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Via Email (oira_submission@omb.eop.gov) and eRulemaking Submittal

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725 17th Street NW
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RE: Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report

Dear Mr. Nye,

The U.S. Chamber of Commerce ("Chamber") submits these comments concerning the Equal Employment Opportunity Commission's ("EEOC's" or "Commission's") Proposed Revisions to the Employer Information Report ("EEO-1") and in response to the EEOC's Notice of Submission for OMB Review, Final Comment Request: Revision of the EEO-1 ("Final Proposed Revisions").

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, industry sector, and region, with substantial membership in all 50 states. The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all -- including equal pay for equal work and non-discriminatory compensation practices. However, as set forth in further detail below, the Chamber cannot support EEOC's proposed revisions to the EEO-1 report as they violate both the Paperwork Reduction Act ("PRA")[1] and Title VII of the Civil Rights Act of 1964, as

[1] 44 U.S.C. §3501 *et. seq.*

amended ("Title VII"). By seeking to compel employers to disclose employee compensation and hours worked data, EEOC is proposing to collect extensive data heretofore never collected by the federal government, without any developed framework to review the data, or use the data for any legally authorized or recognized purpose, with the irrational hope that it will support the Commission's mission. Accordingly, the Final Proposed Revisions should be returned to the EEOC for the following reasons:

- Pursuant to the PRA, the Office of Information and Regulatory Affairs ("OIRA") has the substantive and independent obligation to review the EEOC's data request proposal. Whatever the policy implications, OIRA must independently review the Final Proposed Revisions to ensure that the burdens placed upon responding employers is minimized, the information collected has the maximum utility, and that the confidentiality and privacy of the information is assured.

- EEOC has not minimized the burden on respondents but has put forth an unreasonable burden calculation which is not based on any empirical data. EEOC claims its Final Proposed Revisions will cost employers approximately $50 million to comply each year, whereas the Chamber's own economic survey reveals that this figure is actually over $400 million.

- The Final Proposed Revisions are of no utility and are not necessary, as EEOC proposes to gather data which itself admits will not allow it to demonstrate compensation discrimination as a matter of law; nor does the EEOC claim that the data will allow it to proactively identify potential discriminators. Every element of the proposal – aggregating employees in broad job groups, basing wage rates on estimated and inaccurate "proxy" hours, choosing an underlying source of data which inherently differs based on individual employee choice and skills – will yield inaccurate data that will lead to both false negatives and false positives for discrimination, wasting valuable time and resources for both employers *and* EEOC.

- In an era where data breaches – in both the private and public sectors – occur frequently, the Final Proposed Revisions fail to propose a mechanism to adequately protect the confidentiality of sensitive employee compensation information.

- Finally, all of these defects are brought into high relief by the fact that EEOC overtly failed to address in any meaningful sense of the word the criticisms and comments made by the Chamber and others during the initial phase of the PRA process.

Ultimately, the EEOC's Final Proposed Revisions do not comply with the mandatory requirements of the PRA or Title VII, and thus, for all the reasons set forth below, and in the

attachments, the Chamber urges OIRA, consistent with its mandate, to return the Final Proposed Revisions to EEOC so the Commission can perform a proper analysis under the PRA.

The Chamber wishes to emphasize that its highly critical analysis of the Final Proposed Revisions does not reflect an indifference to pay inequities which are based upon invidious factors. The Chamber is a long-standing supporter of reasonable and necessary steps designed to ensure equal pay for equal work and non-discriminatory compensation practices. While the existence of a pay gap, its scope and causation is a proper subject for debate, as has occurred in the Congress and public discourse and will undoubtedly continue, the Final Proposed Revisions in fact have nothing to do with the pay gap other than the bare assertion that it somehow is a response to it. In fact, the Chamber believes that the Final Proposed Revisions, if adopted, will further confuse the issue, prevent a cogent analysis of pay practices and data and add absolutely nothing to this policy debate.

I. EEOC'S FINAL PROPOSED REVISIONS FAIL TO SATISFY THE PRA

On February 1, 2016, the EEOC published a proposed revision to its EEO-1 data collection tool ("2/1/16 Proposed Revisions"). The changes would require every employer with 100 employees or more to submit demographic information and the W-2 wages and hours worked for all of their employees grouped in broad EEO-1 job categories, subdivided into twelve bands. The impact the proposed changes will have on employers is significant and cannot be overstated. Indeed, during the 60 days following the 2/1/2016 Proposed Revisions, 349 comments were submitted to the EEOC.

On March 9, 2016, the Chamber submitted written testimony to the EEOC in support of the oral testimony provided by Camille Olson on behalf of the Chamber at the EEOC's March 16, 2016 hearing regarding the 2/1/16 Proposed Revisions. On April 1, 2016, the Chamber also submitted comments to the EEOC addressing the significant substantive problems with the 2/1/16 Proposed Revisions. The Chamber's testimony was supported by the testimony and expert analyses of three renowned economists, Drs. Ronald Bird, J. Michael Dumond, and Robert Speakman. Dr. Bird's declaration also summarized the results of a national employer survey regarding the actual burden the 2/1/2016 Proposed Revisions would have on employers. The Chamber's submission welcomed the opportunity to respond to questions the EEOC may have had with its comments. On July 14, 2016, the EEOC submitted its final proposal for revisions to the EEO-1 Form to the Office of Management and Budget ("OMB"). Despite the detailed and in-depth analyses provided to the EEOC, the EEOC did not meaningfully address any of the substantive flaws in the 2/1/16 Proposed Revisions raised by the Chamber.

The Final Proposed Revisions catalogue, in general terms, the number of comments the EEOC received. Otherwise the EEOC ignored their substance, and with a rare exception, failed to address the significant defects raised.

- This is especially troubling, and contrary to the PRA, because the Final Proposal Revisions lack the analysis and due diligence required by the PRA in terms of assessing the attendant burden placed upon employers required to comply with the massive recordkeeping undertakings contained in its proposal.[2]

- It is doubly troubling in light of the empirical survey data presented by the Chamber to the EEOC that directly contradicts the EEOC's "assumptions" about the burden that would be incurred by employers. [3]

- The EEOC also did not meaningfully address the comments of labor economists that provided concrete analyses to debunk the assertion that the additional data would be helpful to an examination of whether employers were in compliance with Title VII and the Equal Pay Act. The Chamber, for example, proved that the data requested lacked any benefit.

- Finally, the EEOC failed to reasonably address the confidentiality concerns raised by employers and the Chamber as to the safekeeping of sensitive confidential pay data that would be required by the 2/1/2016 Proposed Revisions.

In other words, other than making minor proposed changes to the 2/1/2016 Proposed Revisions, the EEOC did not address any of the critical issues that undermine the utility of the data it requests employers be required to annually compile and submit.[4] For example, the EEOC ignored comments criticizing the utility and feasibility of accurately reporting hours worked for exempt employees paid on a salaried basis, where no existing federal or state regulation requires the recording of hours worked for any purpose. Instead, the EEOC held fast to its requirement that employers create and report "proxy" hours for its exempt employees by simply saying, "it is

[2] The EEOC's proposal relies heavily on enormous amounts of statistical information from employers and purports to apply technical statistical analyses to this data. Accordingly, OIRA should ensure that EEOC adheres to OMB's 'Standards and Guidelines for Statistical Surveys'. In this regard, coordination with Katherine Wallman, Chief Statistician of the United States and head of OIRA's Statistical Policy Branch, is recommended, and her report on the matter should be included in the public docket for this information collection review.

[3] In addition to the Chamber, many others also attacked the validity of the EEOC's burden assumptions. For example, both the Equal Employment Advisory Council ("EEAC") and the Society for Human Resource Management ("SHRM") also criticized the EEOC's "assumptions" of its burden analysis. Letter from EEAC for EEOC (Apr.1, 2016) available at https://www.eeac.org/public/Proposed%20EEO-1%20Revisions.pdf ; Letter from SHRM for EEOC https://www1.eeoc.gov//eeoc/meetings/3-16-16/eastman.cfm?renderforprint=1; Letter from SHRM for EEOC (April 1, 2016) available at https://www.shrm.org/hr-today/public-policy/hr-public-policy-issues/Documents/SHRM%20Comment%20on%20EEO%201%20final.pdf .

[4] The EEOC made two procedural changes to their proposed collection requirements proposal and address two other open questions. First, the EEOC adjusted the EEO-1 reporting date from September 30 to March 31. Second, the EEOC moved the date of the snapshot collection period.

not convinced" by the critical commentary.[5] The Commission neither analyzed nor commented upon the objections raised by the responding parties and instead answered its own question by establishing by fiat what it offered as a question. Ultimately, without providing any analysis of how it arrived at its decision, the Final Proposed Revisions mandate employers report either "proxy" hours for exempt employees of 40 hours for full-time workers and 20 hours for part-time workers or provide actual hours worked for exempt employees. Of course, besides ignoring public commentary, reporting inaccurate hours-worked renders the data significantly inaccurate, and seriously undermines the utility of the data.

Further, the EEOC clarified that the compensation data should be produced based on earnings reported in Box 1 of Form W-2. Again, the EEOC's methodology is flawed, and the information that will be collected will be defective, as described below.

Finally, facing significant economic analyses submitted by the Chamber utilizing real survey data of the estimated compliance costs that highlighted the EEOC's sleight of hand in its original burden estimates, the EEOC revised its burden analysis. Still far off the mark of what the PRA requires of the EEOC -- an accurate annual burden estimate for EEO-1 responders providing Component 1 and 2 data (demographic, job category, pay, and hours-worked) - the EEOC nevertheless increased its original erroneous estimate of annual burden from $10 million to $53 million per year.[6] The EEOC made these adjustments without an explanation of their new assumptions, and without an explanation as to why it rejected the alternative estimate submitted by the Chamber, based on real survey data of employers who complete EEO-1 Forms. As is noted in detail below, as there was no basis for the EEOC's original cost estimates, there is no basis for its "revised" estimates and the actual cost burden from this proposal is greater than the EEOC's estimates by magnitudes of seven to ten times or greater.

II. OIRA AND THE EEOC MUST SATISFY THE SUBSTANTIVE OBLIGATIONS OF THE PAPERWORK REDUCTION ACT

The PRA establishes a high standard of compliance and places both procedural and substantive obligations on OIRA and all federal agencies regarding information collection requests. The Final Proposed Revisions are submitted pursuant to the PRA and Section 709(c) of Title VII. The PRA was promulgated in order to bring a degree of coherence and prudence to the Government's rather voracious quest to collect data from responding employers (and other

[5] We are not aware that either the PRA or the APA have endorsed the proposition that an agency can cavalierly reject thoughtful comments supported by extensive data noting that it is "not convinced."

[6] Similarly, the EEOC increased its annual burden estimate for contractors with 50-99 employees, who must only provide Component 1 data (demographic and job category) from $516 thousand to $1.8 million. Such significant revisions themselves, with little to no backup analysis leave the EEOC's Proposed Revisions with significant credibility concerns overall.

responders).[7] The purposes of the PRA set forth in direct terms what the Act was designed to accomplish:

> The purposes of this chapter are to--
>
> (1) minimize the paperwork burdens for individuals, small businesses…Federal contractors…and other persons resulting from the collection of information by or for the Federal Government;
>
> (2) ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the federal Government.
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> * * *
>
> (4) improve the quality and use of Federal information to strengthen decision-making, accountability and openness in Government and society;
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> * * *
>
> (8) ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws, including laws relating to -- (A) privacy and confidentiality;[8]
>
> * * *

The PRA established OIRA within the OMB, and charged OIRA with the administration of the PRA,[9] giving it a substantial role in the federal regulatory process. No data collection instrument which is directed to more than nine responders can be issued without first receiving the approval of OIRA.[10]

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[7] *See Dole v. United Steelworkers of Am.*, 494 U.S. 26, 32 (1990) (recognizing that the PRA was enacted in response to the federal government's "insatiable appetite for data.").
[8] Paperwork Reduction Act of 1995, 44 U.S.C.A. 35 § 3501.
[9] *Livestock Mktg. Ass'n v. USDA*, 132 F. Supp. 2d 817, 830 (D.S.D. 2001) ("Among other things, the Act establishes the Office of Information and Regulatory Affairs within the Office of Management and Budget, with authority to" facilitate and manage the PRA).
[10] *CTIA-The Wireless Ass'n v. FCC*, 530 F.3d 984, 987 (D.D.C. 2008) ("The need for OMB approval of information collections derives from the Paperwork Reduction Act"); *Gossner Foods, Inc. v. EPA*, 918 F. Supp 359, 361-62 (D. Utah 1996) ("The Act institutes a second layer of review by the OMB for new paperwork requirements.") (quoting *Dole*, 494 U.S. at 32-33).

In addition to the actual review of agency data requests, OIRA is charged with the responsibility to oversee the use and collection of information. In fulfilling its oversight responsibility, OMB issued Circular A-130, which directs federal agencies to establish mechanisms and procedures to meet the PRA's mandate to reduce the collection burden and ensure that the information being collected has significant public utility.[11] Furthermore, it also issued Circular A-4 on Regulatory Analysis, which provides federal agencies with detailed guidance on which types of analysis to use, how, and when they are appropriate. This requires, among other things, that agencies identify and quantify expected undesirable side effects of the rule, and provide an analysis of the monetary values of private-sector compliance costs and savings.[12] These Circulars reinforce the PRA mandates by providing further details on how to maximize public utility from the information collected. Under the PRA and the implementing Circulars, OIRA has the substantive and *independent* obligation to review the data request proposal. OIRA cannot yield to the Commission's policy determination but must review the data request under the strictures of the PRA and the implementing circulars. Neither OIRA nor EEOC has the discretion to ignore the PRA, Circular A-130, or Circular A-4. Nevertheless the EEOC has already done so, and on that basis we urge OIRA to return the EEOC proposal to the agency so that it can meet the clear requirements of the PRA.

OIRA is mandated to review data collection requests in accordance with the direction of the PRA in order to (1) "minimize burden and duplication" on those individuals and entities most adversely affected; (2) "provide useful information" by maximizing the practical utility and public benefit from the information; and (3) "support the proper performance of the agency's mission."[13] OIRA is also charged with developing and promulgating standards to ensure the privacy, confidentiality, and security of information collected or maintained by agencies.[14]

It is under this specific statutory obligation that OIRA must scrutinize the Final Proposed Revisions. While the EEOC has superficially followed the PRA procedures in terms of the submission of the Final Proposed Revisions, the EEOC has ignored PRA's substantive obligations. There is no exemption from the mandates of the PRA and neither the agency head nor the Administrator of OIRA may exempt data collection efforts from the mandates of the PRA.[15] Simply put, OIRA must review independently the EEOC's massive data collection

[11] OFFICE OF MGMT. & BUDGET, CIRCULAR A-130 MANAGEMENT OF FEDERAL INFORMATION RESOURCES (2000), *available at* https://www.whitehouse.gov/omb/circulars_a130_a130trans4.
[12] OFFICE OF MGMT. & BUDGET, CIRCULAR A-4 REGULATORY ANALYSIS, 3, 37 (2003), *available at* https://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/a-4.pdf .
[13] *Office of Info. and Regulatory Affairs Q&A's* OFFICE OF MGMT. & BUDGET, https://www.whitehouse.gov/omb/OIRA_QsandAs (last visited Aug. 8, 2016).
[14] *In re French*, 401. B.R. 295 (E.D. Tenn. 2009) (noting that, amongst other things, the PRA's purpose is to ensure that information is collected consistent with privacy and security laws) (quoting 44 U.S.C. § 3501).
[15] The Director of the OMB can delegate its duties under the PRA to the Administrator of OIRA pursuant to The Paperwork Reduction Act, 42 U.S.C.A. 35 § 3503.

request to ensure that the burdens placed upon responders is minimized, the information collected has the maximum utility, and that the security and confidentiality of the information is assured.[16]

The measure of the burden placed upon responders must be determined with respect to the efforts necessary to collect and report the data. OIRA must review the EEOC's obligation to minimize the burden relative to the purposes and utility of the data requested. And in this regard, the obligation to minimize the burden does not mean that the agency merely recite its factually devoid compilation of the cost of compliance. The agency must show how it analyzed alternatives to propose the least burdensome collection process. In this proposal, the EEOC simply ignored burden calculations.

Similarly, the benefit derived from the data collection is dependent on the utility of the data collected, not on the burden it does or does not create. The government is not permitted to require an excessively burdensome collection effort when the data collected will be tangential at best for EEOC's mission.

In short, the PRA ensures that the government has no license to collect data without a clearly articulated purpose and legitimate use. Nor does OIRA have a license to "rubber stamp" the requests of federal agencies without scrutinizing each information collection request ensuring that it is based "on high-quality evidence and sound analysis."[17] Finally, in conjunction with the type and sensitivity of the data being collected, the PRA obligates both OIRA and the EEOC to ensure that the requested data is collected and retained in a manner which secures its confidentiality and privacy. The PRA establishes a commonsense framework by which the requesting agency in the first instance, and OIRA in the second instance, must review requests for authorization to collect data.

We would note as well that the EEOC's response to the submitted comments and the testimony elicited at the March 16 hearing reflects a stunning disregard of the purpose of notice and comment.[18] Of the 349 comments submitted, many of which were substantive and represented thoughtful and extensive analysis, the EEOC remarkably made only two procedural

[16] *See Dole*, 494 U.S. at 32-33 (explaining that all federal agency regulations that require the collection of paperwork must be reviewed by the OMB in accordance with the goals and purpose of the PRA).
[17] *Before the Judiciary Subcomm. H. Comm.* U.S. House of Reps. (2016) (statement of Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).
[18] The PRA requires even more extensive Notice and Comment than the Administrative Procedure Act. While the APA requires the issuing agency to note and respond to comments, the PRA requires the issuing agency to undertake its own analysis in response to comments to justify its choices under the standards of the PRA.
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changes (for example, it agreed to move the reporting date for the revised EEO-1 to permit the report to coincide with the preparation of the annual W-2 reports).[19]

The EEOC also recognized that the cost estimates it attached to the 2/1/2016 Proposed Revisions had no basis in reality. However, it has simply provided new cost estimates, which while increasing the acknowledged burden more than five times from the proposal, still lacks any basis in fact. The EEOC chose to ignore public comment on the business costs associated with complying with the 2/1/2016 Proposed Revisions, "due to the wide range of estimates provided about annual reporting costs," instead "rel[ying] on its own experience."[20] Yet, the EEOC failed to articulate what "experience" it relied upon to suggest its new cost estimates. As is shown in this submission, and based upon professional statistical sampling of actual employer responders, the actual burden will still exceed $400 million at the very conservative minimum, still more than seven times greater than the new acknowledged burden.

OIRA is entrusted with the legal duty to ensure that the EEOC's information collection request substantively passes the safeguards established by the PRA. When an agency fails to meet its own statutory obligation, ignores submitted comments and adopts as its final proposal almost entirely what it originally proposed, the Administrator of OIRA is required to reject the agency's proposal, and send a return letter.[21] This mechanism is designed as a control to reinforce federal agency compliance with the PRA. In the face of the EEOC's blatant failures to comply with the PRA and OMB guidance, OIRA cannot fulfill its obligation under the PRA and approvingly "rubber stamp" the Final Proposed Revisions. Therefore, we urge OIRA to reject the EEOC's Final Proposed Revisions and return them to the EEOC so that appropriate review under the PRA can be conducted.

III. THE FINAL PROPOSED REVISIONS ARE INCONSISTENT WITH § 709(c)(3) OF TITLE VII

The PRA requires OIRA to, "ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws."[22] The legal basis for the Employer Information Report (EEO-1) form and recordkeeping requirements is Section 709(c)(3) of Title VII of the Civil Rights Act of 1964, as amended, which imposes the requirement that employers,

[19] There was no cogent explanation for the EEOC to require bifurcated W-2 data to be submitted and it wisely choose not to.
[20] 81 Fed. Register 135, 45493 (July 14, 2016).
[21] *OIRA Return Letters*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS http://www.reginfo.gov/public/do/eoReturnLetters (last visited Aug. 8, 2016).
[22] The Paperwork Reduction Act of 1995, 44 U.S.C. § 3501, *et. seq*.

> (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports there from as the Commission shall prescribe by regulation or order after public hearing, as *reasonable, necessary, or appropriate* for the enforcement of this title…"[23] (emphasis added).

The Final Proposed Revisions fail to meet any of these Title VII requirements. The failure of the EEOC to adhere to the requirements of Title VII is critical insofar as Section 709(c)(3) is the only section of Title VII which authorizes the EEOC to issue regulations and require reports. The EEO-1 Report in its form and content is simply the reflection of the EEOC's regulatory authority and therefore the EEOC cannot disregard the statute's requirements when issuing regulations under this authority. The EEOC itself recognized that Section 709(c)(3) was the regulatory basis for its changes: "The Commission prescribes the EEO–1 report by regulation at 29 CFR part 1602, subpart B, which requires private employers with 100 or more employees to ''file [annually] with the Commission or its delegate executed copies of [the] EEO–1 [report] in conformity with the directions set forth in the form and accompanying instructions.''[24] Thus, while OIRA has the sole authority to determine if the reporting requirements comply with the PRA, it must also ensure that this regulatory revision in accordance with the direction of Title VII. The EEOC followed neither the PRA nor Title VII.

The EEOC has ignored the mandate of Title VII that regulations issued pursuant to § 709(c)(3) be "reasonable, necessary or appropriate." While those terms are not otherwise defined in Title VII, it is clear that the report being required by the regulation be reasonable. This is closely analogized to the PRA requirement that the required report minimize the burden on respondents. As shown below in great detail, the EEOC ignored in entirety the direction that it minimize the burden. So too, the enormous cost imposed by the revision cannot be considered "reasonable."

Similarly, Title VII's statutory requirement that the report be "necessary" is closely analogized to the PRA requirement that the records required be designed to maximize the utility of the required submissions. Again, as shown in these comments and the previous comments filed by the Chamber, the EEOC has failed to maximize the utility of the reports. Perhaps even more striking, in the Final Proposed Revisions, the EEOC *admits* that the required submission is neither necessary nor appropriate for the enforcement of Title VII: "the EEOC does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter."[25] Instead, the EEOC poses of series of "mights" and

[23] 42 U.S.C. § 2000e-8(c)(3).
[24] 81 Fed. Register 135, 45481(July 14, 2016).
[25] *Id.* at 45489.

"mays" and otherwise talks around the proposition that the requested data will have no legal meaning. Indeed, as the EEOC properly notes, when it receives and processes a charge alleging pay discrimination, it will require the employer to send compensation information relevant to the charge. Perusing a massive amount of legally irrelevant data will not assist the EEOC in the "enforcement" of Title VII.[26]

Nor is the EEOC's announced plan to issue its compilation of the aggregated wage data at some future time to give guidance as to appropriate wage rates by job, industry or standard metropolitan area an "appropriate" function of the EEOC.[27] The EEOC is authorized to issue regulations to assist in enforcement. Other agencies of government, such as the Bureau of Labor Statistics are certainly better staffed with the competencies required to publish comparative wage data. Nothing in the EEOC's mandate gives it the authority or competency to publish such data with its own "spin." Thus, the other stated purpose for this massive data collection is certainly not "appropriate" to the EEOC's mission.

Failing in every respect to comply with its statutory mandate, the EEOC fails to justify this data request under its regulatory authority. Therefore, in conjunction with its independent review of the proposal under the PRA, OIRA must similarly determine that the Final Proposed Revisions run far afield of EEOC's statutory and regulatory authority, and must be rejected.

IV. OIRA SHOULD REJECT THE EEOC'S PRA BURDEN ANALYSIS BECAUSE IT IS BASED ON CONJECTURE AND MISGUIDED ASSUMPTIONS RATHER THAN EMPIRICAL EVIDENCE

The EEOC began considering potential changes to employers' EEO-1 data collection and reporting requirements more than four years ago. Following that lengthy deliberation period, the EEOC issued the 2/1/2016 Proposed Revisions, seeking public comment. The 2/1/2016 Proposed Revisions were advanced pursuant to PRA which requires that any request for data by a government agency must (1) minimize the burden on responders to the request; (2) result in data that is meaningful to the government for policy and enforcement purposes; and (3) be designed to ensure that the data is obtained and maintain in a secure and confidential manner. After reviewing the 2/2016 Proposed Revisions, the Chamber concluded that the justification and burden analysis presented by the EEOC failed to meet the PRA's statutory requirements. In response to the 2/1/2016 Proposed Revisions, the Chamber submitted a thorough analysis based on actual empirical evidence from its members and supported by expert testimony that identified numerous fatal flaws in the way in which the EEOC calculated the burdens associated with the 2/1/2016 Proposed Revisions.

[26] 42 U.S.C. § 709(c)(3).
[27] 81 Fed. Register 135, 45491 (July 14, 2016).

After considering the public comments and recognizing that its initial PRA analysis was woefully deficient, the Commission recalculated the burdens associated with the 2/1/2016 Proposed Revisions and, on July 14, 2016, issued a new, higher estimate of the burdens associated with the Final Proposed Revisions and has sought further public comment.

Unfortunately, the PRA burden analysis set forth in the Final Proposed Revisions, while a revision of the EEOC's prior analysis, is plagued by many of the same fatal deficiencies the Chamber identified its initial submission. Specifically, the EEOC's PRA burden analysis is not supported by empirical evidence. Instead, it is based on overly optimistic assumptions not grounded in fact regarding the amount of time required to collect, analyze and report the data necessary to satisfy the newly proposed EEO-1 reporting requirements, and the resources available for and costs associated with such efforts. In short, the EEOC's burden analysis, even as modified, does not comply with the PRA's requirements. Accordingly, OIRA should reject the Final Proposed Revisions and require the Commission to perform a proper PRA analysis based on credible empirical data, which plainly exists and has been readily available to the EEOC.

1. The EEOCs' Initial and Revised Burden Estimates

In its 2/1/2016 Proposed Revisions, the EEOC estimated that the burden associated with preparation of the existing EEO-1 Report would decrease to just over $5.5 million – an amazing *$14.3 million reduction* in the estimated burden from what EEOC proposed in 2015. EEOC also estimated that the one-time burden to comply with the new wage and hours data reporting requirements in the 2/1/2016 Proposed Revisions would be approximately $23 million, and the annual recurring burden on all EEO-1 Filers in 2017 and 2018 would be approximately $10.2 million. The Commission based those estimates on several key assumptions, including the following:

- Each EEO-1 Filer spends 3.4 hours generating its current EEO-1 Reports each year, irrespective of its number of establishments or types of reports it must file

- Employers' HRIS can be easily modified to combine demographic data and wage data and generate the W-2 wage and hours data in the required form

- All work necessary to complete the EEO-1 Report is performed by "Administrative Personnel" at a rate of $24.23 per hour

- There is no meaningful cost associated with investigating and responding to false positives that will result from the new data collection

In support of its initial comments, the Chamber conducted an initial survey of 35 of its members to gather concrete data regarding the time and cost associated with the collection and tabulation of data for both the current EEO-1 and the proposed expanded EEO-1, with the inclusion of earnings and hours data. The preliminary findings of the study, developed by noted labor economists, confirmed the EEOC's assumptions were unreasonable and lacked any basis in fact, and the Chamber detailed these findings in its comments on the 2/1/2016 Proposed Revisions. After receiving public comments, including those submitted by the Chamber, the Commission recognized that its initial estimates were not accurate and adjusted the methodology for calculating the PRA burden in the Final Proposed Revisions to increase the estimated cost of compliance. The Commission's revised burden estimates assert:

- In 2016, 67,146 responders will file a total of 683,275 reports, which will take 1.055 million hours to generate (1.5 hours per report or 15.7 per employer on average), at a total cost of 30.0 million (or $448 per company).

- In 2017-2018, federal contractors with 50 to 99 employees will spend 59,166 hours annual to file 9,129 reports (or 1.5 reports per employer) at an annual cost of approximately $1.9 million; this equates to 6.5 hours per report or 9.5 hours per company at an average cost of $299 per company.

- In 2017-2018, 60,866 companies with 100 or more employees, who will be required to report aggregated wage data (completing EEO-1 Components 1 and 2) will file 674,146 reports (or 11.1 reports per employer on average) and will spend 1.893 million hours annually (or 2.8 hours per report or 31.1 hours per employer) at an annual predicted cost of $53.5 million (or $880 per employer).

- The one-time burden associated with complying with new wage and hour reporting format in 2017 will be $27.2 million, based on 8 hours of work by information systems specialists for each of the 60,866 affected employers.

Although the EEOC's revised estimates are a modest improvement over its prior estimates, they continue to lack any reasonable basis in fact, and wildly underestimate the actual burden associated with the Final Proposed Revisions.

2. The Commission's Revised PRA Estimates Are Based on Speculation

a. *The EEOC's Estimate of the Burden Associated with Completing the Current EEO-1 Report Remains Flawed.*

In its 2/1/2016 Proposed Revisions, the EEOC estimated that each employer currently spends just 3.4 hours generating its EEO-1 reports at an annual cost of $5.5 million. In its Final Proposed Revisions, the EEOC conceded that its initial estimate was wholly inaccurate, and it revised its estimate significantly. The Commission now estimates that employers spend an average of 15.7 hours completing their EEO-1 forms at an annual cost of $30.0 million. Specifically, the Commission now estimates that each employer spends an average of 8 hours on "firm level tasks" associated with the preparation of the current EEO-1 Type 1, 2, 6 and 8 reports, and it takes one additional hour per report to perform the "establishment-level" tasks associated with the associated EEO-1 Type 3, 4 and 8 reports.

The EEOC's new estimate does not withstand scrutiny and is contradicted by the survey data that the Chamber has compiled. As an initial matter, the Commission fails to explain, or cite to any empirical data to support, the assertion that employers spend an average of 15.7 hours (or 1.5 hours per report for a total of 1.055 million hours) to generate the EEO-1 in its current format. It appears that the EEOC has pulled its time estimates out of thin air. The EEOC must identify at least some basis for its estimate to satisfy the PRA.

Additionally, the Commission appears to have largely ignored the initial survey data provided by the Chamber in its initial submission – data that clearly demonstrate that the burden imposed by the existing EEO-1 format is significantly greater than the EEOC's estimates. In response to the 2/1/2016 Proposed Revisions, the Chamber developed and issued a survey to 35 of its members seeking data regarding the time and cost burdens associated with the current and newly proposed EEO-1 reports. The Chamber compiled and submitted with its April 2016 comments the preliminary results of its survey based on the data provided by the 22 employers that had responded to the survey by March 25, 2016.[28] Since the submission of its initial comments, the Chamber has expanded and continued to collect survey data.[29] At present, 50 employers have responded to the survey, representing a range of company sizes and industries, with the smallest company having approximately 400 employees and the largest company having

[28] The Chamber was unable to gather survey data from all 35 members initially surveyed due to the short comment period, and the Commission's rejection of the Chamber's request to extend the comment period.
[29] *See* Exh. 1, Ronald Bird Decl. p. 1.

more than 200,000 employees.[30] In total, the 50 companies that responded to the survey employ approximately 1.8 million employees, and filed a total of 20,040 EEO-1 reports in 2015.[31] On average, the companies surveyed spent a total of 6.6 hours per report filed using the current EEO-1 format, at an average cost of $3,323 per company.[32]

Based on Chamber's survey data, the total annual burden for the 67,146 filers cited in the EEOC estimates is 4.48 million hours, at a cost of $223 million. In other words, real life experience of the Chambers' member companies shows that the actual cost of completing the EEO-1 in its current form is more than seven times the estimate advanced by the EEOC in the Final Proposed Revisions.

b. *The Burden Associated with Generating Earnings and Hours Data in 2017-2018 Is Far Greater Than the Commission Estimates*

Pursuant to the Final Proposed Revisions, employers with more than 100 employees would be required to submit demographic data as well as data regarding earnings and hours worked by their employees, grouped by broad job categories and subdivided into 12 arbitrary pay bands, starting in 2017. Based on its revised calculations, the EEOC estimates that 60,866 companies will be required to generate EEO-1 reports that include earnings and hours data, and it claims that the total annual burden to such companies will be 1.893 million hours, at a cost of $53.5 million, or $880 per company. Once again, the EEOC's estimates are devoid of factual support and greatly underestimate the burden associated with collection, analysis and filing of the proposed EEO-1 containing earnings and hours information.

The EEOC's calculations are based on unrealistic and inaccurate assumptions regarding the extent to which employers maintain one centralized human resources information system ("HRIS"), the extent to which employers' HRIS contain fully integrated data from relevant personnel records, and the extent to which automation reduces the time and cost associated with compiling and tabulating relevant information. In support of its overly optimistic assumptions, the EEOC cites a single report in the International Public Management Association for Human Resources journal for the proposition that "90% of human resources departments use some form of HRIS." Even if that is accurate, it does not speak to whether the information systems referenced contain all the information necessary to generate the current and proposed EEO-1 reports, whether companies have multiple human resources systems for separate establishments and whether such systems are interconnected, compatible with or even similar to one another.

[30] *Id*., p. 1, 7.
[31] *Id*., p. 7.
[32] *Id*., p. 8, 10.

The Chamber's survey shows that most of the responding companies have HRIS software, but it is not always standardized across the companies, and many systems are not linked directly to the companies' headquarters. In fact, the survey showed that in many instances, each of the companies' local establishments are currently tasked with generating their own EEO-1 reports in spreadsheet form, which are then forwarded to the companies' headquarters where they are reviewed and compiled for submission. The EEOC could have obtained this type of data independently in a variety of ways (such as through surveys of its own of past EEO-1 filers or by conducting field pilot studies) prior to preparing its PRA burden estimates, but there is no indication in the Final Proposed Revisions that the EEOC did so.

Even the EEOC's own experience with its HRIS capabilities and that of other government entities would have been a valuable source of information that could have been analyzed, and shared with the public, concerning the time and costs associated with collecting and generating reports involving the type of information required by the existing and proposed EEO-1 form. Aside from vague references to its "experience," the EEOC conducted no analysis of the burdens associated with compiling, tabulating and generating reports using its own information systems. And if such an analysis was conducted, it should have been published in the Final Proposed Revisions for public review and comment.

Based on their current HRIS tools, the 50 employers in the Chamber's survey estimated that, on average, it would take them 1.8 times more effort to prepare the EEO-1 report with the wage and earnings data, as currently proposed.[33] Stated differently, the member companies estimated that it would take an average of 12 hours per report in 2017-2018 to comply with the expanded EEO-1 reporting obligations now being proposed.

Applying the Chamber's survey results to the 67,146 filers cited in the EEOC estimates shows that the total annual burden to generate EEO-1 reports with earnings and wage date in 2017-2018, would be approximately 8 million hours, at a cost of $400 million.[34] Stated differently, the actual cost of completing the EEO-1 in its expanded format in 2017-2018 is likely to be more than seven times the figure identified by the EEOC in the Final Proposed Revisions.

c. *The EEOC's Estimate of the One-Time Burden Is Unrealistic*

In the Final Proposed Revisions, the Commission increased its estimate of the one-time burden associated with its changes from $23.1 million to $27.1 million. The EEOC arrived at this figure based on the assumption that, on average, the 60,886 filers in its estimate could assign

[33] *Id*. at 10.
[34] *Id*.

a computer programmer, at an hourly rate of $55.81 per hour, to implement all of the necessary changes in a total of 8 hours. In other words, the EEOC estimates that an average employer could make all of the changes required to accommodate the proposed EEO-1 earnings and hours reporting obligations in 8 hours, at a cost of less than $500. The EEOC offers no evidentiary support for this wildly optimistic estimate, and none exists.

In the Final Proposed Revisions, the Commission notes that many employers commented that it would be "extremely expensive" to modify their payroll and HRIS systems or purchase the software updates necessary to accommodate the changes. Others indicated that the one-time cost associated with making the required system changes could range from $5,000 to $40,000 per company. Remarkably, the EEOC appears to have discounted those cost estimates because the commenters "did not provide details explaining how they were calculated." Yet, the EEOC nowhere explains or provides any detail as to how it reached the conclusion that a computer software developer, at $55.81 an hour, could make all of the required modifications in a total of 8 hours. As the Chamber pointed out in its April 2016 submission, simply determining how to marry gender, race and ethnicity data contained in an HRIS with earnings data contained in a separate payroll system, often administered by a third party, would itself take more than 8 hours.

Moreover, while the Commission is critical of the $5,000 to $50,000 cost range cited by certain commenters, it does not cite *any* evidence to refute those estimates or provide any credible evidence whatsoever in support of its assertion that the one-time system modifications could be accomplished for less than $500.

Additionally, in its initial comments, the Chamber noted that the underlying assumption for the EEOC's calculation – that employers have a single HRIS that houses all the data necessary to generate the earnings and hours data required by the proposed EEO-1 – is plainly false. In the Final Proposed Revisions, the EEOC states that it examined three of the most popular HRIS tools – ADP Enterprise, PeopleSoft and UltiPro – and noted that all three systems have the capacity to store demographic data and earnings information. The EEOC conceded that many (and in reality most) employers do not use that capacity in those tools. Yet, it claimed that the existence of the capacity to collect such information suggests that creating software solutions necessary to meeting EEO-1 reporting requirements "*may not be* as complex or novel as some commenters suggest." While it claims to have examined the potential capacity of the three HRIS tools it examined, there is no evidence that the EEOC made any effort to actually create software solutions necessary to bridge HRIS and payroll data or to even assess the time, money or resources associated with reconfiguring the three HRIS tools it examined to take advantage of the tools capacity to migrate existing data to those tools or collect the required data from new employees.

Further, companies typically elect to structure their various information technology systems to address a variety of significant business needs. The fact that so many commenters

confirmed that their current HRIS and payroll systems are not linked and they do not currently have the capacity to marry payroll date to EEO demographic data is telling. In its PRA burden analysis, the EEOC must accurately assess the cost of collecting and reporting the data it seeks based on employers' *current capabilities* – not on based on the capabilities of information technology systems it wishes were in place.

The Chamber estimates that the one-time cost of designing, developing, testing, implementing and training employees to use the new data compilation and query systems to comply with the proposed expanded earnings and hours data requirement will total $41.9 million in direct labor costs.[35] This equates to $688 in direct labor costs for the average EEO-1 filer company submitting 11 reports annually, or 54% more than the $27.2 million (or $446 per company) estimated by the Commission.[36]

d. *The EEOC's Burden Estimates Use Artificially Low Wage Rates and Fail to Account For Any Overhead Costs*

In reaching its PRA burden estimates, the EEOC relied on a blended or composite labor wage rate of $28 per hour, which was based on estimated work allocations to different types of employees at different wage rates. The EEOC calculated its direct wage rates based on median pay figures obtained from the Bureau of Labor Statistics. Based on the results of its survey, the Chamber believes the $28 composite wage is exceedingly low. The Chamber's survey found that the average composite wage rate of the personnel required to prepare the EEO-1 reports or its responding members is $49.75.[37] This higher figure reflects more time spent by skilled human resources managers, executives and legal counsel than is included in the EEOC's estimates. The employers in the Chambers' survey indicated that human resource managers, legal counsel and executives devoted more time reviewing EEO-1 reports than the minimum amounts of time estimated by the EEOC because of the potential legal liability that could arise from the submission of inaccurate or incomplete EEO-1 reports.

Applying the more accurate composite labor rate of $47.95 and the average amount of labor required for each report as provided by the 50 employers in the Chamber's survey reveals that the real burden associated with the Final Proposed Revisions (even without including any overhead costs) is:

- A total of 4.485 million hours, equaling $223 million in 2016, to generate the existing EEO-1 report for 67,146 employers – or $3,232 per company.

[35] *Id*., p. 11.
[36] Application of the 3.25 overhead factor would increase the one-time cost associated with the design, testing and implementation and training on updated information systems to $136.1 million or $2,236 per company.
[37] *See* Exh. 1, Ronald Bird Decl. p. 9.

- An annual total of 59,928 hours in 2017-2018, equaling $2.98 million, to generate data for the existing EEO-1 report for 6260 federal contractors employing 50-99 workers, or $429 per company

- An annual total of 8.066 million hours in 2017-2018, equaling approximately $400 million, to generate data for the expanded EEO-1 report, with earnings and hours data, for 60,866 companies with 100 or more employees, or $6,612 per company[38]

Neither the EEOC's burden calculations, nor the Chamber's calculations above, include any consideration of overhead costs. The OIRA has specifically recommended that agencies improve the accuracy of their burden estimates under the PRA by adding appropriate overhead load factors to labor wage rates:

> In estimating the appropriate wage rate, it is critical that the wage be properly "loaded" to include overhead and fringe benefit costs associated with the employee's time. For example, although a technical employee's wage rate may be $20 per hour, she may also receive benefits from her firm such as health and life insurance, paid vacation, and contributions to a retirement plan. To support her work activities, her employer must also purchase office supplies and services, including office space, furniture, heat and air conditioning, electricity, a telephone and telephonic services, a personal computer, printer and photocopier access, and various office supplies. **These costs need to be accounted for when assessing the overall impact of the Federal information collection on the resources of the respondent**.[39]

The Chamber's labor economist, Dr. Ronald Bird, has concluded that a multiplier of 3.25 would be an appropriate overhead factor.[40] This figure is based on an examination of the fully loaded labor cost reimbursement rates paid by government agencies for administrative, professional, technical and managerial services under GSA government-wide service contracts.[41] Applying the 3.25 factor to the $49.75 composite direct wage rate derived from the Chamber's survey results in an applicable, fully loaded average wage rate of $161.69.[42] Applying this wage

[38] *Id*., p. 10.
[39] *Estimating Paperwork Burden*, OFFICE OF MGMT. & BUDGET (OCT. 4, 1999), https://www.whitehouse.gov/omb/fedreg_5cfr1320.
[40] *See* Exh. 1, Ronald Bird Decl. p. 11.
[41] *Id*., p. 11, n. 6.
[42] *Id*., p. 11.

rate to the calculation of the burden associated with generation of the current and proposed EEO-1 reports increases the annual cost burden to approximately $725 million in 2016 and approximately $1.3 billion in 2017- 2018.[43]

The following chart provides a comparison of the unrealistic burden calculations asserted by the Commissions with the calculations prepared by noted labor economist Dr. Bird based on actual data from the 50 employers that provided responses to the Chamber's survey.

Comparison of EEOC and U.S. Chamber Estimates of Annual Paperwork Compliance Burden Hours and Cost			
	2016 all respondents complete component 1 only	**2017/2018 contractors with 50-99 employees complete only component 1**	**2017/2018 employers with 100 + employees complete both component 1 & 2**
Number of respondents	67,146	6,260	60,866
EEOC estimated burden hours	1.055 million hours	59,166 hours	1.893 million hours
Chamber estimated burden hours	4.485 million hours	59,928 hours	8.066 million hours
EEOC estimated Cost[44]	$30.0 million	$1.9 million	$53.5 million
Chamber estimated cost without overhead cost	$223.0 million	$2.98 million	$400.8 million

[43] *Id*.
[44] The Commission only estimated cost on a no overhead basis – omitting the cost of the workplace, equipment, materials and other support labor requires to perform the reporting task.

Chamber estimated cost with overhead added[45]	$725.3 million	$9.7 million	$1.3 billion
EEOC estimated one-time cost			$27.2 million, with no allowance for overhead cost
Chamber estimated one-time cost			$41.9 million direct labor cost or $136.1 million including overhead cost

3. The EEOC's Burden Analysis Fails to Account for Costs Associated With "False Positives"

The EEOC's PRA calculations fail to consider the cost employers will incur in responding to investigations and potential enforcement actions that flow from the "false positives" that will inevitably flow from comparing compensation paid to employees within broad EEO-1 categories. In the Final Proposed Revisions, the EEOC attempts to justify the way it intends to use the new wage and hour data it seeks in future investigations and enforcement actions. As part of that explanation, the EEOC states that it "is confident that the risk of Type I (false positive) or Type II (false negative) errors will not undermine its statistical analysis" and (2) the chances of a "false positive" correlates to the probability in the statistical significance test used by the EEOC to detect potential discrimination." In other words, in the EEOC's opinion, the risk of a false positive flowing from its analysis of earnings and hours data exists, but is relatively low.

While the Chamber does not agree with the EEOC's risk assessment, there is no dispute that there is some risk of false positives tied to the proposed submission of earnings and wage data. And there is no dispute that the EEOC's PRA burden assessment fails to account for *any* costs that employers will incur in responding to investigation or enforcement actions prompted by false positives. The costs associated with responding to false positives could include the resources required to produce additional information to the EEOC and/or OFCCP, or generate pay analyses or retain legal counsel, all in an attempt to rebut the presumption of discrimination generated by the false positive. The EEOC's PRA analysis fails to account for the burden associated with this acknowledged risk. Accounting for this additional cost would result in an even larger hours and cost burden than is identified in the chart above.

[45] The Chamber calculation applied an overhead load multiple of 3.25 times direct labor cost per hour.

V. THE EEOC'S ARTICULATED USE OF THE PAY DATA HAS NO BASIS IN LAW, AND THEREFORE, SERVES NO PUBLIC BENEFIT.

EEOC's failure to comply with the PRA requirements is plain. Additionally, the data requested is neither reasonable, necessary, nor appropriate under Title VII. EEOC is on a fishing expedition for data that it concedes will not "establish pay discrimination as a legal matter."[46] Such an onerous obligation applied in a wholesale fashion to every employer across the country is outrageous when one considers that the EEOC is already authorized to request detailed compensation data from any employer in connection with an investigation. Thus, collection of aggregate compensation data that is coupled with erroneous "proxy" hours, will lead to false findings that will serve no purpose under the laws the EEOC and the OFCCP are charged with enforcing.

In its Final Proposed Revisions, the EEOC articulates that it will use the proposed W-2 and hours-worked data in three ways: (1) Early Assessment of Charges of Discrimination; (2) Publication Aggregate EEO-1 Data and (3) EEOC Training.[47] None of these articulated bases are sufficient to meet the "utility" PRA requirement when compared against the burden of collecting sensitive compensation data from every employer in the country with more than 100 employees. Despite its affirmative requirement to do so, the EEOC has not offered any reasonable rationale sufficient to support this mass collection of data and how it will be useful for law enforcement or policy enhancement. The explanations they did provide do not pass even minimum threshold requirements under Title VII, EO 11246 and the Equal Pay Act.

1. The Proposed EEO-1 Pay Data Cannot Assist in Early Assessment of Charges of Discrimination

The comments previously submitted to the EEOC articulated the significant flaws with the proposed EEO-1 Revisions in advancing investigations of compensation discrimination allegations under Title VII, EO11246 and the Equal Pay Act.[48] Those flaws were supported by the declarations and statistical analyses presented by renowned Economists Drs. J. Michael DuMond and Rob Speakman. The EEOC's Final Proposed Revisions ignores the substantive comments in conclusory and cursory fashion.

[46] *Id.* at 45489.
[47] *Id.* at 45490-91.
[48] *See* U.S. Chamber of Commerce April 1, 2016 Submission, at 23-40.

a. *Using EEO-1 Job Groupings To Analyze Differences in Compensation Serves No Purpose Under Title VII, EO 11246 the EPA*

As Dr. DuMond previously observed, one of the most serious deficiencies with the proposed EEO-1 Revisions are the "very broad occupational group[ings]" that would "result in comparisons of employees who work in very different jobs and who may perform different work."[49] Dr. Speakman expressed similar concerns, stating "it is my experience [employers] don't use the EEO-1 job classification for any type of review or planning or comparison purposes, much less for compensation-related determinations, outside the scope of providing data to the government. It's an artificial and meaningless conglomeration of dissimilar workers used only for EEO-1 reports. . . . It's unclear why anyone or any agency would consider it an appropriate grouping for a meaningless analysis of employees' pay."[50]

In response, the EEOC makes the following surprising admission:

> The EEOC does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter. Therefore, it is not critical that each EEO-1 pay band include only the same or similar occupations.[51]

Based on the EEOC's own response, it is clear the data cannot be used to: 1) identify similarly situated comparators; or 2) establish pay discrimination. It is also clear the EEOC acknowledges that the groupings will not include individuals in the "same or similar occupations." But that is precisely what is required under Title VII, EO 11246 and the Equal Pay Act. [52] Indeed, courts upholding federal employment laws do not permit the aggregation of dissimilar individuals into artificial job groupings in order to prove pay inequity. In other words,

[49] *See id*., at 25.
[50] *Id*.
[51] 81 Fed. Register 135, 45489 (July 14, 2016).
[52] Although a similarly situated employee need not be "identical," *Caskey v. Colgate–Palmolive Co*., 535 F.3d 585, 592 (7th Cir. 2008), he or she must be "directly comparable to the plaintiff in all material respects...." (citing *Naik v. Boehringer Ingelheim Pharm., Inc*., 627 F.3d 596, 600 (7th Cir. 2010); *Lopez v. Kempthorne*, 684 F. Supp. 2d 827, 856-57 (S.D.Tex. 2010) ("'Similarly situated' employees are employees who are treated more favorably in 'nearly identical' circumstances; the Fifth Circuit defines 'similarly situated' narrowly. Similarly situated individuals must be 'nearly identical' and must fall outside the plaintiff's protective class. Where different decision makers or supervisors are involved, their decisions are rarely 'similarly situated' in relevant ways for establishing a prima facie case."); *Alexander v. Ohio State Univ. Coll. of Soc. Work*, 697 F. Supp. 2d 831, 846-47 (S.D. Ohio 2012) (finding that to be similarly situated, a plaintiff's purported comparators must have the same responsibilities and occupy the same level position.)

comparing individuals who are not in the same or similar jobs has absolutely no bearing in a Title VII or Equal Pay Act claim.

Despite its admission, the EEOC then provides the following example of one way in which the data could be used during an investigation:

> For example, if a charging party alleges that she was paid less than her male colleagues in a similar job, the EEOC's enforcement staff *might* use the expanded EEO-1 analytics tool[53] to generate a report comparing the distribution of the pay of women to that of men in the same EEO-1 job category.[54] (emphasis added).

This attempted justification is meaningless. Under long-standing legal principles, there can be no comparison of pay between men and women to others in the same EEO-1 job category *unless* the jobs themselves are the same or substantially the same and the EEOC has already conceded that jobs within an EEO-1 job category may not be comparable.[55] The EEOC not only ignores these legal principles but instead tramples on them by claiming that:

> Enforcement staff could choose to compare men and women in one particular EEO-1 job category, for multiple categories, or even all job categories.[56]

The EEOC's position in this regard is astounding. The names of the EEO-1 job categories themselves make clear that such comparisons are inappropriate as a matter of law. There is absolutely no legal support for comparing Sales Workers, to Laborers and Helpers, or Executive/Senior level Officials and Managers, or Operatives, or Professionals to name just a few of the job categories.

b. *The Final Proposed Revisions Ignore Legitimate Reasons for Differences in Compensation*

As the Chamber's comments to the EEOC reflect, employers have an inherent right to value jobs differently based on non-gender or race/ethnicity based standards. No federal law in this country prohibits such an analysis.[57] In its Final Proposed Revisions, the EEOC did not address this critical fact.

[53] Such an " expanded analytic tool" has not yet been developed.
[54] 81 Fed. Register 135, 45490 (July 14, 2016).
[55] *See* legal authority identified in *supra* note 34.
[56] 81 Fed. Register 135, 45490 n.85 (July 14, 2016).
[57] *See*, U.S. Chamber of Commerce April 1, 2016 Submission, at 25.

EEOC avoids recognition of the numerous factors that could influence pay and instead takes the leap in claiming that its statistical tests "could determine whether factors such as race, ethnicity, gender and hours worked impact the distribution of individuals in pay bands."[58] However, ignoring explicitly-permitted differences in compensation based on factors like experience, performance, work productivity, skills, scope of responsibility, market, and education renders any statistical analysis meaningless. This is particularly true in instances where sex and race/ethnicity correlate with some of the permitted pay factors.[59]

The EEOC's solution for employers in the face of the inaccurate analyses inherent in any evaluation based on the Final Proposed Revisions is that an employer will have the "opportunity to explain its practices, provide additional data, and explain the non-discriminatory reasons for its pay practices and decisions."[60] But this solution only underscores the lack of utility with this data. As previously stated, when the EEOC is evaluating a charge of discrimination, it is entitled to collect detailed compensation information from employers based on the specific allegations in the charge under investigation. The EEOC has made no indication that this report would eliminate such specific data requests, nor could it because of the erroneous conclusion that will be inherent in any analysis based simply on Box 1, W-2 wages and flawed hours data. To the contrary, the EEOC concedes that "only after considering [the employer's explanation] and possibly additional information, would the EEOC reach a conclusion" about alleged discriminatory pay practices.[61] Thus, employers will still be subject to the same requests for information to which they are required to comply in connection with a specific charge filing. However, they will be forced to explain the erroneous assumptions the EEOC will be making based on the flawed compensation data analyses generated by the Proposed EEO-1 Data.

c. *The Proposed Statistical Methods Will Serve No Purpose Under Title VII, EO 11246 or the EPA*

The Chamber articulated – with supporting declarations and statistical analyses from Drs. DuMond and Speakman – that the EEOC's planned statistical analysis of the data will lead to many false-positive and false-negative conclusions. The analyses presented warrant the conclusion that the data requested in the revised EEO-1 Report will be of no value in enforcing compensation discrimination laws; that is, ascertaining whether there are disparities in pay between individuals performing the same, or substantially similar work.

In its Final Proposed Revisions, the EEOC simply claims that its own analysis suggested the statistical tests "provide insight that are useful in developing a request for information or deciding whether an investigation of a charge should have a more limited scope." Their response

[58] 81 Fed. Register 135, 45490 (July 14, 2016).
[59] *See* U.S. Chamber of Commerce April 1, 2016 Submission, at 25.
[60] 81 Fed. Register 135, 45490 (July 14, 2016).
[61] *Id*.

makes clear that the EEO-1 pay data report will do nothing to assist the EEOC in actually determining whether discrimination has played any role in setting compensation. And persisting in claiming that aggregated compensation information, coupled with faulty hours data will assist the Commission in refining information requests is simply disingenuous. As previously stated, the EEOC has the power to seek detailed compensation data from employers against whom a charge of discrimination has been filed. It simply lacks credibility to suggest the Final Proposed Revisions in their broad and aggregate form will aid agency investigations.

d. *Using Proxy Hours Will Lead to Inaccurate Results and Will Serve No Purpose Under Title VII, EO 11246 or the EPA*

The EEOC's 2/1/16 Proposed Revisions made clear that the Commission was unsure how to account for hours for full-time exempt employees. In this regard, the agency requested "employer input" on the methodology for collecting hours information. In the Final Proposed Revisions, the EEOC offers two options for employers – using "proxy" hours or using actual hours to the extent the employer collects actual hours for exempt employees.

As previously noted by the Chamber in its submission to the EEOC, using "proxy" hours to analyze compensation will do further harm to the efficacy of the data and will only compound the inaccuracies inherent in any statistical analysis. The impact of this data limitation is serious given that 41% of the US workforce is paid on a basis for which only "proxy" hours will be used to evaluate differences in pay. The Final Proposed Revisions do not address this serious deficiency.

Moreover, the EEOC claims that collecting "hours worked" data will aid the EEOC in its initial investigation of allegations that an employer gave a charging party "fewer hours," or "denied overtime or premium pay." Such a claim is absurd. It is simply not possible to ascertain usable information related to such allegations given that both exempt and non-exempt employees will be included in the same EEO-1 job grouping and there is no information related to the types of positions included in each broad EEO-1 grouping. And including "proxy" hours information for exempt employees renders the overall hours analysis meaningless for discerning actual assignment of hours or denial of overtime or premium pay. As with its current investigations, the EEOC will simply issue a request for information for detailed information related to the specific allegations in the charge of discrimination.

e. *Using W-2 Box 1 Data Will Lead To Inaccurate Pay Comparisons and Can Serve No Purpose Under Title VII, EO 11246 or the EPA*

In its Final Proposed Revisions, the Commission clarifies that employers should report Box 1 W-2 data as part of the new EEO-1 pay data. In addition to the Chamber's concerns regarding any evaluation of compensation that fails to take into account job changes, promotions, annual pay adjustments, different working conditions or locations, performance, and years of service, among other factors, the use of W-2 information creates another flaw that goes unaddressed.

As the EEOC described in its Final Proposed Revisions, Box 1 of Form W-2 includes the following components: total wages, bonuses, non-cash payments, and tips, among other forms of income.[62] It is intended to capture all forms of compensation employees receive through their employer in a year. However, as explained by Dr. DuMond, Box 1 of Form W-2 explicitly *deducts* monies that employees may choose to invest on a tax-deferred basis in their 401(k) or 403(b) account as well as amounts used to fund flexible spending and health savings accounts.[63]

In his declaration, Dr. DuMond provides an example that highlights the potential error associated with relying on Box 1 W-2 earnings.[64] As explained, assume that a male employee and a female employee are in the same EEO-1 job category, earn the same base salary ($75,000 per year) and were each awarded a $10,000 bonus in the same year. Neither received any other compensation so each earned $85,000. However, if the female employee opted to defer 6% of her compensation to her 401(k) plan but the male employee did not, then the reported Box 1 W-2 income for the male employee will remain $85,000 compared to $79,900 for the female employee. In other words, these two employees who are paid exactly the same amounts by their employer will be placed into different pay bands on the EEO-1's new report, suggesting that they are being treated differently by their employers. However, the entire pay differential in this example arises from choices made by individual employees – not the employer.

Dr. DuMond goes on to explain that this issue would be less concerning if there were few differences between genders and or race/ethnicity groups with respect to participation in retirement plans.[65] However, published research indicates that the exact opposite is true. The study by the ERISA Advisory Council which was published by the US Department of Labor found that "significant disparities exist for women and racial minorities" with respect to their

[62] 81 Fed. Register 135, 45485 n.50 (July 14, 2016).
[63] *See* Exh. 2, J. Michal DuMond Supplemental Declaration, ¶¶ 7-8.
[64] *Id*. at ¶ 9.
[65] *Id*. at ¶ 10.

retirement savings.[66] Put another way, the EEOC is now proposing to use a measure of total compensation (Box 1) for which there is published research indicating that these amounts will be disproportionately affected based on employees' race and gender.

Moreover, in selecting W-2 wage data, the EEOC ignores that some types of pay, specifically commissions and tips, are determined more by an employee's skill and effort than an employer's pay policies. For example, in the Chamber's submission to the EEOC, Dr. DuMond noted that differences in W-2 earnings among servers at a restaurant will be based on their ability to provide quality service and earning the associated tips/gratuities, and is largely undetermined by the employer.

Thus, the EEOC's clarification that employers use Box 1 W-2 data for the EEO-1 pay submission creates greater concerns than what it resolves.

2. The EEOC's Publication of Aggregate EEO-1 Data Serves No Utility

The EEOC also contends that "EEOC enforcement staff could examine how the employer compares to similar employers in the labor market by using a statistical test to compare the distribution of women's pay in the respondent's EEO-1 report to the distribution of women's pay among competitors in the same labor market."[67] Here too, there is absolutely no basis in law for such comparisons in evaluating compensation discrimination.[68] In its Final Proposed Revisions, the Commission does not even attempt to explain how such an analysis could serve any purpose under applicable laws.

As set forth in the Chamber's comments to the EEOC, employers cannot use as a defense to claims of inequitable pay practices that others in its industry are also paying women or minorities in a particular EEO-1 category less than white men.[69] Conversely, it is not discriminatory for an employer to decide to pay lower wages for certain positions than its competitors may choose to pay for the same positions. As such, the mere fact that a particular employer's aggregate compensation data is below the pay of the industry is irrelevant to an investigation of whether an employer's pay practices are discriminatory.

The EEOC made no attempt to respond to or address these comments in its Final Proposed Revisions. The Commission's failure to address these substantive issues highlights its failure to meet its requirements under the PRA which requires a rigorous analysis of the burden, and utility of the proposal.

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[66] *Id*.
[67] 81 Fed. Register135, 45490 (July 14, 2016).
[68] *See* U.S. Chamber of Commerce April 1, 2016 Submission, at 39-40.
[69] *Id*., at 39-40.

3. The EEOC's Training Goals Do Not Justify the Final Proposed Revisions

The PRA instructs the OMB to "maximize the practical utility of and public benefit from information collected by or for the Federal Government."[70] The PRA goes on to command the issuing agency to develop "a plan for the collection of the information."[71] The EEOC attempts to respond to this command by setting forth a plan to establish training for EEOC personnel and other purposes.[72] Like so much else in the EEOC response to comments on the 2/1/2016 Proposed Revisions, the EEOC packages words to attempt to paint a picture of compliance with the PRA mandate but offers instead little more than a description of vague aspirations as to how the EEOC personnel can make any practical use of the data and how the data may be of use for stakeholders. This does not meet even the bare minimum facial requirements of the PRA.

The EEOC admits that at the time of publication, it has no "analytical tools" or accepted methods to use the data.[73] Rather, it posits that if and when such an analytical tool is developed, it will periodically train relevant personnel as to how to make any practical use of the data.[74] It makes a mockery of the PRA to propose a massive data collection burden before there are any developed tools to utilize the data.[75] Promising to train personnel at some future date does not meet the statutory requirements. And, as noted, the information proposed to be collected by the revised EEO-1 will not serve to assist intake personnel who receive compensation charges to "issue spot" potential pay discrimination since the Commission admits that the information cannot be used to identify pay discrimination. It is unclear then what the intake personnel will be trained on insofar as there are already in place well established protocols to develop requests for information from employers to respond to the particulars of a charge. The proposed EEO-1 compensation data will offer absolutely no assistance to this process.

The EEOC states that "staff is trained with regard to confidentiality obligations with respect to pay data."[76] However, the EEOC goes on to state that the aggregate pay data will be provided to employees, their advocates and academic researchers. The EEOC does not commit however that this group will be trained with respect to any proper confidentiality requirements. Rather, the EEOC obviously plans to unleash a mass of unanalyzed raw data, which has no

[70] 44 U.S.C. § 3504(c)(4).
[71] 44 U.S.C. § 3506(c)(1)(iii).
[72] 81 Fed. Register 135, 45491 (July 14, 2016).
[73] *Id*. at 45490.
[74] *Id*. at 45491.
[75] The Paperwork Reduction Act of 1995, 44 U.S.C.A. 35 § 3506(c); 5 C.F.R. § 1320.8. *See also*, NATIONAL RESEARCH COUNCIL, COLLECTING COMPENSATION DATA FROM EMPLOYERS 2 (National Academies Press 2012), *available at* http://www.nap.edu/catalog/13496 (suggesting that the EEOC should "prepare a comprehensive plan for the use of earnings data before initiating any data collection").
[76] 81 Fed. Register45491 (July 14, 2016).

legally probative value, to plaintiff attorneys and researchers who are not bound to any statutory prohibition on disclosure. The EEOC also suggests that it will conduct "enhanced technical assistance" (nowhere described) to employers through various medium to permit them to undertake voluntary compliance measures. Again, these are words without any meaning. There is already an outreach program by the government agencies to assist employers in voluntary compliance efforts. Covered government contractors are mandated by the OFCCP to conduct such analysis. While there is no objection to outreach in this critical area, the EEOC makes no attempt to tie this training program to any data developed or submitted through the Final Proposed Revisions. Further, the examples of pay practices which the EEOC suggests may cause improper compensation rates are already addressed by existing law, and as noted, have absolutely no connection to the proposed EEO-1 data which the EEOC admits cannot be used to determine if there are discriminatory pay practices.

Thus, it is clear that aside from some empty lip service to the requirement that there be training programs in place to use the data, the EEOC has developed absolutely no content for this training and proposes that it may, at an unnamed future date, develop analytical tools which might be of some use. This does not meet the requirements of the PRA and by itself must compel OIRA to return the proposal to the EEOC and direct it to first develop meaningful and substantive training programs which might be of use in analyzing the massive amount of data to be created by the revised EEO-1.

VI. OIRA HAS A SUBSTANTIVE OBLIGATION TO ENSURE THAT THE EEOC'S PROPOSAL WILL PROTECT THE CONFIDENTIALITY AND SECURITY OF THE EEO-1 DATA

The highly sensitive nature of the data requested by the revised EEO-1 Report, presents significant confidentiality issues related to the potential disclosure of this data. The PRA requires OIRA to, "ensure that the creation, collection, maintenance, use, dissemination, and disposition of information by or for the Federal Government is consistent with applicable laws, including laws relating to -- (A) privacy and confidentiality."[77] This is a substantive obligation to scrutinize the proposal with regard to data security protection. Although EEO-1 data has always been sensitive, the addition of pay data to the report increases the value of the information, and thus the security risk. The EEOC publishes aggregate data collected from the EEO-1 reports and shares original EEO-1 data with other federal and state agencies and individual researchers. With regard to the aggregate data, there are concerns that those who receive it will be able to reverse-engineer the aggregate data. With regard to original data, there are concerns that those who receive it might not take appropriate steps, or have appropriate procedures in place, to maintain its confidentiality.

[77] Paperwork Reduction Act of 1995, 44 U.S.C.A. 35 § 3501.

Prior to issuing the proposed rule, the EEOC engaged the National Academy of Sciences (NAS) to conduct a study, which, *inter alia*, looked at confidentiality concerns raised by the EEOC's collection of employee pay data in EEO-1 reports and its subsequent disclosure of this data in aggregate and original form. As a threshold matter, the report issued by the NAS (NAS Report) recognized -- and we wish to emphasize -- that, "[e]mployee compensation data are generally considered to be highly sensitive; they are even considered proprietary information by many private-sector employees."[78] The NAS Report underscored that, "there will be a great demand on the part of other federal agencies, researchers, analysts, compensation-setting bodies and others for access to these powerful new data."[79] It is alarming that the NAS Report noted that, the "EEOC provides [this] data to agencies that do not have the same level of confidentiality protections."[80]

1. Risk of Data Security Breach is Imminent

Despite increasing awareness of cyber security issues, training in data protection and cyber security, and improved technological systems that comply with the latest information security laws, large-scale cyber security breaches continue to occur in many government offices and private businesses alike. Just last year, a massive data breach occurred in the Office of Personnel Management, when 21.5 million individual victims' private data was compromised. This extensive data breach was one of the largest in recent memory and was specifically targeted at employee, applicant and former employee information. OPM now faces a class action alleging that OPM did not do enough to vet the security measures employed by the vendor or require the vendor to provide ongoing updates to OPM regarding its security program and any breaches.

Cyber-breaches of private data are such a growing problem that in 2015, the Government Accountability Office ("GAO") escalated them to "high risk" status in its biennial High-Risk Series report,[81] in order to ensure "the security of federal information systems and cyber critical infrastructure and [protect] the privacy of personally identifiable information (PII)." This report highlighted the importance of cyber security, calling it "vital to public confidence and the nation's safety, prosperity, and wellbeing." The report defines PII as, "information that is collected, maintained, and shared by both federal and nonfederal entities," such as the type included in the EEO-1 proposal. GAO reports that in 2014 the number of information security incidents reported by federal agencies to the U.S. Computer Emergency Readiness Team was 67,168 – twelve times greater than just 8 years earlier.

[78] NATIONAL RESEARCH COUNCIL, COLLECTING COMPENSATION DATA FROM EMPLOYERS 84 (National Academies Press 2012), *available at* http://www.nap.edu/catalog/13496 .
[79] *Id*. at 90.
[80] *Id*.
[81] GOVERNMENT ACCOUNTABILITY OFFICE, HIGH-RISK SERIES AN UPDATE REPORT TO CONGRESSIONAL COMMITTEES 235 (2015), *available at* http://www.gao.gov/assets/670/668415.pdf .

The NAS Report emphasized that, "the consequences of a breach in the protection of data provided in confidence are, as other federal agencies have discovered, painful and of lasting consequence."[82] Ineffective protection of this information, "could lead to serious consequences and result in substantial harm to individuals and to the federal government."[83] In the hands of the wrong people, the original pay data from the EEO-1 report could cause significant harm to EEO-1 responders and subject employees to potential violation of their privacy. Even though no information in the EEO-1 report is tied to the name of any one individual, it is not hard to imagine a scenario in which individual employees within a small group listed on the EEO-1 report could be identified. The risk of security breach is imminent and must be taken seriously.

2. The Final Proposed Revisions Do Not Adequately Address Concerns of Privacy and Confidentiality of EEO-1 Data

The OPM breach holds lessons for all federal agencies and should have informed the EEOC's plan to handle the disclosure and transfer of employee pay data to third parties. However, the EEO-1 proposal does not take this risk seriously, giving short shrift to the privacy and confidentiality issues raised therein. The EEOC glibly states that, "EEO-1 pay and hours worked data will be held in confidence by the EEOC and OFCCP to the maximum extent permitted by law,"[84] as if that were sufficient to address the range of issues presented by this highly sensitive data.

There is no indication in the Final Proposed Revisions that the EEOC requires those to whom it provides the EEO-1 reports to (1) maintain the same level of confidentiality that the EEOC does with respect to this information (other than the Department of Justice); (2) demonstrate that their information security programs are sufficient to protect this data from malicious attacks targeted at such data; or (3) provide notification to the EEOC in the event their data security is compromised or the entity or individual experiences a data breach. Moreover, the proposal is silent as to how the data will be transferred from the EEOC to the various federal or state agencies or individuals.

We also observe that the EEOC is providing establishment EEO-1 data to researchers whom it engages under a consultancy agreement to enable the researchers to publish findings in learned journals or to enhance their academic credentials. There is absolutely no indication as to what, if any, confidentiality restrictions are imposed on these shared reports, nor is there any agency enforcement purpose from these arrangements – the only Title VII justification for requiring these reports. Of course the PRA does not permit an exemption from its requirements

[82] *Id*.
[83] *Id.*
[84] *Questions and Answers Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/eeo1survery/2016_eeo-1_proposed_changes_qa_revised (last visited July 18, 2016).

authorizing agencies to share privileged data with academic researchers, which data has been submitted as a result of massive cost and operational burden to employers.

In light of the EEOC's serious omissions in relation to protecting the privacy and integrity of the highly sensitive EEO-1 data, OIRA has a significant obligation to scrutinize the proposal and ensure that it is consistent with applicable laws related to privacy and confidentiality. It is absolutely clear that the EEOC made no such effort to protect confidentiality. Faced with the criticism that its initial proposal devoted two paragraphs to confidentiality, the EEOC now publishes two pages which list various federal programs to establish procedures which might protect the confidentiality of information. Publishing lists of government procedures which have apparently not worked to protect the OPM, the White House, the FDIC or other government agencies from data breaches does not meet the requirements of the PRA or common sense. The EEOC should be instructed to take this issue seriously, and develop actual procedures to deal with data breaches, or permit a competent government agency to be charged with doing so. Failure to do so would violate OIRA's statutory obligation under the PRA.

VII. CONCLUSION

The EEOC's Final Proposed Revisions allocate considerable words to explain why it is important to include supplemental pay in its analysis, but fails to address how it will control for *lawful differences* in this data; and avoid the statistical errors associated with not doing so. Inexplicably, the EEOC proposes revisions that will create a great burden on responders, yield useless analysis, and fail to advance the enforcement of federal employment policies. For these reasons the EEOC's Final Proposed Revisions are neither reasonable, necessary, nor appropriate and therefore, in violation of Title VII § 709(c)(3) and the Paperwork Reduction Act.

If OIRA approves the Final Proposed Revisions as is, this will violate its own, independent obligation under the PRA to ensure consistency with applicable laws. On that basis, we urge OIRA to reject the Final Proposed Revisions and return them to the EEOC.[85] We note that insofar as the revised EEO-1 report will not be scheduled to be returned until March, 2018, returning this proposal with direction to comply with the PRA, the requirements of Title VII and insure the confidentiality of the data being requested will not impede any agency policy.

[85] If OIRA does not reject the Final Proposed Revisions, it should be noted that the EEOC's actions do not comply with Title VII statutory requirements regarding reporting regulations and are therefore judicially reviewable under the Administrative Procedure Act.
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Joseph B. Nye, OIRA
Policy Analyst
August 15, 2016

Sincerely,

Randel K. Johnson
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Labor, Immigration and
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James Plunkett
Director
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Exhibit 1

Declaration and Report of Ronald Bird Regarding Results of a Survey of Affected Companies Regarding EEO-1 Information Collection Burdens

Prepared for the U.S. Chamber of commerce in Response to Equal Employment Opportunity Commission 30-Day Notice to Revise EEO-1 Reporting Requirements

QUALIFICATIONS:

I hold the Ph.D. degree in economics (University of North Carolina at Chapel Hill, 1974), and I have over 25 years of experience conducting and reviewing economic analyses of the benefits and burdens of government policies, regulations and information collection mandates. I presently serve as Senior Regulatory Economist with the United States Chamber of Commerce. Previously, I served as Chief Economist of the United States Department of Labor (2005-2009), Chief Economist for The Employment Policy Foundation (1999-2005), Chief Economist for Dyncorp Information Technologies (a regulatory and policy analysis support contractor to Federal agencies (1992-1999)), and Senior Economist for Jack Faucett Associates (a regulatory and policy analysis support contractor to Federal agencies (1989-1992)). I have held faculty appointments in economics at North Carolina State University (1973-1975 and 1982- 1987), The University of Alabama (1975- 1982), Meredith College (1986-1987), and Wesleyan College (1987-1989).

INTRODUCTION:

In response to the Equal Employment Opportunity Commission's ("EEOC's" or "Commission's") announcement, 81 Federal Register 20, p. 5113, February 1, 2016, of intention to revise Form EEO-1, Annual Employer Report ("EEO-1"), to add mandatory reporting of earnings and hours worked data ("Proposed Revisions"), I reviewed EEOC's documentation of its estimates of the burden of the current version of the EEO-1 form and its estimates of the future burden of its proposed revised report form. From that review, I found that the estimated time and cost burdens presented by EEOC were based on specious reasoning and lacked a credible empirical foundation. These findings were discussed in the Declaration I submitted in support of the comments filed on April 1, 2016 by the U.S. Chamber of Commerce in response to the Proposed Revisions. The analysis contained in my initial Declaration was based, in part, on the initial results of 22 Chamber member companies that responded to a survey instrument I designed to illicit information concerning the burden associated with generating the EEO-1 in its current and proposed format.

The EEOC has now revised its information collection burden estimate for the EEO in its current and proposed form, and that burden calculation estimate has been submitted to the Office of Management and Budget's Office of Information and Regulatory Affairs ("OIRA"), 81 Federal Register 135 p. 45479 July 14, 2016, for approval subject to a 30 day public comment period ("the 30-Day Notice"). Since the submission of the Chamber's initial comments and my initial Declaration in April, the Chamber has continued to collect responses to the survey instrument I prepared. The Chamber has now received 50 responses, more than double the 22 responses that were initially tabulated and included in support of the Chamber's first set of

comments. As explained more fully below, the additional survey responses confirm the initial survey results, namely that the EEOC grossly underestimates both the time and cost burdens that will be imposed on the responding public.

SUMMARY OF FINDINGS:

The EEOC has submitted to OIRA a request to approve the current and proposed expanded EEO-1 based on the following estimates of burden:

1. 2016: Collection and reporting of "Component 1" data (i.e., data in the current EEO-1 format) from 67,146 respondents (683,275 reports or 10.2 reports per employer on average) at an annual burden of 1.055 million hours, equivalent to $30.0 million. This would amount to 1.5 hours per report, or 15.7 hours for the average company in terms of reports submitted, or $448 per company.

2. 2017-2018: Collection and reporting of Component 1 data only from 6,260 Federal contractors employing 50 to 99 workers (9,129 reports or 1.5 reports per employer) at an annual burden of 59,166 hours, equivalent to $1.9 million. This would amount to 6.5 hours per report, or 9.5 hours for the average company, or $299 per company.

3. 2017-2018: Collection and reporting of both Component 1 and "Component 2" data (i.e., the earnings and hours data required under the proposed expanded EEO-1 format) from 60,866 companies with employing 100 or more employees (674,146 reports or 11.1 reports per employer on average) at an annual burden of 1.893 million hours, equivalent to $53.5 million. This would amount to 2.8 hours per report, or 31.1 hours per employer for the average employer in terms reports submitted, or $880 per employer.

4. The Commission also estimates one-time costs for implementation of the expanded earnings and hours reporting format in 2017 as $27.2 million based on 8 hours of information system programming specialist work by each of 60,886 employers.

The Commission's analysis lacks empirical evidence to support key parameters of its calculations. The Chamber's survey of its member employers was conducted to develop more credible estimates of the key parameters on which burden calculations depend. The Chamber's survey shows that alternative burden estimates are significantly higher than the Commission's estimates:

1. 2016: Collecting and reporting Component 1 data (the current EEO-1 format) from 67,146 respondents (683,275 reports or 10.2 reports per employer on average) at an annual burden of 4.485 million hours, equivalent to $223 million. This would amount to 6.6 hours per report, or 66.8 hours for the average company in terms of reports submitted, or $3,323 per company.

2. 2017-2018: Collecting and reporting Component 1 data only from 6,260 Federal contractors employing 50 to 99 workers (9,129 reports or 1.5 reports per employer) at an annual burden of 59,928 hours, equivalent to $2.98 million. This would amount to 6.6 hours per report, or 9.6 hours for the average company, or $476 per company.

3. 2017-2018: Collecting and reporting both Component 1 and Component 2 (earnings and hours data) from 60,866 companies with employing 100 or more employees (674,146 reports or 11.1 reports per employer on average) at an annual burden of 8.066 million hours, equivalent to $400.8 million. This would amount to 12 hours per report, or 132.9 hours per employer for the average employer in terms reports submitted, or $6,612 per employer.

4. The Chamber estimates that the one-time cost of designing, developing, testing, implementing and training employees in the use of new data compilation and query systems to satisfy the expanded earnings and hours data requirement will total $41.9 million in direct labor costs or $688 direct labor cost for the average EEO-1 filer company submitting 11 reports annually, 54% more than the $27.2 million amount ($446 per company) estimated by the Commission.

5. The Chamber has also considered the matter of overhead costs, which the Commission did not include in its calculations. The addition of overhead costs could substantially increase the annual cost to $725.3 million for 2016 and to $1.3 billion per year for 2017 and 2018. For the one-time cost component, the inclusion of overhead would increase the one-time cost for design, testing and implementation of information systems to $136.1 million, or $2,236 per company.

The chart set forth below compares the EEOC's most recent burden estimate with the burden estimate prepared by the Chamber based on actual data provided by 50 member companies.

Comparison of EEOC and U.S. Chamber Estimates of Annual Paperwork Compliance Burden Hours and Cost			
	2016 all respondents complete component 1 only	**2017/2018 contractors with 50-99 employees complete only component 1**	**2017/2018 employers with 100 + employees complete both component 1 & 2**
Number of respondents	67,146	6,260	60,866
EEOC estimated burden hours	1.055 million hours	59,166 hours	1.893 million hours
Chamber estimated burden hours	4.485 million hours	59,928 hours	8.066 million hours
EEOC estimated Cost[1]	$30.0 million	$1.9 million	$53.5 million
Chamber estimated cost without overhead cost	$223.0 million	$2.98 million	$400.8 million
Chamber estimated cost with overhead added[2]	$725.3 million	$9.7 million	$1.3 billion
EEOC estimated one-time cost			$27.2 million, with no allowance for overhead cost

[1] The Commission only estimated cost on a no overhead basis – omitting the cost of the workplace, equipment, materials and other support labor requires to perform the reporting task.

[2] The Chamber calculation applied an overhead load multiple of 3.25 times direct labor cost per hour.

Chamber estimated one-time cost			$41.9 million direct labor cost or $136.1 million including overhead cost

DISCUSSION:

The Commission revised information collection burden estimate for the EEO-1, which has been submitted to the OIRA for approval subject to a 30 day public comment period, grossly underestimates both the time and cost burdens that will be imposed on the responding public. The burden has been underestimated for both the continuation of the current report format and for the proposed expanded report format (incorporating earnings and hours worked data) that is proposed to become effective for the 2017/2018 report years.

EEOC's estimate of the hours burden are based on arbitrary assertion of optimistic assumptions regarding the amount of time and the kinds of labor resources that the typical employer will use to complete the data collection and tabulation tasks that the EEO-1 reporting requirement will entail. Instead of relying on surveys of affected companies, field trail pilot studies, or experiments to establish credible and statistically reliable estimates of the key burden calculation parameters, as required by good economic analysis practice, the Commission relies on suppositions without empirical foundation. The failure of the Commission to conduct adequate empirical research to inform its burden estimates is a flaw that permeates the Commission's presentation to OIRA.

The Commission's estimates of burden presented in the 30-day notice Paper Work Reduction Act submission to OIRA on July 14, 2016 (81 Federal Register 130, p. 45479) is an improvement over the preliminary estimate published for public comment in February 1, 2016 (81 Federal Register 20, p. 5113). The Commission adopted some public recommendations, but not enough. In particular, the Commission failed to implement the public comment recommendations to delay further action until it has undertaken its own efforts to collect credible empirical data from the field about the time and resources required to collect the data for the current EEO-1 report format (referred to as Component 1 by the Commission) and about their capabilities of respondents to implement the requirements of the proposal to add earnings and hours data to the report.

At the heart of the Commission's underestimation of the burden of this information collection are overly optimistic and inadequately informed assumptions regarding the extent to which employers maintain centralized human resource information systems, the extent to which employers systems fully integrate all aspects of personnel records, including payroll, and the extent to which automated information technology reduces the time and cost of compiling and tabulating available information. The Commission's overly optimistic view relies on a single

citation, footnote 102 in the Commission's 30 day notice (*see* 81 Federal Register 135, p. 45493), which quotes a report in the International Public Management Association ("IPMA") journal, (Public Personnel Management, Volume 39, no. 3, Fall 2010) that "90% of human resources departments used some form of HRIS(Human Resource Information System)". Since IPMA represents only public sector personnel managers, the 90% reference may not be relevant to private sector employers. Nothing in this citation addresses the critical questions of whether systems throughout the establishments of a company are similar, connected or contain full information needed to complete the current and proposed EEO-1 report formats. These are researchable questions that the Commission could have readily addressed through surveys of past EEO-1 respondents, through field pilot studies, or through examination of its own human resource information system capabilities and the capabilities of other Federal Government HRIS resources.

A simple experiment to attempt to implement the current and proposed expanded EEO-1 report formats with data in the Commission's own personnel files would have been a useful basis for investigation of both the burden and the utility of the report. Extending that trail to the Department of Labor, which also relies on EEO-1 data for its Office of Federal Contract Compliance Programs activities would have been additionally useful.

The Federal Government expends billions of dollars every year to procure and operate information technology data storage and analysis systems. Much of this expenditure is through contracts for specialized labor and services. The government's own experience is a valuable source of information about the time and cost involved in creating, accessing and modifying information systems that the Commission could have relied upon to inform its estimates of this information collection burden. Other than vague references to "experience", the Commission's report of its burden calculation method does not show that any systematic and statistically reliable analysis of government IT procurement and operations experience was conducted. If any such data was relied upon, it is incumbent on the Commission to publish it for public review and comment.

In its comments to the Commission in April, the Chamber presented preliminary findings of a survey that it has conducted to estimate the time and cost burdens of the current and proposed EEO-1 report formats, and the Commission appears to have adopted some data presented in our comments to inform its revised burden estimates now being presented to OIRA. Unfortunately, the Commission seems to have ignored the central findings of our survey and analysis:

- That the information collection and processing capabilities of employers are diverse and the diversity is reflected in large variations in the time, resources and costs of compliance;

- That the Commission's expectation of economies of scale for multi-establishment employers may be countered by inefficiencies of communication and verification within large organizations;

- That the burden of the existing EEO-1 format is significantly greater than previous burden estimates by the Commission have acknowledged; and

- That the proposal to add new reporting elements has the potential to multiply the information collection burden.

UPDATED SURVEY RESULTS:

Since the submission of the comments in April, the Chamber has continued to collect survey responses. 50 responses in total have been received, more than double the 22 responses tabulated for the April 1 comment report. The added survey responses confirm the preliminary results, especially with regard to the diversity of capabilities and experiences of respondents and the greater burden of the current EEO-1 format (Component 1 in the Commission's presentation).

The 50 respondents to the Chamber survey represent a range of company sizes and industries. The smallest company reported having about 400 employees, 90% of whom are housed in a single establishment. The largest company reported having over 200,000 employees in more than 2,000 EEO-1 reportable establishments.[3] Altogether, the 50 respondents account for about 1.8 million employees, 1.5% of total private non-farm payroll employment in the U.S. in 2015 and respondents to this survey filed a total of 20,040 EEO-1 reports in 2015, comprising 2.9% of the 683,275 EEO-1 reports filed annually according to EEOC's most recent tabulation. The number of reports submitted per company averaged 400 with a sample standard deviation of 900. Five respondents accounted for a total of more than 11,000 reports filed. At the low end of the spectrum, there were five that filed 10 or fewer reports, accounting for a total of 20. The median number of reports filed was 90. The written survey was completed by the individual or team at the headquarters location primarily responsible for organizing and implementing the annual report submission.[4] Written survey responses were supplemented by interviews of human resource managers and others in the 23 of the respondent organizations who were identified as the primary contact for the survey.

[3] These and other numbers have been rounded to ensure confidentiality of individual company data.

[4] One survey response indicated that it was a multi-establishment subsidiary of another company that submitted its EEO-1 data through the parent company, which was not a survey respondent itself.

BURDEN TO PREPARE THE CURRENT EEO-1:

The average respondent company estimated that it expended a total of 6.6 hours per report filed using the current EEO-1 format. This included time expended by headquarters staff compiling, reviewing, verifying and submitting the combination of all of the reports submitted by the company. It also includes time expended at the local establishment level to provide or clarify data for the headquarters staff. There were only two cases among 23 follow-up interviews where it was reported that the work was done entirely at the central office without significant input from the establishment locations. These were large multi-establishment respondents who reported maintaining fully centralized human resource information system networks. In most cases the information collection burden involved significant time of both headquarters and establishment level staff.

The reported "per report" time values represent the composite of work at both levels as perceived by the responding headquarters staff member. Individual company responses ranged from a low of 0.5 hours per report to a high of more than 30 hours per report. Both extreme responses were from moderately large companies each with several hundred establishments. In each case about half to two-thirds of establishments employed fewer than 50 employees. In the low time per report case the company's human resource information system is fully centralized and highly automated, including software tailored to compilation of current format EEO-1 reports. In the high time per report case, the company has virtually no centralized human resources information system. Each location is autonomous in terms of hiring, records management, and payroll. Many locations have HRIS software, but it is not standardized across the company. Systems are not networked directly to headquarters. Each local establishment is charged to generate its own current format EEO-1 report as a spreadsheet and to email it to headquarters where they are checked and combined for submission.

The standard deviation for the hours per report item was 6.3. Three companies reported time of less than 3.4 hours (the 2015 EEO-1 information collection request hours per report parameter previously reported to OIRA); 14 companies agreed with the benchmark vales of 3.4 hours per report, and 33 reported greater than 3.4 hours per report. 21 companies reported more than 5 hours per report, and of these, 7 reported 10 or more hours.

The Chamber's survey data calls into question the Commission's optimistic assumption that large, multi-establishment employers can collect and submit EEO-1 data more efficiently and at less cost per report than smaller employers. Correlation analysis between hours per report responses and number of reports filed found a correlation coefficient of only 0.12, a very weak association.

Alternatively, a strong associate between hours per report and having or not having a centralized human resource information system is apparent in the survey data. Companies that reported having a centralized HRIS, where all detailed information is accessible at headquarters, reported an average of 5.3 hours per report. Companies that reported not having a centralized HRIS averaged 7.8 hours per report. To more accurately estimate the information collection burden of the current format EEO-1 form, it is not enough to presume that employers have an HRIS. Rather, the Commission should collect data regarding the centralized or decentralized character of the HRIS systems in use.

While acquiring more centralized HRIS networks would have the effect of reducing the EEO-1 information collection burden, it is not the proper role of the Commission to force or encourage companies to centralize their systems. Companies choose the structure of their organization, management and information systems for a variety of legitimate business reasons, and minimizing EEO-1 reporting cost is probably a low item on the list of relevant factors. It is the duty of the Commission to report accurately the cost of the information that it collects from employers, and that requires the Commission to represent the structures as they are, and not presume to change them. The Commission should consider the utility of its information collection activities in relation to the costs that emerge from the reporting structure that exists.

BURDEN TO COLLECT AND REPORT "COMPONENT 2" DATA:

The Chamber survey asked respondents to estimate the effect of adding Component 2 (earnings and hours data) on each company's level of total effort in relation to the reported Component 1 time per report. The average response for this item was a 1.8 times increase in effort, which translates into a 12 hour per report average parameter. The standard deviation for the 1.8 adjustment factor is .83.

The survey also asked about the combination of labor resources (e.g., executive, HR manager, information technology specialist, clerical, etc.) involved in the information collection and submission effort and the resulting composite wage per hour. The average composite wage rate estimated by Chamber survey respondents was $49.75. The responses for this item ranged from $17 per hour to $86 per hour. The standard deviation is 14. The survey-based estimate of composite labor wage compare to the $28 per hour composite labor cost per hour assumed in the Commission's calculation. The Commission's labor time distribution shown in Table 3 of their presentation [insert FR notice citation and page] reflects less time of skilled human resource managers, executives and legal counsel for review of reports prior to submission than is reflected in the Chamber survey responses. In follow-up interviews, Chamber survey respondents cited the significant legal liability potentially arising from submission of an inaccurate or incomplete EEO-1 report as reason to devote more senior time to review and correction prior to submission.

Taken together, the higher average labor time per report (6.6 hours for component 1 and 12 hours for component 2) and the higher per hour composite labor wage ($49.25) compared to the values arbitrarily assumed by the Commission, account for the Chamber's estimates of burden:

1. 2016: Collect Component 1 data (current EEO-1 format) from 67,146 respondents (683,275 reports or 10.2 reports per employer on average) at an annual burden of 4.485 million hours, equivalent to $223 million. This would amount to 6.6 hours per report, or 66.8 hours for the average company in terms of reports submitted, or $3,323 per company.

2. 2017-2018: Collect Component 1 data only from 6,260 Federal contractors employing 50 to 99 workers (9,129 reports or 1.5 reports per employer) at an annual burden of 59,928 hours, equivalent to $2.98 million. This would amount to 6.6 hours per report, or 9.6 hours for the average company, or $476 per company.

3. 2017-2018: Collect both Component 1 and Component 2 (earnings and hours data) from 60,866 companies with employing 100 or more employees (674,146 reports or 11.1 reports per employer on average) at an annual burden of 8.066 million hours, equivalent to $400.8 million. This would amount to 12 hours per report, or 132.9 hours per employer for the average employer in terms reports submitted, or $6,612 per employer.

APPLICATION OF APPROPRIATE OVERHEAD COSTS:

In addition, the Chamber has considered the matter of overhead costs. OIRA recommended in 2000 that agencies improve the accuracy of burden estimates under the Paperwork Reduction Act by adding to labor wage rates appropriate overhead load factors to be included in the monetization of time burdens for information collections from private employers:

> *In estimating the appropriate wage rate, it is critical that the wage be properly "loaded" to include overhead and fringe benefit costs associated with the employee's time. For example, although a technical employee's wage may be $20 per hour, she may also receive benefits from her firm such as health and life insurance, paid vacation, and contributions to a retirement plan. To support her work activities, her employer must also purchase office supplies and services, including office space, furniture, heat and air conditioning, electricity, a telephone and telephone service, a personal computer, printer and photocopier access, and various*

> *office supplies. These costs need to be accounted for when assessing the overall impact of the Federal information collection on the resources of the respondent.*[5]

Available data from previous studies indicates that an overhead/profit multiplier of 3.25 is appropriate for estimating the fully loaded opportunity cost of labor relative to direct wages.[6] Applying this overhead plus profit load factor to the $49.75 per hour blended direct wage average reported by survey respondents yields a full opportunity cost value of $161.69 per hour.[7]

Applying the fully loaded labor rate to the calculation of burden for the current and proposed expanded EEO-1 formats results in substantially increasing the annual cost to $725.3 million for 2016 and to $1.3 billion per year for 2017 and 2018.

ONE-TIME BURDEN ASSOCIATED WITH COMPONENT 2 DATA:

The Chamber estimates that the one-time cost of designing, developing, testing, implementing and training employees in the use of new data compilation and query systems to satisfy the expanded earnings and hours data requirement will total $41.9 million in direct labor costs or $688 direct labor cost for the average EEO-1 filer company submitting 11 reports annually, 54% more than the $27.2 million amount ($446 per company) estimated by the Commission. the inclusion of overhead would increase the one-time cost for design, testing and implementation of information systems to $136.1 million, or $2,236 per company.

COMPARISON OF EEOC AND CHAMBER PRA BURDEN ESTIMATES:

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[5] https://www.whitehouse.gov/omb/fedreg_5cfr1320

[6] The 3.25 multiplier is based on an examination of fully loaded labor cost reimbursement rates paid by government agencies for administrative, professional, technical and managerial services under GSA government-wide services contracts. For example, government agencies who hire contractors to perform technical services typically pay the contract firm $162.69 per hour for the services of a professional worker that the contractor firm pays direct wages of $49.25. The difference is accounted for by the contractor's indirect costs (overhead) and profit. EEOC is encouraged to examine the details of its own contract with Sage Computing for research services related to the EEO-1 form proposal to confirm this.

[7] Two survey respondents noted that survey question asked only for the wage information and volunteered their own acknowledgement that overhead costs and foregone profit should also be considered. These respondents independently reported individual "fully loaded" opportunity cost amounts that their companies use for internal planning purposes. These amounts each were between $250 and $275 per labor hour, significantly greater that the loaded rates based on government contractor data used above, and if proven to be broadly applicable these observations would significantly increase both the baseline EEO-1 burden and the impact of the proposed information collection expansion. The next stage of survey research for this matter will include an effort to estimate with more precision the economic opportunity cost factor applicable to EEO-1 filers.

Comparison of EEOC and U.S. Chamber Estimates of Annual Paperwork Compliance Burden Hours and Cost			
	2016 all respondents complete component 1 only	**2017/2018 contractors with 50-99 employees complete only component 1**	**2017/2018 employers with 100 + employees complete both component 1 & 2**
Number of respondents	67,146	6,260	60,866
EEOC estimated burden hours	1.055 million hours	59,166 hours	1.893 million hours
Chamber estimated burden hours	4.485 million hours	59,928 hours	8.066 million hours
EEOC estimated Cost[8]	$30.0 million	$1.9 million	$53.5 million
Chamber estimated cost without overhead cost	$223.0 million	$2.98 million	$400.8 million
Chamber estimated cost with overhead added[9]	$725.3 million	$9.7 million	$1.3 billion
EEOC estimated one-time cost			$27.2 million, with no allowance for overhead cost

[8] The Commission only estimated cost on a no overhead basis – omitting the cost of the workplace, equipment, materials and other support labor requires to perform the reporting task.

[9] The Chamber calculation applied an overhead load multiple of 3.25 times direct labor cost per hour.

Chamber estimated one-time cost			$41.9 million direct labor cost or $136.1 million including overhead cost

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 15th day of August 2016, at Washington, D.C.

Ronald Bird

Exhibit 2

DECLARATION OF J. MICHAEL DUMOND, PH.D.

I, J. Michael DuMond, do hereby declare as follows:

1. I am over the age of 18. I have personal knowledge of the facts contained in this declaration and if called as a witness I would testify truthfully to the matters stated herein.

2. My name is Jon Michael DuMond. I hold a Ph.D., M.S. and B.S. in economics, all from Florida State University. I am currently a Vice President at Economists Incorporated, a position I have held since 2014.

3. I have been retained by the United States Chamber of Commerce in connection with the Equal Employment Opportunity Commission's (EEOC) proposed changes to the EEO-1 survey. I previously provided a sworn declaration in response to the EEOC's initial proposal.[95] My previous declaration outlined my background and qualifications as well as a copy of my curriculum vitae, and is attached to this declaration as Exhibit 1.

4. My prior declaration noted that the collection of limited and aggregated data by the EEOC through the survey is highly unlikely to provide meaningful information for detecting discriminatory pay disparities and even less useful in determining whether a contractor or covered employer is providing "equal pay for equal work." More specifically, I identified six deficiencies associated with the EEOC's initial proposal. Those deficiencies are: 1) The occupational groupings are too broad and inappropriately combine employees that are in no way performing similar work; 2) The data that will be reported does not account for how differences in job experience or tenure would affect pay; 3) The collected data will not account for working conditions that often necessitate shift or pay differentials; 4) The EEOC's focus on total compensation rather than base pay ignores that some forms of pay, such as tips

[95] The details of the EEOC's proposal are presented in the Federal Register, Vol. 81, No. 20, pp. 5113 – 5121.

and commissions, are often determined more by the employee's interaction with clients and customers than the employer; 5) The number of annual work hours for exempt employees are not typically tracked by their employers since they are often not eligible for overtime pay, yet the OFCCP's proposal would still require employers to provide this information; and 6) The two statistical tests that the OFCCP suggested they will use to analyze the data could easily lead to both "false positives" and "false negatives," meaning that these tests would generate incorrect conclusions about whether employers have discriminatory pay practices.

5. On July 14, 2016, the EEOC published their final proposal[96], and adopted the following changes and clarifications: 1) The annual EEO-1 filing deadline would be changed from March 31st of the year that follows the reporting year; 2) The measure of each employee's total compensation that would be used for reporting purposes was defined as Box 1 of Form W-2; and 3) Employers can report a proxy of 40 hours per week for fulltime exempt employees and 20 hours per week for part-time exempt employees if the actual work hours of those employees are not maintained by the employer.

6. In my opinion, however, none of these revisions correct the deficiencies that I described in my first declaration. In fact, rather than reduce the potential errors associated with these issues, the EEOC's definition of total compensation in their final proposal actually creates another flaw.

7. As the EEOC described in their final proposal, Box 1 of Form W-2 includes the following components: total wages, bonuses, non-cash payments, and tips, among other forms of income.[97] It is intended to capture all forms of remuneration employees receive through their employer in a year. However, Box 1 of Form W-2 explicitly ***deducts*** monies that employees may choose to

[96] Federal Register, Vol. 81, No. 135, pp. 45479 – 45497.
[97] Federal Register, Vol. 81, No. 135, page 45485, footnote 50.

invest on a tax-deferred basis in their 401(k) or 403(b) account as well as amounts used to fund flexible spending and health savings accounts.

8. The impact of excluding tax-deferred contributions from measures of an employee's total compensation is significant as a large percentage of the labor force have access to 401(k) or similar types of defined-contribution (DC) plans. According to a study published by the US Department of Labor, there were 76.7 million active participants in DC plans in the 2013 plan year.[98] This represented an increase of 1.7% from the prior year, and continued a pattern in which the number of workers actively participating in such plans has increased in 35 of the past 38 years.[99] Given that the size of the US Labor Force in 2013 was 155.39 million workers[100], this suggests that nearly half of the workforce are actively contributing to DC plans, and therefore the amounts reported in Box 1 of their W2 tax forms will be adjusted to reflect those contributions.

9. A simple example shows the potential error associated with relying on Box 1 W-2 earnings. Assume that a male employee and a female employee are in the same EEO-1 job category, earn the same base salary ($75,000 per year) and were each awarded a $10,000 bonus in the same year. Neither were provided any other forms of pay so each earned $85,000 in annual compensation. However, if the female employee opted to defer 6% of her compensation to her 401(k) plan but the male employee did not, then the reported Box 1 W-2 income for the male employee will remain $85,000 compared to $79,900 for the female employee. That is, these two employees who are paid exactly the same amounts by their employer will be placed into different pay bands on the EEO-1's new report, suggesting that they are being

[98] See: Private Pension Plan Bulletin, Abstract of 2013 Form 550 Reports at: https://www.dol.gov/ebsa/pdf/2013pensionplanbulletin.pdf.

[99] Data showing the number of active participants in DC plans from 1975-2013 are available at: https://www.dol.gov/ebsa/pdf/historicaltables.pdf.

[100] Data on the size of the US Labor Force are provided by the Bureau of Labor Statistics and are available at: http://www.bls.gov/cps/aa2013/cpsaat01.htm.

treated differently by their employers. However, the entirety of the pay differential in this example arises from choices made by individual employees.

10. This potential problem would be less concerning if there were few differences between genders and or race/ethnicity groups with respect to participation in retirement plans. However, published research indicates that the exact opposite is true. The study by the ERISA Advisory Council which was published by the US Department of Labor found that "significant disparities exist for women and racial minorities" with respect to their retirement savings.[101] Put another way, the EEOC is now proposing to use a measure of total compensation (Box 1) for which there is published research indicating that these amounts will be disproportionately affected based on employees' race and gender.

11. In summary, the EEOC's final proposal has not made any adjustments to address the deficiencies I have previously identified in the original proposal. Additionally, the final proposal has introduced another source of potential error in its proposed data collection by defining Box 1 W-2 to be an employee's total compensation. Therefore, this final proposal is even *less* likely than the original proposal to provide meaningful information for detecting discriminatory pay disparities and also less useful in determining whether a contractor or covered employer is providing equal pay among similarly-situated employees.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Tallahassee, Florida on August 11, 2016.

J. Michael DuMond

[101] https://www.dol.gov/ebsa/publications/2010acreport3.html

EXHIBIT 1

DECLARATION OF J. MICHAEL DUMOND, PH.D.

I, J. Michael DuMond, do hereby declare as follows:

12. I am over the age of 18. I have personal knowledge of the facts contained in this declaration and if called as a witness I would testify truthfully to the matters stated herein.

13. My name is Jon Michael DuMond. I hold a Ph.D., M.S. and B.S. in economics, all from Florida State University. I am currently a Vice President at Economists Incorporated, a position I have held since 2014. Economists Incorporated ("EI") is an economic consulting firm that offers consulting services to a wide variety of clients, including law firms, businesses, trade associations, government agencies and multilateral organizations. From 2009 to 2014, I worked as a Principal within the labor and employment practice of Charles River Associates ("CRA"). Prior to CRA, I worked as an economist with ERS Group from 2001 to 2008, an economic consulting firm which specializes in the economic analysis of labor and employment issues.

14. Since 2002, I have also been an adjunct professor with the Department of Economics at Florida State University. Beginning in 2006, my teaching has consisted solely of graduate-level courses, including computer programming, applied research methods and the econometric analysis of data. My academic research has focused on employee compensation and selection procedures and has appeared in peer-reviewed professional economic journals such as *Economic Inquiry, Industrial Labor Relations Review, Managerial and Decision Economics, and the Journal of Sports Economics*.

15. During my tenure with EI, CRA and ERS Group, I have regularly been engaged to analyze employee compensation for potential disparities in pay related to gender or race/ethnicity. These engagements have encompassed a wide variety of industries and occupations, and have included both private-

sector and public-sector employees. I have been retained on behalf of both plaintiffs and defendants. A copy of my curriculum vitae is attached to this declaration as Exhibit A.

16. I was retained by the United States Chamber of Commerce in connection with the Equal Employment Opportunity Commission's proposed changes to the EEO-1 survey, which would affect federal contractors and private employers with at least 100 employees. More specifically, I was asked to evaluate whether the data that would be collected by the Equal Employment Opportunity Commission (EEOC) would be useful and informative with respect to identifying pay discrimination.[102]

17. If adopted, the new reporting requirements would require covered employers to "collect aggregate W-2 data in 12 pay bands for the 10 EEO-1 job categories. Employers will simply count and report the number of employees in each pay band.[103]" Separate counts would be made in order to show the number of male and female employees in each of the pay bands as well as the number of employees in seven race/ethnic groups.[104] In addition to the number of employees in each pay band, covered employers would also report the total number of hours worked by those same employees in the prior 12 months.

18. The EEOC and Office of Federal Contract Compliance Programs (OFCCP) have stated they intend to rely on these data to not only guide their investigations, "identify employers with existing pay disparities" and "detect discrimination.[105]" The proposal does not define "discrimination".

19. In my opinion, this collection of such limited and aggregated data is highly unlikely to provide meaningful information as to whether a federal

[102] The details of the EEOC's proposal are presented in the Federal Register, Vol. 81, No. 20, pp. 5113 – 5121.
[103] Federal Register, Vol. 81, No. 20, page 5117.
[104] These seven groups are: 1) Hispanic/Latino, 2) White (not Hispanic/Latino), 3) African-American (not Hispanic/Latino), 4) Native Hawaiian or Other Pacific Islander (not Hispanic/Latino), 5) Asian (not Hispanic/Latino), 6) American Indian or Alaskan Native (not Hispanic/Latino) and 7) Two or More Races (not Hispanic/Latino).
[105] Federal Register, Vol. 81, No. 20, pages 5115, and 5118.

contractor or covered employer is providing "equal pay for equal work," and even less useful for detecting pay disparities or discrimination. The reasons that these data would be uninformative in identifying potential pay discrimination are numerous, and I have detailed six of the most serious deficiencies in the following paragraphs.

20. First, the aggregated reporting structure proposed by the EEOC only distinguishes employees based on very broad occupational groups. That is, these groupings result in comparisons of employees who work in very different jobs and who may perform different work. As a result, these groupings will necessarily result in comparisons of employees with large differences in skills, training, education and other qualifications. For example, one of the 10 EEO-1 job categories is "Professionals", which encompasses a wide range of occupations such as lawyers and registered nurses. Hospitals that employ both nurses and lawyers would nevertheless be required to include both of these occupations together in the proposed EEO-1 survey. This grouping of nurses with lawyers ignores the fact that a nursing degree does not require a post-graduate college degree whereas a lawyer will almost surely have post-graduate education. Moreover, the knowledge, skills and abilities required of a nurse differ greatly from those factors that required of a lawyer. In fact, there is actually very little in common between nurses and lawyers beyond the sharing of a common EEO-1 category. While it is undeniable that nurses and lawyers are tied to very different labor markets, the EEOC's proposal ignores this reality and assumes pay should be similar for these types of occupations simply because they are both "Professionals."

21. Second, the EEOC's proposal does not recognize that pay is highly correlated with job experience. For example, some employers may have an explicit seniority-based pay system. Also, pay generally increases the longer an employee has been with a company. Recent data from the Bureau of Labor

Statistics indicates that the average amounts of company-specific tenure differ between men and women and among different race/ethnic groups.[106] Notwithstanding, the statistical tests proposed by the EEOC do not account for differences between employees based on length of service.

22. Third, The EEOC's proposal ignores the role of working conditions and how that affects an employee's compensation. For example, employees who work night shifts, swing shifts and/or weekends are often paid a differential to account for less desirable work schedules. For the same reason, jobs that require employees to work outside or exert atypical physical effort may also command a wage premium. Nevertheless, the statistical tests proposed by the EEOC using the collected data will not and cannot account for differences in working conditions.

23. Fourth, the EEOC is proposing that employers use W-2 data rather than an employee's "base" pay as the former includes commissions, tips, overtime pay, shift differentials and bonus payments. However, the EEOC is not proposing that employers report each of these compensation types separately, but instead is requiring that employers use the total of all these earnings when assigning an employee to one of the 12 proposed pay bands. In doing so, the EEOC is ignoring that some types of pay, specifically commissions and tips, are determined more by an employee's skill and efforts rather than an employer's pay policies. For example, differences in W-2 earnings among servers at a restaurant will be based on their ability to provide quality service and earning the associated tips/gratuities, and is largely undetermined by the employer. Unfortunately, the data that the EEOC is proposing to gather will not allow for such a determination.

[106] See "Employee Tenure in 2014"; News Release; Bureau of Labor Statistics, US Department of Labor; http://www.bls.gov/news.release/pdf/tenure.pdf

24. The fifth reason that the data collected through the EEOC's proposal would be uninformative and unreliable for purposes of identifying pay disparities arises from the inherent problem in determining the number of work hours for salaried employees. As previously noted, covered employers would be required to also determine the total number of annual work hours for employees in each of the 12 pay bands. While such data is obviously available for employees paid by the hour, in my experience very few employers track the number of actual work hours for their salaried workers. In reviewing data from numerous HRIS data systems over the course of my professional career, I have learned that even though these systems often simply maintain a standardized or default value for "work hours" for salaried exempt employees (such as 40 hours per week) this default value frequently does not reflect an employee's actual work hours. For most employers, there is no need to track actual work hours for salaried exempt employees, as they are not eligible for overtime pay. Put another way, accurate data on work hours for salaried or commissioned employees are typically not maintained in the normal course of business.

25. This limitation on accurate data for non-hourly employees is openly acknowledged within the EEOC's own proposal, as they invite "specific, detailed input on this aspect of its proposed data collection.[107]" The impact of this data limitation is serious: according to data from the Bureau of Labor Statistics, 59% of the US workforce is paid by the hour, meaning that 41% of the US workforce is paid on a basis for which no accurate work hours may be available and for which the EEOC does not have a recommended method for measuring.[108]

26. The proposal is also unclear as to how the EEOC will use or analyze the data relating to work hours. I assume that this information will be

[107][107] Federal Register, Vol. 81, No. 20, page 5118, footnote 46.
[108] http://www.bls.gov/opub/reports/cps/characteristics-of-minimum-wage-workers-2014.pdf

used to undertake a rough conversion of the pay range counts into hourly rates for workers in each of the pay bands, most likely using the midpoint of each of the proposed pay bands divided by the number of hours per employee. This approach, however, could be very misleading. For example, an employee that has an annual salary of $120,000 per year but was recently hired and only worked 1 of 12 months will be placed in the lowest pay band since he/she only earned $10,000. Under the EEOC's proposal, this employee would be grouped with minimum wage workers at the same company, even though the hourly rate for this employee would be much higher than the other employees in the same pay band. Similarly, an employee who works a part time schedule of 20 hours per week will be grouped and counted with FT employees who earn half of that hourly rate but work 40 hours per week. Simply collecting the aggregate number of hours worked doesn't fix the bigger underlying problem with the EEOC's proposal: employees are being counted in the "wrong" pay band. However, the EEOC and OFCCP might again infer discrimination from differences in the imputed hourly rates for employees in the same pay band, not recognizing that those differences can just as easily arise from part time and partial year employees, and the agencies will not be able to make that distinction with the aggregated data. Additionally, the proposal does not suggest a methodology by which the EEOC and the OFCCP will distinguish between intermixed part time, partial year or fulltime employees in the aggregate W-2 data. Moreover, since the total number of hours worked by employees in a pay band does not incorporate any of the factors known to affect pay, the data collected under this proposal will not provide any useful insight into the actual nature of employers' pay practices.

27. The sixth reason that the data that would be collected by the EEOC would not be useful in identifying pay disparities is that the two statistical tests that the EEOC suggests they would use in analyzing the collected data (i.e., the

Mann-Whitney tests and the Kruskal-Wallis test) could easily lead to both "false positives" and "false negatives." In this context, an example of a "false positive" would be an inference that a company has gender pay disparities although women and men working in the same job are paid exactly the same (i.e., "equal pay for equal work.") On the other hand, an example of a "false negative" is a conclusion that pay disparities do not exist at a company even in the presence of unambiguous pay discrimination.

28. The reason that the two statistical tests proposed by the EEOC are likely to lead to both false negatives and false positives is that the aggregated data collected by the EEOC will not include one of the most critical factors that determine pay, specifically the job level/job grade of an employee. It is commonly understood that all employees, regardless of their race, ethnicity or gender, will experience increases in pay as they move "up" or "higher" in an organization. In my experience, most every company defines salary ranges for positions based on the level of the job within the organization. For example, Pharmaceutical Sales Representatives are paid less than their District Sales Managers who are paid less than their Regional Sales Directors. It would not be reasonable to assume that an inexperienced Pharmaceutical Sales Representative would be paid similarly to an experienced Regional Sales Director simply because they are in the same EEO-1 job category (Sales). But since the data that the EEOC is proposing to collect will not include any information or breakdown relating to an employee's job level/job grade, these relevant data will be ignored.

29. Despite a lack of consideration for an employee's job level/grade, the two statistical tests will nevertheless ascertain whether gender and racial groups are equally distributed across all the pay levels of a company without any consideration of the employee's job level/grade. The Pilot Study commissioned by the EEOC is very clear as to what these two statistical tests assume:

> *Although the (Mann-Whitney) test is sensitive to pure shifts, it has the more general interpretation of a test of the differences between two or more distributions.*[109]

30. Because the Mann-Whitney and Kruskal-Wallis tests are determining whether men and women, for example, are distributed similarly across all pay bands (and hence all levels of an organization), these tests do not determine whether there are improper disparities within a pay band. Instead, it is a test of whether racial and gender groups of employees are similarly distributed across all pay bands, even when the employees in these groups may have very different levels of experience, may hold very different jobs (e.g., nurses and lawyers) and may be at very differently job levels of an organization. If the EEOC proceeds with their stated proposal to use these tests on the collected data to "detect discrimination," then the likelihood that they would lead to false positives and false negatives is greatly increased.

31. I conducted the Mann-Whitney test on two sets of simulated employment data[110] that the EEOC is proposing to collect in order to illustrate the inherent flaws in the analytical framework in the EEOC's proposal. In the first simulation, an employee's pay is completely determined by two factors: their job grade/level and the number of years they have worked at that level. For example, an employee entering the first job grade receives a starting annual salary of $30,000 and is awarded a raise of $1,000 each year he or she remains in that position. Similarly, an employee hired into the next grade level would receive a starting salary of $40,000 and receives a raise of $2,000 each year he/she or she remains in their job. A similar method of pay determination exists for the next three job grades at this fictitious company, though the starting pay and annual pay adjustments are naturally greater in the higher level grades. In

[109] Sage Computing Pilot Study, September 2015, page 27. Emphasis added.
[110] A summary of these two simulations is provided within this declaration. The details of these simulations are included as Exhibit B.

this simulation, it is clearly impossible for a pay disparity to exist between women and men in the same job grade, after taking into account any differences in job tenure. A standard multiple regression analysis of this simulated data confirmed this obvious conclusion.

32. Using the Mann-Whitney test on these simulated data, however, yielded a statistically significant result, which the EEOC may incorrectly interpret as an indication of pay disparities that are adverse to women. That is, even in a simulation in which an employee's pay is 100% determined by a formula that allows no room for discrimination, the test that the EEOC is proposing to use still found a statistically significant difference.

33. This seemingly contradictory result occurs because in this simulation there are (by design) proportionately more female employees than male employees in the lower job grades, and therefore also in the lower pay bands. This demonstrates an important issue about the EEO-1 Pay Reporting Proposal: Since employees' compensation (and therefore their pay band) is highly correlated with their job grade, the statistical significance of both the Mann-Whitney and Kruskal-Wallis tests are going to depend on whether men and women are similarly distributed across all levels of a company's job grades/levels. This of course, is a very different type of question than whether pay disparities exist among employees in jobs requiring substantially equal skill, effort, and responsibility. Put simply, the EEOC's proposal won't be able to test whether or not similarly situated men and women are paid equally.

34. This point is further illustrated in the next simulation. At this second fictitious company, an African-American employee in grade level 1 receives a starting salary of $30,000. In contrast, a white employee in grade level 1 receives a higher starting salary of $30,500. Both employees receive a pay adjustment of $1,000 for each year worked. This blatant policy of pay discrimination is found at all other job grades as well: white employees in grade

level 2 receive a starting pay of $40,500 compared to $40,000 for African-Americans. At the highest job grade in this hypothetical company, the starting pay gap is even more pronounced: African-Americans have a starting salary of $100,000 compared to $105,000 for white employees.

35. As would be expected, the existence of such an overt policy of pay discrimination was readily detectible through a standard multivariate regression analysis, which indicated that African-American employees were paid statistically significantly less than their white counterparts. On the other hand, applying the EEOC's proposed Mann-Whitney test to these same data did *not* show any statistically significant differences between white and African-American employees.

36. As before, this contradiction occurs because the Mann-Whitney test does not measure actual pay differences between groups of employees, but instead it tests if groups of employees are found in relatively similar proportions across all pay levels of that company. To illustrate this point, the second simulation included a similar percentage of African-Americans and white employees in each of the EEO-1 pay bands, even though the actual pay of African-Americans was always less than white employees in the same job grade.

37. These two simulations call into question the usefulness of the data that would be collected under the EEOC's proposal. These examples illustrate that the proposed statistical tests may not identify actual pay differences that are consistent with discrimination when they truly exist, and may incorrectly conclude that there is evidence consistent with discrimination when employees are actually paid equivalently.

38. But perhaps more importantly, the first simulation shows that a company with a disproportionate greater number of female or minorities at the lower grade levels is likely to "fail" the Mann-Whitney test. In fact, failing the Mann-Whitney test could occur while companies are making good-faith efforts

to increase their minority and female representation. That is, many firms have worked diligently to increase the participation of workers from historically disadvantaged groups by hiring these workers as they became available. The result of this effort is that higher percentages of female, African American, and Hispanic workers are found in some of the lower job levels as they gain additional experience to be eligible for promotion. Accordingly, such companies would "fail" the Mann-Whitney or Kruskal-Wallis tests. The EEOC's proposal is likely to have the unintended and ironic effect of harming employers seeking to increase the participation of historically disadvantaged workers at all levels of their organization.

39. In summary, the aggregated data that the EEOC is proposing to collect and the analyses using the Mann-Whitney and Kruskal-Wallis tests are extremely unlikely to be useful or informative in addressing the laudable and important goal of eliminating gender and race-related pay disparities. The EEOC's proposal, as currently designed, will result in misleading comparisons, will not take into account known and accepted factors that influence pay, and will not lead to any useful determination as to whether employees are truly being paid the same for equal work or are otherwise being subjected to pay practices which violate Title VII.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed at Tallahassee, Florida on March 4, 2016.

J. Michael DuMond

EXHIBIT A

Economists
INCORPORATED

J. Michael DuMond

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Professional Experience

Economists Incorporated

· Vice President (2014 – Present)

Apply economic, econometric and statistical analysis to pay equity, employment litigation, EEOC investigations, OFCCP audits and pro-active self-monitoring studies. Consult with corporations, government contractors and law firms on employment discrimination matters to monitor and assess the risk of litigation or government investigation for various occupations and industries. Work closely with clients to design statistical models consistent with the employer's hiring, promotion, performance evaluation, compensation, termination and reduction-in-force decisions. Assist clients in identifying the data required to conduct thorough analyses of their workforce and excels at preparing and analyzing extremely large and complex human resources data.

Conduct quantitative data analysis designed to help attorneys assess the value and merits of Fair Labor Standards Act (FLSA) and state wage and hour claims including misclassification, missed meal/rest periods, donning/doffing, off-the-clock work, unpaid overtime and regular rate calculations. Assist companies with extracting, compiling and summarizing archived data from payroll and timekeeping systems, as well as unconventional systems such as computer logs, to evaluate wage and hour claims. Compute waiting time penalties and other PAGA penalties in California wage claims.

Prepare written reports and declarations relating to economic analyses, data production and/or the calculation of economic exposure; provide support of these analyses in the form of sworn testimony.

Charles River Associates

· Principal (2009 – 2014)

Manage and design economic analyses relating to labor and employment issues, including matters in preparation for litigation, audits, mediation, monitoring, and settlement. Supervise the activities and analyses of a team of Ph.D. economists and other junior staff. Direct the construction of computerized databases for use in analyses. Extensive experience in matters relating to Fair Labor Standards Act compliance (as well as state-specific wage and hour laws), including calculation of economic exposure relating to allegations of unpaid overtime and the miscalculation of the regular rate of pay.

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Economic Research Services (ERS) Group, Inc.

· Client Relationship Manager (2008 – 2009)
· Research Economist (2001 – 2008)

Professional Experience (Continued)

Worked as a client relationship manager at an economic consulting firm that specializes in labor and employment issues. Casework included matters in preparation for litigation, arbitration, monitoring and settlement. Conducted economic and statistical analyses involving allegations of gender, race, and age discrimination in a variety of employment practices, including selection, termination, and compensation as well as Fair Labor Standards Act compliance.

Case management experience included the supervision of economists and analysts, data receipt and preparation, database construction and analysis, summarization of relevant economic literature and direct contact with clients. Past clients represent a wide variety of employers, including state and local governments, multi-facility retailers, production facilities, and educational institutions.

Florida State University

· Adjunct Professor (2002 - Present)

Courses taught include Labor Economics, Economic Analysis of Data, SAS Programming, and MS Project. Since 2006, all courses have been taught at the post-graduate level. MS Project is the capstone course that simulates a consulting project, including the preparation of written and oral presentations.

Blockbuster, Inc.

· Director of Franchise Finance (1999 – 2001)
· Manager/Director of Modeling and Research (1997 – 1999)
· Senior Demographic Research Analyst (1996 – 1997)

Responsible for all budgeting, forecasting and financial analysis of the 800+ store franchise division. Designed and implemented projects to improve profitability of both franchisees and franchisor, such as optimal labor allocation methods and alternative methods of acquiring rental product. These programs and models helped franchisees lower their labor and product costs without sacrificing top-line revenue.

Developed and supervised the implementation of predictive models for use by the real-estate, product and special format divisions. Oversaw the worldwide rollout of site-selection and cannibalization modeling applications and assisted in the valuation and pricing of company stores for sale to franchise units. The site-selection models were used extensively during the years in which Blockbuster

opened 500 stores annually, resulting in first-year store revenues that exceeded the projected rate of return. Expanded the scope of the department by introducing econometric models into business segments that had not previously relied on statistical tools. Subsequently, took on the additional responsibility of designing a product allocation system that simultaneously determines the optimal aggregate purchase amount for the entire company. Managed a staff of analysts, including Ph.D economists. Prepared written reports and presented results to executive management.

Education

- Ph.D., Labor Economics, Florida State University (1997)
- M.S., Economics, Florida State University (1994)
- B.S., Florida State University (1991) – Summa Cum Laude

Publications and Research Papers

"An Easily Implemented and Accurate Model for Predicting NCAA Tournament At-Large Bids," (With Jay B. Coleman and Allen K. Lynch), Journal of Sports Analytics, *Forthcoming.*

"Stockwell v. City & County of San Francisco: What it Doesn't Say about Statistics in Age Discrimination Cases," (with Kenneth W. Gage), Daily Labor Report, Bloomberg BNA, July 2, 2014.

"Evidence of Bias in NCAA Tournament Selection and Seeding," (with Jay B. Coleman and Allen K. Lynch), Managerial and Decision Economics, Vol. 31, March 2010.

"An Examination of NBA MVP Voting Behavior: Does Race Matter?" (with Jay B. Coleman and Allen K. Lynch), Journal of Sports Economics, Vol. 9, No. 6, December 2008.

"An Economic Model of the College Football Recruiting Process," (with Allen K. Lynch and Jennifer Platania), Journal of Sports Economics, Vol. 9, No. 1, February 2008.

"Estimating Wage Differentials: When Does Cost-of-Living Matter?" (with Barry Hirsch and David Macpherson), Economic Inquiry, Vol. 37, No. 4, October 1999.

"Two Essays on Wage Differentials," Ph.D. Dissertation, Department of Economics, Florida State University, April 1997.

"Workers Compensation Recipiency in Union and Nonunion Workplaces," (with Barry Hirsch and David Macpherson), Industrial and Labor Relations Review, Vol. 50, No. 2, January 1997.

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Presentations/Professional Meetings

"Navigating the New Frontier of Steering Claims," National Industry Liaison Group 2015 Annual Conference, July 2015, New York, NY. (Panel Discussant).

"Early Mediation of Wage and Hour Claims," American Conference Institute's 20th National Forum on Wage and Hour Claims and Class Actions, January 2014, Miami, FL. (Panel Discussant).

"Prob(it)ing the NCAA: Three Empirical Models on Collegiate Athletics," (with Allen K. Lynch and Jay B. Coleman), 2005, presented at the SAS M2005 Data Mining Conference. Invited Presentation, Mid-day Keynote Address.

"An Economic Model of the College Football Recruiting Process," paper presented at the Eastern Economic Association meetings, 2005.

Expert Reports & Testimony

Johnny Reynolds v. State of Alabama. This case involved the termination of a consent decree between the State of Alabama and the U.S. Department of Justice relating to the hiring and promotions of African-American employees. Submitted report and provided testimony at judicial hearing.

Simmons, et al. v. Comerica Bank. This matter involved allegations of additional overdraft fees resulting from changes in debit posting procedures during nightly settlement. Submitted a written report that examined plaintiff's expert's statistical approach and its applicability for purposes of class certification and provided deposition testimony.

Coordinated Proceedings Special Title, Sutter Health Wage and Hours Cases and Coordinated Actions. These matters involved allegations of missed meal and rest periods for nurses and surgical care technicians at approximately 20 affiliates within the Sutter Health system. Submitted a declaration in relation to the motion for class certification.

Tammy Garcia v. MAKO Surgical Corporation. This case involved allegations of an unlawful termination due to plaintiff's gender. Submitted a written report that provides estimates of economic loss, arising from differences in base salary, incentive compensation, and stock options.

Angel Corona v. Time Warner Cable. This matter involved calculation of unpaid overtime due to an alleged improper calculation of the regular rate of pay. Written report submitted.

Selene Prado v. Warehouse Demo Services, et al. This report detailed the necessary calculations relating to the determination of rest period violations on a class-wide basis and damages relating to the miscalculation of the regular rate of pay for overtime purposes. Submitted a written report in relation to the motion for class certification.

Victor Guerrero v. California Department of Corrections and Rehabilitation.

Plaintiff alleges that he was disqualified from consideration of a Correctional Officer position due to his past usage of a false Social Security number, a pre-employment criteria that allegedly had a disparate impact on Latino applicants. Submitted written reports and provided testimony at deposition and trial.

Daisy Vazquez and Bryan Joseph, et al.v. TWC Administration, LLC. Plaintiff alleges that putative class members were not properly paid overtime due to the inclusion of non-working hours in the calculation of the regular rate of pay and an improper allocation of commissions to the time periods in which they were earned. Submitted a written report in relation to the motion for class certification.

Fernando Vega v. Hydraulics International, Inc. Submitted a written report in regards to allegations that non-exempt employees were not paid for all hours they were logged into the timekeeping and project management system.

Graciela Galvan v. AMVAC Chemical Corporation. Plaintiffs allege that defendant did not properly calculate the regular rate of pay when paying overtime. Submitted a written declaration showing the economic impact of this practice for the named plaintiff.

Statement of the U.S. Chamber of Commerce on The Equal Employment Opportunity Commission's Proposed Revisions to the Employer Information Report (EEO-1). Provided a supporting declaration describing the utility and validity of the pay reporting proposal made by the EEOC.

Representative Engagements as a Consulting Expert – Wage and Hour

Regular Rate Miscalculation

Inside sales employees at a multi-site retailer alleged that their overtime true-ups were based only on weekly overtime hours without consideration of additional daily overtime hours. Prepared estimates of economic exposure, including the valuation of potential offsets from factors that were included in the regular rate calculation beyond what was legally required.

Customer Service Representatives at multiple facilities filed collective actions involving failure to properly calculate the regular rate relating to overtime pay. Prepared economic loss estimates for use in mediation and settlement. Prepared measures of overpayments that were used as financial offsets to the estimated liability.

First line supervisors at a national landscaping company had overtime pay calculated using the fluctuating work week (FWW) methodology, in violation of wage and hour laws in some states, and the paid overtime did not properly include shift differential payments. Calculated economic exposure relating to these claims using the proper regular rate of pay.

Misclassification of Exempt Status

Inside sales representatives for an online retailer alleged they were misclassified as

salaried exempt. Analyzed millions of records of time-stamped activity in order to ascertain estimates of alleged overtime hours. Calculated potential economic losses under alternate scenarios for use at mediation.

Store managers at a nationwide multi-site retailer claimed misclassification as salaried exempt. Prepared economic loss estimates of alleged unpaid overtime for use in mediation. (Multiple similar engagements)

Outside engineers at a national telecommunications company alleged that they were misclassified as exempt. Prepared an analysis of alleged overtime work and the related economic exposure for mediation and eventual settlement.

First-line construction and maintenance supervisors challenged their exempt status; prepared estimates of potential liability exhibits for trial.

Missed Meal/Rest Periods

Delivery drivers of a nationwide medical supply distributor alleged that their schedule necessitated that they work through their unpaid meal periods. Combined multiple data sources, including GPS data to assess the validity of these claims.

Major financial institution with multiple collective actions involving pay stub violations, deductions, wait-time penalties, overtime, and meal and rest periods. Prepared economic loss estimates for use in mediation and settlement.

Assistant store managers at a nationwide multi-site retailer alleged they were working without compensation during meal periods. Prepared an analysis to assess liability by integrating time-clock data with time-stamped cash register activity records.

Representative Engagements as a Consulting Expert – Wage and Hour (continued)

Employees of on-campus restaurants at a state university alleged they were denied meal and rest breaks in violation of state law. Analyzed time-punch records to assess violation incidence and prepared estimates of economic exposure that were relied upon during mediation to reach settlement.

Off-the-clock/Time-Rounding allegations

Call center operators at several facilities filed collective actions involving failure to pay overtime as required under the Fair Labor Standards Act (FLSA). Prepared estimates of the amount of alleged "off-the-clock" work and the associated economic loss estimates; identified and corrected numerous errors made by plaintiff's expert. (Multiple similar engagements)

Customer Service Representatives at multiple facilities filed collective actions alleging a failure to pay for pre-shift activities. Integrated employees' computer time-stamp records with their time-clock data in order to determine the potential range of pre-shift work. Prepared estimates of potential exposure for use at mediation.

Non-exempt employees alleged that their Employees of a restaurant chain alleged that paid hours were systematically lower than their actual work hours due to the employer's time-rounding policies. Analyzed and compared actual work activity with payroll data to assess validity of these claims. (Multiple similar engagements)

Representative Engagements as a Consulting Expert – Equal Employment Opportunity

Prepared numerous pay equity audits to a large number of clients in a wide range of industries. Calculated salary remediation recommendations for sub-groups of employees based on results of the audit.

Prepared analyses relating to threatened litigation of all major employment decisions at a global healthcare company, including promotions, terminations, performance evaluations, compensation, and disciplinary actions.

A major computer manufacturer was faced with allegations of Title VII violations, specifically involving discriminatory compensation and promotions. Assisted client with data production and responses to discovery requests. Conducted statistical analyses of compensation, promotions and estimates of potential economic exposure. Developed methodologies and analytical tools used to assess differences in performance ratings, annual bonuses, and merit pay adjustments on an on-going basis. (Multiple similar engagements)

Servers at a nationwide chain of restaurants alleged disparate treatment with respect to work assignments. Prepared a statistical analysis of allegations that resulted in a favorable settlement for client.

Store managers at a nationwide multi-site retailer alleged compensation differences under the Equal Pay Act. Prepared analytical databases and prepared estimates of potential economic exposure.

Representative Engagements as a Consulting Expert – Equal Employment Opportunity

Reviewed and identified errors made by opposing counsel's expert relating to the valuation of stock-options in a case involving a termination allegedly based on the plaintiff's age.

Multiple retentions for a variety of clients relating to potential adverse impact by race and gender of employees' annual performance rating assignments and the associated merit increases/bonus payments.

Prepared analyses of compensation for a large technology company. Investigated whether the observed pay differentials were the result of initial (starting) pay or whether they developed during the course of their employment tenure with the company. Calculated remediation amounts and devised a procedure in which the pay adjustments were incorporated into the annual merit pay adjustment cycle.

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Data Sampling and Production

Processed millions of data records and prepared numerous databases for opposing counsel for a class of over 600 opt-ins in a wage and hour matter after limiting the data to relevant work dates and employment spells. (Multiple similar engagements)

Prepared a stratified sampling plan of stores for a nationwide, multi-site retailer who was alleged to have improperly classified assistant managers as salaried exempt. The sample was used for purposes of challenging conditional certification.

EXHIBIT B

The EEOC's pay reporting proposal ("Proposal") recommends the use of the Mann-Whitney or Kruskal-Wallis test to evaluate the pay band data that will be submitted by companies. The Proposal does concede that the accuracy of these tests "needed to be addressed" as there is a concern that using them may yield "false positives."[1] Put another way, a statistically significant result from these tests may give rise to an inference of discrimination, even when no such discrimination exists. This is not a trivial concern. As will be shown in the following two examples, the Mann-Whitney test can be shown to find "discrimination" against women even when a company has a gender-neutral and formulaic pay policy. The second example shows just the opposite: the Mann-Whitney test fails to identify evidence consistent with discrimination against African-Americans even when a company chooses to pay them less than white employees in every job.

Example 1 – "False Positive"

Company XYZ sets their employee's salary based on two factors. The first factor is the employee's job grade. Like most companies, jobs at the higher grade levels pay more than jobs at the lower grade levels in accordance with the greater responsibilities, supervisory authority and requisite skills and experience that the higher grade jobs require. Second, company XYZ increases an employee's salary for each additional year of experience in their job grade. The salary structure of Company XYZ is shown in the following table.

Job Grade Level	Starting Salary	Additional Salary per (Full) Year in Job
1	$30,000	$1,000
2	$40,000	$2,000
3	$70,000	$3,000
4	$90,000	$4,000
5	$100,000	$5,000

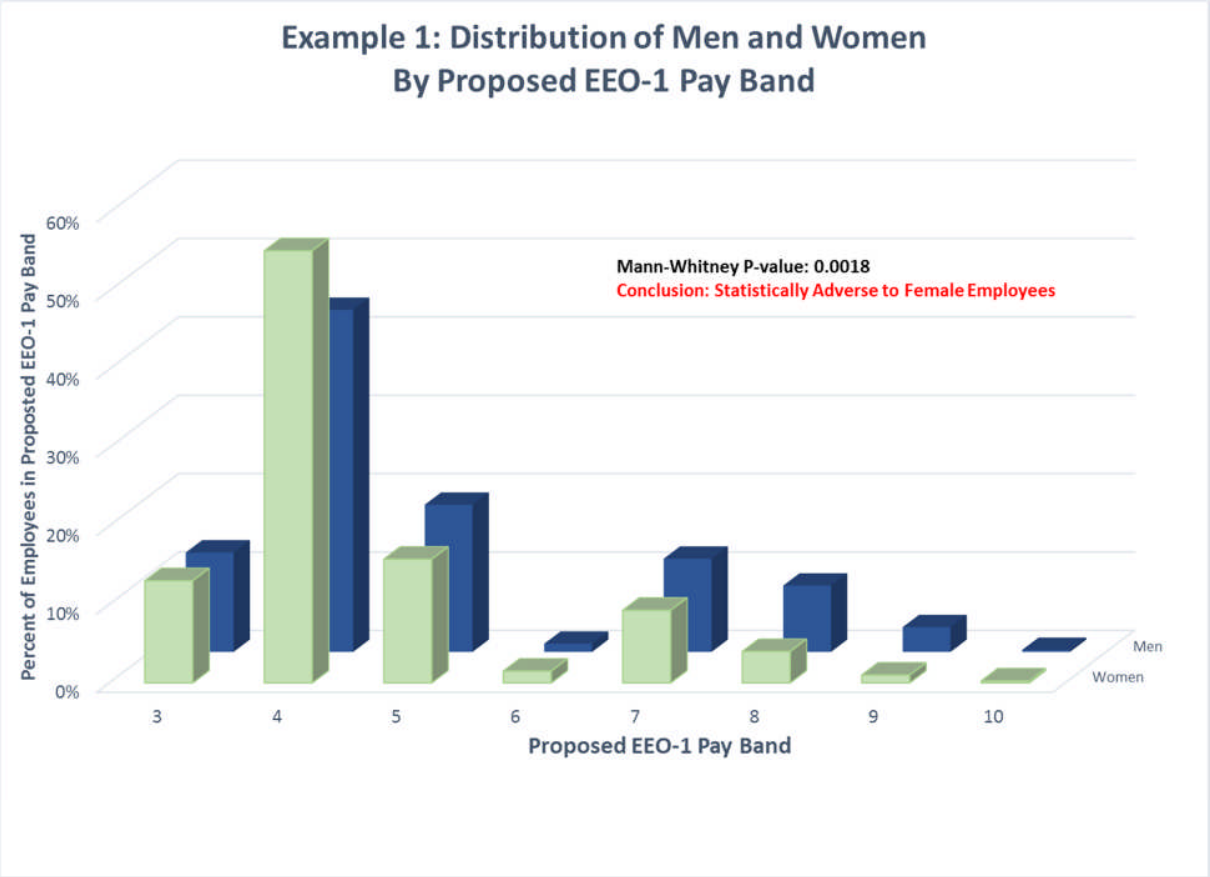
As would be expected, a standard regression analysis of employee compensation that controls for job grade and the number of years an employee has worked in their current grade would

[1] Federal Register, Vol. 81, No. 20, page 5118. The Proposal also suggests that the statistical tests would be used to "detect discrimination," implying that a statistically significant result from either a Mann-Whitney or Kruskal-Wallis would be sufficient evidence thereof. However, statistical evidence cannot be used to find discrimination—it can only identify outcomes that are consistent or inconsistent with discrimination.

reveal that there is not a gender pay difference. That is, the average female employee at Company XYZ is paid almost identically to the average male employee, after considering the effect of job grade and the number of years worked, and the measured gender pay difference is not statistically significant.

Total Number of Employees	Number of Female Employees	Estimated Pay Difference for Female Employees	Number of Standard Deviations
777	399	-$44.54	-0.19

Despite a pay policy that is, by construction, completely gender-neutral, the Mann-Whitney test of the EEO-1 pay bands would show a statistically significant result in favor of male employees, as depicted in the following chart.



This seemingly contradictory result stems only from the fact that there are proportionately more female employees than male employees in the lower grades, and therefore also in the lower pay bands. For example, the percent of women in Pay Band 4 ($30,680 - $38,999) is noticeably higher than the percent of men, while the opposite is true in Pay Bands 7 and above. This raises an important issue about the EEO-1 Pay Reporting Proposal: Since employees' compensation (and therefore their pay band) is heavily correlated with their job grade, the statistical significance of both the Mann-Whitney and Kruskal-Wallis tests are going to depend on whether men and women are similarly distributed across all levels of a company's pay grades.

Put simply, the Proposal doesn't test whether or not similarly situated men and women are paid equally, but rather, whether women are hired, promoted or otherwise placed into levels within the company at rates similar to men. This point is further illustrated in the second example.

Example 2 – "False Negative"

Like the first example, Company ABC uses only three factors to determine an employee's pay: job grade, the number of years of worked in the job and the race of an employee.[2] The salary structure for Company ABC is as follows:

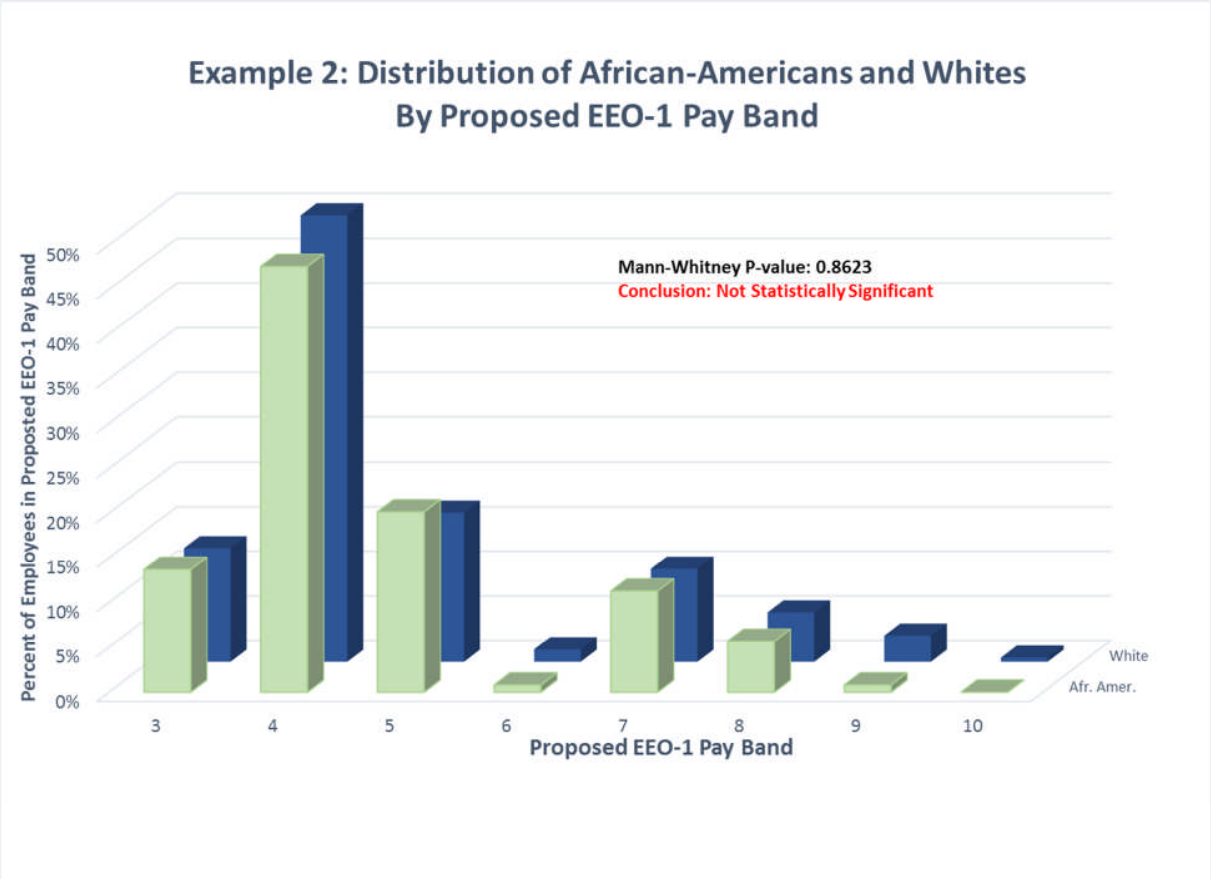
Grade Level	Starting Pay Whites	Starting Pay African-Americans	Additional Salary per Year in Job
1	$30,500	$30,000	$1,000
2	$40,500	$40,000	$2,000
3	$71,000	$70,000	$3,000
4	$95,000	$90,000	$4,000
5	$105,000	$100,000	$5,000

Naturally, a regression analysis that controls for job grade and the number of years an employee has worked in their current job would identify the existence of a pay disparity. More specifically, African-Americans are paid, on average, $923 less than otherwise similar white employees, a difference that is statistically significant.

Total Number of Employees	Number of Female Employees	Estimated Pay Difference for Female Employees	Number of Standard Deviations
777	79	-$923	-2.34

[2] For this simulation, an employee's race was randomly assigned such that 12.5% of the employees were designated as African-American. The random nature of this assignment results in a similar job grade distribution of "white" and "African-American" employees.

In spite of this pay policy, the Mann-Whitney test does not reveal a statistically significant difference in the pay bands between whites and African-American employees, even in a situation in which the company is blatantly discriminating against African-Americans.



These examples call into question the usefulness of the data that would be collected under the EEOC's Pay Data Reporting proposal. First and foremost, these examples illustrate that the proposed statistical tests may not identify differences that are consistent with discrimination when those differences exist, and may incorrectly conclude that there is evidence consistent with discrimination when the evidence definitively is not. Secondly, while it is often the case that female and minority employees are paid less than male and white employees on average, the aggregated data that would be collected ignores any of the possible and often legitimate reasons for pay differences between gender or race/ethnicity groups. It only depicts the pay difference in a different manner.