EQUAL EMPLOYMENT ADVISORY COUNCIL

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

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725 17th Street NW
Washington, DC 20503

Re: Comments of the Equal Employment Advisory Council on the EEOC's Proposed Revisions of the Employer Information (EEO-1) Report

Dear Mr. Nye:

On behalf of the Equal Employment Advisory Council (EEAC), I am pleased to submit these comments in response to the Equal Employment Opportunity Commission's (EEOC's or Commission's) proposed revision of the Employer Information (EEO-1) Report as published in the *Federal Register* on July 14, 2016.[1]

OVERVIEW OF COMMENTS

EEAC strongly opposes compensation discrimination based on protected characteristics such as sex and race. In addition, we support efforts by the EEOC and other workplace regulators to focus their limited resources in ways that effectively identify so-called bad actors. We respectfully submit, however, that by proposing that all covered employers report nearly 3 *billion* fields of data — a twenty-fold increase over the current EEO-1 form — on an "EEO-1 reported" workforce of only 76 million people, the EEOC has failed to craft an effective and efficient enforcement tool. Instead, the proposal is in direct conflict with the purposes of the Paperwork Reduction Act (PRA), which include maximizing the utility and minimizing the burden of information collected by the federal government.[2]

The EEOC had every opportunity to craft a proposal that would have been less burdensome and of greater utility in identifying unlawful pay disparities. It chose not to do so. Indeed, past experience demonstrates that collecting summary compensation data in the format proposed by the EEOC is likely to be of negligible utility in identifying pay discrimination. This experience led the National Academy of Sciences (NAS) to recommend that the EEOC conduct a pilot study of employers to evaluate both the burdens and utility of its methodology, a step which would have been entirely consistent with both the letter and

[1] Equal Employment Opportunity Commission, Agency Information Collection Activities; Notice for Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479. (Current Proposal).
[2] See 44 U.S.C. § 3501 (1), (2).

the spirit of the PRA. The EEOC ignored this recommendation and refused to conduct such a study, candidly admitting that it didn't want to ask your office for the required PRA approval.

As EEAC's comments will demonstrate, the EEOC's proposed revisions do not warrant PRA approval. Instead, the Office of Information and Regulatory Affairs (OIRA) should disapprove this proposal and return it to the EEOC until the Commission has complied with the recommendations of the National Academy of Sciences report the EEOC itself commissioned. While we do not support these proposed revisions for the reasons stated in these comments, should OIRA decide to clear them, we urge you to require the EEOC to consider alternative methods of measuring pay, which would significantly reduce the burdens on employers and increase the utility of the data collected.

STATEMENT OF INTEREST

EEAC is the nation's largest nonprofit association of employers dedicated to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC's membership includes approximately 260 of the nation's leading and largest employers, all of which are firmly committed to the principles and practice of workplace nondiscrimination. All of our members are employers subject to the compliance, recordkeeping, and reporting requirements imposed by federal statutes and regulations prohibiting workplace discrimination. In addition, 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, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations.

EEAC has a long track record of working closely with the EEOC to ensure that the EEO-1 Report maintains its relevance and utility to both the Commission and the employers who file it. Over the years, EEAC frequently has been the only organization to submit public comments in response to the EEOC's invitations for stakeholder input on the burdens and utility of the EEO-1 Report under the federal Paperwork Reduction Act.[3] And for more than four decades, we have worked and communicated less formally with Commission staff to resolve practical concerns regarding the EEO-1 reporting process in ways that benefitted both the Commission and employers.

EEAC also has a long history of researching and providing feedback on other federal agency initiatives to collect compensation data from employers on a broader scale, including those implemented or proposed by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). These include OFCCP's Equal Opportunity Survey, which collected summary compensation data from a sample of federal contractors during a five-

[3] See, for example, the supporting documents maintained by the Office of Management and Budget related to EEOC's 2014, 2011, and 2009 information collection requests for approval of the EEO-1 Report, *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201412-3046-001, http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-3046-003, and http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=200901-3046-001.

year period between 2000 and 2004,[4] as well as OFCCP's more recent proposed Equal Pay Report.[5]

EEOC Is Proposing To Collect a Bottom-of-Range Estimate of 3 Billion Cells of Data Every Year From Covered Employers

Census data indicate that the size of the workforce employed by employers that would be required to report compensation and hours worked data under the proposed revision is about 76 million employees.[6] But to summarize the compensation paid to these 76 million employees, and using a bottom-of-range estimate of the total number of employers who would be required to complete one of the "full-grid" EEO-1 Report types, the EEOC has constructed a compensation data collection tool that would require employers to complete, or review and skip over, nearly *3 billion* fields of data.

The EEOC does not acknowledge anywhere in its proposal that it would, in fact, require covered employers to submit between 3 billion and 5 billion data points every year. In fact, the EEOC had not publicly released the number of "full-grid" EEO-1 Reports that employers filed until EEAC requested the information as part of our efforts to respond to the agency's proposal.[7] According to the EEOC, 1,482,810 EEO-1 Reports were filed in 2014, 810,390 of which were "full-grid" reports, and 672,420 of which were "Type 6" summary reports. As many as 9,129 reports were filed by smaller employers that would not be subject to the new compensation and hours worked reporting requirements.

The existing version of the full-grid EEO-1 Report contains 180 data fields. The EEOC's proposal would expand the full-grid report from 180 data fields to 3,660 data fields, with 1,830 of these fields containing employee headcount data for 12 new pay bands within each job category, and an additional 1,830 fields containing hours worked data for the employees reported in each of the first 1,830 data fields.

If the same number of covered employers continued to file EEO-1 Reports in the same number and in the same manner as they did in 2014, then in 2018, these employers would be required to complete, or review and skip over, 2,932,615,260 data fields on their

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[4] OFCCP formally repealed the EO Survey in 2006. Office of Federal Contract Compliance Programs, Final Rule, Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors, Equal Opportunity Survey, 71 Fed. Reg. 53,032 (Sept. 8, 2006).

[5] Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking, Government Contractors, Requirement to Report Summary Data on Employee Classification, 79 Fed. Reg. 46,561 (Aug. 8, 2014).

[6] The civilian non-institutionalized workforce consists of approximately 159 million workers. Bureau of Labor Statistics, Employment Situation Summary Table A. Household data, seasonally adjusted, *available at* http://www.bls.gov/news.release/empsit.a.htm. According to census data, about 76 million workers are employed by employers with 100 or more employees. Census Bureau, Statistics of U.S. Businesses Employment and Payroll Summary: 2012 (released Feb. 2015), *available at* https://www.census.gov/content/dam/Census/library/publications/2015/econ/g12-susb.pdf.

[7] Letter from Carol R. Miaskoff, Acting Associate Legal Counsel, *Equal Employment Opportunity Commission*, to Joseph S. Lakis, President, *Equal Employment Advisory Council* (Feb. 18, 2016), *available (redacted)* at https://www.eeoc.gov/eeoc/foia/letters/2016/title_vii_revision_eeo1_report_2_18.html.

EEO-1 Reports (801,261 full-grid reports multiplied by 3,660 data cells per report).[8] The Commission does not — and cannot — dispute the magnitude of this bottom-of-range estimate.

We have repeatedly questioned whether forcing employers to complete or skip over nearly 3 billion data cells each year for an EEO-1 reported covered workforce of approximately 76 million people is an effective or efficient reporting framework for any purpose. And while the Commission has increased its estimate of this proposal's annual burden — from an unrealistically low $9.7 million to $53.5 million — it has not seriously considered any alternatives that would significantly reduce the number of EEO-1 data fields to something less than 38 separate fields for each individual employee in the entire EEO-1 reported workforce.

This analysis also reveals that the vast majority of these data cells — and by vast majority we mean in the billions — will be zero, even when aggregated across the entire workforce. The EEOC tacitly acknowledges this, stating that, "No EEO-1 filers enter data in every cell, so basing the annual PRA burden on the total number of cells on the EEO-1 form would be inaccurate." However, what the EEOC glosses over is that employers can't ignore the 3,660 data fields on each form — instead they must navigate through them, determining whether each cell requires some entry (not to mention review) of data for the specific race/ethnicity, gender, job category, and pay band that corresponds to that cell. For the overwhelming majority of employers that use the EEOC's on-line portal, simply searching for the right fields to fill in will take time — and it will take considerably more time to find the proper fields among 3,660 choices than it will among the existing 180 choices.

Employers that use the data file upload option for filing their EEO-1s are not relieved of this burden either, as the EEOC seems to suggest by heavily relying on the availability and usage of Human Resources Information Systems (HRIS) and other software solutions in its burden estimate. Even if an employer utilizes an information system that includes all relevant data, and our members report that few if any employers are in such a position today, the simple fact is that no employer will simply transfer data from its HRIS or other system to the EEOC without taking the time to review its data for accuracy and completeness. This is especially true for a government form that is filed *under penalty of perjury*. Part of this review is an examination of whether the correct data is correctly entered into each of the 3,660 data fields and, at some stage of the process, it is likely that the employer will review a hard copy, or its electronic equivalent, of each full-grid report. Even if employers will not be required to manually enter a zero into each of the billions of empty data fields, they will be required to spend time locating and verifying that the correct fields are being utilized and that the correct data are reported in each field.

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[8] In our April 1, 2016, comments to the EEOC we stated that the total number of data fields would be up to 2,966,027,400, acknowledging that we did not know the number of reports filed by smaller employers that would not be subject to the new reporting requirements for compensation and hours worked. For purposes of our current analysis, we assume 9,129 establishment reports will be filed by 6,260 filers not subject to the compensation and hours worked requirements based on the EEOC's Paperwork Reduction Act statement. See Current Proposal, 81 Fed. Reg. at 45,496 n.118.

As one example of how the EEOC could cut the reporting burden in half, we support the NAS recommendation that the EEOC not collect pay information based on W-2 wages. If an alternative such as base pay or annualized compensation is used, there would be no need to collect information on hours worked, immediately removing one-half (1,830) of the data fields from the proposed report without any decrease in the utility of the data it collects. In addition, by not measuring compensation using W-2 data, employers would not need to construct ways for different information systems to communicate with each other. While the EEOC's proposal does describe why it prefers collecting W-2 wages to base pay or annualized compensation, it does not perform any sort of cost-benefit analysis related to the collection of pay information based on W-2 wages. Again, a proper pilot study would enable the EEOC to test more than one methodology, measure the utility of data collected, and accurately evaluate respondent burden.

OMB Should Require the EEOC To Adhere To the Recommendations Made in the NAS Report

In 2010, President Obama's National Equal Pay Task Force recommended that the EEOC engage the NAS to "conduct a study assessing how to most effectively collect pay data to support its wage discrimination law enforcement efforts."[9] This recommendation led to a NAS panel report that reviewed options and made several important recommendations regarding actions that the EEOC, OFCCP, and other agencies should take before implementing a new compensation data collection instrument. The report discussed numerous issues relevant to the development of any data collection tool that would collect compensation data from private-sector employers. As summarized below, the Commission has for the most part disregarded the NAS panel's recommendations. OMB should withhold approval of the EEOC's proposed revisions until the Commission complies with the NAS panel's recommendations.

NAS Recommendation	EEOC's Initial Proposal	EEOC's Current Proposal
1. The EEOC should prepare a **comprehensive plan** for use of earnings data before initiating any data collection.	While the proposal briefly states that enforcement agencies have consulted on how EEO-1 data might be used in enforcement and that development of software tools and guidance is also anticipated, no comprehensive plan has been presented.	No comprehensive plan has been presented. However, the proposal states that the EEOC's primary goal is to focus investigations and employer information requests when a charge of pay discrimination is raised. The EEOC did not address the NAS panel's primary concerns about use of pay data without a comprehensive plan.

[9] Equal Employment Opportunity Commission, Proposed Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5114 (February 1, 2016) (Original Proposal).

NAS Recommendation	EEOC's Initial Proposal	EEOC's Current Proposal
2. After completing a comprehensive plan a **pilot study** should test the collection instrument and plan for the use of data. An independent contractor should conduct the study and measure the resulting data quality, fitness for use, cost, and respondent burden.	While a "pilot study" was conducted, it was conducted before development of a comprehensive plan and **did not** test the plan for use of data. The study **did not** use actual data collected from employers, **did not** examine cost or respondent burden, and **did not** determine fitness for use.	The EEOC claims that its use of "synthetic data" was "real." However, it does not and cannot assess whether its methodology will allow it to efficiently target enforcement resources, focus investigations, develop information requests, or assess responded burden because synthetic data is not capable of measuring real-world impacts.
3. The EEOC should **enhance its capacity** to summarize, analyze, and protect earnings data.	Not addressed.	Not addressed.
4. The EEOC should collect data on **rates of pay**, not actual earnings or pay bands, in a manner that permits calculation of both central tendency and dispersion.	Rejected.	Rejected.
5. The EEOC should consider implementing data protection techniques to **protect the confidentiality** of the data.	Referenced in passing in a footnote.	Not addressed (not even in a footnote).
6. The EEOC should **seek legislation** that would increase the ability of the agency to protect confidential data.	Not addressed.	Not addressed.

The EEOC's response to each of these recommendations is discussed in turn.

THE COMMISSION MUST ARTICULATE A COMPREHENSIVE PLAN FOR THE USE OF COMPENSATION DATA BEFORE AN APPROPRIATE DATA COLLECTION TOOL CAN BE DEVELOPED

The first recommendation of the NAS panel was for the EEOC, operating in conjunction with the Labor Department's Office of Federal Contract Compliance Programs

and the Civil Rights Division of the Department of Justice (DOJ), to "prepare a comprehensive plan for the use of earnings data before initiating any data collection."[10] The NAS panel made this recommendation after observing that:

> [T]here is, at present, no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies. The main purpose for which the wage data would be collected, as articulated to the panel by EEOC and OFCCP representatives, is for targeting employers for investigation regarding their compliance with antidiscrimination laws[.] But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency.[11]

After reviewing OFCCP's 2011 Advanced Notice of Proposed Rulemaking regarding the development of a compensation data collection tool:

> [T]he panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into compliance programs, for which the triggers for the EEOC and DOJ have primarily been a complaint process that has generated relatively few complaints about pay matters.[12]

Finally, the panel observed that, "[u]nless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to determine, with precision, the actual burden on employers and the probable costs and benefits of the collection."[13]

The EEOC's original proposal acknowledges this recommendation, and in response stated:

> Similarly, the NAS Report recommended that the federal EEO enforcement agencies develop a coordinated plan for using compensation data. In the course of developing this EEO-1 proposal, the EEOC and OFCCP together consulted with the Department of Justice, focusing on how EEO-1 pay data would be used to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further examination. The EEOC and OFCCP plan to develop statistical tools that would be available to staff on their computers, to utilize the EEO-1 pay data for these purposes. They also anticipate developing software tools and guidance for stakeholders to support analysis of aggregated EEO-1 data. Finally, the EEOC and OFCCP anticipate that the process of reporting pay data may

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[10] National Research Council of the National Academies, *Collecting Compensation Data From Employers* 2, 87 (2012) (hereinafter "NAS Report").
[11] NAS Report at 2.
[12] *Id.*
[13] *Id.*

> encourage employers to self-monitor and comply voluntarily if they uncover pay inequities.[14]
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> The EEOC's original proposal also stated:
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> The EEOC and OFCCP plan to develop a software tool that will allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing the firm's or establishment's data to aggregate industry or metropolitan-area data. This application would highlight statistics of interest.[15]

These statements fall far short of the "comprehensive plan" unequivocally recommended by the NAS panel. Indeed, they serve as little more than the general statement of purpose criticized by the NAS panel in the first place.

In its present proposal, the EEOC does not directly address the issue of developing a comprehensive plan at all.[16] However, it does include a discussion of how the EEOC will use reported data. This discussion reveals that the EEOC apparently no longer intends to use the reported data to target employers for investigation. Instead, the proposal states that the data will be used, after receiving a charge of discrimination, to "decide how to focus the investigation and what information to request from the employer." Further, the EEOC concludes that statistical tests "provide insights that are useful in developing a request for information or deciding whether an investigation of a charge should have a more limited scope."[17]

While we are aware of no data showing the number of employers alleged to have engaged in compensation discrimination annually, the NAS report described the rate of compensation discrimination charges as "relatively few."[18] This is consistent with EEOC's reported data that show pay discrimination charges account for a relatively small percentage of all Title VII charges, and that all Equal Pay Act charges combined account for approximately one percent of total charges filed with the agency.[19] Further, as with all charges filed with the EEOC, most are non-meritorious. In FY 2015, 67 percent of Title VII charges and almost 64 percent of EPA cases were closed with a finding of no reasonable cause.[20]

Given the small number of charges alleging pay discrimination and the EEOC's new stated plan that the primary use of the pay data will be to frame those charge investigations, we are left wondering why the EEOC has chosen an approach that will require covered

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[14] Original Proposal, 81 Fed. Reg. 5115.
[15] Original Proposal, 81 Fed. Reg. 5118 (footnote omitted).
[16] In fact, the Department of Justice isn't even mentioned in the *Federal Register* notice.
[17] Current Proposal, 81 Fed. Reg. at 45,490.
[18] NAS Report at 87.
[19] For data on the number of wage discrimination charges filed under Title VII and other nondiscrimination laws, see https://www.eeoc.gov/eeoc/statistics/enforcement/bases_by_issue.cfm.
[20] For Title VII charge resolution statistics, see https://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm. For EPA charge resolution statistics, see https://www.eeoc.gov/eeoc/statistics/enforcement/epa.cfm.

employers to annually report nearly 3 billion data fields for approximately 76 million employees working in roughly 800,000 establishments.

A MEANINGFUL PILOT STUDY IS ESSENTIAL BEFORE PROCEEDING

One of the most important recommendations made by the NAS panel was the need to conduct a pilot study before proceeding with a new compensation data collection mandate. Specifically, the NAS panel stated that the enforcement agencies "should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent contractor charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost, and respondent burden."[21]

The EEOC states that it commissioned an independent pilot study to identify the most efficient means to collect pay data. However, the pilot study commissioned by the EEOC is wholly inadequate as *it did not analyze any compensation data collected from actual employers*. It also failed to assess the utility of data collected and made no attempt to understand the actual burdens imposed on employers by the proposed collection tool.

In the 109-page final report prepared by Sage Computing, there is no discussion of a pilot study that used actual employer data, no discussion of a pilot study that examined the time for employers to compile and submit actual data, and no discussion of a pilot study that analyzed collected data for use in enforcement. Astonishingly, the Sage report discussion of employer burdens is less than one page long, and no more than a handful of private-sector employers were contacted to gather this information. It also implies that the limited data Sage did receive simply did not enable it to provide any meaningful estimates of the proposal's true burdens.

Why didn't Sage reach out to a representative sample of employers to help answer any of these questions? Incredibly, according to a footnote in the Commission's original proposal, it was because doing so would have required the EEOC to seek OMB's approval: Footnote 17 states, "Synthetic pay data was used because conducting a test survey of nine or more companies would require [Paperwork Reduction Act] Approval."[22] In other words, the EEOC made a conscious decision to forgo a rigorous pilot test using actual employers and actual employer data because it didn't want to ask OMB for permission to conduct the very pilot study specifically recommended by the NAS panel. This is plainly inconsistent with both the letter and spirit of the Paperwork Reduction Act.

In our previous comments to the EEOC, we recommended that the Commission seek OMB approval for a pilot study involving a sufficient number of employers of different sizes, and with different employee populations, to generate data that would yield accurate and meaningful estimates of the proposed revisions' burdens and utility. We also recommended that the EEOC test alternate versions of its proposal so that meaningful comparisons of

[21] NAS Report at 88.
[22] Original Proposal, 81 Fed. Reg. at 5114 n.17.

burden and utility could be performed, published, and evaluated by all interested stakeholders.

The EEOC did not address our concerns and recommendations, other than to defend its synthetic data as "real."[23] But the EEOC does not and cannot show how its "real" synthetic data helped target employers for enforcement or develop information requests for employers who have been charged with pay discrimination. Nor can the EEOC derive any information about employer burdens related to its "real" data.

Given the recommendations of the NAS panel and the history of the federal government's use of compensation data to target employers, which is discussed more fully below, OMB should reject the EEOC's proposed revisions and require the EEOC to conduct a rigorous pilot test before re-submitting a similar compensation data collection proposal for PRA approval.

THE EEOC HAS NOT ADDRESSED QUESTIONS REGARDING ITS CAPACITY TO PROCESS AND PROTECT COMPENSATION DATA

The third recommendation by the NAS panel was for the EEOC to enhance its capacity to summarize, analyze, and protect earnings data. As described by the NAS panel, the EEOC "has a small and lightly resourced data collection and analytical program that has traditionally been focused nearly exclusively on collecting employment data, developing summary statistics, and assessing individual employer compliance through the means of rather straightforward statistical tests."[24] For this reason, the panel recommended that more be done to "prepare the ground prior to commencing any data collection."[25]

While the Sage report provides very general estimates of burdens that might be imposed on the EEOC should it expand the EEO-1 reporting requirement as proposed, the proposal does not indicate that any efforts have been made by the Commission to enhance its capacity to process, let alone analyze, the significant increase in reported data.

ANNUALIZED COMPENSATION OR BASE RATES OF PAY ARE MORE APPROPRIATE THAN W-2 WAGES FOR THIS REPORTING REQUIREMENT

The NAS panel recommended that the EEOC collect data based on rates of pay, not actual earnings or pay bands. The EEOC rejects this recommendation and would require employers to report their establishment-level headcount and hours worked data using *both* actual earnings *and* pay bands. More specifically, covered employers would be required to report headcount and hours worked data by race/ethnicity and gender in 12 new *pay bands* within each of the existing 10 EEO-1 job categories using each employee's W-2 wages (*i.e.*, actual earnings) to determine the pay band in which the employee would be reported.

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[23] See Current Proposal, 81 Fed. Reg. at 45,490.
[24] NAS Report at 3-4.
[25] NAS Report at 3.

Collecting W-2 wages is likely to be problematic, however. First, W-2 wages are among the measures of compensation least likely to reflect discriminatory practices, given that they reflect a mixture of employer and employee decisions. They therefore are a poor choice if the Commission is seeking to maximize the utility of data it intends to collect to find evidence of employer discrimination. Second, it is significantly more burdensome and difficult for employers to report W-2 wages than it is for them to report annualized compensation or base rate of pay.

More specifically, W-2 wages are a poor choice for this reporting requirement because they reflect numerous components driven primarily by the choices of individual employees and other factors that have no bearing on the employer's decision as to how much an employee earns. These include, but are not limited to: parking stipends, mass transit stipends, relocation and travel stipends, military stipends, expense reimbursements, 401(k) contributions, certain insurance premiums, sick pay, severance payments, back wages, deferred compensation, and profit sharing.

Reporting W-2 wages also conflicts with the single-point-in-time "snapshot" nature of the EEO-1 Report. Whereas employers report each employee's EEO-1 job category as of the specific date selected within the reporting window, the proposed revisions would have employers also report an entire year's worth of each employee's earnings, at least for those employees who had been with the employer for an entire 12-month period. For employees who changed EEO-1 categories during the prior year, their EEO-1 category on the snapshot date might not match their prior year's earnings, skewing the aggregate data and inviting inaccurate inferences and conclusions. We submit that rates of pay or annualized salary would correct for this potential mismatch, as they would be drawn from the same snapshot date as the EEO-1 job category.

Using rates of pay or annualized compensation to determine pay band placement also would reduce the burden on employers because pay *rates* are typically stored in the same human resources information system in which current EEO-1 Report data are stored, whereas *wages earned* data typically are stored in separate payroll systems, requiring covered employers to retrieve, analyze, tabulate, and reconcile data from entirely separate systems at significant difficulty, burden, and expense. In addition, reporting by pay rate would remove the requirement to report hours worked, which would effectively halve the burden imposed on employers by the proposed revisions.

Importantly, the NAS panel also explicitly recommended collecting data on rates of pay, not actual earnings or pay bands. Reporting by pay rate is consistent with the recommendation of the NAS panel that enforcement agencies should evaluate pay in the manner in which employers actually look at compensation. Rates of pay thus provide better data points to evaluate compensation for indicators of unlawful discrimination.

An Overinclusive Definition of Compensation Will Not Help Direct Enforcement Resources or Identify Meaningful "Statistics of Interest"

At the March 16, 2016, public hearing the EEOC held on its proposal, some witnesses urged the agency to adhere to its proposed measure of compensation utilizing W-

2 wages because W-2 wages are among the most comprehensive measures of compensation.[26] One argument raised in favor of using a comprehensive measure of compensation is that it will catch employers engaged in a variety of unlawful practices, such as awarding overtime, bonuses, or stock options in a discriminatory manner, that otherwise would not be identified using base pay or annualized compensation. This is the approach adopted by the EEOC in its present proposal.

While we understand the desire to use a comprehensive measure in order to ensure that no component of compensation is hidden or overlooked, using a comprehensive measure of pay such as W-2 wages will only serve to obfuscate the most important elements of pay. As noted above, W-2 wages are impacted significantly by decisions not made by employers, such as whether an employee should max-out his or her 401(k) contribution or what health care plan to sign-up for. In addition, W-2 wages also include many components that are not necessarily best analyzed in the aggregate to detect potential discrimination.

As noted in one commentary on the Commission's original proposal, "[b]ecause the decision-making process varies across different forms of compensation (*e.g.*, base pay versus bonus), it is more appropriate to model each type of pay individually and not in the aggregate."[27] In other words, a rogue manager with a discriminatory practice of paying one group of workers less based on sex or race will be harder to identify if base pay is included with numerous other components of total compensation set by different officials. The simple fact is that if the EEOC wants its pay data collection tool to show more meaningful pay differences, then it must limit the components by which compensation is evaluated. Like the NAS panel, we suggest base pay or annualized compensation for this purpose.

OFCCP's experience indicates that even when obtaining a very detailed breakdown of individual compensation information, meaningful pay disparities are hard to find. More specifically, from fiscal year 2010 to the present, OFCCP has conducted more than 24,000 compliance reviews covering nearly 10 million employees, but in only 30 of those reviews has it identified a potential systemic pay violation. The table below shows the data for each year from 2010 to the present, along with totals for two periods: (1) 2010 to the present; and (2) 2004 (the year EEAC first started collecting enforcement data) to the present.

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[26] See, for example, written testimony of Emily J. Martin, National Women's Law Center, *available at* http://www.eeoc.gov/eeoc/meetings/3-16-16/martin.cfm.

[27] Gurkan Ay, Ph.D., *et al*., *Interpreting EEOC's Equal Pay Data Statistical Tests*, Law 360 (Feb. 10, 2016).

Fiscal Year	Compliance Evaluations	Conciliation or Consent Agreements & Financial Settlements	Flagged for Pay or Salary Violations	Flagged for Systemic Violations
FY2010	4,942	923	17	7
FY2011	4,007	1,109	29	4
FY2012	4,005	1,330	38	0
FY2013	4,100	1,135	24	2
FY2014	3,839	570	11	8
FY2015	2,602	467	7	4
FY2016*	603	148	10	5
FY2010-Present	24,098	5,682	136	30
FY2004-Present	46,768	8,156	171	42

* FY2016 data include all updates made to OFCCP enforcement data through March 14, 2016.[28]

The self-evident conclusion from these figures is that even when armed with very detailed compensation data — indeed, far more detailed data than the EEOC is proposing to collect — OFCCP has not found many instances of unlawful pay practices. It is hard to see how less detailed compensation data will produce more meaningful results.

THE PROPOSAL DOES NOT APPROPRIATELY ADDRESS CONFIDENTIALITY CONCERNS OF EITHER EMPLOYEES OR EMPLOYERS

Many employers view the data reported on the current EEO-1 Reports to be confidential and proprietary. These concerns will only be heightened by revising EEO-1 Reports to include data related to compensation and hours worked. In addition to employers' confidentiality concerns, the Commission's proposal raises significant concerns that individually identifiable pay data will be publicly disclosed. As described in more detail below, these concerns have been recognized by the NAS panel, the Sage report, employer stakeholders, and others. While the preamble to the EEOC's original proposal states that the Commission intends to address some of these concerns, it has not. OMB should require the EEOC to commit to fully protecting data confidentiality before proceeding with its proposal.

Current Reporting Does Not Adequately Protect Individually Identifiable Data

A review of current EEOC practices indicates that the Commission does not prioritize protecting individually identifiable data. This concern will be significantly heightened if pay data are collected on the EEO-1 Report and aggregated for public disclosure.

[28] We attempted to update this chart with data taken from the OFCCP enforcement database on August 10, 2016. However, the dataset available from OFCCP's website at that time listed no systemic violations from FY 2011 through FY 2016. Rather than use obviously flawed data, we repeat here data we updated for our earlier comments in March.

CURRENT AGGREGATED DATA REVEALS INDIVIDUAL CHARACTERISTICS

In the instructions to the current EEO-1 Report, the EEOC provides language that employers may use to notify employees regarding the voluntary nature of self-identification of demographic information. In part, that statement says, "The information obtained will be kept confidential .... When reported, data will not identify any specific individual."[29] However, currently reported aggregate data make it possible to discern some individually identifying data.

The EEOC collects and aggregates EEO-1 data and makes aggregated data publicly available on its website.[30] The public may search nationally aggregated EEO-1 data using the North American Industry Classification System (NAICS) code down to the five-digit NAICS industry detail. Broader searches by two-, three-, and four-digit NAICS codes are also possible. The EEOC also makes geographical aggregates and industry aggregates available, but only at the two- and three-digit levels. While aggregating data will mask individually identifiable data points for many, or even most, employees, it will not mask all personally identifiable information.

This is easily shown by a casual search of the EEOC's 2014 data. The EEOC's data shows that in the District of Columbia, employers identifying by NAICS two-digit code 72 (Accommodation and Food Services) employed 24,585 employees. However, in looking at these data, there are several instances where very small numbers are reported that could be used to reveal personally identifiable information.

Of the reported data, only one woman is identified in the EEO-1 job category of technician. Looking further, we learn that she is white. The same data set also reveals a single Asian male in the job category of Executive/Senior Level Officials and Managers. What's more, in nearly every job category the data reported for American Indians and those identifying as Native Hawaiian are very small. And if the Commission's proposed revisions are approved, it would be possible to determine not only how many hours these individuals worked each year, but also what bracket their total earnings fell within.

This trend is seen in nearly all EEOC aggregate datasets.

EEOC'S DATA SUPPRESSION RULES CURRENTLY DO NOT PROTECT AGAINST DISCLOSURE OF INDIVIDUALLY IDENTIFIABLE INFORMATION

While EEOC has not detailed the steps it takes to protect individually identifiable data, the NAS panel report provides a summary. After noting that the EEOC publishes aggregate EEO-1 data by geographic area and industry group, the report summarizes the steps that the EEOC takes to protect individually identifiable data as follows:

> In releasing aggregated data of private employers collected from annual EEO-1 surveys, the EEOC uses a data suppression rule that is quite similar to the rule used

[29] See EEO-1 Instruction Booklet at 5.
[30] See http://www.eeoc.gov/eeoc/statistics/employment/index.cfm.

> by other government agencies for statistical data based on information collected from employers . . . . The EEOC suppression rule is triggered when it meets the two primary suppression stipulations: (1) the group has three or fewer employees, or (2) one employer makes up at least 80 percent of the group employment in the aggregate.
>
> In applying the suppression rules to industry group or geography entity or any combination of aggregates, the EEOC withholds any group's numbers if the group (an industry or a geography entity or an industry-by-geography group, etc.) contains fewer than three firms (represented by the presence of any number of establishment(s) of an individual firm within the group) or if any one firm in the group (represented by the total numbers of all the establishment(s) of the same firm within the given group) constitutes more than 80 percent of the totals.
>
> Unlike some other federal agencies, EEOC does not withhold aggregated data beyond its two primary suppression rules. There are no secondary suppression rules, and the agency does not further screen the aggregated data if the data have passed the fewer-than-three rule test.[31]

While not a model of clarity, this summary appears to say that the EEOC does not make any additional effort to suppress aggregated EEO-1 Report data even if that data tends to identify particular individuals, so long as the particular group includes three or more employers and no single employer's employees account for more than 80 percent of the total group.

Further, when the EEOC in the past has sought approval of the EEO-1 Report from the Office of Management and Budget, it has not focused on individually identifiable information. Instead, it has represented that, "All reports and information from individual reports are subject to the confidentiality provisions of … Title VII, and may not be made public by EEOC prior to the institution of any proceeding under Title VII. However, aggregate data may be made public in a manner so as *not to reveal any particular employer's statistics*" (emphasis added).[32]

In its present submission, the EEOC has used different language, instead stating, "The EEOC may publish aggregated data but only in a manner that *does not reveal any particular respondent's information*" (emphasis added).[33] This language change comes with no explanation and we are left to assume that the EEOC has no plans to further protect individually identifiable information.

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[31] NAS Report at 78.
[32] See Supporting Statement, Recordkeeping and Reporting Requirements for Employer Information Report (EEO-1) (Oct. 23, 2014), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201412-3046-001.
[33] Supporting Statement, Recordkeeping and Reporting Requirements for Employer Information Report (EEO-1) (Jul. 14, 2016), *available* at http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201607-3046-001.

PROPOSED EXPANSION OF THE EEO-1 REPORT WILL SIGNIFICANTLY INCREASE THE POTENTIAL DISCLOSURE OF PERSONALLY IDENTIFIABLE SENSITIVE INFORMATION

As described above, even aggregations of the data currently collected reveal a significant amount of data fields populated by very low numbers that make individual identification possible. Dividing job groups into 12 different pay bands will multiply this problem considerably. When small numbers are present and disclosed, it may be relatively easy to discern the pay band of particular individuals simply based on their demographics, state, or statistical area.

Unfortunately, we cannot estimate the frequency with which low numbers will be reported, but our experience with the current reporting regime indicates it will be significant. Many individuals view information about their compensation to be much more sensitive than information about their race or gender. Perhaps this is why the EEOC has regularly represented to OMB that the current EEO-1 reporting requirement "does not solicit any information of a sensitive nature from respondents."[34] In its current proposal, the Commission has changed its representation, instead saying that "no employee's personal information will be reported."[35] However, unless the Commission changes its practices, it will be possible to discern sensitive pay information of potentially tens of thousands of employees.

EEOC HAS NOT PROPERLY ADDRESSED THESE WELL-KNOWN CONCERNS ABOUT DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION

As noted above, the NAS panel summarizes the EEOC's current process and then suggests that additional data protection techniques may be appropriate, such as "adding noise and controlled tabular adjustment."[36] The panel report then observes that, "Creating publicly available data products that are statistically valid and in which confidential data are protected is a complicated process. The best procedure to use depends upon the types of data and their intended purposes, as well as on the risks of disclosure."[37] The report concludes with the following recommendation:

> [T]he agency should consider implementing appropriate data protection techniques, such as data perturbation and the generation of synthetic data, to protect the confidentiality of the data, and it should also consider supporting research for the development of these applications.[38]

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[34] See Supporting Statement, Recordkeeping and Reporting Requirements for Employer Information Report (EEO-1) (Oct. 23, 2014), *available at* http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201412-3046-001.
[35] Supporting Statement, Recordkeeping and Reporting Requirements for Employer Information Report (EEO-1) (Jul. 14, 2016), *available* at: http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201607-3046-001.
[36] NAS Report at 79.
[37] NAS Report at 79-80.
[38] NAS Report at 91.

The Commission's original proposal states that the EEOC has "balanced enforcement objectives with the burden and confidentiality concerns of respondents."[39] However, the original proposal addressed concerns regarding confidentiality of individually identifiable data in only two ways. First, the EEOC stated that increased confidentiality is one of the reasons it is requiring the reporting of data in pay bands. However, as shown above, even reporting data only in pay bands and releasing only aggregate data will result in publishing a substantial amount of highly sensitive, individually identifiable pay data.

The Commission acknowledged this in a footnote, stating that the "EEOC intends to re-examine the rules for testing statistical confidentiality for publishing aggregate data to make certain that tables with small cell-counts are not made public."[40] While this is a good first step, the EEOC should disclose the specific steps it is considering taking and invite public comment on those processes to ensure they sufficiently address the concerns regarding disclosure of personally identifying information without imposing further unintended consequences. In its current proposal, the EEOC has not revisited this issue. OMB should not permit the EEOC to proceed until it convincingly demonstrates that it has developed an objectively reasonable plan to appropriately protect confidential employee data.

The Proposal Only Partially Addresses Employer Confidentiality Concerns

The proposal summarizes current practices with respect to the confidentiality of EEO-1 Reports submitted by employers, including the statutory requirements prohibiting Commission staff from disclosing reports or related data under pain of criminal sanctions, and OFCCP's practice of treating EEO-1 Reports as confidential "to the maximum extent permitted by law, in accordance with Exemption 4 of the Freedom of Information Act and the Trade Secrets Act."[41] The proposal notes, but does not detail, that the EEOC shares EEO-1 Report data with other federal and state agencies. The proposal does not address employers' increased confidentiality concerns regarding disclosure of pay data.

Confidentiality concerns were recognized by the NAS panel. As noted in the panel's report, "In order to assure reporting employers that their data are indeed protected from disclosure, it will be important to establish clear and legally enforceable protections for sharing the data that employers provide in confidence."[42] According to the NAS panel report, the EEOC's data sharing practices are not consistent with or as strong as those used by other agencies:

> [T]he EEOC shares sensitive EEO-4 and EEO-1 report data with other agencies across the federal government and with the FEPAs through rather informal arrangements, most of which are not backed by the force of law. This practice is in contrast to the usual practice of federal statistical agencies that protect shared data through formal agreements backed by clear legislative authority that is enforced by stern penalties.

[39] Original Proposal, 81 Fed. Reg. at 5121.
[40] Original Proposal, 81 Fed. Reg. at 5115 n.18.
[41] Original Proposal, 81 Fed. Reg. at 5118.
[42] NAS Report at 5.

> For EEOC, even where there is no formal agreement, such as the one with DOJ, there is no indication that the data are shielded from court challenge or from requests under the Freedom of Information Act when they are shared.[43]

Recognizing the current deficiencies in practices regarding confidentiality of EEO-1 data and increased concern associated with reporting compensation data, the NAS panel recommended that the EEOC:

> [S]hould seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.[44]

These observations by the NAS panel, including its recommendation for legislating further confidentiality protections, are not addressed in the proposal. The very fact that the NAS panel made legislative recommendations strongly implies that the EEOC lacks sufficient authority to appropriately safeguard the sensitive data it now seeks to collect on a massive scale. Nevertheless, the EEOC has included strong language in its current proposal stating that it does not give agencies (other than OFCCP) access to EEO-1 data unless they agree, by letter or memorandum of understanding, to comply with the confidentiality provisions of Title VII. We appreciate this assurance. However, given the strong concerns expressed by the NAS panel, we believe this is an area that warrants greater scrutiny.

THE EEOC HAS SERIOUSLY UNDERESTIMATED THE REPORTING BURDEN

The EEOC's estimate of the burdens imposed by the proposed revisions has changed significantly since its original proposal. For example, the total annual burden for employers subject to the proposed requirement to report compensation and hours worked data has been revised from $9.7 million to $53.5 million. While the EEOC's new estimate is based on more appropriate methodology than its original proposal, it still dramatically understates the true burden that the revisions will impose on employers. Again, it should be emphasized that the EEOC could have significantly bolstered the credibility of its burden estimates had it conducted a credible pilot study involving real employers and real data.

Among the problems with the EEOC's estimates are the following:

- Failing to consider alternatives that are less burdensome than requiring employers to submit a minimum of nearly three billion fields of compensation-related data based on a total U.S. civilian workforce of approximately 159 million people, fewer than half of whom work for employers covered by the EEO-1 reporting requirement;

[43] NAS Report at 84.
[44] NAS Report at 91.

- Underestimating the burdens associated with the current EEO-1 reporting requirement;

- Basing estimates on the proposed revisions almost entirely on inappropriately low estimates of current burdens;

- Failing to appropriately account for the dramatic increase in data fields that employers must report; and

- Underestimating the burdens associated with developing systems to communicate between payroll and HRIS platforms or otherwise query and report payroll data.

METHODOLOGY SIGNIFICANTLY UNDERSTATES CURRENT REPORTING BURDEN

In prior years, the EEOC has estimated the burdens imposed by the EEO-1 Report based on estimates of the amount of time required to complete and submit each report. In the past, the Commission has estimated that these tasks took employers 3.4 hours per establishment. Assuming all other things remained equal, with the number of data cells on the proposed EEO-1 Report increasing twenty-fold (or 2,000 percent) from 180 to 3,660, if the burden hours to complete each EEO-1 Report were to double (an assumption we submit is far lower than the true increase in burden hours), the annual total burden hour estimate resulting from the proposed revisions would be more than 5,510,000 burden hours (810,390 (the number of full-grid reports filed in 2014) multiplied by 3.4 x 2).

But according to the Commission's proposal, all other things are not remaining equal. In its original proposal, the EEOC changed its longstanding methodology by stating:

> [E]mployers now rely extensively on automated HRIS to generate the information they submit on the EEO-1 Report. As a result, each additional report filed has just a marginal additional cost. To accurately reflect the manner in which employers now collect and submit the data for filing, the estimated reporting burden … is calculated per firm, rather than per report. This burden calculation is based on the time spent on the tasks involved in filing the survey, rather than on "key strokes" or data entry. As such it more accurately reflects how virtually all employers actually complete the EEO-1 ….[45]

After applying its new methodology, the EEOC estimated that the annual burden hours for filing Component 1 data would be 3.4 hours *per employer* instead of 3.4 hours *per establishment*. This significant change in methodology was the subject of much criticism in our comments to the EEOC because EEAC members report that *current* requirements impose a burden greater than 3.4 hours per *establishment*. Changing the methodology to measure costs only on a per-employer level, and then not increasing that estimate to

[45] Original Proposal, 81 Fed. Reg. at 5120 (footnotes omitted).

account for the actual burdens on employers, results in extraordinarily low burden calculations.

The EEOC's current proposal is largely consistent with its original proposal. However, it also provides a minor component for per-establishment burdens. Specifically, the agency now asserts that employer-level costs will total 8 hours with per-establishment costs of 1 hour. While the Commission's methodology in calculating some costs at the employer level and some costs at the establishment level is likely more appropriate than that originally proposed, it is still using time estimates that have no basis in reality.

As part of our effort to analyze the burdens that would be imposed by the proposal, we asked EEAC members to explain to us their processes and estimate the time and dollars spent to comply with current reporting requirements. These estimates indicate that the EEOC's assumption, used in prior years, of 3.4 hours *per establishment* is low, although it is somewhat appropriate. On the low-end, one large EEAC member with approximately 1,000 establishments provided us with in-depth cost estimates showing that the employer, which does not outsource any EEO-1 reporting functions, spends about 3,800 hours to comply with the annual reporting requirement for a total cost of approximately $132,750 per year.

Under the EEOC's methodology, this employer should be able to complete its *current* EEO-1 reporting responsibilities in 1,008 hours (1 hour for each of 1,000 establishments plus 8 hours at headquarters). However, in actuality, the EEOC's methodology only captures about one-quarter of the actual burden imposed. Furthermore, other EEAC members showed higher per-establishment costs, ranging as high as three times the EEOC's previous estimate of 3.4 hours per *establishment*. It bears repeating that this does not yet take into account the burdens of EEOC's proposed revisions.

Given these experiences, it is clear that the EEOC's estimates of the burdens associated with the current EEO-1 reporting requirement are dramatically lower than that actually experienced by employers. The EEOC should first derive a more accurate estimate of current requirements before making assumptions about the burdens imposed by its proposed revisions.

THE EEOC'S FAULTY ESTIMATES OF CURRENT BURDEN TAINT ITS ESTIMATES OF BURDENS IMPOSED BY ITS PROPOSED REVISIONS

As discussed above, the EEOC estimates that current EEO-1 reporting requirements will impose 8 hours of burden per employer and 1 additional hour per establishment. This is the same burden imposed on employers who will only need to file Component 1 of the EEO-1 Report in the future. The EEOC estimates that adding Component 2 will increase employer burdens by 90 percent. For employers that use the on-line portal method of filing, the estimate is 15.2 hours per firm and 1.9 hours per establishment. For those employers who use the data file upload method, the estimate is 15.2 hours per firm and 0.95 hours per establishment. The EEOC does not explain the basis for its assumption that adding

Component 2 will increase the burden by 90 percent other than to say it is "[b]ased on information received during the comment period."[46]

While we question the basis for the EEOC's assumption, the more important point is that the burden estimate for Component 2 is based entirely upon faulty burden estimates for Component 1. In our comments to EEOC, we noted one member with about 1,000 establishments that estimated compliance with the proposed revisions would taken roughly 4,600 hours of staff time, for a per *establishment* burden of 4.6 hours. However, using the EEOC's methodology, this employer would spend only 965.2 hours complying with the new reporting requirements — barely 20 percent of the amount of time this employer estimated it would take. More accurate burden estimates of current costs would help mitigate the inaccurate estimates associated with reporting pay and hours worked data.

ESTIMATES INAPPROPRIATELY MINIMIZE TIME NECESSARY TO COMPLETE OR VERIFY REPORTS

The EEOC's methodology moves away from calculating burdens based on the time it takes to complete individual EEO-1 Reports, justifying this change by pointing to the increased use of software systems in completing reports. The EEOC brushes aside comments that the number of data fields is an important factor in determining burden, stating that, "No EEO-1 filers enter data in every cell, so basing the annual PRA burden on the total number of cells on the EEO-1 form would be inaccurate."[47]

We disagree. The number of data fields on the reporting form is a very important factor in determining respondent burden. This is most obvious for the vast majority of employers who report using the on-line portal. These filers must literally tab through each field on the form or must spend time looking for the correct field in which to enter data. It is beyond question that finding the correct data field in a grid of 3,660 data fields for each location will take considerably more time than finding a data field in a grid of 180.

The number of data fields is also relevant for employers who use the data file upload option. As noted above, it is highly unlikely that any EEO-1 filers will submit a report without reviewing a printed or electronic version of the form. These employers will also spend time locating the correct data fields before confirming that the reported data are accurate. Again, it should be obvious that it will take considerably longer to identify the proper data field on a grid of 3,660 than a grid of 180.

The simple fact is that advances in technology, while helpful in filing reports such as the EEO-1, do not magically mitigate the proposed 20-fold increase in data cell reporting. Such an increase in reported data cannot come without a significant increase in respondent burden.

[46] Current Proposal, 81 Fed. Reg. at 45,494.
[47] Current Proposal, 81 Fed. Reg. at 45,493.

THE EEOC'S ASSUMPTION THAT EMPLOYERS CAN "BRIDGE HR AND PAYROLL" IN A MERE EIGHT HOURS IS NOT SUPPORTED BY EMPLOYER EXPERIENCE

The EEOC's proposal estimates that employers who must file both Component 1 and Component 2 will incur one-time costs of just over $27 million to develop queries related to the new compensation reporting requirements, and that such queries are estimated to take eight hours per filer at an average wage rate of $55.81 per hour. This is the same burden estimate originally proposed by the EEOC, except that a slightly higher wage rate was used in developing the estimate. Based on feedback from our members who have attempted to determine what changes will be required to their systems, these assumptions appear entirely unrealistic.

The EEOC dismisses concerns about the complexity of making systems changes by stating that it has reviewed three available software products that appear to have fields to capture the required data and that the existence of such products "suggests that creating software solutions for the EEO-1, Components 1 and 2, may not be as complex or novel as some comments suggest."[48] This statement demonstrates that the EEOC has no understanding of corporate information technology systems and the processes needed to make even minor modifications. Indeed, as we reported to the EEOC in response to its original proposal, making changes to corporate IT systems imposes burdens that are orders of magnitude above what the agency has assumed.

For many employers, the task will be extremely complicated. For example, one EEAC member reported that the employees from the following departments would need to be involved in creating a technology solution to help comply: data governance, global employee data, systems, reporting analytics, business optimization, and data security and privacy. This employer projected that such a project would take hundreds of hours and a minimum of seven months lead time. Rushing an IT project at this speed means putting off other planned projects and involving senior leadership to make decisions about which projects are prioritized. This illustrates that making changes in large corporate IT systems can be extremely complex, challenging, and time consuming.

In addition, some employers will have significant challenges posed by the current use of multiple payroll systems. This can be common when a company has evolved through corporate acquisitions and mergers and legacy systems remain in place. For some of these employers, compliance cannot be achieved by simply programming a patch or query. They will need to decide whether to comply by manually pulling and sorting numerous reports or transition to new systems at a significant cost.

Finally, the EEOC should not assume that all employers use their HRIS platform in any particular manner. For example, one EEAC member reported using its HRIS platform to track nonemployees for compliance with unrelated regulations in a heavily regulated industry. This employer uses its HRIS platform to track independent contractors, temporary workers, and franchised employees without any specific tag distinguishing employees from

[48] Current Proposal, 81 Fed. Reg. at 45,487.

nonemployees. This has not been an issue for EEO-1 compliance because they complete their EEO-1 Reports through manual processes that do not rely on a simple HRIS query. Adoption of the EEOC's proposal will require this employer to make significant changes to how it uses its HRIS platform and to consider whether additional changes are necessary to comply with other regulations.

THE CURRENT PROPOSAL DOES INCLUDE SOME MODEST IMPROVEMENTS FROM THE EEOC'S INITIAL PROPOSAL

While we do not support the current proposal, we acknowledge that it contains some positive changes from the EEOC's original proposal, specifically:

- Inclusion of definitions of "hours worked" and "W-2 wages";
- Aligning the reporting period for compensation with the calendar year; and
- Modestly improved methodology for determining actual burdens imposed by the proposal.

Aligning the reporting period and calendar year and providing definitions of key terms improve this proposal over that originally proposed and will modestly ease compliance burdens. We appreciate these modest revisions.

CONCLUSION

EEAC urges OIRA to disapprove the EEOC's proposed revisions of the EEO-1 Report and to maintain the current EEO-1 Report until the EEOC has thoroughly addressed the recommendations of the National Academy of Sciences panel, including the completion of a meaningful pilot study that examines actual employer data and includes a more complete assessment of both burden on respondents and utility of data collected.

EEAC is committed to working with the Commission and OIRA on the matters raised in the current proposal. Please do not hesitate to contact me if EEAC may be of further assistance as you consider these important matters.

Thank you for your consideration of these comments.

Sincerely,

Michael J. Eastman
Vice President, Public Policy