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

Ms. Bernadette Wilson, Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

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

Dear Ms. Wilson:

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 February 1, 2016.

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.[1] And for more than three decades, we have worked and communicated less formally with Commission staff to

[1] 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.

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-year period between 2000 and 2004,[2] as well as OFCCP's more recent proposed Equal Pay Report.[3]

OVERVIEW AND CONTEXT

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. However, by proposing that all covered employers report nearly 3 *billion* fields of data on a reported workforce of only 76 million people, we respectfully submit the EEOC has failed to craft an effective and efficient enforcement tool.

It is important to point out that the EEOC's proposal does not occur in a vacuum, but rather against the backdrop of prior, and since discredited, efforts to target enforcement based on the collection of summary compensation data, including OFCCP's Equal Opportunity (EO) Survey. This instrument was eventually repealed because it did not provide useful data to help the agency identify federal contractors who were engaging in unlawful compensation discrimination. Rather, the data collected by the EO Survey were in such a raw and aggregate form that they could not be used to compare similarly situated employees—one of the critical prerequisites to any meaningful analysis of compensation data for the purpose of detecting unlawful pay discrimination.

As OFCCP itself has recognized, "[i]nvestigations of compensation discrimination are complex and nuanced," and such investigations require a "tailoring of compensation investigation and analytical procedures to the facts of the case based on Title VII principles."[4] These candid acknowledgements underscore the reality that aggregate compensation data are of negligible—if any—utility in identifying the factors that drive private-sector compensation, and even more importantly, whether those factors are legitimate or discriminatory.

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[2] 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).
[3] 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).
[4] Office of Federal Contract Compliance Programs, Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246, Notice of Proposed Rescission, 76 Fed. Reg. 62, 63 (Jan. 3, 2011).

Even OFCCP's contractor-level, site-specific compensation investigations have revealed remarkably few instances of race- or gender-based pay discrimination—especially considering the sheer volume of line-item compensation data the agency has collected since it began using its revised scheduling letter in 2014. Indeed, despite OFCCP's allocation of significant resources to discovering pay discrimination at the "local" level, it failed to identify significant numbers of violations. And yet, this flawed methodology—as resource intensive as it is—still is more likely to identify compensation discrimination than EEOC's proposed approach in the form of the revised EEO-1 Report.

In addition to lessons learned from OFCCP's experience, the EEOC sought the advice of, and received a report on, the collection of employer pay data from the National Academy of Sciences (NAS).[5] This led to a report published by a panel convened by NAS (NAS panel) that reviewed options and made several important recommendations regarding actions that the EEOC, OFCCP, and other agencies should take *before* implementing a new survey to collect compensation data. Unfortunately, for reasons not disclosed, the recommendations by the NAS panel have been rejected, disregarded, or not completely followed in the EEOC's current proposal.

While we have no quarrel with the EEOC's intent to root out and eliminate pay discrimination where it exists, we respectfully submit that the EEOC's current proposal to collect pay data from employers is misguided and unlikely to produce data that will be useful either for enforcement purposes or for employer self-evaluations. Given that the proposal is unlikely to collect sufficiently useful data, the significant burdens it will impose on covered employers simply cannot be justified. We therefore urge the Commission to withdraw the proposed changes.

Should the Commission decide to move forward, we strongly encourage EEOC to follow the recommendations of the NAS panel, including conducting a reliable pilot study to determine if the proposed revisions effectively accomplish the EEOC's underlying objectives before the massive new burdens associated with these revisions are imposed on employers across-the-board. In addition, we recommend that the Commission not utilize W-2 wages as a measure of compensation in this reporting instrument, and establish stricter confidentiality processes to protect highly sensitive data. We also suggest ways in which the Commission could significantly reduce burdens associated with the proposal and increase the utility of data collected.

EEAC remains committed to working with the EEOC as it considers whether to move forward with the proposal and, if so, what changes should be made.

THE NAS REPORT RECOMMENDATIONS HAVE NOT BEEN FOLLOWED

As previously noted, the President's National Equal Pay Task Force recommended that the EEOC engage the NAS to "conduct a study assessing how to most effectively collect

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

pay data to support its wage discrimination law enforcement efforts."[6] 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. While many of these issues are important to the discussion of the Commission's proposal, we begin by reviewing the proposal in the context of the six specific recommendations made by the NAS panel. As summarized below, the Commission has either disregarded or not fully complied with all of the NAS panel's recommendations.

NAS Recommendation	EEOC's Proposal
1. 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.
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.
3. EEOC should **enhance its capacity** to summarize, analyze, and protect earnings data.	Not addressed.
4. 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.
5. EEOC should consider implementing data protection techniques to **protect the confidentiality** of the data.	Referenced in passing in a footnote.
6. EEOC should **seek legislation** that would increase the ability of the agency to protect confidential data.	Not addressed.

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

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 OFCCP and the Civil Rights Division of the Department of Justice, to "prepare a comprehensive plan for the use of earnings data before initiating any data collection."[7] The NAS panel made this recommendation after observing that:

> there is, at present, no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies. 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.[8]

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

> the panel found no evidence of a clearly articulated plan for using the earnings data if they are collected. The fundamental question that would need to be answered is how the earnings data should be integrated into 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.[9]

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 costs of the collection."[10]

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

> 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

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[7] National Research Council of the National Academies, *Collection Compensation Data From Employers* 2, 87 (2012) (hereinafter "NAS Report").
[8] NAS Report at 2.
[9] *Id.*
[10] *Id.*

> 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 encourage employers to self-monitor and comply voluntarily if they uncover pay inequities.[11]

The EEOC's proposal also states:

> 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.[12]

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

In order to properly evaluate the utility of the massive amounts of data the EEOC proposes to collect, stakeholders must understand how enforcement agencies intend to use these data. This includes addressing, at a minimum, how the data would be integrated into compliance programs based around what is primarily a complaint-based process. The mere identification of "statistics of interest" does not sufficiently answer this question.

A MEANINGFUL PILOT STUDY IS ESSENTIAL BEFORE PROCEEDING

One of the most important recommendations to the EEOC and OFCCP 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."[13]

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.

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[11] 81 Fed. Reg. 5115.
[12] 81 Fed. Reg. 5118 (footnote omitted).
[13] NAS Report at 88.

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. Incredibly, 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 burden of the proposed changes.

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 proposal, because doing so would have required the EEOC to seek OMB's approval. Footnote 17 states that "Synthetic pay data was used because conducting a test survey of nine or more companies would require [Paperwork Reduction Act] Approval."[14] In other words, the EEOC made a conscious decision to forgo a rigorous pilot test using actual employers and real data because it didn't want to ask OMB for permission to conduct the very pilot study specifically recommended by the NAS panel. This strikes us as being flatly inconsistent with the letter and spirit of the Paperwork Reduction Act.

We recommend that before moving forward with its proposal, the EEOC should seek OMB approval for a pilot study that involves a sufficient number of employers of different sizes and with different employee populations to yield accurate and meaningful estimates of the burdens and utility of the proposed revisions. EEOC should also consider pilot testing alternate versions of its proposal so that meaningful analyses of burden and utility can be performed, published, and evaluated by all interested stakeholders.

The EEOC should also conduct an analysis of actual compensation data that it already possesses through the EEO-4 Report, which provides the agency with salary information from state and local governments. We are not aware of any analysis showing that the EEO-4 Report's collection of data by pay band helps the EEOC identify public-sector employers engaging in systemic pay discrimination. This suggests that the current proposal will not produce data sufficient to justify the costs of collection.

For example, the EEOC could conduct statistical analyses of the real data it already has from state and local governments to further evaluate the utility of expanding the EEO-1 Report in a similar way. Of course, public-sector entities are more likely to establish pay structures based on rigid pay grades and steps and, in this way, are unlike most private-sector employers. Nevertheless, such an analysis would provide an opportunity to test statistical models on existing data before instituting a new broad-based mandate for private-sector employers.

[14] 81 Fed. Reg. at 5114 n.17.

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, 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."[15] For this reason, the panel recommended that more be done to "prepare the ground prior to commencing any data collection."[16]

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 EEOC to enhance its capacity to process, let alone analyze, the significant increase in reported data fields. Under current practices, there are often delays of 10 to 14 days or more between the time an employer e-mails its EEO-1 Reports the time the EEOC notifies the employer that the EEO-1 Reports are ready for final edits and certification. It is unclear how the EEOC will have the capacity to process this significant increase in reported data without adding significant delays to the annual filing process for tens of thousands of covered employers.

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 proposal rejects this recommendation and would require employers to report their establishment-level headcount and hours worked data using <u>both</u> actual earnings <u>and</u> pay bands. More specifically, covered employers would be required to report headcount and hours worked data by race/ethnicity and gender in 12 new <u>pay bands</u> within each of the existing ten 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. The proposal does not define precisely how W-2 wages are to be calculated.

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 far more burdensome 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

[15] NAS Report at 3-4.
[16] NAS Report at 3.

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 "snapshot" basis of the EEO-1 Report. Whereas employers report each employee's EEO-1 category as of a certain date 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 could not match their prior year's earnings, skewing the aggregate data and inviting incorrect conclusions to be drawn. 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 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 (HRIS) 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 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 Over-inclusive Definition of Compensation Will Not Help Direct Enforcement Resources or Identify Meaningful "Statistics of Interest"

At the March 16 public hearing that 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.[17] 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.

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 recent commentary on the Commission's 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."[18] 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. In support, consider the very few instances where OFCCP has found evidence of a systemic pay violation. Looking at the data from fiscal year 2010 to the present, OFCCP has conducted more than 24,000 compliance reviews covering nearly ten million employees. 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.

[17] 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.
[18] 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.

The self-evident conclusion from these figures is that even when armed with very detailed compensation data, 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.

EEOC Has Not Defined "W-2 Wages" or "Hours Worked"

Most key definitions necessary to comply with current EEO-1 reporting requirements are included in the instructions accompanying the form. The definitions included in the instructions carry some weight, as the regulations implementing the EEO-1 Reporting requirement explicitly require employers to submit the EEO-1 Report "in conformity with the directions set forth in the form and accompanying instructions."[19]

However, the EEOC has not made the text of the proposed instructions available for comment. Nor has the agency made available its understanding of how key terms, such as "W-2 wages" and "hours worked," are to be defined. These are concepts that are open to several interpretations, and the public should have the opportunity to understand the EEOC's thinking in order to properly respond to its proposal.

If W-2 Wages Are Collected, the Commission Should Consider Permitting Employers To File Reports Based on a Calendar Year

Covered employers currently must file EEO-1 Reports by September 30 each year. When doing so, they are required to report data based on a "snapshot" taken of the employer's workforce between July 1 and September 30. The Commission's proposal maintains the current due date and three-month window during which the employer may take its "snapshot," but would require employers to report on W-2 wages and hours worked

[19] 29 C.F.R. § 1602.7.

for the 12-month period prior to the snapshot date. This approach would require employers to extract W-2 wage data and hours worked over two different tax years. For many employers, it would be significantly less burdensome to report W-2 data and hours worked for a single calendar year, and the Commission should provide employers with this option if it does not accept our recommendation for using rate-of-pay information to assign employees into the appropriate pay band.

It should be noted that the Commission's current regulations establish a due date for the report but not the reporting period.[20] We believe the Commission could provide for this option through this proposal. At one time the EEO-1 Report was due on March 31 and was based on a reporting period in the first three months of the year. It was changed to September because the Commission believed the third quarter of the year was "less affected by the variation in seasonal employment, such as employment in the construction industry, … and will provide employment figures which reflect average annual employment more closely than" reporting in the first quarter.[21] These concerns are not relevant to the reporting of annual W-2 wages. In the interest of minimizing burdens on employers, the Commission should provide employers with the option to file using calendar-year data.

If the Commission were to change the reporting requirement from W-2 wages to base rate of pay or annualized compensation, the reporting period would no longer be a concern.

If Hours Worked Are To Be Reported, the Commission Should Permit Employers To Use a Default Assumption for Exempt Employees or Any Other Reasonable Estimate

While the proposal does not define "hours worked," it does call for comments on how hours worked should be determined for employees exempt under the Fair Labor Standards Act (FLSA). This is because employers typically will not have any records of hours worked for FLSA-exempt employees. While we do not support inclusion of the hours-worked data, if the EEOC is to include the requirement, we urge that the Commission provide several options for employers to report hours worked for exempt employees.

We recommend that employers be permitted to report hours worked for FLSA-exempt workers in any of the following methods:

- actual hours worked;
- a default assumption of hours worked (such as 40 hours per week); or
- any other reasonable method of approximating hours worked.

Permitting the reporting of hours worked for FLSA-exempt employees using these alternatives will allow employers to report the most accurate data, while recognizing that this information will not be available for most employers. Allowing employers to use a standard assumption will help mitigate the reporting burden and should be permitted. However, if an employer would like to use a more realistic assumption, such as a case where FLSA-exempt

[20] 29 C.F.R. § 1602.7.
[21] Equal Employment Opportunity Commission, Recordkeeping and Reporting Under Title VII and the ADA, Final Rule, 56 Fed. Reg. 35,753, 35,754 (July 26, 1991).

employees in a particular position tend to work an average of 50 hours per week, then the employer should be free to report using this methodology.

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

As the Commission is well aware, 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 states that the Commission intends to address some of these concerns, it should commit to more 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.

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."[22] 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.[23] The public may search nationally aggregated EEO-1 data used 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. 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

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

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 Native Americans and those identifying as Native Hawaiian are very small.

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 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 suppressions 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.[24]

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.

[24] NAS Report at 78.

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)[25]

Again, the EEOC has not focused on when reported data may be sufficient to reveal personally identifiable information about individual employees.

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

As described above, even aggregations of the current reporting requirement 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."[26] However, should pay data be collected as proposed, the Commission will need to revisit this representation as it is clear that many individuals regard their income as sensitive information and would be concerned if it were reported in ways that made such information publicly available.

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."[27] The panel report then observes "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

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[25] 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.
[26] 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*.
[27] NAS Report at 79.

data and their intended purposes, as well as on the risks of disclosure."[28] The Report concludes with the following recommendation:

> the agency should consider implementing appropriate data protection techniques, such as data perturbation and the generation of synthetic data, to protect the confidentiality of the data, and it should also consider supporting research for the development of these applications.[29]

The Commission's proposal states that the EEOC has "balanced enforcement objectives with the burden and confidentiality concerns of respondents."[30] However, the proposal addresses concerns regarding confidentiality of individually identifiable data in only two ways. First, the EEOC states 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 sensitive, individually identifiable pay data.

The Commission acknowledges 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."[31] 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.

The Proposal Fails To Properly Address 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 EEOC 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."[32] The proposal notes, but does not detail, that 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."[33] 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:

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[28] NAS Report at 79-80.
[29] NAS Report at 91.
[30] 81 Fed. Reg. at 5121.
[31] 81 Fed. Reg. at 5115 n.18.
[32] 81 Fed. Reg. at 5118.
[33] NAS Report at 5.

> [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. 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.[34]

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 EEOC:

> should seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.[35]

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 should ensure that it does not release data obtained pursuant to Title VII's grant of authority to any entity that has not agreed to strict confidentiality requirements.

EEOC Should Not Release Component Two Data Unless Directly Relevant to a Title VII "Proceeding"

As the EEOC notes in its proposal, Title VII generally prohibits the Commission from releasing data collected on existing EEO-1 Reports. This provision is codified at 42 U.S.C. § 2000e-8(e) and reads, in part, as follows:

> **(e) Prohibited disclosures; penalties**
>
> It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information.

[34] NAS Report at 84.
[35] NAS Report at 91.

As described on the EEOC's website, the EEOC interprets this provision as prohibiting disclosure "before a Title VII proceeding is instituted that involves that information."[36] In other words, it is the Commission's position that while it is generally prohibited from releasing EEO-1 Reports, it may do so if a lawsuit is filed under Title VII and involving the information included on the EEO-1 Report.

While we believe it is clear from the statute and EEOC's stated interpretation, the Commission may wish to provide further clarity by stating explicitly that it does not have the authority to release an EEO-1 Report after the initiation of any proceeding apart from a Title VII proceeding, such as a suit alleging a violation of the Americans with Disabilities Act, Age Discrimination in Employment Act, Fair Labor Standards Act, or Equal Pay Act.

Second, the EEOC should affirm it will not release information collected on an EEO-1 Report unless the Title VII proceeding explicitly involves such information. In other words, if a proceeding does not involve pay, then Title VII bars the release of any pay information included on the EEO-1 Report. As the Commission's proposal explains, employers with 100 or more employees will be required to submit two separate components of the EEO-1 Report. Component one contains the data fields currently in use while component two includes 3,660 data fields related to pay and hours worked. If a proceeding were filed alleging race-based systemic hiring, the proceeding would not involve component two data and consequently Title VII would not permit its release.

THE EEOC HAS SERIOUSLY UNDERESTIMATED THE REPORTING BURDEN

The EEOC's estimate of the burdens imposed by the proposed revisions is flawed and needs to be significantly revised. Our comments address these flaws and offer our assessment, where possible, of more appropriate measures. Regrettably, the short comment period has not allowed sufficient time to thoroughly evaluate the burdens the proposed revisions undoubtedly will impose. We intend to continue evaluating the proposal and submit additional comments on its likely burdens at a later stage of the process, assuming the Commission moves forward with this or a similar proposal.

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

- Failing to consider alternatives that are less burdensome than requiring employers to submit as many as three billion fields of compensation-related data based on a workforce of approximately 159 million people, fewer than half of whom work for employers covered by the requirement;

- Improperly changing the analysis of burden from the number of forms filed to the number of entities filing them without accounting for the majority of filers who do not use the data file upload method;

[36] Questions and Answers, Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers, *available at* http://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_qa.cfm.

- Failing to properly explain the rationale for the estimate of burden hours per entity, resulting in an unreasonably low burden estimate;

- Assuming the vast majority of time spent compiling and filing reports will be by "administrative support" employees earning an average of $24.23 per hour, despite the fact that the proposal will require complex analyses and system adjustments that can only be made by more highly paid professional and senior-level employees; and

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

ARE THREE BILLION DATA CELLS NECESSARY?

The Commission reports that in 2014, 1,482,810 EEO-1 Reports were filed and that 672,420 of those reports were "Type 6" summary reports. This means that employers filed 810,390 "full-grid" Reports of one type or another containing the number of employees in each job group by demographic category. Currently, the full grid includes 180 data fields.

The EEOC's proposal expands the size of the grid from 180 data fields to 3,660 data fields: 1,830 of these data fields would be used to report the number of employees in each of 12 pay bands in each job group by demographic category. An additional 1,830 data fields would be used to report the hours worked by the employees reported in each of the first 1,830 data fields. If covered employers continue to file EEO-1 Reports in the same number and in the same manner as they did in 2014, in 2017, employers will report on up to 2,966,027,400 data fields. It should be noted that this estimate does not discount the number of federal contractor filers with fewer than 100 employees who will not be required to file compensation data. While we know that in 2014 there were 6,260 such filers, we do not know the number of EEO-1 Reports that they filed.

A proposed reporting requirement that would force employers to complete or skip over nearly three billion data cells each year, when there are only approximately 76 million workers who work for employers arguably covered by the reporting requirements, is simply not an effective or efficient reporting framework.[37]

It 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. Yet nowhere in the EEOC's proposal does it explain alternatives that could significantly cut down on the number of unnecessary data fields.

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[37] 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.

As set forth above, we strongly recommend that, if the EEOC proceeds with its proposal, it 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 1,830 data fields from the proposed report without decreasing the utility of data collected. In addition, by not measuring compensation using W-2 data, employers would not need to construct ways for different IT systems to communicate.

Further, the proposal does not address several suggestions made by the NAS panel for reducing the burden, such as less frequent collection or collecting data on a rotating sample. The EEOC should carefully evaluate these and similar suggestions for reducing burdens beginning with our recommendation that the EEOC not mandate that employers complete Component 2 of the report, which collects headcount by pay band and hours worked, more frequently than once every three years. [38]

BURDEN CALCULATION METHODOLOGY IMPROPERLY IGNORES MAJORITY OF FILERS WHO USE THE EEOC'S ON-LINE PORTAL

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%) 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 810,390 (the number of full-grid reports filed in 2014) multiplied by 3.4 x 2 (6.8), or more than 5,510,000 burden hours.

But according to the Commission's proposal, all other things are not remaining equal. In its calculations of the burdens that the proposed revisions would impose, the EEOC changes its longstanding methodology by stating:

> employers 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 ….[39]

The EEOC supports its changed methodology by observing that in 2014, 1,449 firms filed EEO-1 Reports by uploading a data file. This accounts for 704,654 of the EEO-1 Reports

[38] EEO-4 data is not collected annually, but every other year.
[39] 81 Fed. Reg. at 5120 (footnotes omitted).

filed in that year. It does not account for the 478,392 "full-grid" EEO-1 Reports that were manually entered by more than 59,000 firms (almost 98%) using, primarily, the EEOC's on-line portal. Data entry and the number of key strokes are indeed essential parts of determining the true burden for this overwhelming majority of EEO-1 filers.

For 98% of the filers, the expansion of the EEO-1 Report's data grid from 180 data fields to 3,660 data fields will be particularly significant. At a minimum, they will need to tab through the data fields or search for the data fields into which their data should be reported, a process that will invariably take longer with so many more data fields to chose from.

What's more, as explained below, initial feedback from our members indicates that when using EEOC's data file upload option and accounting for economies that arise in companies reporting large numbers of reports, per-establishment estimates exceed EEOC's estimate of 3.4 hours.

BURDEN ESTIMATES ARE NOT EXPLAINED OR CONSISTENT WITH EMPLOYER'S EXPERIENCES

As discussed above, the EEOC for many years has calculated its burden estimates per report filed. For example, in 2014, the EEOC concluded that the burden of the EEO-1 Reporting requirement was $19.8 million, based on an estimate of 307,103 reports filed and an average burden hour per report of 3.4 hours. But now, in response to a request that we submitted on January 29, 2016, the EEOC has revealed that more than 1.4 million EEO-1 Reports were filed in 2014—four and one-half times the number of establishments used in the Commission's burden estimate. We do not know why the Commission used a number that was less than one quarter of the known number of establishments in its burden estimate, but we urge the EEOC to look into this matter as soon as possible and refrain from moving forward until this discrepancy is explained.

That said, the EEOC's proposal acknowledges that the Commission is changing its methodology from a per-report analysis to a per employer analysis. Astonishingly, the EEOC estimates that the burden per employer for Component 1 will be 3.4 hours, the same amount of time that the EEOC had previously estimated per report. The only explanation for this change is that "each additional report filed has just a marginal additional cost" because most employers now have automated HRIS systems to generate information needed.[40] It should be emphasized that some employers file not just one or two EEO-1 Reports, but thousands. Asserting that the per-employer cost is now the same as the per-report cost from two years ago strains credulity.

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 existing assumption 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

[40] 81 Fed. Reg. at 5120 (footnote omitted).

Reporting functions, spends about 3,800 hours to comply with the annual reporting requirement for a total cost of approximately $132,750 per year. This employer utilizes the EEOC's data file upload option. Other EEAC members showed higher per-establishment costs, ranging as high as three times the EEOC's current estimate of 3.4 hours per establishment.

When considering the impact of adding proposed data related to pay and hours worked, estimates increase significantly. For example, one large EEAC member estimated that the proposed report would take roughly 4,600 hours of staff time to complete, for a cost of approximately $195,000. This equates to a *per-establishment* burden of 4.6 hours. Other EEAC members estimate that annual compliance costs will increase as much as 300 percent over current costs.

The EEOC has assumed that annual costs will include 1 hour *per employer* for reading the instructions to the new report. This estimate cannot be verified because no draft of the proposed instructions has been provided for notice and comment. It is our experience that several people at each company are responsible for reading the report's instructions and the actual burden will therefore be significantly higher.

Finally, the proposal estimates that employers who must file both components will incur one-time costs of just over $23 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 $47.22 per hour. Based on feedback from our members who have attempted to determine what changes will be required to their systems, these assumptions appear entirely unrealistic.

A small minority of EEAC members may have systems that can coordinate W-2 data, hours worked, and demographic data stored on an HRIS platform with minimal work. However, even these members do not believe eight hours is a reasonable estimate. For others 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 it 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 members 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 members, compliance cannot be achieved by simply programming a patch or query. These members 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 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 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.

PUBLIC COMMENT PERIOD INSUFFICIENT FOR FULL ANALYSIS

The Commission has proposed these significant changes to the EEO-1 Report not through notice and comment rulemaking under the APA, but by seeking revision of a currently approved information collection request under the Paperwork Reduction Act. The normal process for such requests is for an agency to first solicit comments on its proposal for a minimum of 60 days. After the agency deliberates and decides on whether and how to respond to public comments, the agency then submits the proposal to the Office of Management and Budget for review in conjunction with a separate comment period of at least 30 days.

The EEOC has chosen to follow the minimum requirements set forth by the PRA. We submit that 60 days is an insufficient time period to assess the impact of such a significant proposal. This is evident by the Commission's own experiences in attempting to measure the utility and burden of its proposal. Thus far, the Commission has refused to extend the public comment deadline. However, the Commission has stated that it intends to consider comments made during both the 60-day comment period as well as comments made during the anticipated 30-day comment period that will occur if the Commission submits its proposal to OMB.[41]

EEAC intends to take the Commission at its word. While these comments respond to a great number of issues identified in the proposal, we intend to continue to analyze and assess the proposal after the conclusion of the 60-day period with the expectation that the Commission and OMB will take additional comments into account at later stages of this proceeding.

[41] See, for example, Letter from Jenny R. Yang, Chair, U.S. Equal Employment Opportunity Commission, to Randel K. Johnson, Sr. V.P., U.S. Chamber of Commerce, *et al.* (Feb 23, 2016)..

CONCLUSION

EEAC urges the EEOC to withdraw its proposed revisions of the EEO-1 Report and to maintain the current EEO-1 Report until it 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.

If the Commission decides to move forward with this proposal, we urge that it be modified to address the concerns we have expressed herein. In addition, we intend to continue to analyze this proposal and provide additional input should the Commission send this proposal or a similar initiative to the Office of Management and Budget for approval in the future.

EEAC is committed to working with the Commission 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