FALL 2017

# OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS:

# Right Mission, Wrong Tactics

## Recommendations for Reform

U.S. CHAMBER OF COMMERCE
Labor, Immigration & Employee Benefits

## PREFACE

In 2014, the U.S. Chamber of Commerce released a report detailing enforcement and litigation abuses of the Equal Employment Opportunity Commission (EEOC).[1] The report has been praised for its strong but fair criticism of an agency whose overzealous enforcement tactics threatened to undermine its principled mission of rooting out discrimination in the workplace.[2] Additionally, the report subsequently laid the groundwork for the introduction of EEOC reform legislation in the U.S. House of Representatives.[3]

In this report, the Chamber performs a similar critique of the Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP or the Agency)—the federal agency tasked with enforcing the affirmative action and nondiscrimination requirements of federal contractors. Like EEOC, OFCCP has a critical—and clearly—worthy mission. Also like EEOC, OFCCP has become an agency that appears to focus more on garnering splashy headlines and securing high-dollar settlements than it does simply pursuing its admirable, if at times, unglamorous mission. As this white paper demonstrates, OFCCP is too often antagonistic toward the regulated community, ignores the myriad and effective diversity efforts undertaken by contractors, engages in overly broad and unreasonable fishing expeditions for employment data, and pursues take it or leave it conciliation efforts. It is no stretch to say that many of these tactics have employers questioning whether they want to perform work for the federal government.

In a unique way, however, OFCCP differs from EEOC. OFCCP's power to debar or disqualify contractors from future federal contract opportunities dramatically underscores the relationship the Agency has with the regulated community. Facing the threat of debarment, federal contractors are understandably reluctant to challenge OFCCP's unreasonable document requests, overreaching investigations, or even allegations of discrimination. Indeed, this fear runs so deep that several Chamber member companies expressed concern about relaying their experiences with OFCCP for this paper, even anonymously, for fear of future retribution from the powerful Agency.

OFCCP's debarment authority emboldens the Agency and creates an incentive to engage in aggressive investigatory tactics. But with contractors so hesitant to challenge OFCCP, there have been few opportunities for administrative law judges or federal judges to review and opine on Agency practices (with a few exceptions, of course). Accordingly, this comprehensive

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[1] "A Review of Enforcement and Litigation Strategy during the Obama Administration—A Misuse of Authority," U.S. Chamber of Commerce (June 2014). https://www.uschamber.com/sites/default/files/documents/files/021449_LABR%20EEOC%20Enforcement%20Paper_FIN_rev.pdf

[2] *See WSJ* blog, "U.S. Chamber, House Republicans Assail EEOC," June 11, 2014. https://walberg.house.gov/media/in-the-news/wsj-blog-us-chamber-house-republicans-assail-eeoc

[3] *See* H.R. 548 (114th Congress), the "Certainty in Enforcement Act of 2015," H.R. 549 (114th Congress), the "Litigation Oversight Act of 2015," and H.R. 550 (114th Congress), the "EEOC Transparency and Accountability Act," all introduced by Rep. Tim Walberg, and S. 2693 (114th Congress), the "EEOC Reform Act," introduced by Sen. Lamar Alexander.

analysis is necessarily based to a great degree on feedback from Chamber members discussed against a backdrop of what case law and decisions exist.

The Chamber and its members value OFCCP and applaud its mission. To be sure, federal contractors are proud of often being the vanguard for the advancement of diversity and nondiscrimination efforts in the workplace. The critiques presented are made in the spirit of good faith suggestions for reform and will not undermine or interfere with OFCCP's diversity and antidiscrimination efforts if implemented. Quite the opposite—the Chamber believes that adoption and implementation of the recommendations in this paper are crucial to ensuring that OFCCP remains a relevant and well-regarded stakeholder for workplace equality.

The first part explores the history of OFCCP. This discussion provides an essential backdrop for understanding the contemporary practices of OFCCP and the policy debates concerning its future.

The second part provides an insider's view of what it is like to be a contractor under audit by OFCCP and makes the case for why reform is needed. OFCCP's investigatory tactics as communicated by Chamber members include the following:

- Demanding that the employer provide enormous amounts of data in a short time frame, rather than working with the employer to narrow the request to focus on data relating to a specific issue.

- Informing a contractor that it was welcome to bring a matter before an administrative law judge, "but the judge works for us."

- Telling employers "we can ask for anything we want."

- Unilaterally setting dates and times for on-site investigations without an invitation to discuss legal issues or trying to work with the employer's schedule.

- Refusing to grant good faith requests for extensions of time in which to respond to document production demands.

- Discouraging employees from bringing HR personnel to their interviews during on-site investigations.

- Insisting that nonmanagerial employees review and sign the OFCCP-generated interview statement at the end of the interview without giving them time to review the statement carefully.

- Demanding to meet with a contractor's information technology professional to scour through company emails "on the system," without any regard to privacy, propriety concerns, or relevancy.

- Making an unwavering demand to meet with a contractor's CEO, who does not have detailed legal knowledge of the company's hiring and compensation practices.

The third part presents the Chamber's commonsense recommendations for reform at OFCCP. These are practicable suggestions that will help streamline OFCCP investigations while adding much-needed consistency and transparency. Greater clarity in OFCCP's regulations and subregulatory policies is essential to ensuring an evenhanded compliance program.

Finally, I would like to acknowledge the many members of the U.S. Chamber's Labor Relations Committee for their contributions to this report, in particular, Lynn Clements, Larry Lorber, Kris Meade, and Rebecca Springer, recognized experts in the field of OFCCP regulatory issues.

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## I. EXECUTIVE SUMMARY

The Department of Labor's (DOL's) Office of Federal Contract Compliance Programs (OFCCP or the Agency) is at a critical junction regarding how the Agency accomplishes its mission of advancing diversity and ensuring nondiscrimination in the workplace. OFCCP is at a pivotal crossroads not just for the Agency but for all stakeholders—from the contracting community and the civil rights community to individuals employed by, or seeking employment with, America's federal contractors and subcontractors. As of this writing, whether the Agency will survive beyond 2018 is unclear. If it does, OFCCP's mission is equally uncertain.[4]

The U.S. Chamber of Commerce (the Chamber) is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, counting among its members hundreds of federal contractors and subcontractors, large and small. The Chamber has prepared this paper to inform the discussion of OFCCP's proper role at this point in its and our nation's history. It examines OFCCP's historical roots and mission—an essential step to a discussion of its current state. The final section provides an assessment of the Agency's current operations and concludes with a summary of reforms that the Chamber urges OFCCP to adopt.

This paper sets forth the foundation for the Chamber's overarching recommendation that OFCCP deliberately (1) return to its core mission of fostering true affirmative action by federal contractors and subcontractors, and (2) abandon its transformation to an opaque, plaintiff-style enforcement agency, purposefully hostile to the contracting community and singularly focused on issuing findings of discrimination, often where none exist.

The Chamber's recommendations are grounded in the following:

**Findings**

- The basis for OFCCP's authority is the federal procurement system. The purpose of the Agency is to ensure that federal procurement dollars are spent over a diversified workforce and the workforce reflects the diversity of America.

- OFCCP's historical mission—unique to the Agency—is to ensure affirmative action by federal contractors and subcontractors.

- Affirmative action is distinct from nondiscrimination but is wholly aligned with principles of diversity and inclusion—principles that have been widely adopted by contractors, large and small.

[4] The administration's FY 2018 budget justification for the Department of Labor proposes abolishing the OFCCP and transferring functions to the Equal Employment Opportunity Commission (EEOC), the primary federal agency charged with investigating and eliminating discrimination in employment. The U.S. Chamber takes the position that while the OFCCP is in need of deep reform, the Agency should be kept within the Department of Labor.

- The key hallmarks of affirmative action are good faith efforts to employ and advance in employment women, racial minorities, veterans, and individuals with disabilities.

- Over the last several decades, OFCCP has evolved from an agency that balanced efforts to foster affirmative action with ensuring nondiscrimination to an agency singularly focused on nondiscrimination.

- OFCCP has dedicated its resources and personnel to probing alleged numbers-based systemic discrimination in pay and personnel actions while ignoring its basic responsibility to serve as a neutral enforcement agency. This includes significant good faith efforts by federal contractors to employ and advance in employment women, racial minorities, veterans, and individuals with disabilities.

- OFCCP seems to have abdicated supervision of the regional and district offices. There is little consistency between audits with respect to focus, production demands on contractors, and required remedial actions. This is particularly difficult for national contractors who are subject to audits from different regions. Such lack of supervision also undermines a contractor's ability to voluntarily comply with OFCCP's requirements because the requirements are often interpreted differently region by region.

- The shift to acting like a mini-plaintiff's law firm focused solely on issuing findings of discrimination has been accompanied by a dramatic change in the way the Agency interacts with the contractor community. Gone are the days of partnering with the contracting community (ultimately, backed up by enforcement) and cooperative compliance evaluations, during which the Agency and the contractor worked together to examine and resolve potential issues. Whereas cooperation once became the pathway to progress in full diversity and utilization of the contractor workforce, it now seems that the Agency views cooperation and conciliation as concepts to be avoided.

- The partnership between OFCCP and the contracting community has been replaced by Agency refusals to disclose, much less discuss constructively, any preliminary findings during the compliance evaluation process. Today's compliance evaluations are marked by unreasonable deadlines, burdensome requests for documents and data typical of class action litigation (without contractor recourse), outright refusals to engage in cooperative discussions, on-site phases that feature as many as a dozen OFCCP compliance officers at contractor locations for weeks at a time, opacity regarding statistical methodologies used, and an overreliance on statistical results, detached from existing case law and any anecdotal evidence of actual discrimination.

- Symptomatic of OFCCP's abandonment of its original mission was its overt decision to abandon wholesale its "compliance assistance activities," as

documented by a 2016 report issued from the U.S. Government Accountability Office.[5]

In short, Chamber members have embraced diversity and inclusion. Amid a constant and rapidly changing battle for talent, contractors simply have no room for and no tolerance for discrimination based on race, sex, veteran status, disability status, or any other protected characteristic. As contractors seek qualified candidates to propel their individual mission forward, all interested parties— from the contractors to the individuals they seek to and ultimately employ—would be best served by an OFCCP that understands its historical mission and its particular ability to help contractors develop workforces that reflect today's multicultural society.

Stakeholders would be best served by an OFCCP that partners with contractors and employees; views the compliance evaluation process through a neutral lens that enables it to understand and potentially improve contractor personnel and pay practices (rather than a vehicle designed solely to generate back pay and press releases); and works with contractors to broaden opportunities to employ and advance in employment women, racial minorities, veterans, and individuals with disabilities. Accordingly, the Chamber recommends the following reforms to put OFCCP back on this path:

**Recommendations**

- Return to a more neutral enforcement agency approach that encourages OFCCP investigators and contractors to work together to understand and resolve issues during all phases of audits.

- Encourage comprehensive and holistic evaluations of contractors' affirmative action and nondiscrimination efforts as opposed to overemphasizing statistical analyses.

- Revise subregulatory guidance documents to make them consistent with well-established federal antidiscrimination law, allow for more transparency during investigations, and provide greater clarity regarding OFCCP's jurisdictional reach.

- Reevaluate the true burden placed on federal contractors in responding to the revised Scheduling Letter and Itemized Listing and ensure that the information requested by the Scheduling Letter is consistent with current OFCCP regulatory reporting requirements. In this regard, the Chamber urges OFCCP and the Office of Management and Budget (OMB) to review the revised Scheduling Letter to determine how it could be revised to better reflect a nonintrusive, cooperative compliance review process.

- Revise OFCCP's current anti-retaliation regulations to make them consistent with federal antidiscrimination law and U.S. Supreme Court jurisprudence.

[5] GAO-16-750: "Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance" (September 22, 2016). https://www.gao.gov/products/GAO-16-750

- Make technical revisions to OFCCP's interpretations of its regulations that implement Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment and Assistance Act of 1974 (VEVRAA) to provide greater clarity regarding contractors' obligations and ease the regulatory compliance burden for contractors.

- Implement guidance/regulations to set clear parameters on OFCCP investigations with consistent application across regional and district offices nationwide.

- Examine ways to minimize the compliance burden on small businesses without sacrificing OFCCP's overall goals.

The U.S. Chamber looks forward to partnering with OFCCP in 2017 and beyond to help achieve these goals.

## II. HISTORY OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

OFCCP has its genesis in a long line of presidential executive orders dating back more than 75 years. In 1941, President Franklin D. Roosevelt issued Executive Order 8802, requiring that defense contracts contain a clause prohibiting discrimination on the basis of race and national origin.[6]

In 1943, he issued Executive Order 9346, establishing a new Committee on Fair Employment Practices "to promote the fullest utilization of all available manpower" for federal contractors and eliminate discriminatory practices on the basis of race, creed, color, or national origin in hiring, tenure, terms or conditions of employment, or union membership.[7] Established during World War II, the committee was designed to encourage the hiring of minorities in the burgeoning defense industry. It had a full-time chairman and was housed within the Executive Office of the President. The committee could receive and investigate complaints, conduct hearings, and make findings of fact but had little enforcement authority. It could also recommend policies to various federal agencies. The authority for the Roosevelt executive orders was rooted in the president's war powers.

In 1951, President Harry S. Truman issued Executive Order 10308, establishing the Committee on Government Contract Compliance.[8] This committee was designed to build upon the Roosevelt executive orders by strengthening the nondiscrimination requirements for government contracts. Specifically, the committee created by Executive Order 10308 was instructed to "study the rules, procedures, and practices of the contracting agencies of the Government as they relate to obtaining compliance with Government contract provisions prohibiting . . . discrimination . . . in order to determine in what respects such rules, procedures, and practices may be strengthened and improved."[9] President Truman cited the Defense Production Act of 1950 as authority for issuing Executive Order 10308.

In 1953 and 1954, President Dwight D. Eisenhower issued Executive Orders 10479 and 10557, which established the Committee on Government Contracts within the White House and, for the first time, promulgated a standard equal employment opportunity clause to be inserted

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[6] Franklin D. Roosevelt: "Executive Order 8802—Reaffirming Policy Of Full Participation In The Defense Program By All Persons, Regardless Of Race, Creed, Color, Or National Origin, And Directing Certain Action In Furtherance Of Said Policy," June 25, 1941. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=16134

[7] Franklin D. Roosevelt: "Executive Order 9346— Establishing a Committee on Fair Employment Practice," May 27, 1943. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=16404

[8] Harry S. Truman: "Executive Order 10308—Improving the Means for Obtaining Compliance with the Nondiscrimination Provisions of Federal Contracts," December 3, 1951. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=78360

[9] Ibid.

into every covered federal contract and subcontract.[10] The obligations of the Eisenhower executive orders were also implemented by the individual contracting agencies, and the committee issued general guidance on compliance.[11] In 1958, a task force headed by then-Vice President Richard Nixon recommended that further efforts be made to increase the utilization of minorities on government contracts and suggested a more formal enforcement program be considered.

In 1961, President John F. Kennedy issued Executive Order 10925, which fundamentally changed the focus of the procurement-based nondiscrimination programs.[12] Perhaps most dramatic, Executive Order 10925, for the first time, required government contractors and subcontractors to undertake "affirmative action" to ensure equal employment opportunity. The executive order created the President's Committee on Equal Employment Opportunity, chaired by the vice president and co-chaired by the Secretary of Labor.

The executive order also established the equal employment opportunity clause that is still used today in federal procurement contracts. Executive Order 10925 further required government contractors to submit periodic reports to their lead procurement agency. The basis for such reports was a program called Plans for Progress, first publicized by the National Association of Manufacturers, which emphasized outreach, training, and inclusion of minority job applicants.[13]

In addition, Plans for Progress suggested that the individual contractors follow then-prevalent business practice by creating written plans based on relevant applicant and hiring data, including goals to measure the progress made in the hiring of minority applicants. These affirmative action goals became the basis of the government procurement affirmative action and nondiscrimination program.[14]

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[10] Dwight D. Eisenhower: "Executive Order 10479—Establishing the Government Contract Committee," August 13, 1953. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=106587. Dwight D. Eisenhower: "Executive Order 10557—Approving the Revised Provision in Government Contracts Relating to Nondiscrimination in Employment," September 3, 1954. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project.* http://www.presidency.ucsb.edu/ws/?pid=106457

[11] Although the Federal Property and Administrative Services Act (FPASA or the Procurement Act) was passed in 1949, centralizing federal procurement in the executive branch and to the president, the Eisenhower executive orders did not cite the Procurement Act as the basis for their promulgation. However, it soon became clear that the various socioeconomic obligations placed on federal procurement found their basis in the Procurement Act.

[12] John F. Kennedy: "Executive Order 10925—Establishing the President's Committee on Equal Employment Opportunity," March 6, 1961. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=58863

[13] Lyndon B. Johnson: "Remarks to New Participants in 'Plans for Progress' Equal Opportunity Agreements," December 12, 1963. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=26310.

[14] Ibid.

In 1965, after the enactment of the Civil Rights Act of 1964, which included Title VII—the first federal fair employment practices act—President Lyndon B. Johnson issued Executive Order 11246,[15] which placed the responsibility of federal contract compliance with the Secretary of Labor. As a result, all functions previously housed in the White House and in the President's Committee on Equal Employment Opportunity were transferred to the Department of Labor.

Shortly thereafter, Secretary of Labor William Willard Wirtz established the Office of Federal Contract Compliance (OFCC) within DOL. In 1967, Executive Order 11246 was amended by Executive Order 11375 to include sex as a protected category.[16] In 1974, after passage of Section 503 of the Rehabilitation Act (Section 503)[17]and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA),[18] those programs whose implementation were statutorily assigned to DOL were housed in OFCC, and its name was changed to the current Office of Federal Contract Compliance Programs.[19]

Thus, the history of using the federal procurement system to impose various socioeconomic employment obligations on the part of federal contractors is a long one. The various orders and statutes that led to the creation of the current OFCCP also recognized that procurement was a function of the executive branch insofar as procurement is an executive branch responsibility.

However, with the issuance of President Kennedy's Executive Order 10925, the passage of Title VII, the issuance of Executive Order 11246, and the passage of the Rehabilitation Act and VEVRAA, the procurement-based contract compliance function was viewed as a complement to federal nondiscrimination requirements. In contrast to these federal nondiscrimination statutes, OFCCP focused primarily on increasing the inclusion of minorities, women, disabled qualified workers, and veterans in the federal contractor workforce, as well as ensuring that their terms and conditions of employment were not inferior to that of their fellow employees.

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[15] Lyndon B. Johnson: "Executive Order 11246—Equal Employment Opportunity," September 24, 1965. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=59153

[16] Lyndon B. Johnson: "Executive Order 11375—Amending Executive Order No. 11246, Relating to Equal Employment Opportunity," October 13, 1967. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=60553

[17] Section 503 of the Rehabilitation Act of 1973, (P.L. 93-112); codified into law, 29 U.S.C. §701 *et seq.*

[18] Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (P.L. 93-508); codified into law, 38 U.S.C. §4212. Section 503 and VEVRAA prohibit federal contractors and subcontractors from discriminating against individuals with disabilities and protected veterans, respectively, and require contractors to take affirmative action to recruit, hire, promote, and retain these individuals. *See* sections B and C for more details.

[19] 29 USC §793(b) assigned responsibility for the Rehabilitation Act federal contract obligations to the Secretary of Labor; 38 USC §4212(a) assigned responsibility for the Vietnam Veterans Readjustment Act federal contract obligations to the Secretary of Labor.

This brief history of the executive orders issued and the passage of Section 503 and VEVRAA describe how the current OFCCP and its mission evolved from its various predecessors in the White House. It is important to note that until 1965 a federal fair employment practice statute had not been enacted into law.

Accordingly, the early executive orders and the various White House committees used mostly publicity and exhortations to address workplace discrimination, focusing almost entirely on eliminating overt discriminatory actions. It was not until 1961 when President Kennedy issued Executive Order 10925[20] that the focus included the concept of affirmative action, with the goal of increasing the representation of underrepresented groups in the procurement workforce. In the debates leading up to the enactment of Title VII in 1964,[21] several opponents of Title VII discussed the impact of the President's Committee on Employment and suggested that the committee established by Executive Order 10925 and Title VII would overlap. Indeed, an amendment was offered by Rep. James Sikes of Florida to limit the authorization of EEOC to 4 years and then sunset it.[22]

In support of this amendment, Rep. H.R. Gross of Iowa offered the following remarks: "While I support the gentleman's amendment, I see no reason why we should have both a President's Committee on Equal Employment Opportunity and an Equal Employment Opportunity Commission. One or the other ought to go."[23]

The amendment was defeated in part because the proponents of Title VII noted the difference between the charge processing function of EEOC and the affirmative action procurement reviews conducted by and under the auspices of the President's Committee.

In the Senate debates, the potential for overlap between the President's Committee and EEOC was also raised. Sen. John Tower introduced an amendment that addressed the overlap between the President's Committee and the newly created EEOC[24] and gave EEOC primacy in investigating discrimination issues.[25] The amendment was defeated after debate as the proponents of Title VII argued that while EEOC would deal with intentional discrimination, the

[20] *See* note 12.

[21] Title VII of the Civil Rights Act of 1964, (P.L. 88-352), codified into law, 42 U.S.C. §2000d *et seq.*

[22] U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1968), pgs. 3337–3339, citing 1964 *Congressional Record* (herein after cited as Cong. Rec.), 2706–2708, February 10, 1964.

[23] U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964 (1968), citing 1964 *Cong. Rec*., 2708-8, February 10, 1964.

[24] U.S. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act (1968), pgs. 3321–3325, citing 1964 *Cong. Rec.*, 13650.

[25] Ibid.

President's Committee would focus on the inclusion of individuals who were members of groups excluded from participation in the contractor workforce.[26]

President Johnson's Executive Order 11246 transferred the President's Committee to the Secretary of Labor. One of the purposes of the transfer was to use the resources and new training programs in DOL to help increase the pool of qualified minorities (and in 1967, women) to work on jobs created by federal procurement of goods and services. The newly created OFCC was not intended to replicate the functions of EEOC but to serve as an additional resource to help provide incentives for job training and other inclusive actions by federal contractors.[27]

As President Johnson said in 1965, "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say you are free to compete with all the others, and still just believe that you have been completely fair."[28] In many ways, President Johnson's statement defines the complementary but different requirements of Title VII and Executive Order 11246 and similarly the complementary nature of Section 503 and the Americans with Disabilities Act (ADA),[29] as well as VEVRAA and The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)[30].

Affirmative action is a process-oriented concept designed to encourage the development of procedures unique to each employer to increase the utilization of certain historically underutilized—and excluded—groups of individuals. Special obligations are imposed upon government contractors because they benefit from federal procurement and have jobs created because of federal expenditures. Nondiscrimination requirements, by contrast, are designed to address specific employment actions on a universal basis that harm or result in harm to individuals. Affirmative action is a government-directed function; nondiscrimination can be achieved by government or private action.

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[26] Ibid., p. 3325.

[27] The Manpower Development and Training Act of 1962 (P.L. 87-415); codified into law, 42 U.S.C. §2751 *et seq.*, repealed by the Comprehensive Employment and Training Act (P.L. 93–203); codified into law, 29 U.S.C. §801 *et seq.*, was the first extensive federal effort at training workers displaced by technology for new jobs. This became the basis for the various federal job training programs housed in DOL.

[28] Lyndon B. Johnson, "Commencement Address at Howard University: 'To Fulfill These Rights,'" June 4, 1965, in *Public Papers of the Presidents of the United States: Lyndon B. Johnson, 1965*, Vol. 2 (Washington, D.C.: Government Printing Office, 1966), pgs. 635–40.

[29] Americans with Disabilities Act of 1990 (P.L. 101–336), codified into law at 42 U.S.C. §12101.

[30] Uniformed Services Employment and Reemployment Rights Act of 1994 (P L. 103-353), codified into law at 38 U.S.C. §§4301-4335.

## A. Equal Employment Opportunity Act of 1972

In 1971, legislation was introduced to give EEOC direct authority to bring lawsuits in its own name to address alleged violations of Title VII.[31] Prior to this, only private individuals and the Department of Justice could bring lawsuits challenging discriminatory employment practices. In addition, the bill as passed by the House would have transferred functions of OFCC to EEOC.[32] The proponents of the transfer argued that since other provisions of the legislation would enhance the authority of EEOC to remedy discrimination and that government contractors were otherwise covered by Title VII, there was no need for the duplication of effort. The opponents of the transfer argued there was a substantive difference between EEOC and OFCC, noting the following:

> "While OFCC and EEOC share the goal of promoting the civil rights of minority workers, the programs they are presently administering are considerably different. The EEOC acts, following an individual complaint to redress instances of actual job discrimination. OFCC works with Government contractors to insure equal employment opportunity."[33]

The House passed the bill that included the transfer of OFCC to EEOC. However, the debate in the Senate highlighted the differences between the basic functions of the two agencies and, in particular, emphasized that OFCC could work in tandem with the job training and apprenticeship functions within the Department of Labor to fulfill its primary mission of promoting affirmative action and equal employment opportunity.[34] The Senate rejected the transfer of OFCC, and the House acceded to the Senate action. The bill was signed into law in 1972.[35]

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[31] For a detailed account of the provisions of these bills and related proposals, together with the transcript of testimony, see Equal Employment Opportunities Act of 1971: Hearings on S. 2515, S. 2617, and H.R. 1746 before the Subcom. on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 1st Sess. (1971). See also Subcommittee on Labor of the Senate Comm. on Labor and Public Welfare, 92nd Cong., 2nd Sess., Legislative History of the Equal Opportunity Act of 1972 (Comm. Print 1972).

[32] Ibid., pg. 117–Section 717(f) – H.R. 1746. See also pg. 123, *Minority Report* on H.R. 1746.

[33] *Minority Report* on HR 1746, pg. 123, Legislative History of the Equal Employment Opportunity Act of 1972.

[34] *See* statement of Sen. Percy, Legislative History of the Equal Employment Opportunity Act of 1972, pgs. 937–943. *See* statement of Sen. Saxbe, prime sponsor of amendment to strip the transfer of OFCC to EEOC, pgs. 915, 927–933. Sen. Saxbe included the statement of EEOC Chair William Brown opposing the transfer of OFCC.

[35] However, after the merger of the two agencies was voted down, Title VII was amended by adding Section 715, establishing an Equal Employment Opportunity Coordinating Council, consisting of the Attorney General, Secretary of Labor, and chairs of the Civil Service Commission, Civil Rights Commission, and Equal Employment Opportunity Commission, to coordinate federal equal employment functions.

## B. Rehabilitation Act of 1973

The Rehabilitation Act of 1973 represented the first federal efforts to ban disability discrimination in participation under federal grants and programs[36] and require affirmative action to employ and advance individuals with disabilities under certain federal contracts.[37] There is no private right of action under Section 503 of the Rehabilitation Act (applying to federal contractors),[38] but the Supreme Court has long recognized a private right of action under Section 504 of the Rehabilitation Act (prohibiting disability discrimination by any program or activity receiving federal funds).[39]

Of even greater interest is that Section 503 requires contractors to undertake affirmative action, while Section 504 mandates that grant and program participants not discriminate in employment. OFCCP was given primary responsibility for Section 503 and the then-Department of Health, Education and Welfare (now the Department of Health and Human Services) was given responsibility for Section 504.[40] Here again, there is a statutory delineation between affirmative action and nondiscrimination enforcement responsibilities.

## C. Vietnam Era Veterans' Readjustment Assistance Act

Like Section 503 of the Rehabilitation Act, Section 4212 of VEVRAA requires covered contractors to take affirmative action to employ, promote, and retain qualified veterans. And like Section 503, Section 4212 does not contain a nondiscrimination provision and does not create a private right of action for covered veterans.[41] Nor does Section 4212 permit a judicial challenge to the actions of the Secretary of Labor in enforcing its provisions.[42] Like Section 503, enforcement of Section 4212 of VEVRAA was assigned to OFCCP.

## D. Post-1974 OFCCP Developments

Subsequent to the incorporation of Section 503 and VEVRAA programs into OFCCP and the enactment of the first set of implementing regulations, OFCCP began to operationally define

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[36] 29 U.S.C. §794.

[37] 29 U.S.C. 793.

[38] *Rogers v. Frito-Lay,* 611 F.2d 1074 (5th Cir. 1980).

[39] *School Bd. of Nassau City v. Arline,* 480 U.S. 273 (1987).

[40] It was not until 1990, when ADA was passed, that a general federal law prohibiting employment discrimination based on one's disability became effective. ADA also contained a provision similar to Section 715 of Title VII, creating an Interagency Disability Coordinating Council to prevent duplication of effort. Further, the Rehabilitation Act was amended to require the Secretary of Labor to establish regulations treating complaints under the same standards as the ADA. *See* 29 U.S.C. §793 (d)(e).

[41] *Barron v. Nightingale Roofing,* 842 F.2d 20 (1st Cir. 1988).

[42] *Greer v. Chao*, 492 F.3d 962 (8th Cir. 2007).

its role as an affirmative action enforcement agency. It increased its enforcement of Executive Order 11246 but concentrated on affirmative action issues.

For example, in 1976, the Timken Company was debarred because it restricted its recruitment area to exclude a metropolitan area, Mansfield, Ohio, where a greater number of minorities with manufacturing skills resided.[43] By excluding Mansfield, Timken's minority availability percentage was reduced. This was the first debarment in several years. Timken appealed and the debarment was reversed by a federal district court.[44] The reversal was predicated on a finding that the asserted metropolitan recruiting was, in fact, not within the local recruiting area for the Timken facility. Nevertheless, this case reflects OFCCP's then-current priorities and willingness to assert affirmative action obligations including enhanced minority recruitment. Other cases brought at this time stressed that OFCCP would vigorously promote its concept of affirmative action.

During this period, OFCCP began to formalize its direction of contract compliance programs. From the first executive order in 1941 through 1976, the program was operated with central policy control, but actions were taken through the various federal contracting agencies. By 1976, it became clear that more centralized operational control was necessary as enforcement was increasing and Section 503 and VEVRAA programs were being established. Therefore, DOL, on behalf of OFCCP, requested that the 1977 budget reflect a consolidation of compliance functions. Part of that proposal was adopted and the number of compliance agencies was reduced from 16 to 11.[45]

In addition, the first significant revision of OFCCP procedural and coverage regulations was issued.[46] These regulations increased coverage to financial entities through federal deposit insurance, issuance of savings bonds, bills of lading, and other indicia of federal contracting. The regulations also instituted for the first time a uniform set of hearing regulations to govern the conduct of enforcement hearings and centralize them within the DOL regardless of the procurement agency bringing the action.

The regulations also adopted the 1974 Memorandum of Understanding between OFCCP and EEOC and directed that individual complaints of discrimination be sent to EEOC for processing. EEOC, therefore, became the primary federal agency for enforcing the prohibitions against discrimination. Moreover, to support the various joint enforcement actions brought by OFCCP, the Department of Justice, and EEOC in some instances, the regulations specified that OFCCP had authority to require back pay if the case warranted.

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[43] A company that is debarred is ineligible to receive federal contracts.

[44] *Timken Co. v, Vaughn,* 413 F. Supp. 1183 (N.D. Ohio 1976).

[45] These were the departments of Treasury, Defense, Interior, Commerce, Health and Human Services, Housing and Urban Development, Transportation, Energy, Environmental Protection Agency, General Services Administration, and Small Business Administration.

[46] 42 *Federal Register* (herein cited as *Fed. Reg.*) 3454 (1977).

## E. Executive Order 12086—1978

Beginning in 1977, OFCCP shifted to focus more of its attention on the nondiscrimination requirements of Executive Order 11246, Section 503, and VEVRAA. While many of the actions still emphasized compliance with the affirmative action obligations, the Agency began to focus more on standard Title VII-type discrimination issues. Finally, in 1978, President Jimmy Carter issued Executive Order 12086, which consolidated all OFCCP legal authority within DOL and then to OFCCP.[47] Compliance staff and resources were transferred to OFCCP, which became a fully operational agency.

## F. OFCCP Post-Consolidation

While OFCCP experienced significant bureaucratic issues after the consolidation of compliance enforcement functions, it seemed to be moving toward becoming a more effective agency.[48] Several developments increased the momentum for OFCCP to focus more attention on the nondiscrimination requirements of Executive Order 11246, Section 503, and VEVRAA.

In 1997, OFCCP amended its Executive Order 11246 regulations to emphasize that compliance evaluations should address discrimination as well as affirmative action issues.[49] At this time, OFCCP began pursuing the so-called Pay Grade theory of compensation discrimination, whereby contractors' compensation practices were evaluated based on the dispersion of employees within a designated pay grade by protected characteristic. The theory assumed that employers had determined that all jobs within a single pay grade or pay band were substantially equal. While the Agency never formally adopted the theory, it conducted compliance reviews based on this premise. These developments led the Agency to focus on so-called systemic discrimination.

Following a change in administration, OFCCP reexamined its approach to systemic discrimination. However, it did not change the focus of its investigations. Rather, the Agency examined Title VII principles and adopted a comprehensive analysis stating its understanding of the reach of the law in dealing with discrimination issues. This continued emphasis addressing Title VII-related discrimination issues was opposed by the contractor community. Indeed, in 2005, when OFCCP adopted a comprehensive policy to address "Systemic Compensation Discrimination," the Agency addressed the issue that such a policy represented a change to OFCCP's historic mission:

> Several commenters, such as the U.S. Chamber of Commerce …argued that OFCCP should not focus its efforts on investigating systemic employment discrimination, but

[47] Jimmy Carter: "Executive Order 12086—Equal Employment Opportunity Functions," October 5, 1978. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. http://www.presidency.ucsb.edu/ws/?pid=29933

[48] Report of U.S. General Accounting Office, HRD-82-8, *The Administration of the Contract Compliance Program Has Shown Improvement*, October 9, 1981.

[49] 62 *Fed. Reg.* No. 160 (August 19, 1997). https://www.gpo.gov/fdsys/pkg/FR-1997-08-19/pdf/FR-1997-08-19.pdf

should instead spend more agency resources on monitoring compliance with OFCCP's affirmative action regulations. OFCCP does not agree with these commenters.[50]

The direction of OFCCP toward becoming a discrimination enforcement agency continued, detrimental to the Agency's core mission of pursuing affirmative action for contractors. As discussed in the next section, since 2009, OFCCP has accelerated this shift toward nondiscrimination issues and potential monetary remedies in a dramatic, unprecedented way.

[50] 71 *Fed. Reg.* No. 116 (June 16, 2006). https://www.gpo.gov/fdsys/pkg/FR-2006-06-16/pdf/06-5458.pdf

## III. UNDERSTANDING DISPARATE IMPACT DISCRIMINATION AND DEBARMENT

With this historical backdrop in place, before turning to an examination of OFCCP's current audit and investigation tactics, it is imperative to understand two factors that play a vital role in these practices: (1) OFCCP's reliance on the disparate impact theory of discrimination, and (2) the Agency's power to debar contractors.

Unlike disparate treatment, which focuses on intentional discrimination, the disparate impact theory can find discrimination even in the absence of intent. In the employment context, disparate impact discrimination focuses on otherwise facially neutral policies or practices of the employer that result in disparate—or adverse—impact on a protected group or groups. For example, OFCCP may allege that a contractor's hiring referral program, which results in an underrepresentation of female employees is neutral on its face but has a disparate impact on women.

To support its allegations of disparate impact discrimination, OFCCP relies almost entirely on the use of statistical analysis of contractor-provided data. (See Part IV F.) This dependency on data-driven enforcement theories has a direct influence on OFCCP's demanding tactics during investigations. Indeed, OFCCP's practice of alleging unintentional disparate impact discrimination based on an undisclosed and often different statistical modeling of employer data—without anecdotal evidence of discrimination— underlies many of the existing problems with Agency audits. While the Agency may properly consider statistical evidence, it cannot—under Title VII precedent—do so in a vacuum without supporting anecdotal evidence of discrimination.

Executive Order 11246[51] and the regulations implementing Section 503 of the Rehabilitation Act[52] and VEVRAA[53] authorize the Secretary of Labor to debar federal contractors or subcontractors and declare them ineligible to receive federal government contracts in the future. The debarment remedy isn't limited to final determinations of actual discrimination but can be applied during all stages of an OFCCP audit. This constant threat of debarment gives OFCCP tremendous leverage over contractors during an investigation.

For most companies, the threat of such a penalty is so severe that it creates a powerful incentive for contractors to settle any dispute with OFCCP no matter how frivolous an allegation may be or how egregiously Agency staff has acted. While sophisticated contractors may push back against OFCCP allegations, few are willing to go through the administrative review

[51] *See* note 15.

[52] Department of Labor, Office of Federal Contract Compliance Programs, "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities; Final Rule," 78 *Fed. Reg.* No. 185 (September 24, 2013), 58748, citing 41 C.F.R. §60 –741.66 (c). https://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf

[53] Department of Labor, Office of Federal Contract Compliance Programs, "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans; Final Rule", 78 *Fed. Reg.* No. 185 (September 24, 2013), 58675, citing 41 C.F.R. Part §60 –300.66 (c). https://www.gpo.gov/fdsys/pkg/FR-2013-09-24/html/2013-21227.htm

process, with all of the attendant negative publicity that OFCCP generates about the contractor's alleged denial of access. Federal contractors are hesitant to seek protection of their rights in court because even a small risk of debarment is unacceptable no matter how good the contractor's case.

The inconsistent application of audit standards and the heavy-handed threats of adverse publicity before an audit is completed, as well as the constant threat of a show cause notice and debarment, creates an enormous disincentive for contractors to maintain or pursue government contracts notwithstanding a commitment to strong equal employment opportunity policies. For these reasons, it is all the more important that OFCCP compliance efforts be *objective and reasonable* and undertaken only after careful and thoughtful analysis has been conducted *and shared with the contractor*. Unfortunately, all too often, OFCCP fails to acquit itself in such a manner.

## IV. ANATOMY OF AN OFCCP COMPLIANCE EVALUATION

The contours of OFCCP's compliance evaluations conducted over the past several years bear no resemblance to the Agency's mission and historical practice. OFCCP has morphed from an agency that could usefully partner with contractors to advance the principles of affirmative action to an agency singularly focused on identifying potential discrimination and seeking broad class-based remedies. While senior officials have professed a desire to partner with contractors, recent compliance evaluations belie any such claim. Instead, Chamber members tell us that OFCCP routinely leaves contractors in the dark regarding potential areas of concern; regularly demands reams of personnel activity and salary data (along with various other documents) without explaining a basis for its requests; consistently imposes wholly unrealistic deadlines; and —perhaps most regrettably—often attempts to intimidate contractors with threats to issue a show cause notice, seek debarment, or publish negative press accounts.

The following sections attempt to capture the realities of compliance evaluations conducted over the last several years. The information is gleaned from subregulatory developments (such as the revised Scheduling Letter), litigated matters, and Chamber members' experiences in recent OFCCP audits.

### A. The Onset of a Compliance Review—Issuance of Scheduling Letter

OFCCP primarily enforces federal contractor obligations by periodically selecting contractors for a review or audit. OFCCP states that it uses a neutral selection system that considers a variety of factors to identify contractor establishments for compliance evaluations. OFCCP begins the auditing process by sending what is called a Scheduling Letter and Itemized Listing. In October 2014, OFCCP significantly changed its approach to compliance evaluations by revising its Scheduling Letter (Revised Scheduling Letter).[54]

Among the most significant changes were the following:

- A requirement that contractors produce individualized compensation data at the outset of *every* audit for *every* employee at the establishment.

- A requirement that contractors submit applicant, hire, promotion, and termination data by individual racial categories, no longer using the broader categories of minorities and nonminorities.[55]

Prior to 2014, contractors were required to submit only compensation data that was aggregated by salary grade or salary ban in response to the Scheduling Letter. OFCCP, in turn,

[54] A slightly modified version of this 2014 Scheduling Letter and Itemized Listing was approved by OMB on July 1, 2016, for use until July 1, 2019. OMB approved these revised Scheduling Letters notwithstanding vigorous protesting comments by the contractor community. https://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201602-1250-001&icID=13735

[55] According to the Revised Scheduling Letter, these racial categories include African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White.

issued a follow-up request for individualized data only where its initial review indicated some basis for requesting further information. By contrast, the 2014 Revised Scheduling Letter requires contractors to submit individualized, employee-level compensation data as a matter of course at the outset of each compliance evaluation.

Colloquially referred to as Item 19, the compensation-related item of the Revised Scheduling Letter obligates contractors to produce "Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees)."[56] For every employee, contractors are to provide base pay or wage rate, typical hours worked, job title, job group, EEO-1 category, date of hire, race/ethnicity, and gender in a single file. "Other compensation," such as bonuses, incentive pay, commissions, merit increases, locality pay, and overtime, should be identified separately for each employee.[57]

Item 19 also states that contractors may provide any additional data on factors used to determine employee compensation, such as education, experience, duty location, performance ratings, department or function, and salary level/band/range/grade. Finally, documentation and policies related to the contractor's compensation practices are requested. This was plainly a considerable expansion from OFCCP's prior request, which sought only wages, salaries, commissions, or bonus data, aggregated by pay level or salary grade. [58]

The Revised Scheduling Letter also requires contractors to produce all personnel activity data (e.g., applicants, hires, promotions, and terminations) by individual racial subgroups. This was a significant departure from the prior requirement that the data simply reflect counts of minorities and nonminorities. It was likewise a departure from OFCCP's regulations, which speak only in terms of "minorities," not individual racial subgroups.[59] Parsing the data in this way obviously increases contractors' compliance burdens and expands the initial stages of the investigation beyond what is required by OFCCP regulations. It also allows OFCCP to evaluate a contractor's personnel activity using a multitude of unexplained statistical models that can result in claims that the same employer discriminated against both men and women or against and in favor of Asians. [60]

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[56] *See* note 54.

[57] OFCCP has never explained why it requires contractors to provide elements of compensation such as "commissions," "overtime," and "locality pay," all of which are regularly administered in formulaic, nondiscriminatory fashions by employers. This is another example of OFCCP's disregard for the burden associated with its revised Scheduling Letter and the gulf between its requests for data and appropriate areas of OFCCP concern focusing on affirmative action compliance and progress as well as potential areas of discrimination.

[58] *See* FAQs 3 and 4 from https://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter_FAQs.html (comparing compensation data requirements from prior Scheduling Letter and Itemized Listing to data elements required by 2014 approved Scheduling Letter and Itemized Listing).

[59] *See* 41 CFR 60-2.17(b)(4), https://www.law.cornell.edu/cfr/text/41/60-2.17 (requiring analysis of selection and other procedures to "determine whether they result in disparities" against "minorities or women").

[60] The five individual racial subgroups for which contractors must now provide data are African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White. Those five groups—not simply minorities and nonminorities—now provide the foundation for all of the adverse impact analyses contractors must conduct and that OFCCP will conduct in an audit. Given that contractors are required to conduct separate analyses

In addition to the personnel activity data and individualized compensation data, the Revised Scheduling Letter requires a contractor to submit its affirmative action plan (AAP) for women and minorities, veterans, and individuals with disabilities (the latter two groups include for the first-time numerical analyses), as well as other supporting documentation. If a contractor is more than 6 months into its AAP year when it receives the Revised Scheduling Letter, it must submit data not only from the prior year but also at least 6 months' worth of data for the current year. This effectively modified the regulatory requirement that the AAPs be developed on a yearly basis.

Regardless of how far into its AAP year a contractor is and what information is required, all the information requested in the Scheduling Letter must be submitted to OFCCP within 30 days. Understandably, contractors often struggle to meet this deadline for numerous reasons, for example: (1) the contractor has just started a new AAP year and is still in the process of preparing its AAPs; (2) the contractor is more than 6 months into its AAP year and thus has to gather and analyze current-year data for the audit; (3) the significant compensation data required by the Revised Scheduling Letter is not part of an annual AAP and therefore has to be prepared only once the Scheduling Letter is received; (4) the contractor is a small business with limited resources; or (5) the Revised Scheduling Letter has been addressed to an official no longer present at the particular establishment under review, and it takes weeks for the request to make its way to corporate-level personnel who are responsible for preparing the response. In such circumstances, contractors have routinely requested short extensions of time to submit the required information.

Under prior administrations, such a request for an extension of up to 30 days was routinely granted in most cases. However, OFCCP has been increasingly resistant to granting extensions of more than a few days regardless of the basis for the request and even though the amount of information requested by the Revised Scheduling Letter has significantly increased and goes far beyond what must be in a contractor's annual written AAP. In other words, OFCCP demands more while giving less.

In one instance, a contractor was informed that an extension beyond 5 business days would require approval of the regional director of OFCCP—a formal and complicated requirement for such a minimal request. In another, OFCCP reluctantly provided a contractor a 5-day extension, 2 days of which occurred over a weekend. The reluctance to consider delays of more than a few days is a significant and disheartening departure from OFCCP's prior flexibility

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of four different personnel processes (hires, promotions, terminations, and compensation) to identify potential problem areas, this expansion in the Scheduling Letter means that, at a minimum, contractors must conduct 20 additional analyses in conjunction with its affirmative action plan (i.e., comparing selection rates for each racial subgroup against Whites for each of the four sets of analyses). Moreover, given that OFCCP runs analyses to identify the "most favored" group for any particular personnel action, the number of analyses prudent contractors runs increases exponentially, as each racial subgroup is compared with every other racial subgroup. That is, contractors are now well advised to compare promotion rates for African-Americans against not just Whites but also against Hispanics, Asians, and American Indians/Alaskan Natives. As a result, where contractors previously performed a total of eight analyses for each job group (White v. Minorities and Women v. Men as to hires, promotions, terminations, and compensation), contractors—faced with the duty to furnish information by racial subgroup and with OFCCP's current practice of identifying the "favored group" in each of the four sets of analyses) — now must run 44 separate analyses and, according to OFCCP, take action if any of those 44 analyses reflect adverse impact against any group, including Men and Whites.

Furthermore, if a contractor is unable to produce the required information within the 30-day period, OFCCP now threatens to issue a show cause notice, asserting that the contractor has failed to meet its obligations under the regulations. A show cause notice requires that the contractor comply within 30 days or the Agency will recommend the government initiate enforcement proceedings to debar the contractor. The threat to issue a show cause notice is an aggressive tactic that was previously used only during the early stages of an audit in instances of egregious noncompliance. It has now become a commonplace tool of intimidation by the Agency.

While OFCCP has become extremely rigid in requiring contractors to meet incredibly short deadlines, it is under no requirement to complete a compliance review in any particular time frame. Chamber members report that many compliance reviews remain open for months or even years with no activity or communication by OFCCP. The OFCCP process is a real-life example of the bureaucratic policy of "hurry up and wait."

## B. The Desk Audit Phase of OFCCP Compliance Evaluations

Once a contractor submits its initial response to the Scheduling Letter, OFCCP begins its desk audit phase —reviewing the submitted information and possibly requesting additional data. Just like its position during the initial stage of the audit, OFCCP's compliance posture during this desk audit phase has changed substantially in recent years. OFCCP is sharing much less, and more and more frequently, no information with contractors regarding areas of concern while requiring contractors to submit mountains of additional data. This change in posture was spurred, in part, by the Administrative Review Board's (ARB's)[61] decision in the *Frito-Lay* case,[62] which set an extraordinarily low standard upon which the Agency can seek data beyond that required by the Scheduling Letter.

*Frito-Lay* involved a 2007 compliance review of one of the company's establishments. During the desk audit phase, which stretched for several years, OFCCP sought to compel Frito-Lay to provide personnel activity data for calendar years 2008 and 2009, all based on the Agency's assertion that it had discovered a statistically significant disparity in selection rates in the 3 years of AAP data already provided by the company, covering 2005 to 2007. Frito-Lay objected to OFCCP's request, declaring that the Agency could not demand data for a period beyond the start of the review period.

Though the administrative law judge (ALJ) ruled in favor of Frito-Lay, OFCCP appealed, and the ARB overturned the ALJ and found that OFCCP had the right to seek additional data "where it discovers a potential violation during a desk audit" and the request is "motivated by an

[61] According to the Department of Labor, the Administrative Review Board's mission is to "issue final agency decisions for the Secretary of Labor in cases arising under a wide range of worker protection laws, primarily involving environmental, transportation, and securities whistleblower protection; H-1B immigration provisions; child labor; employment discrimination; job training; seasonal and migrant workers; and federal construction and service contracts." The Administrative Review Board is composed of a maximum of five members appointed by the Secretary of Labor, one of whom is designated chair.

[62] *See Office of Federal Contract Compliance Programs v. Frito-Lay* (ARB Case No. 10-132, May 8, 2012).

objective deficiency."[63]ARB explained that OFCCP had found a "disparity in the hiring rates of females as compared to males that was statistically-significant at 3.26 standard deviations"[64] for the period for which Frito-Lay had provided data. ARB concluded that this statistical disparity was an objective "deficiency" on which the request for 2 years of additional data were reasonably based.

Armed with the *Frito-Lay* decision, OFCCP regularly demands additional years of personnel activity data from contractors during the desk audit phase. In many cases, these requests come at the start of a compliance review—when any "objective deficiency" could not have possibly been investigated. Indeed, in some cases, OFCCP compliance officers have asserted that it is "their practice" to request an additional year or more of personnel activity data up front because it is "easier." In support of such requests, the Agency simply states it has found "indicators of discrimination" in the data already provided.

Chamber members report that Agency demands for additional data extend to compensation, applicant, hire, promotion, and termination. Perhaps, most importantly, and in marked contrast to the past, when OFCCP would describe in some detail the purported "indicators of discrimination," the Agency now almost never shares such detail. OFCCP claims that its analyses are "merely preliminary" and promising full disclosure once the Agency's work is complete and has reached its findings. In many cases, OFCCP won't even confirm the personnel activity numbers it is using for its analyses, a common prior practice that allowed a contractor to confirm that the Agency had understood its submission correctly and avoided drawn out investigations based on an initial data calculation error or misinterpretation of a submitted report.

The impact of this change in enforcement posture on contractors simply cannot be overstated. Previously, when compliance officers of OFCCP were willing—and were permitted by their supervisors—to engage in full discussions of the basis for further requests for data, the contractor was often able to demonstrate that OFCCP's preliminary decisions were not accurate or they were misreading the contractor's data, documents, and policies. This would enable the parties to resolve issues early on to the benefit of both the contractor and OFCCP. Those days are gone. Contractors are now faced with the undesirable choice of either capitulating and producing reams of additional data or engaging in costly administrative litigation over a show cause notice.

Notably absent from OFCCP's typical follow-up requests during desk audits are additional inquiries into a contractor's *affirmative action*—as opposed to nondiscrimination—efforts. Contractors have dedicated significant time and resources to enhancing their true *affirmative action* efforts, both because of the revised regulations implementing VEVRAA and Section 503[65] and the voluntary diversity and inclusion efforts in corporate America. OFCCP's reaction to such extraordinary efforts has been indifference at best.

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[63] Ibid.

[64] Ibid.

[65] *See* notes 52 and 53.

## 1. Google—A Case Study in Overreaching, Overly Burdensome Tactics

Bolstered by the expansive language of *Frito-Lay* and adopting a class action plaintiff-side approach to compliance evaluations, OFCCP regularly, as mentioned, makes extraordinary requests for data and information—requests that frequently go beyond its legal mandate and place tremendous burden on contractors. While OFCCP proclaims that it is bound by Title VII principles when addressing discrimination, its data demands go far beyond what would be permissible in a Title VII case or by EEOC.

The *Google* case, pending before DOL's ARB following a hearing before an ALJ of DOL, is a case study of OFCCP's overly aggressive approach in what essentially amounts to a discovery battle over employer data and information.[66] As the ALJ in the *Google* matter observed, OFCCP should not be "an advocate representing Google's employees against their employer" and, instead, should conduct "an objective audit of a government contractor against which there have been no allegations raised with OFCCP."[67] The following summary of the *Google* case is based on publicly available information.

In January 2017, a few weeks before President Donald J. Trump's inauguration, OFCCP filed an administrative complaint against Google, alleging that the company had wrongfully refused to produce data it was required to provide in connection with a 2015 audit of the company's headquarters location.[68] The company had already produced compensation data for all 21,000 employees at its headquarters, as well as "hundreds of thousands of" additional compensation-related records. OFCCP, *without revealing what its initial analysis of this data showed and without crafting a narrow request to focus on areas of alleged disparities*, subsequently demanded that Google provide a complete job and salary history for *all* employees in the "snapshot" (some of whom had been with the company since its founding in 1998), as well as contact information for employees and other documentation. [69] Google asked OFCCP for an explanation for the relevance of these requests, but OFCCP repeatedly refused to provide answers. This put Google in the position of either waiving its Fourth Amendment rights by

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[66] *OFCCP v. Google*, Case No. 2017 OFC-0004, Recommended Decision and Order, pg. 38 (July 14, 2017).

[67] Ibid., pg. 26.

[68] *See* Complaint, *Office of Federal Contract Compliance Programs v. Google, Inc.* (OAJL Case No. OFCCP No. R00197955). https://www.dol.gov/sites/default/files/newsroom/newsreleases/OFCCP20162406_0.pdf

[69] A "snapshot" is a collection of data from a static representation of employees at a particular contractor establishment on a particular date. Although a snapshot sounds like it requires a simple push of a button, as the ALJ in the *Google* case noted, "It is far from a simple 3" x 3" photograph." In reality, assembling a snapshot is often an enormous undertaking, and can include gathering dozens of data points (e.g., race, gender, hire date, wage rate, job group, hours worked) on hundreds or thousands of employees, depending on the circumstances of the case and type of information sought by the OFCCP investigator. Moreover, a snapshot is an artificial measuring point that does not correlate with typical HR data compilation and retention. Many times, contractors maintain these employee data points in separate files, databases, and systems. So contrary to what some OFCCP investigators may believe, matching up all these data points with hundreds or thousands of employees is an incredibly time-consuming and expensive task.

producing the information without any explanation as to why OFCCP sought it or face litigation brought by OFCCP.

OFCCP filed an administrative complaint against the company alleging denial of access to records and then sought summary judgment in the case. The ALJ denied the summary judgment motion, finding that OFCCP's request was unreasonable and stating that the cost to Google of just producing the interview notes (estimated to be $1 million) exceeded the total value of Google's government contracts (approximately $600,000). As the ALJ noted in his summary judgment order … "a compliance review is only that: an investigation to determine whether the contractor has complied with its anti-discrimination and affirmative action obligations. There has been no finding of wrongdoing. This is not litigation that the government is prosecuting based on investigative findings."[70]

Following his denial of OFCCP's motion for summary judgment, the ALJ held a hearing on April 7, 2017, and May 26, 2017. At that hearing, the regional director for the Pacific Region asserted on the record that the Agency had found "*systemic compensation disparities against women pretty much across the entire workforce.*"[71] This was the first time Google had heard such an allegation. The regional office had not shared the results of its initial analysis with Google and had not stated this claim prior to the hearing. Google has vigorously denied the allegations, both at the hearing and in press statements since this hearing.

The ALJ's Recommended Decision and Order, issued July 14, 2017, encapsulates much of what is wrong with OFCCP audit practices. First, the ALJ lamented the fact that had OFCCP been more transparent about the goals of its investigation, "it might have made the present litigation unnecessary."[72] The ALJ repeatedly emphasized that OFCCP had a statutory duty to "make reasonable efforts to secure compliance 'by methods of conference, conciliation, mediation and persuasion' before seeking sanctions and penalties for violations."[73] Second, although the ALJ required Google to provide OFCCP with a limited amount of information, he ruled that sweeping demands for employee contact information and salary history dating back to 1998 were "over-broad, intrusive on employee privacy, unduly burdensome and insufficiently focused on obtaining relevant information."[74] Ultimately, the ALJ rejected OFCCP's "unfocused, irrelevant, and unduly burdensome" demands for years of employee compensation data:

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[70] *Office of Federal Contract Compliance Programs v. Google, Inc.*, Case No. 2017-OFCC-00004, p. 6. https://hr.cch.com/ELD/OFCCPGoogle031517.pdf

[71] We note as well that during the litigation over the additional data that Google would have to submit to OFCCP, the Regional Solicitor inappropriately spoke to the press and discussed issues that were not the subject of the litigation and had not been submitted for adjudication. This pattern of "trial by press statement" is wholly inappropriate and not consistent with OFCCP's hearing rules or the standards for administrative litigation. *See*, "Google accused of 'extreme' gender pay discrimination by US labor department." *The Guardian* (April 7, 2017).

[72] *OFCCP v. Google*, Case No. 2017 OFC-0004, Recommended Decision and Order, pg. 20 (July 14, 2017).

[73] Ibid., pg. 18.

[74] Ibid, pg. 31.

> Despite having several investigators interview more than 20 Google executives and managers over two days and having reviewed over a million compensation-related data points and many hundreds of thousands of documents, OFCCP offered nothing credible or reliable to show that its theory about [compensation discrimination] is based in the Google context on anything more than speculation.[75]

One final point illuminates how the current OFCCP takes an adversarial and confrontational —rather than cooperative— approach to contractor audits. The ALJ criticized OFCCP for arguing that the hundreds of millions of dollars Google spent on diversity issues demonstrated that the company should be able to easily comply with its demands for information. Describing this position as demonstrating animus toward Google, the ALJ noted that OFCCP should commend Google for these endeavors instead of trying to use such voluntary efforts against it. In the past, Google's diversity initiatives would have been discussed as a positive factor during an OFCCP audit. Today, contractors' voluntary, good faith diversity and antidiscrimination efforts are too often glossed over by OFCCP, or in Google's case, used against them.

### 2. Other Examples of Burdensome, Overreaching, Unreasonable Requests at the Desk Audit Phase

The *Google* case is not an anomaly. Unfortunately, OFCCP's approach has been just as the ALJ in the Google case observed—like that of an overzealous prosecutor or class action plaintiff-side law firm, treating each compliance evaluation as a discrimination enforcement action rather than a neutral objective review of the contractor's affirmative action efforts.

Chamber members have reported numerous other examples of overreaching, overly burdensome, and unreasonable requests from OFCCP during recent audits:

- *Requests for national origin information for all applicants and employees.* While OFCCP has jurisdiction to investigate national origin discrimination, there is no regulatory obligation that employers collect such data and, in fact, employers are prohibited from requesting such information from applicants and employees in most instances.

- *Requests for H-1B visa information for all employees.* An employee's H-1B visa status cannot serve as a proxy for national origin. Country information included on an H-1B visa does not establish the visa holder's national origin; it only identifies his or her country of residence at the time of the visa. As such, this request exceeds OFCCP's regulatory authority. The ALJ in the *Google* matter confirmed this.

[75]Ibid., pg. 38.

- *Voluminous Document Requests With Unreasonable Time Frames.* OFCCP routinely requests a substantial number of documents. In one compliance evaluation, the Agency requested resumes, applications, and interview notes for all 12,000 applicants for every open position in the company. This request was made without OFCCP first identifying any job groups in which it had determined there was adverse impact in hiring. Unfortunately, this is par for the course. The Agency rarely takes the time to narrow its requests to focus on areas in which it has identified disparities, choosing instead to make sweeping demands without regard to the tremendous time and expense required for contractors to comply. These extraordinary requests are usually coupled with a demand that the contractor submit the data within 3 to 5 days. Such timing is virtually impossible given the broad scope of most requests.

  More examples include the following:

  - In one audit, before sharing any analysis of adverse impact in hiring, OFCCP insisted that the contractor produce more than 5,000 applications, 2,000 of which related to candidates whose applications the contractor never reviewed because they did not meet the necessary requirements for the vacant positions. OFCCP rejected the contractor's request that it refrain from incurring the time and expense associated with gathering—in a manual process—those 2,000 applications.

  - In another audit, OFCCP requested job descriptions for the entire workforce, just a few days after the contractor's initial submission and before any meaningful analyses of potential indicators could have been completed.

  - In a more recent case, OFCCP requested two additional compensation snapshots at the beginning of a compliance review. At the same time, it sent its first request to clarify certain information about the initial compensation submission, making any preliminary analysis of the initial submission virtually impossible.

The key point of frustration for contractors is OFCCP's unwillingness to provide any explanation as to the relevance or necessity of the additional information and its wholesale unwillingness to engage with the contractor to narrow the requests. OFCCP's response to any inquiries regarding why such information is needed is often the vague phrase— there are "indicators of discrimination" that warrant their requests. Moreover, the Agency frequently insists on near immediate production of the follow-on data or information, even when the OFCCP has been silent for months or perhaps even more than a year. The desk audit has simply become a fishing expedition, with the Agency seeking—without regard to cost or burden to contractors—any statistical evidence to support any claim of discrimination.[76]

[76] *See, e.g., OFCCP v. Google*, Case No. 2017 OFC-0004, Recommended Decision and Order, at page 21, citing *McClane Co, Inc. v. E.E.O.C.*, 137 S. Ct. 1159, 1165 (2017). As the ALJ in the *Google* matter noted, however, when

Small businesses are perhaps most impacted by the burdensome and unreasonable desk audit requests of recent years.[77] Companies with limited resources, operating on thin margins, can be crippled by multiple overarching requests for data and documents as compliance reviews extend over multiple years. As many small businesses cannot afford legal counsel, they are often deprived of the ability to effectively push back against the Agency's overbroad requests. Instead, they are buried by the time and expense required to respond to OFCCP. As such, the Agency's approach only serves to discourage small businesses from becoming, or remaining, government contractors.

### 3. OFCCP's Demand for Privileged, Self-Critical Analyses at the Desk Audit Phase

Another concerning trend in OFCCP's enforcement stance is its efforts to obtain during an audit a contractor's own attorney-client privileged, self-critical analyses of compensation. This growing practice is troubling both because there is no regulatory basis for the request and such demands will only discourage employers from conducting such self-critical analyses. In support of its demands for privileged, self-critical analyses, OFCCP consistently asserts that any compensation analysis conducted by the contractor is done pursuant to its regulatory obligations, not for the purpose of obtaining legal advice, and thus cannot be privileged and must be produced.

This position is not supported by the governing regulations that only require contractors to "evaluate . . . compensation *system(s)* to determine whether there are gender- , race- , or

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entering into a contract with the federal government, contractors do not give up their Fourth Amendment rights when OFCCP issues a document request that is unreasonable, "too indefinite, is issued for an improper purpose [e.g., is beyond the Agency's authority], or is unduly burdensome." But, as a practical matter, contractors find it difficult and dangerous to assert these rights. Contractors cannot "quash" or make a direct legal challenge to OFCCP's overly broad information requests.

Rather, the only way for contractors to seek relief in these situations is to refuse to comply with OFCCP's demand, thereby triggering a show cause notice. Unless the contractor agrees to the Agency's demands, OFCCP initiates administrative litigation against the contractor, bringing all of its attendant consequences, such as negative publicity and even the possibility of eventual debarment. This is a risky and expensive option.

An ALJ hears the case first, then the ARB, and finally a federal court—if the issue gets that far. This is in direct contrast to EEOC-issued subpoenas, which can be immediately appealed to a federal District Court. On top of all this, while this discovery battle is being litigated, OFCCP continues its audit of the employer with subsequent demands for additional data. Being forced to engage in defensive litigation—with the attendant cost and potential negative press—is not a path that many employers would readily embrace. In addition, the issuance of a show cause notice may trigger adverse consequences if the contractor bids on state or local procurements, which often inquire as to the status of OFCCP compliance. OFCCP knows this and uses this as an additional point of leverage over employers during audits.

[77] There is a misperception that federal contractors are usually very large employers. However, many contractors are, in fact, small businesses, which are nevertheless governed by OFCCP's nondiscrimination and affirmative action requirements. For example, an employer with a single contract with the government of $10,000 must comply with the nondiscrimination requirements of Executive Order11246 and the Rehabilitation Act and pursue affirmative action practices. A small employer with at least 50 employees and a federal contract of $50,000 or more must develop and adopt in each of its establishments a written affirmative action plan.

ethnicity-based disparities" (emphasis added).[78] The regulations do not dictate what type of evaluation must be conducted. Hence, any assessment of the contractor's system itself would satisfy the regulatory obligation, from evaluation of the compensation policies to the compensation structure utilized by a contractor.

The regulatory language in no way eviscerates the legal privileges that otherwise apply to analyses that are performed for the purpose of providing legal advice to the company on potential pay disparities and/or in anticipation of litigation. Further, OFCCP has no need for these analyses in the context of an audit. It can and does conduct its own statistical analyses and routinely obtains, via the Scheduling Letter, the underlying data needed to conduct such analyses.

Where OFCCP finds differences using appropriate factors that impact pay, the Agency can dig deeper and obtain additional data from the contractor. Finally, OFCCP's continued relentless pursuit of these privileged, self-critical analyses may only serve to disincentivize employers from taking a serious and detailed look at their compensation practices and making adjustments where warranted. This is directly contrary to OFCCP's professed mission to encourage contractors to comply with the equal opportunity/affirmative action laws and take proactive steps to ensure the absence of discrimination.

## C. On-Site Phase of Audits

The Agency's current noncooperative posture extends as well to the on-site phase of the audit, during which frequently large teams of auditors spend days and sometimes weeks at the contractor site, turning over every rock, seeking evidence of discrimination. Again, OFCCP's posture is at odds with its historical practice.

Under prior administrations—Democratic[79] and Republican alike—Agency compliance officers routinely identified to contractors, well in advance of the on-site phase, the key areas of potential noncompliance and often engaged in constructive dialogue with the contractor regarding those areas. The parties were often able to resolve significant potential issues in advance of the on-site visits, making them efficient and streamlined, both for Agency personnel and contractor personnel.

The Agency also worked cooperatively with the contractor to identify potential interview topics, interviewees, and documents and records that would be reviewed during the on-site review. Finally, OFCCP compliance officers and contractor personnel usually worked cooperatively to find dates and times for the on-site review to maximize efficiency. In contrast, OFCCP's posture as to the on-site review can typically be both opaque and downright hostile to contractors.

[78] *See* 41 CFR 60-2.17(b)(3). https://www.law.cornell.edu/cfr/text/41/60-2.17

[79] During the Clinton administration, the Agency pursued expansive theories of liability, but did not— in the ordinary course—engage in the broad-scale "hide the ball" tactics that are emblematic of recent years.

First, the OFCCP compliance officer who shares information about the issue areas under review—for example, hiring patterns for X job group or base pay for incumbents in job title Y or salary grade Z—is the exception. The much more common approach is either to not share ***any*** information about the issue areas under review or simply convey that there are "indicators of discrimination" or "preliminary results showing adverse impact" in certain unidentified job groups, without disclosing the factual underpinning for that assertion. To the extent the "indicators" flow solely from statistical analyses, OFCCP's approach is again inconsistent with Title VII case law. The mystery, in many cases, extends right up until the start of the on-site review.

The following are examples of the types of communication contractors receive regarding the on-site review:

*Example One:* [prior to the initiation of the on-site phase of the investigation]: "I sent you an email earlier today to schedule a discussion, but unfortunately you're out of town. The discussion is in reference to scheduling an on-site for [Contractor]. We will conduct the on-site the first week of April 2017." Both the voicemail and the email came without an invitation to discuss the basis for the on-site review or even the timing of the review. This deprived the contractor of the opportunity to explore the issue areas with OFCCP and determine together whether the parties could obviate the need for the costly and time-consuming on-site investigation.

*Example Two:* [in response to a contractor request for a meeting with OFCCP to discuss issue areas under review]: "As is typical in any compliance evaluation, the next step of the review is the on-site phase of the investigation. A pre-on-site meeting will be premature as our investigation is ongoing and we have not reached a conclusion. However, upon completion of the on-site phase of the compliance evaluation, we will be available to discuss our findings with you." The Agency never identified areas of concern prior to the on-site or whether its analysis of those areas was appropriate given the contractor's processes and policies.

*Example Three:* [while contractor was in the process of responding to voluminous document requests and without any advance notice]: "I am calling to discuss the scheduling of an on-site visit. We will visit the [facility] April 12–14, 2016." This request, too, came without an opportunity to discuss with the Agency its areas of concern.

*Example Four:* While the contractor is preparing for an on-site visit with OFCCP, the Agency sends a request for two additional compensation snapshots, requesting a response within 15 days from the receipt of the letter. The Agency knew full well that the same individuals who would be responsible for gathering and reviewing the additional compensation data requested would spend 3–5 days of the 15-day response period preparing for and participating in the already scheduled OFCCP on-site review.

As a result of the Agency's opacity, the contractor is often required to guess as to the issues that will be addressed during the on-site visit, the identity of the individuals that may need to be present for the on-site, and the topics each must speak to. Such on-site ambushes belie any notion of a partnership with the contracting community. As recognized by the ALJ in the

*Google* matter, these actions likewise are inconsistent with the Agency's obligation to conduct "objective" audits of contractor practices and engage in "conciliation" efforts at all stages of an audit, not just when a notice of violation (NOV) is issued. Failure to engage in such good faith exchanges can often lead, just as the ALJ in the *Google* matter concluded, to the Agency failing to fully understand or appreciate the contractor's practices at issue.

Second, OFCCP regularly combines lack of transparency regarding the topics it will explore with unreasonable demands of the contractor when scheduling and conducting the on-site review. Unreasonable demands run the gamut from little notice of the on-site date and demands for extensive conference room space to conduct interviews to lengthy witness interview lists and document requests. In an on-site review, OFCCP provided a Chamber member with a listing of more than 100 employees it wished to interview, including several senior personnel. It provided this list fewer than two weeks before the on-site review.

The document and data requests that accompany the on-site phase of current reviews are also extraordinary. In one audit of a Chamber member, OFCCP issued an on-site letter setting the on-site to begin about 4 weeks from the date of the letter and demanding that the contractor provide the following information and documents *within 7 business days after* issuance of the letter:

- Company and personal email addresses and telephone numbers for more than 5,000 employees.
- Copies of resumes, applications, and interview notes/records for more than 7,500 applicants.
- Copies of applications, resumes, and complete job histories for more than 5,000 employees.
- A privilege log for any and all privileged documents that were responsive to any Agency document request made by the Agency over a one-year period.

In most compliance reviews, OFCCP compliance officers also conduct a compensation manager interview, leading to large-scale data requests for pay factor information for all employees at the location under review. In many cases, these requests seek multiple data points for each employee, with some cases yielding requests for more than 60 individual data points for hundreds or thousands of employees. Many of the requested data points, such as starting salary, educational background, and prior experience, are not easily retrievable, leading to significant expenditures of time and money by contractors. The data requests also span multiple time periods, with OFCCP regularly seeking data for time periods beyond the one-year period generally covered by a compliance review. Finally, many of these requests have been made with unreasonably short deadlines, sometimes of 5 days or less.

For example, members report having to respond to the following compensation-related data requests:

- Providing data points outlined in a five-page request from OFCCP for all employees in the plan under review, including providing the requested data points for two additional compensation snapshots.

- Responding to requests for 20–60 data points for all employees, within a 5-day period, including items that are not easily retrievable or readily available to most employers, such as educational degrees and prior experience.
- Providing additional compensation snapshots beyond the one required by the Scheduling Letter and Itemized Listing, often for time periods that are completely divorced from a contractor's AAP year and often while clarifying questions are still being asked about the contractor's compensation practices and policies.
- Gathering job descriptions for every job title in the AAP within days of the contractor's initial submission, such that it would have been virtually impossible for OFCCP to have already found any preliminary indicators of discrimination.
- Providing contact information for more than 20,000 employees.
- Providing complete salary history information for an entire workforce, which may span 20+ years or more.

Requests of this breadth, unfortunately, are becoming commonplace and are accompanied by the previously discussed unwillingness to engage with the contractor regarding potential areas of disparity and to narrow extant requests.

A third hallmark of OFCCP on-site reviews are aggressive interviews of contractor employees, both managers and nonmanagers alike. For instance, OFCCP interviews have included the following: (1) requests that employees provide personal email addresses to which the OFCCP compliance officer would send an interview statement; (2) telling nonmanagerial employees who have requested that HR personnel accompany the employee in an interview that such a request is "not normal" or "almost never happens"; (3) requests that employees open laptops and share information on the laptops with the compliance officers; (4) requests that the contractor make an "IT representative available so we can go through Company email"; and (5) insistence that nonmanagerial employees review and sign the OFCCP-generated interview statement at the end of the interview without permitting time for the employee to review the statement carefully.

## D. Issuance of Notice of Violation Without Conciliation Regarding Preliminary Findings and Without Notice

The Agency's "hide-the-ball" tactics extend beyond the on-site phase to its issuance of a notice of violation (NOV), the first step in an administrative enforcement proceeding. For decades, OFCCP willingly shared with contractors information regarding key areas of concern, especially at the exit conference that concluded the on-site portion of any compliance evaluation. OFCCP identified with particularity the job groups in which it had identified potential adverse impact and the personnel activity at issue (e.g., hiring, promotions, or terminations). As for issue areas involving compensation, OFCCP previously identified the incumbents or job titles at issue and provided the contractor with an opportunity to explain differing pay among employees OFCCP viewed as similarly situated. In short, the Agency previously provided the contractor an opportunity to address areas of concern *before a NOV was issued*. Chamber members were frequently able to provide additional data or explanation that would resolve the issue in advance of OFCCP issuing a NOV and draft Conciliation Agreement. This cooperation benefits all parties as it often results in quicker and more amicable resolutions.

Those days are again gone. It is the exceptional OFCCP audit that involves disclosure by the Agency regarding areas of concern and an opportunity for the contractor to respond prior to receiving a NOV. Instead, OFCCP now—as a matter of course and enforcement posture— issues a NOV out of the blue and demands a response by the contractor within a few weeks. The NOV often lacks detail as to the statistical methodologies used and the assumptions made by the Agency. Contractor requests to discuss the NOV in detail are often denied, with the Agency insisting upon a written response before any explanatory meeting is held. When OFCCP finally agrees to meet regarding the NOV, the information shared remains scant.

The current process surrounding issuance of the NOVs is both unfair to contractors and inefficient for both contractors and the Agency. *The Chamber urgently requests that OFCCP reverse course and return to its prior practice of engaging with the contractor well before an NOV issues*. A return to such an enforcement posture will facilitate earlier resolution of open issues at a lower cost to both the Agency and contractors.

An additional change in enforcement posture relates to coordination across OFCCP offices that are conducting compliance evaluations with regard to a single contractor. Chamber members with national operations report that many locations may be under audit simultaneously —a phenomenon that is not new but nonetheless burdensome. Yet Chamber members are also reporting that the Agency is frequently coordinating those audits and issuing the NOVs on or around the same time, even when the alleged violations in each review are wholly unrelated to each other. Such simultaneous issuance of the NOVs provides OFCCP with more leverage to extract resolutions from contractors that are experiencing multiple audits at once.

## E. OFCCP's Perfunctory Conciliation

After a notice of violation (NOV) issues, OFCCP investigation subsequently enters the conciliation phase. This phase of audits conducted in recent years carries with it additional challenges not faced by contractors in prior years and is frequently conciliatory in name only.

First, OFCCP is frequently unbending in its reliance on its own statistical methodologies and rarely willing to consider the contractor's differing statistical analyses. This fact is particularly problematic because the Agency's statistical methodologies are often grounded in a misunderstanding of the contractor's decision-making processes. That misunderstanding, not surprisingly, flows from OFCCP's unwillingness to discuss the issue areas and its methodologies with the contractor before reaching the conciliation phase. Chamber members report that OFCCP has been wholly unwilling to include in its statistical models variables that truly— and irrefutably— impact the personnel decision at issue.

Examples include the following:

- An unwillingness to include an employee's salary grade in a statistical analysis of pay.

- An insistence that pay comparisons be made across a job group, even when the job group is irrelevant to a contractor's compensation system and the contractor's compensation personnel state as such.
- A refusal to include work location as a variable, even though the employees being compared are located in different states with different costs of living.

Second, OFCCP is regularly unwilling to provide details regarding anecdotal evidence that OFCCP claims supports allegations of discrimination. Agency compliance officers routinely interview or survey current and former rank-and-file employees during a desk audit. Now, OFCCP does not disclose any information regarding those interviews or surveys until the conciliation phase. By that time, OFCCP takes what the current or former employee has conveyed as the absolute truth and provides the contractor with no opportunity to rebut the alleged "evidence."

Third, and consistent with its unyielding approach to its statistical methodologies, OFCCP frequently adopts a take it-or-leave-it approach to conciliation, particularly when it comes to the underlying finding of discrimination. While OFCCP may negotiate with contractors over the back pay sums due or the potential number of "instatements" (hiring applicants who were allegedly wrongly denied employment), OFCCP has become far less willing to credit contractor responses to the NOV and reverse its findings of violations. This bureaucratic approach— coupled with the threat of litigation—is at odds with the Agency's historical role as a neutral enforcement agency and with accepted notions of good faith conciliation.

Finally, OFCCP all too frequently claims that contractors engage in delay tactics after issuance of a NOV. In many cases, the NOV issues years after an audit began and OFCCP nonetheless demands a written response within 30 days of the NOV and then abruptly terminates conciliation efforts citing contractor delay. This absence of good faith is far too prevalent in current audits.

## F. Enforcement Theories and Statistical Methodologies

Contractors are increasingly finding that OFCCP grounds its claims of discrimination *solely* on numerical differences or other statistical proof. For instance, in September 2016, the Solicitor of Labor, on behalf of OFCCP, filed an administrative complaint against Palantir Technologies, a private software company headquartered in Palo Alto, California.[80] In the *Palantir* matter, the Solicitor of Labor alleged that an internal employee referral program resulted in a statistically significant underrepresentation of Asians among the individuals hired. The six-page complaint cites alleged statistical disparities in the company's hiring into three roles at Palantir, but it contains no other allegations of nonstatistical proof to support these claims.

[80] *OFCCP v. Palantir Technologies, Inc.* Complaint for Violations of Executive Order 11246. https://www.dol.gov/sites/default/files/newsroom/newsreleases/OFCCP20160926_0.pdf

In advancing the case to the Solicitor's office for enforcement, OFCCP ignored (1) the actual qualifications of the candidates who applied for positions within the three roles at issue; (2) 41 other job titles for which there were no statistically significant disparities in the company's hiring practices; and (3) that more than a third of the jobs filled at Palantir during the time frame at issue were filled by Asians.

In short, OFCCP scoured 6 years of data supplied by Palantir, selectively identified a few roles in which the statistics showed potential adverse impact against Asians based on an applicant flow analysis that ignored utilization and moved the matter to enforcement based on those statistics alone. Palantir recently settled the matter for $1.6 million, without an admission of liability, issuing a press release noting that it continued to disagree with the allegations and stating that it settled "in order to focus on our work." [81]

Similarly, just days before the end of the Obama administration in mid-January 2017, OFCCP filed a complaint against Oracle America, Inc. (Oracle) alleging that the technology company discriminated against female employees by paying them less than their male counterparts in three separate lines of business at its California headquarters. The complaint also alleges that Oracle discriminated against African-Americans and Asians by paying them less than their White co-workers. Further, OFCCP alleges that Oracle's recruiting and hiring process discriminated against African-Americans, Hispanics, and Whites in favor of Asian applicants and that Oracle refused to respond to various demands for data.[82]

As in the *Palantir* case, OFCCP bases its allegations of discrimination solely on statistical analyses and offers no other evidence of discrimination. In doing so, OFCCP relies on Oracle job titles to attempt to demonstrate that certain female, African-American, and Hispanic employees were "comparable" to males and Whites employed in similar roles. But job titles cannot serve as proxies for establishing that certain employees are proper comparators under federal antidiscrimination law. To OFCCP, it appears to be all about the numbers that it can spin from aggregated employer-provided data, and individual employee differences relating to productivity, required skills, and experience are ignored. This issue remains pending as of this writing.

The *Palantir* and *Oracle* matters—like the *Google* matter— are a few examples of the many cases in which OFCCP is pursuing claims of discrimination based on statistical evidence alone. Indeed, the Agency's practice has become so common it has not gone unnoticed by Congress. House Report 114–99, accompanying the appropriations bill for the Departments of Labor, Health and Human Services and Education, issued in July 2016, expressed deep concern over OFCCP's overreliance on statistical "evidence" of discrimination. The Appropriations Committee specifically noted as follows:

[81] U.S. Department of Labor Press Release, "U.S. Department of Labor Settles Charge of Hiring Discrimination With Silicon Valley Company," April 25, 2017. https://www.dol.gov/newsroom/releases/ofccp/ofccp20170425

[82] *OFCCP v. Oracle America, Inc.*, Complaint. https://www.dol.gov/sites/default/files/newsroom/newsreleases/OFCCP20170071.pdf/. As in the Google case, OFCCP is demanding multiple years of compensation-related documents and information from Oracle.

> The Committee remains concerned with OFCCP's implementation of anti-discrimination policy by the overreliance upon statistical evaluation methods to identify contractors that will be subject to compliance evaluation reviews. Despite the concerns expressed by both the Committees on Appropriations of the House of Representatives and the Senate in 2015, OFCCP continues to rely too heavily on the use of statistical methods to target enforcement rather than seeking to fulfill its critical mission of increasing compliance with Federal law through a more comprehensive approach, such as identifying persistent violators, and assisting Federal contractors with compliance. Although OFCCP denies either the creation or enforcement of quotas, the agency's requirements make clear that any contractor that does not meet the statistical definition of nondiscrimination can be subject to enforcement evaluations, which the Committee believes is effectively enforcement of a de facto quota.[83]

The shortcomings that flow from OFCCP's overreliance on statistical proof extend beyond hiring practices like those at issue in the *Palantir* matter. They extend equally to OFCCP's treatment of contractors' compensation practices where, as noted, OFCCP often ignores a contractor's compensation system and the variables that properly impact pay, such as an employee's salary grade. Moreover, OFCCP often aggregates compensation data in a manner that is inconsistent with the contractor's own decision-making model, all in an effort to show statistical disparities.

Until recently, OFCCP's enforcement practices encouraged frequent and early conversations between the Agency and contractor about any compliance concerns. This transparency often allowed for early resolution of issues—a positive result for the contractor, OFCCP, and any impacted workers. However, recent years have ushered in a new, more adversarial approach to enforcement. The Agency's current plaintiff law firm tactics have negatively impacted its credibility and ability to positively influence contractors' proactive behaviors.

As a result, some Chamber members are actively taking steps to disengage their federal contracting business in light of the increased risks that such one-sided enforcement brings. Others are evaluating whether it makes sense to become, or continue to be, a federal contractor. The loss of potential federal contractors can be expected to intensify if OFCCP continues to follow its current enforcement path. Small businesses in particular will need to weigh the benefits of receiving federal dollars against the significant compliance costs and risks that come with such awards, specifically those that are of small value.

Quite simply, decreased competition in the federal sector arena does not further OFCCP's historical role in the procurement process. More important, the Agency's current approach does

[83] H.R. 114–699, pg. 17.

not seem to be yielding more positive compliance results. Indeed, the Agency has reviewed far fewer contractors than it has under other compliance models across various administrations.

According to GAO Report 16-750, *Equal Employment Opportunity—Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, issued to congressional requesters in September 2016, OFCCP completed 47% *fewer* compliance evaluations in 2015 than it completed in 2010.[84] In addition, even reviews that resulted in no findings of violation were lengthy, averaging 247 days to complete in 2015. Needlessly drawn out reviews also do not appear to be leading to more findings of noncompliance or recovery of additional financial remedies. According to the GAO report, OFCCP found discrimination in 71 audits completed in 2010 compared with findings of discrimination in just 32 audits in 2015.[85] And for the few reviews that resulted in a finding of discrimination, the average length of the review was an astonishing 1,487 days—just over 4 years.[86]

The Agency's current focus on numbers-based discrimination comes at the expense of affirmative action. At a time when corporate America is heavily focused on and invested in intensified diversity and inclusion initiatives, the Agency charged with assisting with these efforts has all but abandoned them. Very rarely do compliance reviews focus on a contractor's true *affirmative action* efforts; instead, the primary focus of the Agency's compliance reviews have evolved into an exercise of finding raw numerical differences in selection rates or pay and then requiring contractors to prove that the math doesn't equate to discrimination. OFCCP has strayed far from its original purpose, leading to duplication of efforts (that are better left to other enforcement civil rights agencies or private litigation) and a neglect of the Agency's core mission of ensuring that all workers regardless of race, gender, disability, or veteran status have an equal opportunity to perform federal contract work.

[84] https://www.gao.gov/products/GAO-16-750.

[85] Ibid.

[86] Ibid.

## V. CHARTING A PATH FORWARD FOR OFCCP

OFCCP is an agency that has lost its way, increasingly relying on abusive enforcement tactics and catchy press releases instead of focusing on its central mission of ensuring that companies participating as federal contractors take proactive, affirmative steps to ensure equal employment opportunity through a neutral enforcement program. The impact of this change in its enforcement focus simply cannot be overstated. Now is the time to refocus the Agency's priorities to ensure that federal procurement practices continue to benefit from the advantages of a diverse workforce.

Accordingly, the Chamber and its members firmly believe that the three most important steps for OFCCP in 2017 and going forward are as follows:

(1) Discontinuing the opaque and, at times, openly hostile approach to compliance evaluations and returning to its mandated neutral enforcement role based on sharing of information regarding potential issue areas and attempts to both understand and resolve the issues at hand.

(2) Returning to a more holistic assessment of contractors' affirmative action and nondiscrimination efforts.

(3) Retreating from the strictly numbers-based game of gotcha currently employed by the Agency.

As noted throughout the other sections of this white paper, these recommendations make sense based on OFCCP's *own* experience in evaluating contractor compliance with its affirmative action and nondiscrimination requirements. Year after year, regardless of the administration, OFCCP has found that about 98% of the federal contractors it reviews have not engaged in discrimination.

Yet, despite this, over the last several years, the Agency has charted a course primarily focused on finding discrimination using questionable statistical methods rarely explained to the contractor and threatening debarment, sanctions, and bad publicity from the beginning of a compliance review. Not only have the Agency's tactics come at the expense of its core mission of helping contractors engage in affirmative action to ensure that federal procurement dollars are spent over a diversified workforce, but its efforts have not yielded more findings of discriminatory conduct. Indeed, to the contrary, OFCCP's approach has meant fewer compliance reviews and therefore fewer opportunities to work collaboratively with contractors on affirmative steps to improve equal employment opportunity.

On a more granular level, OFCCP should do the following to accomplish the above three steps:

- Revise OFCCP regulatory guidance documents to make them consistent with well-established federal antidiscrimination law, enable more transparency during investigation, and provide greater clarity regarding OFCCP's jurisdictional reach.

- Reevaluate the true burden placed on contractors in responding to the revised Scheduling Letter and Itemized Listing and ensure that the information requested by the letter is consistent with OFCCP's regulatory reporting requirements.

- Revise OFCCP's anti-retaliation regulations to make them consistent with federal antidiscrimination law and Supreme Court jurisprudence.

- Make technical revisions to OFCCP interpretations of its Section 503 and VEVRAA regulations to provide greater clarity as to contractors' obligations and ease the regulatory compliance burden for contractors.

- Implement guidance/regulations to set clear parameters on OFCCP investigations and ensure that those guidelines are followed consistently by all OFCCP offices.

- Examine ways to minimize the compliance burden on small employers without sacrificing OFCCP's overall goals.

OFCCP should strive to understand contractors' personnel and pay practices; be willing to accept legitimate, nondiscriminatory factors that explain numerical differences; and provide "best practices" inputs to contractors that are truly fostering inclusive, diverse workforces. OFCCP should likewise reverse its recent de-emphasis of compliance assistance activities, specifically noted in *GAO Report 16-75*0, and reengage with contractors to best ensure compliance.

## A. Revisit Subregulatory Guidance to Ensure Consistency With Existing Law and the Agency's Mission

In conjunction with refocusing OFCCP's enforcement priorities and processes to better align with its historical mission, the Agency should revise recent subregulatory guidance documents that hinder, rather than advance, its central purpose.

### 1. Directive 307 (Compensation Investigation Practices)

On February 28, 2013, OFCCP issued Directive DIR 2013-03, Procedures for Reviewing Contractor Compensation Systems and Practices (Directive 307 or the Directive).[87] The Directive specifies the procedures OFCCP field investigators are to follow when reviewing contractor compensation systems and practices. According to Directive 307, compliance officers review contractor compensation and data to evaluate whether there is a measurable difference in compensation because of sex, race, or ethnicity among comparable employees for which there are not legitimate (i.e., nondiscriminatory) explanations.

[87] https://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf. We note that Directive 307 represents a major refocus of the Agency's mission and means of conducting its responsibilities and was issued without any notice, comment, or the ability of the contractor community to offer opinions or suggestions.

The Directive mandates a case-by-case approach, requiring that compliance officers group employees for analysis into Pay Analysis Groups (PAGs), defined as a group of employees who are comparable for purposes of the contractor's pay practices. The Directive specifically provides that PAGs may "be based on groups that are larger than individual job titles and AAP job groups"[88] because "by combining employees into appropriate pay analysis groups, using statistical controls as necessary for title or level, OFCCP is able to more easily identify potential systemic discrimination needing further investigation and potential remedy."[89]

In practice, Directive 307 has led OFCCP compliance officers to compare the pay of the following groups of employees during actual compliance evaluations since 2014:

- All exempt and nonexempt employees in a location.
- Some, but not all employees, across multiple job groups.
- All employees in a certain EEO-1 category regardless of job title or job group.
- Employees in managerial roles without regard to function or role.
- Employees in different job titles who may or may not be in the same job group.

In this way, many of the principles set forth in Directive 307 are contrary to well-established Title VII law regarding appropriate analyses of compensation. OFCCP's reliance on PAGs is wholly without support, as courts across this country have held that although similarly situated employees need not be "identical," they must be "directly comparable to the plaintiff in all material respects. ..."[90] Indeed, OFCCP field staff have completely disregarded the Directive's mandates for determining whether compensation discrimination exists.

Directive 307 provides that compliance officers *must* address three questions:

1. Is there a measurable difference in compensation on the basis of a protected category?
2. If so, is the difference in compensation between employees who are comparable under the contractor's wage or salary system (i.e., are the employees similarly situated)?
3. Is there a legitimate (i.e., nondiscriminatory) explanation for the difference?[91]

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[88] Ibid.

[89] Ibid.

[90] *Eskridge v. Chicago Bd. of Educ*., 47 F. Supp. 3d 781, 790-91 (N.D. Ill. 2014). Although a similarly situated employee need not be "identical," *Caskey v. Colgate–Palmolive Co*., 535 F.3d 585, 592 (7th Cir. 2008), he must be "directly comparable to the plaintiff in all material respects. ..." citing *Naik v. Boehringer Ingelheim Pharm., Inc*., 627 F.3d 596, 600 (7th Cir .2010); *Lopez v. Kempthorne*, 684 F.Supp.2d 827, 856–57 (S.D. Tex. 2010) (" 'Similarly situated' employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State University College of Social Work*, 697 F.Supp.2d 831, 846–47 (S.D. Ohio 2012) (To be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position.)

[91] *See* pgs. 7–8, https://www.dol.gov/ofccp/regs/compliance/directives/Dir307_508c.pdf

Separate from OFCCP's improper use of PAGs, OFCCP compliance staff consistently fail to inquire and investigate whether jobs are *actually* comparable (i.e., are the employees at issue in fact similarly situated). Directive 307 and applicable Title VII law make clear that determinations of comparability require a detailed factual inquiry and neither job titles nor job descriptions suffice or serve as a substitute for such factual inquiry.

Moreover, even if employees are determined by OFCCP to be similarly situated, OFCCP compliance staff do not ask for or allow the employer to provide explanations of possible nondiscriminatory reasons for any pay differences. Employers consistently point out that OFCCP has failed to address questions two and three mentioned above under Directive 307 and rely instead on superficial statistical analyses to attempt to prove discrimination.

Finally, OFCCP's implementation of Directive 307 has been ineffective and unduly burdensome on contractors. Indeed, OFCCP's compensation discrimination enforcement practice of "ask burdensome questions now, explain why later" leaves contractors with an impossible choice in many compliance reviews: (1) provide the voluminous data requested and hope that OFCCP analyzes it correctly despite the Agency's unwillingness to engage in early, meaningful discussion about areas of concern, or (2) resist production and risk the well-publicized wrath of the Agency in administrative proceedings.

For these reasons, Directive 307 should be rescinded.

**2. Directive 310 (Back Pay Calculation)**

In July 2013, OFCCP issued Directive 2013-04, *Calculating Back Pay as a Part of Make-Whole Relief for Victims of Employment Discrimination* (Directive 310 or the Directive).[92] Directive 310 sets forth how OFCCP will calculate back pay to remedy allegations of discrimination under Executive Order 11246, Section 503, and VEVRAA. The Directive provides that compliance officers should normally calculate back pay using "formula relief" rather than individual relief in most cases.

Under Directive 310, formula relief is calculated by determining a total amount of back pay for an affected class of discrimination victims and then dividing that among all class eligible members, for up to a two-year period prior to the date of receipt of the Scheduling Letter and continuing until the alleged discriminatory acts are stopped.

In practice, this has led to OFCCP consistently seeking personnel activity data for a two-year period in compliance reviews regardless of the specific facts of the case. In a further break from historical practice, this two-year period is often completely divorced from a contractor's AAP year, such that OFCCP's requests regularly cover time periods that the contractor was not required to analyze as part of its annual affirmative action plan. The Directive's formulaic approach to back pay calculations also has led to less flexibility in a contractor's ability to reach agreement with the Agency during conciliation, and it requires

[92] https://www.dol.gov/ofccp/regs/compliance/directives/dir310.htm

contractors to follow litigation-like practices when trying to reach an informal resolution with OFCCP.

Directive 310 also sets out several presumptions, such as a period of unemployment for all alleged victims and a presumption of continued employment that are rebuttable by the contractor only with very specific evidence. For example, the Directive states that indicators of employment on applications will not rebut the presumption of unemployment "unless specifically and individually verified" by the contractor.[93]

The approach taken in Directive 310 means that contractors must affirmatively present additional data to the Agency to meet their burden to provide mitigating information that would reduce their potential back pay liability. In a departure from past practice, the Directive's approach also means that OFCCP no longer requests this information, leaving unsophisticated contractors unaware that any damages' calculation may be reduced by normal attrition rates and ability to find other employment.

Moreover, Directive 310 replaces the Agency's prior straightforward request for a simple rate of pay with a litany of types of earnings that may need to be considered when calculating back pay remedies. In many cases, requesting all the listed earnings information unnecessarily impedes a voluntary resolution between OFCCP and the contractor. It also requires that the contractor provide extensive additional information beyond that already provided in the compliance review.

Directive 310 makes it more difficult for a contractor to demonstrate that OFCCP's initial back pay calculations should be reduced through mitigation. Although the Directive claims to follow Title VII principles for calculating back pay, such rigorous proof requirements conflict with current case law under Title VII. Directive 310 also makes OFCCP the sole arbitrator of whether any mitigation principles will be applied to the Agency's initial conciliation demand. The overall tone of the Directive reflects a strong presumption against doing so unless a contractor produces volumes of evidence more typically used during litigation defense after liability has been established. Such an approach is misplaced and wastes precious agency and contractor resources where OFCCP is attempting to conciliate allegations of discrimination prior to actual litigation.[94]

Accordingly, Directive 310 should be rescinded.

### 3. TRICARE Enforcement Moratorium

One of the great frustrations of contractors— and subcontractors, in particular— is the ambiguous test OFCCP uses to assert its jurisdiction. In fact, many contractors and

[93] Ibid.

[94] Directive 310, like Directive 307, was issued without public notice or opportunity to comment. The recent practice of establishing substantive contractor requirements or restating the law by unilateral Directive should be reversed.

subcontractors are not even sure whether they are subject to OFCCP regulations and therefore must comply with its various rules and obligations. In one salient example of OFCCP unilaterally stretching its jurisdictional bounds, the Agency has aggressively argued that health care contractors that participate in Medicare, TRICARE, and the Federal Employee Health Benefits Program (FEHBP) are federal "subcontractors" subject to the Agency's jurisdiction.[95] Hospitals in Pennsylvania[96] and Florida[97] challenged OFCCP's position leading to protracted litigation over coverage. In May 2014, after significant pressure from stakeholders and Congress, OFCCP issued Directive 2014-01, *TRICARE Subcontractor Enforcement Activities*,[98] and withdrew the pending litigation against the two hospitals.

Directive 2014-01 established a five-year moratorium on the scheduling of a compliance review for all health care entities that participate in TRICARE as subcontractors under a prime contract between the Department of Defense TRICARE Management Activity and one of the prime managed care contractors. The moratorium expressly applies to health care providers that participate in TRICARE: (1) only as subcontractors, (2) as subcontractors under TRICARE and any Medicare program, and (3) as subcontractors under TRICARE and FEHBP or any other federal health program. TRICARE providers who hold prime contracts with a federal government agency or a separate, independent non-health care-related federal subcontract are not covered by the moratorium.

The moratorium also stated that OFCCP would provide "extensive technical assistance" to TRICARE subcontractors.[99] Specifically, OFCCP was to conduct regional and national webinars and convene listening sessions to better understand the concerns of TRICARE providers. To date, OFCCP has conducted no such efforts in this regard, leaving it woefully uninformed about the policy concerns surrounding its initial position.

The temporary enforcement moratorium is set to expire in May 2019. Far from clarifying that TRICARE providers are not "subcontractors" for purposes of OFCCP's jurisdiction, Directive 2014-01 merely provides that the moratorium was issued because of "confusion" surrounding the obligations of TRICARE providers. In addition, the moratorium does not apply to the Agency's processing of independent complaints that might be filed against TRICARE subcontractors. OFCCP should adopt a clear position that health care providers are not covered federal contractors under Executive Order 11246, as amended, Section 503, and VEVRAA merely because they provide health care coverage under TRICARE as a subcontractor.

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[95] *See* U.S. Congress, House, Committee on Education and the Workforce, Subcommittee on Workforce Protections, *Examining Recent Actions Taken by the Office of Federal Contract Compliance Programs*, 113th Congress, 1st sess., 2013. https://archive.org/stream/gov.gpo.fdsys.CHRG-113hhrg85673/CHRG-113hhrg85673_djvu.txt

[96] *OFCCP v. UMPC Braddock, UMPC McKeesport, and UPMC Southside*, DOL OAJL, No. 2007- OFC-001, No. 2007-OFC-002, and No. 2007-OFC-003 (May 29, 2009).

[97] *OFCCP v. Florida Hospital of Orlando*, DOL OALJ, No. 2009-OFC- 00002 (October 18, 2010).

[98] https://www.dol.gov/ofccp/regs/compliance/directives/Dir2014_01_508c.pdf

[99] Ibid.

## B. Revise the Scheduling Letter and Itemized Listing

Every OFCCP compliance review begins with the issuance of a Scheduling Letter and Itemized Listing, which sets forth a list of specific items that each contractor must submit to the Agency in every compliance review. This data collection is subject to regular review and approval by the Office of Management and Budget under the Paperwork Reduction Act.[100]

The 2014 Revised Scheduling Letter significantly increased the amount of data each contractor must provide in a compliance review. It added a requirement to provide individual employee-level pay data (Item 19, discussed earlier); it changed the way contractors report personnel activity data to include reporting by individual race, rather than total minority; and it added reporting requirements under Section 503 and VEVRAA. Despite this, OFCCP somehow estimated that it would take contractors slightly *less* time to provide a response to the 2014 Scheduling Letter (28.35 hours for 2008 Scheduling Letter compared with 27.9 hours for the 2014 proposal). Indeed, at the time the revisions were finalized, OFCCP argued that its decision to require employee-level compensation data was "expected to reduce the cost and burden that some commenters associated with collecting, tabulating, and analyzing data to submit in aggregate form."[101]

In practice, however, the 2014 Revised Scheduling Letter has significantly increased contractor time and expense in responding to a compliance review. In conjunction with reviewing the efficacy of Directive 307, OFCCP should reexamine the costs and benefits of its Scheduling Letter and Itemized Listing under the Paperwork Reduction Act. The Agency should also reevaluate its request in every compliance review for personnel activity data by individual race as well as employee-level compensation data.

In addition, the Agency should amend the Scheduling Letter to make it clearer that some of the requested information such as "other compensation," pay factor information, and documentation regarding compensation policies is not required. OFCCP compliance officers routinely and mistakenly claim otherwise, even though the OMB-approved Itemized Listing merely states that such documentation should or may (not shall or must) be provided.

As part of this compliance review, OFCCP should reassess its legal authority for requesting certain updated information under Section 503 and VEVRAA if a contractor is more than 6 months into its current affirmative action plan year when a Scheduling Letter is received. Because no such updates are required by the underlying regulations, the Agency's request for this information in its Itemized Listing is unjustified. Moreover, the Agency's burden estimates for both the Scheduling Letter and underlying regulations do not appear to account for the burden associated with providing these updates.

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[100] Paperwork Reduction Act of 1980 (P.L. No. 96-511), codified at 44 U.S.C. §3501, *et seq*.

[101] 79 *Fed. Reg.* No.189, at pgs. 58807-58808 (September 30, 2014). https://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=27831

## C. Engage in Policymaking to Restore Agency's Central Affirmative Action Mission

While the Chamber recognizes this administration's desire to limit additional rulemaking, our members believe that several proposals deserve OFCCP's attention even if rulemaking is required. These commonsense proposals seek to restore the Agency's focus to its historical mission and practices.

### 1. Revise compensation anti-retaliation provisions to be consistent with Title VII 'motivating factor' jurisprudence

OFCCP should reevaluate its regulations implementing Executive Order 13665, Non-Retaliation for Disclosure of Compensation Information, signed by President Barack Obama on April 8, 2014.[102] This executive order amends Section 202 of Executive Order 11246 to prohibit federal contractors from discharging or retaliating against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. OFCCP issued final regulations to implement Executive Order 13665 in September 2015, which apply to covered federal contracts and subcontracts entered into or modified after January 1, 2016.[103]

Among other provisions, OFCCP's regulations provide contractors with two defenses to an allegation that an applicant or employee was retaliated against for discussing pay: the "workplace rule" defense and "essential job functions" defense.

Under the workplace rule defense, contractors may defend actions taken against employees who have inquired about, discussed, or disclosed their pay or the pay of others if they do so pursuant to a legitimate workplace policy or practice. For example, employees who discuss pay over lunch are not immune from being disciplined for returning late from lunch if the employer has a policy or practice of imposing discipline for tardiness and consistently applies that rule to all employees whether they discuss pay or not. Importantly, this defense only applies where the workplace rule does not itself prohibit individuals from disclosing or discussing pay.[104]

OFCCP regulations take the position that the workplace rule defense, unlike the essential job functions defense, is not a complete defense but rather is subject to a mixed motive causation analysis. Under the mixed motive analysis, a contractor may still be held liable where it is shown that preventing or discouraging individuals from discussing or disclosing pay was a motivating

[102] Executive Order 13655 of April 8, 2014, Non-Retaliation for Disclosure of Compensation Information, published at 79 *Fed. Reg.* No. 70, April 11, 2014. https://www.gpo.gov/fdsys/pkg/FR-2014-04-11/pdf/2014-08426.pdf.

[103] Department of Labor, Office of Federal Contract Compliance Programs, Government Contractors, Prohibition Against Pay Secrecy Policies and Actions; Final Rule, 80 *Fed. Reg.*, No. 106, September 11, 2015. https://www.gpo.gov/fdsys/pkg/FR-2015-09-11/pdf/2015-22547.pdf

[104] The "essential job functions" defense provides contractors with a defense against alleged violations in which an employee discloses compensation information that the employee learned about because his or her essential job functions permit access to employee or applicant compensation data.

factor for the employment decision. In such a case, liability may be established despite the application of a legitimate workplace rule, although damages will be limited.

The preamble to OFCCP's regulations explains that the Agency believes the protections afforded by Executive Order 13665 are more properly analyzed as antidiscrimination protections rather than anti-retaliation protections. This is a significant distinction as the Supreme Court has repeatedly held that the standards for proving a discrimination claim differ from those used to prove a retaliation claim under Title VII of the Civil Rights Act.

Title VII's discrimination protections seek "to prevent injury to individuals based on who they are, i.e. their status" while the "anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e. their conduct."[105] Moreover, as made clear by the Supreme Court in *University of Texas Southeastern Medical Ctr. v Nassar,*[106] Title VII's antidiscrimination provisions include explicit statutory provisions providing for mixed motive claims, while the anti-retaliation provision does not. This means that retaliation claims may only be proven by showing that the protected activity was the "but for" cause of the alleged adverse action.

The Chamber believes that OFCCP's characterization of Executive Order 13655's protections is incorrect under existing Supreme Court precedent. Both the name of the executive order, which expressly characterizes the order as an "anti-retaliation" measure, and the nature of the underlying claim as one related to an individual's conduct rather than an individual's status, compel this result. Consequently, OFCCP should revise its regulations to provide that any claim under Executive Order 13665 must be analyzed in a manner consistent with the anti-retaliation provisions of Title VII, as set forth in *Nassar*.

### 2. Revise FAQs and forms associated with recently amended Section 503 and VEVRAA regulations

In 2014, OFCCP signigicantly revised its regulations implementing Section 503 and VEVRAA.[107] Among other items, the revised regulations require that covered federal contractors and subcontractors offer individuals the opportunity to provide their disability and veteran status pre- and post-offer and requires that contractors collect certain data points each affirmative action plan year, including the number of disabled and protected veteran applicants, the number of jobs opened and filled, and the number of hires who identified as individuals with disabilities and protected veterans.

In a series of frequently asked questions (FAQs) regarding the new rules, OFCCP adopted defintions of the terms "job openings," "jobs filled," and "hires" that are inconsistent with other data frequently analyzed by contractors under Executive Order 11246 and not

[105] *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (*citing McDonnell Douglas Corp. v Green*, 411 U.S. 792, 800-801 (1973)).

[106] *University of Texas Southeastern Medical Ctr. v Nassar,* 133 S. Ct. 2517 (2013).

[107] *See* notes 52 and 53.

sanctioned by the revised regulations. Specifically, OFCCP defined job opeinings and jobs filled as follows:

- Job Openings—The total number of job openings refers to the number of individual positions advertised as open in a job vacancy announcement or requisition. For example, if one job vacancy announcement or requisition includes five open positions and results in four hires, the contractor would document this as five job openings and four jobs filled.

- Jobs Filled—In the context of the data collection requirements of 60–741.44(k), "jobs filled" refers to all jobs the company filled by any means, be it through a competitive process or non-competitively, e.g., through reassignment or merit promotion. According to the FAQs, contractors should take into account both new hires into the company and those employees who were placed into new positions via promotions, transfers, and reassignments. In contrast, according to the FAQ, the number of those "hired" refers solely to those applicants (both internal and external to the contractor) who are hired through a competitive process, including promotions.

  Both competitive and non-competitive movements may qualify as "jobs filled," so long as the movement is one into a different position, rather than simply a movement within the same position. This will necessarily be a fact-based determination. So, for example, a time-driven salary increase from one "step" to the next within the same position would not be a "job filled," since there was not any movement into a new position. By contrast, if an apprentice completes a certification program and moves into a journeyman position, then such movement would be a "job filled" since it is a movement from one position to another.[108]

The definitions set forth in the subregulatory FAQs are inconsistent with similar data points regularly collected by contractors under Executive Order 11246. In particular, many contractors do not regularly collect or analyze information about noncompetitive movements, such as reassignments or merit promotions, as such analyses are not mandated by other OFCCP requirements. In addition, the Agency's position that contractors should use an individualized, fact-based analysis to determine if competitive and noncompetitive positions should be reported as "jobs filled" unnecessarily adds burden to the required data collection, with little to no benefit to the Agency's stated purpose for the required data collection. Moreover, OFCCP's approach has led to widespread confusion among contractors about the data points that are to be collected

[108] *See* OFCCP Frequently Asked Questions.
https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm#Q37
https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm#Q38
https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm#Q39

and the measures contractors should use to analyze their progress under Section 503 and VEVRAA.

OFCCP should abandon the definitions set forth in the FAQs and reconsider how it has defined these required data collection elements, both to reduce the regulatory burden on contractors and ensure consistency of application from one contractor to the next. Chamber members believe that OFCCP could achieve the purposes of the required data collection by simply examining the total number of positions filled competitively and the total number of individuals with disabilities or protected veterans selected for these positions during an affirmative action plan year. This approach would be more consistent with the analyses already performed under Executive Order 11246 and better align with the current record-keeping practices of most contractors.

OFCCP regulations also require that all federal contractors and subcontractors use a particular form to solicit disability status information from applicants and employees. The prescribed form is reviewed and approved by the Office of Management and Budget and, as a result, may not be modified in any way by federal contractors. OFCCP has said that contractors may reproduce the required form as long as the form (1) displays the OMB number and expiration date, (2) contains the text of the form without alteration, (3) uses a sans-serif font, such as Calibri or Arial, and (4) uses at least 11-pitch for font size, except for the footnote and burden statement, which must be at least 10-pitch in size.[109]

The Agency's use of a prescribed form approved by OMB has unnecessarily complicated federal contractors' efforts to collect this data from applicants and employees. First, incorporating the required form into online applicant tracking systems has proven to be administratively difficult and costly. Every time the form is changed, including when the expiration date is updated by OMB, contractors must undertake another expensive revision to their online applicant tracking systems to include the most current version of the form.

In addition, Chamber members would like OFCCP to make clear that applicants and employees can be required to indicate either their disability or veteran status or that they do not wish to self-identify as an individual with a disability or protected veteran as part of the voluntary self-identification process. The Chamber urges OFCCP to revisit its requirement that an OMB-approved form be used to collect this information; contractors should be given the flexibility to use a similar form that produces the same data. If OFCCP and OMB rules require a uniform self-identification form, we urge OFCCP to convene a task force of stakeholders to help recommend a more adaptable and user-friendly form that encourages self-identification.

### 3. Implement regulations that clearly outline investigative procedures

OFCCP enforcement efforts have increasingly become hostile audits rather than compliance reviews by a neutral enforcement agency. The Agency's lack of transparency during the compliance review process continues to frustrate contractors' voluntary compliance efforts.

[109] *See* OFCCP Frequently-Asked Questions.
https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm#Q411.

This lack of transparency also impedes a contractor's ability to explain and defend its employment practices during a compliance review.

Many contractors report that OFCCP never explains its investigative focus or the factual basis for its requests until the end of a compliance review, leaving the contractor to only guess at what types of information may aid the compliance officer's understanding during his or her review. Similarly, the Agency's requests for additional information with short turnaround times, sometimes of 5 days or less after the compliance review has been dormant for weeks, months, and sometimes years, reflect poor internal management of cases at the expense of the contracting community.

OFCCP should develop regulations establishing procedures that expressly detail the compliance review process that all compliance officers are to follow. The procedures should set forth reasonable timelines for contractor responses to Agency requests for information. Because many OFCCP compliance reviews extend for months and even years with little to no activity by the Agency, the regulations also should provide that the Agency will complete most compliance reviews within a specific time, such as 180 days, absent unusual circumstances or contractor delay. The regulations also should require that the Agency issue a predetermination notice in every review, allowing the contractor an opportunity for a written response before a NOV is issued. Such a cooperative approach to compliance would help ensure quicker and more efficient investigations.

In contrast to OFCCP's directive-driven approach, formalizing the Agency's compliance review process through notice and comment rulemaking allows contractors and other interested stakeholders to provide valuable feedback before any processes are finalized. Such an approach also provides for clear and stable expectations, while allowing for appropriate Agency discretion and flexibility. It also ensures that all OFCCP offices will be bound by the same procedural requirements, bringing more consistency to the compliance review process for national employers. This aids contractors' voluntary compliance efforts without harming OFCCP's enforcement abilities.

**4. Examine ways to minimize compliance burden on small businesses**

Executive Order 11246, as amended, broadly requires that covered contractors "will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin [and] . . . 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, sexual orientation, gender identity, or national origin."[110] Executive Order 11246 does not require the preparation of annual affirmative action plans. Instead, the order provides that covered contractors will "furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books,

[110] *See* note 15.

records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders."[111]

The requirement to prepare a written affirmative action plan is found in OFCCP's implementing regulations at 41 CFR 60-2. Section 60-2.31 of OFCCP's regulations provides that a contractor's affirmative action program must be summarized and updated annually.[112]

To reduce the regulatory burden of compliance on small businesses, OFCCP should consider modifying the requirement to prepare an annual affirmative action plan for small businesses or holders of government contracts involving less than a specified amount of money. For example, OFCCP could require that small businesses prepare affirmative action plans on a biannual basis or even every 3 years. Such an approach would not alter a contractor's nondiscrimination obligations, or even the affirmative action steps a contractor takes to address underutilization, but would reduce the need to document and analyze these items annually in a written affirmative action plan. OFCCP's scheduling process for small businesses should also be aligned with any such revised written affirmative action requirements.

Section 204 of Executive Order 11246 also provides that the "Secretary of Labor may, by rule or regulation, exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier," among other reasons.[113]

OFCCP's regulations provide that annual affirmative action plans are required whenever a company holds a federal contract or subcontract of $50,000 or more and has 50 or more employees.[114] Unlike Section 503 and VEVRAA, which provide for an indexed contract coverage amount (now at $100,000 for Section 503 and $150,000 for VEVRAA), the written AAP coverage threshold requirements under Executive Order 11246 have never been updated.[115]

OFCCP should evaluate whether updating the contract threshold amount makes sense. The Agency also should make clear that the contract thresholds are not based on aggregated small-dollar contract awards and coverage does not attach until government purchases exceed the established contract threshold on indefinite quantity or options contracts. Indeed, an ALJ in

[111] Ibid.

[112] Available at: https://www.ecfr.gov/cgi-bin/text-idx?rgn=div5;node=41%3A1.2.3.1.2.

[113] *See* note 15.

[114] *See* 41 CFR 60-2.1.

[115] In 1976, OFCCP proposed to increase the level of employees necessary to trigger an affirmative action plan requirement to 100 to mirror the employee number necessary to file an EEO-1. That proposal was not adopted. The Agency should at least consider making the employing reporting requirement 100 employees so that there is consistency in federal reporting.

an OFCCP enforcement action recently posited a rule of proportionality between the size of a business' government contract and the burden it need endure.[116] Executive Order 11246 empowers the Secretary of Labor to engage in such balancing, and the time is ripe for OFCCP to evaluate these issues.

In conjunction with this review, OFCCP should also consider exercising the discretion given to it by Executive Order 11246 to exempt coverage of subcontractors below a specified tier. Under the current scheme, any entity that provides a good or service that is "necessary" to the prime contract valued at $50,000 or more may be a covered subcontractor.

All too often, small businesses do not even know whether the goods or services they are providing are being used to fulfill a government contract. For example, a small company may sell a keyboard key to another private company that uses the keyboard key in computers sold to various entities, including, but not limited to, the federal government. When the small company is not the exclusive supplier of keyboard keys, it has no idea if its keyboard keys are necessary to its customer's contract with the federal government.

Clearer rules regarding coverage of subcontractors would benefit everyone. Businesses would be able to make more informed choices about whether certain business opportunities are worthwhile, given the significant costs of OFCCP compliance. Those that choose to do so would be more likely in compliance with the affirmative action obligations because it would be more transparent as to when those obligations applied. OFCCP would face fewer jurisdictional challenges, freeing up resources to focus on other matters. Workers would still be protected from discrimination, with the hope of enhanced affirmative action activity by those subcontractors that more clearly understand when the requirement to prepare a written affirmative action program applied.

## VI. CONCLUSION

For roughly 75 years, the federal government has correctly recognized—through various and evolving requirements—that it is critical for federal contractors to maintain diverse workplaces free from discrimination. While employers that contract with the U.S. federal government have become worldwide leaders with regard to diverse and inclusive workplaces, even today there is still a role for OFCCP to play. However, as this paper demonstrates, it is clear that OFCCP requires much-needed reform. The Chamber posits that its commonsense suggestions for reform will instill the clarity, credibility, and transparency that OFCCP desperately needs for it to effectuate its essential mission.

The Chamber looks forward to working with OFCCP and policymakers on these reforms as the debates about OFCCP's future continue to unfold.

[116] See note 69.


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