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October 28, 2011

VIA ELECTRONIC MAIL TO
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Ms. Brenda Aguilar
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Office of Federal Contract Compliance Programs
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10235
725 17th Street, NW
Washington, DC 20503

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

Dear Ms. Aguilar:

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

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

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

Statement of Interest

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

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

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

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

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

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

- the erroneous assumption that federal contractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly at the touch of a keystroke; and
- the erroneous assumption that in order to effectively carry out its enforcement responsibilities, OFCCP must, at the onset of each routine compliance evaluation, have access to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

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

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

As we explained in EEAC’s written comments to OFCCP, that agency is proposing far more than a simple “extension” of this ICR, as suggested by its PRA pre-clearance notice published in the *Federal Register* on May 12, 2011.³ More specifically, OFCCP is proposing

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

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

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

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

OFCCP's Burden Estimates Are Not Credible

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

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

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

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

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

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

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

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

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

Ms. Brenda Aguilar
October 28, 2011
Page 6 of 6

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

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

Conclusion

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

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

Sincerely,



Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Patricia A. Shiu, U.S. Department of Labor

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July 11, 2011

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

Ms. Debra A. Carr
Director, Division of Policy, Planning
and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

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

Dear Ms. Carr:

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

EEAC's Interest in the Proposed Scheduling Letter Revisions

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

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

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

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

Overview

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

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

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

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

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

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

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

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

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

Scheduling Letters

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

Itemized Listing

Item 11: Employment Transactions Data

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

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

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

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

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

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

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

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

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

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

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

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

Item 12: Compensation Data

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

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

Snapshot Date

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

Employees Covered

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

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

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

Scope and Detail of Requested Data

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

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

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

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

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

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

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

Item 13: VEVRAA Support Data

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

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

Item 8: Employment Leave Policies

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

Item 9: Collective Bargaining Agreements

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

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

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

Item 10: Goals Progress Reports

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

Conclusion

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

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

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

Ms. Debra A. Carr

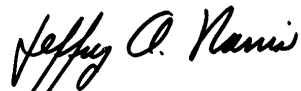
July 11, 2011

Page 10

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

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

Sincerely,

A handwritten signature in black ink that reads "Jeffrey A. Norris". The signature is written in a cursive style with a large, stylized initial "J".

Jeffrey A. Norris
President

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

EQUAL EMPLOYMENT
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July 11, 2011

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

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

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

Dear Ms. Carr:

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

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

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

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

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

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

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

STATEMENT OF INTEREST

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

EQUAL EMPLOYMENT ADVISORY COUNCIL

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

U.S. CHAMBER OF COMMERCE

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

HR POLICY ASSOCIATION

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

OVERVIEW

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

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

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

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

A CORRECT ANALYSIS OF THE NPRM'S ECONOMIC IMPACT YIELDS A TOTAL FIRST-YEAR ANNUAL COST TO PRIVATE-SECTOR EMPLOYERS OF AT LEAST \$825 MILLION, AND YEARLY COSTS THEREAFTER OF AT LEAST \$727 MILLION

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

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

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

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

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

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

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

³ See DOL-VETS Annual Federal Contractor Reporting Comparison Table, January 31, 2011, attached as Exhibit A.

⁴ See www.dol.gov/ofccp/regs/compliance/aa.htm, attached as Exhibit B.

⁵ 41 C.F.R. §§60-250.2(i), 60-250.5, 60-300.2(i), and 60-300.5. See also OFCCP "Compliance Assistance – Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended," attached as Exhibit C.

⁶ OFCCP added to this figure 257 post-secondary institutions it believes also are subject to its jurisdiction.

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

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

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

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

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

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

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

⁷ 5 U.S.C. §804(2).

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

OFCCP Has Omitted Critical Compliance Requirements From Its Economic Impact Analysis

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

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

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

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

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

sessions each year. For the required annual “all employee” meetings, that cost is simply the product of the number of employees covered by OFCCP’s requirements, multiplied by the average hourly compensation of these employees, multiplied by the length of the meeting.

DOL-VETS data from the 2010 VETS-100A Report show a total of 22,019,153 federal contractor employees in the United States. This figure is consistent with OFCCP’s “Facts on Executive Order 11246 – Affirmative Action” document, which states that in 2002 “OFCCP’s jurisdiction cover[ed] approximately 26 million” employees.⁸ BLS data from March 2011 show that the average hourly compensation rate of all employees across all occupations in private industry was \$28.10. Accordingly, if each federal contractor employee were required to participate in a mandatory annual meeting that lasted just six (6) minutes, the total economic impact would be \$61,873,820 per year (22,019,153 multiplied by \$28.10 multiplied by 0.1 or one-tenth of one hour). If the meeting lasted 30 minutes, the total economic impact would be \$309,369,100 per year. And if the meeting lasted exactly one hour, the total economic impact would be a staggering \$618,738,199 per year.

These estimates do not take into consideration the additional cost impact that would be imposed by the proposed rule’s requirement that separate meetings be held with “all executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation.” As with the general staff meeting requirement, OFCCP estimated costs for developing the materials for these meetings, but not for actually holding these meetings. BLS data from March 2011 show that the average hourly compensation rate of all management occupations in private industry was \$57.35. Using the same management-to-non-management ratio as is observed in the EEOC’s 2009 aggregate EEO-1 data, there are approximately 2,390,930 management employees in the 22,019,153 federal contractor employee population, excluding first-line supervisors who are not members of management. Accordingly, if each of these management employees were required to participate in a mandatory annual meeting that lasted just one hour, the total economic impact would be \$137,119,836 per year (2,390,930 multiplied by \$57.35 multiplied by 1). If the meeting lasted 1.5 hours the total economic impact would be \$205,679,753 per year. And if the meeting lasted two hours, the total economic impact would be \$274,239,671 per year.

Altogether, the elements entirely omitted from OFCCP’s economic impact analysis add a total at least \$544,691,633 in first year costs, and a minimum of \$446,488,934 in annual costs thereafter,⁹ *before* correcting for the several other inaccuracies within OFCCP’s economic impact analysis.

OFCCP Has Significantly Understated Time Burdens and Other Critical Parameters of Its Economic Impact Analysis

In addition to the costs omitted entirely from OFCCP’s analysis, the agency’s total cost impact estimate of \$60,670,691 is based on unfounded and unrealistically low assumptions about other parameters required for employer compliance with the proposed rule, including: (1) the number of open positions which federal contractors would be required to list with appropriate state or local

⁸ See Exhibit B.

⁹ These estimates assume the “all employee” meetings would last just 30 minutes, and the management meetings would last one hour.

employment service offices each year pursuant to 41 C.F.R. §§60-250.5 and 300.5; (2) the amount of time contractors would be required to spend annually reviewing their physical and mental job qualification standards pursuant to 41 C.F.R. §§60-250.44(c) and 300.44(c); (3) the amount of time contractors would be required to spend annually reviewing the effectiveness of their affirmative action efforts pursuant to 41 C.F.R. §§60-250.44(f)(3) and 300.44(f)(3); (4) the amount of time contractors would be required to spend annually collecting and tabulating the veterans applicant and hire data required pursuant to 41 C.F.R. §§60-250.44(k) and 300.44(k); and (5) the amount of time contractors would be required to spend annually calculating hiring benchmarks required pursuant to 41 C.F.R. §§60-250.45 and 300.45.

Mandatory Job Listings

OFCCP's cost analysis implausibly assumes that each federal contractor establishment will be required to list a total of just two (2) job openings per year with the appropriate state or local employment service. After extending this per-establishment estimate to the number of federal contractor establishments the agency believes would be required to comply with this requirement, OFCCP concludes that the entire federal contractor community would be required to list just 216,576 positions each year with state and local employment services offices across the country.

However, DOL's Job Openings and Labor Turnover Survey (BLS Series ID JTS1000000HIR) show that the average monthly new hire rate for private business establishments during the period from 2001 to present was 4.0 percent. Applying even this low turnover (or job listing) rate to the 22,019,153 employees in the federal contractor workforce results in a total of 880,766 openings per month, or 10,568,193 job openings per year. And while we acknowledge that not all of these openings would have to be listed under OFCCP's rule (because it exempts executive and top management positions from the listing requirement), the figure still is significantly greater than the 216,576 openings used by the agency in its analysis.

Similarly, in a survey conducted by EEAC which asked respondents to identify the number of job openings listed with state or local employment services offices in 2010, 42 EEAC member companies employing approximately 1,898,000 employees in the United States reported listing 183,626 job openings in 2010, for a job listing rate of roughly 9.7 percent. Applying this more realistic turnover or job listing rate, which for certain employers in certain industries is extremely low, results in a total of 2,135,858 openings per year, a figure that still understates the number of job listings federal contractors are required to submit to state and local employment service offices each year.

Nevertheless, using an estimate of 2,135,858 openings per year and OFCCP's blended hourly cost of \$36.50, and assuming that OFCCP's estimate that each job takes just 15 minutes to list is correct, the economic impact of this requirement alone would be \$19,489,703. As we explain below, however, OFCCP's proposal to force contractors to list their positions with state and local employment services offices in the "manner and format" required by each office would significantly increase the time burdens associated with this obligation.

Annual Review of Physical and Mental Qualifications

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

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

Annual Review of the Effectiveness of Outreach and Recruitment Efforts

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

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

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

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

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

Annual Calculation of Veterans Hiring Benchmarks

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

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

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

Economic Costs of the Proposal Significantly Outweigh Its Benefits

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

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

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

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

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

OFCCP Has Not Demonstrated Sufficient Need for New Regulation

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

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

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

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

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

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

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

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

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

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

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

A contractor may satisfy the mandatory job listing requirement by submitting job listings to the appropriate employment delivery system in a variety of ways, including via mail, facsimile (FAX), electronic mail, or other electronic postings.

OFCCP believes that this approach allows contractors the necessary flexibility to determine the most effective way to comply with the mandatory job listing requirement, depending on the number, timing, and location of the positions to be filled.

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

Is there a particular way contractors must list employment openings with the appropriate employment delivery system?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

OFCCP's Required Annual Review of Personnel Processes

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

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

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

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

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

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

The Annual Review of Physical and Mental Qualifications

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

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

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

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

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

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

CONCLUSION

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

Debra A. Carr
July 11, 2011
Page 23

Sincerely,



Jeffrey A. Norris
President
Equal Employment Advisory Council



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



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

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

EXHIBIT A

**ANNUAL FEDERAL CONTRACTOR REPORTING
COMPARISON TABLE
January 31, 2011**

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

Office of Federal Contract Compliance Programs (OFCCP)

Facts on Executive Order 11246 — Affirmative Action

Revised January 4, 2002

A. **OFCCP Mission Description**

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

- OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments). The Federal Government awarded more than \$179 billion tax-payer dollars in prime contracts in Fiscal Year 1995.
- OFCCP requires a contractor, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. No other Government agency conducts comparable systemic reviews of employers' employment practices to ferret out discrimination. OFCCP also investigates complaints of discrimination. In Fiscal Year 1999, OFCCP conducted 3,833 compliance reviews. Moreover, OFCCP programs prevent discrimination. Further information about the OFCCP programs may be obtained from the Internet.

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

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

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

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

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

C. **Executive Order Affirmative Action Requirements**

i. **For Supply and Service Contractors**

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

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

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

ii. **For Construction Contractors**

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

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

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

ii. **Examples of Affirmative Action Programs**

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

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

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

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

iii. **Successes**

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

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

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

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

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

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

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

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

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

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

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

Excerpts from Department's EVE awards:

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

Secretary's Opportunity 2000 Award Honoree

"When you do the right thing by people, it's usually the right thing for business."

Jim Adamson, Chief Operating Officer

United Space Alliance, Houston, TX

Oct. 1, 1998 EVE Awards

Office of Federal Contract Compliance Programs (OFCCP)

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

- [The Law](#)
- [The Regulations](#)
- [Federal Register](#)

Synopsis of Law

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

There are currently two different coverage thresholds under VEVRAA.

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

Compliance Assistance Materials

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

Quick Links

Link to Compliance resources:

- [OFCCP Compliance Assistance](#)

Links to other Departmental compliance resources:

- [Compliance Assistance](#)
- [Summary of Major DOL Laws](#)
- [Compliance Tools](#)
- [Employment Law Guide](#)