues, most commonly terms and conditions of employment, termination, promotions, or discharges.

The Employment Litigation Section of the DOJ's Civil Rights Division is also charged with the enforcement of Title VII of the Civil Rights Act. Specifically, DOJ has jurisdiction to enforce Title VII against state and local government employers nationwide. DOJ can initiate litigation under Title VII in two ways: (1) DOJ has independent authority to bring suit against a state or local government employer when there is reason to believe that a "pattern or practice" of discrimination exists; (2) DOJ may investigate and file suit against a state or local government employer based on an individual charge of discrimination referred by the EEOC. DOJ can initiate such a suit if the EEOC has found reasonable cause to believe that discrimination occurred, the EEOC's efforts to obtain voluntary compliance have been unsuccessful, and EEOC has referred the charge to DOJ.

The Office of Federal Contract Compliance (OFCCP) in DOL is responsible for making certain federal contractors follow requirements in Executive Order 11246 (issued in 1965) to practice equal opportunity and take affirmative action on issues of race and gender:[2] in addition, OFCCP is responsible for enforcing Section 503 of the Rehabilitation Act of 1973, covering persons with disabilities, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), covering veterans and disabled veterans. Under these laws, federal contractors must provide equal employment opportunities and take affirmative action to employ and advance employees and applicants; provide reasonable accommodations to disabled employees and applicants; prepare Affirmative Action Plans (AAPs); permit OFCCP access during compliance reviews; and file an annual report with the EEOC.[3]

OFCCP regulations require contractors to maintain records on employee compensation and provide them on request (41 C.F.R. §60-1.12(a), covering records on "rates of pay or other terms of compensation"). The regulations also require contractors to "regularly" monitor their compensation systems for potential pay disparities based on race and gender, develop and implement appropriate corrections to any problem areas they identify, and report the results of their internal monitoring to management (41 C.F.R. §60-2.17). This language apparently requires federal contractors to maintain data on earnings by demographic characteristics.

[2]In addition to race and sex, Executive Order 11246 (originally implemented in 1965) addresses equal opportunity on the basis of religion, color, and national origin.

[3]The application of each of these requirements may vary on the basis of contract size and number of employees.

EEOC DATA COLLECTION AND REPORTS

The various laws and regulations to enforce antidiscrimination laws are accompanied by laws and regulations for the federal government to collect data that can be used in their enforcement. The EEOC uses its authority under Section 2000e-8(c) of Title VII to collect workforce data from employers. The statute requires employers to preserve "records relevant to the determinations of whether unlawful employment practices have been or are being committed," and to "make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of [Title VII] or the regulations or orders thereunder."

The EEOC currently collects workforce data from private-sector employers with more than 100 employees, from federal contractors with 50 or more employees, and from all state and local government employers. Employers that meet the reporting thresholds have a legal obligation to provide the data; it is not voluntary. The data are collected through several equal employment opportunity (EEO) reports.

There are four versions of the required EEO reports, each addressed to different employer groups. Each of the versions collects employment data about gender and race/ethnicity by some type of job grouping; each provides, in essence, a snapshot of the demographics of the workplace by job category. Copies of these report forms are provided in Appendix A.

EEO-1 Report

The EEO-1 report is required from private employers with: 100 or more employees or 50 or more employees and a federal contract. Firms must file a separate report for each facility with 50 or more employees. Approximately 67,000 establishments filed more than 1.3 million EEO-1 reports (Standard Form 100) in 2010. For 2010, the reports covered 59 million employees, which is almost one-half of the 108 million employees for all firms in the private sector. The largest 10 percent of covered firms represented about 75 percent of covered employment, and covered establishments with 120 employees or less represented only about 2.5 percent of covered employment: see Table 1-2.

Employers are required to file the EEO-1 report annually (due to the EEO-1 Joint Reporting Committee on September 30). The data elements that are collected include 7 race/ethnicity categories and 10 job groups, by gender.[4] Employers may use employment figures from any pay period in July through September. Employers may submit their EEO-1 reports on paper forms, as data files[5] by electronic transfer, or by keying the data online through the EEO-1 online filing system. About 99 percent of the reports are received electronically.

There are different types of reports for single establishment employers and multiple establishment employers. Multiple establishment reports must include a consolidated form that includes all employment for the company, one for headquarters locations, and one for each

[4]The race/ethnicity categories are Hispanic or Latino, and—under not-Hispanic or Latino—white; black or African-American; Native Hawaiian or Other Pacific Islander; Asian American Indian or Alaska Native; and two or more races. The 10 job groups are executive/senior level officials and managers; first- or mid-level officials and managers; professionals; technicians; sales workers; administrative support workers (formerly, office and clerical workers); craft workers (formerly, craft workers, skilled); operatives (formerly, operatives, semiskilled); laborers and helpers (formerly, laborers, unskilled); and service workers.

[5]The files are sent as ASCII/text files, a simple data transfer that does not use developing techniques such as XML.

location with 50 or more employees. Locations with fewer than 50 employees are required to report only the address and total number of employees at that establishment, rather than a complete matrix.

EEO-3 Report

The EEO-3 report form is used for referral unions, which are generally unions with exclusive hiring arrangements with an employer. The report is required in even-numbered years with a due date of December 31. The EEO-3 form collects data on membership and referrals by race/ethnicity and gender. In 2010, there were about 1,200 reporting unions. The reports are used for enforcement and provide basic membership and referral data for investigators. They also allow statistical analyses to examine equity in membership and referrals.

EEO-4 Report

The EEO-4 report form is used for state and local governments. It is required in odd-numbered years and is due on September 30. Approximately 6,000 jurisdictions filed EEO-4 reports in 2009. The reports that year covered 5,980,305 employees.

This is the only EEO report that now collects employment data by job group and salary ranges for race/ethnicity and gender, with separate reports by function. Data are also collected separately for part-time employees and new hires. (See Chapter 3 for discussion of the wage data that are collected in this survey.)

EEO-5 Report

The EEO-5 report form is used for primary and secondary public school districts. It is required in even-numbered years with a due date of November 30. For 2010, the EEOC received more than 5,800 of these reports. The data are collected from each school district with 100 or more employees by race/ethnicity and gender for relatively detailed job groups.[6] EEO-5 data are also collected for part-time employees and for new hires.[7]

WHITE HOUSE TASK FORCE REPORT AND PANEL CHARGE

Following President Obama's pledge in the 2010 State of the Union address to increase enforcement of equal pay laws, the administration established the National Equal Pay Enforcement Task Force in 2010, bringing together EEOC, DOJ, DOL, and the Office of Personnel Management (OPM). The task force identified several challenges to successful enforcement of compensation discrimination laws and made recommendations to address each

[6]The job groups are: officials, administrators, and managers; principals; teaching assistant principals; nonteaching assistant principals; elementary classroom teachers; secondary classroom teachers; other classroom teachers; guidance staff; psychological staff; librarians and audiovisual staff; consultants and supervisors of instruction; other professional staff; teacher aides; technicians; clerical and secretarial staff; service workers; skilled crafts; and unskilled laborers.

[7]Part-time employees are grouped by "Professional Instructional" and "All Other." New hires are grouped by "Officials, Administrators, Managers," "Principals and Assistant Principals," "Classroom Teachers," "Other Professional Staff," and "Nonprofessional Staff."

challenge. Three of the five challenges identified by the task force have implications for this report:

- Three different federal agencies have distinct responsibilities to enforce the laws prohibiting pay discrimination, and the agencies do not consistently coordinate these responsibilities.
- The government's ability to understand the full scope of the wage gap and to identify and combat wage discrimination was limited by the data that are currently available. As the task force report says, "this lack of data makes identifying wage discrimination difficult and undercuts enforcement efforts. We must identify ways to collect wage data from employers that are useful to enforcement agencies but do not create unnecessary burdens on employers" (National Equal Pay Task Force, 2010, p. 5).
- Existing laws do not always provide federal officials with adequate tools to fight wage discrimination. The task force report noted the administration's strong support for the Paycheck Fairness Act, which would have required EEOC to use its data collection authority to implement a pay data collection program within 18 months of its enactment. Specifically, the bill text would require EEOC to "consider factors including the imposition of burdens on employers, the frequency of required data collection reports (including which employers should be required to prepare reports), appropriate protections for maintaining data confidentiality, and the most effective format for the data collection reports."[8] The Paycheck Fairness Act would also have amended the Equal Pay Act to prohibit employers from retaliating against employees for discussing their pay.[9]

The EEOC charge to the panel stressed that it is important for the panel to bear in mind the key considerations about the balance between enforcement utility and burdens on employers. Regardless of the fate of the Paycheck Fairness Act, the EEOC wants to ensure that any effort to collect wages takes into full account the considerations expressed in the Act regarding burden on employers, confidentiality, and appropriate format for collection. The complete statement of task is in Box 1-1.

PAY RATE INFORMATION

The employment data collected by EEOC are currently used for a variety of purposes, including enforcement, self-assessment by employers, and research. The EEOC's current collection of employment data contributes significantly to the efficiency of EEOC investigations and particularly to the development of systemic investigations. However, in a statement submitted to the panel, EEOC chair, Jacqueline A. Berrien, stated that the agency sees the absence of "employer-specific pay data broken down by demographic category" as a "significant barrier" to the agency's work to eradicate pay discrimination. Berrien contrasted pay discrimination, a form of discrimination she described as "largely invisible," with other forms of discrimination that are easier to detect and that EEOC can more easily confirm or refute through

[8]This text is from the 112th Congress version of the bill, S. 3220.

[9]The legislation passed the House of Representatives in 2009 but then failed in a cloture vote in the Senate in 2010. It has since been reintroduced in both chambers in the 112th Congress, with the Senate version (S. 3220) failing a cloture vote in June 2012.

the use of its current data collections.

Many workplaces explicitly prohibit employees from discussing pay, and even in the absence of an explicit prohibition, employees in the United States rarely discuss their pay with one another. Because very few people know what their coworkers are paid, few people file complaints with the EEOC alleging that they are being paid in a discriminatory manner. In his testimony to the panel, EEOC Commissioner Stuart Ishimaru pointed out that sex-based wage charges have made up a surprisingly small portion of the charges EEOC has received—about 2.5 percent.

Berrien contended that, in addition to strengthening the EEOC enforcement program under Title VII and the Equal Pay Act, better pay data collection would also assist employers in monitoring their compliance with federal, state, and local laws prohibiting wage discrimination. By maintaining accurate pay data, Berrien said, employers will be able "to compare and identify pay differentials that deserve closer scrutiny and to detect other patterns that may suggest departures from the standard of equal pay for equal work."

EARNINGS INFORMATION

Use by OFCCP[10]

OFCCP officials similarly argued for the collection of earnings information in a presentation to the panel. Under the authorities discussed above, federal contractors must provide equal employment opportunities, take affirmative action to employ and advance their employees, and make reasonable accommodations to employees and applicants.

A major requirement imposed on certain covered federal contractors is to develop an Affirmative Action Plan (AAP). To meet this requirement, contractors must maintain appropriate records by establishment or function. The AAP data requirements cover the following topics: an organizational profile; a job group analysis; and information on placement of incumbents, determining availability, and comparing incumbency to availability. The AAP should spell out placement goals and designate an individual responsible for implementation. Problem areas need to be identified and action-oriented programs specified, and the plans need to be audited periodically.

The AAP instructions call on employers to group jobs by similar pay and work content and to classify them into an appropriate EEO category based on similar duties and responsibilities, as well as similar opportunities for training, transfer, pay, and promotion, and similar jobs in lines of progression. An example of an AAP workforce analysis is shown in Table 1-3 below.

The OFCCP has minimum employee and contract size requirements for federal contractors[11] and different rules for construction contractors. For example, construction contractors with federal contacts or subcontracts valued at more than $10,000 in any 12-month period are covered by Executive Order 11246 at all construction worksites in the United States

[10]This section summarizes a presentation to the panel by Pamela Coukos, senior program advisor, OFCCP.

[11]Basically, all federal contracts and subcontracts are covered under Executive Order 11246 unless specifically exempted. Contracts and subcontracts of less than $10,000 generally are exempt, though some contracts under that amount are covered (e.g., bills of lading). Also exempt is work performed outside the United States; certain contracts with state or local governments; contracts with religious corporations, associations, and educational institutions; and contracts involving work on or near an Indian reservation. See 41 CFR § 60-1.5.

(Office of Federal Contract Compliance Programs, 2009).

The enforcement activities of OFCCP primarily involve full compliance reviews. These reviews begin with desk audits of information submitted by a contractor in response to a scheduling letter, and they may also include an onsite review. Contractors are identified as being subject to enforcement activities based, in part, on a system called the Federal Contractor Selection System (FCSS). This system draws information from the universe of EEO-1 reports and federal contractor databases. Using these data sources, OFCCP selects contractors based on threshold requirements, sampling procedures, and mathematical modeling.

An OFCCP compensation analysis consists of an initial review of average pay differences for job categories. The agency then performs a statistical or individual analysis as appropriate (depending on sample size and available data) and further review and analysis based on contractor pay practices and data. These data are used to assess the company's practices. The investigation is designed to answer some basic questions: Are there pay differences between employees in a protected class and otherwise similar employees? Are there differences in salary/hourly rate, promotions, job assignment, and access to earning opportunities? Are there legitimate explanations for any differences?

At the time this report was being prepared, OFCCP was considering a new compensation reporting tool that would proactively allow the agency to more effectively identify potential violations of Executive Order 11246. The agency has requested public input on the kind of instrument that could be used for this purpose. This initiative is discussed in Chapter 2.

Use by DOJ[12]

According to Jocelyn Samuels, senior counselor to the assistant attorney general for civil rights of DOJ, the department uses data, including pay data, gleaned from the EEO-4 reports to fulfill its responsibilities under antidiscrimination statutes. The "pattern or practice" cases initiated based on the department's independent authority under Title VII, Samuels told the panel, "are factually and legally complex cases that seek systemic injunctive relief to alter unlawful employment practices—such as discriminatory recruitment, hiring, assignment or promotion policies—which have the purpose or the unjustified effect of denying employment or promotional opportunities to a class of individuals." DOJ may also investigate and file suit against a state or local government employer based on an individual charge of discrimination referred by the EEOC, as described above.

The department routinely consults and relies on the information included in the EEO-4 reports regarding workforce composition and new hires, in combination with other information, to determine whether or not to use its enforcement jurisdiction to investigate a specific state or local government employer. Specifically, the department relies on EEO-4 reports for data on the demographics of different job categories in an employer's workforce to assist in deciding whether to pursue investigations of allegations that may constitute a "pattern or practice" of discrimination. The EEO-4 information enables comparisons of an employer's workforce in a particular job category to an applicable benchmark—such as civilian labor force data in the relevant geographic area taken from census and survey sources—to determine whether a particular group appears to be underrepresented in that job category or in the employer's workforce as a whole. The comparison provides a basis to estimate whether there is a disparity in

[12]Statement of Jocelyn Samuels to the Panel on Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin Workshop, May 24, 2011.

representation in the workforce and to make an initial assessment of the significance of the disparity, which is one factor that informs the department's evaluation of whether to open an investigation in order to gather more detailed information from an employer.

In her presentation to the panel, Samuels stated that the demographic data collected on the EEO-4 reports are invaluable for enforcement purposes, but the wage data on the form are currently less useful. The job categories and the wage bands reported on the EEO-4 form are too broad, and the current EEO-4 form does not include any other information, such as longevity (years of service), which can be a key determinant of salary in the public sector.

In order to allow meaningful analysis, the department needs salary information in narrower job classes and information about years of service in the job class. In addition, according to Samuels, salary information should be collected in narrower bands, and should, to the extent possible, reflect the entire amount earned, not solely base pay. State reports suggest that these data are readily available in many states.[13]

In addition, DOJ has recently executed a memorandum of understanding with the EEOC in order to obtain access to EEO-1 data for private employers. DOJ anticipates that it will use these data in enforcement efforts for comparison purposes in job categories that exist in both the public and private workforce.

Use for Analysis and Research

In their presentations to the panel, the representatives of the EEOC, OFCCP, and DOJ emphasized the enforcement purposes behind the collection of data from employers and unions. However, by virtue of their depth and coverage, these data also have statistical, analytical, and research uses.

EEOC publishes annual statistical summaries of employment data from the EEO-1 and EEO-4 reports, as well as information received from federal government departments and agencies, on its website in three series: *Job Patterns for Minorities and Women In Private Industry* (EEO-1); *Job Patterns for Minorities and Women in State and Local Government* (EEO-4); and *Federal Sector Reports.* The employment data by race/ethnicity and sex are published by industry, geographic area (state and local areas), and job category.

As part of an emphasis on proactive prevention, EEOC's Office of Research, Information, and Planning has produced a series of reports based on EEO-1 data. The reports over the past decade have focused on industries and sectors (the finance industry, retail distribution centers, the media, high-end department stores, investment banking, broadcasting, and law firms) as well as on particular labor market topics, including: *How New Business Processes Impact Minority Labor Markets*; *Women of Color: Their Employment in the Private Sector*; *Glass Ceilings: The Status of Women as Officials and Managers in the Private Sector*; and *Characteristics of Private Sector Employment Report.*

A major use of the employment data is in the context of charge-based investigations, in which the data are used to assist EEOC in identifying employers that warrant statistical comparisons, which could, in turn, trigger further investigation of their EEO practices. For example, using the EEO-1 establishment reports of the numbers of employees in the establishment(s) that fall in a certain job group and gender, race, and ethnic category, EEOC staff

[13]For example, see information from the Florida Bureau of State Payrolls http://www.archive.org/details/StateOfFloridaPayrollDatabase2008 [July 2012].

calculate a number of indicators that are designed to assess the EEO status of the firm. Those indicators include:

- *Actual number*: The reported number of employees in a particular job group and gender, race, and ethnic category.
- *Expected number*: the number of employees that would be expected to exist in that certain job group and gender, race, and ethnic category according to the percentage employed by comparison establishments that have been selected based on specified geographic and industrial scope.
- *Difference*: The difference between the actual number and expected number of employees in a certain job group and gender, race, and ethnic category. If the difference is positive, the establishment is over the expected number; if it is negative, the number of employees in that category is below the expected number—a difference that is often referred to as a "shortfall."
- *Actual percent*: The percentage of employees in a certain job group and gender, race, and ethnic category.
- *Expected percent*: The percentage of employees that would be expected in that certain occupational and gender, race, and ethnic category based on that percentage in comparison establishments.
- *Two-tail probability*: A binomial statistical significance test, which is used to determine if the differences between the actual and expected numbers are statistically significant.

Administratively, EEOC primarily uses the EEO-1 data to identify potential discriminatory practices in the context of an investigation of a charge and to otherwise support investigations. The EEO-1 data are used in different ways at different stages of the investigation, and the analysis becomes more refined as the investigation progresses.

In a presentation to the panel, Bliss Cartwright of the EEOC Office of Research, Information, and Planning discussed these uses, selecting as a hypothetical example a comparison of gender employment in one firm to employment in similar firms in the labor market. In his example, the firm had 180 female professionals of 624 total professionals, about 29 percent: in contrast, the proportion of female professionals in the labor market was 40 percent. He assumed that the labor market percentage was estimated by aggregate EEO-1 data on other firms in similar industries and locations, and he applied a one-sample binomial test of statistical significance. The main characteristics of this hypothetical example can be summarized as follows:

- TOTAL PROFESSIONALS: 624
- FEMALE PROFESSIONALS: 180
- OBSERVED PROPORTION: 0.2885
- LABOR MARKET PROPORTION: 0.4067
- NULL HYPOTHESIS: NO DIFFERENCE
- TWO-TAILED PROBABILITY: < 0.0000 (LESS THAN ONE CHANCE OUT OF 10,000)
- CONCLUSION: SUBSTANTIAL EVIDENCE AGAINST NULL HYPOTHESIS OF NO DIFFERENCE IN PROPORTIONS

Other situations may require more refined analyses. For example, sometimes a national firm has many facilities, hiring workers for the same job in different local labor markets. Alternatively, a single firm may recruit executives from a national market, midlevel managers from a regional market, and operatives from a local market. The issue is that there are multiple units of analysis, each with different employee counts and labor market estimates. In these situations, other statistical methods might be more appropriate. For example, Cartwright illustrated one approach commonly known as a pooled binomial (Gastwirth and Greenhouse, 1987), which provides an estimate of the overall shortfalls giving a single probability value. It also allows examination of homogeneity, the extent to which the units of analysis differ from each other.

The next step in an analysis is to seek additional information from an employer through a request for information (RFI) that is tailored to the potential infraction alleged in the charge. For hiring issues, for example, EEOC typically requests files with demographic information, applicant flow data, and job history records. The requested data may be extensive. The job history information typically contains the effective date of the hire or the action that distinguishes initial hires from rehires or returns by use of employee identification numbers. The requested records also include specific job titles, divisions, and salary grades. At this stage, a wide variety of statistical methods would be considered—including linear regression, survival analysis, and stratified contingency tables—depending on the facts and issues in a particular case.

Understanding the Labor Market

Since collection of information about employment by gender, race, national origin, and job category was initiated on a regular basis in the 1970s, there has been intense interest by the academic community in using the data to understand labor markets, especially the effect of governmental programs and corporate human resource practices on employment discrimination. EEO-1 reports and enforcement data from the OFCCP have been used to examine the effect of affirmative action and other factors on the employment of minorities and women across different sectors of the economy.

Selden (2006) assessed a variety of studies that transcended disciplines,[14] pointing out that most use the EEO-1 survey data to examine the impact of affirmative action on minority and female employment shares among firms with or without federal contracts in the private sector. Selden summarized work by Leonard (1990) that concluded that affirmative action led to employment gains among women and minorities for the period 1974–1980 which rose more significantly for federal contractors than for noncontractors. Selden concludes that "overall, studies using EEO-1 data have shown that affirmative action has significantly and positively influenced the minority employment share in the private sector, particularly in unskilled positions" (2006, p. 915).

Although there have been difficulties in obtaining access to EEOC's survey data, the agency has made significant efforts to increase the access that researchers have to these data. Since 1996 the EEOC has entered into agreements with more than 35 researchers to allow access

[14]Selden's assessment covered Ashenfelter and Heckman (1976); Chay (1998); U.S. Government Accountability Office (1991); Goldstein and Smith (1976); Holzer and Neumark (2000a , 2000b); Kellough (1990a, 1990b); Leonard (1984, 1990); Naff (2001); Naylor and Rosenbloom (2004); Rodgers and Spriggs (1996); and Stephanopoulos and Edley (1995).

to these confidential data bases. Much of this work has been published in peer-reviewed articles and books, which in many cases has raised new questions and topics for academic research. In economics, for example, Donohoe and Levitt (2011), McCrary (2007), and Miller and Segal (2011) examined the relationship between diversity and crime rates using EEO-4 data. In sociology, Dobbin, Kalev, and Kelly (2006) examined how personnel practices impact a firm's work force diversity, particularly in management. These researchers also examined the impact of OFCCP compliance reviews and Title VII lawsuits on employment profiles (Dobbin, Kalev, and Kelly, 2007; Kalev and Dobbin, 2009), and Kalev (2009) examined how work restructuring impacts occupational segregation based on race and gender.

A wide range of other work has also been done. Several researchers compared firm-level and sector-level changes in segregation by race, ethnicity, and sex (Stainback, Robinson and Tomaskovic-Devey, 2005; Stainback and Tomsakovic-Devey, 2009). Huffman, Cohen, and Pearlman (2010) studied the impact of women managers on firm gender integration for the period 1975–1990. Skaggs (2008) studied how government action, including court decisions affected female employment in food stores. Several other researchers explored the impact of various factors, including EEOC charge processing on the employment of women and nonwhites (Hirsh, 2008, 2009; Hirsh and Kmec, 2009; Hirsh and Kornrich, 2008). Yet another group of researchers used EEO-4 data for a series of articles examining diversity in state and local governments including an examination of glass ceilings among those employers (Kerr, Reid, and Miller, 1999, 2000a, 2000b, 2002, 2003, 2004). All of this research has been done even with the kinds of difficulty of obtaining access to the data, which is discussed in Chapter 5, and in the absence of compensation data.

In the absence of employer-based earnings data by job category and demographics, however, the research community largely turned to household data to support analysis of the extent and effect of compensation discrimination in the labor market. The Current Population Survey and, more recently, the American Community Survey have emerged as powerful sources of data on earnings, industry groups, occupations, and demographics. However, these sources, are limited because they do not associate the indicators of discrimination with actual employer situations and practices, nor can they be directly linked to measures of enforcement.

There is clearly a strong research and analytical interest in having an earnings dimension to establishment, occupation, and demographic data (see, e.g., Consad Research Corporation, 2009, p. 2). It is expected that there would be significant pressure on agencies that held data enriched with earnings information to make them available for analytical uses by private sector researchers. Such data could quickly become a primary source for new analytic work on equal employment and compensation issues.

Auditing the Effectiveness and Efficiency of Antidiscrimination Programs

Over the years, Congress and a number of government agencies have used data collected on EEO-1 forms to assess the effectiveness of government antidiscrimination programs. Just as the research community would benefit from the availability of earnings data, these agencies would be expected to take advantage of earnings information to sharpen their auditing reports.

The U.S. Government Accountability Office (GAO), in particular, has been at the forefront in terms of using employment data by job category and demographics. In the past two decades, GAO has published seven major studies that have been based in part on the EEOC employment data:

Sharing Promising Practices and Fully Implementing Strategic Human Capital Planning Can Improve Management of Growing Workload (2008);

Financial Services Industry: Overall Trends in Management-Level Diversity and Diversity Initiatives (2006);

Equal Employment Opportunity: The Policy Framework in the Federal Workplace and the Roles of EEOC and OPM (2005);

Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings (2003);

Equal Employment Opportunity: Discrimination Complaint Caseloads and Underlying Causes Require EEOC's Sustained Attention (2000);

Equal Employment Opportunity: DOL Contract Compliance Reviews Could Better Target Federal Contractors (1995); and

EEOC: An Overview (1993)

Cross-Checking the Integrity of EEO Data

An additional justification for the collection of pay data is that they may help to improve the integrity of EEO employment data. Smith and Welch (1984) found some evidence that the number of minorities and women reported to be in high-level occupations by their employers on EEO-1 forms exceeded the number who reported themselves to be in those occupations in the Current Population Survey. To the extent that some employers of minority- or female-intensive occupations systematically upgrade (or misclassify) them, it would cause unusual pay compression across EEO-1 job categories and unusual pay dispersion within the higher level occupations. Being able to make such assessments by using pay data would be valuable for evaluation purposes.

TABLE 1-1 Charges Filed with U.S. Equal Employment Opportunity Commission, by Issue: October 1, 2009, to September 30, 2010

		Basis for Charge	
Issue	Total Charges	Race/National Origin	Gender
Total charges in which wage discrimination was an issue	4,478	2,314	2,164
Charges alleging only wage discrimination	638	282	356
Percent of wage discrimination charges in which wage discrimination was the only allegation	14.3%	12.2%	16.5%

SOURCE: Data from U.S. Equal Opportunity Commission.

TABLE 1-2 EEO-1 Reports by Number of Employees Covered and Percent Female and Minority, 2010

Size of Firm	Number of Firms	Number of Employees	Percent Female	Percent Minority
Total	67,422	59,128,582		
5th percentile: 1–67 employees[a]	3,443	191,965	38.6	26.8
5th–25th percentile: 68–120 employees	13,511	1,312,297	41.7	29.6
25th–50th percentile: 121–194 employees	16,875	2,587,008	45.6	31.1
50th–75th percentile: 195–407 employees	16,767	4,615,048	46.6	32.6
75th–90th percentile: 408–1,118 employees	10,090	6,541,695	47.4	33.6
90th percentile and higher: more than 1,118 employees	6,736	43,880,569	50.0	34.8

[a]Includes only establishments with at least 50 employees

SOURCE: Data from U.S. Equal Employment Opportunity Commission (2010 EEO-1 Aggregate Report of U.S.)

TABLE 1-3 Example of an Employer's Workforce Analysis for an Affirmative Action Plan.

Workforce Analysis

DEPARTMENT/WORK UNIT: Administration					MALES						FEMALES					
Job Title	Wage Rate	EEO-1 Category (EEO-1 Form or OFCCP regulations)	Job Group	Total Employees	Total	White	Black/African American	Asian/Pacific Islander	American Indian/Alaskan Native	Hispanic	Total	White	Black/African American	Asian/Pacific Islander	American Indian/Alaskan Native	Hispanic
General Manager	S-A	1	1	1	1	1										
Personnel Manager	S-D	1	1	1	1	1										
Executive Assistant	S-J	5	5	1							1	1				
Administrative Assistant	H-8	5	5	1							1		1			
File Clerk	H-11	5	5	2	1					1	1				1	
DEPARTMENT TOTAL				6	3	2				1	3	1	1		1	

SOURCE: U.S. Department of Labor, available: http://www.dol.gov/ofccp/regs/compliance/pdf/sampleaap.pdf [July 2012].

Box 1-1
Statement of Task

The National Research Council through its Committee on National Statistics (CNSTAT) will convene a panel of experts to review methods for measuring and collecting pay information from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964, as amended. The panel will evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data. The panel will consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues. It will issue a report with findings and recommendations on what data the EEOC should collect to enhance wage discrimination law enforcement efforts, which will assist the Equal Employment Opportunity Commission (EEOC) in formulating regulations at the conclusion of an 18-month study.

2
Alternative Sources of Wage Data

The charge to this panel included a request to "evaluate currently available and potential data sources" for measuring and collecting pay information from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964. We begin our response to this part of the charge with a discussion of the collection of earnings data from public-sector employers on the EEO [equal employment opportunity] form 4, or EEO-4. Indeed, the Equal Employment Opportunity Commission (EEOC) has some experience from which to draw when considering the collection of earnings data because the agency now collects wage band information on the EEO-4 form.

We also discuss other possible sources of wage information and the experiences of other agencies in collecting such information.[1] We first consider the capacity of existing federal administrative data series that include earnings information from employers to meet a requirement for wage information by gender, race, and national origin. If these administrative data, mostly from tax collections, could suffice to provide the necessary wage data for use in antidiscrimination enforcement, a new data collection process could be avoided. Unfortunately, as discussed in this chapter, the use of administrative data is not a promising path because of data incompleteness and uncertain quality.

We then consider the experience of the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor (DOL) with collection of earnings information on a trial basis a decade ago. The lessons learned in that experiment should be considered by EEOC as it examines collecting earnings information.

We also discuss the data collection programs of the states of New Mexico and Minnesota and the Canadian province of Ontario. These jurisdictions now gather earnings information from employers for pay equity purposes. We assess the potential of these collections to inform an EEOC decision on whether and how to collect earnings information.

Finally, we consider survey-based wage information and discuss three Bureau of Labor

[1]This report does not assess another data source that has appeared recently in which individual employees self-report pay by employer, occupation, and location on a variety of websites; these self-posting sometimes include pay stubs. These self-reports are not a random sample, offer little or no demographic information, have variable or in many cases no coverage of occupations, and are difficult to verify.

Statistics (BLS) surveys—the Current Employment Statistics (CES) Survey, the National Compensation Survey (NCS), and the Occupational Employment Statistics (OES) Survey. These surveys can inform the collection of wage data and provide a source of potential validation information for data series that could be collected by EEOC, but we do not judge them to be suitable sources for the wage data for EEO enforcement purposes. They do not collect data by gender, race, or national origin; they are covered by strict confidentiality provisions, which limit their use for enforcement; and they do not cover all establishments covered by EEO laws and executive orders.

DATA FROM EEO-4 REPORTS

As noted in Chapter 1, EEO-4 reports are collected in odd-numbered years from state and local governments: in 2009 approximately 6,000 jurisdictions filed EEO-4 reports that covered 3,238,769 employees. The report collects employment data by job group and salary ranges for race/ethnicity and gender, with separate reports by function (e.g., streets and highways, health, corrections). Data are also collected separately for part-time employees and new hires.

The EEO-4 report is the only one that collects any wage-related data. It collects annual salaries by job category for eight pay bands:

- $1,000 to $15,999
- $16,000 to $19,999
- $20,000 to $24,999
- $25,000 to $32,999
- $33,000 to $42,999
- $43,000 to $54,999
- $55,000 to $69,999
- $70,000 and over

The pay band data are collected for eight job categories:

- officials and administrators
- professionals
- technicians
- protective service workers
- paraprofessionals
- administrative support
- skilled craft workers
- service and maintenance workers

The wage data collected on this report have some limitations, according to EEOC Commissioner Stuart Ishimiru, who addressed the panel on May 24, 2011. The form requests wage data by race, ethnic origin, and gender, but the wages are reported in broad intervals that do not allow for precise comparisons. Similarly, according to the commissioner, the job categories for which wages are reported are so broad that they are rarely if ever used to conduct wage disparity analyses. Despite these limitations, the reports are used extensively by the Department

of Justice (DOJ) for administrative and enforcement purposes. Academic institutions use these reports for self-assessment purposes.

ADMINISTRATIVE DATA

The federal government and state agencies now collect a massive amount of wage data from employers and maintain them in the form of administrative records of three tax systems. Two of these systems are administered by federal agencies—the Internal Revenue Service (IRS) and the Social Security Administration (SSA)—and one by state unemployment insurance agencies under the auspices of the DOL's Employment and Training Administration (for details, see Greenia, Appendix B of this volume). The three administrative data systems are used primarily to collect taxes and determine benefits for the purposes of administering and funding the federal income tax system (by the Internal Revenue Service [IRS]), the Social Security and Medicare programs (by SSA), and the joint state-federal unemployment insurance (UI) system.

The data are used by the programs that collect them for purposes of enforcement of their own laws and regulations. In select circumstances, federal legislation has also authorized use of these data for enforcement purposes in other programs. For example, a new hires database derived from UI filings is used by the Administration for Children and Families in the U.S. Department of Health and Human Services to facilitate finding employed parents who are not making required child support payments under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.[2]

National compilations of statistics are produced from the three sets of data by the pertinent statistical offices of IRS and SSA, as well as the Bureau of Labor Statistics (BLS).[3] In addition, the data are used for policy analysis by the Joint Committee on Taxation of Congress, the Congressional Budget Office, and the Office of Tax Analysis in the U.S. Department of the Treasury. The data are also used for analysis by academic researchers, through the Intergovernmental Personnel Act, as well as through the U.S. Census Bureau's Research Data Centers. Table 2-1 summarizes the availability of items from each of these administrative records sources.

According to Greenia (in Appendix B of this volume), the three sets of data are interrelated. For example, the three tax-based systems depend on the social security numbers (SSNs) assigned by SSA, the employer identification numbers (EINs) assigned by IRS, the reporting of employment and payroll at both the firm and individual worker level for federal and state purposes, and other information from the administrative systems, such as changes in name and address, to update the records.

The IRS has the duty to determine which workers are employees and which are contractors. "The IRS decision is obtained by the filing of a Form SS-8 for a firm or worker seeking to have IRS establish officially the employee or independent contractor status of a particular worker. This transaction then has ramifications for the other employee data collection

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[2]For details, see http://www.acf.hhs.gov/programs/cse/newhire/library/ndnh/background_guide.htm [July 2012].

[3]IRS data are primarily published by the Statistics of Income Division of IRS: see http://www.irs.gov/taxstats/productsandpubs/article/0,,id=125133,00.html [July 2012]. SSA data are published by the Office of Retirement and Disability Policy: see http://www.ssa.gov/policy/docs/statcomps [July 2012]. And BLS data are published in the Quarterly Census of Employment and Wages series: see http://www.bls.gov/cew/cewbultn10.htm [July 2012]. The Census Bureau also uses these data sets as input to several of its statistical programs.

systems that are mandated by such legislation as the State Unemployment Tax Act (SUTA) and the Federal Unemployment Tax Act (FUTA)" (Greenia, Appendix B of this volume).

Thus, although only the SSA system has data on earnings by gender, race, and national origin (items needed for enforcement purposes), it is possible, by virtue of their coverage and interrelationships, to link data from the three tax systems so that each of them could produce some data on employee earnings by gender, race and ethnicity, nativity, and age, by employer. These data could be used to inform EEOC's enforcement programs, although they most likely could not be used directly in enforcement actions.

State Unemployment Insurance Data

In addition to complying with the Federal Unemployment Tax Act, employers must also comply with the State Unemployment Tax Act by withholding and depositing tax or insurance payments from each employee's wages with state unemployment offices. These state unemployment taxes fund unemployment benefits in each state or territory (including the District of Columbia, Puerto Rico, and the Virgin Islands; see Greenia, Appendix B of this volume).

This section presents a brief summary of the UI wage records and the Quarterly Census of Employment and Earnings (QCEW) program that draws on them. It discusses how the UI data are reported, collected, and shared with the federal government, and assesses the potential usefulness of these data for EEO enforcement purposes.

UI tax rates and coverage vary by state, as do the content and format of the records a particular state collects. In general, all workers are covered by the UI system with the exception of federal employees, contractors, the self-employed, and some agricultural workers. A state collects detailed employment and compensation data in quarterly reports from each employer. The data include the SSN, name, and quarterly compensation for each individual employee, as well as the employer name and EIN.[4] The products of this collection are known as UI wage records.

State employment security agencies also collect aggregate monthly employment (for the pay period containing the 12th of the month) for each quarter and aggregate quarterly employee compensation from each employer in the state covered by state UI laws and for federal workers covered by the Unemployment Compensation for Federal Employees (UCFE) Program. This data collection program, the Quarterly Census of Employment and Earnings, is administered and partially funded by BLS.

Although states request data from employers at the establishment level for multiple worksites or multi-establishment employers, there is no disincentive for an employer that does not comply with the request as long as total employment is reported accurately and the appropriate amount of UI taxes is paid to the states (Greenia, Appendix B of this volume).

In considering wage data for purposes of EEO enforcement, the UI data system provides the earnings data needed and at the employee level, but it also has several shortfalls:

- It is difficult, if not impossible, to disaggregate the data from multi-establishment employers to the worksite level to match with the EEO-1 reports (see Chapter 1).
- There are no gender, race and ethnicity, or nativity data collected for UI wage records, though there have been instances in which demographic data from other

[4]The coverage varies by state; see Stevens (2002) for a complete review.

sources, such as driver's licenses files, have been associated with the wage records (Moore, 2011; Glover, 2011) to enable analysis of UI wage information by gender. As discussed below, it would be possible to match these records to SSA demographic data.

- In order to obtain either of the two data components provided to the states by employers—especially the detailed employee earnings—it would be necessary to obtain the data directly from employers (who would submit a copy of their UI filings to EEOC) or to enter into separate agreements with each state, and it is likely that both of these actions would require a legal action.

Internal Revenue Service Data

Since 1976, when the current simplified Combined Annual Wage Reporting (CAWR) program was established by the Tax Reform Act, employers have reported individual earnings statements and the amount of taxes withheld (including federal income tax, Social Security tax, and Medicare tax) on a single form (Form W-2 Wage and Tax Statement) for both IRS and SSA purposes. The earnings details available from the W-2 are rich: wages and salaries, deferred compensation (part of total compensation, even if not taxable currently), and certain fringe benefits are reported, in addition to capped Social Security earnings and uncapped Medicare earnings. Together, the W-2 earnings variables provide a unique and comprehensive window on earnings data at the employee level.

These individual W-2 forms are transmitted with another form (Form W-3, Transmittal of Income and Tax Statements), which cumulates the information from the W-2 forms for each reporting establishment. Because of this arrangement, it would be possible to obtain detailed annual employee compensation, quarterly and annual aggregate employee compensation, and number of employees at both the employee and employer level with links to Social Security information through an SSN and EIN crosswalk. The industry codes available at SSA, in full North American Industry Classification System (NAICS) levels, can provide a further source of rich classifier information on employers' business activities. In addition, other tax forms can provide various components of aggregate and even detailed employee compensation: for example, compensation to corporate officers. Finally, EIN and individual taxpayer identification numbers (ITIN) assignment and other transactions would enable the tracking of new business births, foreign-born workers without SSNs, and even the employee or contractor status of a worker.

An employer is required to file an annual FUTA tax return (Form 940)[5] for purposes of reporting and paying the federal unemployment taxes required by FUTA. Filing is required—at the aggregate employment level—for each nonagricultural employee earning at least $1,500 in any quarter of the year or for each employee who was employed for part or all of a day in any 20 different weeks of the year.[6] Although Form 940 does report annual total compensation, it does not report the number of employees. However, the compensation information may be useful for benchmarking compensation data reported on other federal tax forms, such as Form W-2 and Form 941, as well as the UI data.

[5]The form is available at: http://www.irs.gov/pub/irs-pdf/f940.pdf [December 2011].

[6]For 2009 and 2010, agricultural employers were required to file if they paid cash wages of $20,000 or more to farm workers during any calendar quarter or if they employed 10 or more farm workers during some part of the day (whether or not at the same time) during any 20 or more different weeks in either year.

In summary, IRS data include a wealth of earnings information for individual employees and employers. However, a limitation is that the IRS data include establishment data only when the establishment is also an enterprise (and has an EIN). Another limitation is that the tax data contain no information by gender (except, sporadically, for the IRS Statistics of Income Division individual Form 1040 tax sample), race and ethnicity, or nativity (except for ITIN applications).

Social Security Administration Data[7]

The data of most interest for examining pay equity issues are the demographic data that are available on the application for a Social Security Number (Form SS-5),[8] which can be linked to federal tax data shared by IRS. The application for an SSN captures gender, race and ethnicity, and nativity—often shortly after birth for most U.S. citizens. In addition, it captures citizenship status, which might be used as a proxy for or to supplement nativity information.

Although the Form SS-5 data are self-reported (by the individual or a parent), SSA uses supporting documentation for verification, particularly for changes, such as a marriage license (name), passport (citizenship), and birth certificate (place of birth) . The Form SS-5 data, including updates, are maintained in SSA's Numerical Identification System file, referred to as the Numident file.

Despite the richness of the demographic detail, the Numident file data have some limitations. They are not updated as often as tax information for such changes as name and address due to marriage or divorce (the tax information at IRS may be updated before the Numident data). In addition, although nativity data classified by country might be considered relatively reliable, researchers have noted that some of the "foreign born" may be, in fact, the progeny of U.S. citizens, say, for military and other Americans stationed overseas, where birth occurs. In conjunction with citizenship status, however, the data are probably useful for indicating native versus foreign-born status.

EQUAL OPPORTUNITY SURVEY PILOT

In order to identify federal contractors with potential problems of pay discrimination that could warrant further review or evaluation by OFCCP or to support a contractor self-audit, OFCCP has long been interested in developing a screening tool to enable the agency to identify supply and service contractors whose compensation data indicate that further investigation is warranted. This interest led to initiation of a pilot survey to collect earnings data with demographic and job group information from federal government contractors. An employer survey was developed and undertaken by the OFCCP. The OFCCP experience is instructive for EEOC as it considers collecting wage information by gender, race, and national origin.

As discussed in Chapter 1, the authority for this collection rests in Executive Order 11246, as amended, which requires that federal government contractors and subcontractors "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin." Affirmative action under the executive order requires that contractors take affirmative steps to identify and eliminate impediments to equal employment opportunity. The affirmative steps include

[7]Information in this section is based largely on Greenia (Appendix B of this volume).
[8]This form is available at: http://www.ssa.gov/online/ss-5.pdf [July 2012].

numerous record-keeping obligations designed, first, to assist the contractor and then OFCCP in monitoring the contractor's employment practices.[9]

In the early 2000s, the OFCCP listed three objectives for the survey (71 FR 3374):

(1) to improve the deployment of scarce federal government resources toward contractors most likely to be out of compliance;
(2) to increase agency efficiency by building on the tiered-review process already accomplished by OFCCP's regulatory reform efforts, thereby allowing better resource allocation; and
(3) to increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations.

Field testing for the survey of federal contractors to collect wage information, as well as other new data items, was conducted in 1999. In 2000, OFCCP issued a requirement that nonconstruction contractor establishments designated by OFCCP prepare and file the new Equal Opportunity Survey. On a pilot basis, in April 2000, the EO Survey was sent to 7,000 contractors. One part of the survey (Part C) collected data on monetary compensation (expressed as an annual amount) and on tenure for four groups—minority females, nonminority females, minority males, and nonminority males—by the EEO-1 report categories applicable at that time: (1) officials and managers; (2) professionals; (3) technicians; (4) sales workers; (5) office and clerical workers; (6) craft workers; (7) operatives; (8) laborers; and (9) service workers. The questionnaire instructions defined annual monetary compensation as "an employee's base rate (wage or salary), plus other earnings such as cost-of-living allowance, hazard pay, or other increment paid to all employees regardless of tenure on the job, extrapolated and expressed in terms of a full year."[10] The annual monetary compensation measure was not to include the value of benefits, overtime, or one-time payments, such as relocation expenses.

The survey did obtain annual monetary compensation information—98.3 percent of respondents provided a numerical response to the compensation item. Reported median average annual compensation by gender and occupation appeared to be "broadly consistent" with other well-established data sets, such as the decennial census, the Current Population Survey, and other salary surveys (Bendick, 2000, p. 9).

After receipt of pilot survey responses, OFCCP commissioned a study to determine whether the pilot survey results could be used to predict whether a contractor would have findings of noncompliance. The study concluded, based on the first wave of survey responses, that the survey could contribute to improvements in procedures for selecting establishments for compliance evaluations (Bendick, 2000, p. i).

The OFCCP proceeded with the EO Survey that was sent to contractors beginning in December 2000 and continuing to December 2004. It included information, in summary form, about personnel activities, compensation, and tenure, as well as the contractor's affirmative action program. A total of 53,000 forms were sent.

To assess the quality and usefulness of these data, the OFCCP engaged an outside contractor to evaluate the collection to that point. The evaluation criteria were based on

[9]For full text of Executive Order 11246, as amended, see http://www.dol.gov/ofccp/regs/statutes/eo11246.htm [July 2012].

[10]U.S. Department of Labor form, available: http://www.management-advantage.com/media/eosurvey.pdf [July 2012].

wage information, are available only to qualified researchers at one of the Census Bureau's Research Data Centers.[17]

All information collected by the federal government for statistical purposes, including the data in these three BLS surveys, is collected under a pledge of confidentiality according to the provisions of the 2002 Confidential Information Protection and Statistical Efficiency Act (CIPSEA). This means that the data cannot be shared for purposes of antidiscrimination enforcement; however, the information may be used to assist in analysis relevant to wage discrimination, and the ability of the survey to collect wage information may be instructive for EEOC.

National Compensation Survey

The NCS is an establishment-based survey that annually provides estimates of occupational earnings, employer costs for employee compensation, compensation trends, wages in one geographic area relative to other geographic areas, the incidence of employer-provided benefits among workers, and provisions of employer-provided benefit plans. The employment cost index (ECI)—a principal federal economic indicator—is estimated from data collected by the NCS.[18]

The NCS samples private industry establishments with one or more workers and state and local governments across the 50 states and the District of Columbia. Each sampled establishment—over 35,000 establishments in 2010—is asked to report on selected occupations. As stated in the *BLS Handbook of Methods*, major exclusions from the survey are workers in federal and quasi-federal agencies, military personnel, agricultural workers, workers in private households, the self-employed, volunteers, unpaid workers, individuals receiving long-term disability compensation, and individuals working overseas. Currently, the NCS also excludes individuals who set their own pay (e.g., proprietors, owners, major stockholders, and partners in unincorporated firms) and family members being paid token wages; however, these exclusions are being reevaluated (U.S. Bureau of Labor Statistics, undated).

Among the products of the survey are estimated average hourly wages for over 800 occupations in approximately 80 metropolitan and selected nonmetropolitan localities, weekly and annual earnings and hours for full-time workers, and earnings by work level that permit wage comparisons across occupational groups. The survey collects no demographic detail, however, and it is therefore not directly useful for analysis that might facilitate anti-discrimination enforcement.

Current Employment Statistics Survey

The CES is an establishment payroll survey that is based on a monthly survey of approximately 141,000 businesses and government agencies representing approximately 486,000 worksites throughout the United States.[19] The primary statistics derived from the survey are monthly estimates of employment, hours, and earnings for the nation, states, and major metropolitan areas. Preliminary national estimates for a given reference month are typically

[17]For details, see http://lehd.did.census.gov/led/ [July 2012].
[18]For details, see http://www.bls.gov/eci/# [July 2012].
[19]Information in this section is largely reproduced from http://www.bls.gov/ces/cescope.htm [July 2012].

released on the third Friday after the conclusion of the reference week, which is the week that includes the 12th of the month.

National estimates of average weekly hours and average hourly earnings are made for the private sector for all employees and for production and nonsupervisory employees. Detail is available for about 750 industries. Average weekly overtime hours in manufacturing are also available.

Hours and earnings are derived from reports of gross payrolls and corresponding paid hours. However, hours for salaried workers who may have set compensation but volatility in their hours are often reported as standard weekly hours rather than hours actually worked and paid. The payroll for employees covered by the CES is reported before deductions of any kind, for example, for Social Security, federal and state withholding tax, union dues, or retirement plans. Included in the payroll reports is pay for overtime, vacations, holidays, and sick leave paid directly by the firm. Bonuses, commissions, and other types of nonwage cash payments are excluded unless they are earned and paid regularly (at least once a month). Employee benefits paid by the employer, as well as in-kind payments, are excluded.

Total hours during the pay period include all hours worked (including overtime hours), and hours paid for holidays, vacations, and sick leave. Total hours differ from the concept of scheduled hours worked. Average weekly hours reflect effects of numerous factors, such as unpaid absenteeism, labor turnover, part-time work, strikes, and fluctuations in work schedules for economic reasons. Overtime hours in manufacturing are collected when overtime premiums were paid and the hours were in excess of the number of straight-time hours in a workday or workweek. No information is collected by gender, race/ethnicity, or nativity.

Occupational Employment Statistics Survey

The OES Survey is a semiannual mail survey designed to measure occupational employment and wage rates among full- and part-time wage and salary workers in nonfarm establishments in the United States.[20] The survey does not include the self-employed, owners and partners in unincorporated firms, household workers, or unpaid family workers.

The OES Survey is a cooperative program between BLS and state workforce agencies (SWAs). BLS funds the survey and provides the procedures and technical support, while the SWAs collect most of the data.[21]

The OES is a very large survey. Its estimates are constructed from a sample of about 1.2 million establishments grouped into six semiannual panels over a 3-year period. Each year, forms are mailed to two panels of approximately 200,000 establishments, one panel in May and the other in November. Thus, for example, the May 2010 estimates were based on responses from six panels—May 2010, November 2009, May 2009, November 2008, May 2008, and November 2007.

The overall national response rate for six panels is about 78 percent based on establishments and 74 percent based on employment. The survey covers all employer size classes, and response rates are actually higher among smaller employers. The survey's coverage is extensive—approximately 63 percent of total national employment is represented by the unweighted employment of sampled establishments across all six semiannual panels.

[20]Information in this section is largely reproduced from http://www.bls.gov/oes/ [July 2012].

[21]Data for 180 large firms are collected directly by BLS.

The OES Survey draws its sample from state UI files. The survey sample is stratified by metropolitan and nonmetropolitan area, industry, and size. To provide the most occupational coverage, larger employers are more likely to be selected than smaller employers.

The data available from the OES include cross-industry occupational employment and wage estimates for over 500 areas, including the nation, states, and the District of Columbia, metropolitan statistical areas (MSAs), metropolitan divisions (the result of MSA subdivisions) nonmetropolitan areas, and territories; national industry-specific estimates at the 2007 NAICS 3-, 4-, and selected 5-digit industry levels; and national estimates by ownership across all industries and for schools and hospitals (U.S. Bureau of Labor Statistics, 2010a). No data are collected by gender, race/ethnicity, or nativity.

The OES Survey categorizes workers into nearly 800 detailed occupations based on the Office of Management and Budget's Standard Occupational Classification (SOC) system. The detailed occupations cover 22 of the 23 SOC major occupational groups. The May 2010 OES estimates mark the first set of estimates based in part on data collected using the 2010 SOC system, and after May 2012, the OES data will reflect the full set of detailed occupations in the 2010 SOC. Importantly, the 2010 SOC occupations will be capable of being cross-walked into the EEOC job categories when EEOC completes an update of the crosswalk between the EEOC job categories and the 2000 SOC.

SUMMARY

Several surveys have been developed specifically to measure pay discrimination, and there are several survey-based and administrative records-based sources of estimates of earnings. They vary widely in their approach to measurement, their coverage of employers, and their content: for example, only some of them collect demographic as well as earnings information. Only two of the data sources for establishments contain information on hours and whether the employee is on a temporary or permanent schedule, and neither of those sources includes demographic information.

It is clear that there is no current source of earnings data that incorporates the demographic, occupation, work schedule, and employer information necessary to support an antidiscrimination enforcement and analytical program. A new reporting mechanism would have to be put in place to produce earnings by gender, race, and gender for establishments.

Nonetheless, the fact that earnings data are now generally reported to the taxing authorities and to federal (and state) government statistical and enforcement agencies suggests that it might be feasible to collect earnings information by gender, race, and national origin in an EEOC data collection program. It also suggests that the EEOC may be able to identify other data collections that could serve as sources of benchmarks to assist in validating the information that might be collected as part of a new reporting arrangement.

TABLE 2-1 Available Items in Administrative Records Relevant to EEO

Source	Earnings at Employee Level	Identity of Employer	Employee Gender	Employee Race/Ethnicity	Employee Nativity
State Unemployment Insurance	YES	YES	NO	NO	NO
State Employment Security Agency	NO	YES	NO	NO	NO
Internal Revenue Service	YES	YES	NO	NO	YES[a]
Social Security Administration	YES	YES	YES	YES	YES

[a] Only from individual taxpayer identification number (ITIN) applications.
SOURCE: Adapted from Greenia, Appendix B of this volume.

Commission (EEOC) may depend as much on whether the information is available and collectable than on the purpose for which it is collected and how it will be used.

In this chapter we discuss the various components of employee compensation that can be considered when selecting the most appropriate definition of earnings for antidiscrimination purposes. We also consider trends over time in compensation practices. Finally, we assess several possible definitions from the perspectives of scope, coverage, frequency, reliability, and collectability.

ROLE OF COMPENSATION

Compensation plays many roles in the modern economy. According to Kevin Hallock, Director of the Cornell University Institute of Compensation Studies, who discussed compensation issues with the panel, compensation depicts market pricing of an essential component in the production function, and, in most instances, helps to match supply and demand for a workforce and for particular skills and qualifications.[1] It can be a measure of responsiveness to offers. It can be adjusted to fit time, place, and circumstance by adjusting the pieces of compensation (wages, benefits, schedule, and other pay). Nowhere have these kinds of adjustments been more aggressive than with executive and highly paid professional compensation, for which a rich array of compensation options has emerged in recent years.

Compensation policies also play a large role in business strategy. These policies undergird and give meaning to job analysis and job evaluation processes and they enable pay-for-performance and other productivity enhancement strategies. They facilitate internal comparisons and, when data are available, facilitate external comparisons, which are a component of competitive analysis.

More and more, compensation policies are a key element in corporate strategies to improve efficiency, effectiveness, and marketplace viability. In a broad sense, they have been identified as "total rewards" strategies (WorldatWork Association, 2011). In addition to their importance as compensation is in corporate business strategies, employers also seek through these policies to achieve balance in work-life considerations, performance and recognition policies, and development and career opportunities for their workforce.

There are common elements to compensation strategies across the occupational spectrum. However, one result of strategic "fine tuning" by businesses is that wages and total compensation have come to vary among occupational groups, which adds to the difficulty of making cross-occupational comparisons. Data from the National Compensation Survey (NCS)—administered by the Bureau of Labor Statistics (BLS)—indicate that wages and salaries make up a larger proportion of its definition of compensation (wages and salaries plus benefits, including supplemental pay) for management, sales, and service workers than for construction and production workers: see Figure 3-1. Total compensation may encompass much more than hourly earnings, so it is important to consider broader measures of compensation.

EARNINGS DATA AVAILABLE IN FIRMS

It is important to define earnings in a way that makes economic sense, but it is also

[1] Various administrated pay systems (such as much of the civil service) and structures that constrain supply (e.g., licenses and apprenticeship systems) may include departures from the generalization that compensation reflects the operation of the unfettered labor market.

critical to define earnings in a way that reporting employers can understand. Earnings should be capable of being reported using records readily available in the firm because they are otherwise necessary to meet the requirements of law or regulation or because they are needed for the efficient operation of the firm. Existing laws and regulations help delineate the kinds of compensation and demographic data that employers maintain.

At a minimum, all employers covered by the Fair Labor Standards Act (FLSA)[2] must keep certain records for each covered, nonexempt worker.[3] Although there is no required format for the records, the content of the records is specified: The records must include accurate information about the employee and data about the hours worked and the wages earned, to include:[4]

- employee's full name, as used for Social Security purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;
- address, including zip code;
- birth date, if younger than 19;
- sex;
- occupation;
  time and day of week when employee's workweek begins; hours worked each day and total hours worked each workweek;
- basis on which employee's wages are paid;
- regular hourly pay rate;
- total daily or weekly straight-time earnings;
- total overtime earnings for the workweek;
- all additions to or deductions from the employee's wages;
- total wages paid each pay period; and
- date of payment and the pay period covered by the payment.

Given these FLSA requirements, it is safe to assume that employers covered by FLSA will maintain wage information by gender. However, wage data may not be universally available by race and national origin (data on these characteristics data are required by equal employment opportunity [EEO] legislation, but not necessarily with wage data associated with them).

Other statutory and administrative requirements dictate the kind of data that employers should maintain on employee compensation. For example, those firms that have adopted employer-matching 401(k) plans called Safe Harbor plans must use the Internal Revenue Service definition of compensation, which includes: all wages; salaries; other amounts received that are includible in the employee's gross income, including overtime; other items including commissions, fees for professional services, tips, bonuses, fringe benefits, and reimbursements for some other expense allowances; and foreign earned income. All of these compensation items must be accounted for: thus, for firms with this type of 401(k) plan, the compensation

[2]Employers covered by FLSA are those with at least two employees and an annual dollar volume of sales or business of at least $500,000. See: http://www.dol.gov/whd/regs/compliance/whdfs14.pdf [December 2011].

[3]Under the FLSA, some employees are exempt from the act's overtime provisions. These employees include executive, administrative, professional and outside sales employees who are paid on a salaried basis, some commissioned sales employees, and some seasonal employees.

[4]For details, see: http://www.dol.gov/dol/topic/wages/wagesrecordkeeping.htm [July 2012].

information is likely to be obtainable from the firm's compensation records.

Although FLSA coverage and other administrative reporting requirements tend to define the mandatory wage information that is likely be maintained by employers that report to EEOC, the specific data that are maintained by any particular employer are defined by the particular payroll and human resource systems that support the business's operations. In many cases, these systems are developed within the company, although, increasingly, company payroll and human resource systems are developed by outside firms that specialize in providing software or "turnkey" human resources and payroll management services (see Chapter 1). Thus, a good rule of thumb would be that earnings measures for EEOC reporting would need to be compatible with data elements available from vendor systems or, at least, only require changes that could be easily implemented in vendor software.

FEASIBLE DEFINITIONS OF EARNINGS

There is no single, commonly accepted definition of earnings. Table 3-1 shows the wide and rich variety of definitions embedded in the major survey and tax collection systems (discussed in Chapter 2). Because earnings data are now being collected according to various definitions, any of the definitions could be considered collectable. However, not all definitions have a history of being collectable with the addition of occupational and demographic information.

Two employer-based BLS data collections now bring together data on the establishment, compensation, occupation, and hours—the Occupational Employment Survey (OES) and National Compensation Survey (NCS).[5] These survey collections do not include demographic information: such information would have to be added to the compensation, occupation, and hours data collected in these two surveys to provide the information minimally needed for antidiscrimination purposes.[6] The definitions of earnings in these surveys are discussed below.

OES Wage Definition

Earnings in the OES are defined as straight-time gross pay, exclusive of premium pay. The definition includes a base rate of pay; cost-of-living allowances; guaranteed pay; hazardous-duty pay; incentive pay, including commissions and production bonuses; and tips. The definition excludes overtime pay, severance pay, shift differentials, nonproduction bonuses, employer costs for supplementary benefits, and tuition reimbursements.

The OES collects wage data from private-sector employers in 12 intervals (or bands): see Table 3-2. For each occupation, respondents are asked to report the number of employees paid within each wage intervals. The effect of having a relatively large number of intervals in the OES, is to narrow the bands so as to minimize the possibility of concealing pay disparities that could signal discrimination, which might occur with broad bands. The intervals are defined both as hourly rates and the computed corresponding annual rates: the annual rate for an occupation

[5]This discussion is limited to measures of compensation that can be collected from employers rather than from individuals because of the requirement to identify the possibility of pay discrimination at the point of employment, even though the most complete view of compensation and demographics can be developed from household and individual surveys (Abowd and Hallock, 2007; Zhao, 2010).

[6]As discussed in Chapter 2, data from these surveys are collected under a pledge of confidentiality and are not available for enforcement purposes. However, the data could serve a benchmarking role for EEOC surveys; moreover, the surveys indicate the feasibility of data collection by establishment on occupation, hours, and earnings.

is calculated by multiplying the hourly wage rate by a typical work year of 2,080 hours.

The responding establishments are instructed to report the hourly rate for part-time workers and to report annual rates for occupations that are typically paid at an annual rate but for less than 2,080 hours per year, such as teachers, pilots, and flight attendants. Other workers, such as some entertainment workers, are paid hourly rates, but generally do not work 40 hours per week, year round. For these workers, only an hourly wage is reported.

NCS Earnings Definition[7]

In the NCS, wages and salaries, or earnings, are defined as regular payments from the employer to the employee as compensation for straight-time hourly work or for salaried work. The survey includes the following components as part of earnings:

- incentive pay, including commissions, production bonuses, and piece rates;
- cost-of-living allowances;
- hazard pay;
- payments of income deferred because of participation in a salary reduction plan; and
- deadhead pay, defined as pay given to transportation workers returning in a vehicle without freight or passengers.

The following items are not considered part of straight-time earnings, and data on them are not included in the NCS:

- uniform and tool allowances;
- free or subsidized room and board;
- payments made by third parties (e.g., tips); and
- on-call pay.

The following forms of payments are considered benefits and not part of straight-time earnings:

- payments for shift differentials, defined as extra payment for working a schedule that varies from the norm, such as night or weekend work;
- premium pay for overtime, holidays, and weekends; and
- bonuses not directly tied to production (such as Christmas and profit-sharing bonuses).

The NCS annually publishes national, Census Bureau division, and local area occupational earnings estimates of mean hourly earnings, mean and median weekly and annual earnings, and weekly and annual hours, for civilian workers (as defined by the NCS), private-industry workers, and state and local government workers. Occupational earnings data are published for some major and minor industry groups, by worker attributes (such as collective bargaining status), and by establishment characteristics (such as number of workers in the establishment). Percentile earnings by worker attributes and establishment characteristics are also published. Earnings data are presented as mean and median hourly, weekly, and annual

[7]The information in this section is largely taken from descriptions of the NCS, available: http://www.bls.gov/ncs/ncswage2010.pdf [July 2012].

earnings (along with hours worked weekly and annually); as percentiles; by selected worker attributes (such as full time and part time, and union and nonunion); and by establishment characteristics (such as number of employees and geographic area).

To calculate earnings for various periods (hourly, weekly, and annual), the NCS collects data on work schedules. For hourly workers, scheduled hours worked per day and per week, exclusive of overtime, are recorded, as well as the number of weeks worked annually. For salaried workers, field economists record the typical number of hours actually worked (salaried workers who are exempt from overtime provisions often work beyond the assigned work schedule).

The NCS publishes earnings estimates for occupational groups and detailed occupations; it also presents earnings estimates by work levels and combined work levels. Work levels represent a ranking of the duties and responsibilities in an occupation.

CONCLUSION

Of the two feasible wage definitions that could be used, we conclude that the definition used in the OES should be considered for use for antidiscrimination purposes because its current coverage is so widespread. Most employers who are in the industries and size classes that report employment by gender, race, and national origin to the EEOC already have experience in assembling and reporting hours and earnings together by occupation in order to complete the OES (see Chapter 2). There is strong reason to believe that the information is available and retrievable in the firms that would be called on to report earnings data to the EEOC.

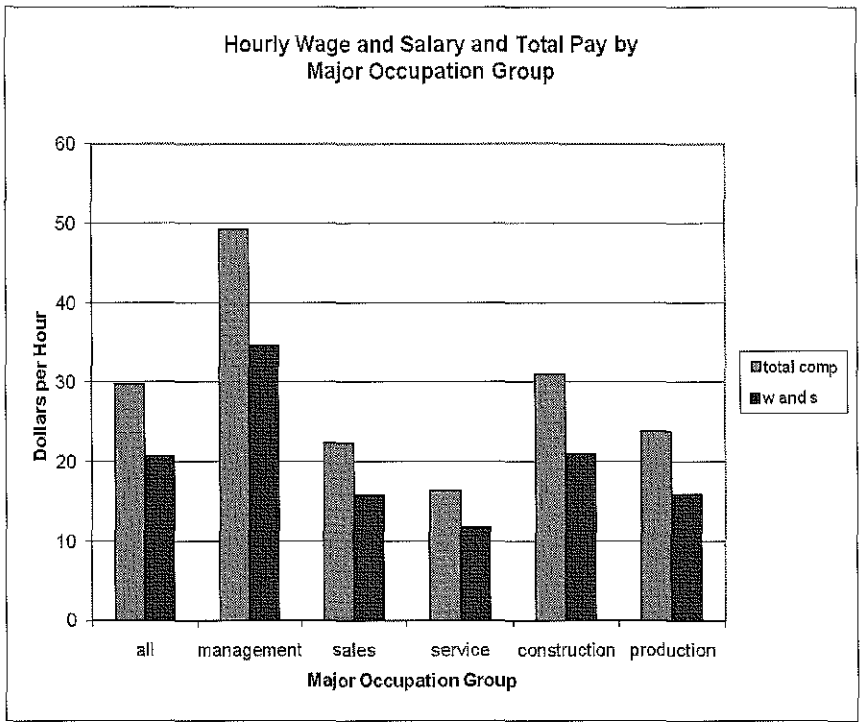

FIGURE 3-1 Hourly Wage and Salary and Total Pay by Major Occupational Group, 2011 SOURCE: Presentation by Kevin Hallock at panel workshop on May 24, 201 based on data from National Compensation Survey. Reprinted with permission.

TABLE 3 -1 Comparison of Earnings Definitions and Data Availability for Key Earnings Data Sources

Data Source	Definition of Earnings	Occupational Coverage	Demographic Information
Employer/Establishment-based Surveys			
Occupational Employment Survey (Bureau of Labor Statistics)	Wages for the OES survey are straight-time, gross pay, exclusive of premium pay. Earnings include base rate; cost-of-living allowances; guaranteed pay; hazardous-duty pay; incentive pay, including commissions and production bonuses; and tips. Excluded are overtime pay, severance pay, shift differentials, non-production bonuses, employer cost for supplementary benefits, and tuition reimbursements.	The OES survey categorizes workers into nearly 800 detailed occupations based on the Office of Management and Budget's Standard Occupational Classification (SOC) system.	None
Current Employment Statistics Survey (Bureau of Labor Statistics)	Provides arithmetic averages (means) of the hourly and weekly earnings of all production and nonsupervisory jobs in the private nonfarm sector of the economy. The hours and earnings are derived from reports of gross payrolls and corresponding paid hours. Payroll is reported before deductions of any kind, e.g., for old-age and unemployment insurance, withholding tax, union dues, or retirement plans. Included in the payroll reports is pay for overtime, vacations, holidays, and sick leave paid directly by the firm. Bonuses, commissions, and other types of non-wage cash payments are excluded unless they are earned and paid regularly (at least once a month). Employee benefits paid by the employer, as well as in-kind payments, are excluded.	None	None
National Compensation Survey (Bureau of Labor Statistics)	Wages and salaries, or earnings, are defined as regular payments from the employer to the employee as compensation for straight-time hourly work or for any salaried work performed. Includes incentive pay, including commissions, production bonuses, and piece rates; cost-of-living allowances; hazard pay; payments of income deferred because of participation in a salary reduction plan; and deadhead pay, defined as pay given to transportation workers returning in a vehicle without freight or passengers	Standard Occupational Classification (2010) definitions are used for initial data collection at an establishment. (The 2010 SOC system contains 840 detailed occupations, aggregated into 461 broad occupations.)	None
EEO-4 Survey (state and local governments)	Annual salary including all special increments of an employee's annual earnings that are regular and recurrent. Overtime pay is not included. Where employees are paid on another-than-annual basis, their regular earnings in the payroll period that includes June 30 are to be expanded and expressed in terms of an annual income.	Officials and administrators; professionals; technicians; protective service workers; paraprofessionals; administrative support (including clerical and sales); skilled craft workers; service-maintenance	White (not of Hispanic origin); Black (not of Hispanic origin); Hispanic; Asian or Pacific Islander; American Indian or Alaskan Native, by male and female

Data Source	Definition of Earnings	Occupational Coverage	Demographic Information
OFCCP EO Survey	Annual monetary compensation: the employee's base rate (wage or salary) plus other earnings, such as cost-of-living allowance, hazard pay, or other increment paid to employees regardless of tenure on the job. The annual monetary compensation measure was not to include the value of benefits, overtime, or one-time payments such as relocation expenses.	(1) officials and managers; (2) professionals; (3) technicians; (4) sales workers; (5) office and clerical workers; (6) craft workers; (7) operatives; (8) laborers; and (9) service workers	Minority females, non-minority females, minority males, non-minority males
Ontario Pay Equity Survey	Pay as of December 31 expressed in hourly, weekly or annual amounts	Job/position title	Male and female
Minnesota Pay Equity Survey	Minimum and maximum monthly salary	Job class	Male and female
New Mexico Pay Equity Survey	Total annual compensation converted to average hourly wages in each job category are computed by adding the total compensation by gender divided by the total hours worked by that gender	EEO-1 job categories	Male and female
Administrative Records			
Employer's Quarterly Contribution and Wage Report	Total quarterly wages paid to all regular, part-time, temporary or casual employees, without regard to age; wages paid for services performed for a partnership by the wife, husband, child, or other relative of a partner; wages paid by an individual owner to a son or daughter who is 18 or more years of age; salaries and other payments made to corporate officers for their services to the corporation (including Subchapter S corporations); tips reported by employees for Internal Revenue Service purposes by the 10th day of the month of receipt; reasonable cash value of meals, lodging, merchandise, and other types of remuneration furnished for services; commissions and bonuses paid to employees; vacation payments; dismissal pay, severance pay, or wages in lieu of notice; salary reductions pursuant to Internal Revenue Code (IRC) Section 125 (cafeteria plans) or 401K plans.	None	None
IRS W-2 Form	Wages and salaries, deferred compensation (part of total compensation, even if not taxable currently), and certain fringe benefits are reported in addition to capped Social Security earnings and uncapped Medicare earnings	None	None
IRS 941 and 943 Forms	Total compensation; employer reported W-2 income and tips	None	None

Data Source	Definition of Earnings	Occupational Coverage	Demographic Information
Social Security Master Earnings File	OASDI and Medicare taxable wages, and total wages reportable as IRS-taxable income on Form 1040, which includes wages above the OASDI taxable maximum, noncovered wages, and deferred-compensation distributions, but not deferred-compensation contributions	None	Gender; self-reported race and ethnicity data provided on voluntary basis
Fair Labor Standards Act (FLSA)	Time and day of week when employee's workweek begins; hours worked each day and total hours worked each workweek; basis on which employee's wages are paid; regular hourly pay rate; total daily or weekly straight-time earnings; total overtime earnings for the workweek; all additions to or deductions from the employee's wages; total wages paid each pay period; date of payment and the pay period covered by the payment	Occupation	Age; sex
Safe Harbor 401K Plans	All wages; salaries; other amounts received that are includible in the employee's gross income, including overtime; other items including commissions, fees for professional services, tips, bonuses, fringe benefits and reimbursements for some other expense allowances; and foreign earned income	None	None

SOURCE: Information from: Current Employment Statistics forms (available: http://www.bls.gov/ces/cescope.htm [July 2012]; Employer's Quarterly Contribution and Wage Report (available: https://uitax.nvdetr.org/crppdf/nucs-4072.pdf [July 2010]; and Recordkeeping Requirements under the Fair Labor Standards Act (available: http://www.dol.gov/whd/regs/compliance/whdfs21.htm [July 2012].

TABLE 3-2 Occupational Employment Survey Wage Intervals, May 2010

Wage intervals	Hourly	Annual
Range A	Under $9.25	Under $19,240
Range B	$9.25 to $11.49	$19,240 to $23,919
Range C	$11.50 to $14.49	$23,920 to $30,159
Range D	$14.50 to $18.24	$30,160 to $37,959
Range E	$18.25 to $22.74	$37,960 to $47,319
Range F	$22.75 to $28.74	$47,320 to $59,799
Range G	$28.75 to $35.99	$59,800 to $74,879
Range H	$36.00 to $45.24	$74,880 to $94,119
Range I	$45.25 to $56.99	$94,120 to $118,559
Range J	$57.00 to $71.49	$118,560 to $148,719
Range K	$71.50 to $89.99	$148,720 to $187,199
Range L	$90.00 and over	$187,200 and over

SOURCE: Bureau of Labor Statistics, Handbook of Methods, Chapter 3, p. 5 (2009)

4
Survey Design and Statistical Methodology

When considering the collection of earnings data by gender, race, and national origin, the U.S. Equal Employment Opportunity Commission (EEOC) confronts several key decisions in the realm of survey design and statistical methodology. The decisions involve four closely associated issues: collectability, quality (defined as fitness for use), utility for statistical analysis, and response burden.

In this chapter we discuss the pros and cons of options for collecting earnings data from employers by adding items to existing equal employment opportunity (EEO) forms or developing a new collection instrument. We consider the fitness for use of the data, which addresses the relevance of the data to users' needs. We illustrate a model-based approach to identifying the utility of the categorical variables that would also be collected if wage data is collected. We address the question of employer burden and assess various options for minimizing the burden on reporting units. The last issue is complicated by the fact that there is a differential burden faced by employers of different sizes and with different levels of sophistication in their human resource and payroll systems. In the case of collection of earnings data by gender, race, and national origin, one approach may not be appropriate for all respondents.

OPTIONS FOR DATA COLLECTION

Modify Current EEO Forms

The most direct solution to obtaining earnings information for EEOC purposes would be to add earnings items to existing EEO reports. The collection instrument that it would likely make most sense to modify for this purpose would be the EEO-1 form, for several reasons. First, it enjoys substantial coverage. As discussed in Chapter 1, the mandatory EEO-1 reports annually cover about 45,000 private-sector respondents, which represent about 200,000 establishments with about 55 million employees.

Second, the form is part of the everyday operations of the antidiscrimination agencies. The EEO-1 reports are used by the EEOC and the Office of Federal Contract Compliance Programs (OFCCP) to trigger enforcement and technical assistance based on the identification of potential EEO problems, which is determined from data provided by employers on the reports.

Third, it is expected that the necessary modifications to the EEO-1 form would be quite manageable for both EEOC and the respondents. The addition of the earnings data could be accomplished in much the same way that earnings data are collected on the EEO-4 form: that is, either by adding another column to the form that requests the earnings data or adding another row for each occupation, which would collect average pay in addition to the current row that collects number of employees by race/ethnicity group. An alternate collection design would be to simply duplicate the existing EEO-1 form and have employers place in the cells of one table the number of employees, as they now do, and in the second table enter the pay corresponding to those employees.

Design a New Collection Instrument

A second option would be to design a new and, one hopes, a more streamlined collection instrument that would collect both employment and earnings information. The design of such a new instrument could be informed by the current effort by OFCCP to develop a collection instrument to replace the defunct Equal Opportunity Pilot Survey discussed in Chapter 2. As this report was being prepared, the OFCCP had issued an Advance Notice of Proposed Rulemaking (ANPR) that solicited comments on several issues important for designing a new collection instrument. For example, OFCCP asks whether expanded information should be collected in order for OFCCP to assess whether further investigation into a contractor's compensation decisions and policies is warranted. To collect such data as average starting or initial total compensation (including paid leave, health and retirement benefits, etc.); average pay raises; average bonuses; minimum and maximum salary; standard deviation or variance of salary; the number of workers in each gender and race/ethnicity category; average tenure; and average compensation data by job series (e.g., all engineers within a particular department or all secretaries throughout the establishment) would require a substantial redesign of the collection form.

Some of the items that might be useful in understanding the EEO environment in establishments would likely require open-ended questions, such as on topics suggested in the OFCCP ANPR pertaining to company policies related to promotion decisions, bonuses, shift pay, and setting of initial pay. This information is difficult to collect and to process efficiently in a standardized manner.

FITNESS FOR USE

Types of Uses

Quality of information is generally defined in terms of its fitness for use. This is a multidimensional concept embracing the relevance of the information to users' needs and the accuracy, timeliness, accessibility, interpretability, and coherence that affect how the data can be used. There is a considerable literature on statistical quality and the steps that should be taken to make data useful for its intended purpose (see, e.g., Brackstone. 1999; U.S. Office of

Management and Budget, 2002). The literature highlights the importance of clearly understanding the requirements for the data before collection begins. It is important in this context to consider the need of the EEOC for earnings information.

The major use of the EEO compensation data would be to aid enforcement of pay discrimination statutes in two ways: targeting enforcement actions and carrying out enforcement actions against an employer that has been targeted. Targeting is primarily a matter of selecting among the complaints the EEOC receives to identify those firms that are most likely to be found to have discriminatory practices.

There are, however, secondary uses, such as analysis of overall trends in pay discrimination and trends by industry and location, as well as research on compensation trends. If such new compensation data become available, they would be a powerful supplement to existing sources of compensation data, such as those discussed in Chapters 2 and 3 above.

Because the data collected by this survey would be so important to collect correctly, it is incumbent on EEOC to identify the potential uses of the data early in a design process so that the data items to be collected can be identified and issues of data quality considered. Again, the requested comments in the OFCCP ANPR are instructive when paraphrased in EEOC terms:

- Should the data be used to conduct industry-wide compensation trend analyses? If so, what type of compensation trend analyses would be appropriate to conduct on an industrywide basis?
- For each type of analysis identified, identify the categories of data that should be collected in order to compare compensation data across contractors in a particular industry and the job groupings that should be used.
- Should the data be used to identify employers in specific industries for industry-focused compensation reviews?
- What specific categories of data would be most useful for identifying contractors in specific industries for industry-focused compensation reviews?
- Should the data be collected by individual establishment for multi-establishment employers? What specific categories of data would be most useful for conducting compensation analyses across an employer's various establishments?

Utility of the Data Items for Statistical Analysis

In this section we consider how the EEOC could develop a statistical model for use in screening individual employers for possible violations of pay discrimination. There are several key considerations here. First, the data to be used in this model would, of course, be reported by each individual employer. In addition to the information already requested for the EEO-1 report (e.g., employment by occupation, sex, and race/ethnicity), a form would collect pay (measured as discussed in Chapter 3) and possibly other information, such as employees' years of service. Given these data, one could conduct a multiple regression analysis of pay in relation to demographic variables (e.g., the EEO-1's 14 sex and race/ethnicity groups) and other characteristics, usually called "control variables," such as occupational category and years of service. More complex models might include controls for occupation or job categories or more elaborate controls for education and labor force experience. Still more complex models might include more detailed occupational or job categories and more elaborate controls for previous experience and qualifications.

There are a large number of potential control variables that could be included in such regression models, and, especially for employers with small numbers of employees, there would be benefits from keeping the number of covariates in such models relatively small. To do that, there are a variety of statistics, including Mallows' C_P, Akaike Information Criterion (AIC), and Bayesian Information Criterion (BIC) that could be employed to remove control variables that were not contributing substantially to the fit of the model.

While there is substantial disagreement over the most appropriate models to use for establishing a reasonable claim of possible wage discrimination, or defending one, it is not necessary to have a definitive model to assess the potential quality of certain basic statistical tests that might be reasonably performed by EEOC. We undertake such an analysis here. We emphasize that the regression model we describe below is intended, first and foremost, as an illustrative example of a methodology for undertaking some of these basic statistical tests. For this purpose, we need to provide enough specifics to allow a clear and straightforward discussion of the general nature of the issues that would arise in such an exercise.

The regression model we use is a general linear model of the form:

$$y_i = \beta_0 + d_i\beta_1 + x_i\beta_2 + \varepsilon_i$$

Here, y_i is the logarithm of the wage measure for individual i, d_i is the vector of design variables that indicate the EEO-1 categories occupied by individual i, x_i, is a vector of control variables, ε_i is the statistical error, β_0 is the intercept, β_1 is the vector of EEO-1 log wage differentials from a specified reference group (usually white, non-Hispanic males), β_2 is the vector of effects associated with the control variables, and $i = 1,\ldots,N$, where N is the total number of employees in the analysis.[1]

For an agency such as EEOC or OFCCP, the results from this kind of regression analysis that will be of greatest concern will be the estimates of the coefficients for gender and race/ethnicity: that is, the betas, because the estimates of these coefficients indicate the extent (if any) to which women or nonwhites are paid less than men or whites who are the same in terms of the other factors (the "control variables") included in the analysis. It will be particularly important to perform a test to determine if these coefficients are statistically significantly different from zero (i.e., are unlikely to have occurred simply as a result of random or chance factors).

Assuming that design vectors d_i and x_i are statistically exogenous with respect to ε_i and that ε_i has a normal distribution with zero mean, constant variance, and independence over individuals, there is a well-known F-test for the null hypothesis: $\beta_1 = 0$. This statistic tests the

[1]The earliest analyses that used the logarithm of wages were Blinder (1973) and Mincer (1974). Their work discussed specifications in the logarithm and levels. Since the early 1970s the prevailing practice in economics has been to use the logarithm of the rate of pay as the dependent variable. The regression model has been selected because when analysis is expressed in logs pay gaps can be expressed in a comparable way (i.e. as percentages) even for dates that are wide apart. This also means that estimated coefficients in log regressions can be interpreted as showing the *percentage change* in y that occurs as a result of a change in x and when x is an indicator for race or gender, it measures the percentage difference in pay between the indicated group relative to a reference group.

hypothesis that all of the EEO-1 log wage differentials are jointly zero versus the alternative that at least one of the differentials is nonzero. The usual *F*-statistic is based on the Type-III sum of squares for the model component associated with the design vector d_i: that is, the conditional model sum of squares for d_1 given the other variables, x_i, in the model. This statistic is invariant to the choice of reference group.

An automated test of the hypothesis $\beta_1 = 0$ could be conducted from an enhanced EEO-1 report that included appropriate wage data. The suitability of such a test depends on how likely it is that the test would detect a departure from $\beta_1 = 0$ for realistic configurations of employer data and with appropriate controls. We approach this question by attempting to measure the power of the standard *F*-test for $\beta_1 = 0$ in scenarios that resemble best-case outcomes for such an automated procedure.

The power of a test is the probability that it will reject the null hypothesis when that hypothesis is false. In other words, the power of a test is the probability that it will actually find a sex or race/ethnicity difference when such a difference exists. In colloquial terms, one might say that the power of a test is the probability that it will detect a potentially discriminating ("guilty") party. The power depends on the magnitude of the departure from the null hypothesis (how big the differentials are) and the precision with which those differentials can be estimated. In turn, the precision of the estimate(s) depends critically on the number of data points used in forming the estimates.

In the present context, it is crucial to note that the power of the statistical model for screening employers will be sensitive to the number of data points used in its construction. It is simple common sense that, other things being equal, a poll of 1,000 people is likely to be much more precise (will have much greater power) than a poll of 100 people; similarly, regression estimates of sex or race/ethnicity pay differences that are based on many data-points will have greater power than estimates based on only a few data points. Finally, note that the number of data points in an analysis of a particular employer will depend on the size of the employer's work force: the greater the number of employees, the greater the number of data points, and the greater the power of the statistical model used in screening employers. Thus, when the number of employees is small, any screening model that EEOC might develop will have very low power, and when the number of employees is large, the screening model will have high power. The important question is thus obvious: How many data points must there be—how large does the employer's work force have to be—to yield "enough" power?

For general linear models, there is standard software to assist with this power assessment. The inputs consist of estimates of the magnitude of the likely discrepancy and summary measures of the estimation precision. We next describe how we estimated those components.

We considered an employer-size power analysis that is based on the predictions and estimation precision of models fit on the March 2010 Current Population Survey (CPS) Annual Social and Economic Supplement. Essentially, we are asking: "How many employees must a respondent firm have in order for the *F*-test to have the specified power to detect log wage differentials as big as the ones in the overall economy, as measured in March 2010?" This is a "best-case" scenario for two reasons. First, the differentials in the overall economy are larger than those typically found at a single employer because the heterogeneity in job types between employers is much greater than the heterogeneity of job types for a given employer. Second, because the overall workforce is more heterogeneous than the workforce of a given employer, most effects are estimated more precisely in the March CPS than they would be in a sample

drawn from a single employer.

Because the CPS data are more heterogeneous than microdata from a single employer, they permit estimation of models that strongly resemble the ones that might be used by EEOC to screen EEO-1 reports that included wage data developed according to either of the two pilots recommended in this report (see Chapter 6). And because they allow a plausibly "best-case" power analysis, it is reasonable to consider them before investing heavily in data that might permit a more precise answer.

To minimize the effects of different definitions of the wage rate, we selected previous-year wage and salary earners only. The selected individuals were full-time employed (at least 35 hours/week) for at least 50 weeks in 2009 (the reference year for the March 2010 CPS supplement) and were between the ages of 16 and 75. We coded these individuals into the appropriate gender and race/ethnicity categories corresponding to the EEO-1 form. The design of these log wage differentials has 13 degrees of freedom. We used the major occupation codes (a taxonomy of 10 occupation groups) and the detailed occupations (a taxonomy of about 500 categories).[2] The use of 10 major occupation code categories is a reasonable proxy for the EEO-1 occupations for the purposes of these power studies.

In addition to occupation categories, we also used 16 educational categories. These were entered as control variables in some analyses and used in combination with age to create a measure of time since leaving school, which is called "potential experience."

Analyses based on the public-use CPS data are necessarily between-employer estimates, rather than within employer estimates, as any analysis of EEO-1 wage data would be. We included a control for major industry (13 categories) to allow the power analyses to be closer to those that a full pilot might produce. Model 1 controls for occupation only; Model 2 controls for occupation and covariates; Model 3 controls for detailed occupations and covariates. Figure 4-1 compares the estimates of the three models.

Model 1, shown in the Table 4-1 below, estimates the EEO-1 differentials within major occupational categories. It corresponds to the test $\beta_1 = 0$ conditioning on main effects only for the major occupational group. Not surprisingly, relative to the base group of white non-Hispanic males, all of the estimated differentials are large. Jointly, the F-test rejects $\beta_1 = 0$ with a P-value of less than 0.0001, and individually all of the differentials are statistically significant at the 0.05 level or higher. The R^2 for this equation is 0.25, and the residual variance is 0.37. These two statistics are also used in the power analysis.

The first power analysis asks what the minimum employer size would be in order to detect differentials as large as those in Model 1 and with employer-specific data that had the same design and explanatory power. The line labeled "Controls EEO-1 Occupation Only" in answers this question. All power analyses assume that the basic F-test has size 0.05 at $\beta_1 = 0$: that is, the probability of rejecting a true null hypothesis is fixed at 0.05 throughout.

A regression analysis of an employer with approximately 99 employees has power of 0.50: it is equally likely to accept or reject the null hypothesis $\beta_1 = 0$ for wage differentials on the magnitude of those in Model 1. Employment of 200 is needed to boost the power to 0.90, a value that is often used as the standard for acceptable power.[3]

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[2]We chose this approach because a standardized recoding of the CPS occupational codes to EEO-1 categories would have involved about as much measurement error as the error associated with the coding to major and detailed occupations in the first place.

[3]All model estimation was conducted in SAS (statistical analysis software) version 9.3 using PROC GLM.

Model 2, shown in Table 4-2 computes the EEO-1 log wage differentials with controls for main effects of the major occupation category as well as main effects of education, major industry, and a quartic in potential experience. The estimated log wage differentials are much smaller than in Model 1, although still quite substantial in magnitude. The *F*-test for the joint significance is 238.41 with a *P*-value less than 0.0001. The R^2 for this equation is 0.39, and the residual variance is 0.30. As can be seen in Figure 4-1, an analysis based on 155 employees delivers power of 0.50 in this case, and an analysis of an employer of size 318 is required for power of 0.90.

Model 3 is shown in Table 4-3 below. In this estimation, we control for detailed occupation in addition to the covariates that were included in Model 2. The *F*-statistic falls to 138.38 but with a *P*-value that is still less than 0.0001. Estimated differentials also fall substantially. The R^2 for this equation is 0.47, and the residual variance is 0.26. As can be seen in Figure 4-1, 545 employees are required for a power of 0.50 in this case, while about the same sample size (551 employees) yields a power of 0.90. The power curve for this model is flat because there are 496 degrees of freedom for the detailed occupation controls. Once there are adequate data to fit this model, about 50 additional observations are needed to achieve the target power for the EEO race and gender test.

MINIMIZATION OF REPORTING BURDEN

Estimation of Burden

One reason for the outcry on the part of the business community when the Paycheck Fairness Act was under consideration in Congress was the perception that the legislation would impose a significant new reporting burden on employers, particularly on small employers. The Paperwork Reduction Act of 1995 specifically requires agencies to demonstrate the practical utility of the information that they propose to collect and to balance this against the burden imposed on the public.

EEOC currently calculates the cost and burden of its data collections in its submissions of Information Collection Requests to the U.S. Office of Management and Budget (OMB). The number of respondents (including multi-establishment respondents), responses (usually at the establishment level), estimated burden hours, costs, and mode of collection for the four major EEO data collections in the most recent reports of EEOC to OMB are shown in Table 4-4.

The estimates of burden costs and hours in Table 4-4 are based on the EEOC's best estimates of the amount of time it takes for clerks to retrieve and enter the data to paper records. However, because less than one-fourth of employers who report now file paper records, the burden estimates may be overstated.

Options for Minimizing Response Burden

To the extent that the current burdens data are representative, the addition of earnings data to the existing EEOC data collection forms that do not now collect the data, in much the same manner in which earnings data are collected in the EEO-4 form, could be expected to

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All power analysis was conducted in SAS version 9.3 PROC GLMPOWER. The design matrices, estimated subgroup means, and regression summary statistics used in the power analysis were computed from the March CPS data in the statistical summaries shown in all three of our models.

nearly double the current burden on employers. In the case of the largest collection, the current average of 3.5 hours per EE0-1 form might increase to somewhere near the average of 6.6 hours now reported for the EE0-4 form. This is not an inconsequential increase in response burden. It would behoove EEOC to consider taking steps to reduce the increase in response burden.

Several options are available for reducing the burden on reporters. Three are discussed in this section—less frequent data collection, use of a rotating scheme for certain employer size classes, and raising the size cutoff so that fewer employers would be in the scope of the collection.

Less Frequent Collection

The EEO-1 report is now collected annually, while the other forms are collected on a biannual basis. The main issue is with the EEO-1 form. The law does not require the annual collection of EEO-1 data. The timing of collection is an administratively imposed requirement. By administratively reducing the frequency of data collection, the burden might also be reduced, though the extent to which it might be reduced is not entirely clear.

On the negative side, the less frequent availability of the reports would mean that the information that supports EEOC enforcement functions would be less current, by a year or so. This lag could be an important issue during economic turning points, when hiring or layoffs could significantly influence the employment and earnings profiles of covered firms. The time lag for EEOC's investigations of potential discrimination would increase and the ability of the agency to be responsive to complaints in a timely manner would be negatively affected.

Rotating Sample

It might be possible to continue to collect data annually but from only a part of the current reporting population and to permit firms with certain characteristics, such as not meeting a threshold size or in a selected industry group, to report less frequently. The selection of annual versus biannual reporters could, for example, be based on an analysis by EEOC of the probability of discrimination based, in turn, on the experience of the agency with enforcement. This tailored approach to selection of those firms that could report less frequently, however, would be hard to administer and could well be difficult to implement fairly in practice.

Moreover, this nuanced approach might actually complicate matters for employers. Because so many firms automate their reporting, it is now a routine matter, and rotating the reporting requirement might actually increase the administrative burdens. Employers would need to figure out when they needed to report, and the task of developing a database to capture the reports might be much more burdensome for EEOC.

Raising the Size Cutoff

The current employment cutoff for the annual requirement to submit an EEO-1 form is 100 employees (50 employees if the firm is a federal government contractor). This cutoff limits the overall potential response burden significantly. By raising the size cutoff to, say, 200 employees (based on the statistical power analysis presented above), the number of firms that would have to report earnings would be reduced by half, but the employment coverage would be reduced by less than 10 percent (see Table 1-1, in Chapter 1). One consequence of raising the

cutoff size would be a relative reduction in coverage of the earnings of females and minorities. The firms in the size classes for which the reporting requirement would be eliminated are those in which women and minorities are more heavily represented. Experiments with different cutoff sizes to better determine the tradeoffs between burden and coverage could be useful to include in the pilot study that the panel recommends (see Chapter 6).

HUMAN RESOURCE AND PAYROLL SYSTEMS

Most companies of the size covered by EEO regulations have at least somewhat automated payroll and human resource management systems. Today, larger companies are more able to comply with a potential requirement for compensation data by gender, race, and national origin because they can gather compensation information from automated payroll systems and demographic data from automated human resource systems.

The panel reviewed the state of automation of company payroll systems from the perspective of three service providers—a large payroll-providing service firm, a firm that specializes in the emerging software-as-a-service market, and a firm that specializes in using companies' own internal data to analyze EEO status and prepare Affirmative Action Plans for those companies. In summary, we found that automated systems were expanding rapidly among U.S. employers, but that there are differences in the extent of implementing these applications by size of firm.

Currently, larger firms are likely to have human resource and payroll management systems, and they are likely to have an easier time in complying with a new requirement to provide compensation data by demographic characteristics than would smaller firms. Over time, one would expect that the use of such systems will grow and spread among smaller firms. In the long term, these automated systems may well serve as the basis for EEOC employment and wage data collection. As discussed in Chapter 6, the panel recommends a pilot test to collect information on the extent of penetration of these human resource and automated systems: see Appendix C.

Payroll and Human Resource Providers

The industry of payroll and human resource providers is characterized by a growth in services beyond the usual provision of timekeeping and payroll functions. Most recently, the industry has expanded to include human resource management. As a result, one provider can bring together information on hours, earnings, and the demographics and work histories of the workforce. These data are captured directly from a client's data systems, often without client intervention.

The panel interviewed a large payroll-providing company to determine the influence of the growth of this sector on the reporting of earnings data to EEOC. This company lists 600,000 clients, representing, in the company's estimation, one of every six U.S. employees. The clients employ as few as 1 and as many as 1 million employees.

The company has a line of business that focuses on smaller employers—those with fewer than 100 employees—to provide a total source of payroll and human resource services. The company estimates that about 40 percent of these smaller employers use human resource services as well as payroll services. One product for the clients who use human resource services and who have an OFCCP or EEOC requirement is to produce EEO-1 reports.

Growth of Software-as-a-Service Applications

The workshop presentation by Karen Manzonni of Workday Solutions, representing an enterprise software solution, highlighted the unified human capital management solutions offered by the enterprise software and services provider, Workday Solutions. The company is one of a growing number of firms that provide turnkey payroll and human resource management solutions to businesses under the general label of software-as-a-service (SaaS). The solutions provide a new, global core system of record to replace legacy systems that have been maintained by the establishments themselves. The approach taken by these service providers is through a multitenant architecture: that is, one version of the application with common hardware, networking, and operating systems is used for all customers ("tenants"). The applications are often supported in the "cloud," that is, through Internet connectivity. The fact that these new service approaches have so much in common allows the generation of common reports (such as EEO reports) across the system, drawing on data from both the human resource and payroll functions of the serviced companies. Most of the companies that use this service are mid-size, large, and very large companies. Workday Solutions has 246 customers.

These SaaS providers have been enjoying remarkable growth. An annual survey of employing establishments by the consulting firm CedarCrestone, to ascertain the penetration of human resource applications in business, found them to be widespread, and it forecast SaaS as a deployment option will likely continue that growth as organizations move from licensed on-premise solutions to the cloud. The source of this information is the *CedarCrestone 2010–2011 HR Systems Survey.* The survey is based on 1,289 responses, representing employers of over 20 million employees (CedarCrestone, 2011). The survey also found that there were measurable differences in the penetration of these administrative applications by size of firm. In the most recent survey, 94 percent of employers with 10,000 or more employees had such systems, compared with 87 percent for employers with 250 to 2,499 employees. The CedarCrestone survey found that most of the applications were still licensed software, but the subscription-based SaaS applications and outsourcing solutions were growing in use.

Analysis of Salary and Related Data for Pay Equity Purposes

In order to ensure that their firms are in compliance with the Equal Pay Act, Title VII, and Executive Order 11246 provisions, many employers use firms that perform compensation analysis and, in many cases, actually prepare automated affirmative action plans. Other firms use software to support this analysis internally.

The panel heard testimony from Liz Balconi and Michele Whitehead, representatives of Berkshire Associates, a company that is very active in the compensation analysis business. This company obtains the following information from its client firms: employee identifier; job code; race; gender; date of hire; annualized base salary or hourly rate; grade, band, or classification (if applicable); time in current position, or date of last title change; date of last degree earned, or date of birth; full time or part time status; exempt or nonexempt status; title; employee location; years of relevant experience (or date of birth); factors that may legitimately impact pay in an organization, such as performance rating; education; date in grade; professional certifications; division; job group; starting salary; annualized total compensation (including bonuses, commissions, cost of living allowances, and overtime).

The firm uses these data (which are generally available from their clients) to conduct two kinds of analyses: cohort analysis, which is a nonstatistical comparison of similarly situated incumbents within a group based on factors such as time in the company, educational background and performance assessment; and statistical (regression) analysis to study the combined effect of factors on pay between comparator groups. Although not all of these data elements may be necessary to identify potentially discriminatory practices, prudent employers can be expected to have these types of data available and to use them to evaluate their own practices, using algorithms developed by specialty firms such as Berkshire Associates.

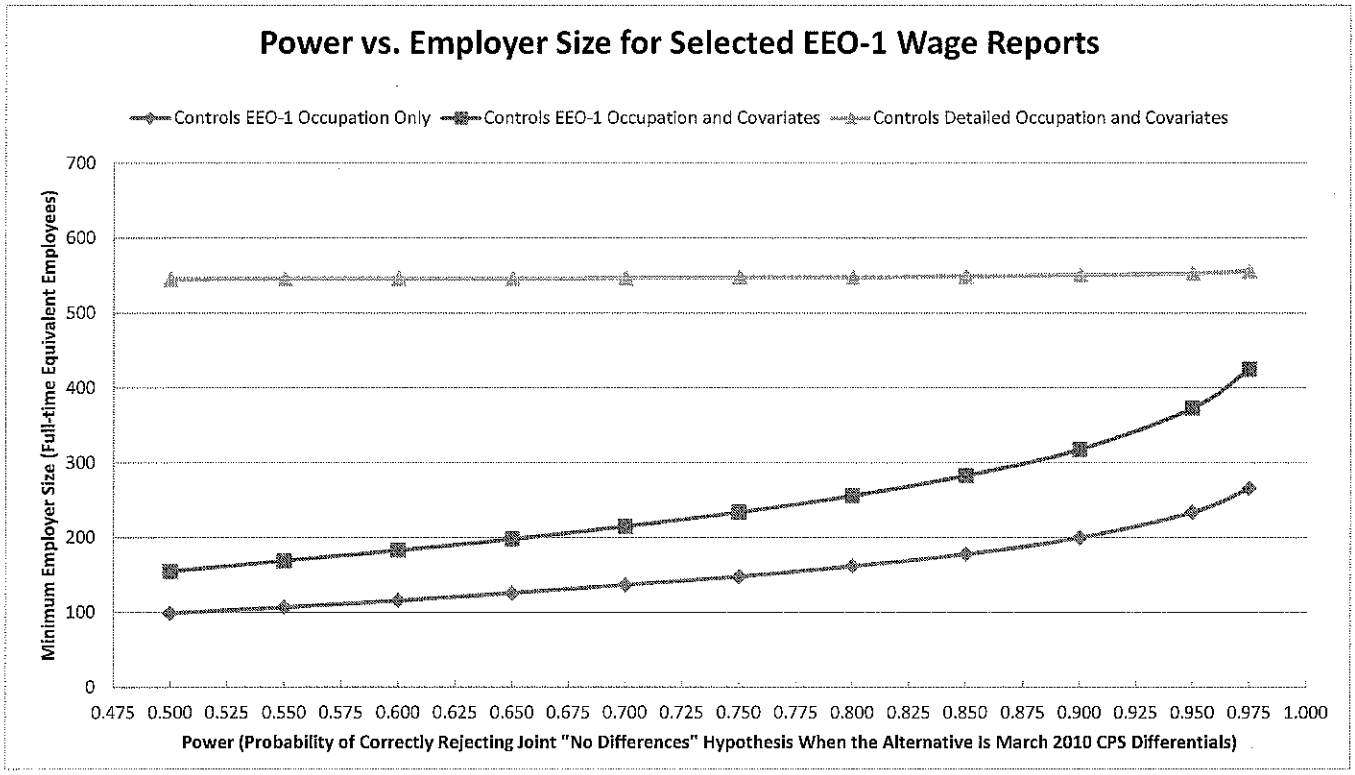

FIGURE 4-1 Comparisons of analytic power and employer size for selected EEO-1 wage reports, three models.
NOTE: See Tables 4-1, 4-2, and 4-3 and text discussion of these models
SOURCE: Analysis by panel using Current Population Survey data.

TABLE 4-1 Statistics from Estimating EEO-1 Log Wage Differentials, Panel's Model 1

Model 1 Base Model for Estimating EEO-1 Log Wage Differentials (Current Population Survey, March Supplement 2010)				
Parameter	Estimate	Standard Error	t Value	Pr > |t|
Intercept [base is white (only) non-Hispanic male]	10.57427	0.010841	975.37	<.0001
Hispanic male	-0.31926	0.009651	-33.08	<.0001
Hispanic female	-0.53986	0.011632	-46.41	<.0001
White (only) non-Hispanic female	-0.35903	0.006372	-56.35	<.0001
Black or African American (only) non-Hispanic male	-0.24208	0.011809	-20.5	<.0001
Black or African American (only) non-Hispanic female	-0.46951	0.011104	-42.28	<.0001
Native Hawaiian Islander or Other Pacific Islander (only) male	-0.15631	0.072491	-2.16	0.0311
Native Hawaiian Islander or Other Pacific Islander (only) female	-0.36209	0.07278	-4.98	<.0001
Asian (only) male	-0.03405	0.015258	-2.23	0.0257
Asian (only) female	-0.23185	0.017217	-13.47	<.0001
American Indian or Alaska Native (only) male	-0.18747	0.04766	-3.93	<.0001
American Indian or Alaska Native (only) female	-0.61771	0.046857	-13.18	<.0001
Two or more races male	-0.13671	0.034945	-3.91	<.0001
Two or more races female	-0.38639	0.037565	-10.29	<.0001
	DF Model	DF Error	F Value	Pr > F
EEO-1 differentials	13	62001	410.19	<.0001
* Controls for major occupation only (10 categories)				

SOURCE: Analysis by panel using Current Population Survey data.

TABLE 4-2 Statistics from Estimating EE0-1 Log Wage Differentials, Panel's Model 2

Model 2				
Model for Estimating EEO-1 Log Wage Differentials Controlling for Education, Major Industry, and Potential Experience (Current Population Survey, March Supplement 2010)				
Parameter	Estimate	Standard Error	t Value	Pr > |t|
Intercept [base is white (only) non-Hispanic male]	10.76643	0.026731	402.77	<.0001
Hispanic male	-0.14658	0.009124	-16.07	<.0001
Hispanic female	-0.35794	0.010739	-33.33	<.0001
White (only) non-Hispanic female	-0.27918	0.005939	-47	<.0001
Black or African American (only) non-Hispanic male	-0.18823	0.010623	-17.72	<.0001
Black or African American (only) non-Hispanic female	-0.36063	0.010188	-35.4	<.0001
Native Hawaiian Islander or Other Pacific Islander (only) male	-0.08204	0.064992	-1.26	0.2068
Native Hawaiian Islander or Other Pacific Islander (only) female	-0.3048	0.065245	-4.67	<.0001
Asian (only) male	-0.08435	0.013757	-6.13	<.0001
Asian (only) female	-0.20779	0.015511	-13.4	<.0001
American Indian or Alaska Native (only) male	-0.12243	0.04276	-2.86	0.0042
American Indian or Alaska Native (only) female	-0.45678	0.042071	-10.86	<.0001
Two or more races male	-0.08784	0.031334	-2.8	0.0051
Two or more races female	-0.27587	0.033715	-8.18	<.0001
	DF Model	DF Error	F Value	Pr > F
EEO-1 differentials	13	61970	238.41	<.0001
* Controls for major occupation (10 categories), education (16 categories), major industry (13 categories), and potential experience (quartic)				

SOURCE: Analysis by panel using Current Population Survey data.

TABLE 4-3 Statistics from Estimating Detailed Occupation Log Wage Differentials, Panel's Model 3

Model 3				
Model for Estimating Detailed Occupational Log Wage Differentials Controlling for Education, Major Industry, and Potential Experience (Current Population Survey, March Supplement 2010)				
		Standard		
Parameter	Estimate	Error	t Value	Pr > |t|
Intercept [base is white (only) non-Hispanic male]	10.86089	0.101712	106.78	<.0001
Hispanic male	-0.1025	0.008748	-11.72	<.0001
Hispanic female	-0.26943	0.010489	-25.69	<.0001
White (only) non-Hispanic female	-0.22409	0.006035	-37.13	<.0001
Black or African American (only) non-Hispanic male	-0.12759	0.010168	-12.55	<.0001
Black or African American (only) non-Hispanic female	-0.27721	0.009984	-27.76	<.0001
Native Hawaiian Islander or Other Pacific Islander (only) male	-0.06155	0.061529	-1	0.3172
Native Hawaiian Islander or Other Pacific Islander (only) female	-0.22667	0.061754	-3.67	0.0002
Asian (only) male	-0.07825	0.013192	-5.93	<.0001
Asian (only) female	-0.17078	0.015011	-11.38	<.0001
American Indian or Alaska Native (only) male	-0.10341	0.040606	-2.55	0.0109
American Indian or Alaska Native (only) female	-0.37084	0.039894	-9.3	<.0001
Two or more races male	-0.08578	0.029677	-2.89	0.0039
Two or more races female	-0.22016	0.031971	-6.89	<.0001
	DF Model	DF Error	F Value	Pr > F
EEO-1 differentials	13	61483	138.38	<.0001
* Controls for detailed occupation (497 categories), education (16 categories), major industry (13 categories), and potential experience (quartic)				

SOURCE: Analysis by panel using Current Population Survey data.

TABLE 4-4 Estimated Cost and Burden of EEOC Data Collections

Form	Frequency	Respondents	Responses	Estimated Burden Hours	Estimated Cost	Percent Electronic Reported
EEO-1	Annual	45,000	170,000	599,000	$11,400,000	80
EEO-3	Biannual	1,399	1,399	2,098	85,000	79
EEO-4	Biannual	6,018	6,018	40,000	700,000	76
EEO-5	Biannual	1,135	1,135	10,000	190,000	58

SOURCE: Data from EEOC Form 83-I submissions to OMB.

5
Confidentiality, Disclosure, and Data Access

In contrast to the usual situation in federal government survey data collections—in which the data are available for statistical use but are protected from being used for compliance and enforcement purposes—data on equal employment opportunity (EEO) issues are available for compliance purposes but are closely held and almost never made available for research and statistical analysis purposes. This anomalous situation poses interesting challenges to the U.S. Equal Employment Opportunity Commission (EEOC) and the other federal agencies that have responsibility for the data collected from public- and private-sector employers and unions for antidiscrimination enforcement purposes.

In addition to internal EEOC compliance and analytical uses, the data collected from employers have value to other federal and state agencies for their compliance and analytical purposes, to researchers to support analysis of discrimination practices, and to those who evaluate the effectiveness and efficiency of antidiscrimination programs. These uses outside of EEOC require the agency to develop practices and procedures to protect the data that are collected from employers under a pledge of confidentiality.[1]

In this chapter we discuss current EEOC procedures for protecting confidential employer data in tabular and microdata form, evaluate the effectiveness of those measures, and suggest possible enhancements to those measures.

[1]That pledge derives from Title VII, Section 709(e) of the Civil Rights Act of 1964, which sets the requirements for confidentiality: "It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000 or imprisoned not more than one year."

STATISTICAL PROTECTION OF TABULAR DATA AND MICRODATA

As discussed in Chapter 1, the EEOC now publishes a large amount of data that are derived from the collection of information from employers, both private and public. These data are generally published in aggregated form by geographic area and industry group detail in standard tabular packages that are posted on the EEOC website and otherwise made available to the public. To comply with the confidentiality provisions of Title VII that govern release of individually identifiable information from EEO-1 reports (see Chapter 1), the tables are assembled under reportedly elaborate but unpublished rules that provide for suppression of data that could identify a particular establishment or multi-establishment firm.

In releasing aggregated data of private employers collected from annual EEO-1 surveys, the EEOC uses a data suppression rule that is quite similar to the rule used by other federal government agencies for statistical data based on information collected from employers, including the Quarterly Census of Employment and Wages (QCEW) program from the Bureau of Labor Statistics (BLS).[2] The EEOC suppression rule is triggered when it meets the two primary suppression stipulations: (1) the group has three or fewer employers, or (2) one employer makes up at least 80 percent of the group employment in the aggregate.

In applying the suppression rules to industry group or geography entity or any combination of aggregates, the EEOC withholds any group's numbers if the group (an industry or a geography entity or an industry-by-geography group, etc.) contains fewer than three firms (represented by the presence of any number of establishment(s) of an individual firm within the group) or if any one firm in the group (represented by the total numbers of all the establishment(s) of the same firm within the given group) constitutes more than 80 percent of the group totals.

Unlike some other federal agencies, EEOC does not withhold aggregated data beyond its two primary suppression rules. There are no secondary suppression rules, and the agency does not further screen the aggregated data if the data have passed the fewer-than-three rule test. But although EEOC literature documents the above rules, as a general practice EEOC does not disclose the detailed methodology for suppression because the agency wants to prevent users from reverse-engineering the data in order to obtain the suppressed numbers.

Cell suppression is just one means of protecting tabular data. Because there is always a risk of secondary disclosure, other means have been explored in recent years by the U.S. government agencies to protect data by perturbing the data in some way (see Reznek, 2006, p.3). Two methods are discussed here: adding noise and controlled tabular adjustment.

Noise addition is accomplished by adding random "noise" to the underlying establishment-reported data before they are tabulated. In this data perturbation method, cell values that would normally meet the criteria for suppression are changed by a large amount, while cell values that are not as sensitive are changed by a smaller amount. This technique is less complicated than cell suppression, and, by adding noise, an agency can show data for all cells and for all tables, which preserves the ability to draw inferences from all cells.[3] Another

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[2]For more information on suppression, see: http://www.bls.gov/opub/hom/homch5_d.htm#Presentation [December 2011].

[3]The technique is currently being used by the Census Bureau to protect confidential microdata from the Longitudinal Employer-Household Dynamics (LEHD) Program used in the Quarterly Workforce Indicators, which use, as inputs, sensitive data from unemployment insurance wage records and Census Bureau demographic and economic information (Abowd et al., 2006).

effort to preserve the analytical value of protected sensitive data is being developed using a controlled tabular adjustment technique. In this technique, a sensitivity rule determines which cells are sensitive, and the technique replaces each sensitive value with a safe value that is some distance away from the sensitive value. To preserve additivity, the nonsensitive values are minimally adjusted (Reznek, 2006, p. 5).

Another increasingly popular technique that is intended to make data available for research and analytical purposes is to generate synthetic data: for generation of synthetic microdata, see Reiter (2005); for generation of synthetic tables, see Slavkovic and Lee, 2010). This technique relies on sampling and simulations. Typically, a model is developed to generate synthetic or partially synthetic data that have some of the same properties as the original data by sampling from the posterior predictive distribution of the confidential data. A typical method would be to use a sequential regression imputation. In this procedure, the original value of each variable is blanked-out and replaced by a model-generated value. The technique has been used at the Census Bureau to develop a synthesized microdata file linking Social Security Administration earnings data with data from a Census Bureau demographic survey (Reznek, 2006, p. 6).

Creating publicly available data products that are statistically valid and in which confidential data are protected is a complicated process. The best procedure to use depends on the type of data and their intended purposes, as well as on the risks of disclosure. For an overview of current statistical disclosure limitation practices in the United States, see Federal Committee on Statistical Methodology (2005). Many new techniques are being developed. The most recent ones combine techniques from statistics and computer sciences and aim to account for increased disclosure risk due to the presence of more externally available information and better record linkage technologies. Recent advances in data redaction strategies and data sharing, that include among others, virtual research data centers, remote access servers, privacy-preserving mechanisms for distributed databases, and differentially private mechanisms are highlighted in a special 2009 issue of the *Journal of Privacy and Confidentiality* (Kinney et al., 2009).

SHARING AND PROTECTING ORIGINAL DATA

EEOC Procedures

The actual, original data collected from the forms that employers submit to EEOC are now shared with the Office of Federal Contract Compliance (OFCCP) of the U.S. Department of Labor, the Civil Rights Division of the U.S. Department of Justice (DOJ), and 95 state-level fair employment practices agencies (FEPAs). There are other sharing arrangements with the U.S. Department of Education and with researchers. Often these agencies have their own procedures for assuring the confidentiality of the shared data.

The specific arrangements vary in each instance. For example, OFCCP is a statutory member of the joint reporting committee with EEOC for the collection of the EEO-1 reports. This arrangement is made known in advance to companies that provide their data to the EEOC.[4]

[4]The EEO-1 instruction booklet (p. 1) states that: "In the interests of consistency, uniformity and economy, Standard Form 100 has been jointly developed by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs of the U.S. Department of Labor, as a single form which meets the statistical needs of both programs."

According to protocols that are in place for the joint reporting committee, EEOC collects the data, edits them as needed, appends some additional identifiers to the records, and transmits a copy of the entire statistical file to OFCCP.

The DOJ Civil Rights Division is a member of a joint state and local reporting committee with EEOC for the collection of EEO-4 reports (see Chapter 1). As it does with the EEO-1 data, EEOC collects the data and at the conclusion of the survey forwards a copy of the EEO-4 statistical file to DOJ.[5] It also transmits copies of the actual individual EEO-4 reports directly to DOJ officials, allows immediate access to reports during the reporting period, as well as access to historical data.

FEPAs are state or local authorities that investigate and resolve charges of employment discrimination filed under Title VII, the Americans with Disabilities Act (ADA), the Age Discrimination Employment Act (ADEA), and comparable state laws and local ordinances in partnership with EEOC. Over the years, EEOC has negotiated work-sharing agreements with these agencies that allow the sharing of data. EEO-1 data are shared routinely in a charge tracking system that EEOC provides, which enables the FEPAs to retrieve the reports and run statistical comparisons. Other data are shared on an ad hoc basis.

Under the auspices of a school reporting committee, the EEOC shares EEO-5 data (see Chapter 1) with DOJ and the U.S. Department of Education. Statistical files are shared with both agencies. Specific requests for EEO-5 data are also honored, most often for DOJ.

From time to time, EEOC has entered into agreements with other federal agencies to allow the sharing of survey data. Currently, the only active agreement is with DOJ to share EEO-1 data. The memorandum of understanding (MOU) agreement, discussed below, spells out strict provisions for the protection of the confidentiality of the data.

The EEOC has also historically entered into agreements with individual researchers to allow the sharing of data: see Box 5-1. This has been a practice of the EEOC since 1969, when EEOC entered into an agreement with Eleanor Brantley Schwartz of Georgia State University to study women in management. The mechanism for sharing data in a protected environment is quite detailed, complicated, and time consuming, and it relies on giving the potential data user the status of a sworn federal employee.

Office of Federal Contract Compliance Procedures

OFCCP confidential data are derived from a "scheduling letter" process in which compliance reviews are initiated and certain documents and data sets are requested. The documents consist of the written Affirmative Action Plan (AAP) for the scheduled facility, certain compensation data, and information on additional personnel practices and policies to demonstrate compliance obligations.

Unlike EEOC, OFCCP has no formal data-sharing arrangement with federal or state agencies. Its data sharing occurs on an ad hoc or informal basis, such as when OFCCP refers cases to DOJ or EEOC to pursue enforcement. Sharing can also occur on a very limited basis under the MOU with EEOC. For data collected only by OFCCP, the past instances of data sharing have been infrequent, although additional sharing with EEOC can be foreseen.

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[5]This arrangement is described in the EEO-4 booklet (p. 1): "In the interests of consistency, uniformity and economy, State and Local Government EEO-4 is being used by Federal government agencies that have responsibilities for equal employment opportunity. A joint State and Local Reporting Committee, with which this report must be filed, represents those various agencies."

Unlike Title VII of the Civil Rights Act of 1964 as amended, Executive Order 11264, which comprises the legal basis for OFCCP, is silent on rules and penalties for confidentiality of data from employers. However, confidentiality provisions that cover OFCCP are spelled out in the agency's regulations (see 41 *CFR* 60-1.20(f)-(g) and 60-1.43). The regulations essentially state that the disclosure of data to the public is subject to the Freedom of Information Act and the Privacy Act and also to the procedures for preclusion of certain data due to assertion of privileges during litigation.[6]

The OFCCP approach to data confidentiality is evolving in the direction of greater transparency. An example is a new initiative under the umbrella of the Open Government Directive,[7] under which the Department of Labor (DOL) has developed a searchable "enforcement database" comprised of DOL enforcement agencies, including OFCCP.[8] This database is available for viewing by academic researchers, stakeholders, and the public. Users can retrieve data by state or zip code, the company name, North American Industry Classification System codes, violation, and year. The database divides OFCCP data into two categories: evaluations (compliance reviews) and investigations (complaints). In making these administrative data available for the first time, OFCCP has a policy of limiting disclosed information. For example, it provides only data specific to the facility reviewed and only summary data (yes/no) for violations found, if any. However, it should be noted that the true underlying disclosure risks with such data are not fully understood.

Department of Justice Procedures

As noted above, DOJ's Civil Rights Division obtains EEO-4 data from EEOC on a regular basis and holds it in confidence as a member of the joint state and local reporting committee. The DOJ uses the EEO-4 data to identify investigations that it believes should be launched, but it does not use the data directly in the investigation, nor are the data directly used in court cases. Instead, DOJ uses the data collected in the process of discovery to support its litigation.

The transmittal of EEO-1 data from EEOC to DOJ is covered by an MOU that was executed in May 2011.[9] The MOU calls on EEOC to provide DOJ with data for the most recent reporting period as soon as practicable after the EEOC has reconciled and finalized the statistical file. Historical EEO-1 files are also to be provided. In turn, DOJ agrees to preserve the confidentiality of the data in the same manner that EEOC employees are required by Title VII of the Civil Rights Act of 1964 as amended.

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[6]OFCCP rules were spelled out in the regulation that authorized the collection of the Equal Opportunity Survey (41 CFR 60-2.18(d)). These rules state:

> (d) Confidentiality. OFCCP will treat information contained in the Equal Opportunity Survey as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that the release of data would subject the contractor to commercial harm.

[7]White House, Memorandum on Transparency & Open Government, M-10-06. December 8, 2009. See: http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf

[8]For details, see: http://ogesdw.dol.gov [July 2012].

[9]U.S. Equal Employment Opportunity Commission, Memorandum of Understanding Between the U.S. Equal Employment Opportunity Commission and the U.S. Department of Justice – Civil Rights Division for Sharing of Employer Information Report (EEO-1) Data, May 12, 2011.

Among the steps leading to identification of a possible infringement of EEO laws, the DOJ compares the profiles of the public sector organizations under the agency's jurisdiction with similar organizations in the private sector, using the EEO-1 data that are obtained from EEOC.

FURTHER PROTECTION OF SHARED EEO DATA

As the above discussion indicates, the EEOC shares sensitive EEO-4 and EEO-1 report data with other agencies in the federal government and with the FEPAs through rather informal arrangements, most of which are not backed by force of law. This practice is in contrast to the usual practice of federal statistical agencies that protect shared data through formal agreements backed by clear legislative authority that is enforced by stern penalties. For EEOC, even when there is an agreement, such as the one with DOJ, to share EEO-1 data, there is no indication that the data are shielded from court challenge or from requests under the Freedom of Information Act when they are shared.

In recent years, a procedure for protecting shared data has been implemented by several federal statistical agencies that might well serve as a model for protecting the EEOC employer data. The Bureau of Labor Statistics, Census Bureau, and Bureau of Economic Analysis can now share confidential data obtained from employers under provisions of the Confidential Information Protection and Statistical Efficiency Act (CIPSEA). This statute, under the umbrella of the U.S. Office of Management and Budget, prohibits disclosure or release, for nonstatistical purposes, of information collected under a pledge of confidentiality. Under this law, data may not be released to unauthorized persons. Willful and knowing disclosure of protected data to unauthorized persons is a felony punishable by up to 5 years imprisonment and up to a $250,000 fine—penalties that are significantly more stringent than those that are enumerated in the Title VII legislation.

It is certain that the sensitivity of the data that employers provide to EEOC will be heightened if earnings data were to be added to the EEO data records. Employee compensation data are generally considered to be highly sensitive; they are even considered proprietary information by many private-sector employers.

As this chapter points out, EEOC provides data to agencies that do not have the same level of confidentiality protections and are not covered by the same penalties that apply to EEOC employees and researchers under Interagency Personnel Act agreements. Legislation patterned after the CIPSEA law could increase the protection of confidentiality of EEO data, specifically, to authorize sharing agreements between EEOC, OFCCP, DOJ, and the state and local FEPAs and extend the Title VII penalties beyond EEOC and its intergovernmental personnel agreement (IPA) researchers.

Such protection could be expected to increase the willingness of employers to provide detailed employment data. It could also help mitigate concerns of other federal agencies about the matching of the EEO-1 survey records to administrative data (such as those discussed in Chapter 2) if such matching was some day deemed useful to help improve the quality of the data.

BOX 5-1

Intergovernmental Personnel Act Agreements with Researchers

EEOC has used Intergovernmental Personnel Act agreements that detail outside persons to an employment arrangement to allow the sharing of survey data. These agreements give the researcher the status of a federal employee and access to the data. The researcher signs an agreement that prohibits disclosure of the data to anyone (including professors, advisers, and colleagues), except those persons directly employed by the project. It also requires the researcher to submit any work based on the EEOC information to the EEOC to (a) determine whether it contains any confidential information and (b) approve any language describing the relationship between the researcher and the EEOC. The data are to be returned to EEOC at the conclusion of the project, and all working files are to be certified as destroyed. The penalties for disclosure of confidential data in Title VII are formally transferred to the researcher.

SOURCE: Summary by panel staff of sample EEOC Intergovernmental Personnel Act agreement for external researchers, provided by EEOC staff on November 28, 2011.

6
Conclusions and Recommendations

The panel was invited to make recommendations to assist the U.S. Equal Employment Opportunity Commission (EEOC) in formulating regulations on methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964 as amended, if a decision is made to proceed with such a data collection. We have considered currently available and potential data sources, as well as methodologies and statistical techniques for the measurement and collection of such employer pay data. The panel's recommendations are made with an appreciation that such a new data collection would be a significant undertaking for EEOC and that it could well generate an increased reporting burden on some employers, and so any new data collection would have to be fully justified.

PURPOSE OF A NEW DATA COLLECTION

Based on the literature we reviewed and the papers and presentations made to us by the staff of EEOC, the Office of Federal Contract Compliance Programs (OFCCP) in the U.S. Department of Labor, and the U.S. Department of Justice, the panel finds that there is no clearly articulated vision of how data on wages would be used in the conduct of the enforcement responsibilities of these agencies. The most often proposed use, as best articulated in the OFCCP Advance Notice of Proposed Rulemaking (ANPRM) (see Chapter 3), envisions that the wage data would be somehow aggregated at the company level and used to compare the company's pay rates by gender, race, national origin, and occupation with other "like" companies as defined by industry coding or geographic location to target non-compliant employers.

As discussed in Chapter 2, the use of the employment data from the EEO-1 reports for the purpose of targeting potentially noncompliant firms was highlighted by EEOC leadership as an objective of the collection of earnings data by gender, race, and national origin. Thus, targeting is broadly given as the objective of collection of earnings data by both OFCCP and EEOC, but the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency. The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected: the

fundamental question that would need to be answered is how earnings data should be integrated into the compliance programs that have to date been triggered mainly by a complaint process, which, in their absence, includes relatively few complaints about pay matters.

With regard to existing studies of the cost-effectiveness of an instrument for collecting wage data, the panel concludes that they are inadequate to assess any new survey program. For example, unless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to reliably determine the actual burden on employers and the costs and benefits of the collection.

As discussed in Chapter 3, it is important to clearly understand the requirement and potential uses of data as a first step in determining their fitness for use, that is, the quality of the data. Although it is assumed that, if these data are collected, they could greatly enhance the enforcement process, until EEOC and its cooperating agencies gain experience with collecting, processing, and using earnings data in field investigations and in litigation, it will not be known if the data are of sufficient reliability to support enforcement.

Other potential benefits of the possible collection of pay data remain to be fully articulated but are of interest. In addition to targeting, the collection of earnings data could well be used in research on discrimination and pay equity. Analysts would be able to associate pay differentials by type of establishment, location, job category (occupation), and demographic detail, which cannot currently be done with existing data. For such use, however, systems for maintaining, retrieving, archiving, and processing the data in a protected environment would have to be developed.

Recommendation 1: In conjunction with the Office of Federal Contract Compliance Programs of the U.S. Department of Labor and the Civil Rights Division of the U.S. Department of Justice, the U.S. Equal Employment Opportunity Commission should prepare a comprehensive plan for use of earnings data before initiating any data collection.

PILOT STUDY

With a comprehensive plan in hand, the next logical step would be to test it. Because of the current paucity of evidence about such a data collection, the panel concludes that reliable information about the costs and benefits of the proposed collection would best be provided by an independent pilot study. The panel's has identified two possible approaches to conducting a pilot study. The selection of the appropriate approach would be dependent on the purpose for the data collection and the amount of detail needed as identified in the comprehensive plan. The options are outlined below and detailed in Appendix C.

The first approach—a microdata pilot test—would collect a number of core demographic variables—using the categories on the Equal Employment Opportunity (EEO)-1 form and adding an annual wage measure for individual employees. This approach would test targeting firms for enforcement purposes, as well as testing the collection of additional variables that could illuminate the relevant characteristics of targeted firms. For example, age and years-on-the-job variables could assist in controlling for the legitimate effect of these characteristics on wages. In developing the test, the public responses to the OFCCP ANPRM could well be instructive.

The second approach—a simplified aggregated-data pilot test—would develop and test an enhanced EEO-1 report that would include all the summary data required for the computation of test statistics comparing wage data in existing EEO-1 occupations. This pilot would use

grouped data techniques that would produce standardize wage rates and other measures of interest.

Both approaches to the pilot study could test various earnings definitions. On the basis of our analysis, we conclude that the definition used in the Occupational Employment Survey (OES) is the most feasible (see below). The tests could also assess the possibility of reducing employers' response burden through building in compatibility with the electronic record-keeping systems that are now in use in larger companies.

The quality of the data from the pilot tests would have to be assessed in light of the analysis plan that results from Recommendation 1. It would also be desirable for the quality of the data collected in the pilot to be verified by independent record checks of reporting establishments or by comparison of aggregated results with administrative databases (see Chapter 2), again using the criteria developed as part of the analysis plan in Recommendation 1.

Recommendation 2: After the U.S. Equal Employment Opportunity Commission, the Office of Federal Contract Compliance Programs, and the U.S. Department of Justice complete the comprehensive plan for use of earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost, and respondent burden.

AGENCY CAPACITY AND BURDEN

It is important to consider the administrative capacity for the collection, analysis, and protection of pay data. The EEOC has a small data collection and analytical program, which has traditionally been focused nearly exclusively on collecting employment data and assessing employer compliance through the means of rather straightforward statistical tests.

If EEOC undertakes a major new activity, it is not clear that it could administratively handle the work given available resources. If data on compensation is added to an existing form, or collected in a new instrument, the agency's resources for both collection and analysis are likely to be severely strained. Thus, EEOC needs to consider its capacity to undertake any new collection. To take full advantage of new opportunities for analytics and compliance using more sophisticated measures enabled by the availability of detailed earnings data will surely require an enhancement of EEOC's analytical and data processing capacity, as well as its capability to protect the confidentiality of the information.

Recommendation 3: The U.S. Equal Employment Opportunity Commission should enhance its capacity to summarize, analyze, and protect earnings data.

MEASURES FOR COLLECTION OF PAY INFORMATION

Several possible measures of pay information could be used for the possible new data collection, ranging from pay bands (the measure now used on the EEO-4 form) to rates of pay (e.g., annual salaries, hourly wages, etc.). Though pay band collection is attractive in that it aligns with the way that human resource managers tend to look at compensation, the best data are collected from payroll records, and those data are most likely to be rates of pay or average

annual earnings as computed using total wage and hours information. Rates of pay as a measure have the advantage of being more likely to provide valid measures of both central tendency and dispersion, important quality checks and analytical capabilities that pay band data cannot provide. Rates of pay collection would add rigor to the collection process and subsequent analysis.

Recommendation 4: The U.S. Equal Employment Opportunity Commission should collect data on rates of pay, not actual earnings or pay bands, in a manner that permits the calculation of measures of both central tendency and dispersion.

DEFINITION OF COMPENSATION

A number of definitions of compensation are currently in use, ranging from comprehensive measures of total compensation to simple straight-time hourly pay. As noted above and in Chapter 3, we conclude that the best definition is that in the OES, and we urge that a test of collection of data from employers by gender, race and national origin be conducted as part of the pilot test program.

As noted in Chapter 3, earnings in the OES survey are defined as straight-time, gross pay, exclusive of premium pay. The definition includes a base rate of pay, cost-of-living allowances, guaranteed pay, hazardous-duty pay, incentive pay (including commissions and production bonuses), and tips. The definition excludes overtime pay, severance pay, shift differentials, nonproduction bonuses, employer cost for supplementary benefits, and tuition reimbursements.

Earnings data by occupation are collected in the OES survey with use of this definition from more than 1.2 million establishments in the United States with response rates of nearly 80 percent. Clearly, most of the firms that fall within the scope of the EEO statutes and are now required to complete an annual EEO-1 report have the ability to provide these data from their existing payroll and human resource systems.

With the growth of highly sophisticated electronic systems, such as those represented in software-as-a-service applications, the ability to transfer data efficiently between the payroll and human resource systems is expected to expand in the future. By monitoring these quickly changing software developments and continuing its work with reporting employers, EEOC could capitalize on advances in electronic reporting. The widespread availability of these services and software systems can be expected to considerably simplify the addition of wages to the current data collections or to enable the preparation of microdata reports.

ACCESS TO PAY INFORMATION IN A PROTECTED ENVIRONMENT

If the pilot tests and other developmental activities recommended in this report bear fruit and if EEOC begins collection of pay data from employers, the data will comprise an important new source of information for research and analytical purposes, in addition to their intended use in enforcement. We expect that there will be great demand on the part of other federal agencies, researchers, analysts, compensation-setting bodies, and others for access to these powerful new data. EEOC would be well advised to start taking steps now to develop policies to provide access in a protected environment.

Recommendation 5: In anticipation of increased user demand for microdata on pay information by demographic detail for research and analytical purposes if the data are collected by the U.S. Equal Employment Opportunity Commission, the agency should consider implementing appropriate data protection techniques, such as data perturbation and the generation of synthetic data, to protect the confidentiality of the data, and it should also consider supporting research for the development of these applications.

Though there have been no known breaches of the EEOC's ability to protect EEO data, the consequences of a breach in the protection of data provided in confidence are, as other federal agencies have discovered, painful and of lasting consequence. The rules for protection of shared confidential EEO data are now spelled out through the mechanism of a memorandum of agreement between the EEOC and the receiving agency. With new legislation, along the lines of recent confidentiality protection legislation covering much of the federal statistical community, EEOC could insure the same protections to the organizations and individuals that become parties to data-sharing agreements as it now has with its own employees.

Recommendation 6: The U.S. Equal Employment Opportunity Commission should seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.

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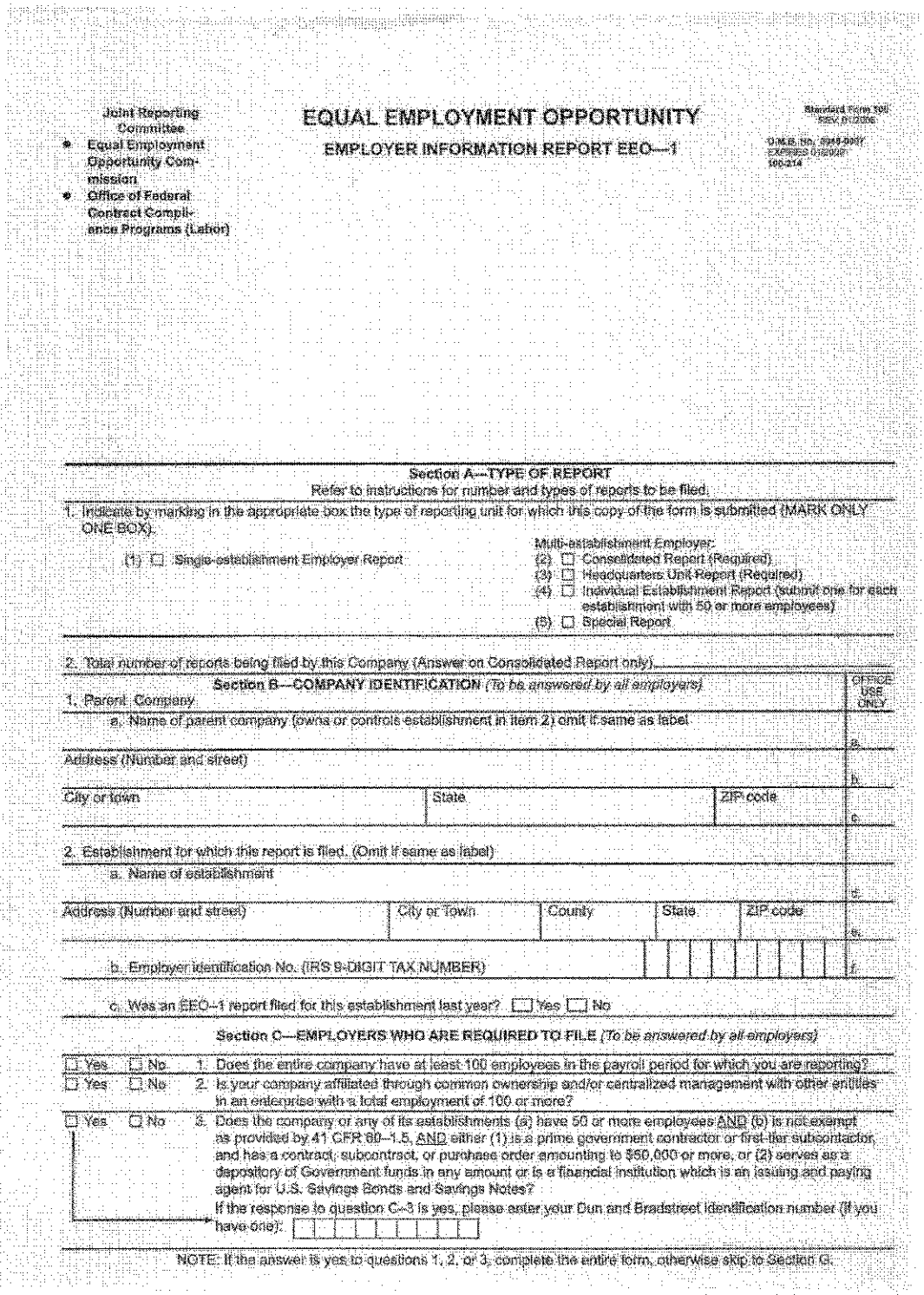
Appendix A
EEO Report Forms

This appendix reproduces the four equal employment opportunity (EEO) reports that collect data relevant to wages and employment, discussed in Chapter 1:

- EEO-1, required from private employers with 100 or more employees or 50 or more employees and a federal contract;
- EEO-3, referral unions, primarily unions with exclusive hiring arrangements with an employer;
- EEO-4, required of state and local governments; and
- EEO-5, required from primary and secondary public school districts.



Joint Reporting Committee
* Equal Employment Opportunity Commission
* Office of Federal Contract Compliance Programs (Labor)

EQUAL EMPLOYMENT OPPORTUNITY

EMPLOYER INFORMATION REPORT EEO—1

Standard Form 100 REV. 01/2006

O.M.B. No. 3046-0007 EXPIRES 01/2009 100-214

Section A—TYPE OF REPORT

Refer to instructions for number and types of reports to be filed.

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

(1) ☐ Single-establishment Employer Report

Multi-establishment Employer:
(2) ☐ Consolidated Report (Required)
(3) ☐ Headquarters Unit Report (Required)
(4) ☐ Individual Establishment Report (submit one for each establishment with 50 or more employees)
(5) ☐ Special Report

2. Total number of reports being filed by this Company (Answer on Consolidated Report only)

Section B—COMPANY IDENTIFICATION *(To be answered by all employers)* — OFFICE USE ONLY

1. Parent Company

a. Name of parent company (owns or controls establishment in item 2) omit if same as label — a.

Address (Number and street) — b.

City or town | State | ZIP code — c.

2. Establishment for which this report is filed. (Omit if same as label)

a. Name of establishment — d.

Address (Number and street) | City or Town | County | State | ZIP code — e.

b. Employer Identification No. (IRS 9-DIGIT TAX NUMBER) — f.

c. Was an EEO–1 report filed for this establishment last year? ☐ Yes ☐ No

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

☐ Yes ☐ No 1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?

☐ Yes ☐ No 2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

☐ Yes ☐ No 3. Does the company or any of its establishments (a) have 50 or more employees AND (b) is not exempt as provided by 41 CFR 60–1.5, AND either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to $50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

If the response to question C–3 is yes, please enter your Dun and Bradstreet identification number (if you have one):

NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.

Section D - EMPLOYMENT DATA

Establishment for this establishment – Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Number of Employees
(Report employee in only one category)

Job Categories	Hispanic or Latino		Not-Hispanic or Latino												Total Col. A-N
	Male		Male					Female							
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O
Executive/Senior Level Officials and Managers	11.														
First/Mid-Level Officials and Managers	12.														
Professionals	2.														
Technicians	3.														
Sales Workers	4.														
Administrative Support Workers	5.														
Craft Workers	6.														
Operatives	7.														
Laborers and Helpers	8.														
Service Workers	9.														
TOTAL	10.														
PREVIOUS YEAR TOTAL	11.														

1. Date(s) of payroll period used: _____ (Omit on the Consolidated Report.)

Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report.)

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Indicate the specific type of product or type of service provided, as well as the principal business or industrial activity.)

Section F - REMARKS

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

Section G - CERTIFICATION

Check one: 1 ☐ All reports are accurate and were prepared in accordance with the instructions. (Check on Consolidated Report only.)
2 ☐ This report is accurate and was prepared in accordance with the instructions.

Name of Certifying Official: | Title: | Signature: | Date:

Name of person to contact regarding this report: | Title: | Address (Number and Street):

City and State: | Zip Code: | Telephone No. (including Area Code and Extension): | Email Address:

All reports and information obtained from individual reports will be kept confidential as required by Section 709(e) of Title VII. WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW (U.S. CODE, TITLE 18, SECTION 1001.

Union Reporting Program
Washington, DC 20507

EQUAL EMPLOYMENT OPPORTUNITY LOCAL UNION REPORT (EEO-3)

Approved by OMB
No. 3046-0008
Expires: 12/31/04

Part A. LOCAL UNION IDENTIFICATION

1. Full name of local union for which this report is filed. (Include local number, if any.)

2. Mailing address.

a. Where official mail should be sent to the union.

Number and street

City

County

State

Zip Code

b. Union office, if different from 2a.

Number and street

City

County

State Zip Code

3. Indicate type of local union report by a check in applicable box:

a. ☐ Report filed by local union in its own behalf

b. ☐ Other (explain)

4a. Are you affiliated with or chartered by a national or international union or national federation? Yes ☐ No ☐

b. If "Yes" to item 4a, give name and address of such national or international organization.

5. Are you affiliated with the AFL-CIO? Yes ☐ No ☐

Part B. LOCAL UNION PRACTICES

1. To the best of your knowledge, does your membership include any:

	Yes	No
a. Blacks (Non-Hispanic)?	☐	☐
b. Hispanics?	☐	☐
c. Women?	☐	☐

3. To the best of your knowledge, has your international union chartered a separate local within the same work and/or area jurisdiction which consists only of:

	Yes	No
a. Persons of the same race/ethnic identity	☐	☐
b. Persons of the same sex?	☐	☐

2. If "No" to any items 1a, 1b, or 1c, is this because the group or groups not represented:

	(CHECK ALL APPLICABLE BOXES) BLACK NON-HISPANIC 1 (a)	HISPANIC 1 (b)	WOMEN 1 (c)
a. Are not in the local community?			
b. Are not in the bargaining unit?			
c. Are excluded by provision in constitution or bylaws?			
d. Have not applied for membership?			
e. Have applied, but did not have a sponsor?			
f. Have applied, but did not meet qualifications other than sponsorship?			

g. Other reason(s) (Explain)

Part C. LOCAL UNIONS REQUIRED TO FILE

	Yes	No
1. Has the local union had 100 or more members at any time since December 31 of the preceding year?	☐	☐
2. Does the local union, or any unit, division, or agent of the local union, or any labor organization which performs, within a specific jurisdiction, the functions ordinarily performed by a local union, whether or not it is so designated:		
a. Operate a hiring hall or hiring office?	☐	☐
b. Have an arrangement under which one or more employers are required to consider or hire persons referred by the local union or an agent of the local union?	☐	☐
c. Have 10 percent or more of its members employed by employers which customarily and regularly look to the union, or any agent of the union, for employees to be hired on a casual or temporary basis, for a specified period of time, or for the duration of a specified job?	☐	☐

The union must complete the entire report if it answered "YES" to item 1, *AND* the answer is "YES" to any of the three questions in item 2.

The union is not required to complete the entire report if it answered "NO" to item 1, *OR* "NO" to all three questions in item 2. If that is the case, the union must complete Parts A, B, C and E and return this form to the specified address.

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Part D. REMARKS

Part E. IDENTIFICATION AND SIGNATURE

To the best of my knowledge and belief, the information contained in this report is true and complete. It is further certified that to the extent any data in Schedule I, Items 1 or 2, are based on self-identification by individuals, this information was gathered only after they were advised of its confidential nature and purposes.

1. Type or print name, title, address and telephone number for union business of designated representative

Name _____

Title _____

Work address _____

Telephone number (including area code) _____

2. Signature of designated representative | 3. Date

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both." Title 18, Section 1001, United States Code.

SCHEDULE I—LOCAL UNION REPORT (EEO—3)

MEMBERSHIP, APPLICANT and REFERRAL INFORMATION

1. Method of identification

How was information as to race/ethnic identification and sex in Item 2 below obtained?

This information may be obtained by visual survey, from records made at the employment, from personal knowledge or by self-identification. The self-identification method may be used subject to the conditions set forth in the instructions. No State law prohibiting the self-identification method applies, since the Equal Employment Opportunity Commission's regulations supersede such laws.

	Check all applicable boxes
a. Existing Record	
b. Visual Survey	
c. Tally from Personal Knowledge	
d. Self-Identification	
e. Other (Specify)	

2. Statistics

	TOTAL (COLUMNS B-K)	MALE					FEMALE				
		NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE	NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE
		WHITE	BLACK				WHITE	BLACK			
	A	B	C	D	E	F	G	H	I	J	K
a. MEMBERSHIP IN REFERRAL UNIT											
(1) MEMBERS											
(2) APPLICANTS FOR MEMBERSHIP DURING THE PAST YEAR											
b. REFERRALS DURING 2-MONTH PERIOD											
(1) NUMBER OF PERSONS REFERRED											
(2) NUMBER OF REFERRALS											
(3) APPLICANTS FOR REFERRAL											

3. Period Used For Referral Data

You should obtain the figures reported in Item 2 "Statistics" using any 2-month period between August 1 and November 30.

Dates of 2-month Period _____

EEOC ORIGINAL

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Page 2

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATE AND LOCAL GOVERNMENT INFORMATION (EEO-4)

EXCLUDE SCHOOL SYSTEMS AND EDUCATIONAL INSTITUTIONS
(Read attached instructions prior to completing this form)

APPROVED BY OMB 3046-0008
EXPIRES 12/31/2005

DO NOT ALTER INFORMATION PRINTED IN THIS BOX

MAIL COMPLETED FORM TO:
EEO-4 Reporting Center
PO Box 8127
Reston VA 20195

A. TYPE OF GOVERNMENT (Check one box only)

☐ 1. State ☐ 2. County ☐ 3. City ☐ 4. Township ☐ 5. Special District

☐ 6. Other (Specify)_____

B. IDENTIFICATION

1. NAME OF POLITICAL JURISDICTION (If same as label, skip to Item C)

2. Address--Number and Street	CITY/TOWN	COUNTY	STATE/ZIP	EEOC USE ONLY A / B

C. FUNCTION

(Check one box to indicate the function(s) for which this form is being submitted. Data should be reported for all departments and agencies in your government covered by the function(s) indicated. If you cannot supply the data for every agency within the function(s) attach a list showing name and address of agencies whose data are not included.)

	1. Financial Administration. Tax billing and collection, budgeting, purchasing, central accounting and similar financial administration carried on by a treasurer's, auditor's or comptroller's office and GENERAL CONTROL. Duties usually performed by boards of supervisors or commissioners, central administration offices and agencies, central personnel or planning agencies, all judicial offices and employees (judges, magistrates, bailiffs, etc.)		8. HEALTH. Provision of public health services, outpatient clinics, visiting nurses, food and sanitary inspections, mental health, alcohol rehabilitation service, etc. 9. HOUSING. Code enforcement, low rent public housing, fair housing ordinance enforcement, housing for elderly, housing rehabilitation, rent control.
	2. STREETS AND HIGHWAYS. Maintenance, repair, construction and administration of streets, alleys, sidewalks, roads, highways and bridges.		10. COMMUNITY DEVELOPMENT. Planning, zoning, land development, open space, beautification, preservation.
	3. PUBLIC WELFARE. Maintenance of homes and other institutions for the needy; administration of public assistance. (Hospitals and sanatoriums should be reported as item7.)		11. CORRECTIONS. Jails, reformatories, detention homes, halfway houses, prisons, parole and probation activities
	4. POLICE PROTECTION. Duties of a police department sheriff's, constable's, coroner's office, etc., including technical and clerical employees engaged in police activities.		12. UTILITIES AND TRANSPORTATION. Includes water supply, electric power, transit, gas, airports, water transportation and terminals.
	5. FIRE PROTECTION. Duties of the uniformed fire force and clerical employees. (Report any forest fire protection activities as item 6.)		13. SANITATION AND SEWAGE. Street cleaning, garbage and refuse collection and disposal. Provision, maintenance and operation of sanitary and storm sewer systems and sewage disposal plants.
	6. NATURAL RESOURCES. Agriculture, forestry, forest fire protection, irrigation drainage, flood control, etc., and PARKS AND RECREATION. Provision, maintenance and operation of parks, playgrounds, swimming pools, auditoriums, museums, marinas, zoos, etc.		14. EMPLOYMENT SECURITY STATE GOVERNMENTS ONLY
	7. HOSPITALS AND SANATORIUMS. Operation and maintenance of institutions for inpatient medical care.		15. OTHER (Specify on Page Four)

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D. EMPLOYMENT DATA AS OF JUNE 30

(Do not include elected/appointed officials. Blanks will be counted as zero)

1. FULL-TIME EMPLOYEES (Temporary employees are not included)

JOB CATEGORIES	ANNUAL SALARY (In thousands 000)	MALE						FEMALE				
		TOTAL (COLUMNS B-K)	NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE	NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE
			White	Black				White	Black			
		A	B	C	D	E	F	G	H	I	J	K
OFFICIALS ADMINISTRATORS	1. $0.1-15.9											
	2. 16.0-19.9											
	3. 20.0-24.9											
	4. 25.0-32.9											
	5. 33.0-42.9											
	6. 43.0-54.9											
	7. 55.0-69.9											
	8. 70.0 PLUS											
PROFESSIONALS	9. $0.1-15.9											
	10. 16.0-19.9											
	11. 20.0-24.9											
	12. 25.0-32.9											
	13. 33.0-42.9											
	14. 43.0-54.9											
	15. 55.0-69.9											
	16. 70.0 PLUS											
TECHNICIANS	17. $0.1-15.9											
	18. 16.0-19.9											
	19. 20.0-24.9											
	20. 25.0-32.9											
	21. 33.0-42.9											
	22. 43.0-54.9											
	23. 55.0-69.9											
	24. 70.0 PLUS											
PROTECTIVE SERVICE	25. $0.1-15.9											
	26. 16.0-19.9											
	27. 20.0-24.9											
	28. 25.0-32.9											
	29. 33.0-42.9											
	30. 43.0-54.9											
	31. 55.0-69.9											
	32. 70.0 PLUS											
PARA-PROFESSIONALS	33. $0.1-15.9											
	34. 16.0-19.9											
	35. 20.0-24.9											
	36. 25.0-32.9											
	37. 33.0-42.9											
	38. 43.0-54.9											
	39. 55.0-69.9											
	40. 70.0 PLUS											
ADMINISTRATIVE SUPPORT	41. $0.1-15.9											
	42. 16.0-19.9											
	43. 20.0-24.9											
	44. 25.0-32.9											
	45. 33.0-42.9											
	46. 43.0-54.9											
	47. 55.0-69.9											
	48. 70.0 PLUS											

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D. EMPLOYMENT DATA AS OF JUNE 30 (Cont.)

(Do not include elected/appointed officials. Blanks will be counted as zero)

1. FULL-TIME EMPLOYEES (Temporary employees are not included)

JOB CATEGORIES	ANNUAL SALARY (In Thousands 000)	MALE						FEMALE					
		TOTAL (COLUMNS B-K)	NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE	NON-HISPANIC ORIGIN		HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE
			WHITE	Black				White	Black			
		A	B	C	D	E	F	G	H	I	J	K
SKILLED CRAFT	49. $0.1-15.9											
	50. 16.0-19.9											
	51. 20.0-24.9											
	52. 25.0-32.9											
	53. 33.0-42.9											
	54. 43.0-54.9											
	55. 55.0-69.9											
	56. 70.0 PLUS											
SERVICE MAINTENANCE	57. $0.1-15.9											
	58. 16.0-19.9											
	59. 20.0-24.9											
	60. 25.0-32.9											
	61. 33.0-42.9											
	62. 43.0-54.9											
	63. 55.0-69.9											
	64. 70.0 PLUS											
65. TOTAL FULL TIME (LINES 1 – 64)												
2. OTHER THAN FULL-TIME EMPLOYEES (Including temporary employees												
66. OFFICIALS/ADMIN												
67. PROFESSIONALS												
68. TECHNICIANS												
69. PROTECTIVE SERVICE												
70. PARA-PROFESSIONAL												
71. ADMIN. SUPPORT												
72. SKILLED CRAFT												
73. SERVICE/MAINTENANCE												
74. TOTAL OTHER THAN FULL TIME (LINES 66 – 73)												
3. NEW HIRES DURING FISCAL YEAR - Permanent full time only JULY 1 – JUNE 30												
75. OFFICIALS/ADMIN												
76. PROFESSIONALS												
77. TECHNICIANS												
78. PROTECTIVE SERVICE												
79. PARA-PROFESSIONAL												
80. ADMIN. SUPPORT												
81. SKILLED CRAFT												
82. SERVICE/MAINTENANCE												
83. TOTAL NEW HIRES (LINES 75 – 82)												

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REMARKS (List National Crime Information Center (NCIC) number assigned to any Criminal Justice Agencies whose data are included in this report)

LIST AGENCIES INCLUDED ON THIS FORM

CERTIFICATION. I certify that the information given in this report is correct and true to the best of my knowledge and was reported in accordance with accompanying instructions. (Willfully false statements on this report are punishable by law, US Code, Title 18, Section 1001.)

NAME OF PERSON TO CONTACT REGARDING THIS FORM	TITLE
ADDRESS (Number and Street, City, State, Zip Code)	TELEPHONE NUMBER extension: FAX NUMBER

DATE	TYPED NAME/TITLE OF AUTHORIZED OFFICIAL	SIGNATURE
E-MAIL		

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ELEMENTARY-SECONDARY STAFF INFORMATION (EEO-5)

Public school systems

FORM APPROVED BY OMB NO. 3046-0003 APPROVAL EXPIRES 12/31/2004

This is a joint requirement of EEOC, and the Office for Civil Rights and National Center for Education Statistics of the Department of Education.

DO NOT ALTER INFORMATION PRINTED IN THIS BOX

NOTE: ALL EMPLOYEES IN YOUR SCHOOL DISTRICT MUST BE INCLUDED ON THIS FORM. Additional Copies of this form may be obtained from the address below. Send your full report (the original and one copy of this form) to:

PART I. IDENTIFICATION

PART A. TYPE OF AGENCY WHICH OPERATES THE REPORTING SCHOOL SYSTEM

☐ Local Public School System ☐ Special or Regional Agency ☐ State Education Agency

☐ Other (Specify) _____

B. SCHOOL SYSTEM IDENTIFICATION (OMIT IF SAME AS LABEL)

NAME				
STREET AND NO. OR POST OFFICE BOX	CITY/TOWN	COUNTY	STATE	ZIP

C. GENERAL STATISTICS

NUMBER OF SCHOOLS OPERATED	NUMBER OF ANNEXES OPERATED	OCTOBER 1ST ENROLLMENT

D. REMARKS

AUTHORIZATION

THE NATIONAL CENTER FOR EDUCATION STATISTICS WILL PUBLISH INFORMATION APPEARING IN PART II, TOTAL COLUMN "A" UNLESS THE DISTRICT SPECIFICALLY WITHHOLDS AUTHORITY TO DO SO. IF THE DISTRICT WISHES TO WITHHOLD SUCH AUTHORITY, CHECK HERE.

☐ **AUTHORITY WITHHELD**

EOC FORM 168A
April 96

EEOC-ORIGINAL

PAGE 1

PART II. STAFF STATISTICS AS OF (DATE)_____ DO NOT INCLUDE ELECTED/APPOINTED OFFICIALS (SEE DEFINITION IN APPENDIX)

DISTRICT NAME: DISTRICT ID #:

ACTIVITY ASSIGNMENT CLASSIFICATION	OVERALL TOTALS (SUM OF COL. B THRU K)	STAFF TOTALS — MALE					FEMALE				
		WHITE (NOT OF HISPANIC ORIGIN)	BLACK (NOT OF HISPANIC ORIGIN)	HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE	WHITE (NOT HISPANIC ORIGIN)	BLACK (NOT OF HISPANIC ORIGIN)	HISPANIC	ASIAN OR PACIFIC ISLANDER	AMERICAN INDIAN OR ALASKAN NATIVE
	A	B	C	D	E	F	G	H	I	J	K
A. FULL-TIME STAFF											
1. Officials, Administrators, Managers											
2. Principals											
3. Assistant Principal, Teaching											
4. Assistant Principals, Non teaching											
5. Elementary Classroom Teachers											
6. Secondary classroom Teachers											
7. Other Classroom Teachers											
8. Guidance											
9. Psychologists											
10. Librarians/Audio Visual Staff											
11. Consultants &Supervisors of Instruction											
12. Other Professional Staff											
13. Teachers Aids											
14. Technicians											
15. Clerical/Secretarial Staff											
16. Service Workers											
17. Skilled Crafts											
18. Laborers, Unskilled											
19. TOTAL (1-18)											
B. PART-TIME STAFF											
20. Professional Instructional											
21. All Other											
22. TOTAL (20-21)											
C. NEW HIRES (JULY THRU SEPT. OF THE SURVEY YEAR)											
23. Officials, Administrators, Managers											
24. Principals/Asst. Principals											
25. Classroom Teachers											
26. Other Professional Staff											
27. Nonprofessional Staff											
28. TOTAL (23-27)											

CERTIFICATION: I certify that the information given in this report is correct and true to the best of my knowledge and was prepared in accordance with accompanying instructions. Willfully false statements on this report are punishable by law, U.S. Code, Title 18, and Section 1001.

Date	Phone (Include Area Code)	Typed Name/Title of Person Responsible for Report	Signature

EEOC FORM 168A EEOC-Original Page 2 April 96

Appendix B

Study of Employment Earnings for the Equal Employment Opportunity Program: A Possible Role for Administrative Data from Three Tax Systems

Nicholas Greenia

INTRODUCTION

The proposed Paycheck Fairness Act of 2009 (H.R. 12 in the 112th Congress), would have required the U.S. Equal Employment Opportunity Commission (EEOC) to issue regulations mandating the provision of earnings data from employers to the EEOC classified by the race, gender, and national origin of their employees. According to the proposed legislation, these pay or earnings data are needed to bolster the related employment and other data already collected through the equal employment opportunity (EEO) reports, particularly the EEO-1 reports, for purposes of enforcing compliance with statutory nondiscrimination employment practices. The new data were argued to be critical in continuing to administer Section 709 of the Civil Rights Act of 1964, as amended.

This paper explores the feasibility of using existing data from the administrative records of three tax systems for accomplishing the EEO-1 stated goals for new data collection. It discusses the data collected from and the interrelationships among three tax systems: two administered by federal agencies, the Internal Revenue Service (IRS) and the Social Security Administration (SSA), and one by the state agencies, the unemployment insurance (UI) offices that operate as federal-state partnerships under the Employment and Training Administration (ETA) of the U.S. Department of Labor. It continues by discussing how the interrelationships of the three tax systems benefit data quality, including timeliness, for EEO-1 purposes. It also provides an overview of the sources, including the forms, that could provide the needed data. The paper concludes by presenting major concerns on confidentiality.

These systems hold particular promise for a number of reasons. One is the coverage of the taxes reported and collected: federal income taxes for funding many federal programs that benefit all U.S. residents, taxes that help fund the Social Security and Medicare programs for retirees and other qualified recipients, and unemployment insurance taxes that fund the unemployment benefits of workers who are laid off during difficult economic times, particularly

for extended periods such as during the recent deep recession. Another is data quality: the data records tend to have, in general, high levels of compliance because of the importance of these programs—highlighted by the penalties for noncompliance—for the nation's safety net and in funding congressionally mandated expenditures. A third is the potential for triangulation of firm and worker levels of reporting by the use of all three systems. Although there are some issues with response rates in each system, such as the tax gap for federal income taxes, partial participation is likely to result in detection by one of the three systems.

Although each administrative record data set holds promise for supplementing EEO-1 data, there are also challenges associated with the use of these administrative data. Like any data system, these three administrative record systems are imperfect in terms of response rates, accuracy, and all levels of granularity, such as multiemployer member reporting in the UI system. In addition, each also has constraints, including purposes and access.

How the EEOC decides to approach the enhancement of its data, including any redesign of its own EEO-1 collection system, may be key to determining not only the most useful plan, but also the most viable for purposes of obtaining earnings data classified by gender, race/ethnicity, and nativity.

A BRIEF OVERVIEW OF THE THREE TAX SYSTEMS

This section presents an overview of the purpose, coverage, data availability, national importance, and interrelationships of the three systems. These administrative earnings data are captured by multiple administrative forms, reported in various components, and available across multiple years from the three tax systems. The classifier variables for gender, race/ethnicity, nativity, and even age, also exist at the employee record level although they are not universally captured in the databases. All of these data could be linked to a specific employer for an employee, including for multiple employers.

Purpose

The three data systems are used primarily to collect taxes for administering and funding vital mandated programs: the federal income tax system by IRS, the Social Security and Medicare programs by SSA, and the state UI systems, which are operated as State Employment Security Agencies (ESAs) under a federal-state partnership. Related national statistics are produced from all three sets of data by the statistical offices of SSA and IRS, as well as the Department of Labor's Bureau of Labor Statistics and the U.S. Census Bureau. In addition, they are used for policy analysis in a wide range of offices, including the Joint (Senate-House) Committee on Taxation, the Congressional Budget Office, and the Office of Tax Analysis at the U.S. Department of the Treasury, and for analytical research by top academics through the Intergovernmental Personnel Act as well as the Census Bureau's Research Data Centers.

Such robust—and visible—uses of the data have beneficial consequences for the EEO-1 program because weaknesses, limitations, and inaccuracies in the data systems tend to become known and corrective measures taken in order to ensure the utility and consistency of the data over time. In addition, because the U.S. statistical system is decentralized, it is more difficult for any one system's data anomalies to go unnoticed, given the cross-checks implicitly or explicitly built in across these quasi independent systems–particularly for financial data, including employment earnings.

Coverage

Across the three systems, as well as the U.S. Census Bureau, establishments and workers needed for EEO-1 purposes would be covered. The data are reported on IRS income tax returns (for individuals and businesses), employment tax returns (for both the Federal Income Contributions Act [FICA] and the Federal Unemployment Tax Act [FUTA]), information returns (including for tax-exempt nonprofit organizations), applications for Social Security Numbers (SSNs), and on UI-related forms. Several federal agencies play major roles in either funding or helping process the data and payments for these programs: the Department of Labor (DOL)—particularly its Bureau of Labor Statistics (BLS) and the Employment Training Administration (ETA)—SSA and IRS. In addition, the states play a major role in administering the State Unemployment Tax Authority (SUTA), program as well as the employment and training administration system funded in large part by ETA.

Data Availability

Table B-1 summarizes availability of the EEO-1 items needed by source, including Census Bureau.

National Importance

The data are critical for funding many federal programs that benefit all U.S. residents, taxes that help fund the Social Security and Medicare programs for retirees and other qualified recipients, and unemployment insurance taxes that fund the unemployment benefits of workers who are laid off during difficult economic times.

Inter-Relationships

The three sets of data are interrelated, albeit sometimes in subtle ways. For example, all three systems depend upon the Social Security Numbers (SSNs) assigned by SSA, the employer identification numbers (EINs) assigned by IRS, the reporting of employment and payroll at both the firm and individual worker level for federal and state purposes, and related information to update them, such as changes in name or address. Similarly, the IRS determination of which workers are employees and which are contractors has an impact on the other systems. The IRS decision is obtained by the filing of a Form SS-8 for a firm or worker seeking to have IRS establish officially the employee or independent contractor status of a particular worker. This transaction then has ramifications for the other employee data collection systems, such as SUTA and FUTA, and could also be used to inform and supplement the EEO-1 reports.

EEO-1 Utility

Because of the coverage, availability, and interrelationships, the three tax systems hold considerable promise for providing the employee earnings data needed by gender, race/ethnicity, nativity, and even age, by employer. In addition, these systems could be useful also because of

the other data they contain, in addition to employee earnings, for supplementing the EEO-1 report data currently collected, including across time both retrospectively and prospectively.

STATE UNEMPLOYMENT INSURANCE DATA

This section presents a brief summary of why and how UI and Quarterly Census of Employment and Earnings (QCEW) data are reported, collected, and shared with the federal sector, and the significance for the EEO-1 program.

Purpose

In addition to complying with FUTA, employers must also comply with the State Unemployment Tax Authority (SUTA) by withholding and depositing tax or insurance payments from each employee's wages with the state unemployment offices. Although federal unemployment taxes serve several purposes (see below)state unemployment taxes are used only to fund unemployment benefits in a particular state or territory (including the District of Columbia, Puerto Rico, and the Virgin Islands).

Coverage

Tax rates and coverage vary by state, as do the content and format of the records a particular state collects. In general, workers not covered by this system include federal employees, contractors, the self-employed, and some agricultural workers.

Content

A state collects the employment and compensation data in two parts. The first part is detailed earnings data[1] collected as part of the UI system. The state UI agency collects reports from each employer that include the SSN, name, and quarterly compensation for each individual employee (as well as the employer name and EIN).[2] This collection of detailed employee earnings, often called UI wage records, provides the most frequent and granular information about employee earnings across the three tax systems.

For the second part, the state ESA collects aggregate monthly employment (for the pay period containing the 12th of the month[3]) for each quarter and the aggregate quarterly employee compensation from each employer in the state covered by state UI laws and federal workers covered by the Unemployment Compensation for Federal Employees (UCFE) Program.[4] This program, administered by the BLS, also includes the collection of monthly employment data and provides the most frequent aggregate employment data across the three tax systems.

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[1]See, for example, http://detr.state.nv.us/uicont/forms/NUCS-4072.PDF [July 2012].

[2]The coverage varies by state; for a complete review, see Stevens (2002), available: http://lehd.did.census.gov/led/library/techpapers/tp-2007-04.pdf [July 2012].

[3] The 12th of the month is the same date used for reporting of employment on the IRS quarterly employment FICA tax returns (Form 941 series) that is, March 12, June 12, etc.

[4]This quarterly reporting of aggregate compensation provides more commonality with the IRS Form 941 series, which also reports quarterly aggregate employee compensation: see, for example, http://www.bls.gov/cew/forms/mwr_nm.pdf July 2012], also see http://www.bls.gov/cew/cewover.htm [July 2012].

The second part data collection is partly funded by BLS, and after a state edits the data, it transmits electronic summaries to BLS for its statistical needs. Although data are also requested for multiple worksite or multi-establishment employers, there is no disincentive for an employer that does not comply with the multisite request as long as total employment is reported accurately and the appropriate amount of UI taxes is paid to the states.

EEO-1 Utility

For purposes of expanding the EEO-1 program, the UI data system provides the earnings data needed and at the employee level, but it also presents three problems. First, because of the lack of a disincentive for nonreporting of multisite employer detail, there may be a disconnect in matching to multi-establishment employer data at the worksite level—but not the enterprise level—from the EEO-1 reports. It would be up to the EEOC to determine how big a problem this represents for its enforcement needs. Second, gender, race/ethnicity, and nativity data are not collected for either of the two parts described above. However, if the detailed employee earnings data could be matched to SSA Numident (Numerical Identification System) data, this problem could be reduced if not resolved. Third, and perhaps most daunting, in order to obtain either of the two data parts provided to the states—especially the detailed employee earnings—it would be necessary to obtain separate agreements with each state. as was done so laboriously for the Longitudinal Employer-Household Dynamics (LEHD) program at the Census Bureau starting in the 1990s).[5]

INTERNAL REVENUE SERVICE DATA

This section presents a summary of several tax and information forms, especially Form W-2, Form 941, and Form 940, and why they might be of interest to expand the EEO-1 reports on employment and earnings data. In addition, it discusses the close relationship IRS and SSA have in terms of the first two forms, particularly for validating and reconciling amounts withheld for income, Social Security, and Medicare taxes.

Purpose

In 1976[6] the current simplified Combined Annual Wage Reporting (CAWR) Program was established by law to ensure that employers pay and report the correct amount of tax, including federal income tax withholding and that they file timely all necessary forms with SSA. That same year, Form W-2 (Wage and Tax Statement) was redesigned to include Social Security information, and Form W-3 (Transmittal of Income and Tax Statements), was amended to include cumulative totals of each money field appearing on the associated Form W-2.

Content

Detailed annual employee compensation, quarterly, and annual aggregate employee compensation and number of employees are provided at both the employee and employer level

[5]The LEHD program is briefly described in Chapter 2.

[6]The Tax Reform Act of 1976 (TRA76) also established the present confidentiality statute in the tax code, namely, section 6103.

and are linkable by the SSN/EIN crosswalk also provided. In addition, other tax forms provide various components of aggregate and even detailed employee compensation, such as compensation to corporate officers. Finally, EIN and ITIN assignment and other transactions enable the tracking of new business births, foreign born workers without SSNs, and even the employee or contractor status of a worker.

For purposes of expanding EEO-1 reports, three forms in particular figure prominently in the CAWR process: Form W-2, Form 941, and Form 940.[7]

Form 940, Employer's Annual Federal Unemployment (FUTA) Tax Return [8]

Purpose

Form 940 is required to be filed annually by an employer for purposes of reporting and paying the federal unemployment taxes required by FUTA. These taxes are used to fund state workforce agencies, pay half the cost of extended unemployment benefits in severe economic downturns, and also for loans to states to help them pay unemployment benefits, including extended unemployment benefits.

Coverage

Filing is required—at the aggregate employment level—for each nonagricultural employee earning at least $1,500 in any quarter of the year or for each employee who was employed for part/all of a day in any 20 different weeks of the year.[9]

EEO-1 Utility

Although Form 940 does report annual total compensation, it does not report the number of employees. However, for purposes of this analysis, the compensation information may be useful for benchmarking compensation data reported on other federal tax forms, say, Form W-2, and Form 941, as well as the UI data.

Form W-2, Wage and Tax Statement[10]

Purpose

Form W-2 is required to be filed by both employees, with their individual tax returns (Form 1040) and employers, transmitted under the summary Form W-3. The form's major tax purpose is threefold: reporting of federal income tax, Social Security tax, and Medicare tax withheld from employees' compensation. The W-2 is also required to be filed if these taxes were not withheld but should have been.

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[7]Schedule H, filed with Form 1040 to report household employees, is omitted from this discussion.

[8]See http://www.irs.gov/pub/irs-pdf/f940.pdf [July 2012].

[9]For 2009 and 2010, agricultural employers were required to file if they paid cash wages of $20,000 or more to farm workers during any calendar quarter or if they employed 10 or more farm workers during some part of the day (whether or not at the same time) during any 20 or more different weeks in either year.

[10]See http://www.irs.gov/pub/irs-pdf/fw2.pdf [July 2012].

Coverage

Withholding of federal income tax is not required for an employee who had no federal tax liability in the previous year and is expected to have none in the current year. However, because Social Security and Medicare taxes must be withheld, a Form W-2 must be filed for such an employee. Thus, this is an extremely potent building block for employment and wage data—at the employee level, but cross-referenced to the employer level by the cross-walk of SSN/EIN—even for low-wage employees. In addition, because a different W-2 must be filed by each employer of an employee, these data can provide multiple employer information for an employee with multiple jobs.

EEO-1 Utility

The industry codes available at SSA (at the full 6-digit level of the North American Industry Classification System can provide a further source of rich classifier information on employers' business activities. Earnings detail is also rich: wages and salaries, deferred compensation (part of total compensation, even if not taxable currently), and certain fringe benefits are reported, in addition to capped Social Security earnings and uncapped Medicare earnings. Together, the W-2 earnings variables provide a unique and comprehensive window on earnings data at the employee level.

Form 941, Employer's Quarterly Tax Return[11]

Purpose

Form 941 is required to be filed quarterly by an employer in order to report and pay federal income tax withheld for employees, and both the employer's and employees' share of Social Security and Medicare Taxes. Similarly, Form 943, Employer's Annual Federal Tax Return for Agricultural Employees,[12] is required to be filed annually for the same reasons, but for agricultural employees.

Coverage

In general, coverage of FICA employees by the Form 941 series is very similar to that of FUTA employees by the Form 940.

EEO-1 Utility

Both the Form 941 series and Form 943 contain a number of useful fields, especially the total number of employees and their total compensation–quarterly for the Form 941, annually for Form 943. In addition, the forms report taxable Social Security sages (which are capped at the SSA ceiling), taxable Medicare wages (which are not capped and thus, equivalent to total wages).

[11]See http://www.irs.gov/pub/irs-pdf/f941.pdf [July 2012].
[12]See http://www.irs.gov/pub/irs-pdf/f943.pdf [July 2012].

Data Quality: IRS and SSA Reconciliation

IRS and SSA use a reconciliation process involving the filings of both Form W-2 and Form 941 in order to determine discrepancies and possible tax delinquencies. Specifically, they compare taxable SSA wages, taxable SSA tips, taxable Medicare wages, and federal income tax withheld. Discrepancies result in the direct contact of employers, and consequences for noncompliance–and even nonresponse–can be serious. For example, in addition to monetary penalties that may result, so-called "bad boy" employers have been required to file Form 941 on a monthly, instead of a quarterly, basis.

IRS uses a similar cross-check system involving more tax forms, such as, the Form 1040[13] series of individual tax returns to ensure that an individual's total reported income jibes with other reports of the income source; e.g., the Form W-2 for earnings and other compensation and Form 1099R for income such as interest, dividends, and pension distributions.

The consequences of being noncompliant with the federal income tax system are well known and potentially include not only prison, monetary penalties and interest, but also damage to one's credit ratings for both individuals and firms. For a firm, such damage can extend to its reputation in the business community, e.g.,, for partnering and other collaborative efforts, and adversely affect attempts to raise capital publicly, say, with an initial public offering, and privately.

Because of the adverse consequences of tax noncompliance, firms are generally highly incentivized to comply and provide accurate and timely information to both IRS and SSA. If they are not, IRS enlists an array of tools for enforcing compliance that include DIF scoring[14] of individual and some business tax returns and numerous auditors and agents to ensure that tax laws are obeyed and corrective measures taken when they are not.

DATA QUALITY: IRS AND STATE UI RECONCILIATION

Although a similar relationship exists between IRS and the state workforce agencies[15] for purposes of ensuring the timely and accurate payment of both state and federal unemployment taxes, Form 940 earnings data–annual employment compensation by employer--may be less useful for purposes of expanding EEO-1 reports than the more detailed information on the Form W-2 and Form 941. However, the information sharing between IRS and the state workforce agencies also helps ensure the accuracy of the data reported to the states at both the firm and employee level for purposes of both federal and state unemployment taxes. The importance of the interagency relationship for ensuring that these taxes are paid correctly and timely is a major reason these data from all three tax systems may hold such promise for expanding the earnings data on the EEO-1 reports.

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[13]See http://www.irs.gov/pub/irs-pdf/f1040.pdf [July 2012].

[14]Under this system IRS computer programs assign each return a numeric discriminant function system (DIF) score rating the potential for necessary changes to the return, based on past IRS experience with similar returns. The unreported income DIF score is used to rate the return for the potential of unreported income. IRS staff screen the highest-scoring returns, selecting some for audit and identifying the items on these returns that are most likely to need review.

[15]Under section 6103 of the tax code (and reciprocating state and municipal laws), IRS, state, and even municipal tax authorities have long shared data for mutual benefit involving tax administration. For states, such sharing has included data to administer both income taxes and employment or payroll taxes.

Form SS-4, Application for Employer Identification Number[16]

In addition to starting the process for assigning an EIN for an entity (usually, but not always, a business), the Form SS-4 establishes an employer's account on the IRS Business Master File (similar to the business registers at BLS and the Census Bureau, but for tax administration), including filing requirements for income tax returns (Form 1120 series, Form 1065 series, Form 990 series) and employment tax returns (Form 940 and Form 941 series). It also provides the SSN-EIN crosswalk for a sole proprietorship converting from nonemployer to employer status, important information in order to link the Schedule C posting to the Individual Master File on SSN with the accompanying Form 1040, to the sole proprietorship's employment tax returns posting on EIN to the Business Master File. IRS also provides SS-4 population data to SSA (and the Census Bureau), which uses the detailed alpha information on business activity to assign full 6-digit industry codes,[17] which should be useful industry classification for EEO-1 reports. In summary, this short form initiates actions in several systems–both statistical and administrative–which begin the cross-tracking of many events for a central use of the form, the identification of new businesses.

Form W-4, Employee's Withholding Allowance Certificate[18]

Form W-4 identifies a new employee's withholding status for purposes of the required Form W-2 that is later filed with an employee's Form 1040 individual income tax return. Although the W-4 is not required to be filed with IRS, it is required to be filed by federal and state agencies for employers, as part of the National Directory of New Hires at HHS (see related discussion below under Confidentiality). One use of this form, in addition to its potential for identifying increases in national employment on practically a real-time basis, is that it individually identifies new employees, something that may be of interest for EEO-1 reports to track employment by employers.

Form W-7, Application for IRS Individual Taxpayer Identification Number (ITIN) [19]

Form W-7 is filed for foreign workers, regardless of immigration status,[20] in place of an application for SSN. The ITIN is important not only because of the foreign nativity information it contains, but also because it helps complete identification of the worker universe information, supplementing and complementing the SSNs reported for more permanent status workers. Thus, it indirectly helps provide detailed worker information on the forms filed with the states as well as a more complete picture of the employee/employer relationships revealed by

[16]See http://www.irs.gov/pub/irs-pdf/fss4.pdf [July 2012].

[17]The 6-digit North American Industry Classification System (NAICS) codes replaced the 4-digit Standard Industrial Classification (SIC) codes in 1997, but continuity mappings (from SIC to NAICS) exist at many federal agencies using these codes. IRS uses NAICS-based codes for its tax returns, but only what can fit on the allotted one page of the form instructions. These vary by business entity according to the business activity distribution; for example, Form 1065 codes differ from those for Form 1120.

[18]See http://www.irs.gov/pub/irs-pdf/fw4.pdf [July 2012].

[19]See http://www.irs.gov/pub/irs-pdf/fw7.pdf [July 2012].

[20]From a general policy perspective, IRS has not cared about an immigrant's legal or illegal status, only that the employee and employer file required returns and withhold and pay all required taxes.

Form W-2 filings. In addition, most immigrants–even in illegal status–have incentives to have an ITIN so that they and their employers can file required tax returns. The worker may have the additional incentive of obtaining a tax refund later.

Form SS-8, Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding[21]

Although Form SS-8 is not required, it may be filed by either a worker or firm to determine whether a worker should be considered an employee or independent contractor. The resulting determination may have ramifications for not only IRS forms, such as the W-2 and employment tax returns, but also for UI and related record filings with the states for SUTA and their employment training administration programs. One purpose of a related return, Form 1099 Miscellaneous,[22] is to report payments to contractor workers. Thus, this information, in conjunction with compensation information reported for employees, can help provide a complete worker compensation picture by employer.

In addition to helping capture information for contractors required to complete EEO-1 reports, such information might also be helpful for EEOC in determining which employers might be avoiding compliance with EEOC requirements and which are evading compliance. To paraphrase IRS compliance parlance, avoidance would be considered legal, but not evasion.

Additional Income Tax Returns

Finally, several returns report earnings at both the individual and firm levels. For the former, Form 1040 and the related Schedule C (for sole proprietorships) report individual and self-employment earnings. Moreover, when the Schedule C's filer is also an employer, the Schedule C will contain compensation information for the firm's workers; for example, Cost of Labor. At the firm level, aggregate employment compensation—salaries and wages, cost of labor—can be found on the Form 1120 series,[23] in addition to an item of possible interest for expanding EEO-1 reports, namely, compensation to officers of the corporation. Aggregate employment compensation is also reported on pass-through forms, such as the Form 1065 series[24] for partnerships and Form 1120-S[25] for subchapter S investors. Income and taxes are reported for the individual partner or investor on Schedule K-1[26] and the respective Form 1040 (although partners and investors may be businesses, not individuals).

An additional sector of employers may also be of interest for the EEOC, namely, nonprofit or tax-exempt organizations that have to file Form 990, Return of Organization Exempt from Income Tax,[27] (or the related Form 990-T,[28] Exempt Organization Business Income Tax Return). Both forms, especially the former, report a number of earnings items of potential

[21]See http://www.irs.gov/pub/irs-pdf/fss8.pdf [July 2012].
[22]See http://www.irs.gov/pub/irs-pdf/f1099msc.pdf [July 2012].
[23]See http://www.irs.gov/pub/irs-pdf/f1120.pdf [July 2012].
[24]See http://www.irs.gov/pub/irs-pdf/f1065.pdf [July 2012].
[25]See http://www.irs.gov/pub/irs-pdf/f1120s.pdf [July 2012].
[26]See http://www.irs.gov/pub/irs-pdf/f1065sk1.pdf [July 2012] and http://www.irs.gov/pub/irs-pdf/f1120ssk.pdf {July 2012].
[27]See http://www.irs.gov/pub/irs-pdf/f990.pdf [July 2012].
[28]See http://www.irs.gov/pub/irs-pdf/f990t.pdf [July 2012].

interest, including aggregate cost of labor and compensation to officers, as well as detailed individual compensation to officers, directors, trustees, and highly compensated employees.

LIMITATIONS FOR IRS DATA

Although IRS data include a wealth of earnings data by individual employee and employer, they include establishment data only when an establishment is also an enterprise (and has an EIN). Another limitation is that they contain no data by gender (except. sporadically, for the Statistics of Income [SOI] individual Form 1040 tax sample), race/ethnicity, or nativity (except for ITIN applications).

SOCIAL SECURITY DATA

Although a massive amount of data exist at SSA, the data of most interest for expanded EEO-1reports are captured from the application for an SSN and the linkable federal tax data shared by IRS. Thus, only these data are discussed below.

Purpose

The data at SSA are used for administering the Social Security and Medicare programs mandated by law. Nevertheless, a related purpose is the statistical analysis necessary for such administration, conducted by not only the Office of the Actuary, but also the Office of Research, Evaluation, and Statistics (ORES). The latter would most likely be the office with which the EEOC would need to discuss any future work involving EEO-1 report data.

Content

Form SS-5,[29] Application for Social Security Number, is administered by SSA and captures gender, race/ethnicity, and nativity–often shortly after birth for most U.S. citizens. In addition, it captures citizenship status, which might be used as a proxy for or to supplement nativity information. Although the Form SS-5 data are self-reported, SSA uses supporting documentation for verification–particularly for changes, such as a marriage license (name), passport (citizenship), and birth certificate (place of birth). The Form SS-5 data, including updates, are maintained on SSAs Numident file. Because many people. such as nonretirees, have more incentives to update their tax information changes, say, name and address due to marriage or divorce, the tax information at IRS may be updated before the Numident data. However, because of the Form W-2/941 reconciliation process partnered by SSA and IRS on withholding for income, Social Security, and Medicare taxes, SSA has these data as an additional source for updating changes to the Numident, and can also query the individuals and firms in case of doubt.

Quality

Because of the supporting documentation, the SSA-IRS relationship (as well as the SSA-Census Bureau relationship), and penalties for noncompliance, filers should have incentives to provide accurate and timely data, although some limitations may be inherent. For example,

[29]See http://www.ssa.gov/online/ss-5.pdf July 2012].

and the compliance chair for the company's U.S. diversity networks. She has more than 25 years experience in labor and employment law, particularly with class investigations by the U.S. Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). After serving as an in-house counsel in major corporations for more than 20 years, Ms. Beecher joined Mercer (then ORC) in 2000, and became the chair of the ELLG in 2003. In her role as compliance chair, she works with the OFCCP and the EEOC on matters of interest to Workforce Opportunity Network and ELLG members. Her corporate experience includes positions at E. I. du Pont de Nemours & Company, the Consolidation Coal Company, Arch Mineral (now Arch Coal), and McDonnell Douglas/The Boeing Company. She is a graduate of the University of North Carolina School of Law.

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Polygraph in 2001 and part of 2002. She holds a Ph.D. in statistics from Carnegie Mellon University.

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VALERIE RAWLSTON WILSON is an economist and vice president of research at the National Urban League Policy Institute in Washington, DC, where she chairs the National Urban League's Research Council and is responsible for planning and directing the Policy Institute's Research Agenda. She is also a member of the National Urban League President's Council of Economic Advisors, which assists the League in shaping national economic policy. Under her direction, the Policy Institute recently launched *State of Urban Jobs,* a component of Iamempowered.com, that features the Institute's research and policy analysis and serves as a vehicle for communicating the latest information related to African-American and urban employment issues. Dr. Wilson has served as managing editor, associate editor and contributing author for the National Urban League's annual *The State of Black America* report and oversees production of the National Urban League's annual Equality Index™. In 2001, a report she co-wrote with William E. Spriggs—formerly executive director of the National Urban League's Institute for Opportunity and Equality (IOE)—earned the IOE the Winn Newman Award from the National Committee on Pay Equity. Dr. Wilson earned a PhD from the Department of Economics at the University of North Carolina at Chapel Hill. Her fields of specialization include labor economics, racial and economic inequality, and economics of higher education.

COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2181 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6100

September 6, 2012

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, Northwest
Washington, D.C. 20210

Dear Secretary Solis:

We remain concerned about the policies and priorities of the Department of Labor's (the department) Office of Federal Contract Compliance Programs (OFCCP). Recently, OFCCP proposed a number of requirements relating to the collection of compensation data from federal contractors. At the same time OFCCP proposed these requirements, the National Academy of Sciences (NAS) studied the collection of employers' compensation data by the federal government and determined federal agencies should refrain from collecting compensation data until agencies develop a clearly articulated, comprehensive plan regarding how such data would be used. In light of NAS's study, we respectfully request information regarding the department's actions, including OFCCP's actions, relating to the collection of compensation data from employers.

On August 15, 2012, NAS issued a study entitled "Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin."[1] Commissioned in October 2010 by the U.S. Equal Employment Opportunity Commission (EEOC), at the suggestion of the White House's National Equal Pay Enforcement Task Force, NAS was asked to "determine what [compensation] data [EEOC] should collect to most effectively enhance its wage discrimination law enforcement efforts."[2] To do so, NAS "evaluate[d] currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data," and "consider[ed] suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access

[1] National Academy of Sciences, *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin* (Aug. 15, 2012) [hereinafter NAS Study], *available at* http://www.nap.edu/catalog.php?record_id=13496&utm_source=feedburner&utm_med.
[2] The White House, National Equal Pay Enforcement Task Force (Jan. 2010) [hereinafter Equal Pay Task Force], *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf.

issues."[3] In conducting this review, NAS met with and gathered information from compensation data "users" and "experts," and considered "papers and presentations provided by leadership and staff of EEOC, the Office of Federal Contract Compliance Programs [. . .] of the U.S. Department of Labor, and the U.S. Department of Justice."[4]

The following findings of NAS are of particular relevance:

> The main purpose for which the wage data would be collected, as articulated to the [NAS] panel by EEOC and OFCCP representatives, is for targeting employers for investigation regarding their compliance with antidiscrimination laws. But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency. The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into the compliance programs, for which the triggers have primarily been a complaint process that has generated relatively few complaints about pay matters.[5]
>
> . . .
>
> [T]he panel concludes that existing studies of the cost-effectiveness of an instrument for collecting wage data and the resulting burden are inadequate to assess any new program. Unless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to determine, with precision, the actual burden on employers and the probable costs and benefits of the collection.[6]
>
> . . .
>
> In conjunction with [OFCCP] and the Civil Rights Division of the U.S. Department of Justice, [EEOC] should prepare a comprehensive plan for use of earnings data before initiating any data collection.[7]

While NAS was conducting a study that led to the aforementioned conclusions, OFCCP was taking steps to advance its own, separate agenda for the collection of compensation data from federal contractors:

- On January 3, 2011, OFCCP announced the rescission of its standards and guidelines on systemic compensation discrimination and self-evaluation of compensation practices.[8]

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[3] The National Academies, Project Information, *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin, available at* http://www8.nationalacademies.org/cp/projectview.aspx?key=49344.
[4] *See* NAS Study, *supra* note 1, at FM – ix.
[5] *Id.* at S – 2.
[6] *Id.*
[7] *Id.*

- On May 12, 2011, OFCCP announced changes to its "Scheduling Letter and Itemized Listing"—the mechanism by which OFCCP collects contractors' workforce-related information—which requires contractors to provide OFCCP with compensation-related data.[9]

- On August 10, 2011, OFCCP issued an advance notice of proposed rulemaking entitled "Non-Discrimination in Compensation; Compensation Data Collection Tool."[10] According to OFCCP, this new tool would "collect compensation data from 70,000 to 110,000 contractors,"[11] so the agency can examine pay practices and policies at individual contractor establishments and conduct "nationwide, multi-establishment compensation reviews."[12]

We are concerned OFCCP, in its haste to regulate, potentially wasted time and resources, and created undue uncertainty for federal contractors by not working with EEOC and other federal agencies to develop a "comprehensive" plan for collecting compensation data. As outlined by NAS in their recommendations, without such a plan, "it will not be possible to reliably determine the actual burden on employers and the costs and benefits of the collection."[13]

We are also concerned OFCCP's actions conflict with the order from the White House's National Equal Pay Enforcement Task Force that OFCCP and EEOC "work collaboratively when evaluating data collection needs, capabilities, and tools," so as to "avoid duplicative data collection efforts."[14] Duplicative or inconsistent efforts by OFCCP and EEOC unnecessarily burden employers and increasingly divert their resources away from innovation, growth, and much-needed new hiring and job creation.

Further, before the department takes any new action relating to the collection of compensation data, we urge it to ensure there is an overwhelming need for and benefit to pursuing burdensome new requirements for federal contractors to collect, compile, and disclose such data. To that end, the so-called "wage gap" should not be casually cited in justifying sweeping revisions to federal anti-discrimination laws and increased government intervention in economic decision-making.[15] The Government Accountability Office found that any number of factors explains the "wage gap," that

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[8] *See* Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Rescission, RIN 1250-ZA00, 76 Fed. Reg. 62 (Jan. 3, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-01-03/pdf/2010-32602.pdf.

[9] *See* Proposed Extension of the Approval of Information Collection Requirements; Comment Request, 76 Fed. Reg. 27670 (May 12, 2011), *available at* http://www.gpo.gov/fdsys/pkg/FR-2011-05-12/pdf/2011-11570.pdf. *See also id.* at "Supporting & Related Material," *available at* http://www.regulations.gov/#!docketDetail;dct=FR%252BPR%252BN%252BO%252BSR;rpp=25;po=0;D=OFCCP-2011-0003.

[10] RIN 1250-AA03, 76 Fed. Red. 49398 (Aug. 10, 2011) [hereinafter ANPRM], *available at* http://webapps.dol.gov/federalregister/PdfDisplay.aspx?DocId=25238.

[11] FY 2012 Congressional Budget Justification, Office of Federal Compliance Programs, *available at* http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-04.pdf.

[12] *See* ANPRM, *supra* note 10, at 49401.

[13] *See* NAS Study, *supra* note 1, at 6 – 2.

[14] *See* Equal Pay Task Force, *supra* note 2, at 5.

[15] *See, e.g.*, ANPRM, *supra* note 10, at 49399-400; Equal Pay Task Force, *supra* note 2, at 1.

raw earnings differences cannot be explained simply as a function of wage or sex discrimination, and that any unexplained portion of the "wage gap" is "problematic" to interpret and may be "impossible" to measure and quantify.[16]

If the department determines it necessary and beneficial to participate in a "comprehensive" data collection plan or related efforts, per NAS's recommendations, we request the department consult with the public and Congress before initiating any such efforts.

Finally, to assist the committee in better understanding the department's actions to date, including OFCCP's actions,[17] relating to NAS's study and the collection of compensation data from employers, please provide the following information **no later than September 20, 2012**[18]:

1. All documents and communications relating to the NAS study, including, but not limited to:

    a. All documents and communications within the department relating to the NAS study

    b. All documents and communications between the department and NAS relating to the NAS study

    c. All "papers and presentations" provided by the department to NAS, and all documents and communications within the departing relating to same[19]

    d. All documents and communications relating to the participation of department personnel in the NAS study and its "two workshops"[20]

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[16] Government Accountability Office, *Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings*, GAO-04-35 at 2-3 (Oct. 2003), *available at* http://www.gao.gov/new.items/d0435.pdf. *See also* CONSAD Research Corporation, *An Analysis of the Reasons for the Disparity in Wages Between Men and Women* (2009) (in the foreword to CONSAD's study, the department's Deputy Assistant Secretary for Federal Contract Compliance said: "[T]he differences in the compensation of men and women are the result of a multitude of factors and [] the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct. The differences in raw wages may be almost entirely the result of the individual choices being made by both male and female workers."), *available at* http://www.consad.com/content/reports/Gender%20Wage%20Gap%20Final%20Report.pdf; June E. O'Neill and Dave M. O'Neill, *What Do Wage Differentials Tell Us About Labor Market Discrimination?* (Mar. 2005) ("[T]he gender gap largely stems from choices made by women and men concerning the amount of time and energy devoted to a career, as reflected in years of work experience, utilization of part-time work, and other workplace job characteristics."), *available at* http://www.nber.org/papers/w11240.pdf.

[17] For the purpose of the following requests, please provide all responsive information within the department's control, whether within OFCCP, the Bureau of Labor Statistics, the Women's Bureau, or any other office or agency within the department.

[18] If you are unable to provide the requested information by said date, please inform the committee in writing why the deadline cannot be met and the date by which you will provide the requested information.

[19] *See* NAS Study, *supra* note 1, at FM – ix.

[20] *See id.* at FM – x.

e. All documents and communications between the department and EEOC relating to the NAS study

f. All documents and communications between the department and other federal agencies relating to the NAS study

2. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning the collection of compensation-related data from employers.

3. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's January 3, 2011 rescission of its standards and guidelines on systemic compensation discrimination and self-evaluation of compensation practices.

4. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's May 12, 2011 announced changes to its "Scheduling Letter and Itemized Listing."

5. All documents and communications relating to the department's collaboration with EEOC and other federal agencies concerning OFCCP's August 10, 2011 advance notice of proposed rulemaking entitled "Non-Discrimination in Compensation; Compensation Data Collection Tool."

If you have questions, please contact Donald McIntosh or Molly Conway of the committee staff at (202) 225-7101.

Sincerely,

JOHN KLINE
Chairman
Committee on Education and the Workforce

DAVID "PHIL" ROE
Chairman
Subcommittee on Health, Employment, Labor, and Pensions

Enclosure

CC: The Honorable George Miller, Senior Democratic Member, Committee on Education and the Workforce

The Honorable Robert Andrews, Senior Democratic Member, Subcommittee on Health, Employment, Labor, and Pensions